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UNITED STATES REPORTS

VOLUME 404

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1971

(BEGINNING OF TERM)

OCTOBER 6, 1971, THROUGH JANUARY 27, 1972

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

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.[1]
WILLIAM H. REHNQUIST, Associate Justice.[2]

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.[3]

OFFICERS OF THE COURT

JOHN N. MITCHELL, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
E. ROBERT SEAVER, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.[4]
HENRY CHARLES HALLAM, Jr., Librarian.

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*Mr. Justice Black, who retired effective September 17, 1971, died September 25, 1971. See also *post*, p. VII. For other notes, see p. IV.

NOTES

[1] THE HONORABLE LEWIS F. POWELL, JR., of Virginia, was nominated by President Nixon on October 22, 1971, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on December 6, 1971; he was commissioned on December 9, 1971; and he took the oath and his seat on January 7, 1972. See also *post*, p. XI.

[2] THE HONORABLE WILLIAM H. REHNQUIST, of Arizona, was nominated by President Nixon on October 22, 1971, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on December 10, 1971; he was commissioned on December 15, 1971; and he took the oath and his seat on January 7, 1972. See also *post*, p. XV.

[3] Mr. Justice Harlan, who retired effective September 23, 1971, see also *post*, p. IX, died December 29, 1971, see also *post*, p. XIX.

[4] Mr. Frank M. Hepler, who was appointed Marshal on December 20, 1971, see also *post*, p. 997, took office on January 1, 1972. He succeeded Mr. T. Perry Lippitt, who retired effective December 31, 1971, see also *post*, p. XXI.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

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

For the Second Circuit, THURGOOD MARSHALL, 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, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

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

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

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

DEATH OF MR. JUSTICE BLACK

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 4, 1971

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN.

THE CHIEF JUSTICE said:

It is a sad duty for us to take note today, on opening the October 1971 Term of Court, of the absence from this Bench for the first time in 34 years, of our beloved colleague the late Mr. Justice Hugo Black. His tenure spanned that of five of the 15 Chief Justices who have presided here since the Constitution was adopted and his departure is a profound loss to each of us personally and to the Court.

Much has been and much more will be said and written of the life and work of Mr. Justice Black. His public service in the Army in World War I, in the State of Alabama, in the United States Senate, and on this Court covered more than 50 of the 85 years of a life rich in accomplishment.

In time, I believe, one thing will stand out above all in his work and in his thinking. Throughout his entire life he never wavered in his unbounded faith in the people and in the political processes of a free people under the American Constitution. He loved this Court as an institution, and contributed mightily to its work, to its strength, and to its future. He revered the Constitution; he had enormous respect for the Presidency and for the Congress, but above all else, he believed in the people.

In a period when institutions are under attack and when people are having doubts about their capacity to govern themselves, this should give heart to all, for Hugo Black had no doubt whatever about the ability of an informed and free people to govern their own destinies.

We will miss his wise counsel, his rare spirit, his vigor, his sparkle, and the warmth of his comradeship.

In the near future a date will be fixed for presentation in this Court of appropriate memorials to him.

RETIREMENT OF MR. JUSTICE HARLAN

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 4, 1971

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN.

THE CHIEF JUSTICE said:

It is with deep regret that we take note today of the retirement of our beloved colleague, Mr. Justice Harlan, who served on this Court since March 28, 1955, after prior service on the United States Court of Appeals for the Second Circuit.

Before going on the Bench, Mr. Justice Harlan combined a brilliant career as a lawyer with significant positions of high public responsibility, including a distinguished military career in the European theater in World War II. Ill health led Mr. Justice Harlan to submit to retirement when his high sense of duty persuaded him he could not continue to carry out his obligations to the Court. The volumes of the U. S. Reports from the 1954 Term through the most recent Term attest to his prolific and erudite contributions to the work of the Court.

I speak for the whole Court, and the Bar as well, in expressing heartfelt wishes for Mr. Justice Harlan's restoration to health.

APPOINTMENT OF MR. JUSTICE POWELL

SUPREME COURT OF THE UNITED STATES

FRIDAY, JANUARY 7, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN.

THE CHIEF JUSTICE said:

In this special sitting of the Court, we will receive the commission of Justice-designate Powell, and at this time the Court recognizes the Attorney General.

Mr. Attorney General Mitchell said:

MR. CHIEF JUSTICE, may it please the Court:

I am happy to advise that the President of the United States has nominated, the Senate has consented, and the President has appointed Mr. Lewis F. Powell, Jr., of Virginia, as an Associate Justice of the Supreme Court of the United States.

I bear with me the commission, dated December 9, 1971, signed by the President of the United States, and attested by me as Attorney General, and, with the permission of the Court, I will turn the commission over to the Clerk of the Court.

THE CHIEF JUSTICE said:

The commission is accepted, Mr. Attorney General. Thank you.

The Clerk then read the commission as follows:

RICHARD NIXON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Lewis F. Powell, Jr., of Virginia, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Lewis F. Powell, Jr., during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this ninth day of December, in the year of our Lord one thousand nine hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

[SEAL] RICHARD M. NIXON.

By the President:

JOHN N. MITCHELL,

Attorney General.

The oath of office was then administered by THE CHIEF JUSTICE, and MR. JUSTICE POWELL was escorted by the Marshal to his seat on the bench.

The oath taken by MR. JUSTICE POWELL is in the following words, *viz.:*

I, Lewis F. Powell, Jr., do solemnly swear that I will administer justice without respect to persons, and do

equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court of the United States, according to the best of my abilities and understanding, agreeably to the Constitution of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

THE CHIEF JUSTICE said:

MR. JUSTICE POWELL, on behalf of all members of the Court, I welcome you to this bench and we look forward to many years of work together in our common calling.

APPOINTMENT OF MR. JUSTICE REHNQUIST

SUPREME COURT OF THE UNITED STATES

FRIDAY, JANUARY 7, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL.

THE CHIEF JUSTICE said:

In this special sitting of the Court, we will receive the commission of Justice-designate Rehnquist, and at this time the Court recognizes the Attorney General.

Mr. Attorney General Mitchell said:

MR. CHIEF JUSTICE, may it please the Court:

I am happy to advise that the President of the United States has nominated, the Senate has consented, and the President has appointed Mr. William H. Rehnquist, of Arizona, as an Associate Justice of the Supreme Court of the United States.

I bear with me the commission, dated December 15, 1971, signed by the President of the United States, and attested by me as Attorney General, and, with the permission of the Court, I will turn the commission over to the Clerk of the Court.

THE CHIEF JUSTICE said:

The commission is accepted, Mr. Attorney General. Thank you.

The Clerk then read the commission as follows:

RICHARD NIXON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of William H. Rehnquist, of Arizona, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said William H. Rehnquist, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this fifteenth day of December, in the year of our Lord one thousand nine hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

[SEAL] RICHARD M. NIXON.

By the President:

JOHN N. MITCHELL,

Attorney General.

The oath of office was then administered by THE CHIEF JUSTICE, and MR. JUSTICE REHNQUIST was escorted by the Marshal to his seat on the bench.

The oath taken by MR. JUSTICE REHNQUIST is in the following words, *viz.:*

I, William H. Rehnquist, do solemnly swear that I will administer justice without respect to persons, and do

equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court of the United States, according to the best of my abilities and understanding, agreeably to the Constitution of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

THE CHIEF JUSTICE said:

MR. JUSTICE REHNQUIST, on behalf of all members of the Court, I welcome you to this bench and we look forward to many years of work together in our common calling.

DEATH OF MR. JUSTICE HARLAN

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 10, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

Since the last regular sitting of the Court in December, our beloved Brother, Mr. Justice John Marshall Harlan, died, and it is appropriate that we take note today of his death on December 29, 1971.

Much has already been written in professional journals and in the Nation's press of the life and work of Justice Harlan, and much more will be said and written. Everyone acknowledges his great contribution to the work of the Court in which he dedicated so large a part of his career in the law.

For us in the Court, however, the loss is far more than the loss of a colleague valued for his great legal abilities, for his penetrating mind, and as a prodigious worker. He was all of these, but to us he was much more. The deep personal loss to us is the departure of a beloved friend whose warmth and gaiety lightened all the burdens and cheered all the gatherings of the Justices of this Court for 16 years. Words are inadequate to express the deep affection felt for John Harlan and our admiration for his gallant courage in adversity and illness. We will miss him greatly.

In due course there will be an appropriate memorial proceeding in this Court and a date will be fixed for that purpose.

RETIREMENT OF MARSHAL

SUPREME COURT OF THE UNITED STATES

TUESDAY, JANUARY 11, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

As we hear arguments in this first session of 1972, it is appropriate that we take note that this is the first time in 35 years that Mr. Perry Lippitt is not a part of the staff of the Supreme Court.

Mr. Lippitt retired as Marshal of the Court on December 31, but observers will have noted that on last Friday, January 7, one week after his retirement, he was present in the courtroom to collaborate with his successor for the oath-taking ceremonies of our two new colleagues. This was typical of Perry Lippitt's dedication to duty and loyalty to the Court which he served so long.

During his tenure at the Court he served with nearly one-third of all the 100 Justices of the Court and five Chief Justices commencing with his appointment in the time of Chief Justice Hughes.

Mr. Lippitt leaves with the warmest wishes of the Court and the staff of the Court for all good things in the years ahead.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1971

HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, ET AL. *v.* PLEASURE HOUSE, INC., ET AL.

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

No. 70–127. Decided October 12, 1971

This Court has no jurisdiction under 28 U. S. C. § 1253 to entertain a direct appeal from a temporary restraining order issued under 28 U. S. C. § 2284 (3) by single district judge after he had certified a request for designation of three-judge court to hear suit for permanent relief.

Appeal dismissed.

PER CURIAM.

The appellants seek review of a temporary restraining order entered by a single district judge in a case certified for presentation to a statutory three-judge court. The order, *inter alia,* stayed a pending prosecution of the appellees under certain state obscenity laws and temporarily restrained further enforcement of the laws against the appellees. It was entered by the District Judge shortly after he had certified a request for designation of a three-judge court to hear the appellees' suit for permanent declaratory and injunctive relief. Under

28 U. S. C. § 2284 (3), a single district judge has power to enter such an order in a case to be heard by a three-judge court, but the order can be entered only "to prevent irreparable damage" and can "remain in force only until the hearing and determination by the full court."

The appellants argue that the order in this case contravenes principles set forth last Term in *Younger* v. *Harris,* 401 U. S. 37 (1971). They invoke this Court's jurisdiction on direct appeal from "an interlocutory or permanent injunction" in any action "required . . . to be heard and determined by a district court of three judges," under 28 U. S. C. § 1253. Since, however, § 1253 does not authorize a direct appeal to this Court from a § 2284 (3) order by a single district judge, we dismiss this appeal for want of jurisdiction.

Long ago, this Court made clear that no direct appeal lies under § 1253 to the Supreme Court from a temporary restraining order issued by a single judge, even though the order may amount to an "interlocutory injunction" and may have been issued in an action required to be heard by a three-judge court. *Stratton* v. *St. Louis S. R. Co.,* 282 U. S. 10.[1] See *Ex parte Metropolitan Water Co.,* 220 U. S. 539. This is so because § 1253 "plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement." *Stratton* v. *St. Louis S. R. Co., supra,* at 16. See *Mengelkoch* v. *Industrial Welfare Comm'n,* 393 U. S. 83; *Wilson* v. *City of Port*

[1] In the instant case, the single judge himself determined that the action was one required to be heard by a three-judge court and then entered his temporary restraining order; in *Stratton, supra,* on the other hand, the single judge erroneously determined that a three-judge court was not required and then entered a similar order. This distinction between the cases, however, makes no difference in principle.

Lavaca, 391 U. S. 352; *Schackman* v. *Arnebergh,* 387 U. S. 427; *Buchanan* v. *Rhodes,* 385 U. S. 3.

More recently, this Court has held that an appeal may lie to a court of appeals from certain actions of a single district judge in a case required to be heard by three judges. *Mengelkoch* v. *Industrial Welfare Comm'n, supra; Wilson* v. *City of Port Lavaca, supra; Schackman* v. *Arnebergh, supra; Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713. A court of appeals is not "powerless . . . to give any guidance when a single judge has erroneously invaded the province of a three-judge court." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra,* at 716. Thus, if a single judge oversteps his limited authority under § 2284 (3), a court of appeals may correct his error. In addition, a temporary restraining order issued pursuant to § 2284 (3) is reviewable in a court of appeals to the extent that any such order is reviewable under 28 U. S. C. §§ 1291 and 1292 (a). However, if no such appeal is taken before the three-judge court is convened,[2] application must be made to that court for vacation or modification of the temporary restraining order pending a final determination on the merits.

The appeal is dismissed for want of jurisdiction.

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[2] The papers before the Court in this case do not make clear whether or not the three-judge court has now been convened.

ARCINIEGA *v.* FREEMAN, U. S. MARSHAL

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

No. 70–5135. Decided October 26, 1971

The Court of Appeals erred in holding that mere on-the-job contact with fellow employees with police records is sufficient evidence of parole violation, in the absence of a clear directive of the Federal Parole Board to that effect.

Certiorari granted; 439 F. 2d 776, reversed.

PER CURIAM.

Petitioner's parole was revoked by the Federal Parole Board because of association with other ex-convicts. In a petition for habeas corpus, petitioner contended that the record did not disclose any evidence in support of this conclusion. The Court of Appeals for the Ninth Circuit sustained the revocation on the sole ground that petitioner worked at a restaurant-nightclub that employed other ex-convicts. 439 F. 2d 776.

The Parole Board has wide authority to set conditions, 18 U. S. C. § 4203 (a), and here petitioner was forbidden to "associate" with other ex-convicts. But the Board's own regulations require "satisfactory evidence" of a parole violation to justify an arrest warrant. 28 CFR § 2.35. We do not believe that the parole condition restricting association was intended to apply to incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer. Nor is such occupational association, standing alone, satisfactory evidence of non-business association violative of the parole restriction. To so assume would be to render a parolee vulnerable to imprisonment whenever his employer, willing to hire ex-convicts, hires more than one. Absent a clear Parole Board directive to this effect, we cannot sustain the

judgment of the Court of Appeals that on-the-job contact with fellow employees with police records is sufficient evidence of parole violation. If there is in this record other evidence of forbidden association or evidence of other parole violations, neither the Court of Appeals nor the United States has identified it.

The motion for leave to proceed *in forma pauperis* is granted, the petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is

Reversed.

SUPERINTENDENT OF INSURANCE OF NEW YORK *v.* BANKERS LIFE & CASUALTY CO. ET AL.

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

No. 70–60. Argued October 13, 1971—Decided November 8, 1971

Petitioner, liquidator of Manhattan Casualty Co., alleged that the company was defrauded, in violation of federal securities laws, by a fraudulent sale of securities owned by it. Manhattan's sole stockholder agreed to sell all of its Manhattan stock to one Begole for $5 million. Begole conspired with others to use United States Treasury bonds owned by Manhattan to pay for the shares. Through a deceptive device the bonds were sold and the proceeds used in the purchase of the stock. The depletion of Manhattan's assets was concealed by the purported transfer to it, in exchange for the proceeds of the bond sale, of a certificate of deposit which in fact had been assigned by Manhattan's new president, a co-conspirator, to another corporation and by it used as collateral for a loan. The District Court dismissed the complaint and the Court of Appeals affirmed, finding that "no investor [was] injured" and that the "purity of the security transaction and the purity of the trading process were unsullied." *Held:* Section 10 (b) of the Securities Exchange Act of 1934 makes it unlawful to use "in connection with the purchase or sale" of any security "any manipulative or deceptive device or contrivance" in contravention of the Securities and Exchange Commission's rules and regulations. Section 10 (b) prohibits the use of any deceptive device in the "sale" of any security by "any person," and it is irrelevant that Manhattan was a corporation rather than an individual investor; that the fraud was perpetrated by a corporate officer and his outside collaborators; that the transaction was not conducted through a securities exchange or an organized market; that the proceeds due the seller were misappropriated; and that the creditors of the defrauded corporate seller may be the ultimate victims. Pp. 9–14.

430 F. 2d 355, reversed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

Arnold Bauman argued the cause for petitioner. With him on the briefs was *Morton J. Schlossberg.*

William W. Karatz argued the cause and filed a brief for respondent Irving Trust Co. *Irving Parker* argued the cause for respondent Bankers Life & Casualty Co. With him on the brief were *William T. Kirby* and *Isaac M. Bayda.* *William E. Willis* and *Michael M. Maney* filed a brief for respondents Belgian-American Banking Corp. et al. *William Heller* filed a brief for respondents Garvin, Bantel & Co. et al.

Walter P. North argued the cause for the Securities and Exchange Commission as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Peter L. Strauss, Philip A. Loomis, Jr.,* and *Theodore Sonde.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Manhattan Casualty Co., now represented by petitioner, New York's Superintendent of Insurance, was, it is alleged, defrauded in the sale of certain securities in violation of § 17 (a) of the Securities Act of 1933, 48 Stat. 84, 15 U. S. C. § 77q (a), and of § 10 (b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j (b). The District Court dismissed the complaint, 300 F. Supp. 1083, and the Court of Appeals affirmed, by a divided bench. 430 F. 2d 355. The case is here on a petition for a writ of certiorari which we granted, 401 U. S. 973.

It seems that Bankers Life & Casualty Co., one of the respondents, agreed to sell all of Manhattan's stock to one Begole for $5,000,000. It is alleged that Begole conspired with one Bourne and others to pay for this stock, not out of their own funds, but with Manhattan's assets. They were alleged to have arranged, through Garvin,

Bantel & Co.—a note brokerage firm—to obtain a $5,000,000 check from respondent Irving Trust Co., although they had no funds on deposit there at the time. On the same day they purchased all the stock of Manhattan from Bankers Life for $5,000,000 and as stockholders and directors, installed one Sweeny as president of Manhattan.

Manhattan then sold its United States Treasury bonds for $4,854,552.67.[1] That amount, plus enough cash to bring the total to $5,000,000, was credited to an account of Manhattan at Irving Trust and the $5,000,000 Irving Trust check was charged against it. As a result, Begole owned all the stock of Manhattan, having used $5,000,000 of Manhattan's assets to purchase it.

To complete the fraudulent scheme, Irving Trust issued a second $5,000,000 check to Manhattan which Sweeny, Manhattan's new president, tendered to Belgian-American Bank & Trust Co. which issued a $5,000,000 certificate of deposit in the name of Manhattan. Sweeny endorsed the certificate of deposit over to New England Note Corp., a company alleged to be controlled by Bourne. Bourne endorsed the certificate over to Belgian-American Banking Corp.[2] as collateral for a $5,000,000 loan from Belgian-American Banking to New England. Its proceeds were paid to Irving Trust to cover the latter's second $5,000,000 check.

Though Manhattan's assets had been depleted, its books reflected only the sale of its Government bonds and the purchase of the certificate of deposit and did

[1] Manhattan's Board of Directors was allegedly deceived into authorizing this sale by the misrepresentation that the proceeds would be exchanged for a certificate of deposit of equal value.

[2] Belgian-American Banking at the same time made a loan to New England Note in the amount of $250,000 which was distributed in part as follows: Belgian-American Banking $100,000, Bourne $50,000, Begole $50,000, and Garvin, Bantel $25,000.

not show that its assets had been used by Begole to pay for his purchase of Manhattan's shares or that the certificate of deposit had been assigned to New England and then pledged to Belgian-American Banking.

Manhattan was the seller of Treasury bonds and, it seems to us, clearly protected by § 10 (b), 15 U. S. C. § 78j (b), of the Securities Exchange Act,[3] which makes it unlawful to use "in connection with the purchase or sale" of any security "any manipulative or deceptive device or contrivance" in contravention of the rules and regulations of the Securities and Exchange Commission.[4]

There certainly was an "act" or "practice" within the meaning of Rule 10b–5 [5] which operated as "a fraud or deceit" on Manhattan, the seller of the Government bonds. To be sure, the full market price was paid for those bonds; but the seller was duped into believing that it, the seller, would receive the proceeds. We cannot

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[3] Section 10 (b) provides:

"It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[4] Rule 10b–5, 17 CFR § 240.10b–5, provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

[5] N. 4, *supra*.

agree with the Court of Appeals that "no investor [was] injured" and that the "purity of the security transaction and the purity of the trading process were unsullied." 430 F. 2d, at 361.

Section 10 (b) outlaws the use "in connection with the purchase or sale" of any security [6] of "any manipulative or deceptive device or contrivance." The Act protects corporations as well as individuals who are sellers of a security. Manhattan was injured as an investor through a deceptive device which deprived it of any compensation for the sale of its valuable block of securities.

The fact that the fraud was perpetrated by an officer of Manhattan and his outside collaborators is irrelevant to our problem. For § 10 (b) bans the use of any deceptive device in the "sale" of any security by "any person." And the fact that the transaction is not conducted through a securities exchange or an organized over-the-counter market is irrelevant to the coverage of § 10 (b). *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195, 201. Likewise irrelevant is the fact that the proceeds of the sale that were due the seller were misappropriated.[7] As the Court of Appeals for the Fifth

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[6] Section 3 (a) (10) of the 1934 Act defines "security" very broadly (see *Tcherepnin* v. *Knight*, 389 U. S. 332) and clearly embraces Treasury bonds.

[7] See, *e. g.*, *Allico Nat. Corp.* v. *Amalgamated Meat Cutters & Butcher Workmen of North America*, 397 F. 2d 727 (CA7 1968), which held sufficient under § 10 (b) and Rule 10b–5 a complaint which charged that defendant union, upon discovering that a third party would pay a higher price, breached a prior agreement to sell 100% of the stock in a wholly owned life insurance company to plaintiffs. The court placed primary reliance on the fact that in the course of the transaction, the union misappropriated some 25,000 shares of the life insurance company's stock which had previously been sold to plaintiffs for cash, but which were being held in escrow pending consummation of the agreement.

"Even if a breach of contract in order to make a more favorable

Circuit said in the *Hooper* case, "Considering the purpose of this legislation, it would be unrealistic to say that a corporation having the capacity to acquire $700,000 worth of assets for its 700,000 shares of stock has suffered no loss if what it gave up was $700,000 but what it got was zero." 282 F. 2d, at 203.

The Congress made clear that "disregard of trust relationships by those whom the law should regard as

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contract would not in itself be sufficient [to confer jurisdiction under § 10 (b)], we have more here. The motivation not only is said to induce a breach of contract . . . but also to induce the conversion of plaintiffs' pledged 25,000 shares." *Id.*, at 729–730. See also *Cooper* v. *North Jersey Trust Co.*, 226 F. Supp. 972 (SDNY 1964), in which a conspiracy to loan plaintiff money to buy securities, followed by the misappropriation of the purchased securities when they were pledged to secure the loan, was held to violate § 10 (b) and Rule 10b–5.

Indeed, misappropriation is a "garden variety" type of fraud compared to the scheme which gave rise to *A. T. Brod & Co.* v. *Perlow*, 375 F. 2d 393 (CA2 1967). That case involved an action by a broker against its own customers for the recovery of losses suffered when defendant customers refused to pay for securities previously ordered which had decreased in value by the settlement date. The complaint charged that this refusal to honor the purchase order was part of the customers' deceptive plan only to pay for securities purchased for their account when those securities had appreciated in value by the date payment was due.

Rejecting the customers' pleas that "no fraud is alleged as to the investment value of the securities nor any fraud 'usually associated with the sale or purchase of securities,'" *id.*, at 396, the Court of Appeals for the Second Circuit—composed of a different panel from the one sitting in the instant case—reversed the District Court's dismissal of the complaint.

"[We do not] think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that § 10(b) and Rule 10b–5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws." *Id.*, at 397.

fiduciaries, are all a single seamless web" along with manipulation, investor's ignorance, and the like. H. R. Rep. No. 1383, 73d Cong., 2d Sess., 6. Since practices "constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers" in the regulatory agency "have been found practically essential." *Id.*, at 7. Hence we do not read § 10 (b) as narrowly as the Court of Appeals; it is not "limited to preserving the integrity of the securities markets" (430 F. 2d, at 361), though that purpose is included. Section 10 (b) must be read flexibly, not technically and restrictively. Since there was a "sale" of a security and since fraud was used "in connection with" it, there is redress under § 10 (b), whatever might be available as a remedy under state law.

We agree that Congress by § 10 (b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement. But we read § 10 (b) to mean that Congress meant to bar deceptive devices and contrivances in the purchase or sale of securities whether conducted in the organized markets or face to face. And the fact that creditors [8] of the defrauded corporate buyer or seller of securities may be the ultimate victims does not warrant disregard of the corporate entity. The controlling stockholder owes the corporation a fiduciary obligation—one "designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." *Pepper* v. *Litton*, 308 U. S. 295, 307.

The crux of the present case is that Manhattan suffered an injury as a result of deceptive practices touch-

[8] The history of the Act shows that Congress was especially concerned with the impact of frauds on creditors of corporations. See H. R. Rep. No. 1383, 73d Cong., 2d Sess., 3–4.

ing its sale of securities as an investor. As stated in *Shell* v. *Hensley,* 430 F. 2d 819, 827:

> "When a person who is dealing with a corporation in a securities transaction denies the corporation's directors access to material information known to him, the corporation is disabled from availing itself of an informed judgment on the part of its board regarding the merits of the transaction. In this situation the private right of action recognized under Rule 10b–5 [9] is available as a remedy for the corporate disability."

The case was before the lower courts on a motion to dismiss.

Bankers Life urges that the complaint did not allege, and discovery failed to disclose, any connection between it and the fraud and that, therefore, the dismissal of the complaint as to it was correct and should be affirmed. We make no ruling on this point.

The case must be remanded for trial. We intimate no opinion on the merits, as we have dealt only with allegations and with the question of law whether a cause of action as respects the sale by Manhattan of its Treasury bonds has been charged under § 10 (b).[10] We think it

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[9] It is now established that a private right of action is implied under §10(b). See 6 L. Loss, Securities Regulation 3869–3873 (1969); 3 L. Loss, Securities Regulation 1763 *et seq.* (2d ed. 1961). Cf. *Tcherepnin* v. *Knight,* 389 U. S. 332; *J. I. Case Co.* v. *Borak,* 377 U. S. 426.

[10] Petitioner's complaint bases his single claim for recovery alternatively on three different transactions alleged to confer jurisdiction under § 10 (b): Manhattan's sale of the Treasury bonds; the sale of Manhattan stock by Bankers Life to Bourne and Begole; and the transactions involving the certificates of deposit. We only hold that the alleged fraud is cognizable under § 10 (b) and Rule 10b–5 in the bond sale and we express no opinion as to Manhattan's standing under § 10 (b) and Rule 10b–5 on other phases of the com-

has been so charged and accordingly we reverse and remand for proceedings consistent with this opinion.

All defenses except our ruling on § 10 (b) will be open on remand.

Reversed.

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plaint. See Kellogg, The Inability to Obtain Analytical Precision Where Standing to Sue Under Rule 10b–5 is Involved, 20 Buffalo L. Rev. 93 (1970); Lowenfels, The Demise of the *Birnbaum* Doctrine: A New Era For Rule 10b–5, 54 Va. L. Rev. 268 (1968).

YOUNGER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. *v.* GILMORE ET AL.

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

No. 70-9. Argued October 14, 1971—Decided November 8, 1971

319 F. Supp. 105, affirmed.

George R. Nock, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *Evelle J. Younger,* Attorney General, *pro se, Albert W. Harris, Jr.,* Assistant Attorney General, and *Robert R. Granucci,* Deputy Attorney General.

John Eshleman Wahl, by appointment of the Court, *post,* p. 814, argued the cause for appellees. With him on the brief was *Marshall W. Krause.*

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Stanley A. Bass, Anthony G. Amsterdam, William Bennett Turner, and *Alice Daniel* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging affirmance.

PER CURIAM.

On this appeal we postponed the question of jurisdiction pending the hearing of the case on the merits. 401 U. S. 906 (1971).

Having heard the case on its merits, we find that this Court does have jurisdiction (*Alabama Teachers* v. *Alabama Public School and College Authority,* 393 U. S. 400 (1969)) and affirm the judgment of the District Court for the Northern District of California. *Johnson* v. *Avery,* 393 U. S. 483 (1969).

McCLANAHAN *v.* MORAUER & HARTZELL, INC., ET AL.

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

No. 70–5097. Argued October 21, 1971—Decided November 8, 1971

142 U. S. App. D. C. 40, 439 F. 2d 550, certiorari dismissed as improvidently granted.

John Louis Smith, Jr., argued the cause for petitioner. With him on the brief was *George H. Mitchell, Jr.*

James C. Gregg argued the cause for respondents. With him on the brief was *James F. Bromley.*

PER CURIAM.

Under § 33 (g) of the Longshoremen's and Harbor Workers' Compensation Act, an employer is not obligated to pay compensation to an employee who, without the employer's written approval, settles a claim against a third person for an amount less than the compensation to which the employee is entitled under the Act. 44 Stat. 1441, as amended, 33 U. S. C. § 933 (g). Certiorari was granted in this case, 402 U. S. 1008 (1971), on the assumption that it presented the question whether the consent judgment entered by the District Judge awarding petitioner damages against a third person evidenced a "compromise" subject to § 33 (g), or an award of damages "determined . . . by the independent evaluation of a trial judge," not subject to § 33 (g) under *Banks* v. *Chicago Grain Trimmers Assn.*, 390 U. S. 459, 467 (1968). Fuller examination of the case on oral argument discloses that the record does not adequately present that question. The writ of certiorari is therefore dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I am unable to agree that the circumstances of this case fail to pose the question whether a consent judgment pursuant to a federal pretrial conference constitutes a "compromise" within the meaning of § 33 (g) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1441, as amended, which reads:

> "If compromise with such third person is made by the person entitled to compensation . . . of an amount less than the compensation to which such person . . . would be entitled . . . the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval."

Petitioner McClanahan was employed by respondent when a steel bar struck his head. On August 24, 1964, the Bureau of Employees' Compensation found that the injury had caused temporary total disability and ordered the respondent to compensate McClanahan in the amount of $3,780. While these proceedings were pending, the petitioner instituted a civil action in the District Court against a third party, alleging that its employees had contributed to his injury. Before the civil action came to trial, the judge conducted a pretrial conference, during which he spoke with counsel first together and then individually. During these conversations the judge suggested that he had reviewed the file and that he believed the plaintiff's case was worth about $5,000 (although McClanahan had sued for $9,000). Other sums were discussed but the parties accepted his suggestion. On March 3, 1967, a consent judgment was entered for $5,000, of which petitioner's wife received $3,000 and he received $2,000. Of petitioner's share $800 was retained by his lawyer and the remaining $1,200 of the petitioner's

share was transferred to his employer's insurance carrier as partial reimbursement for disability payments previously made under the Board's 1964 order.

Thereafter, on July 26, 1967, the petitioner filed with the Bureau a claim for modification of its 1964 compensation award, alleging that his injuries were more serious than previously realized. The Deputy Commissioner agreed with at least part of his assertions and added $2,328.70 to the prior award.

On appeal, however, the lower courts were persuaded that the employer was immune from further liability because the petitioner had "compromised" his claim against a third party. The Longshoremen's and Harbor Workers' Compensation Act provides that an employer is liable only for the excess of a worker's injury over any amount a worker may recover from a third party. Thus, an employer is benefited when an injured employee obtains a larger judgment from a third party. To protect employers from ill-advised compromises by employees § 33 (g) generally relieves an employer of further liability if, without his written approval, his injured servant settles with another possible defendant. Thus, in the instant case, because the respondent had not subscribed to the consent judgment, the lower courts held that it had been spared further payments to McClanahan.

We granted certiorari to consider whether the lower courts' holdings conflict with our decision in *Banks* v. *Chicago Grain Trimmers Assn.*, 390 U. S. 459 (1968), that an employee's acceptance of a judicially ordered remittitur in lieu of a new trial was not a "compromise" within the meaning of § 33 (g). 402 U. S. 1008 (1971). *Banks* involved a similar chain of events except that Banks, unlike McClanahan, went to trial and a jury awarded him $30,000, which the judge thought was excessive. The court accordingly said it would order a new trial unless the parties agreed to a remittitur which

would reduce the total judgment to $19,000. Banks accepted without obtaining his employer's consent. We held that his acquiescence had not constituted a "compromise" because it had been induced by the "independent evaluation of a trial judge" and the danger of Banks' accepting too little had not been present. 390 U. S., at 466, 467.

Similarly, no risk of unwise compromise faced McClanahan's employer. Pretrial conferences are the last stop before the final stage in the trial litigation process. Preceded by pleadings and discovery, the conference previews the expected trial scenario, weeds out illusory and frivolous issues, and exposes the substance of conflicting claims. Because pretrial judges review the evidence to be presented in light of the clarified issues, they are in a position to assess the outcome. Thus, one widely applauded function of the pretrial conference has been its encouragement of settlements in personal-injury cases. While some dispute continues as to the degree of persuasion a judge should exercise in obtaining a settlement, critics have not complained that pretrial conference settlements have been unreasonable or unfair. See F. James, Civil Procedure 228 (1965); Wright, The Pretrial Conference, 28 F. R. D. 141, 145–147 (1960); Brennan, Introduction to the Problem of the Protracted Case, 23 F. R. D. 376, 378–379 (1958); Clark, Objectives of Pre-Trial Procedure, 17 Ohio St. L. J. 163, 167 (1956). Thus, McClanahan's trial judge below surveyed the evidence which was to be presented at trial and after discussion with both adversaries suggested that the expected value of McClanahan's case was about $5,000. That assessment was made by one experienced in understanding how juries are likely to view a claim. Absent circumstances not shown here, we should presume that such evaluations are reasonable and do not prejudice employers' interests.

In *Banks*—unlike here—the judge had seen a full jury trial's worth of evidence. But in both situations there were critical assessments of the expected values of plaintiffs' *future* prospects. In *Banks* the employee might well have adduced different, stronger evidence at a second trial, or, the remittitur order may have been vacated on appeal. In settling on a suggested remittitur of $11,000 the court may have extrapolated from hindsight but it had no more, perhaps even less, information concerning Banks' eventual success than had McClanahan's pretrial judge concerning his prospects. The important similarity between these cases is that an independent and informed forecast was made of events yet to unfold.

Moreover, we have construed § 33 (g) so as to confine this defense to those situations where an employer can demonstrate actual prejudice from unilateral settlements by the employee. In *Chapman* v. *Hoage*, 296 U. S. 526 (1936), our first opinion discussing § 33 (g), the employer claimed prejudice because his employee had unilaterally discontinued a lawsuit against a third party. The trial judge had made no assessment of its prospects. The worker had simply failed to prosecute his case. This Court ultimately determined that the lawsuit had been worthless and that absent a showing of actual prejudice the employer was not entitled to a windfall "compromise" defense as a result of its dismissal.

The trend in other jurisdictions has been to avoid the harshness resulting from strict applications of statutes requiring consent of employers in third-party settlements. Under the analogous provision of the New York employees' compensation statute, after which the federal Act was modeled,[1] circumstances similar to the instant facts have been held nonprejudicial to employers.

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[1] *Banks* v. *Chicago Grain Trimmers Assn., Inc.*, 390 U. S. 459, 466 (1968).

Sadowski v. *J. W. Danforth Co.*, 2 App. Div. 2d 728, 152 N. Y. S. 2d 626 (1956), effectively differed from the instant case only in that the conference was held in the courtroom rather than in chambers:

> "Prior to trial of the action, the attorneys concerned had two or three discussions as to settlement. On the day the case was reached for trial, claimant's attorney told him he believed the case would be settled and later asked him to approve a settlement figure of $10,000, which he did. In the presence of his attorney and an insurance company representative, claimant signed a paper, but so far as appears no effort was made to subpoena such paper on the hearing herein. When the case was reached, both attorneys appeared and waived a jury. Claimant testified as to all the facts relevant to liability and damages and exhibits were received. Defendant's attorney did not cross-examine and put in no proof. The trial court then found defendant negligent and the plaintiff free from negligence and directed judgment for $10,250. We cannot say, as a matter of law, upon the record before us, that this result did not represent the trial court's considered judgment and evaluation, based on the evidence, which appears to have been adequate to enable him to reach a fair determination. In a case where the facts were somewhat more favorable to the compensation insurance carrier than here, we held that the judgment represented the 'trial court's evaluation of the damages sustained and was not the result of any settlement or compromise.' (*Matter of Klump* v. *Erie County Highway Department*, 275 App. Div. 1017, motion for leave to appeal denied 300 N. Y. 761.)" [2]

[2] In *Klump*, the third party and the plaintiff-employee waived a jury, the latter testified briefly, the former conceded liability, and

The purpose of the Longshoremen's and Harbor Workers' Compensation Act was to guarantee a minimum level of compensation to covered employees. The record clearly reveals that McClanahan has not yet received that statutory minimum.

We should not depart from our holding in *Banks*. Where a plaintiff cannot rely on the judgment and experience of a federal district judge, he has no choice but to refuse any disposition of the case short of a full trial and numerous appeals. In these days of crowded court dockets, the effect of the rule adopted by the Court of Appeals will be to discourage consent judgments in cases of this kind and force all such litigation through the trial process, further overwhelming already overburdened judges. Finally, there is something most inequitable in holding that a personal-injury plaintiff who relies on the good faith and judgment of a federal judge should thereafter be penalized and deprived of compensation for his injury because of his reliance. I would reverse the decision below to enforce the congressional mandate contained in the Longshoremen's and Harbor Workers' Compensation Act as we did in our decision in *Banks*.

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when both agreed that damages ranged between $4,000 and $4,500, the trial judge entered a judgment for $4,300. Before the compensation board the employer later argued unsuccessfully that this judgment had constituted a compromise. *Klump* v. *Erie County Highway Department,* 275 App. Div. 1017, 91 N. Y. S. 2d 689, leave to appeal denied, 300 N. Y. 761, 90 N. E. 2d 69. The opinion of the state workman's compensation board is reported at State of New York Workman's Compensation Board, Special Bulletin No. 229, p. 192 (1949).

ENGELMAN, DIRECTOR, DIVISION OF PUBLIC WELFARE, DEPT. OF INSTITUTIONS AND AGENCIES, ET AL. *v.* AMOS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 70–33. Decided November 9, 1971

A New Jersey regulation applicable to payments under the federally financed Aid to Families With Dependent Children program was challenged on income-calculation grounds and, since it authorized payments directly to vendors who provide goods or services to beneficiaries, on the ground that it conflicted with § 406 of the Social Security Act. The District Court upheld the challenges, enjoined enforcement of the regulation "insofar as it violates the federal statute," and ordered the State to "revise the regulation to conform to the federal statute." *Held:* Section 406 does not prohibit a State from making vendor payments solely from nonreimbursable state funds.

333 F. Supp. 1109, affirmed as modified.

PER CURIAM.

The motion of appellee Amos for leave to proceed *in forma pauperis* is granted.

A three-judge District Court has enjoined New Jersey officials from enforcing a state regulation applicable to payments under the federally financed program for Aid to Families With Dependent Children, Title IV of the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U. S. C. §§ 601–610.

The regulation in question, § 615 of the New Jersey Categorical Assistance Budget Manual, would deny AFDC benefits to the extent that a family's "total available adjusted income," calculated without deduction for the "income disregards" specified by § 402 (a)(8) of the federal Act, 42 U. S. C. § 602 (a)(8), exceeds a ceiling specified by the State. The regulation is

challenged on the grounds (1) that it is in conflict with § 402 (a)(8), and (2) that it fails to provide that, in the calculation of earned family income which is to be compared with the § 615 ceiling, a stepfather's earnings are not to be taken into account unless they are "actually available" for the current use of the dependent child, 45 CFR § 233.20 (a)(3)(ii). It was also suggested in the proceedings below that § 615.5 of the state regulation conflicts with § 406 (b) of the federal Act, 42 U. S. C. § 606 (b), when it authorizes payments directly to vendors who provide goods or services to beneficiaries.

The District Court upheld the challenge on all three grounds. Judgment was entered enjoining the enforcement of § 615 "insofar as it violates the federal statute" and ordering that New Jersey "revise the regulation to conform to the federal statute." The state officials appeal.

The appellants and also the United States, in its *amicus curiae* brief, appropriately point out that there is nothing in the federal statute that prohibits a State from making vendor payments so long as they are made from state funds without federal matching. The statute, § 406, merely does not provide for reimbursement to the State for payments of that kind. We agree with these observations by the appellants and the *amicus*, and thus disagree with the District Court's conclusion with respect to direct payments insofar as those payments are made entirely with state funds not reimbursable under § 406 of the federal Act. With this limitation in the application of its general language, the judgment of the District Court is affirmed.

JENNINGS *v.* MAHONEY, DIRECTOR, FINANCIAL RESPONSIBILITY DIVISION, DEPARTMENT OF PUBLIC SAFETY OF UTAH

APPEAL FROM THE SUPREME COURT OF UTAH

No. 71-5179. Decided November 9, 1971

Appellant, an uninsured Utah motorist who was involved in an accident and whose license was suspended, attacks Utah's Motor Vehicle Safety Responsibility Act as not affording the procedural due process required by *Bell* v. *Burson,* 402 U. S. 535. However, although there is plainly a substantial question whether the statutory scheme on its face affords the procedural due process required by *Bell* v. *Burson,* here, where a state court stayed the suspension order pending completion of judicial review and conducted a hearing at which appellant was given an opportunity to present evidence and cross-examine witnesses, there was no denial of procedural due process.

26 Utah 2d 128, 485 P. 2d 1404, affirmed.

PER CURIAM.

Appellant, a Utah motorist, was involved in a collision. Both drivers and a police officer who investigated the accident filed accident reports with Utah's Department of Public Safety as required by the Utah Motor Vehicle Safety Responsibility Act. Without affording appellant a hearing on fault, and based solely on the contents of the accident reports, the Director of the Financial Responsibility Division determined that there was a reasonable possibility that appellant was at fault. Appellant did not carry liability insurance and was unable to post security to show financial responsibility. The Director therefore suspended her license. A Utah District Court sustained the Director, and the Supreme Court of Utah affirmed. 26 Utah 2d 128, 485 P. 2d 1404 (1971).

The proceedings were authorized under Utah Code Ann. §§ 41–12–2 (b) and 41–6–35 (1953). Appellant attacks the statutory scheme as not affording the procedural due process required by our decision in *Bell* v. *Burson,* 402 U. S. 535 (1971). We there held that the Georgia version of a motor vehicle responsibility law was constitutionally deficient for failure to afford the uninsured motorist procedural due process. We held that, although a determination that there was a reasonable possibility that the motorist was at fault in the accident sufficed, "before the State may deprive [him] of his driver's license and vehicle registration," the State must provide "a forum for the determination of the question" and a "meaningful . . . 'hearing appropriate to the nature of the case.'" *Id.,* at 541, 542. Appellant submits that Utah's statutory scheme falls short of these requirements in two respects: (1) by not requiring a stay of the Director's order pending determination of judicial review, the scheme leaves open the possibility of suspension of licenses without prior hearing; (2) in confining judicial review to whether the Director's determination is supported by the accident reports, and not affording the motorist an opportunity to offer evidence and cross-examine witnesses, the motorist is not afforded a "meaningful" hearing.

There is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by *Bell* v. *Burson.* This case does not, however, require that we address that question. The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-

examine witnesses. Both appellant and the Director testified at that hearing. The testimony of the investigating police officer would also have been heard except that appellant's service of a subpoena upon him to appear was not timely under the applicable court rules.

The judgment of the Utah Supreme Court is

Affirmed.

DOHERTY *v.* UNITED STATES

ON APPLICATION FOR APPOINTMENT OF COUNSEL

No. 71-5679. Decided November 9, 1971

The Court of Appeals (apparently on the basis of the inapplicability of a court rule) denied a motion, which petitioner as a claimed indigent filed after his conviction was affirmed, for appointment of counsel to assist in preparing a petition for a writ of certiorari. The case is remanded for reconsideration of petitioner's motion in the light of Criminal Justice Act provisions that might be relevant thereto.

Certiorari granted; vacated and remanded.

PER CURIAM.

Applicant Doherty was convicted in federal court of smuggling marihuana. The Court of Appeals for the Ninth Circuit affirmed. Doherty's retained counsel, who had represented him both at trial and on appeal, withdrew after the appellate decision because Doherty was without funds to pay for legal services. Without opinion the Court of Appeals denied Doherty's *pro se* motion for appointment of counsel to assist in preparing a petition for writ of certiorari. Doherty has now filed a motion in this Court seeking appointment of counsel for that purpose. We treat the motion for appointment of counsel as a petition for writ of certiorari seeking review of the Court of Appeals' order denying the appointment.

The Court of Appeals has a rule that counsel appointed for indigent appellants must, after adverse decision in the Court of Appeals, inform his client of the right to seek review in this Court and, if the client so desires, prepare a petition for certiorari.* In denying Doherty's

*The Ninth Circuit rule provides:

"Following decision on appeal, if the appeal is unsuccessful, counsel appointed shall advise the defendant of his right to initiate a further

motion for counsel, the Court of Appeals apparently determined that its rule was of no help to Doherty, whose counsel had been retained rather than appointed. We defer to that court's construction of its own rule. However, it is not clear that the court also considered Doherty's motion in the light of the provisions of the Criminal Justice Act of 1964 insofar as they may be relevant to a federal prisoner's right to have counsel's help in seeking certiorari in this Court. 18 U. S. C. §§ 3006A (c), 3006A (d)(6), 3006A (g). See also H. R. Rep. No. 1709, 88th Cong., 2d Sess., 7 (1964); Report of the Proceedings of a Special Session of the Judicial Conference of the United States, 36 F. R. D. 282, 291 (1965); Fed. Rule Crim. Proc. 44 (a). In order that the Court of Appeals may give further consideration to the request for counsel, Doherty's motion for leave to proceed *in forma pauperis* is granted, the petition for certiorari is granted, the judgment of the Court of Appeals affirming Doherty's conviction and its order denying appointment of counsel are vacated, and the case is remanded to that court for further proceedings consistent with this opinion, including re-entry of its judgment of affirmance and appropriate reconsideration of the motion for appointment of counsel.

So ordered.

MR. JUSTICE DOUGLAS, concurring.

While concurring completely in the Court's *per curiam*, I believe additional detail clarifying the applicability of

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review by the filing of a petition for certiorari, and, if requested to do so by the defendant, file such petition. If the defendant does not desire to seek certiorari, counsel shall file with the Clerk a statement to that effect, signed by counsel and the defendant. If the defendant refuses to sign, counsel shall so state." Rules of the United States Court of Appeals for the Ninth Circuit, App. 4 (c).

Fed. Rule Crim. Proc. 44 and the Criminal Justice Act [1] to these circumstances is warranted inasmuch as all of the circuits' rules implementing the latter are susceptible of replications of the result reached below.[2] Rule 44 and the Criminal Justice Act each establish a federal policy of providing every indigent federal accused with appointed counsel at every stage in his defense from arraignment through direct review by this Court, including petitioning for certiorari.

I

Rule 44

The Act of June 29, 1940, 54 Stat. 688,[3] authorized the Supreme Court to prescribe uniform criminal procedures in the federal courts prior to and including verdict. By an order of the Court on December 26,

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[1] Act of Aug. 20, 1964, Pub. L. No. 88-455, 78 Stat. 552. As amended by Act of Oct. 14, 1970, Pub. L. No. 91-447, 84 Stat. 916, the Criminal Justice Act is codified at 18 U. S. C. § 3006A.

[2] It appears that the Court of Appeals for the Sixth Circuit has first accepted and then rejected a similar interpretation of its analogous rule. *Beasley* v. *United States*, No. 70-5146, O. T., 1971 (motion for rehearing on denial of certiorari). All of the circuits based their implementing rules on a draft proposal made by the Judicial Conference's Committee to Implement the Criminal Justice Act of 1964, discussed *infra*. The plans adopted by the 11 circuits are reproduced in 1A West's Federal Forms, Supreme Court, § 488 (B. Boskey ed. 1969).

[3] This Act as amended is codified at 18 U. S. C. § 3771. In 1934 Congress had directed the Supreme Court to prescribe procedures in criminal cases in federal district courts after a verdict of guilty had been entered. Act of Mar. 8, 1934, 48 Stat. 399, amending Act of Feb. 24, 1933, 47 Stat. 904, now codified as amended, 18 U. S. C. § 3772. These early rules did not address the issue of indigents' representation on appeal of convictions. 292 U. S. 659. Together these Acts provide the Supreme Court with rulemaking authority over all procedural aspects of the federal criminal judicial process.

1944 (323 U. S. 821), such rules were adopted, thereafter transmitted to the Congress, and became effective on March 21, 1946. These contained the forerunner of the present Rule 44, which provided:

> "Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

This procedure embodied our holding in *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), that federal indigent defendants had a right under the Sixth Amendment to free counsel during trial. Until *Johnson* v. *United States,* 352 U. S. 565 (1957), it was unclear whether Rule 44 extended that assistance to direct appeals of convictions arising in the federal courts. In any event by the last decade the sweep of our decisions involving right to counsel on appeal required revision of Rule 44 to make clear that "every stage of the proceedings" did, in fact, include appeals.[4] Thus, the revised rule effective since 1966 now reads:

> "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or

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[4] Two preliminary drafts of the proposed amendments were prepared by the Committee on Rules of Practice and Procedure of the Judicial Conference. The first, proposed in 1962, did not expressly provide for appointments on appeal. See Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (Dec. 1962). The second draft as it appears in the text was issued in 1964. Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (Mar. 1964).

> the court through appeal, unless he waives such appointment." Fed. Rule Crim. Proc. 44 (a).

Whether "appeal" includes proceedings before the Supreme Court was not addressed by the Advisory Committee's Note and was until now an academic question since the rule became effective *after* the implementation of the Criminal Justice Act under which courts of appeals have uniformly adopted procedures routinely to extend appointed counsel's duty to preparation of certiorari petitions desired by their clients. Because this Court has traditionally appointed counsel for those indigents whose certiorari petitions are granted, the only gap in coverage would arise where, as here, a request for appointment is made to the Court of Appeals after it has decided an indigent's appeal.

It is significant that the language of the amended rule does extend assistance to "appeals" and does not restrict "appeals" to proceedings in "courts of appeals." Moreover, no qualification such as "first appeal" is present. Additionally, to the extent that the Advisory Committee's suggested reading sheds light on its thinking, its Note refers to a law review article which argues for mandatory appointments in all stages of the federal criminal process,[5] including petitions for certiorari. That is the obvious disposition to be made of any ambiguity.

II

Criminal Justice Act

An independent source of the federal statutory policy of continuous representation of indigents during their defense in the federal criminal process is the Criminal Justice Act of 1964. As does Rule 44, the Act provides an automatic right to counsel only in prosecu-

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[5] Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783 (1961).

tions originating in the District Courts and during direct review therefrom. Unlike Rule 44, the Act also authorizes discretionary appointment of counsel in the "interests of justice" to any pauper "subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 or section 4245 of title 18." [6] 18 U. S. C. § 3006A (g). Another important difference between the Act and Rule 44 is that only the former authorizes the disbursement of federal funds to reimburse court-appointed lawyers.[7] Financial relief to the Bar has become increasingly necessary as our decisions have expanded indigents' rights to counsel.

The clearest statement of the Act's policy of providing blanket coverage of indigents' representation from arraignment through review by this Court is found in the first sentence of subsection (c):

> "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters." 18 U. S. C. § 3006A (c).

The ambiguous phrase "through appeal," has been clarified by a 1970 amendment to another section. 18 U. S. C. § 3006A (d)(6) now provides:

> "If a person for whom counsel is appointed under this section appeals to an appellate court or *petitions for a writ of certiorari,* he may do so without

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[6] Once a discretionary appointment under 18 U. S. C. § 3006A (g) has been made in such collateral matters, an indigent is automatically entitled (as in prosecutions on direct review) to counsel's aid in petitioning for certiorari in the event his appeal is adversely decided by the court of appeals. See, for example, the Fifth Circuit Plan Under the Criminal Justice Act, Rule 7 (I)(4) and (III)(4), 28 U. S. C. A. (Supp. 1972).

[7] 18 U. S. C. § 3006A (d).

> prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915 (a) of title 28." 84 Stat. 918.[8] (Emphasis added.)

Most of the original congressional hearings and floor debates concern the wisdom of public defender services in contrast to the more conventional system of rotating appointments among the Bar. No discussion was directed to the precise question involved here. Nonetheless, there are several indicia that "appeal," as used in § 3006A (c), was intended to include proceedings in this Court.

Different versions of the Act—all based upon the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice report of 1963—were passed in each of the Houses of Congress. A conference committee ironed out the differences and its House members afterwards reported concerning the present language of subsection (c):

> "Implied in the Senate version, and expressed in the House version, is the right of a defendant to have counsel appointed at any stage of the proceeding; i. e., before the commissioner, the district court, the court of appeals, or *the Supreme Court.*" H. R. Rep. No. 1709, 88th Cong., 2d Sess., 7 (1964) (emphasis added).

At least two exchanges during the floor debates made explicit that proceedings in this Court were within the Act's coverage.[9]

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[8] This provision was added by the Act of Oct. 14, 1970, Pub. L. No. 91-447, 84 Stat. 916.

[9] One of the sponsors of the House bill was Congressman Moore, who replied in response to a question concerning ceilings on total fees a single attorney could be paid under the Act, "May I answer that by saying the $500 limitation applies, if the appointed attorney

Moreover, the Judicial Conference's Committee to Implement the Criminal Justice Act of 1964 submitted in 1965 an interim recommendation that:

> "[C]ounsel appointed on appeal should advise the defendant of his right to initiate a further review by the filing of a petition for certiorari, and to file such petition, if requested by the defendant." Report on Criminal Justice Act, 36 F. R. D. 285, 291 (1965).[10]

As mentioned earlier, this recommendation has been adopted by all of the circuit conferences.

And our own rules have been amended to implement our participation under the Act in cases where we grant certiorari or note probable jurisdiction. Supreme Court Rule 53 (8).

Other indicators of intent are found in the Attorney General's Committee study. One of its recommendations was that a lawyer appointed by the trial court should have incentives to represent the accused in the subsequent stages of the case including "any appellate proceedings." Hearings on S. 1057 before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 183, 205 (1963). Presumably a purpose to excise the step during which certiorari petitions are prepared would have avoided the phrase "any appellate proceedings" and substituted instead "proceedings before the Courts of Appeals." Moreover, the study group recommended that the Act cover probation and parole revocation hearings,

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represents the defendant before a Commissioner and all the way to the Supreme Court—$500 is the total compensation allowed." 110 Cong. Rec. 446. See also *id.*, at 450 (remarks of Congs. Moore and Kastenmeier).

[10] The Committee reaffirmed this conclusion at the September 22–23, 1965, meeting of the Conference. Report of the Proceedings of the Judicial Conference of the United States, Sept. 22–23, 1965, p. 75.

a suggestion accepted by the legislature. *Id.*, at 210, 18 U. S. C. § 3006A (a). It is difficult to ascribe to Congress a purpose to extend the assistance of counsel to paupers in these ancillary matters but to withhold it when they petition for certiorari.

It is clear that the help of counsel was meant to be available during review by this Court both in filing for certiorari and on the merits. It cannot seriously be urged against this backdrop, that Congress intended to leave lawyerless those relatively infrequent and impecunious petitioners who request counsel only after courts of appeals have adversely decided their claims. In such situations as this one, the judicial function is to resolve ambiguous statutory language in light of the underlying purposes of the measure.

Since the applicant is entitled to counsel to aid in his preparation of his petition for writ of certiorari, the only question which remains is whether it is the duty of the court of appeals or of this Court to make an appointment. Given the existing apparatus of the courts of appeals for the purpose of appointing counsel for their impoverished appellants, it would seem to be little burden upon them to process applications such as this one. Also, local appointments would facilitate swift filings of those petitions within the time limits prescribed by Supreme Court Rule 22 (2). The conclusion that the duty to process these requests should lie with the courts of appeals, rather than this Court, has been suggested elsewhere. Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783 (1961).

I join the Court in remanding the case so that the Court of Appeals may reconsider the application. I agree that it should enter a new decree so that Doherty's time within which he may file his certiorari papers may run anew.

NORFOLK & WESTERN RAILROAD CO. *v.* NEMITZ ET AL.

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

No. 70–97. Argued October 21, 1971—Decided November 15, 1971

In anticipation of a railroad consolidation by which petitioner acquired the so-called Sandusky Line from the Pennsylvania Railroad, petitioner entered into an agreement with certain labor unions for the protection of the employees involved. The agreement provided that the employees would not be adversely affected in their employment as a result of the transaction. Respondents were employees of the Pennsylvania, who worked seasonally on the Sandusky Line, and during the winter freeze which barred navigation on Lake Erie worked at other points on the Pennsylvania system. Upon the consolidation, respondents accepted employment with petitioner. The agreement called for a salary supplement based upon pre-consolidation monthly compensation. The Interstate Commerce Commission (ICC) in its consolidation approval stated that the agreement was "made pursuant to and in conformity with § 5 (2) (f) of the Interstate Commerce Act for the protection of the covered employees." Section 5 (2) (f) provides that the ICC "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," and states that "[n]otwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into" by any railroad and an employee union. A post-consolidation agreement was made between petitioner and the union, under which petitioner claimed that the salary supplement was limited solely to the amount paid respondents for their seasonal Sandusky Line work. The District Court agreed with respondents that the new agreement was not enforceable as it conflicted with the terms of the pre-merger agreement and thus violated the Act under which the consolidation took place, and the Court of Appeals affirmed, with a modification as to damages. *Held:*

1. Section 5 (2) (f) provides mandatory compensation protection for railroad employees affected by a consolidation, and the

ICC's adoption or approval of a pre-merger collective agreement becomes a "condition" of the ICC's approval of a consolidation under that section. Pp. 41–43.

2. The "notwithstanding" proviso of § 5 (2) (f) affords the machinery for the terms of a pre-merger collective agreement and thus supplies one minimum measure of fairness required by the section. P. 43.

3. The post-consolidation agreement abrogated the employees' rights and the standard of "compensation" covered by the pre-merger agreement that had come under the ICC's protective order. Pp. 43–45.

436 F. 2d 841, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 45.

Martin M. Lucente argued the cause for petitioner. With him on the briefs were *Howard J. Trienens* and *John M. Curphey.*

Thomas J. Murray, Jr., argued the cause and filed a brief for respondents.

Solicitor General Griswold, Fritz R. Kahn, and *Leonard S. Goodman* filed a brief for the United States et al. as *amici curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In connection with a 1964 consolidation by which petitioner railway company absorbed New York, Chicago & St. Louis R. Co. (Nickel Plate), the so-called Sandusky Line, running from Columbus, Ohio, to Sandusky, Ohio, was acquired from the Pennsylvania Railroad system. Respondents were at the time employees of the Pennsylvania on the Sandusky Line. Their work was seasonal because the winter freeze barred navigation on Lake Erie. During those periods junior employees of Sandusky

worked at other points on the Pennsylvania's Toledo Division.

In anticipation of the 1964 consolidation, petitioner entered into an agreement with 19 labor organizations for protection of the employees of the several railroads coming into the consolidation, including those on the Sandusky Line. Petitioner agreed to employ "all employees of the lines involved *with the guarantee that they will not be adversely affected in their employment* as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue. 324 I. C. C. 1, 89 (emphasis added).

Each employee was to receive a monthly supplement to his post-consolidation monthly earnings equal to the excess, if any, of his average monthly compensation for the 12 months prior to the consolidation in which he had performed services.

Some 96 Sandusky Line employees elected to accept employment with petitioner on the terms and conditions stated. Twenty-five were junior men who had worked seasonally on the Toledo Division and they were the plaintiffs in this action.

The consolidation took place and over a year elapsed during which these trainmen were not paid the compensation promised. Arbitration pursuant to the collective agreement was agreed upon. At that point in 1965 the union and petitioner entered into a new agreement which reduced substantially the benefits of the junior trainmen who had been Sandusky Line employees. The District Court (287 F. Supp. 221, 309 F. Supp. 575) held that this new agreement was not enforceable as a matter of law as it violated the Act under which the consolidation or merger took place. The Court of Appeals affirmed, 436 F. 2d 841, with a modification that the damages due

respondent-employees should be determined by the District Court, not through arbitration. The case is here on a petition for a writ of certiorari which we granted, 402 U. S. 994.

Section 5 (2)(f) [1] of the Interstate Commerce Act as amended, 54 Stat. 906, 49 U. S. C. § 5 (2)(f), provides that in mergers and consolidations "the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected" for a period of four years.

The ICC in its approval of the consolidation or merger (324 I. C. C. 1, 106 (1964)) stated that the agreements respecting, *inter alia,* the rights of the Sandusky Line employees were "made pursuant to and in conformity with section 5 (2)(f) of the Interstate Commerce Act for the protection of covered employees." [2]

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[1] It provides:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

[2] The Commission stated in its Report, 324 I. C. C. 1, 50:

"As previously stated herein and in appendix A, various agreements have been reached between employee representatives and

It construed the agreements as requiring "that job eliminations as a result of the proposed acquisition of control be accomplished only through normal attrition." *Ibid.*

The mandate of § 5 (2)(f) seems clear enough: the Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." The Commission, as noted, said that the conditions protective of the employees were made pursuant to and in conformity with the provisions of § 5 (2)(f) and it gave its authorization "subject to such agree-

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the Norfolk & Western for the protection of employees adversely affected by these transactions. Our authorizations herein will, by reference, be made subject to such agreements. . . .

"We find that, as conditioned herein, the transactions under consideration meet the requirements prescribed by sections 5 (2) and 20a of the act and conform generally with the purposes and objectives of the national transportation policy declared by Congress. We are convinced that the transactions should be approved."

In the Appendix to its Report and Order, 324 I. C. C., at 89, the Commission continued:

"Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate, and Wabash, as well as persons employed on the Sandusky Line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky Line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms, Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease, and purchase, all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue."

ments." 324 I. C. C., at 50. The Solicitor General and the ICC argue in their *amicus curiae* brief that the last sentence of § 5 (2)(f)—the "notwithstanding" provision—relieved the Commission of any duty to review the adequacy of the protective provisions contained in a collective-bargaining agreement, and that they were not accorded protection by the ICC order.[3]

We disagree with that view. We reviewed the history of § 5 (2)(f) in *Railway Executives' Assn.* v. *United States,* 339 U. S. 142, and said that "one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations." [4] *Id.,* at 148. That "mandatory protection" can be accorded by terms provided by the Commission, or, as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate for a minimum of four years (as required by the second sentence) or longer (as allowed by the first sentence) if the Commission so provides. *Id.,* at 154. The purpose of § 5 (2)(f) was not to freeze jobs but to provide compensatory conditions. *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U. S. 169, 175–176. In that case we noted that the Commission has consistently followed that practice "in over 80 cases, with the full support of the intervening brotherhoods." *Id.,* at 177. And the Commission over and over again has adopted the set of labor conditions contained in collective agreements in discharge of its duty under § 5 (2)(f). See *Gulf, M. & O. R. Co. Purchase,* 261 I. C. C. 405, 434; *Erie R. Co. Trackage Rights,* 295 I. C. C. 303, 305;

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[3] The result, of course, would be that there would be no basis for judicial review of the ICC order pursuant to 28 U. S. C. § 1336.

[4] A synopsis of the legislative history of § 5 (2)(f) is contained in an Appendix to our opinion in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U. S. 298, 315.

Delaware, L. & W. R. Co. Trackage Rights, 295 I. C. C. 743, 755–756.

When there is a collective agreement and the Commission, as here, adopts or approves it, the "notwithstanding" sentence of § 5 (2)(f) is not, as suggested, read out of the Act. The collective agreement then becomes a "condition" of the Commission's "approval" of the consolidation under the first sentence of § 5 (2)(f) and its provisions are deemed by the Commission to be "a fair and equitable arrangement to protect the interests" of the employees within the meaning of the first sentence. Thus, the significance of the "notwithstanding" proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of § 5 (2)(f).

In 1965 an implementing agreement, entered into after the consolidation, was made between the union and petitioner. It is petitioner's claim that it limited these junior employees to their average monthly earnings on the Sandusky Line during the 12 months before the consolidation, regardless of how many months the employees had worked during that period on other sections of the Toledo Division. That is to say, each of them would receive under the 1965 implementing agreement an average monthly compensation based only on their seasonal Sandusky Line work. Thus, respondent Nemitz had an average monthly compensation of $583.34 representing pre-consolidation work on several sections of the Toledo Division. Under the § 5 (2)(f) agreement governing the consolidation, his earnings would be supplemented to the extent that his post-consolidation monthly earnings fell short of $583.34. Under the 1965 agreement his average monthly compensation, based solely on his work on the Sandusky Line, would be $194.40. Even

this amount would not be paid if, as likely, he received that much in unemployment compensation. The 1965 agreement obviously placed these junior employees "in a worse position with respect to compensation," as those words are used in the pre-consolidation agreement. For they no longer could work on any part of the former Toledo Division except the Sandusky Line and their prior compensation, reflecting in part work on other parts of the Toledo Division, was no longer a measure of the "compensation" to which they were entitled under the pre-consolidation agreement. For those whose historical average monthly earnings were so slight that they were now on unemployment insurance, the result would be much more drastic than "normal attrition," which the Commission said was the only way under the protective conditions by which jobs would be eliminated. The Court of Appeals said:

> "An agreement made pursuant to the last sentence of Sec. 5 (2)(f) may vary the protections afforded by the I. C. C. order, but it may not substantially abrogate employees' rights grounded in an I. C. C. order." 436 F. 2d, at 848.

We agree with that view. We also agree that the 1965 implementing agreement [5] abrogated the standard

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[5] The agreement authorized by the Commission when the merger was approved was described as follows by the Commisson, Appendix to Report and Order of Interstate Commerce Commission, 324 I. C. C., at 89:

"The agreement also authorized Norfolk & Western to transfer the work of employees throughout the merged system and requires the labor organizations to enter into implementing agreements permitting employees either to follow their work or be assigned to other jobs within their craft or class within the same general locality as existing jobs, following a period of retraining, if necessary, at Norfolk & Western's expense."

of "compensation" covered by the pre-consolidation agreement [6] which had come under the protective order of the Commission.

The judgment below is therefore

Affirmed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

I am sympathetic with the respondents and with the unfortunate predicament in which, largely by their own acts, they find themselves. I feel, however, that the Court's decision to the effect that federal district court jurisdiction exists here and that the judgment of the Court of Appeals is to be affirmed amounts only to a sympathetically imposed judicial cure that is not authorized by the Interstate Commerce Act, that is violative of Congress' intent, and that ignores unusually clear legislative history.

In January 1962 the Norfolk & Western and the respondents' own Brotherhood, and others, entered into an agreement for the protection of employees in the event of approval of the anticipated merger. This agreement, by the express terms of its paragraph VIII, was directed to "the last sentence of Section 5 (2)(f) of the Interstate Commerce Act." In October 1965 the railroad and the union, and others, entered into an Implementing Agreement. It then follows, it seems to me, that a number of factors demand a result opposite to that reached by the Court:

1. *The very language of the statute.* Section 5 (2)(f) was added to the Interstate Commerce Act by the

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[6] The union that negotiated the Implementing Agreement disagreed with that position as did the union's National Board of Appeals. Both, however, proceeded on a mistaken view of the law.

Transportation Act of 1940, 54 Stat. 906. It is the Act's only provision relating to employee benefits. The thrust of the subsection's third and last sentence, beginning with the exclusionary word "notwithstanding," is crucial here.

The first sentence directs the Interstate Commerce Commission, as a condition of its approval of any railroad merger, to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." The second sentence states that in its order of approval the Commission shall include provisions protective for a four-year period. The third sentence then reads:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

This plain and unambiguous "notwithstanding" language, obviously and necessarily directed to and affecting only the two preceding sentences, requires that an agreement entered into by the carrier and the collective-bargaining representative be controlling. The two preceding sentences have application, therefore, only when an agreement "pertaining to the protection of the interests of said employees" is *not* executed. In the case before us the carrier and the Brotherhood did execute an agreement of the kind specified, and the "notwithstanding" language should come into play. The Court today nullifies that sentence and reads it out of the Act.

2. *The legislative history.* This history is clearly antagonistic to respondents' position here. The Transportation Act of 1940 was no accident or floor-conceived legislation. Indeed, Senator Wheeler was led to "venture

the assertion that the bill was given more careful and more thoughtful consideration than any other bill which has ever come before the Senate in my time." 86 Cong. Rec. 11270. It emerged from the economically distressed days of the 1930's, from the Washington Job Protection Agreement of 1936 (see Hearings on H. R. 2531 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., vol. 1, p. 231), and from recommendations of President F. D. Roosevelt's Committee of Six (see Hearings, *supra,* at 259).

What is now § 5 (2)(f) was not contained in the original House version (H. R. 4862, 76th Cong., 1st Sess.), or in the original Senate version (S. 2009, 76th Cong., 1st Sess.), or, indeed, in the draft contained in the initial H. R. Conf. Rep. No. 2016 of April 26, 1940, 76th Cong., 3d Sess. It surfaced as § 7 of the revised draft submitted with the supplanting H. R. Conf. Rep. No. 2832 of August 7, 1940, 76th Cong., 3d Sess. The new language replaced the earlier Harrington Amendment to the House version. The reasons for the change effected by the conferees are set forth on pages 68–69 of H. R. Conf. Rep. No. 2832. Although the comments there do not focus on the "notwithstanding" sentence, its purpose and significance are apparent from the debates.

Representative Harrington had succeeded in amending the House bill to include a directive that the Commission approve no transaction resulting in unemployment or displacement of employees. 84 Cong. Rec. 9882, 9886, 10127. The conference committee, however, eliminated all employee-protection provisions. When the bill again reached the House floor, Mr. Wadsworth proposed the recommitment of the bill with instructions, among others, to include merger provisions and the "notwithstanding" sentence, drafted by the railroad unions themselves. 86 Cong. Rec. 5886. As to that sentence,

Congressman Harrington, an advocate of compulsory employee protection, had said:

> "But this provision also contains a clause that permits the industry, through the processes of collective bargaining, to work out its problems in a democratic manner." 86 Cong. Rec. 5871.

The motion to recommit passed. The conference committee in due course then reported § 5 (2)(f) in its present form. Congressman Wolverton, a conferee, spoke in support of the revised bill:

> "And, then there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.
>
> "I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment." 86 Cong. Rec. 10189.

And Congressman Lea referred to the "notwithstanding" sentence as "a provision confirming the right of employees to enter into agreements with railroads to take care of them in case of unemployment as a result of consolidations." 86 Cong. Rec. 10178.

For me, all this evinces a clear and positive intent on the part of the authors of this legislation to make appropriate provision for employee protection, but explicitly to withdraw Commission-dictated protection whenever the carrier and the union, before merger, voluntarily arrive at protective provisions satisfactory to them. This was the purpose of the "notwithstanding" clause. Furthermore, it is in accord with the "strong federal labor policy against governmental interference with the sub-

stantive terms of collective-bargaining agreements." *Chicago & North Western R. Co.* v. *United Transportation Union,* 402 U. S. 570, 579 n. 11 (1971). In my view, the Court's decision today, and the decisions of the District Court and the Court of Appeals, overlook or choose to ignore this purpose and this legislative history. Instead, a result is achieved that is the exact opposite of the congressional intent and policy.

Respondents urge that this Court in the past has recognized the Commission's responsibility to review the sufficiency of third-sentence voluntary agreements and to "adopt" them as part of its orders, citing *Railway Executives' Assn.* v. *United States,* 339 U. S. 142 (1950), and *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U. S. 169 (1961). These are the only two decisions the Court produces to support its theory of jurisdiction. Neither is apposite. The former case presented the question whether under sentence two the Commission had the power to prescribe protective provisions extending beyond the four-year period to which that sentence refers. The holding was in the affirmative. The Court now makes much of the language of "mandatory protection" in that decision. But no pre-merger voluntary agreement had been made there, and the effect of sentence three did not enter the case. Nor had a pre-merger agreement been reached in the latter *Maintenance of Way* case, where the issue was whether, when the Commission formulates its own protective provisions under sentence two, it must require the carrier to retain employees for the four-year period or simply to guarantee them equivalent compensation. The disagreement between the parties there arose at the Commission hearing on what protective arrangements should be imposed by the Commission in fulfillment of its sentence two duty.

The Commission seems consistently to have taken a position in line with the legislative history noted above,

and with the clear meaning of the "notwithstanding" sentence. See, *e. g., Great Northern Pacific & Burlington Lines-Merger-Great Northern R. Co.*, 331 I. C. C. 228, 278 (1967); *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I. C. C. 475, 544 (1966); *Norfolk & Western R. Co. and New York, Chicago & St. Louis R. Co.-Merger*, 324 I. C. C. 1, 9, 90 (1964); *Missouri Pacific R. Corp. in Nebraska Trustee Operation*, 247 I. C. C. 653, 657 (1941).

Neither respondents nor the Court points to a single instance in which a pre-merger voluntary protective agreement directed at § 5 (2)(f) was either reviewed and found wanting by the Commission, or was "included" in the Commission's order in any sense except that recognition of the existence of such an order is necessary for the Commission to relieve itself of the duty that would otherwise be imposed on it by sentence two.*

3. *The effect on collective bargaining.* The result reached by the Court appears to me to require the ICC and the courts always to intrude upon collective bargaining, by reviewing the sufficiency of its substantive product, and thereby to discourage and to downgrade the collective-bargaining process that has been so firmly established in this area and so steadfastly protected. See, for example, *International Association of Machinists* v. *Street*, 367 U. S. 740 (1961). As this case makes only too clear, the general standard of sentence two of § 5 (2)(f), namely, "a worse position with respect to their employment," permits of widely varying interpretations when applied to specific dilemmas such as that of the

*Respondents refer to *Florida East Coast R. Co. Reorganization*, 307 I. C. C. 5 (1958), aff'd, 312 I. C. C. 744, aff'd, 171 F. Supp. 512 (SD Fla. 1959), but the District Court's decision in that case plainly sustained the Commission's determination that because a bankruptcy reorganization was involved, no part of § 5 (2)(f) was applicable.

respondents here. The Court's holding implies for me that any agreement between the carrier and the Brotherhood pursuant to sentence three of § 5 (2)(f), however protective, is nevertheless not to be regarded as controlling if it is subsequently deemed less protective than Commissioners or judges think it should have been. Neither the language nor the legislative history warrants our espousing such judicial overview.

4. *The facts and the element of choice.* Contrary to the impression one might receive from a quick appraisal of either the opinions below or that of the Court here, it is not at all clear that the Implementing Agreement took from respondents something they had a reasonable expectation of receiving when the merger was approved. On its face, the application to respondents of the 1962 agreement, the language of which ("placed in a worse position with respect to compensation") reflected the generality of § 5 (2)(f), is ambiguous. Interpretation of this language necessarily requires an understanding of the parties' original intentions with respect to Sandusky Line employees. Respondents were not without a substantial measure of selection of their future work at the time of the transfer of the Sandusky Line. That choice was between continued employment with the Pennsylvania, with seniority on its Toledo division maintained, or abandoning a part of their working territory and casting their lot with Norfolk & Western as acquirer of the Sandusky Line. Had they chosen to stay with the Pennsylvania, as it appears the parties to the agreement expected they would, respondents would not have brought on their present plight. For personal reasons such as, perhaps, residence in Sandusky (a factor of less than ideal convenience in the off-season regardless of the choice they made), they chose the other course and incurred the risks both of new employment and of the application of the protective provisions to them

under the unexpected circumstances. This situation highlights the wisdom of the policy of § 5 (2)(f), namely, to leave the solution of their problem to their own Brotherhood (their bargaining representative with the Norfolk & Western as well as with the Pennsylvania), rather than to the benevolent hindsight of the Commission or of a court.

All this propels me to the conclusion that the Commission may not be held to have reviewed and incorporated the 1962 agreement into its 1964 order authorizing the merger. All it did was to state that its duty to see to the protection of employees under § 5 (2)(f) was satisfied by the execution of the 1962 agreement. It follows that there was no district court jurisdiction and that the respondents' complaint should have been dismissed.

SLAYTON, PENITENTIARY SUPERINTENDENT *v.* SMITH

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

No. 70–108. Decided November 16, 1971

Court of Appeals, having determined that state remedies had not been exhausted by respondent, whose habeas corpus petition alleged that he had been tried and sentenced by a senile state judge, should not have made implications as it did as to merits of the delicate subject involved and, absent special circumstances, should not have ordered the District Court, which had dismissed the petition, to retain the case on its docket until respondent had sought state court relief.

Certiorari granted; 435 F. 2d 453, vacated and remanded.

PER CURIAM.

Respondent's petition for habeas corpus alleged, among other things, that he had been tried and sentenced in the state courts by a senile judge. On appeal from the District Court's dismissal of the petition without a hearing, the Court of Appeals for the Fourth Circuit noted that state remedies had not been exhausted, expressed its confidence that "if the contention is squarely raised, the state courts will be willing to afford the petitioner a reasonable opportunity to prove his case," and observed that a claim of judicial senility raised a most "sensitive issue of state administration of state criminal justice." 435 F. 2d 453, 460 (1970). Despite these judicious observations underscoring the fact that this case was not ripe for federal cognizance, the Court of Appeals vacated the District Court's judgment and remanded for further proceedings with instructions to stay the case until respondent had sought relief in the Virginia state courts.

The Court of Appeals' form of "abstention" is perhaps technically consistent with the statutory prohibition

against issuing the writ where state remedies have not been exhausted. 28 U. S. C. § 2254. But, having determined that state remedies had not been exhausted, the Court of Appeals would have better served the policy of the statute had it avoided any implication as to the merits of so delicate a subject. Further, absent special circumstances, cf. *Nelson* v. *George*, 399 U. S. 224 (1970), *Wade* v. *Wilson*, 396 U. S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

The motion of respondent for leave to proceed *in forma pauperis* and the petition for writ of certiorari are 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.

So ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART joins, believing that the Court of Appeals has observed all the proprieties as well as the requirements of the Act, would affirm its judgment.

HARRIS *v.* WASHINGTON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 70–5213. Decided November 16, 1971

The principle announced in *Ashe* v. *Swenson,* 397 U. S. 436, which bars a second criminal trial where the defendant has been acquitted in a previous trial involving the same ultimate factual issue, applies irrespective of whether the jury in the first trial considered all relevant evidence, and irrespective of the State's good faith in bringing successive prosecutions.

Certiorari granted; 78 Wash. 2d 894, 480 P. 2d 484, reversed.

PER CURIAM.

On June 10, 1969, a bomb sent through the mail exploded in the residence of Ralph Burdick in Clark County, Washington. The explosion killed Burdick and the petitioner's infant son, Mark Allen Harris, and seriously injured the petitioner's estranged wife, Laila Violet Harris. The petitioner was tried in a state court for the murder of Ralph Burdick and was acquitted by a jury. He was immediately rearrested on informations charging the murder of Mark Allen Harris and the assault upon Laila Violet Harris. To these informations the petitioner entered pleas of former jeopardy and collateral estoppel, and moved to dismiss. The trial court denied the motion and struck the defenses.

The state Court of Appeals granted a writ of prohibition on the grounds of collateral estoppel, finding that "the record demonstrates without question that the retrial of petitioner for assault and murder will require relitigation of the same ultimate fact" determined adversely to the State in the previous trial—*i. e.,* whether it was the petitioner who had mailed the bomb. 2 Wash. App. 272, 291–292, 469 P. 2d 937, 948. The Supreme

Court of Washington agreed that the same ultimate issue was involved in both prosecutions, but nevertheless reversed the Court of Appeals and denied the writ of prohibition. The court noted that a ruling on the admissibility of evidence during the murder trial had resulted in the exclusion, on grounds having "no bearing on the quality of the evidence," of a letter allegedly written by the petitioner and containing threats against the lives of Mr. Burdick and Mrs. Harris. 78 Wash. 2d 894, 901, 480 P. 2d 484, 487–488. Because of its view that this evidence would clearly be admissible in the second trial, the court held that the issue of identity had not been "fully litigated" in the previous trial, and that the doctrine of collateral estoppel did not bar a subsequent trial in which litigation of the issue will be "complete."

Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U. S. C. § 1257. See *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555, 558.

In *Ashe* v. *Swenson,* 397 U. S. 436, we held that collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. See *Benton* v. *Maryland,* 395 U. S. 784. We said that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U. S., at 443. The State concedes that the ultimate issue of identity was decided by the jury in the first trial. That being so, the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence, and

irrespective of the good faith of the State in bringing successive prosecutions.

Since *Ashe* v. *Swenson, supra,* squarely controls this case, the motion for leave to proceed *in forma pauperis* is granted, the petition for a writ of certiorari is granted, and the judgment is

Reversed.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant the petition and reverse the judgment both for the reasons stated in the *per curiam* opinion and for the reasons stated in MR. JUSTICE BRENNAN'S concurring opinion in *Ashe* v. *Swenson,* 397 U. S. 436, 448.

CHIEF JUSTICE BURGER, dissenting.

The Court's summary act without hearing argument in this case is wrong in two respects: first, it is another instance of importing into the administration of criminal justice the civil doctrine of collateral estoppel to which I dissent for the reasons stated in my dissent in *Ashe* v. *Swenson,* 397 U. S. 436, 460 (1970); second, even assuming the collateral estoppel approach has validity, the evidence in this case in the second trial is not the "same evidence" on which the first case was submitted so that this is not a case for application of that unsound doctrine.

MR. JUSTICE BLACKMUN, dissenting.

My own views on the issue presented by this case were expressed when I wrote for the Court of Appeals in *Ashe* v. *Swenson,* 399 F. 2d 40 (CA8 1968), reversed and remanded, 397 U. S. 436 (1970). I am not persuaded as to the rightness of the Court's imposing in that case—as a Fifth Amendment-Fourteenth Amendment imperative—the concept of collateral estoppel upon a state

criminal proceeding. I could have understood a flat overruling of *Hoag* v. *New Jersey*, 356 U. S. 464 (1958), and of *Ciucci* v. *Illinois*, 356 U. S. 571 (1958), despite the interim appearance of *Benton* v. *Maryland*, 395 U. S. 784 (1969). But overruling those two cases was a step the Court, for reasons that escape me, refused to take or felt it could not take.

Neither am I persuaded by the "single frolic" or "one criminal episode" or "same transaction" theory espoused by the Justices in concurrence in *Ashe* v. *Swenson*, 397 U. S., at 448–460. That approach would place multiple but separate-shot murders under the protective umbrella of double jeopardy. I cannot subscribe to reasoning that would necessarily produce a result of that kind.

I therefore dissent.

CRUZ ET AL. *v.* HAUCK, SHERIFF

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

No. 70–5343. Decided November 16, 1971

Certiorari granted; vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Younger* v. *Gilmore, ante,* p. 15.

MR. JUSTICE DOUGLAS, concurring.

Petitioners are prisoners who claim that the prison authorities have denied them access to law books needed to seek judicial remedies. They are inmates of the Bexar County Jail in Texas and instituted this action in the District Court to restrain the respondent's interference with their reasonable access to hardbound law books and other legal matter.[1] They asserted that county jail regulations and practices deprived them of their rights to seek judicial redress. Their custodians answered that prison security necessitated removing hardback covers as part of an overall scheme to arrest smuggling of contraband. Without conducting a hearing into the matter, the District Court summarily dismissed the complaint.[2]

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[1] In their complaint petitioners relied upon 28 U. S. C. § 1343 (3); 28 U. S. C. § 2201; and 42 U. S. C. § 1983.

[2] *Cruz* v. *Hauck,* Civil Action SA70CA182 (WD Tex., filed Oct. 30, 1970) (unreported).

The question is an important one in the evolution by statutes and constitutional decisions of a Bill of Rights for prisoners. Prisoners are not statistics, known only to a computer, but humans entitled to all the amenities and privileges of other persons, save as confinement and necessary security measures curtail their activities. Whatever security measures may be needed respecting books, it is not conceivably plausible to maintain that essential books can be totally banned.

That question is submerged in this case as the initial issue concerns these prisoners' request to proceed *in forma pauperis* on appeal from the District Court's dismissal of their action, the Court of Appeals having refused to docket their cases without prepayment of filing fees and security which litigants normally advance.

Petitioners filed a timely notice of appeal and pursuant to Fed. Rule App. Proc. 24 (a) (first paragraph) sought from the District Judge leave to appeal *in forma pauperis* as to prepayment of a $25 filing fee [3] and the $250 minimum security deposit required by Fed. Rule App. Proc. 7. The District Judge refused the request, certifying in relevant part that: "This Court . . . is of the opinion that any appeal taken from the order of denial in this case would be frivolous, without merit, and not taken in good faith." [4] No other explanation was offered although in his earlier unreported order dismissing the original action the District Judge said that prisoners do not have "a right to be furnished with an extensive collection of legal materials" and that courts "may not interfere with the conduct of a prison." [5]

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[3] United States Court of Appeals for the Fifth Circuit Rule 8 (d).

[4] *Cruz* v. *Hauck,* Civil Action SA70CA182 (WD Tex., filed Dec. 3, 1970) (unreported).

[5] *Cruz* v. *Hauck,* Civil Action SA70CA182 (WD Tex., filed Oct. 28, 1970) (unreported).

Petitioners then applied to the Court of Appeals for a similar waiver of filing fees and security. Their application was denied without opinion [6] and their motion for reconsideration was also refused without opinion.[7] Presented with their motion for reconsideration were memoranda posing their primary contention now before this Court that these denials of leave to proceed *in forma pauperis* offended these petitioners' rights of equal access to judicial machinery.[8]

I

We have held, in line with *Griffin* v. *Illinois,* 351 U. S. 12 (1956), that an indigent prisoner cannot be deprived of a direct criminal appeal or of state habeas relief *solely* on account of his inability to prepay docketing fees. *Smith* v. *Bennett,* 365 U. S. 708 (1961) ($4 filing fee for state habeas action and $3 filing fee for appeal therefrom); *Burns* v. *Ohio,* 360 U. S. 252 (1959) ($20 filing fee for discretionary review of criminal appeal).[9] In 1892 Congress authorized the federal courts to provide the disadvantaged with a wide range of *in forma pauperis* relief. Act of July 20, 1892, 27 Stat. 252. The benefits of this

[6] *Cruz* v. *Hauck,* Misc. No. 1964 (CA5, filed Feb. 1, 1971).

[7] *Cruz* v. *Hauck,* Misc. No. 1964 (CA5, filed Mar. 12, 1971).

[8] The issue at stake in the appeal was clearly not frivolous as indicated by our decision in *Younger* v. *Gilmore, ante,* p. 15, that there are limits on the extent to which prison officials may restrict inmates' access to law books. On at least 21 occasions this Court has reversed lower courts' holdings that only frivolous claims were sought to be presented. *Rubio* v. *United States,* 387 U. S. 90 (1967); *Robinson* v. *United States,* 372 U. S. 527 (1963); *Jones* v. *United States,* 371 U. S. 25 (1962); *Gilliam* v. *United States,* 370 U. S. 727 (1962); *Garrett* v. *United States,* 369 U. S. 662 (1962); *Kemp* v. *United States,* 369 U. S. 661 (1962); *Coppedge* v. *United States,* 369 U. S. 438 (1962); see 14 cases prior to *Coppedge* cited *id.,* at 440–441, n. 1.

[9] See also *Roberts* v. *LaVallee,* 389 U. S. 40 (1967); *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966); *Draper* v. *Washington,* 372 U. S. 487 (1963); *Douglas* v. *California,* 372 U. S. 353 (1963).

generous provision, now codified at 28 U. S. C. § 1915, have been limited, however, by the important proviso added in 1910 (36 Stat. 866) which, as now amended, reads:

> "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

"Good faith" has been defined as a requirement that an appeal present a nonfrivolous question for review. If the district court certifies that an appeal would not present such a question, then an indigent may ask the court of appeals for permission to proceed *in forma pauperis*. That court must grant the renewed motion if after a *de novo* determination it disagrees with the district court's application of the good-faith test. If both lower courts refuse permission, then, unless this Court vacates the court of appeals' finding, the pauper's appeal is ended without a hearing on the merits. See Fed. Rule App. Proc. 24 (a). It is important that in all of these proceedings the only cognizable issue is whether a summary survey (as opposed to plenary deliberation) suggests that a substantial argument could be presented. For a discussion of the procedures employed see *Coppedge* v. *United States*, 369 U. S. 438 (1962); *Hardy* v. *United States*, 375 U. S. 277 (1964).

II

Our holdings have steadily chipped away at the proposition that appeals of the poor can be disposed of solely on summary and abbreviated inquiries into frivolity rather than upon the plenary consideration granted paying appellants.[10] In *Eskridge* v. *Washington Prison*

[10] Although no explicit equal protection clause is directed by the Constitution against the Federal Government the concept of equal protection of the laws is incorporated into the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

Board, 357 U. S. 214 (1958), we held that a State may not withhold a transcript and thereby deny an appeal to a poor man merely because a trial judge believed his own conduct had avoided the production of nonfrivolous questions for review. See also *Ross* v. *Schneckloth,* 357 U. S. 575 (1958). In *Lane* v. *Brown,* 372 U. S. 477 (1963), we decided that an impoverished prisoner's appeal from a state *coram nobis* hearing could not be thwarted simply because a public defender officer believed his case lacked merit. In *Ellis* v. *United States,* 356 U. S. 674 (1958), we emphasized that a criminal appellant seeking to establish nonfrivolity under 28 U. S. C. § 1915 is entitled to more than appointed counsel's private view that his appeal would be worthless and that if counsel withdrew for that reason the Court of Appeals was duty bound to replace him. We have also held that a Court of Appeals may not overrule the permission granted by a District Court to proceed *in forma pauperis, McGann* v. *United States,* 362 U. S. 309 (1960), but that a Court of Appeals must review *de novo* a trial judge's certification that an appeal would not be in good faith, *Johnson* v. *United States,* 352 U. S. 565 (1957).

Moreover, in federal criminal appeals on direct review most circuits have provided as a matter of course the entire panoply of § 1915 relief, including counsel, transcripts, and waiver of filing fees and security, merely upon a showing of poverty. And, to the extent that the nonfrivolity test is still enforceable elsewhere, our opinions in *Coppedge, supra,* and *Hardy, supra,* have partially attenuated its harsher effects by requiring the appointment of counsel and the provision of transcripts for the preliminary purpose of ascertaining whether appeals would produce worthwhile issues.

It is true, of course, that most of these decisions in-

volved criminal appeals rather than civil appeals.[11] But the equal protection concept is "not limited to criminal prosecutions" and its "protections extend as well to civil matters." See *Williams* v. *Shaffer*, 385 U. S. 1037, 1039 (1967). Indeed, last Term, in *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), we held on equal protection and due process grounds that a State could not deny a divorce to an impecunious wife solely because she could not pay relatively small filing and service-of-process fees. Moreover, of the *Griffin* progeny at least two of our opinions concerned civil habeas appeals, condemning filing fees substantially less burdensome than those required below by the Fifth Circuit. See *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966), and *Smith* v. *Bennett*, *supra*. And lower court decisions have nurtured the sturdy expansion of *Griffin* to non-habeas civil appeals. In a civil rights case similar to the instant one, *Lockhart* v. *D'Urso*, 408 F. 2d 354 (1969), the Third Circuit held that *in forma pauperis* aid should normally be granted as a matter of course in order to minimize courts' treatment of litigants based upon economic circumstances. *Id.*, at 355. The upshot of these judicial pronouncements was forcefully summarized by Mr. Justice Black last Term: "In my view, the decision in *Boddie* v. *Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney." *Meltzer* v.

[11] For a discussion of application of our *in forma pauperis* decisions to civil appeals in the federal courts, see Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343 (1967).

C. Buck LeCraw & Co., 402 U. S. 954, 955–956 (1971) (dissent from denial of certiorari).[12]

The elusive nature of the frivolity standard is partly demonstrated by the number of times this Court has vacated findings of bad faith by the lower courts.[13] It is no answer that we may continue to rectify such errors on an *ad hoc* basis, for even so indigents are nonetheless required to return to courts of appeals and only then—after substantial delay—obtain plenary review on the merits. *Coppedge, supra,* at 453. Wealthier litigants, of course, have no such hurdles to pass before obtaining full review of their assignments of error. Although these hurdles might be justifiable where indigents requested more substantial relief, they are too onerous where all that is at stake is the prepayment of a $25 filing fee and $250 security deposit.

It is apparent that this disparate treatment has the effect of classifying appellants according to wealth, which, like race, is a suspect classification. *Griffin* v. *Illinois,* 351 U. S. 12 (1956); *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966). See also *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). Accordingly, this classification could withstand challenge only upon a showing of compelling circumstances. Respondent offers none but simply repeats the discredited maxim that paupers' appeals are privileges, not rights.[14]

Thus, I would not remand this case on the limited ground that the Court of Appeals may have underestimated the weight of the petitioners' claim. Rather, I would hold that upon a showing of poverty courts of

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[12] Together with seven other cases, 402 U. S. 954 n. *.

[13] See cases cited at n. 8.

[14] Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

appeals henceforth must waive prepayment and may not inquire into whether an appeal may eventually pose a fruitful issue, at least in cases, such as this one, involving fundamental civil liberties.

I would grant certiorari and remand the case to the Fifth Circuit so that these petitioners may have their appeal docketed without prepayment of fees or security.

SCHREINER *v.* UNITED STATES

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

No. 71–5294. Decided November 16, 1971

Certiorari granted; 435 F. 2d 1004, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for further proceedings, including re-entry of its judgment affirming petitioner's conviction and consideration of the appointment of counsel for petitioner in connection with seeking review in this Court of the judgment of the Court of Appeals. 18 U. S. C. §§ 3006A (c), 3006A (d)(6), 3006A (g). See also H. R. Rep. No. 1709, 88th Cong., 2d Sess., 7 (1964); Report of the Committee to Implement the Criminal Justice Act of 1964, presented to a Special Session of the Judicial Conference of the United States, 36 F. R. D. 285, 291 (1965); Fed. Rule Crim. Proc. 44 (a); *Doherty* v. *United States, ante,* p. 28.

MR. JUSTICE DOUGLAS, concurring.

Schreiner has a statutory right to the assistance of a lawyer in drafting his petition for certiorari. As I indicated in *Doherty* v. *United States, ante,* p. 29, that right is not conditioned on counsel's appraisal of the merits of the petition. No conditions are attached to rights under Fed. Rule Crim. Proc. 44 and the Criminal Justice Act of 1964. This view was adopted by the

Judicial Conference's Committee to Implement the Criminal Justice Act:

> "[C]ounsel appointed on appeal should advise the defendant of his right to initiate a further review by the filing of a petition for certiorari, and to file such petition, if requested by the defendant." Report of the Committee to Implement the Criminal Justice Act, 36 F. R. D. 285, 291 (1965).

Moreover, the Tenth Circuit has implemented this suggestion. See 1A West's Federal Forms, Supreme Court, § 488 (B. Boskey ed. 1969).

There may well be instances where the remedy sought is inappropriate—*e. g.*, an effort to obtain mandamus where the duty is only discretionary. The statute does not, however, permit an indigent's right to be conditioned upon the fortuity of whether a lawyer believes this Court will grant his petition. We ourselves often have difficulty making that prophecy.

CAMP *v.* ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 70–353. Decided November 16, 1971

Certiorari granted; 249 Ark. 1075, 467 S. W. 2d 707, reversed and remanded.

PER CURIAM.

The petition for writ of certiorari is granted. Petitioner's alleged procedural default does not bar consideration of his constitutional claim in the circumstances of this case. See *Henry* v. *Mississippi,* 379 U. S. 443, 447–449 (1965). The judgment of the Supreme Court of Arkansas is reversed. *Griffin* v. *California,* 380 U. S. 609 (1965). The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

PEASE *v.* HANSEN, DIRECTOR, CASCADE COUNTY DEPARTMENT OF PUBLIC WELFARE, ET AL.

APPEAL FROM THE SUPREME COURT OF MONTANA

No. 70–5376. Decided November 16, 1971

157 Mont. 99, 483 P. 2d 720, reversed.

PER CURIAM.

The motion of the appellant for leave to proceed *in forma pauperis* is granted.

Whether a welfare program is or is not federally funded is irrelevant to the constitutional principles enunciated in *Shapiro* v. *Thompson*, 394 U. S. 618. The judgment of the Supreme Court of Montana is reversed.

THE CHIEF JUSTICE is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

REED *v.* REED, ADMINISTRATOR

APPEAL FROM THE SUPREME COURT OF IDAHO

No. 70–4. Argued October 19, 1971—Decided November 22, 1971

A mandatory provision of the Idaho probate code that gives preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate is based solely on a discrimination prohibited by and therefore violative of the Equal Protection Clause of the Fourteenth Amendment.

93 Idaho 511, 465 P. 2d 635, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Allen R. Derr argued the cause for appellant. With him on the briefs were *Melvin L. Wulf, Ruth Bader Ginsburg, Pauli Murray,* and *Dorothy Kenyon.*

Charles S. Stout argued the cause for appellee. With him on the brief was *Myron E. Anderson.*

Briefs of *amici curiae* urging reversal were filed by *J. Lee Rankin* and *Norman Redlich* for the City of New York; by *Martha W. Griffiths, Phineas Indritz, Leo Kanowitz, Marguerite Rawalt, Sylvia Roberts,* and *Faith Seidenberg* for American Veterans Committee, Inc., et al.; and by *Birch Bayh* for the National Federation of Business and Professional Women's Clubs, Inc.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Richard Lynn Reed, a minor, died intestate in Ada County, Idaho, on March 29, 1967. His adoptive parents, who had separated sometime prior to his death, are the parties to this appeal. Approximately seven months after Richard's death, his mother, appellant Sally Reed, filed a petition in the Probate Court of Ada County,

seeking appointment as administratrix of her son's estate.[1] Prior to the date set for a hearing on the mother's petition, appellee Cecil Reed, the father of the decedent, filed a competing petition seeking to have himself appointed administrator of the son's estate. The probate court held a joint hearing on the two petitions and thereafter ordered that letters of administration be issued to appellee Cecil Reed upon his taking the oath and filing the bond required by law. The court treated §§ 15–312 and 15–314 of the Idaho Code as the controlling statutes and read those sections as compelling a preference for Cecil Reed because he was a male.

Section 15–312[2] designates the persons who are entitled to administer the estate of one who dies intestate. In making these designations, that section lists 11 classes of persons who are so entitled and provides, in substance,

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[1] In her petition, Sally Reed alleged that her son's estate, consisting of a few items of personal property and a small savings account, had an aggregate value of less than $1,000.

[2] Section 15–312 provides as follows:

"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

"1. The surviving husband or wife or some competent person whom he or she may request to have appointed.

"2. The children.

"3. The father or mother.

"4. The brothers.

"5. The sisters.

"6. The grandchildren.

"7. The next of kin entitled to share in the distribution of the estate.

"8. Any of the kindred.

"9. The public administrator.

"10. The creditors of such person at the time of death.

"11. Any person legally competent.

"If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate."

that the order in which those classes are listed in the section shall be determinative of the relative rights of competing applicants for letters of administration. One of the 11 classes so enumerated is "[t]he father or mother" of the person dying intestate. Under this section, then, appellant and appellee, being members of the same entitlement class, would seem to have been equally entitled to administer their son's estate. Section 15–314 provides, however, that

> "[o]f several persons claiming and equally entitled [under § 15–312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

In issuing its order, the probate court implicitly recognized the equality of entitlement of the two applicants under § 15–312 and noted that neither of the applicants was under any legal disability; the court ruled, however, that appellee, being a male, was to be preferred to the female appellant "by reason of Section 15–314 of the Idaho Code." In stating this conclusion, the probate judge gave no indication that he had attempted to determine the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate. It seems clear the probate judge considered himself bound by statute to give preference to the male candidate over the female, each being otherwise "equally entitled."

Sally Reed appealed from the probate court order, and her appeal was treated by the District Court of the Fourth Judicial District of Idaho as a constitutional attack on § 15–314. In dealing with the attack, that court held that the challenged section violated the Equal Protection Clause of the Fourteenth Amendment [3] and was, there-

[3] The court also held that the statute violated Art. I, § 1, of the Idaho Constitution.

fore, void; the matter was ordered "returned to the Probate Court for its determination of which of the two parties" was better qualified to administer the estate.

This order was never carried out, however, for Cecil Reed took a further appeal to the Idaho Supreme Court, which reversed the District Court and reinstated the original order naming the father administrator of the estate. In reaching this result, the Idaho Supreme Court first dealt with the governing statutory law and held that under § 15–312 "a father and mother are 'equally entitled' to letters of administration," but the preference given to males by § 15–314 is "mandatory" and leaves no room for the exercise of a probate court's discretion in the appointment of administrators. Having thus definitively and authoritatively interpreted the statutory provisions involved, the Idaho Supreme Court then proceeded to examine, and reject, Sally Reed's contention that § 15–314 violates the Equal Protection Clause by giving a mandatory preference to males over females, without regard to their individual qualifications as potential estate administrators. 93 Idaho 511, 465 P. 2d 635.

Sally Reed thereupon appealed for review by this Court pursuant to 28 U. S. C. § 1257 (2), and we noted probable jurisdiction. 401 U. S. 934. Having examined the record and considered the briefs and oral arguments of the parties, we have concluded that the arbitrary preference established in favor of males by § 15–314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.[4]

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[4] We note that § 15–312, set out in n. 2, *supra*, appears to give a superior entitlement to brothers of an intestate (class 4) than is given to sisters (class 5). The parties now before the Court are not

Idaho does not, of course, deny letters of administration to women altogether. Indeed, under § 15–312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15–314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15–312. In such situations, § 15–314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly,* 113 U. S. 27 (1885); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 (1911); *Railway Express Agency* v. *New York,* 336 U. S. 106 (1949); *McDonald* v. *Board of Election Commissioners,* 394 U. S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into

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affected by the operation of § 15–312 in this respect, however, and appellant has made no challenge to that section.

We further note that on March 12, 1971, the Idaho Legislature adopted the Uniform Probate Code, effective July 1, 1972. Idaho Laws 1971, c. 111, p. 233. On that date, §§ 15–312 and 15–314 of the present code will, then, be effectively repealed, and there is in the new legislation no mandatory preference for males over females as administrators of estates.

different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15–312 and 15–314.

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under § 15–312, seek letters of administration and thereby present the probate court "with the issue of which one should be named." The court also concluded that where such persons are not of the same sex, the elimination of females from consideration "is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives . . . ." 93 Idaho, at 514, 465 P. 2d, at 638.

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15–314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be

said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

We note finally that if § 15–314 is viewed merely as a modifying appendage to § 15–312 and as aimed at the same objective, its constitutionality is not thereby saved. The objective of § 15–312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. *Royster Guano Co.* v. *Virginia, supra.*

The judgment of the Idaho Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BELCHER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 70–53. Argued October 13, 1971—Decided November 22, 1971

Section 224 of the Social Security Act, which requires a reduction in social security benefits to reflect workmen's compensation payments, has a rational basis and does not violate the Due Process Clause of the Fifth Amendment.

317 F. Supp. 1294, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 84. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 88.

Richard B. Stone argued the cause for appellant. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Gray,* and *Kathryn H. Baldwin.*

John Charles Harris argued the cause and filed a brief for appellee.

William E. Miller and *Richard A. Whiting* filed a brief for the American Mutual Insurance Alliance et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Edward J. Kionka* for the American Trial Lawyers Association, and by *Edward L. Carey, Harrison Combs,* and *M. E. Boiarsky* for United Mine Workers of America.

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellee was granted social security disability benefits effective in October 1968, in the amount of $329.70 per month for himself and his family. In January 1969, the federal payment was reduced to $225.30

monthly under the "offset" provision of Section 224 of the Social Security Act, 79 Stat. 406, 42 U. S. C. § 424a, [1] upon a finding that the appellee was receiving workmen's compensation benefits from the State of West Virginia in the amount of $203.60 per month. After exhausting his administrative remedies, the appellee brought this action challenging the reduction of payments required by § 224 on the ground that the statutory provision deprived him of the due process of law guaranteed

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[1] Section 224 provides, in pertinent part:

"(a) If for any month prior to the month in which an individual attains the age of 62—

"(1) such individual is entitled to benefits under section 423 of this title, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

"the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

"(3) such total of benefits under sections 423 and 402 of this title for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

"exceeds the higher of—

"(5) 80 percentum of his 'average current earnings,' . . .

. . . . . .

"For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409 (a) and 411 (b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. . . ." 42 U. S. C. § 424a (a).

by the Fifth Amendment. The District Judge, disagreeing with other courts that have considered the question,[2] held the statute unconstitutional. 317 F. Supp. 1294. The Secretary of the Department of Health, Education, and Welfare appealed directly to this Court under 28 U. S. C. § 1252.[3] We noted probable jurisdiction, 401 U. S. 935, and the case was briefed and argued on the merits. We now reverse the judgment of the District Court.

In our last consideration of a challenge to the constitutionality of a classification created under the Social Security Act, we held that "a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." *Flemming* v. *Nestor,* 363 U. S. 603, 611. The fact that social security benefits are financed in part by taxes on an employee's wages does not in itself limit the power of Congress to fix the levels of benefits under the Act or the conditions upon which they may be paid. Nor does an expectation of public benefits confer a contractual right to receive the expected amounts. Our decision in *Goldberg* v. *Kelly,* 397 U. S. 254, upon which

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[2] *E. g., Gambill* v. *Finch,* 309 F. Supp. 1 (ED Tenn. 1970); *Lofty* v. *Cohen,* 325 F. Supp. 285, aff'd *sub nom. Lofty* v. *Richardson,* 440 F. 2d 1144 (CA6 1971); *Bartley* v. *Finch,* 311 F. Supp. 876 (ED Ky. 1970); *Bailey* v. *Finch,* 312 F. Supp. 918 (ND Miss. 1970); *Benjamin* v. *Finch,* Civ. No. 32816, ED Mich., May 26, 1970, aff'd *sub nom. Benjamin* v. *Richardson,* No. 20,714, CA6, Apr. 29, 1971; *Gooch* v. *Finch,* Civ. No. 6840, SD Ohio, July 13, 1970; *Rodatz* v. *Finch,* Civ. No. 69–170, ED Ill., Sept. 4, 1970, aff'd *sub nom. Rodatz* v. *Richardson* (CA7 1971).

[3] "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . , holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

the District Court relied, held that as a matter of procedural due process the interest of a welfare recipient in the continued payment of benefits is sufficiently fundamental to prohibit the termination of those benefits without a prior evidentiary hearing. But there is no controversy over procedure in the present case, and the analogy drawn in *Goldberg* between social welfare and "property," 397 U. S., at 262 n. 8, cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.

To characterize an Act of Congress as conferring a "public benefit" does not, of course, immunize it from scrutiny under the Fifth Amendment. We have held that "[t]he interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Flemming* v. *Nestor, supra,* at 611. The appellee argues that the classification embodied in § 224 is arbitrary because it discriminates between those disabled employees who receive workmen's compensation and those who receive compensation from private insurance or from tort claim awards. We cannot say that this difference in treatment is constitutionally invalid.

A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is "rationally based and free from invidious discrimination." *Dandridge* v. *Williams,* 397 U. S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499.

To find a rational basis for the classification created by § 224, we need go no further than the reasoning of Congress as reflected in the legislative history. The predecessor of § 224, enacted in 1956 along with the amendments first establishing the federal disability insurance program, required a full offset of state or federal [4] workmen's compensation payments against benefits payable under federal disability insurance. 70 Stat. 816. It is self-evident that the offset reflected a judgment by Congress that the workmen's compensation and disability insurance programs in certain instances served a common purpose, and that the workmen's compensation programs should take precedence in the area of overlap. The provision was repealed in 1958, 72 Stat. 1025, because Congress believed that "the danger that duplication of disability benefits might produce undesirable results [was] not of sufficient importance to justify reduction of the social security disability benefits." H. R. Rep. No. 2288, 85th Cong., 2d Sess., 13.

In response to renewed criticism of the overlap between the workmen's compensation and the social security disability insurance programs, Congress re-examined the problem in 1965. Data submitted to the legislative committees showed that in 35 of the 50 States, a typical worker injured in the course of his employment and eligible for both state and federal benefits received compensation for his disability in excess of his take-home pay

[4] The primary federal workmen's compensation programs are the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, applicable to employees in the District of Columbia and in maritime-related occupations, and the Federal Employees' Compensation Act, 80 Stat. 532, 5 U. S. C. § 8101 *et seq.*, applicable to employees of the Federal Government. The overwhelming majority of workers in the United States are covered by state rather than federal programs, and thus we may refer generally to workmen's compensation as a program of the States.

prior to the disability. Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 2, p. 904. It was strongly urged that this situation reduced the incentive of the worker to return to the job, and impeded the rehabilitative efforts of the state programs. Furthermore, it was anticipated that a perpetuation of the duplication in benefits might lead to the erosion of the workmen's compensation programs.[5] The legislative response was § 224, which, by limiting total state and federal benefits to 80% of the employee's average earnings prior to the disability, reduced the duplication inherent in the programs and at the same time allowed a supplement to workmen's compensation where the state payments were inadequate.

The District Court apparently assumed that the only basis for the classification established by § 224 lay in the characterization of workmen's compensation as a "public benefit." Because the state program was financed by employer contributions rather than by taxes, the court held that the "public" characterization afforded no rational basis to distinguish workmen's compensation from private insurance. We agree that a statutory discrimination between two like classes cannot be rationalized by assigning them different labels, but neither can two unlike classes be made indistinguishable by attaching to them a common label. The original purpose of state workmen's compensation laws was to satisfy a need in-

[5] The Senate Committee on Finance, with which the 1965 amendment originated, took note of "the concern that has been expressed by many witnesses in the hearings about the payment of disability benefits concurrently with benefits payable under State workmen's compensation programs." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 100. Testimony concerning the anticipated effects of duplication upon the future of the state programs appears in Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, pp. 252, 259, 366, pt. 2, pp. 540, 738–740, 892–897, 949–954, 990.

adequately met by private insurance or tort claim awards. Congress could rationally conclude that this need should continue to be met primarily by the States, and that a federal program that began to duplicate the efforts of the States might lead to the gradual weakening or atrophy of the state programs.

We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress might have been better served by applying the same offset to recipients of private insurance, or to judge for ourselves whether the apprehensions of Congress were justified by the facts. If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

The judgment is

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment of the District Court. The statutory classification upheld today is not "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, 397 U. S. 471, 487. It is, in my view, violative of the Federal Government's obligation under the Fifth Amendment's Due Process Clause to guarantee to all citizens equal protection of the laws. *Bolling* v. *Sharpe*, 347 U. S. 497.

Eligibility for social security disability benefits is premised upon a worker's having attained "insured" status in the course of an employment "covered" by the Act. It is undisputed that Raymond Belcher, and through him his wife and two minor children, had so qualified in 1968 when he broke his neck while employed by the Pocahontas Fuel Co. in Lynco, West Virginia. Indeed, his application for such benefits has been approved, and the benefits authorized and paid.

Section 224 of the Social Security Act, however, requires that these benefits be substantially reduced solely because Belcher also receives state workmen's compensation payments. It is said that the duplication of benefits impedes rehabilitation, and may lead to a cutting back of state workmen's compensation programs. *Ante,* at 83.

The rehabilitation goal does not explain the special treatment given to workmen's compensation beneficiaries. There are many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force, and which do not require an offset under the Social Security Act.

Thus, had Belcher's supplemental disability payment come from a Veterans' Administration program,[1] a Civil Service Retirement Act[2] or Railroad Retirement Act[3]

[1] In fiscal 1970, over 2,000,000 veterans received compensation for service-connected disabilities under statutes administered by the Veterans' Administration. Statistical Abstract of the United States 264 (1971) (hereinafter cited as Statistical Abstract). See generally 38 U. S. C. § 301 *et seq.* Benefits are also provided to certain veterans for non-service-connected disabilities. See generally 38 U. S. C. § 501 *et seq.* In 1967, total disability benefits from all Veterans' Administration programs amounted to $3,197,906,000. Berkowitz & Johnson, Towards An Economics of Disability: The Magnitude and Structure of Transfer and Medical Costs, 5 J. Human Resources 271, 282 (1970) (hereinafter cited as Economics of Disability). Raymond Belcher indicated on his application for social security disability benefits that he served for three years during World War II. Transcript of Hearings before Appeals Council 37. The record is silent, however, as to his potential eligibility for non-service-connected veteran's benefits.

[2] Employees covered by the Civil Service Retirement Act, 5 U. S. C. § 8301 *et seq.*, are entitled to a disability annuity after five years of civilian service. *Id.*, § 8337. In fiscal 1970, there were 184,000 disabled annuitants. Statistical Abstract 284.

[3] Title 45 U. S. C. § 228a *et seq.* provides disability benefits for railroad workers with 10 or more years of covered service. Covered

annuity, a private disability insurance policy,[4] a self-insurer,[5] a voluntary wage-continuation plan, or the proceeds in an action in tort arising from the disabling injury, there would have been no reduction in his social security benefits. The offset under § 224 applies only to federal social security disability beneficiaries also receiving workmen's compensation payments, a group which in 1965 totaled only 1.4% of all social security disability bene-

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employment under this Act and the Civil Service Retirement Act is excluded from coverage under the Social Security Act. If, however, a worker's employment history separately qualifies him for dual coverage, supplemental payments under neither of these Acts results in an offset of social security disability payments. HEW publication, Social Security Programs in the United States 46, 108 (1968) (hereinafter cited as Programs).

[4] Participation in West Virginia's state workmen's compensation fund is optional with the employer. W. Va. Code Ann. §§ 23–2–1, 23–2–8 (1970). An employer who declines to participate, however, must provide equivalent benefits through private insurance or as a self-insurer. *Id.*, at § 23–2–9. Had the Pocahontas Fuel Co. elected to pay premiums to a private carrier rather than to the state fund—a decision over which Mr. Belcher presumably had no control other than that which might be exerted through the collective-bargaining process—the private insurance benefits would not have been offset under § 224. Over 26,000,000 employees are covered by some sort of private insurance program. Programs 115. In 1967, disability benefits from private insurance amounted to 1.3 billion dollars. Economics of Disability 278. This figure alone exceeded the total of all benefits paid by workmen's compensation programs for that year. *Ibid.*

[5] Were Mr. Belcher's employer large enough, it might have determined to become a self-insurer with respect to employee disability claims. Disability payments from self-insurers were required by state law to be at least equivalent to benefits available through the state fund, n. 3, *supra,* and they would also not be offset under § 224.

In 1969, employers who were covered by private carriers and who were self-insurers paid a combined total of $2,008,000,000 in benefits. State and federal workmen's compensation funds paid only $604,000,000 in benefits. Statistical Abstract 289.

ficiaries.[6] Yet, of the 849,000 disabled workers who in 1965 received social security disability benefits,[7] over *sixteen* percent also received overlapping veteran's benefits,[8] and almost *fourteen* percent received benefits from private insurance maintained under the auspices of an employer or a union.[9] Congress is, of course, not required to address itself to all aspects of a social problem in its legislation. It must, however, justify the distinctions it draws between people otherwise similarly situated. Rehabilitation incentives are not a rational justification for the discrimination worked by § 224.[10] If it is at all rational to argue that duplicating payments "impede rehabilitation," the argument must apply to all such payments regardless of their source. The nature of the supplemental benefit has no relation to a worker's incentive to return to work.

Nor is § 224 designed to stem a possible "erosion" of state workmen's compensation plans. As MR. JUSTICE MARSHALL points out, *post,* at 94, § 224 itself provides that there shall be no reduction of federal social security benefits with respect to those state workmen's compensation plans which themselves offset federal social security

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[6] 1966 Survey of Disabled Adults, Office of Research & Statistics, Social Security Administration, Table 5 (hereinafter cited as Survey). This figure was confirmed during the hearings which led to the adoption of § 224 by Anthony J. Celebrezze, then Secretary of the Department of Health, Education, and Welfare. Hearings on H. R. 6675, before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 152.

[7] Survey, Table 5.

[8] *Ibid.*

[9] *Ibid.*

[10] Assuming the rationality of rehabilitation as a goal with respect to temporary disabilities, there is still no justification for applying an offset with respect to disabilities concededly permanent in nature. Nevertheless, the statute requires this to be done. The record does not reveal the status of Mr. Belcher's disability.

benefits against state payments. Thus, the statute encourages States concerned about overcompensation of disabled workers to cut back on their own programs. But the "rational basis" discerned by the majority requires the statute to have precisely the opposite purpose.

I would affirm the judgment of the District Court.

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

In my view, the offset provision of § 224 of the Social Security Act, 42 U. S. C. § 424a, 79 Stat. 406, creates an unlawful discrimination under the Due Process Clause of the Fifth Amendment.

Before this 53-year-old appellee became disabled in March 1968, he was supporting his wife and two children on total yearly earnings of approximately $6,600. Once disabled, he could not work, but he and his family were awarded federal social security disability benefits totaling $329.70 per month.[1] Because his employer had chosen to set up a workmen's compensation fund, appellee also became entitled to workmen's compensation benefits totaling $203.60 per month. These were his only forms of disability compensation. Had appellee been allowed to keep his initial award of federal benefits, his income would have totaled nearly $6,400 a year, somewhat less than he had earned before his disability. But because of the offset provision of § 224, appellee's monthly federal payments were reduced, solely because the supplement to his federal benefits was in the form

[1] The test for disability under the federal statute is a stern one. With an exception for elderly blind people, disability means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U. S. C. § 423 (d) (1) (A).

of state workmen's compensation. As a result, appellee's total yearly income was reduced to $5,146.80.

Appellee complains that the offset provision is unconstitutional because it places its severe burden on a single class of disabled persons without adequate justification. Under the challenged offset provision, federal social security disability benefits are reduced only for those persons whose disability entitles them to workmen's compensation. Other persons who receive other kinds of disability compensation—for example, private insurance benefits or tort damages—are allowed the full amount of federal social security benefits. The question here is whether workmen's compensation beneficiaries may be singled out in this way for a reduction in federal benefits.

Starting from the assumptions that federal social security insurance, like welfare assistance, is a "public benefit" in which the beneficiaries have neither contract nor property interests, and that statutory classifications affecting the basic needs of individuals are viewed no differently under the Constitution from classifications in the area of business regulation, the Court concludes that the classification here has a reasonable basis and is consistent with the Fifth Amendment. To reach today's result, the Court revitalizes *Flemming* v. *Nestor*, 363 U. S. 603 (1960),[2] and extends the doctrine of *Dandridge* v. *Williams*, 397 U. S. 471 (1970), to statutory classifications under *federal* law.[3] Thus, the Court to-

[2] *Flemming* was a 5–4 decision upholding a federal statute that terminated the old-age benefits of the family of a fully eligible worker, because he was deported as a former member of the Communist Party. The case has not met with unanimous critical acclaim. See Reich, The New Property, 73 Yale L. J. 733, 768–771, 775 (1964). Prematurely, it would appear, some scholars had predicted its demise. *E. g.*, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 103–104 (1970).

[3] In *Dandridge*, the Court held that a State's maximum grant regulation for welfare recipients did not unconstitutionally dis-

day holds that Congress can take social security benefits from a disabled worker as long as it does not behave in an "arbitrary" way; classifications in the federal social security law are consistent with the Fifth Amendment if they are "rationally based and free from invidious discrimination."

In opposing this course, I adhere to my dissenting views in *Dandridge* v. *Williams*. I continue to believe that the "rational basis" test used by this Court in reviewing business regulation has no place when the Court reviews legislation providing fundamental services or distributing government funds to provide for basic human needs. In deciding whether a given classification is consistent with the requirements of the Fifth or Fourteenth Amendment,[4] we should look to "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state [or federal] interests in support of the classification." *Dandridge* v. *Williams, supra,* at 521 (MARSHALL, J., dissenting); cf. *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968). Under this approach, it is necessary to consider more than the character of the classification and the governmental interests in support of the classification. Judges should not ignore what everyone knows, namely that legislation regulating business cannot be equated with legislation dealing with destitute, disabled, or elderly individuals. Thus, in assessing the lawfulness of the special disadvantages suffered here by workmen's

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criminate between children in large and small families. The regulation was challenged under the Equal Protection Clause of the Fourteenth Amendment.

[4] I would use essentially the same approach when statutory classifications are challenged under either Amendment. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497 (1954).

compensation beneficiaries, the Court should consider the individual interests at stake. Federal disability payments, even when supplemented by other forms of disability compensation, provide families of disabled persons with the basic means for getting by. I would require far more than a mere "rational basis" to justify a discrimination that deprives disabled persons of such support in their time of need.

It is unnecessary to elaborate further the analysis required by the principles of my *Dandridge* dissent. For even under the Court's "rational basis" test, the discriminatory offset provision here cannot be sustained. There simply is no reasonable basis for singling out recipients of workmen's compensation for a reduction of federal benefits, while those who receive other kinds of disability compensation are not similarly treated.

This is not to say that an offset scheme is intrinsically impermissible. Arguably, Congress has an interest in paying greater benefits to people who are relying completely on the federal social security program, and lesser benefits to people who have other sources of disability compensation. But the question here is not whether Congress has the power to prevent "duplicative" payments that might exceed previous take-home pay and might thereby discourage disabled workers from returning to work.[5] The issue is whether Congress may single

[5] The offset idea has had a rocky history. As the majority notes, a prior offset provision was repealed in 1958 because Congress believed that "the danger that duplication of disability benefits might produce undesirable results [was] not of sufficient importance to justify reduction of the social security disability benefits." H. R. Rep. No. 2288, 85th Cong., 2d Sess., 13. The present offset provision was restored to the Act in 1965. It was estimated at the time that no more than 2% of the federal social security disability beneficiaries also received workmen's compensation. Hearings on

out for the purpose of applying the offset only those who are receiving workmen's compensation, and exclude those who are receiving similar supplemental disability compensation from other sources. A concern about excessive combined benefits and "rehabilitation" does not explain that distinction.

What, then, is the "rational basis" for the disfavored treatment of persons receiving workmen's compensation? The majority, in its conclusory treatment of this question, appears to say that workmen's compensation "satisf[ies] a need" which is special; and, claiming to rely on "the reasoning of Congress as reflected in the legislative history," the majority finds that Congress "anticipated that a perpetuation of the duplication in benefits might lead to the erosion of the workmen's compensation programs." I cannot accept that argument as a justification for this statute. There is nothing in the Senate, House, or Conference Reports indicating that this was the basis for the legislation actually passed.[6] And I do not think that the argument is in fact rational. The statutory discrimination exceeds the maximum amount of irrationality and arbitrariness countenanced by the Fifth Amendment.

Workmen's compensation programs serve precisely the same function as other forms of disability insurance and

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H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 152.

It is perhaps plausible to reason that duplicative benefits might in some circumstances discourage rehabilitation and a return to work. It is worth noting, however, that even without the offset provision, appellee's combined benefits would not have exceeded his earnings before disability. See *supra*, at 88.

[6] The sole concern expressed in these documents is that Congress should prevent "excessive combined benefits." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 100; see also H. R. Conf. Rep. No. 682, 89th Cong., 1st Sess.; H. R. Rep. No. 213, 89th Cong., 1st Sess.

tort damage suits. The payments assist workers in the same way, and satisfy the same need. Indeed, in appellee's home State of West Virginia, as in most States, workmen's compensation is by statute the complete functional equivalent of tort liability, since employers who participate in workmen's compensation cannot be sued for tort damages by disabled employees. W. Va. Code Ann. § 23–2–6. Moreover, no distinction can be drawn on the basis of the source of the payments. In West Virginia, as in most States, workmen's compensation is financed privately, just like other forms of insurance and like tort damages. Usually the benefits are paid directly by the employer (as a self-insurer) or by the employer's insurance carriers (in which case the employer pays the premiums). See 3 A. Larson, Law of Workmen's Compensation § 92.10, p. 444 (1971); W. Va. Code Ann. § 23–2–1 *et seq.* I see no basis for singling out workmen's compensation programs for special protection or solicitude.

More pointedly, however, it defies logic to claim that § 224 could to any extent protect or encourage workmen's compensation in the manner suggested by the Court. In support of its claim that § 224 might discourage the erosion of workmen's compensation, the appellant relies heavily on a statement made by a representative of the Council of State Chambers of Commerce to the Senate Committee on Finance:

> "A matter of equal concern is the impact of Federal disability payments on State workmen's compensation programs. Legislative proposals have been offered in several States (Colorado, Florida, Maryland, and Minnesota) to reduce workmen's compensation benefits by the amount of [social security] disability benefits payable to a disabled worker. If other States follow this direction . . . we believe it

> will be only a matter of time until State workmen's compensation programs are destroyed." Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 259.

In addition, the Government refers to the testimony of another Chamber of Commerce representative:

> "Encroachment by social security is hampering efforts to improve the State workmen's compensation systems where improvements are needed. Faced with sharply rising costs and the duplication of benefits, employers in several States have supported legislative proposals to reduce workmen's compensation benefits by the amount of social security disability benefits." *Id.*, at 252.

I am unable to see how § 224 is connected to this asserted rationale. The federal offset provision provides for the reduction of *federal* benefits if the total of those benefits and the workmen's compensation benefits exceeds 80% of "average current earnings." However, federal benefits may not be reduced if the workmen's compensation plan provides for a reduction of *its* benefits in the event of an overlap. § 224 (d). Thus, if a State or employers in the State want to save money, the federal statute invites them to reduce workmen's compensation benefits by means of an offset provision of their own. I do not see how it is possible to argue that the federal statute is designed to prevent States from adopting their own offset provisions. If anything, the States are encouraged to cut back on their programs.[7]

[7] Indeed, where they are free to do so, see 3 A. Larson, Law of Workmen's Compensation 522, Appendix A, Table 7 (1971); W. Va. Code Ann. §§ 23–2–1, 23–2–8, individual workers are encouraged to opt out of workmen's compensation and purchase private disability insurance.

Even if it were possible to believe that the challenged federal offset provision might in some way forestall States and employers from creating offset provisions in their workmen's compensation programs, I do not see how state offset provisions could to any degree "lead to the gradual weakening or atrophy of [those] programs." *Ante,* at 84.[8] How do offset provisions hurt a program? It is as preposterous to suggest that state offset provisions could lead to the destruction of workmen's compensation as it would be to argue that the current federal offset provision might destroy the federal social security program. Such manufactured and totally illusory concerns cannot be deemed rational.

The plain fact is that Congress passed this offset provision because it thought disabled persons should not receive excessive combined disability payments. Perhaps by oversight,[9] it arbitrarily singled out workmen's compensation benefits from the universe of disability compensations, and required that workmen's compensation *alone* was to be offset against federal social security. If the majority's "rational basis" test in fact is to have any meaning, Congress cannot be permitted to single out recipients of workmen's compensation for this adverse

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[8] It is worth noting that payments for total and permanent disability are only a small part of the total scheme of compensation of any workmen's compensation act. Benefits are also provided for medical and hospital expenses, funeral expenses, rehabilitation, specific scheduled losses, temporary disability, and other forms of loss, see, *e. g.,* W. Va. Code Ann. §§ 23–4–3, 23–4–4, 23–4–6, all of which are unaffected by social security.

[9] Secretary of HEW Celebrezze opposed the present offset provision, arguing that any change should await a more thorough study of the overlap problem. Hearings on H. R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 146. The Committee chose not to wait.

treatment. The burden of reduced federal benefits—so devastating to the families of the once-working poor—cannot be imposed arbitrarily under the Fifth Amendment. In my view, that has happened here. I dissent.[10]

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[10] Since, in my view, the present discriminatory offset provision cannot stand, there is no need to decide finally whether Congress has the power to pass an offset provision that would qualify an already accrued interest in social security benefits. Whatever might be said about the characterization of welfare assistance as "property," see *Goldberg* v. *Kelly*, 397 U. S. 254, 262 n. 8 (1970), surely a worker who is forced to pay a social security tax on his earnings has a clearly cognizable contract interest in the benefits that justify the tax. The chacterization of this interest as "noncontractual" in *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960), is, in my view, incorrect. The analogy to an annuity or insurance contract, rejected there, seems apt. *Id.*, at 624 (Black, J., dissenting). See also Reich, The New Property, *supra*. Of course, as the Court says, Congress may "fix the levels of benefits under the Act or the conditions upon which they may be paid." But once Congress has fixed that level and those conditions, and a worker has contributed his tax in accord with the law, may Congress unilaterally modify the benefits in a way that defeats the expectations of beneficiaries and prospective beneficiaries? At the least, it would seem that after a worker has contributed the tax for 20 quarters, 42 U. S. C. § 423 (c)(1), and his interest in the benefits has fully accrued, Congress may not unilaterally qualify that interest by introducing an offset provision not previously contemplated by the parties.

CHEVRON OIL CO. *v.* HUSON

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

No. 70–11. Argued October 20, 1971—Decided December 6, 1971

Respondent was injured in December 1965 while working on petitioner's artificial island drilling rig, located on the Outer Continental Shelf off the Louisiana coast. Allegedly, not until many months later were the injuries discovered to be serious. In January 1968 respondent brought suit for damages against petitioner in federal district court. The District Court, relying on *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352 (1969), held that Louisiana's one-year limitation on personal injury actions applied rather than the admiralty laches doctrine, and granted petitioner's motion for summary judgment. *Rodrigue* had held that state law and not admiralty law applied to fixed structures on the Outer Continental Shelf under the Outer Continental Shelf Lands Act (hereinafter Lands Act), and extended to that area as federal laws the laws of the adjacent State "to the extent that they are applicable and not inconsistent" with federal laws. Respondent argued on appeal that in view of pre-*Rodrigue* jurisprudence making admiralty law (including the laches doctrine) applicable, it would be unfair to give that decision retrospective effect. The Court of Appeals, not reaching that argument, reversed, holding that Louisiana's "prescriptive" time limitation, which barred the remedy but did not extinguish the right to recovery, was not binding outside a Louisiana forum. Consequently, the court concluded that the time limitation was not "applicable" of its own force and was "inconsistent" with the admiralty laches doctrine, which though not directly applicable by virtue of *Rodrigue* was applicable as a matter of federal common law. *Held:*

1. The Lands Act, as interpreted in *Rodrigue,* requires that a State's statute of limitations be applied to actions for personal injuries occurring on fixed structures on the Outer Continental Shelf. The fact that the Louisiana law is "prescriptive" does not make it inapplicable as federal law under the Lands Act, and a

federal court may not apply a laches test to preclude application of the state time limitation. Pp. 100–105.

2. The Louisiana one-year statute of limitations should not, however, bar respondent's action here since retroactive application of that statute under *Rodrigue* would deprive respondent of any remedy at all on the basis of the unforeseeable superseding legal doctrine of that decision. Pp. 105–109.

430 F. 2d 27, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a separate opinion, *post*, p. 109.

Lloyd C. Melancon argued the cause and filed a brief for petitioner.

Samuel C. Gainsburgh argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Gaines Ted Huson, suffered a back injury while working on an artificial island drilling rig owned and operated by the petitioner, Chevron Oil Co., and located on the Outer Continental Shelf off the Gulf Coast of Louisiana. The injury occurred in December 1965. Allegedly, it was not until many months later that the injury was discovered to be a serious one. In January 1968 the respondent brought suit for damages against the petitioner in federal district court. The respondent's delay in suing the petitioner ultimately brought his case to this Court.

The issue presented is whether the respondent's action is time barred and, more particularly, whether state or federal law determines the timeliness of the action. That issue must be resolved under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* (hereinafter "Lands Act"), which governs injuries occurring

on fixed structures on the Outer Continental Shelf. When this lawsuit was initiated, there was a line of federal court decisions interpreting the Lands Act to make general admiralty law, including the equitable doctrine of laches, applicable to personal injury suits such as the respondent's.[1] The petitioner did not question the timeliness of the action as a matter of laches. While pretrial discovery proceedings were still under way, however, this Court announced its decision in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352. That decision entirely changed the complexion of this case. For it established that the Lands Act does *not* make admiralty law applicable to actions such as this one. Relying on *Rodrigue,* the District Court held that Louisiana's one-year limitation on personal injury actions, rather than the admiralty doctrine of laches, must govern this case. It concluded, therefore, that the respondent's action was time barred and granted summary judgment for the petitioner.[2]

On appeal, the respondent argued that *Rodrigue* should not be applied retroactively to bar actions filed before the date of its announcement.[3] But the Court of Appeals declined to reach that question. Instead, it held that the interpretation of the Lands Act in *Rodrigue* does not compel application of the state statute of limitations or prevent application of the admiralty doctrine of laches. It concluded that the doctrine of laches should have been applied by the District Court and, therefore, reversed that court's judgment and remanded the case for trial. 430 F. 2d 27. We granted certiorari to consider the Court of Appeals' construction of the Lands

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[1] See *infra,* at 107.

[2] The decision of the District Court is unreported (ED La., Civil Action No. 68–19D).

[3] The respondent has made the same argument to this Court.

Act and of *Rodrigue*. 402 U. S. 942. We hold that the Lands Act, as interpreted in *Rodrigue*, requires that the state statute of limitations be applied to personal injury actions. We affirm the judgment of the Court of Appeals, however, on the ground that *Rodrigue* should not be invoked to require application of the Louisiana time limitation retroactively to this case.

I

The Lands Act makes the Outer Continental Shelf, including fixed structures thereon, an area of exclusive federal jurisdiction, 43 U. S. C. § 1333 (a)(1). The Act extends the laws of the United States to this area, 43 U. S. C. § 1333 (a)(1), and provides that the laws of the adjacent State shall also apply "[t]o the extent that they are applicable and not inconsistent" with applicable federal laws, 43 U. S. C. § 1333 (a)(2).[4] To the extent

[4] The full text of § 1333 (a)(1) and § 1333 (a)(2) reads:

"(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

"(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending

that a comprehensive body of federal law is applicable under § 1333 (a)(1), state law "inconsistent" with that law would be inapplicable under § 1333 (a)(2).

In *Rodrigue,* we clarified the scope of application of federal law and state law under § 1333 (a)(1) and § 1333 (a)(2). By rejecting the view that comprehensive admiralty law remedies apply under § 1333 (a)(1), we recognized that there exists a substantial "gap" in federal law. Thus, state law remedies are not "inconsistent" with applicable federal law. Accordingly, we held that, in order to provide a remedy for wrongful death, the "gap" must be filled with the applicable body of state law under § 1333 (a)(2).

The Court of Appeals acknowledged that *Rodrigue* clearly establishes that the remedy for personal injury, as for wrongful death, cannot be derived from admiralty law but must be governed by the law of the adjacent State, Louisiana. But the court held that Louisiana's time limitation on personal injury actions need not be applied with the substantive remedy. It supported this holding by reference to the terms of § 1333 (a)(2) that limit the application of state law under the Lands Act. The Louisiana time limitation, the Court of Appeals reasoned, is not "applicable" of its own force and is "inconsistent" with the admiralty doctrine of laches. The court held that, despite the holding in *Rodrigue,* the laches doctrine is applicable as a matter of federal common law. We must disagree.

The Court of Appeals did not suggest that state statutes of limitations are *per se* inapplicable under § 1333 (a)(2). Rather, it focused on the peculiar nature of

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seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

the Louisiana time limitation on personal injury actions found in Art. 3536, La. Civ. Code Ann. Article 3536 provides that personal injury actions shall be "prescribed" by one year. The Court of Appeals attached much significance to the fact that Art. 3536 "prescribes," rather than "perempts," such actions. Under Louisiana law, "prescription," unlike "peremption," bars the remedy but does not formally extinguish the right to recovery. See *Page* v. *Cameron Iron Works,* 259 F. 2d 420, 422–424; *Istre* v. *Diamond M. Drilling Co.,* 226 So. 2d 779, 794–795 (La. App.); *Succession of Pizzillo,* 223 La. 328, 335, 65 So. 2d 783, 786. This characterization has importance under principles of the conflict of laws. It has been held, as a matter of Louisiana conflicts law, that mere "prescriptive" time limitations are not binding outside their own forum. See *Fidelity & Casualty Co.* v. *C/B Mr. Kim,* 345 F. 2d 45, 50; *Kozan* v. *Comstock,* 270 F. 2d 839, 841; *Istre* v. *Diamond M. Drilling Co., supra,* at 795. Reasoning from this principle of conflicts law, the Court of Appeals concluded that the "prescriptive" limitation is not "applicable" in a federal court adjudicating a claim under the Lands Act.

We hold, however, that the "prescriptive" nature of Art. 3536 does not undercut its applicability under the Lands Act. Under § 1333 (a)(2) of the Act, "[s]tate law bec[omes] federal law federally enforced." *Rodrigue* v. *Aetna Casualty & Surety Co., supra,* at 365. It was the intent of Congress, expressed in the Senate Committee Report, in the Conference Report, and on the floor of the Senate, that state laws be "adopted" or "enacted" *as federal law.* See *id.,* at 357–358. Thus a federal court applying Louisiana law under § 1333 (a)(2) of the Lands Act is applying it as federal law—as the law of the federal forum. Since the federal court is not, then, applying the law of *another* forum in

the usual sense, ordinary conflict of laws principles have no relevance. Article 3536 is "applicable" in federal court under the Lands Act just as it would be applicable in a Louisiana court.[5]

The policies underlying the federal absorption of state law in the Lands Act make this result particularly obvious. As we pointed out in *Rodrigue,* Congress recognized that " 'the Federal Code was never designed to be a complete body of law in and of itself' " and thus that a comprehensive body of state law was needed. *Id.,* at 358, 361. Congress also recognized that the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute" favored application of state law with which these men and their attorneys would be familiar. *Id.,* at 365; see *id.,* at 363. If Congress' goal was to provide a comprehensive and familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court. A state time limitation upon a remedy is coordinated with the substance of the remedy and is no less applicable under the Lands Act.[6]

The application of Louisiana's Art. 3536 is, of course, subject to the absence of "inconsistent" and applicable federal law. The Court of Appeals acknowledged that *Rodrigue* forecloses direct applicability of the "inconsistent" laches doctrine through admiralty law. But, by applying laches as a matter of federal common law, it

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[5] This is not to imply that a federal court adjudicating a claim under state law as absorbed in the Lands Act must function as it would in a diversity case. See *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Guaranty Trust Co.* v. *York,* 326 U. S. 99; *Levinson* v. *Deupree,* 345 U. S. 648, 651. We hold only that the state statute of limitations is part of the law to be applied in federal court as it would be part of the law to be applied in a state court.

[6] Here we are not dealing with mere "housekeeping rules" embodied in state law. Cf. *Hanna* v. *Plumer,* 380 U. S. 460, 473.

sought to reintroduce the doctrine through a back door.[7] This approach subverts the congressional intent documented in *Rodrigue, id.*, at 359–366, that admiralty doctrines should *not* apply under the Lands Act.

Moreover, the Court of Appeals' approach amounts to an inappropriate creation of federal common law. Even when a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply the state statute of limitations for analogous types of actions. See *Auto Workers* v. *Hoosier Corp.*, 383 U. S. 696; *Cope* v. *Anderson*, 331 U. S. 461; *Campbell* v. *Haverhill*, 155 U. S. 610; Note, Federal Statutes Without Limitations Provisions, 53 Col. L. Rev. 68 (1953). A special federal statute of limitations is created, as a matter of federal common law, only when the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations. See *Holmberg* v. *Armbrecht*, 327 U. S. 392; *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221. But, under the Lands Act, there is not even such limited freedom to create a federal statute of limitations, for Congress specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. Congress specifically rejected national uniformity and specifically provided for the application of state remedies which demand state, not federal, statutes of limitation. Thus, Congress made clear provision for filling in the "gaps" in federal law; it did not intend that federal

[7] The Court of Appeals justified its creation of federal common law in this instance by suggesting that personal injury actions under the Lands Act are in a "quasi maritime area which is traditionally imbued with the laches doctrine and which presents a strong federal urge toward uniformity." 430 F. 2d, at 32.

courts fill in those "gaps" themselves by creating new federal common law.[8]

II

Although we hold that Louisiana's one-year statute of limitations must be applied under the Lands Act as interpreted in *Rodrigue,* we do not blind ourselves to the fact that this is, in relevant respect, a pre-*Rodrigue* case. The respondent's injury occurred more than three years before the announcement of our decision in *Rodrigue.* He instituted the present lawsuit more than one year before *Rodrigue.* Yet, if the Louisiana statute of limitations controls in this case, his action was time barred more than two years before *Rodrigue.* In these circumstances, we must consider the respondent's argument that the state statute of limitations should be given nonretroactive application under *Rodrigue.*

In recent years, the nonretroactive application of judicial decisions has been most conspicuously considered

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[8] Contrary to the suggestion by MR. JUSTICE DOUGLAS, our holding today is consonant with *Levinson* v. *Deupree, supra,* n. 5. Since *Levinson* involved a federal court's obligation to adopt state procedural rules in an admiralty action, it has very limited relevance to the instant case, which involves an action under a statute which ousts admiralty law and specifically directs that state law shall be adopted as federal law. Moreover, *Levinson* held only that state "procedural niceties relating to amendments of pleadings" need not be applied by federal admiralty courts, and the opinion emphasized that it was not dealing with an important part of the state action, such as a statute of limitations. 345 U. S., at 651–652. As pointed out above, our holding today does not extend to such state "housekeeping rules." See n. 6, *supra.*

Richards v. *United States,* 369 U. S. 1, also referred to by MR. JUSTICE DOUGLAS, held that, under the Federal Tort Claims Act, a federal court must apply "the whole law of the State where the act or omission occurred." *Id.,* at 11. Insofar as *Richards* bears on the present case, it supports our holding that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply.

in the area of the criminal process. *E. g., Mackey* v. *United States,* 401 U. S. 667; *Hill* v. *California,* 401 U. S. 797; *Desist* v. *United States,* 394 U. S. 244; *Linkletter* v. *Walker,* 381 U. S. 618. But the problem is by no means limited to that area. The earliest instances of nonretroactivity in the decisions of this Court—more than a century ago—came in cases of nonconstitutional, noncriminal state law. *E. g., Gelpcke* v. *City of Dubuque,* 1 Wall. 175; *Havemeyer* v. *Iowa County,* 3 Wall. 294; *Railroad Co.* v. *McClure,* 10 Wall. 511.[9] It was in a noncriminal case that we first held that a state court may apply its decisions prospectively. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358. And, in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases. *Cipriano* v. *City of Houma,* 395 U. S. 701; *Allen* v. *State Board of Elections,* 393 U. S. 544; *Hanover Shoe* v. *United Shoe Machinery Corp.,* 392 U. S. 481; *Simpson* v. *Union Oil Co.,* 377 U. S. 13; *England* v. *State Board of Medical Examiners,* 375 U. S. 411; *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371.

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e. g., Hanover Shoe* v. *United Shoe Machinery Corp., supra,* at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e. g., Allen* v. *State Board of Elections, supra,* at 572. Second, it has been stressed that "we must . . . weigh the merits

[9] These cases were decided in the era before *Erie R. Co.* v. *Tompkins, supra,* n. 5. The first case involving nonretroactive application of state law concerned interpretation of the Mississippi Constitution. *Rowan* v. *Runnels,* 5 How. 134.

and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra,* at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* at 706.

Upon consideration of each of these factors, we conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. *Rodrigue* was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act. See, *e. g., Pure Oil Co.* v. *Snipes,* 293 F. 2d 60; *Movible Offshore Co.* v. *Ousley,* 346 F. 2d 870; *Loffland Bros. Co.* v. *Roberts,* 386 F. 2d 540. When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." *Griffin* v. *Illinois,* 351 U. S. 12, 26 (Frankfurter, J., concurring in judgment).

To hold that the respondent's lawsuit is retroactively time barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal

law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. *Rodrigue* v. *Aetna Casualty & Surety Co., supra,* at 361, 365. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.

It would also produce the most "substantial inequitable results," *Cipriano* v. *City of Houma, supra,* at 706, to hold that the respondent "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him. In *Cipriano* v. *City of Houma, supra,* we invoked the doctrine of nonretroactive application to protect property interests of "cities, bondholders, and others connected with municipal utilities"; and, in *Allen* v. *State Board of Elections, supra,* we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury—an injury that may significantly undercut his future earning power—is entitled to similar protection. As in *England* v. *State Board of Medical Examiners, supra,* nonretroactive application here simply preserves his right to a day in court.[10]

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[10] We do *not* hold here that *Rodrigue,* in its entirety, must be applied nonretroactively. Rather, we hold only that state statutes of limitations, applicable under *Rodrigue*'s interpretation of the Lands Act, should not be applied retroactively. Retroactive application of all state substantive remedies under *Rodrigue* would not work a comparable hardship or be so inconsistent with the purpose of the Lands Act.

Both a devotion to the underlying purpose of the Lands Act's absorption of state law and a weighing of the equities requires nonretroactive application of the state statute of limitations here. Accordingly, although holding that the opinion of the Court of Appeals reflects a misapprehension of *Rodrigue,* we affirm its judgment remanding this case to the trial court.

It is so ordered.

MR. JUSTICE DOUGLAS.

Rodrigue v. *Aetna Casualty & Surety Co.,* 395 U. S. 352, does not, with all respect, require reversal in this case. Accordingly, I would affirm the judgment of the Court of Appeals without reaching the question of the retroactivity of *Rodrigue.*

Rodrigue, like the present case, arose under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* That Act created a federal cause of action for offshore injuries enforceable in the federal courts, but made state laws applicable. 43 U. S. C. § 1333 (a)(2).

In *Rodrigue,* La. Civ. Code Ann., Art. 2315 (1970) was relevant, which provides in part: "The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased . . . ."

In the present case Art. 3536 of the Code is applicable and it reads: "The following actions are also prescribed by one year:

> "That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses."

The latter limitation is "prescriptive" only, *i. e.,* that while the Louisiana remedy is barred, the right is not. Under Art. 3536, the limitation runs only to the *remedy*

and would not be applicable in another forum applying the substantive right. *Istre* v. *Diamond M. Drilling Co.*, 226 So. 2d 779, 794–799 (La. App. 1969). Respondent, therefore, argues that the federal doctrine of laches is the only limitation upon his right of recovery and that it is inapplicable where, as here, there is no prejudice to the defendant and any delay in filing the lawsuit was reasonably excusable. See, *e. g.*, *Akers* v. *State Marine Lines*, 344 F. 2d 217.

The Louisiana courts consider the distinction between *peremptive* and *prescriptive* limitations important; [1] and by reason of the federal statute, making Louisiana law applicable, federal courts are bound by the distinction. *Richards* v. *United States*, 369 U. S. 1. As stated in *Rodrigue* the federal Act "supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.'" 395 U. S., at 357.

In *Rodrigue*—an action for wrongful death—the right is extinguished, if the action for recovery is not brought within a year of the death. *Kenney* v. *Trinidad Corp.*, 349 F. 2d 832; *Mejia* v. *United States*, 152 F. 2d 686. Under Art. 3536—which governs here—Louisiana law holds that it is merely a "procedural restraint which bars the remedy, but does not extinguish the right." *Fidelity & Casualty Co.* v. *C/B Mr. Kim*, 345 F. 2d 45, 50 (CA5 1965). See also *Page* v. *Cameron Iron Works*, 259 F. 2d 420, 422 (CA5 1958); *Jackson* v. *Continental*

[1] *Guillory* v. *Avoyelles R. Co.*, 104 La. 11, 15, 28 So. 899, 901 (1900):

"When a statute creates a right of action and stipulates the delay within which that right is to be executed, the delay thus fixed is not properly speaking one of *prescription*, but is one of *peremption*.

"Statutes of prescription simply bar the remedy. Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost."

Southern Lines, 172 F. Supp. 809 (WD Ark. 1959); *Succession of Pizzillo,* 223 La. 328, 65 So. 2d 783 (1953); *Devoe & Raynolds Co.* v. *Robinson,* 109 So. 2d 226 (La. App. 1959).

A district court, sitting in diversity jurisdiction in Arkansas, applied these principles of Louisiana law and held—properly in my mind—that Art. 3536 did not bar an action filed more than one year after the injury complained of. *Jackson* v. *Continental Southern Lines, supra.* See also *Page* v. *Cameron Iron Works, supra.* That decision is in perfect harmony with long-established rules of conflict of laws.[2] A different result

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[2] G. Stumberg, Principles of Conflict of Laws 146–147 (3d ed. 1963):

"The traditional reaction in Conflict of Laws . . . has been that ordinarily limitation is procedural. This view was taken by the Dutch jurists, and where the question arises out of a general statute, it is the view generally accepted by Anglo-American courts. The result is that in the absence of a statute to the contrary in most jurisdictions, when the claim is based upon foreign facts, even though the foreign period of limitation has not run, the plaintiff may not recover if the time allowed for suit at the forum has expired. Conversely, if the foreign period has expired, suit may nevertheless be brought at the forum if the time specified there has not run." (Footnotes omitted.)

Accord, Restatement of Conflict of Laws §§ 603–604 (1934); Restatement (Second) of Conflict of Laws §§ 142, 143 (1971); 3 J. Beale, Conflict of Laws § 584.1 (1935); B. Currie, Conflict of Laws 232–234, 255 (1963); A. Ehrenzweig, Conflict of Laws 428–436 (1962); H. Goodrich, Conflict of Laws 267 (4th ed. 1964); Ailes, Limitation of Actions and the Conflict of Laws, 31 Mich. L. Rev. 474 (1933); Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale L. J. 492 (1919).

While still sitting on the Court of Appeals for the Second Circuit, Mr. Justice Harlan said:

"In actions where the rights of the parties are grounded upon the law of jurisdictions other than the forum, it is a well-settled conflict-of-laws rule that the forum will apply the foreign substantive law,

should not obtain here where federal jurisdiction, 43 U. S. C. § 1333, flows from a head other than diversity.

Apart from traditional conflict of laws is the congressional mandate to apply state laws to these federal causes of action. If we are faithfully to apply the state law of Louisiana we would apply here not the Louisiana *peremption* rule applied in *Rodrigue* but the Louisiana *prescriptive* rule applicable to the instant personal injury case.

Today's decision conflicts with *Levinson* v. *Deupree*, 345 U. S. 648, where the District Court was enforcing in admiralty a state cause of action for wrongful death. Although procedural irregularities in the appointment of the administrator would have barred—under the state statute of limitations—an action in state court, we held that federal courts were free to formulate their own procedural rules. If we were to follow *Levinson*, we would not bind federal courts to state rules of procedure designed to have no application beyond the state forum for which they were created.[3] Cf. *Byrd* v. *Blue Ridge*

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but will follow its own rules of procedure." *Bournias* v. *Atlantic Maritime Co.*, 220 F. 2d 152, 154 (CA2 1955).

Mr. Justice Harlan went on to hold that a Panamanian statute of limitations was not applicable where a Panamanian statutory right was being enforced under the admiralty jurisdiction of the Federal District Court.

[3] The majority supports its limitation on actions by saying that "we are not dealing with mere 'housekeeping rules' embodied in state law. Cf. *Hanna* v. *Plumer*, 380 U. S. 460, 473." *Ante*, at 103 n. 6. This conclusion, however, is directly contrary to the characterization given the prescriptive limitation by Louisiana courts:

". . . It is conceded by the five defendants-appellees that had plaintiff filed this suit in the federal court, the doctrine of laches would apply. The cases cited by plaintiff . . . were filed in the federal forum and are distinguished on this basis.

"But plaintiff chose the State forum. Plaintiff may have preferred some procedural advantages afforded in the State court, such

Electric Cooperative, 356 U. S. 525, 533–539; *Angel* v. *Bullington,* 330 U. S. 183, 192; *Atkins* v. *Schmutz Manufacturing Co.,* 435 F. 2d 527 (CA4 1970); Note, 71 Col. L. Rev. 865 (1971).

Today's decision also conflicts with our decision in *Richards* v. *United States, supra.* There, the Federal Tort Claims Act referred us to the local law for a rule of decision, just as *Rodrigue* and the Lands Act do in the present case. We concluded that the Act "require[d] application of the whole law of the State where the act or omission occurred," 369 U. S., at 11, including its conflict of laws decision.[4] If we were to follow *Richards* and *Rodrigue* in the present case, we would apply Louisiana's

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as: agreement of only nine of twelve jurors needed; ability to call under cross-examination any employee of a party as opposed to the federal rule wherein the right to call witnesses under cross-examination is limited to executive or top supervisory personnel; no procedural vehicle provided for directed verdict or judgment n. o. v. in State court; or shorter delay in State court between filing petition and trial. Having chosen the State forum, he is bound by State procedural rules. The argument that uniformity requires us to import the Federal procedural law of laches rather than use the Louisiana procedural law of prescription, is unacceptable. If we adopt the federal procedural rule in this instance, it would logically follow that more Louisiana procedural rules will, for the same reason, be abandoned in the future. We hold that our State courts are bound to apply State procedural rules." *Istre* v. *Diamond M. Drilling Co.,* 226 So. 2d 779, 794.

The court then concluded, "The applicable Louisiana prescription statute, LSA–C.C. Art. 3536, is procedural." *Id.,* at 794–795.

[4] The majority would limit *Richards'* reasoning "that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply." *Ante,* at 105 n. 8. It is precisely because we must apply the "whole body" of state law, however, that we should apply the Louisiana interpretation of that law and not use the prescriptive rule to bar an action in a federal forum. H. Hart & H. Wechsler, The Federal Courts and the Federal System 456–457 (1953).

prescriptive rule as it has been construed by Louisiana courts and not use it to bar an action in a different forum.

For in that other forum—here the federal district court—Louisiana law allows the federal court, consistently with conflict of laws, to apply a different limitation than Louisiana would apply in her own courts.

In *Rodrigue,* we said:

> "The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the outer Continental Shelf. That this law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law, is made clear by the language of the Act." 395 U. S., at 355–356.

We then concluded: "It is evident from this that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law." *Id.,* at 357.

Since the federal court is not a Louisiana forum,[5] the Louisiana law of *prescription* permits enforcement of this claim after Louisiana's one-year statute has run.[6] Therefore, if we are to be faithful to the federal scheme we must apply Louisiana law; and Louisiana law would

[5] The majority acknowledges that the federal court still retains its identity as a federal forum when it indicates that it is not to "function as it would in a diversity case," *ante,* at 103 n. 5, and that only certain state rules are adopted, *ante,* at 103 n. 6.

[6] *O'Sullivan* v. *Felix,* 233 U. S. 318, does not require a contrary result because there we considered only whether Art. 3536 could be applied to a federal action in a federal court and not how it should be applied. Petitioner conceded that his action was barred if Art. 3536 applied and "the sole question pressed by counsel and which we [were] called upon to decide [was] the application of the state statute to the conceded [federal] cause of action." *Id.,* at 321.

not apply *Rodrigue* in a personal injury case where the suit is not brought in a Louisiana forum.

The Court of Appeals, speaking through our leading admiralty authority, Judge Brown, so held and went on to rule that in harmony with Louisiana's *prescriptive* rule this personal injury suit was not barred under the laches doctrine familiar to maritime law.

This is not a stale claim and its assertion after the one-year period ran was not prejudicial; no prejudice was indeed pleaded. Cf. *Holmberg* v. *Armbrecht,* 327 U. S. 392.

One who reads this record will be impressed with the grave injustice of applying the Louisiana one-year statute as if it were *peremptive,* rather than *prescriptive.* Death comes with a finality lacking in some personal injury cases; and the rigid rule applied in *Rodrigue* can do no injustice. But personal injuries are often lingering and one may not know for months whether he is partially or permanently crippled, whether he must be retrained for wholly different work, and so on. In this case it took some months after the injury for respondent (1) to realize that he could not return to his old work, and (2) to discover the kind of work he could do.

If we followed Louisiana law, as Congress directed, we would affirm the judgment of the Court of Appeals, reflecting as it does good law and a measure of justice not always allowable when the rigidity of *Rodrigue* governs a case.

NATIONAL LABOR RELATIONS BOARD *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL.

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

No. 70–63. Argued October 13, 1971—Decided December 6, 1971*

Two unions, the Plasterers and the Tile Setters, in accordance with procedures binding them to arbitrate, submitted to a board their jurisdictional dispute over work to be done for a contractor. The board awarded the work to the Plasterers. When the contractor and the Tile Setters refused to abide by the arbitration board's decision, the Plasterers, to force reassignment of the work, picketed that contractor as well as another contractor employing members of the Tile Setters. Neither contractor was subject to the arbitration agreement. Charges were thereupon filed against the Plasterers for allegedly violating § 8 (b) (4) (D) of the National Labor Relations Act, and a hearing to resolve the dispute was held under § 10 (k), which directs the National Labor Relations Board (NLRB) to "hear and determine the dispute out of which [the alleged] unfair labor practice has arisen" unless "the parties to such dispute" agree upon a settlement. The NLRB, after weighing the arbitration board's decision "and all [other] relevant factors," awarded the work to the Tile Setters. When the Plasterers refused to abide by the award, a § 8 (b) (4) (D) complaint was filed against them and they were found to have violated that provision. Both contractors, which had collective-bargaining agreements with the Tile Setters (but not with the Plasterers) and had been employing members of that union to perform the operation involved in the jurisdictional dispute, contended that it was far more efficient for them to use tile setters than plasterers. The Court of Appeals on review set aside the NLRB's order, holding that it is not the employer but the rival unions that are parties to the jurisdictional dispute to which § 10 (k) applies. *Held:*

*Together with No. 70–65, *Texas State Tile & Terrazzo Co., Inc., et al.* v. *Plasterers' Local Union No. 79, Operative Plasterers' & Cement Masons' International Assn., AFL–CIO, et al.*, also on certiorari to the same court.

The employers here, both of which had substantial financial stakes in the outcome of the § 10(k) proceeding, were "parties to the dispute" within the meaning of that provision and the NLRB was empowered to determine the jurisdictional dispute under that provision in this case where the competing unions, but not the employers, had agreed upon a voluntary method of adjustment. *Highway Truckdrivers, Local 107 (Safeway Stores, Inc.)*, 134 N. L. R. B. 1320, distinguished. Pp. 123–137.

142 U. S. App. D. C. 146, 440 F. 2d 174, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Norton J. Come argued the cause for petitioner in No. 70–63. With him on the brief were *Solicitor General Griswold, Richard B. Stone, Arnold Ordman, Dominick L. Manoli,* and *Marvin Roth. Wayne S. Bishop* argued the cause and filed a brief for petitioners in No. 70–65.

Donald J. Capuano argued the cause for respondents. With him on the brief were *Martin F. O'Donoghue* and *Patrick C. O'Donoghue.*

Laurence Gold argued the cause for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance. On the brief was *Thomas E. Harris.*

Briefs of *amici curiae* urging reversal were filed by *Joseph M. Stone, George L. Plumb,* and *Betty Southard Murphy* for Associated General Contractors of America et al.; by *Robert J. Connerton, Arthur M. Schiller,* and *Jules Bernstein* for the Laborers' International Union of North America, AFL–CIO; and by *Albert E. Jenner, Jr.,* and *Chester T. Kamin* for the Scientific Apparatus Makers Assn.

Louis Sherman and *Elihu I. Leifer* filed a brief for the Building and Construction Trades Department, AFL–CIO, as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

When a charge is filed under § 8 (b)(4)(D) of the National Labor Relations Act, as amended, the provision [1] banning so-called jurisdictional disputes, the Board must under § 10 (k) "hear and determine the dispute out of which [the] unfair labor practice shall have arisen, unless . . . the parties to such dispute" adjust or agree upon a method for the voluntary adjustment of the dispute.[2]

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[1] 61 Stat. 136, 29 U. S. C. § 141 *et seq.*

[2] Section 8 (b)(4) provides that it shall be an unfair labor practice for a labor organization or its agents "(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." 29 U. S. C. § 158 (b)(4).

Section 10 (k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." 29 U. S. C. § 160 (k).

The issue here is whether an employer, picketed to force reassignment of work, is a "party" to the "dispute" for purposes of § 10 (k). When the two unions involved, but not the employer, have agreed upon a method of settlement, must the Board dismiss the § 10 (k) proceedings or must it proceed to determine the dispute with the employer being afforded a chance to participate?

I

Texas State Tile & Terrazzo Co. (Texas State) and Martini Tile & Terrazzo Co. (Martini) are contractors in Houston, Texas, engaged in the business of installing tile and terrazzo. Both have collective-bargaining agreements with the Tile, Terrazzo and Marble Setters Local Union No. 20 (Tile Setters) and have characteristically used members of the Tile Setters union for laying tile and also for work described in the collective-bargaining contract as applying "a coat or coats of mortar, prepared to proper tolerance to receive tile on floors, walls and ceiling regardless of whether the mortar coat is wet or dry at the time the tile is applied to it." [3]

This case arose when Plasterers' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association of Houston, Texas (Plasterers), picketed the job sites of Texas State and Martini claiming that the work of applying the mortar to receive tile was the work of the Plasterers' union and not of the Tile Setters.[4] Neither Texas State nor Martini had a collective-bargaining contract with the Plasterers or regularly employed workers represented by that union.

Before the Texas State picketing began, the Plasterers submitted their claim to the disputed work to the National Joint Board for Settlement of Jurisdictional Dis-

[3] App. 20.

[4] This dispute grew out of a new method of applying tile that was developed in the mid-1950's. R. 111, 123, 135.

putes (Joint Board), a body established by the Building Trades Department, AFL–CIO, and by certain employer groups.[5] Both the Plasterers' and the Tile Setters' locals were bound by Joint Board decisions because their international unions were members of the AFL–CIO's Building Trades Department. Neither Texas State nor Martini had agreed to be bound by Joint Board procedures and decisions, however. The Joint Board found the work in dispute to be covered by an agreement of August 1917, between the two international unions, and awarded the work to the Plasterers.[6] When Texas State and the Tile

[5] The National Joint Board for the Settlement of Jurisdictional Disputes is an arbitration panel established by a 1948 agreement between the Building and Construction Trades Department, AFL–CIO, and the Associated General Contractors of America and several specialty contractors' associations. The Joint Board consists of an equal number of representatives of employers and unions and a neutral chairman. An employer may become a party to a Joint Board proceeding by signing a stipulation agreeing to be bound by the results of the proceeding. Art. III, § 7, AFL–CIO, Bldg. & Constr. Trades Dept., Plan for Settling Jurisdictional Disputes Nationally and Locally 10 (1970). Member unions of the AFL–CIO's Building Trades Department do not have to agree formally to abide by Joint Board decisions, because they are bound by virtue of provisions contained in their constitutions. AFL–CIO, Bldg. & Constr. Trades Dept., Procedural Rules and Regulations of the National Joint Board 2 (1970). See generally K. Strand, Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB 89–104 (1961). In the cases here, both the Tile Setters and the Plasterers were members of the Building Trades Department.

[6] In the Texas State case, the Joint Board on November 9, 1966, awarded all of the disputed work to the Plasterers except "any coat to be applied wet the same day under tile." App. 316. The Tile Setters refused to give up the work of laying the plaster undercoat to which the dry mortar was applied, claiming that the Joint Board decision gave this work to them. The Plasterers established a picket line on January 24, 1967; on March 15, 1967, the Joint Board issued a clarification of its decision, stating that the final smooth plaster coat was to be done by the Plasterers unless it was laid the same day as the tile and dry-set mortar were applied, in which case it was to be done by the Tile Setters. App. 341.

Setters refused to acquiesce in the Joint Board decision and change the work assignment, the Plasterers began the picketing of Texas State which formed the basis for the § 8 (b)(4)(D) charges. The Plasterers also picketed a jobsite where Martini employees, members of the Tile Setters, were installing tile, although this dispute had not been submitted to the Joint Board.

Martini and Southwestern Construction Co., the general contractor that had hired Texas State, filed § 8 (b)(4)(D) unfair labor practice charges against the Plasterers, and the NLRB's Regional Director noticed a consolidated § 10 (k) hearing to determine the dispute.[7] Southwestern, Texas State, Martini, and the two unions participated in the hearing. A panel of the Board noted that the Tile Setters admitted being bound by Joint Board procedures, but deemed the Joint Board decision to lack controlling weight,[8] and "after taking into account and balancing all relevant factors" awarded the work to the Tile Setters.[9] When the Plasterers refused

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[7] The employer-subcontractor, Texas State, intervened as a party.

[8] App. 22.

[9] The NLRB considered the collective-bargaining agreements among the parties, industry and area practice, relative skills and efficiency of operation, past practices of the employers, agreements between the Plasterers and the Tile Setters, the Joint Board award (the NLRB refused to give this controlling weight because of its "ambiguous nature," App. 22), and concluded:

"Tile setters are at least as skilled in the performance of the work as plasterers, and both Texas Tile and Martini, which assigned them to the work, have been satisfied with both the quality of their work and the cost of employing them. Moreover, the instant assignments of the disputed work to tile setters are consistent with the explicit provisions of the collective-bargaining agreement between the Tile Setters and Texas Tile and Martini, are consistent with the past practice of the Employers, and are not inconsistent with area or industry practice. . . ." App. 23. The Board's decision in the § 10 (k) proceeding is reported at 167 N. L. R. B. 185 (1967) and its decision and order in the unfair labor practice proceeding are reported at 172 N. L. R. B. Nos. 70, 72 (1968).

to indicate that they would abide by the Board's award, a § 8 (b)(4)(D) complaint was issued against them, and they were found to have committed an unfair labor practice by picketing to force Texas State and Martini to assign the disputed work to them.[10] In making both the § 10 (k) and § 8 (b)(4)(D) decisions, the Board rejected the Plasterers' contention that even though the employer had not agreed to be bound by the Joint Board decision, the provisions of § 10 (k) precluded a subsequent Board decision because the competing unions had agreed upon a voluntary method of adjustment.

On petition to review by the Plasterers and cross petition to enforce by the Board, a divided panel of the Court of Appeals set aside the order of the Board.[11] It held that: "It is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled

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[10] The § 10 (k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10 (k) decision, the Board must prove the union guilty of a § 8 (b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a § 10 (k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8 (b)(4)(D) determination. *International Typographical Union,* 125 N. L. R. B. 759, 761 (1959). Both parties may put in new evidence at the § 8 (b)(4)(D) stage, although often, as in the present cases, the parties agree to stipulate the record of the § 10 (k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10 (k), the Board need only find that there is reasonable cause to believe that a § 8 (b)(4)(D) violation has occurred, while in the § 8 (b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8 (b)(4)(D). *International Typographical Union, supra,* at 761 n. 5 (1959).

[11] 142 U. S. App. D. C. 146, 440 F. 2d 174 (1970).

to seek the work in question." [12] It concluded that the Board may not make a § 10 (k) determination of a jurisdictional dispute where the opposing unions have agreed to settle their differences through binding arbitration. Both the Board and the employers petitioned for certiorari, and we granted the petitions.[13]

II

Section 8 (b)(4)(D) makes it an unfair labor practice for a labor organization to strike or threaten or coerce an employer or other person in order to force or require an employer to assign particular work to one group of employees rather than to another, unless the employer is refusing to honor a representation order of the Board. On its face, the section would appear to cover any union challenge to an employer work assignment where the prohibited means are employed. *NLRB* v. *Radio & Television Broadcast Engineers Union, Local 1212,* 364 U. S. 573, 576 (1961) (hereinafter *CBS*). As the charging or intervening party, the employer would normally be a party to any proceedings under that section.[14] Section 8 (b)(4)(D), however, must be read in light of § 10 (k) with which it is interlocked. *CBS, supra,* at 576. When a § 8 (b)(4)(D) charge is filed and there is reasonable cause to believe that an unfair labor practice has been

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[12] *Id.,* at 152, 440 F. 2d, at 180. Although the dispute at the Martini worksite had not been submitted to the Joint Board, the Court of Appeals nevertheless held that, because the two unions had agreed to be bound by the procedures and decisions of the Joint Board, the NLRB was precluded from hearing and determining the Martini dispute under § 10 (k).

[13] 401 U. S. 973 (1971).

[14] See 29 CFR §§ 102.8, 102.9, 102.109 (1971); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO, Local 283* v. *Scofield,* 382 U. S. 205, 219–221 (1965).

committed, issuance of the complaint is withheld until the provisions of § 10 (k) have been satisfied. That section directs the Board to "hear and determine" the dispute out of which the alleged unfair labor practice arose; the Board is required to decide which union or group of employees is entitled to the disputed work in accordance with acceptable, Board-developed standards, unless the parties to the underlying dispute settle the case or agree upon a method for settlement. Whether the § 8 (b)(4)(D) charge will be sustained or dismissed is thus dependent on the outcome of the § 10 (k) proceeding. The Board allows an employer to fully participate in a § 10 (k) proceeding as a party. If the employer prefers the employees to whom he has assigned the work, his right to later relief against the other union's picketing is conditioned upon his ability to convince the Board in the § 10 (k) proceeding that his original assignment is valid under the criteria employed by the Board.

The alleged unfair labor practice in this cause was the picketing of the jobsites by the Plasterers, and the dispute giving rise to this picketing was the disagreement over whether Plasterers or Tile Setters were to lay the final plaster coat. This dispute was a three-cornered one. The Plasterers made demands on both Texas State and the Tile Setters and on both Martini and the Tile Setters. In both cases, the employers' refusal to accede to the Plasterers' demands inevitably and inextricably involved them with the Tile Setters against the Plasterers. It was this triangular dispute that the § 10 (k) proceeding was intended to resolve.

It may be that in some cases employers have no stake in how a jurisdictional dispute is settled and are interested only in prompt settlement. Other employers, as shown by this cause, are not neutral and have substantial economic interests in the outcome of the § 10 (k) proceeding. A change in work assignment may result in different

terms or conditions of employment, a new union to bargain with, higher wages or costs, and lower efficiency or quality of work. In the construction industry, in particular, where employers frequently calculate bids on very narrow margins, small cost differences are likely to be extremely important.[15] In the present cause, both employers had collective-bargaining contracts with the Tile Setters specifically covering the work at issue; neither had contracts with the Plasterers nor employed Plasterers regularly. Both employers determined it to be in their best interests to participate vigorously in the Board's § 10 (k) proceeding. The employers contended it was more efficient and less costly to use the same craft for applying the last coat of plaster, putting on the bonding coat, and laying the tile and that it was more consistent with industry practice to use the Tile Setters as they did.[16] Both companies claimed that their costs would be substantially increased if the award went to the Plasterers, and that without collective-bargaining contracts with the Plasterers, they would lose 30%–40% of their work to plastering contractors.[17] It is obvious, therefore, that both Texas State and Martini had substantial stakes in the outcome of the § 10 (k) proceeding.

The phrase "parties to the dispute" giving rise to the picketing must be given its commonsense meaning corresponding to the actual interests involved here. Cf. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO, Local 283* v. *Scofield,* 382 U. S. 205, 220 (1965). Section 10 (k) does not expressly or impliedly deny party status to an employer, and since the section's adoption in 1947,

[15] See Comment, The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10 (k) of the NLRA, 38 U. Chi. L. Rev. 389, 400 (1971).

[16] R. 96–97, 130–132, 141.

[17] R. 95, 129, 145–148.

the Board has regularly accorded party status to the employer and has refused to dismiss the proceeding when the unions, but not the employer, have agreed to settle.[18]

The Court of Appeals rejected this construction of § 10 (k). Its reasoning, which we find unpersuasive, was that because the employer is not bound by the § 10 (k) decision, he should have no right to insist upon participation. But the § 10 (k) decision standing alone, binds no one. No cease-and-desist order against either union or employer results from such a proceeding; the impact of the § 10 (k) decision is felt in the § 8 (b)(4)(D) hear-

[18] See, *e. g.*, *Lodge 68 of the Int'l Assn. of Machinists* (*Moore Drydock Co.*), 81 N. L. R. B. 1108, 1113–1114, 1126–1128 (1949); *Local 231, Int'l Hod Carriers* (*Middle States Telephone Co.*), 91 N. L. R. B. 598, 604 (1950); *United Brotherhood of Carpenters, Local 581* (*Ora Collard*), 98 N. L. R. B. 346, 348–349 (1952); *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, 108 N. L. R. B. 186, 197 (1954); *Bay Counties District Council of Carpenters*, 115 N. L. R. B. 1757, 1766–1767 (1956); *Local 173, Wood, Wire, & Metal Lathers' Int'l Union* (*Newark & Essex Plastering Co.*), 121 N. L. R. B. 1094, 1103–1104 (1958); *Int'l Union of Operating Engineers* (*Schwerman Co. of Pa., Inc.*), 139 N. L. R. B. 1426, 1429 (1962); *Carpenters District Council of Denver* (*J. O. Veteto & Son*), 146 N. L. R. B. 1242, 1245 (1964); *Electrical Workers, Local 26* (*McCloskey & Co.*), 147 N. L. R. B. 1498, 1501–1503 (1964); *Operative Plasterers Int'l Assn.* (*Twin City Tile & Marble Co.*), 152 N. L. R. B. 1609, 1611, 1615 (1965); *Int'l Union of Operating Engineers, Local 49* (*Egan-McKay Electrical Contractors, Inc.*), 164 N. L. R. B. 672, 673 (1967). The Board has reasserted this view since the Court of Appeals' decision in the instant case, *Lathers Local 104* (*Blaine Petty Co.*), 186 N. L. R. B. No. 70 (1970). Until now, courts of appeals have uniformly upheld the Board's position; see, *e. g.*, *New Orleans Typographical Union No. 17* v. *NLRB*, 368 F. 2d 755, 763 (CA5 1966), *NLRB* v. *Local 825, Int'l Union of Operating Engineers*, 326 F. 2d 213, 216 (CA3 1964); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F. 2d 630, 636 (CA5 1958). See also *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 264 (1964), citing *Wood, Wire & Metal Lathers Int'l Union* (*Acoustical Contractors Assn.*), 119 N. L. R. B. 1345, 1347 (1958).

ing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10 (k) decision against it, a § 8 (b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10 (k) decision and the employer does not comply, the employer's § 8 (b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed.[19] Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10 (k) decision, but both will lose their § 8 (b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10 (k) decision.

We do not find that the legislative history of § 8 (b)(4)(D) and § 10 (k) requires a different conclusion. The Court of Appeals and the Plasterers rely upon various statements in the legislative history of the two sections, particularly the remarks of Senator Morse, referring to

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[19] This dismissal will not be pursuant to the language of § 10 (k) directing dismissal upon "compliance by the parties . . . with the [Board's] decision" but, rather, under § 8 (b)(4)(D) because the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Apparently, the Board construes this language to include disregarding a § 10 (k) decision. Brief for the NLRB 23 n. 16, 28 n. 21. The Board's regulations now provide that "if the Board determination is that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination." 36 Fed. Reg. 9133 (1971).

jurisdictional disputes as controversies between two labor unions,[20] and a passage in the House Conference Report referring to § 10 (k) as directing the Board to "hear and determine disputes between unions giving rise to unfair labor practices under section 8 (b)(4)(D)." [21] Nothing in these remarks or in the other relevant legislative documents indicates an affirmative intent to exclude an interested employer from participating in a § 10 (k) proceeding. The usual focus of the legislative debates was on ways of protecting the employer from the economic havoc of jurisdictional strikes.[22] But it does not follow from statements condemning the economically deleterious effects of inter-union strife that Congress intended an employer to have no say in a decision that may, practically, affect his business in a radical way. Congress did not expressly focus on the non-neutral employer, but there is nothing in the legislative history that negatives employer standing; [23] and in referring to the "parties

[20] 93 Cong. Rec. 1845. Cf. also 93 Cong. Rec. 1824 (remarks of Sen. Morse).

[21] H. R. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., 57 (1947).

[22] See, *e. g.*, 93 Cong. Rec. A1222–A1223 (remarks of Cong. Landis); 93 Cong. Rec. 3424 (remarks of Cong. Hartley); 93 Cong. Rec. 3227–3228 (remarks of Sen. Lucas); 93 Cong. Rec. 4860–4862 (remarks of Sen. Aiken); 93 Cong. Rec. A2251–A2253 (remarks of Sen. Ball). Section 10 (k) protection was also extended to unorganized employees. In the Senate bill, § 8 (b)(4)(D) covered only cases where two unions claimed the same work, but the section was broadened in the Conference Committee to cover conflicts between organized and unorganized employees. See *CBS*, 364 U. S., at 584.

[23] In what is apparently the only time employer participation in the resolution of jurisdictional disputes was explicitly considered, Senator Taft indicated that the employer should be a party to the proceeding:

"Mr. Morreale [General Counsel, International Hodcarriers, Building, and Common Laborers of America]. . . . I do not think

to the dispute," Congress used terminology that would ordinarily include the employer in cases such as these.[24]

The Court has frequently cautioned that "[i]t is at best treacherous to find in congressional silence alone the

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[compulsory arbitration between the antagonistic unions] should be just by labor itself, but that it should be in combination with industry, because in all those matters, the employers are affected and interested, as well as is labor. I think that the procedure set up should provide for a joint procedure between management and labor.

"The CHAIRMAN [Sen. Taft]. . . . I have no objection to giving both to labor and management the right to arbitrate or address themselves to arbitrating the question."

Hearings on S. 55 before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pt. 3, p. 1467 (1947).

The arbitration provision in the Senate version of § 10 (k) was deleted without explanation in Conference. See n. 27, *infra*.

[24] In construing a statute, the Court has ruled that legislative materials, if "without probative value, or contradictory, or ambiguous," should not be permitted to control the customary meaning of words. *United States* v. *Dickerson*, 310 U. S. 554, 562 (1940). See also *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260 (1945).

The Court has previously had occasion to construe the term "party" in the National Labor Relations Act, and it has given it a broad and realistic definition. In *Lewis* v. *NLRB*, 357 U. S. 10 (1958), the issue was whether the Board's General Counsel was a "party" who could apply to the Board for the issuance of a subpoena. The General Counsel had obtained subpoenas *duces tecum* and *ad testificandum* to both an employer and a union after an unfair labor practice complaint had been issued; at the hearing on the complaint, the employer and union had moved to revoke the subpoenas on the ground that the General Counsel was not a "party" for purposes of § 11 (1) of the Act which provides that: "The Board, or any member thereof, shall upon application of any party . . . forthwith issue . . . subpoenas . . . ."

The Court noted that the Act does not define the term "party," but it emphasized that the role of the General Counsel was a "major one" in unfair labor practice proceedings. 357 U. S., at 15. The General Counsel was held to be a party because he was "indispensable to the prosecution of the case" and because relegating him to a

adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U. S. 61, 69 (1946); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235, 241 (1970). It is clear that Congress intended to protect employers and the public from the detrimental economic impact of "indefensible" [25] jurisdictional strikes. It would therefore be myopic to transform a procedure that was meant to protect employer interests into a device that could injure them. In the absence of an "unmistakable directive," the Court has refused to construe legislation aimed to protect a certain class in a fashion that will run counter to the goals Congress clearly intended to effectuate. *FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). We conclude, therefore, that these sections were enacted to protect employers who are partisan in a jurisdictional dispute as well as those who are neutral.

Nothing in *CBS, supra*, mandates a different conclusion. Until that case, the Board's practice had been

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lesser status would "overlook the critical role he performs in enforcement of the Act." 357 U. S., at 16. This description is equally applicable to an employer's function in a § 8 (b) (4) (D) proceeding. In *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO, Local 283* v. *Scofield*, 382 U. S. 205 (1965), the Court went through a somewhat similar analysis of the substantive interests involved at the judicial enforcement stage of an unfair labor practice proceeding, and concluded that a successful "charged" or "charging" party before the Board had a right to intervene in the ensuing Court of Appeals action.

Excluding the employer from participation as a party is inconsistent with the common-law rule that "all persons materially interested in the result of a suit ought to be made parties, so that the court may . . . 'do complete justice.'" *Vetterlein* v. *Barnes*, 124 U. S. 169, 170–171 (1888). *Story* v. *Livingston*, 13 Pet. 359, 375 (1839).

[25] President Truman, 1947 State of the Union Message, 93 Cong. Rec. 136.

to decide against the striking or picketing union unless it was entitled to the work pursuant to a Board certification or a collective-bargaining contract. The Court found the Board to have taken too narrow a view of its task and held that the Board, employing broader, more inclusive criteria with respect to entitlement, must make an affirmative award to one union or the other. In the course of its opinion, the Court referred to § 10 (k)'s phrase "the dispute out of which such unfair labor practice shall have arisen" as having "no other meaning except a jurisdictional dispute under § 8 (b) (4) (D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer." 364 U. S., at 579. Again, we have no quarrel with the view that § 10 (k) is designed to decide which union is entitled to the work. But the issue before us is whether the employer is also a party to that dispute and to the proceeding that decides that question. The Court in *CBS* did not have before it a case in which the employer was particularly interested in which union did the work, since it had collective-bargaining contracts with both unions and since both unions were able to do the disputed work with equal skill, expense, and efficiency. The Court recognized that there, *"as in most instances"* the quarrel was of "so little interest to the employer that he seems perfectly willing to assign work to either [union] if the other will just let him alone." *Ibid.* (emphasis added). We have no doubt, therefore, that the Court had no intention of deciding the case now before us.

If employers must be considered parties to the dispute that the Board must decide under § 10 (k), absent private agreement, they must also be deemed parties to the adjustment or agreement to settle that will abort the § 10 (k) proceedings. It is insisted that so holding will encourage employers to avoid private arbitration,

whereas holding union agreement alone sufficient to foreclose Board action will pressure employers to become part of private settlement mechanisms productive of sound result and much swifter decision.

The difficulties with this argument are several. First of all, if union agreements to arbitrate are sufficient to terminate § 10 (k) proceedings, there is no assurance that these private procedures will always be open to employer participation, that an employer will be afforded a meaningful chance to participate, or that all relevant factors will be properly considered.[26]

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[26] The Board has stated its guidelines for resolving jurisdictional disputes:

"The Board will consider all relevant factors in determining who is entitled to the work in dispute, e. g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL–CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. . . . Every decision will have to be an act of judgment based on common sense and experience rather than on precedent." *Int'l Assn. of Machinists, Lodge 1743 (J. A. Jones Construction Co.)*, 135 N. L. R. B. 1402, 1410–1411 (1962).

The Joint Board award in this case was based solely on the Joint Board's interpretation of a 1917 agreement between the two international unions and a 1924 decision interpreting that agreement. R. 53, 69–70, 73–76. At the time of the dispute, the criteria used by the Joint Board in making awards were: "Decisions and agreements of record as set forth in the Green Book [the Building Trades Department's book of precedents], valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality." Art. III, § 1 (a), AFL–CIO Bldg. & Constr. Trades Dept., Plan for Settling Jurisdictional Disputes Nationally and Locally (1965). These criteria were broadened in 1970 by the addition of Art. III, § 1 (f), which provides: "Because efficiency, cost and good management are essential to the well-being of the industry, the Joint Board

Second, the argument for regarding the employer as a dispensable neutral is reminiscent of the position taken by the Board and rejected by the Court in the *CBS* case. There, the Board sought to justify a narrow view of its function and its failure to make affirmative awards as generating pressure to settle or arbitrate privately. As § 10 (k) passed the Senate, it directed the Board to decide the dispute *or* to order arbitration, but the arbitration alternative was deleted in Conference, and the amended bill was passed by the Senate over the strenuous objections of Senator Morse and others.[27] By this amendment, the Court in *CBS* held that Congress had expressed a clear preference for Board decision as compared with compelled arbitration, and that this policy preference must be respected. 364 U. S., at 581–582. Although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration agreements and settlements has been predicated on the view that the parties have voluntarily bound themselves to such a mechanism at the bargaining table. In both *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 262 (1964) and *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S., at 238, the employers had acceded to binding arbitration as the terminal step of the grievance procedure. This concession is not present in the instant case; the employers here did not even have a collective-bargaining contract with the Plasterers. Section 10 (k) contemplates only a voluntary agreement as a bar to a Board decision. As in *CBS,* we decline to narrow the Board's powers under § 10 (k) so that employers are

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should not ignore the interests of the consumer in settling jurisdictional disputes." AFL–CIO Bldg. & Constr. Trades Dept., Plan for Settling Jurisdictional Disputes Nationally and Locally 8 (1970).

[27] 93 Cong. Rec. 6452–6453; 93 Cong. Rec. 6519 (remarks of Sen. Pepper).

coerced to accept compulsory private arbitration when Congress has declined to adopt such a policy.

There remains the matter of the so-called *Safeway* rule announced by the Board in 1962 [28] and followed since.[29] Under this rule, the Board has held that if one of the unions claiming work effectively renounces its claim, § 10 (k) proceedings are aborted despite legitimate interests an employer may have in securing a Board decision. It is urged that if union agreement prevents a § 10 (k) decision in such a situation, the employer cannot be considered a party to the § 10 (k) dispute when the unions but not the employer have *agreed* upon a method of settlement. As we understand the *Safeway* doctrine, however, when one union disclaims the work, § 10 (k) proceedings terminate, not because all "parties" to the dispute have settled or agreed to settle within the meaning of the statute, but on the ground that, in the words of the Board's brief in this case, "the Board has power, under Section 10 (k), only to hear and determine the merits of a jurisdictional dispute and . . . by definition, such a dispute cannot exist unless there are rival claims to the work. . . ." [30] Concededly, an employer may be a third party to disputes over work assignments, but when

[28] *Highway Truckdrivers, Local 107 (Safeway Stores, Inc.)*, 134 N. L. R. B. 1320 (1961).

[29] *Int'l Assn. of Bridge Workers, Local 678 (W. R. Aldrich & Co.)*, 145 N. L. R. B. 943 (1964); *Carpet, Linoleum & Soft Tile Layers, Local 1905 (Butcher & Sweeney Construction Co.)*, 143 N. L. R. B. 251 (1963); *Wood, Wire & Metal Lathers Union, Local 328 (Acoustics & Specialties, Inc.)*, 139 N. L. R. B. 598 (1962).

[30] Brief for NLRB 30 n. 23. In a case interpreting the *Safeway* doctrine, the Board stated that § 10 (k) is limited "to situations involving competing claims between *rival* groups of employees, and [was] not designed to require the Board to arbitrate a dispute between a union and an employer when no . . . competing claims [of another union] are involved." *Carpet, Linoleum & Soft Tile Layers, Local 1905 (Butcher & Sweeney Construction Co.)*, 143 N. L. R. B. 251, 255–256 (1963) (emphasis in original).

the other two parties settle their differences and one union declines the work assigned to it, the inter-union conflict that §§ 8 (b)(4)(D) and 10 (k) were designed to eliminate disappears. A § 10 (k) hearing is a comparative proceeding aimed at determining which union is entitled to perform certain tasks. Its function evaporates when one of the unions renounces and refuses the work. Similarly, the applicability of § 8 (b)(4)(D) is premised on conflicting claims of unions or groups of employees for the same job; absent such an actual conflict, it would be futile to proceed under that section unless the employer replaces the disclaiming employees by a new third group of employees when they reject the work assignment, and the disfavored union resumes picketing.

If union settlement followed by disclaimer ends the § 10 (k) case, some of the argument about the employer's party status becomes academic; for whether the employer is a party or not, the two unions alone can prevent a Board decision. But recognizing the employer's party status insures his right to participate when the unions do not agree and the Board must come to a decision. Further, the Board's *Safeway* rule applies only where the inter-union conflict is effectively settled and the employer no longer faces conflicting claims to the work. As this case demonstrates, the Board does not apply the *Safeway* rule to unimplemented agreements to arbitrate between the unions alone, and it does not consider it applicable where employees continue on the job after their international union loses an arbitration proceeding and renounces the work.[31] These *de facto* disputes are real,

[31] *Carpenters Local 1849* v. *C. J. Montag & Sons, Inc.*, 335 F. 2d 216, 221 (CA9 1964); *Bldg. and Construction Trades Council of Las Vegas, Local 525 (Charles J. Dorfman)*, 173 N. L. R. B. 1339 (1968). The Board has also held that a union cannot avoid a § 10 (k) determination by a disclaimer of interest in presently

and they deserve Board resolution if the purposes of § 10 (k) are to be achieved. Cf. *CBS, supra,* at 579–580.

The Court of Appeals would extend the *Safeway* rule to foreclose Board decision where the two unions, but not the employer, have agreed to arbitrate; inter-union agreement was deemed equivalent to effective disclaimer by one of the unions. This view ignores the narrow view the Board has taken of the *Safeway* rule. It also fails to recognize the problem arising where a local union or group of employees continues to do work assigned by the employer despite agreement or disclaimer by their parent body. It makes little difference to the picketing union that there has been a "settlement" or an agreed-upon method of deciding the dispute as long as it is barred from enjoying the results of such a theoretical resolution. In the instant case, the Board held a § 10 (k) hearing for the simple reason that a live unresolved jurisdictional dispute between unions and employer in fact existed.

Our conclusion evinces no hostility to voluntary settlement of disputes and is wholly consistent with federal policy with respect to voluntary arbitration. In other contexts, where challenged conduct poses an arbitrable dispute under a collective-bargaining contract but is also an unfair labor practice within the jurisdiction of the Board, the Board will, as a matter of policy, defer to the arbitral settlement, although it is not bound to do so

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representing the employees in question, *United Mine Workers (Turman Construction Co.)*, 136 N. L. R. B. 1068 (1962), and it has ignored explicit disclaimers when it has questioned a representative's authority to disclaim work, *Millwrights' Local 1113 (Brogdex Co.)*, 157 N. L. R. B. 996, 1002 (1966). See also *Local 1291, Int'l Longshoremen's Assn. (Pocahontas Steamship Co.)*, 152 N. L. R. B. 676 (1965), enforced, 368 F. 2d 107 (CA3 1966), cert. denied, 386 U. S. 1033 (1967); *Bricklayers' Local 2,* 152 N. L. R. B. 278, 282 (1965); *Bldg. and Construction Trades Council of Las Vegas, Local 525 (Charles J. Dorfman), supra* (1968).

by the LMRA. See 29 U. S. C. § 160 (a); *Carey* v. *Westinghouse Electric Corp.*, 375 U. S., at 272; *NLRB* v. *Strong*, 393 U. S. 357, 360–361 (1969); *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432, 438 (1967). Although the Board is not statutorily required to honor arbitration awards in such situations, it often defers to them if the arbitrator has considered the alleged unfair labor practice. *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955); *International Harvester Co.*, 138 N. L. R. B. 923 (1962), enforced *sub nom. Ramsey* v. *NLRB*, 327 F. 2d 784 (CA7 1964). But again, such deference is in the context of voluntary arbitration. In the case before us, the LMRA *requires* that the Board defer only when all of the parties have agreed on a method of settlement; when there has been such an agreement, the Board cannot ignore or override the result of that settlement procedure. In the present cause, however, it is claimed the Board must defer when less than all the parties to the dispute have agreed to arbitrate.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* NASH-FINCH CO., DBA JACK & JILL STORES

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

No. 70–93. Argued October 19, 1971—Decided December 8, 1971

A union which had begun organizing respondent company's employees charged the company with unfair labor practices. The General Counsel of the National Labor Relations Board (NLRB) issued a complaint, which a Trial Examiner sustained, recommending that respondent be ordered to cease and desist from such practices. Before the NLRB acted, the union picketed respondent's stores and respondent, contending that the union's action violated state law, sought and obtained an injunction from a state court limiting the union's picketing activities. Subsequently the NLRB issued an order accepting the Trial Examiner's recommendations and then brought this action in District Court to restrain enforcement of the state court injunction on the ground that it regulated conduct governed exclusively by the National Labor Relations Act. The District Court held that it was precluded from granting relief by 28 U. S. C. § 2283, which prohibits a federal court from enjoining state court proceedings except as authorized by Act of Congress "or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The court rejected the contention that the NLRB was within the exception recognized in *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220, for suits brought by the United States. The Court of Appeals affirmed, holding that for purposes of § 2283, the NLRB is "an administrative agency of the United States, and is not the United States." *Held:*

1. Since the action here does not seek to restrain unfair labor practices against which the NLRB had issued its complaint but is based on the general doctrine of pre-emption, the exception in § 2283 for matters "necessary in aid of its jurisdiction" is inapplicable. *Capital Service, Inc.* v. *NLRB,* 347 U. S. 501, distinguished. Pp. 141–142.

2. For the purpose of preventing frustration of the National Labor Relations Act, the NLRB has an implied authority to obtain a federal injunction against state court action pre-empted by the

Act; such an injunction falls within the exception to § 2283 recognized in *Leiter Minerals, Inc., supra,* for suits brought by the United States, and the fact that the party moving for an injunction is a federal agency and not the Attorney General is irrelevant. *Bowles* v. *Willingham,* 321 U. S. 503. Pp. 142–148.

434 F. 2d 971, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a dissenting opinion, *post,* p. 148, in Part I of which BRENNAN, J., joined, *post,* p. 156.

Lawrence G. Wallace argued the cause for petitioner. On the briefs were *Solicitor General Griswold, Peter L. Strauss, Dominick L. Manoli, Norton J. Come,* and *Peter G. Nash.*

William A. Harding argued the cause for respondent *pro hac vice.* With him on the brief was *Richard P. Nelson.*

Solomon I. Hirsh filed a brief for the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, as *amicus curiae* urging reversal.

Milton A. Smith, Jerry Kronenberg, and *Gerard C. Smetana* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Title 28 U. S. C. § 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The question is whether the National Labor Relations Board may, through proceedings in a federal court, en-

join a state court order which regulates peaceful picketing governed by the federal agency. The District Court rejected the Board's contention that it is within the exception to § 2283,[1] recognized in *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220, as respects suits brought by the United States. The Court of Appeals affirmed. 434 F. 2d 971. The case is here on a petition for a writ of certiorari which we granted, 402 U. S. 928.

When a union began organizing employees of certain stores in Grand Island, Nebraska, the union filed unfair labor practice charges against the company. The General Counsel issued a complaint. A hearing was held and a Trial Examiner sustained the complaint and recommended that the company cease and desist. Shortly thereafter and before the Board had acted, the union picketed the stores. The company thereupon petitioned the Nebraska state court for an injunction. The state court issued a restraining order, limiting the pickets to two at each store, enjoining them from blocking or picketing entrances or exits and from distributing literature pertaining to the dispute which would halt or slow traffic, from instigating conversations with customers in any manner relating to the dispute, from mass picketing, from acts of physical coercion against persons driving to work, and from doing any act in violation of Neb. Rev. Stat. § 28–812, which makes unlawful "loitering about, picketing or patrolling the place of work . . . against the will of such person." The injunction also bans anyone other than a bona fide union member from picketing unless he becomes a defendant in the state proceedings. Finally, the injunction bars anyone, other than pickets and named defendants, from picketing, distributing handbills, or otherwise "caus[ing] to be pub-

[1] For the history of present § 2283 see H. R. Rep. No. 308, 80th Cong., 1st Sess., A181.

lished or broadcast any information pertaining to the dispute . . . between the parties."

Later the Board entered its decision and order accepting in part the Trial Examiner's recommendations and rejecting parts not material to the present controversy.

The Board then filed this suit in the Federal District Court seeking to restrain the enforcement of the state court injunction on the ground that it regulated conduct which was governed exclusively by the National Labor Relations Act. As noted, both the District Court and the Court of Appeals denied the Board relief. The Court of Appeals held that for the purposes of § 2283 the Board is "an administrative agency of the United States, and is not the United States." 434 F. 2d, at 975. Congress from the beginning has restricted the authority of the federal judiciary to interfere with state court actions. See *Younger* v. *Harris,* 401 U. S. 37, 43–44. The present § 2283 is a revision of earlier provisions of federal statutes which were construed to allow within limits such federal injunctions in favor of *federal agencies. Bowles* v. *Willingham,* 321 U. S. 503, 510. Any exception in favor of federal agencies must, however, be "implied," *ibid.,* unless it comes within the exceptions stated in § 2283.

It is suggested that this federal injunction was "in aid" of the jurisdiction of the federal court since the suit is in the District Court by reason of 28 U. S. C. § 1337 which grants jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce." In *Capital Service, Inc.* v. *NLRB,* 347 U. S. 501, an employer invoked the aid both of a state court and of the federal Board against picketing. The Board sought a federal court injunction under § 10 (l) of the Act, 29 U. S. C. § 160 (*l*), which specifically allows it wherever an unfair labor practice respecting a secondary boycott or picketing violative of § 8 (b)(4) or § 8 (b)(7)

of the Act is involved. We ruled that the state injunction "restrains conduct which the District Court was asked to enjoin in the § 10 (l) proceeding." *Id.*, at 505. We held that under those circumstances an injunction by the federal court was "necessary in aid of its jurisdiction" over commerce, because the federal court to exercise its jurisdiction "freely and fully" must "first remove the state decree." *Id.*, at 506.

In the instant case the company did not file any charges with the Board which claimed that the union's picketing violated § 8 (b)(4) or § 8 (b)(7) of the Act, 73 Stat. 542 and 544, 29 U. S. C. § 158 (b)(4) and § 158 (b)(7).

Section 10 (j) gives the District Court similar authority in respect of an unfair labor practice of the employer under § 8 (a)(1) of the Act which protects the right of employees to organize. But a resort to court action, the Board has held, does not violate § 8 (a)(1). See *Clyde Taylor Co.*, 127 N. L. R. B. 103, 109.

The action in the instant case does not seek an injunction to restrain specific activities upon which the Board has issued a complaint but is based upon the general doctrine of pre-emption. We therefore do not believe this case falls within the narrow exception contained in § 2283 for matters "necessary in aid of its jurisdiction." There is in the Act no express authority for the Board to seek injunctive relief against pre-empted state action. The question remains whether there is implied authority to do so.

It has long been held that the Board, though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purposes of the Act. We held in *In re National Labor Relations Board*, 304 U. S. 486, 496, that even in the absence of an express statutory remedy, the Board might petition for writ of prohibition against premature invo-

cation of the review jurisdiction of the Court of Appeals. In *Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261, we held that the Board had implied authority to institute contempt proceedings for violation of court decrees enforcing orders of the Board. In *Nathanson* v. *NLRB*, 344 U. S. 25, we found an implied authority of the Board to file claims in bankruptcy covering the sums included in its back-pay awards. The claims were not given priority under § 64 (a)(5) of the Bankruptcy Act, but this was because "the United States [was] collecting for the benefit of a private party," *id.*, at 28, not as suggested, *post*, at 149, because the Board's juridical status was something less than that of the United States.[2]

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[2] The basis of our decision in *Nathanson* was that "[t]he priority granted by [§ 64 (a)(5), 11 U. S. C. § 104 (a)(5)] . . . was designed 'to secure an adequate revenue to sustain the public burthens and discharge the public debts.'" 344 U. S., at 27–28. Because there was "no function . . . of assuring the public revenue" and "[t]he beneficiaries of the claims [were] private persons," *id.*, at 28, we found it inappropriate to apply the priority for claims owing the United States and, instead, gave the claims the same "treatment tha[t] other wage claims enjoy[ed]." *Id.*, at 29. The suggestion that *Nathanson* is a stronger case for equating the status of the Board to that of the United States disregards both the policies of the Bankruptcy Act upon which we relied in that decision and the federal pre-emption which inheres in the present case.

Cases such as *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U. S. 81, do not support a miserly interpretation of the Board's powers. There, we held that costs of litigation could be assessed against a corporation which Congress had launched into the commercial world with the power to "sue and be sued." Contrary to the dissent's assertion that the case turned on the failure of Congress to manifest an intent "to bestow the privileges and immunities of the United States on a federal agency," *post*, at 150, our decision there was based upon the grant of "the unqualified authority to sue and be sued [which] placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." 312 U. S., at 85–86.

We conclude that there is also an implied authority of the Board, in spite of the command of § 2283, to enjoin state action where its federal power pre-empts the field. Our starting point is contained in the observation of Mr. Chief Justice Hughes in *Amalgamated Workers* v. *Edison Co., supra,* at 265.

> "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."

The purpose of the Act was to obtain "uniform application" of its substantive rules and to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union,* 346 U. S. 485, 490. The federal regulatory scheme (1) protects some activities, though not violence (see *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 729–731), (2) prohibits some practices, and (3) leaves others to be controlled by the free play of economic forces. We said in *Garner* v. *Teamsters Union, supra,* at 500:

> "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

In *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220, a state suit over mineral rights in public lands was pending, the parties being private persons. The United States brought suit in the federal court to quiet title to the mineral rights and sought and obtained a federal injunc-

tion against prosecution of the state proceedings. In holding that § 2283 impliedly allowed such an exception we said:

> "The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U. S. C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U. S. C. § 2283 alone." *Id.,* at 225–226.

In *Leiter,* the United States brought suit under the authority of the Attorney General. Here it is the Board that moved to prevent "irreparable injury to a national interest." The Board is the sole protector of the "national interest" [3] defined with particularity in the Act. *Leiter,* of course, was initiated by the Attorney General; but underlying the controversy were federal agencies in the Department of the Interior responsible for administration of the public lands. The fact that the moving party was a federal agency, not the Attorney General, was

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[3] *Amalgamated Clothing Workers* v. *Richman Bros. Co.,* 348 U. S. 511, held that a *private party* under the protection of the Board's order could not obtain injunctive relief in a federal court against an anti-picketing order issued by a state court. And see *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281.

considered irrelevant in *Bowles* v. *Willingham, supra,* where the Administrator of the Emergency Price Control Act sued to enjoin a state court from interfering with orders of the federal agency. An exception from the general ban on federal injunctions against state court action was implied by reason of the fact that the method of review of the orders of the federal agency was in the Emergency Court of Appeals. But there was no suggestion that suit by or against the Administrator was not a suit of the United States.[4] The purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights. We can no more conclude here than in *Leiter* that a general statute, limiting the power of federal courts to issue injunctions, had as its purpose the frustration of federal systems of regulation. See *Brown* v. *Wright,* 137 F. 2d 484, 488. The frustration of superior federal interests by the general language of § 2283 cannot reasonably be imputed. See *NLRB* v. *Sunshine Mining Co.,* 125 F. 2d 757, 762; *NLRB* v. *New York State Board,* 106 F.

[4] Actions against the National Labor Relations Board are dismissed on the ground that they are against a federal agency exercising a governmental regulatory function and so are suits against the United States, which cannot be sued without the consent of Congress. *Clover Fork Coal Co.* v. *NLRB,* 107 F. 2d 1009. The same holds for the Atomic Energy Commission, *Cotter Corp.* v. *Seaborg,* 370 F. 2d 686; the Civil Service Commission, *Soderman* v. *U. S. Civil Service Commission,* 313 F. 2d 694; the Veterans Administration, *Evans* v. *U. S. Veterans Admin. Hospital,* 391 F. 2d 261; and the Securities and Exchange Commission, *Holmes* v. *Eddy,* 341 F. 2d 477. Similarly, an action by the Director General of Railroads was held to be on behalf of the United States and thus was not barred by the relevant statute of limitations. *Davis* v. *Corona Coal Co.,* 265 U. S. 219.

Supp. 749, 752; *NLRB* v. *Industrial Commission,* 84 F. Supp. 593, aff'd, 172 F. 2d 389.

The fact that the Board is given express authority to seek enforcement of its orders in some sections of the Act [5] is not persuasive that the Act expresses a policy to bar the Board from enforcing the national interests on other matters. The instances where the Board is given explicit authority to seek the aid of federal courts are not exclusive examples, as we have already shown. They are only particularized instances of specific enforcement devices relating to specified orders, not a denial by implication that the Act and the Board would not be entitled to federal aid or protection in other instances, as illustrated by *In re National Labor Relations Board, supra; Amalgamated Workers* v. *Edison Co., supra;* and *Nathanson* v. *NLRB, supra.* The exclusiveness of the federal domain is clear; and where it is a public authority that seeks protection of that domain, the way seems clear. For the Federal Government and its agencies, the federal courts are the forum of choice. For them, as *Leiter* indicates, access to the federal courts is "preferable in the context of healthy federal-state relations." 352 U. S., at 226.

Whether there are parts of the state court injunction

[5] Congress has vested the Board with broad powers to seek injunctive relief in the district courts. Section 10 (l), 29 U. S. C. § 160 (*l*), for example, gives the Board power to obtain an injunction where an investigation produces reasonable cause to believe that a charge of secondary boycott or illegal picketing activity is true. Section 10 (j), 29 U. S. C. § 160 (j), provides a similar basis of power for other unfair labor practices. "In case of contumacy or refusal to obey a subpena issued to any person" during "hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of [its] powers" under §§ 9 and 10, 29 U. S. C. §§ 159 and 160, the Board may seek injunctive relief from a district court requiring compliance. 29 U. S. C. § 161 (2).

that should survive our reversal of the judgment below is a question we do not reach. It will be open on the remand of the cause.

Reversed and remanded.

MR. JUSTICE WHITE, dissenting.

I

The National Labor Relations Board here sues in federal court to enjoin the enforcement of a state court injunction against picketing.[1] Title 28 U. S. C. § 2283 bars such injunctions except in specified situations. One exception permits injunctions by a federal court which are "necessary in aid of its jurisdiction." The majority rightfully concedes that this exception is inapplicable

[1] Although the Board had held an unfair labor practice hearing and had found the employer guilty of certain unfair labor practices while exonerating it of others, this proceeding is not relevant to the issues in the present case because it did not concern the union's picketing. The union had originally filed a complaint and an election petition with the Board, charging the employer with a refusal to bargain and with interfering with the employees' rights to organize. A complaint was issued, and a hearing held. The trial examiner on April 28, 1969, found the employer guilty of certain § 8 (a) (1) and § 8 (a) (5) unfair labor practices and entered a cease-and-desist order against certain activities of the employer. A month after the trial examiner's decision, the union began its picketing, and the employer then secured the state court injunction limiting the picketing that is at issue in this case. On August 29, 1969, the Board filed a complaint in federal district court seeking to restrain the employer from enforcing the state court injunction. On September 17, 1969, the Board reversed the decision of the trial examiner and held that the employer was not guilty of a § 8 (a) (5) refusal to bargain nor of certain of the § 8 (a) (1) violations the trial examiner had found, but it found the employer guilty of certain other § 8 (a) (1) infractions and entered a limited cease-and-desist order. Although the picketing occurred contemporaneously with the § 8 (a) (1) and § 8 (a) (5) unfair labor practice proceeding, it was never an issue before the Board.

here. A state court injunction in no way interferes with the Board's admitted power to prevent unfair labor practices or to secure federal injunctions in those situations specifically identified by Congress. *Capital Service, Inc.* v. *NLRB,* 347 U. S. 501 (1954), amply protects the Board's power to enjoin state court proceedings where an unfair labor practice is in progress and the jurisdiction of a federal court might later be invoked, but no such Board adjudication was occurring here concerning the picketing. *Capital Service* is not controlling.

Leiter Minerals, Inc. v. *United States,* 352 U. S. 220 (1957), held that the restrictions of § 2283 do not apply to the Federal Government. The Board identifies itself with the United States and therefore asserts that § 2283 is inapplicable to it. I cannot agree. The juridical status of the Board is not perfectly congruent with that of the United States. For example, although it may file claims for back pay in bankruptcy proceedings, it does not enjoy the priority accorded to debts owing to the United States. *Nathanson* v. *NLRB,* 344 U. S. 25 (1952).[2] *Leiter Minerals* had nothing to do with the cir-

[2] In *Nathanson,* as here, the Board was attempting to protect the § 7 rights of private parties. If anything, the situation in *Nathanson* was a much stronger one for equating the status of the Board to that of the United States, since there the Board was seeking to enforce a back pay award (by filing a proof of claim against the employer, who had become a bankrupt, and asserting that its back pay order was entitled to the priority of a debt owing the United States under § 64 (a)(5) of the Bankruptcy Act, 11 U. S. C. § 104 (a)(5)) which it had assessed after adjudicating the employer guilty of a § 8 unfair labor practice. The Board was thus clearly discharging a designated statutory function, as distinguished from the instant case where the Board's jurisdiction to evaluate the disputed picketing in an unfair labor practice proceeding is totally unclear. The Court held, however, that "[i]t does not follow that because the Board is an agency of the United States, any debt owed it is a debt owing the United States" under the Bankruptcy Act, 344 U. S., at

cumstances in which an agency such as the NLRB should be treated as the United States; nor does that case purport to modify the rule of *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U. S. 81, 85 (1941), that the intention of Congress to bestow the privileges and immunities of the United States on a federal agency must be clearly manifest.[3] The authority of the Federal Government to secure an injunction in *Leiter Minerals* was implied under the judicial rule that a statute that divests pre-existing rights or privileges will not be applied to the sovereign in the absence of explicit language. 352 U. S., at 224. In the instant case, however, we deal with a statutorily defined agency created after the passage of § 2283 and possessing certain specified injunctive powers. The Board can claim no residual sovereignty such as that which was held in *United States*

27, and it disallowed the asserted priority on the ground that the function of the precedence given the United States under the Bankruptcy Act was to insure the collection of claims that had accrued to the fisc. The majority's attempt to distinguish *Nathanson* is less than convincing.

[3] Both *Menihan* and the present case present the question of whether a Governmental agency is clothed with a particular attribute of sovereignty: in *Menihan,* an exemption from payment of costs after unsuccessful litigation under Fed. Rule Civ. Proc. 54 (d) which was afforded to "the United States, its officers, and agencies . . . to the extent permitted by law," in the present case, an implicit exemption from § 2283. The Court emphasized that because the doctrine of sovereign immunity gives the Government a privileged position, it has been "appropriately confined," 312 U. S., at 84, and noted that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Ibid.*, quoting *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 388 (1939). Since "there is no presumption that the agent is clothed with sovereign immunity," 312 U. S., at 85, the Court examined the statute establishing the RFC and concluded that there was no affirmative indication by Congress that it had meant to exempt the RFC from paying costs after it had lost a lawsuit.

v. *United Mine Workers,* 330 U. S. 258, 272–273 (1947), to exempt the United States Government from the restrictions of the Norris-LaGuardia Act, and by a familiar rule of statutory construction, the enumeration of its injunctive powers should be held to preclude the existence of other powers.[4] In light of the congressional disinclination to authorize anything more than extremely limited interferences with state court proceedings by federal courts, and in view of this Court's reluctance to approve such interference by way of the equitable powers of federal courts, *Younger* v. *Harris,* 401 U. S. 37, 43–45 (1971); *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281, 286 (1970), implicit exceptions from § 2283 are at best suspect.

Section 2283 clearly permits injunctions against state court proceedings if "expressly authorized by Act of Congress." There is no claim here that the injunction sought by the Board is expressly authorized by any statute. Indeed, it is admitted that express authorization is lacking, and we are asked to imply such power. The Court does so, but its holding ignores both the language and the traditional interpretation of § 2283 and is inconsistent with the regulatory scheme of the LMRA.

Section 8 of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, specifies unfair labor practices by employers and unions. Section 9 provides for Board determination of bargaining units and employee representatives. Section 10 specifies the procedures to be employed in preventing unfair labor practices prohibited by § 8. Two aspects of § 10 are critical here. First, the Board is not granted unqualified powers to enforce the Act. The statute conditions Board

[4] This rule has been frequently recognized by the Court, *United States* v. *De la Maza Arredondo,* 6 Pet. 691, 724 (1832); *Kendall* v. *United States,* 107 U. S. 123, 125 (1883); *Neuberger* v. *Commissioner of Internal Revenue,* 311 U. S. 83, 88 (1940).

action against unfair labor practices upon the filing of a charge; it may not act on its own motion. The requirement is jurisdictional. *Montgomery Ward & Co.* v. *NLRB*, 385 F. 2d 760, 763 (CA8 1967); *Texas Industries, Inc.* v. *NLRB*, 336 F. 2d 128, 132 (CA5 1964); *Int'l Union of Electrical, Radio & Machine Workers* v. *NLRB*, 110 U. S. App. D. C. 91, 94, 289 F. 2d 757, 760 (1960); *Consumers Power Co.* v. *NLRB*, 113 F. 2d 38, 41–43 (CA6 1940); *NLRB* v. *Hopwood Retinning Co.*, 98 F. 2d 97, 101 (CA2 1938); *NLRB* v. *National Licorice Co.*, 104 F. 2d 655, 658 (CA2 1939), modified on other grounds, 309 U. S. 350 (1940); *Douds* v. *Int'l Longshoremen's Assn.*, 147 F. Supp. 103, 108 (SDNY 1956), aff'd, 241 F. 2d 278 (CA2 1957). See also *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 369 (1940). The Board has no roving, unqualified power to prevent unfair labor practices or to enforce the provisions of § 7 declaring that employees shall have the right to organize, bargain collectively, and otherwise engage in concerted activities. In the case before us, no unfair labor practice charge arising out of the union's picketing has been filed, either by the union or by the employer. Yet the Board appeared in a federal court seeking an injunction seemingly aimed at protecting employee rights guaranteed by § 7.

Second, after a charge has been filed and an unfair labor practice complaint has been issued the Act grants the Board the power to seek "appropriate temporary relief or restraining order" from the courts. § 10 (j). Further, § 10 (l) specifies in even greater detail the circumstances under which temporary injunctions may be secured when charges under §§ 8 (b)(4)(A), 8 (b)(4)(B), 8 (b)(4)(C), 8(e), or 8 (b)(7) have been filed with the Board. Sections 10 (e) and 10 (f) define the powers of the Board and the courts to issue injunctions in connection with enforcement of Board orders after unfair labor practices have been adjudicated

by the Board. Nowhere in the statute is there a provision authorizing the Board to seek injunctions prior to the filing of unfair labor practices or the issuance of a complaint. Nowhere is the Board authorized to use the injunctive power to enforce § 7 rights, except in connection with adjudicating unfair practices. Congress specified the powers of the Board with some care, particularly its powers to seek injunctions. Manifestly, Congress was aware of its longstanding policy against indiscriminate injunctions in labor disputes; for in § 10 (h) it exempted from the Norris-LaGuardia Act only those situations where the courts are "granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, *as provided in this section . . .*" (Emphasis added.) On the floor of the Senate, Senator Smith answered the contention that the passage of § 10 (l) would weaken the Norris-LaGuardia Act:

> "The only comment I can make on that statement is that we were very careful in this bill to protect the injunctive process as it is protected in the Norris-LaGuardia Act, except in exceptional cases where the Government has to step in. In national paralysis cases we permit the Attorney General to step in, and in the boycott and jurisdictional strike cases we permit the National Labor Relations Board to step in; *and there is no other approach to the courts for injunction except in those two situations.*" 93 Cong. Rec. 4283. (Emphasis added.)

In such a context, today's decision is improvident. As a statutory matter under the Labor Management Relations Act, the Board has no power to seek the injunction it now demands even absent the barriers established by § 2283. And under that section, it is error to clothe the

agency with the exception applicable to the United States. When an agency of the United States, rather than the United States itself, is plaintiff in an injunction action, the specific exceptions to § 2283 should be deemed controlling, particularly that exception directing inquiry to whether the injunction is "expressly authorized by Act of Congress." Here it is plain to me that the Board has no such power as it now claims to have, and I would affirm the judgment below.

II

A few additional words are appropriate. Even if, contrary to my view, the Board has power to seek an injunction to prevent interference with § 7 rights absent an unfair labor practice charge, it should not be able to obtain equitable relief by the mere conclusory allegation that such rights are "arguably" protected under the LMRA. Although § 7 rights must be interpreted according to federal law, "Congress has not federalized the entire law of labor relations," *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 309 (1971) (WHITE, J., dissenting), nor has it wholly displaced state and federal courts in the administration of federal labor policy.

The employer in this case was subjected to picketing that it thought illegal and unprotected. It sought and was granted a state court injunction over protests that state judicial power was pre-empted by federal law and the exclusive jurisdiction of the NLRB. Rather than allowing the union to appeal the injunction through the state court system, and to this Court if necessary, as the union would ordinarily have to do, *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers, supra,* the Court today permits the Board to short-circuit that process by securing a federal injunction, solely upon allegations that the conduct of the union was arguably protected under federal law and was within the

exclusive jurisdiction of the NLRB. The Board does not, however, intimate what provisions of the LMRA the union was violating in picketing this employer. It does not assert the existence or imminence of an unfair labor practice by either side in connection with the picketing. It suggests no way in which the employer could secure an adjudication of whether the union's conduct was protected under federal law. It does not indicate what "superior federal interests" the state decree frustrated. Absent an unfair labor practice charge and complaint, the Board itself has no jurisdiction at all, let alone exclusive jurisdiction, to hold hearings and issue cease-and-desist orders to prevent interference with § 7 rights in situations like this.

Congress' swift overruling of the Court's decision in *Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1 (1957), by passage of NLRA § 14 (c), 73 Stat. 541, 29 U. S. C. § 164 (c), should make the Court approach with great caution the creation of another "vast no-man's land, subject to regulation by no agency or court." *Id.*, at 10. The NLRA was not enacted in a void and its strictures presuppose a certain degree of state authority and regulation:

> "A holding that the States were precluded from acting [to enforce their trespass laws against invasions of private property] would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially *create* a no-law area." *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223, 228 (1970) (BURGER, C. J., concurring) (emphasis in original).

The Board should not, therefore, be able to obtain an injunction by merely alleging that conduct is "argu-

ably protected" by the LMRA. This rationale for pre-empting the applicability of state law and the authority of state courts developed to protect the exclusive jurisdiction of the Board. *Int'l Longshoremen's Assn., Local 1416* v. *Ariadne Shipping Co.*, 397 U. S. 195, 201 (1970) (WHITE, J., concurring); *Taggart* v. *Weinacker's, Inc., supra,* at 227–228 (BURGER, C. J., concurring). Where the Board is itself not only unwilling but apparently powerless to move against the challenged conduct, this rationale is a species of federal overkill, pre-empting the field to protect nothing. Of course, federal law remains paramount in its own arena, but if the Board has power to enforce it in this situation, it should be required to prove its case before obtaining an injunction and should demonstrate that federal law has been violated and that equitable relief is necessary to prevent its frustration. An unwarranted and illogical lacuna in the legal regulation of labor-management relations should not be extended. The Board should not be entitled to an injunction against state court proceedings unless it persuades a federal court that the state decree is actually interfering with rights protected by federal law.

MR. JUSTICE BRENNAN would affirm the judgment of the Court of Appeals for the reasons stated in Part I of the dissenting opinion of MR. JUSTICE WHITE.

Syllabus

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL.

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

No. 70–32. Argued October 20, 1971—Decided December 8, 1971*

A labor organization that was the exclusive bargaining agent for employees "working" on hourly pay rates at one of respondent Company's facilities had negotiated with the Company an employee health insurance plan in which retired employees participated. Upon enactment of Medicare the Union sought mid-term bargaining to renegotiate the insurance benefits for retired employees. The Company, maintaining that Medicare made the insurance program useless and that retirees' benefits were not a mandatory subject of collective bargaining, stated that it would offer each retiree a stated monthly amount toward supplemental Medicare coverage. When, despite Union objections, the Company made the offer, the Union filed unfair labor practice charges with the National Labor Relations Board (NLRB). The NLRB concluded that the Company was guilty of unfair labor practices in violation of §§ 8 (a)(5) and (1) of the National Labor Relations Act (NLRA) and issued a cease-and-desist order. The NLRB held that the benefits of already retired employees were a mandatory subject of bargaining as "terms and conditions of employment" of the retirees themselves and, alternatively, of the active bargaining unit employees. It also held that the Company's "establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits" contrary to §§ 8 (d) and 8 (a)(5) of the Act. The Court of Appeals for the Sixth Circuit disagreed with the NLRB and refused to enforce its cease-and-desist order. *Held:*

1. Retirees' benefits are not, within the meaning of §§ 8 (a)(5) and 8 (d) of the NLRA, a mandatory subject of bargaining as "terms and conditions of employment" of the retirees. Pp. 163–176.

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*Together with No. 70–39, *National Labor Relations Board* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, also on certiorari to the same court.

(a) The collective-bargaining obligation extends only to the "terms and conditions of employment" of the employer's "employees," and the term "employee" has its ordinary meaning, *i. e.*, someone who works for another for hire, which excludes retirees. Pp. 165–171.

(b) The collective-bargaining obligation is limited to the "terms and conditions of employment" of the "employees" in the bargaining unit appropriate for the purpose of collective bargaining. Retirees were not members of the unit represented by the Union, because they were no longer "working." Nor could they be members, since they lack a substantial community of interests with the active employees in the unit. Pp. 171–175.

(c) Even if an industry practice of bargaining over retirees' rights exists, which is disputed, that cannot change the law and make into bargaining unit "employees" those who are not. Pp. 175–176.

2. Retirees' benefits are not a mandatory subject of bargaining as "terms and conditions of employment" of the active employees remaining in the bargaining unit, although their own future retirement plans are. Retirees' benefits do not "vitally" affect the "terms and conditions of employment" of current employees. The benefits that active workers may reap by including retired employees under the same health insurance contract as themselves are speculative and insubstantial at best. The relationship that the NLRB asserted exists between bargaining in behalf of retirees and the negotiation of active employees' retirement plans is equally too speculative a foundation on which to base an obligation to bargain. Pp. 176–182.

3. Even if the Company's offering the retirees an exchange for their withdrawal from the already negotiated health insurance plan was a unilateral mid-term "modification" of the plan within the meaning of § 8 (d) of the Act, which is disputed, it did not constitute an unfair labor practice, since it related to a permissive rather than a mandatory subject of bargaining. Pp. 183–188.

427 F. 2d 936, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., dissented.

Mortimer Riemer argued the cause for petitioner in No. 70–32. With him on the brief was *Lawrence M.*

Oberdank. *Norton J. Come* argued the cause for petitioner in No. 70–39. With him on the brief were *Solicitor General Griswold, Richard B. Stone, Arnold Ordman, Dominick L. Manoli,* and *Nancy M. Sherman.*

Guy Farmer argued the cause for respondents in both cases. With him on the brief was *Nicholas R. Criss, Jr.*

Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Laurence Gold, Thomas E. Harris,* and *Stephen I. Schlossberg* for the American Federation of Labor and Congress of Industrial Organizations et al., and by *Harold Edgar, David H. Marlin,* and *Robert J. Mozer* for the National Council of Senior Citizens.

Briefs of *amici curiae* urging affirmance were filed by *Milton A. Smith, Lawrence M. Cohen,* and *Gerard C. Smetana* for the Chamber of Commerce of the United States; by *Lambert H. Miller* and *Richard D. Godown* for the National Association of Manufacturers of the United States; and by *William C. Treanor* and *John W. Whittlesey* for Union Carbide Corp.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the National Labor Relations Act, as amended, mandatory subjects of collective bargaining include pension and insurance benefits for active employees,[1] and an employer's mid-term unilateral modification of such benefits constitutes an unfair labor practice.[2] This cause

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[1] See, *e. g., NLRB* v. *Black-Clawson Co.,* 210 F. 2d 523 (CA6 1954) (dictum); *NLRB* v. *General Motors Corp.,* 179 F. 2d 221 (CA2 1950); *W. W. Cross & Co.* v. *NLRB,* 174 F. 2d 875 (CA1 1949); *Inland Steel Co.* v. *NLRB,* 170 F. 2d 247 (CA7 1948).

[2] See, *e. g., NLRB* v. *Scam Instrument Corp.,* 394 F. 2d 884 (CA7 1968). Cf., *e. g., NLRB* v. *Huttig Sash & Door Co.,* 377 F. 2d 964 (CA8 1967); *C & S Industries, Inc.,* 158 N. L. R. B. 454 (1966). See also *NLRB* v. *Katz,* 369 U. S. 736 (1962).

presents the question whether a mid-term unilateral modification that concerns, not the benefits of active employees, but the benefits of already retired employees also constitutes an unfair labor practice. The National Labor Relations Board, one member dissenting, held that changes in retired employees' retirement benefits are embraced by the bargaining obligation and that an employer's unilateral modification of them constitutes an unfair labor practice in violation of §§ 8 (a)(5) and (1) of the Act. 177 N. L. R. B. 911 (1969).[3] The Court of Appeals for the Sixth Circuit disagreed and refused to enforce the Board's cease-and-desist order, 427 F. 2d 936 (1970). We granted certiorari, 401 U. S. 907 (1971). We affirm the judgment of the Court of Appeals.

I

Since 1949, Local 1, Allied Chemical and Alkali Workers of America, has been the exclusive bargaining representative for the employees "working" on hourly rates of pay at the Barberton, Ohio, facilities of respondent Pittsburgh Plate Glass Co.[4] In 1950, the Union and the Company negotiated an employee group health insurance plan, in which, it was orally agreed, retired employees could participate by contributing the required

[3] The Board has since adhered to its decision in: *Union Carbide Corp.-Linde Div.*, 76 L. R. R. M. 1585 (1971); *Westinghouse Electric Corp.*, 76 L. R. R. M. 1451 (1971); *Union Carbide Corp.*, 75 L. R. R. M. 1548 (1970); and *Hooker Chemical Corp.*, 75 L. R. R. M. 1357 (1970).

[4] The Labor Board's direction of election described the bargaining unit as: "all employees of the Employer's plant and limestone mine at Barberton, Ohio, *working* on hourly rates, including group leaders who *work* on hourly rates of pay, but excluding salaried employees and supervisors . . . ." (Emphasis supplied.) The Union was recertified in 1970, after the Board's decision in this cause, with the same unit description embracing only employees working on hourly rates.

premiums, to be deducted from their pension benefits. This program continued unchanged until 1962, except for an improvement unilaterally instituted by the Company in 1954 and another improvement negotiated in 1959.

In 1962 the Company agreed to contribute two dollars per month toward the cost of insurance premiums of employees who retired in the future and elected to participate in the medical plan. The parties also agreed at this time to make 65 the mandatory retirement age. In 1964 insurance benefits were again negotiated, and the Company agreed to increase its monthly contribution from two to four dollars, applicable to employees retiring after that date and also to pensioners who had retired since the effective date of the 1962 contract. It was agreed, however, that the Company might discontinue paying the two-dollar increase if Congress enacted a national health program.

In November 1965, Medicare, a national health program, was enacted, 79 Stat. 291, 42 U. S. C. § 1395 *et seq.* The 1964 contract was still in effect, and the Union sought mid-term bargaining to renegotiate insurance benefits for retired employees. The Company responded in March 1966 that, in its view, Medicare rendered the health insurance program useless because of a non-duplication-of-benefits provision in the Company's insurance policy, and stated, without negotiating any change, that it was planning to (a) reclaim the additional two-dollar monthly contribution as of the effective date of Medicare; (b) cancel the program for retirees; and (c) substitute the payment of the three-dollar monthly subscription fee for supplemental Medicare coverage for each retired employee.[5]

[5] Hospital benefits under Medicare are provided automatically to any social security annuitant 65 or over. Medical benefits are optional and, at the relevant time period, required a monthly three-dollar payment per person.

The Union acknowledged that the Company had the contractual right to reduce its monthly contribution, but challenged its proposal unilaterally to substitute supplemental Medicare coverage for the negotiated health plan. The Company, as it had done during the 1959 negotiations without pressing the point, disputed the Union's right to bargain in behalf of retired employees, but advised the Union that upon further consideration it had decided not to terminate the health plan for pensioners. The Company stated instead that it would write each retired employee, offering to pay the supplemental Medicare premium if the employee would withdraw from the negotiated plan. Despite the Union's objections the Company did circulate its proposal to the retired employees, and 15 of 190 retirees elected to accept it. The Union thereupon filed unfair labor practice charges.

The Board held that although the Company was not required to engage in mid-term negotiations, the benefits of already retired employees could not be regarded as other than a mandatory subject of collective bargaining. The Board reasoned that "retired employees are 'employees' within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits . . . ." 177 N. L. R. B., at 912. Moreover, "retirement status is a substantial connection to the bargaining unit, for it is the culmination and the product of years of employment." *Id.*, at 914. Alternatively, the Board considered "bargaining about changes in retirement benefits for retired employees" as "within the contemplation of the statute because of the interest which active employees have in this subject . . . ." *Id.*, at 912. Apparently in support of both theories, the Board noted that "[b]argaining on benefits for workers already retired is an established aspect of current labor-management relations." *Id.*, at 916. The Board also held that the

Company's "establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits" contrary to §§ 8 (d) and 8 (a)(5) of the Act. *Id.*, at 918. Accordingly, the Company was ordered to cease and desist from refusing to bargain collectively about retirement benefits and from making unilateral adjustments in health insurance plans for retired employees without first negotiating in good faith with the Union. The Company was also required to rescind, at the Union's request, any adjustment it had unilaterally instituted and to mail and post appropriate notices.[6]

II

Section 1 of the National Labor Relations Act declares the policy of the United States to protect commerce "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . ." 49 Stat. 449, as amended, 29 U. S. C. § 151. To effectuate this policy, § 8 (a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section" 9 (a). 49 Stat. 453, as amended, 29 U. S. C. § 158 (a)(5). Section 8 (d), in turn, defines "to bargain

[6] The Board found that the Company had violated not only § 8 (a)(5) but § 8 (a)(1), and the Board framed its cease-and-desist order accordingly. Section 8 (a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" § 7, which include "the right to self-organization . . . [and] to bargain collectively through representatives of their own choosing . . . ." 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a)(1), 157. However, the § 8 (a)(1) violation derives from the alleged § 8 (a)(5) misconduct and, therefore, presents no separate issues.

collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 61 Stat. 142, 29 U. S. C. § 158 (d). Finally, § 9 (a) declares: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 49 Stat. 453, as amended, 29 U. S. C. § 159 (a).

Together, these provisions establish the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment," with "the representatives of his employees" designated or selected by the majority "in a unit appropriate for such purposes." This obligation extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents. See, *e. g.*, *Mine Workers* v. *Pennington*, 381 U. S. 657, 666 (1965); *NLRB* v. *Borg-Warner Corp.*, 356 U. S. 342 (1958); *Packard Co.* v. *NLRB*, 330 U. S. 485 (1947); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 192 (1941) (dictum); *Pittsburgh Glass Co.* v. *NLRB*, 313 U. S. 146 (1941). The Board found that benefits of already retired employees fell within these constraints on alternative theories. First, it held that pensioners are themselves "employees" and members of the bargaining unit, so that their benefits are a "term and condition" of their employment.[7]

[7] The Court of Appeals below seems to have read the Board's decision as holding that retirees might be considered "employees"

The Court of Appeals, in contrast, held "that retirees are not 'employees' within the meaning of section 8 (a) (5) and . . . the Company was under no constraint to collectively bargain improvements in their benefits with the Union." 427 F. 2d, at 942. The court reasoned, *first*, "[r]etirement with this Company, as with most other companies, is a complete and final severance of employment. Upon retirement, employees are completely removed from the payroll and seniority lists, and thereafter they perform no services for the employer, are paid no wages, are under no restrictions as to other employment or activities, and have no rights or expectations of reemployment," *id.*, at 944; and, *second*, "[i]t has repeatedly been held that the scope of the bargaining unit controls the extent of the bargaining obligation . . . . [And] the unit certified by the Board as appropriate was composed . . . only of presumably active employees . . . ." *Id.*, at 945. For the reasons that follow we agree with the Court of Appeals.

First. Section 2 (3) of the Act provides:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ." 49 Stat. 450, as amended, 29 U. S. C. § 152 (3).

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under the Act, but not as finding that the retirees in this case were. See 427 F. 2d, at 944 n. 14. We do not read the Board's decision that way. The Board said: "For the reasons stated above, the 'underlying economic facts' of this case persuade us that Congress intended to confer employee status on retired employees with respect to health insurance plans affecting them." 177 N. L. R. B. 911, 914.

We have repeatedly affirmed that the task of determining the contours of the term "employee" "has been assigned primarily to the agency created by Congress to administer the Act." *NLRB* v. *Hearst Publications,* 322 U. S. 111, 130 (1944). See also *Iron Workers* v. *Perko,* 373 U. S. 701, 706 (1963); *NLRB* v. *Atkins & Co.,* 331 U. S. 398 (1947). But we have never immunized Board judgments from judicial review in this respect. "[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *NLRB* v. *Hearst Publications, supra,* at 131.

In this cause we hold that the Board's decision is not supported by the law. The Act, after all, as § 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of "workers"—not those who have retired from the work force. The inequality of bargaining power that Congress sought to remedy was that of the "working" man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.

To the contrary, the legislative history of § 2 (3) itself indicates that the term "employee" is not to be stretched beyond its plain meaning embracing only those who work for another for hire. In *NLRB* v. *Hearst Publications, supra,* we sustained the Board's finding that newsboys were "employees" rather than independent contractors. We said that "the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' . . . leaves no doubt that its applicability is to be determined broadly, in

doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." The term "employee" "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." 322 U. S., at 129. Congress reacted by specifically excluding from the definition of "employee" "any individual having the status of an independent contractor." The House, which proposed the amendment, explained:

> "*An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire.* But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* . . . , the Board . . . held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' *'Employees' work for wages or salaries under direct supervision.* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary

> meanings." H. R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947) (emphasis added).

See also 93 Cong. Rec. 6441–6442; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 32–33 (1947). The 1947 Taft-Hartley revision made clear that general agency principles could not be ignored in distinguishing "employees" from independent contractors. *NLRB* v. *United Insurance Co.*, 390 U. S. 254, 256 (1968). Although *Hearst Publications* was thus repudiated, we do not think its approach has been totally discredited. In doubtful cases resort must still be had to economic and policy considerations to infuse § 2 (3) with meaning. But, as the House comments quoted above demonstrate, this is not a doubtful case. The ordinary meaning of "employee" does not include retired workers; retired employees have ceased to work for another for hire.

The decisions on which the Board relied in construing § 2 (3) to the contrary are wide of the mark. The Board enumerated "unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls—who have never been hired in the first place—as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the Act." 177 N. L. R. B., at 913 (citations omitted). Yet all of these cases involved people who, unlike the pensioners here, were members of the active work force available for hire and at least in that sense could be identified as "employees." No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an "employee."

The Board also found support for its position in decisions arising under § 302 (c)(5) of the Labor Management Relations Act, 61 Stat. 157, 29 U. S. C. § 186 (c)(5). Section 302 prohibits, *inter alia*, any payment by an employer to any representative of any of his employees. Subsection (c)(5) provides an exemption for payments to an employee trust fund established "for the sole and exclusive benefit of the employees of such employer" and administered by equal numbers of representatives of the employer and employees. The word "employee," as used in that provision, has been construed to include "current employees and persons who were . . . current employees but are now retired." *Blassie* v. *Kroger Co.*, 345 F. 2d 58, 70 (CA8 1965).[8] The Board considered that it would be anomalous to hold "that retired employees are not 'employees' whose ongoing benefits are fit subjects of bargaining under Section 8 (a)(5), while under [§ 302 (c)] they are 'employees' for the purpose of administering the same health insurance benefits. It would create the further anomaly that a union would not be entitled to act as the representative of retired employees under Section 8 (a)(5), while subject to an explicit statutory duty to act as their representative under [§ 302 (c)]." 177 N. L. R. B., at 915.[9]

Yet the rationale of *Blassie* is not at all in point. The question there was simply whether under § 302 (c)(5) retirees remain eligible for benefits of trust funds estab-

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[8] See also *Garvison* v. *Jensen*, 355 F. 2d 487 (CA9 1966); *Local No. 688, Int'l Bro. of Teamsters* v. *Townsend*, 345 F. 2d 77 (CA8 1965). Section 501 (3) of the Labor Management Relations Act provides that the term "employee" as used in that legislation has the same meaning as when used in the National Labor Relations Act. 61 Stat. 161, 29 U. S. C. § 142 (3).

[9] Although the Board referred to § 302 (b) rather than § 302 (c), it is clear from the context of the Board's discussion that the latter citation was the one intended.

lished during their active employment. The conclusion that they do was compelled by the fact that the contrary reading of the statute would have made illegal contributions to pension plans, which the statute expressly contemplates in subsections (A) and (C).[10] No comparable situation exists in this case. Furthermore, there is no anomaly in the conclusion that retired workers are "employees" within § 302 (c)(5) entitled to the benefits negotiated while they were active employees, but are not "employees" whose ongoing benefits are embraced by the bargaining obligation of § 8 (a)(5). Contrary to the Board's assertion, the union's role in the administration of the fund is of a far different order from its duties as collective-bargaining agent. To accept the Board's reasoning that the union's § 302 (c)(5) responsibilities dictate the scope of the § 8 (a)(5) collective-

[10] Section 302 (c)(5) provides an exemption:

"with respect to money or other thing of value paid to a trust fund established by such [employee] representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . : *Provided*, That (A) such payments are held in trust for the purpose of paying . . . for the benefit of employees, their families and dependents, for medical or hospital care, *pensions on retirement or death of employees*, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; . . . and (C) *such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . . .*" (Emphasis supplied.)

The express reference to pensions in subsections (A) and (C) requires that the phrase "for the sole and exclusive benefit of the employees of such employer" in the introductory clause to § 302 (c)(5) be read to include retirees.

bargaining obligation would be to allow the tail to wag the dog.[11]

Second. Section 9 (a) of the Labor Relations Act accords representative status only to the labor organization selected or designated by the majority of employees in a "unit appropriate" "for the purposes of collective bargaining." Section 9 (b) goes on to direct the Labor Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 49 Stat. 453, as amended, 29 U. S. C. § 159 (b). We have always recognized that, in making these determinations, the Board is accorded broad discretion. See *NLRB* v. *Hearst Publications,* 322 U. S., at 132–135; *Pittsburgh Glass Co.* v. *NLRB,* 313 U. S. 146 (1941). Moreover, the Board's findings of fact, if supported by substantial evidence, are conclusive. National Labor Relations Act, § 10 (e), 49 Stat. 454, as amended, 29 U. S. C. § 160 (e). But the Board's powers in respect of unit determinations are not without limits, and if its

[11] The Board adds an argument in its brief for construing "employee" in §§ 302 (c) (5) and 8 (a) (5) *in pari materia.* Not to read the term that way, the Board contends, "would frequently interject into welfare plan negotiations the troublesome threshold question whether particular proposals involved the administration of the written agreement, in which case the union would be entitled to represent retired employees, or its renegotiation, in which case . . . it would not." However, nothing we hold today precludes permissive bargaining over the benefits of already retired employees. Moreover, to the extent that "the troublesome threshold question" posited by the Board may arise, it is no different from the task of distinguishing the distinct functions of contract application and contract negotiation which employers and labor organizations are already accustomed to addressing.

decision "oversteps the law," *Packard Co.* v. *NLRB,* 330 U. S., at 491, it must be reversed.

In this cause, in addition to holding that pensioners are not "employees" within the meaning of the collective-bargaining obligations of the Act, we hold that they were not and could not be "employees" included in the bargaining unit. The unit determined by the Board to be appropriate was composed of "employees of the Employer's plant . . . working on hourly rates, including group leaders who work on hourly rates of pay . . . ." Apart from whether retirees could be considered "employees" within this language, they obviously were not employees "working" or "who work" on hourly rates of pay. Although those terms may include persons on temporary or limited absence from work, such as employees on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

In any event, retirees could not properly be joined with the active employees in the unit that the Union represents. "As a standard, the Board must comply . . . with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining." *Pittsburgh Glass Co.* v. *NLRB, supra,* at 165. The Board must also exercise care that the rights of employees under § 7 of the Act "to self-organization . . . [and] to bargain collectively through representatives of their own choosing" are duly respected. In line with these standards, the Board regards as its primary concern in resolving unit issues "to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment." 15 NLRB Ann. Rep. 39 (1950). Such a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a function-

ally distinct minority group of employees from being submerged in an overly large unit. See *Kalamazoo Paper Box Corp.*, 136 N. L. R. B. 134, 137 (1962).

Here, even if, as the Board found, active and retired employees have a common concern in assuring that the latter's benefits remain adequate, they plainly do not share a community of interests broad enough to justify inclusion of the retirees in the bargaining unit. Pensioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions, and all other terms of active employment. Incorporation of such a limited-purpose constituency in the bargaining unit would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining. Moreover, the risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits.[12]

But we need not rely on our own assessment of the probable consequences of including retirees in the bargaining unit to conclude that the resulting unit would

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[12] The Board argues in its brief that retirees will be at a greater disadvantage if they are required to bargain individually with the employer than if they are represented by the union. The argument assumes that collective bargaining over the benefits of already retired employees would be a one-way street in their favor. The assumption, however, is not free from doubt, as the Board itself recognized in its opinion, see 177 N. L. R. B., at 917, in declining to take a position on the question. Compare *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711 (1945), adhered to on rehearing, 327 U. S. 661 (1946), with § 9 (a) of the National Labor Relations Act. In any event, in representing retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents, with the result that the interests of active employees might at times be preferred to those of retirees. See Recent Developments, 68 Mich. L. Rev. 757, 766–767, 772–773 (1970).

be inappropriate. The Board itself has previously recognized that retirees do not have a sufficient interest to warrant participation in the election of a collective-bargaining agent. In *Public Service Corp. of New Jersey*, 72 N. L. R. B. 224, 229–230 (1947), for example, the Board stated:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2 (3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers. Accordingly, we find that pensioners are ineligible to vote in the election." [13]

The Board argues, however, that the pensioners' ineligibility to vote is not dispositive of their right to membership in the bargaining unit, since the franchise and the right to membership depend upon different levels of interest in the unit.[14] Yet in *W. D. Byron & Sons of Maryland, Inc.*, 55 N. L. R. B. 172, 174–175 (1944), which the Board found controlling in *Public Service Corp. of New Jersey*, see 72 N. L. R. B., at 230 n. 10, the Board not merely held ineligible to vote, but expressly

[13] See also *J. S. Young Co.*, 55 N. L. R. B. 1174 (1944). The Board indicates in its brief that it adheres to these decisions. Indeed, we are informed by the Company that the Board excluded retirees from the representation election that it conducted following its decision in this case. See n. 4, *supra*.

[14] The Board on that theory at one time withheld the right to vote from certain employees who were, nonetheless, acknowledged unit members. See, *e. g.*, *H. P. Wasson & Co.*, 105 N. L. R. B. 373 (1953). However, that policy was subsequently abandoned. See *Post Houses, Inc.*, 161 N. L. R. B. 1159, 1160 n. 1, 1172 (1966).

excluded from the bargaining unit pensioners who had little expectation of further employment. In any event, it would be clearly inconsistent with the majority rule principle of the Act to deny a member of the unit at the time of an election a voice in the selection of his bargaining representative.[15] The Board's own holdings thus compel the conclusion that a unit composed of active and retired workers would be inappropriate.

Third. The Board found that bargaining over pensioners' rights has become an established industrial prac-

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[15] Section 7 of the Act declares that "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing . . . ." Section 9 (a), in turn, provides that "[r]epresentatives designated or selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit . . . ." The majority rule principle that the Act thus establishes was adopted after considerable public controversy. Both the House and the Senate committees that reported out the Wagner bill were at pains to explain that the principle not only was necessary for the effective functioning of collective bargaining but was sanctioned by the philosophy of democratic institutions. Moreover, they carefully reviewed the provisions that the Act establishes to protect minority groups within the bargaining unit, such as the prohibition on discrimination in favor of union members. See H. R. Rep. No. 972, 74th Cong., 1st Sess., 18–20 (1935); S. Rep. No. 573, 74th Cong., 1st Sess., 13–14 (1935). The language of §§ 7 and 9 (a), coupled with this legislative history, makes plain that all unit members are enfranchised.

This is not to say that the Board is without power to develop reasonable regulations governing who may vote in Board-conducted elections. The House committee expressly indicated that the Board may "make and publish appropriate rules governing the conduct of elections and determining who may participate therein." H. R. Rep. No. 972, *supra*, at 20. Thus, the Board may, for example, withhold the ballot from employees hired after the election eligibility date. As Member Zagoria explained in his dissent from the Board's decision below, that rule "provides an administrative cutoff date for convenience in conducting elections, and to prevent payroll padding and other possible abuses." 177 N. L. R. B., at 919.

tice. But industrial practice cannot alter the conclusions that retirees are neither "employees" nor bargaining unit members. The parties dispute whether a practice of bargaining over pensioners' benefits exists and, if so, whether it reflects the views of labor and management that the subject is not merely a convenient but a mandatory topic of negotiation.[16] But even if industry commonly regards retirees' benefits as a statutory subject of bargaining, that would at most, as we suggested in *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203, 211 (1964), reflect the interests of employers and employees in the subject matter as well as its amenability to the collective-bargaining process; it would not be determinative. Common practice cannot change the law and make into bargaining unit "employees" those who are not.

III

Even if pensioners are not bargaining unit "employees," are their benefits, nonetheless, a mandatory subject of collective bargaining as "terms and conditions of employment" of the active employees who remain in the unit? The Board held, alternatively, that they are, on the ground that they "vitally" affect the "terms and conditions of employment" of active employees principally by influencing the value of both their current and future benefits. 177 N. L. R. B., at 915.[17] The Board ex-

[16] The Company also contends that the record is barren of any evidence to support the Board's findings on industry experience. Even if that is the case, the evidence cited by the Board may have properly been officially noticed. But we need not decide that question in view of our conclusion that the industrial practice that the Board found to exist does not validate its holdings.

[17] The additional interests that the Board found active employees have in pensioners' benefits were properly dealt with by the Court of Appeals below and do not need extended consideration here. The Board stated that "the Union and current employees have a legitimate interest in assuring that negotiated retirement benefits

plained: "It is not uncommon to group active and retired employees under a single health insurance contract with the result that . . . it is the size and experience of the entire group which may determine insurance rates." *Ibid.* Consequently, active employees may "benefit from the membership of retired employees in the group whose participation enlarges its size and might thereby lower costs per participant." *Ibid.* Furthermore, the actual value of future benefits depends upon contingencies, such as inflation and changes in public law, which the parties cannot adequately anticipate and over which they have little or no control. By establishing a practice of repre-

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are in fact paid and administered in accordance with the terms and intent of their contracts . . . ." 177 N. L. R. B., at 915. That interest is undeniable. But Congress has specifically established a remedy for breaches of collective-bargaining agreements in § 301 of the Labor Management Relations Act. 61 Stat. 156, 29 U. S. C. § 185. See, *e. g., Upholsterers' Int'l Union* v. *American Pad & Textile Co.*, 372 F. 2d 427 (CA6 1967). Similarly, Congress has expressly provided for employee representation in the administration of trust funds under § 302 (c)(5) of that Act. In any event, the question presented is not whether retirement rights are enforceable, but whether they are subject to compulsory bargaining.

The Board also noted "that changes in retirement benefits for retired employees affect the availability of employer funds for active employees." 177 N. L. R. B., at 915. That, again, is quite true. But countless other employer expenditures that concededly are not subjects of mandatory bargaining, such as supervisors' salaries and dividends, have a similar impact. The principle that underlies the Board's argument sweeps with far too broad a brush. The Board does suggest in its brief that pensioners' benefits are different from other employer expenses because they are normally regarded as part of labor costs. The employer's method of accounting, however, hardly provides a suitable basis for distinction. In any case, the impact on active employees' compensation from changes in pensioners' benefits is, like the effect discussed in the text of including retirees under the same health insurance plan as active employees, too insubstantial to bring those changes within the collective-bargaining obligation.

senting retired employees in resolving those contingencies as they arise, active workers can insure that their own retirement benefits will survive the passage of time. This, in turn, the Board contends, facilitates the peaceful settlement of disputes over active employees' pension plans. The Board's arguments are not insubstantial, but they do not withstand careful scrutiny.

Section 8 (d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. See, *e. g.*, *Fibreboard Corp.* v. *NLRB*, *supra*, at 220–221 (STEWART, J., concurring); *Richfield Oil Corp.* v. *NLRB*, 97 U. S. App. D. C. 383, 389–390, 231 F. 2d 717, 723–724 (1956). But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees. See, *e. g.*, *NLRB* v. *Borg-Warner Corp.*, 356 U. S. 342 (1958). Although normally matters involving individuals outside the employment relationship do not fall within that category, they are not wholly excluded. In *Teamsters Union* v. *Oliver*, 358 U. S. 283 (1959), for example, an agreement had been negotiated in the trucking industry, establishing a minimum rental that carriers would pay to truck owners who drove their own vehicles in the carriers' service in place of the latter's employees. Without determining whether the owner-drivers were themselves "employees," we held that the minimum rental was a mandatory subject of bargaining, and hence immune from state antitrust laws, because the term "was integral to the establishment of a stable wage structure for clearly covered employee-drivers." *United States* v. *Drum*, 368 U. S. 370, 382–383, n. 26 (1962).[18] Similarly,

[18] Specifically, we noted in *Oliver*, 358 U. S., at 294:

"[The collective-bargaining agreement constitutes] . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the . . . contract. The

in *Fibreboard Corp.* v. *NLRB, supra,* at 215, we held that "the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining . . . ." As we said there, *id.,* at 213, "the work of the employees in the bargaining unit was let out piecemeal in *Oliver,* whereas here the work of the entire unit has been contracted out."

The Board urges that *Oliver* and *Fibreboard* provide the principle governing this cause. The Company, on the other hand, would distinguish those decisions on the ground that the unions there sought to protect employees from outside threats, not to represent the interests of third parties. We agree with the Board that the principle of *Oliver* and *Fibreboard* is relevant here; in each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the "terms and conditions" of their employment.[19] But we disagree with the Board's assessment of the significance of a change in retirees' benefits to the "terms and conditions of employment" of active employees.

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inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service."

[19] This is not to say that application of *Oliver* and *Fibreboard* turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important. See *Fibreboard Corp.* v. *NLRB, supra,* at 217 (STEWART, J., concurring). But we have no occasion in this case to consider what, if any, those considerations may be.

The benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best. As the Board itself acknowledges in its brief, the relationship between the inclusion of retirees and the overall insurance rate is uncertain. Adding individuals increases the group experience and thereby generally tends to lower the rate, but including pensioners, who are likely to have higher medical expenses, may more than offset that effect. In any event, the impact one way or the other on the "terms and conditions of employment" of active employees is hardly comparable to the loss of jobs threatened in *Oliver* and *Fibreboard*. In *Fibreboard*, after holding that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is a mandatory subject of bargaining, we noted that our decision did "not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." 379 U. S., at 215. The inclusion of retirees in the same insurance contract surely has even less impact on the "terms and conditions of employment" of active employees than some of the contracting activities that we excepted from our holding in *Fibreboard*.

The mitigation of future uncertainty and the facilitation of agreement on active employees' retirement plans, that the Board said would follow from the union's representation of pensioners, are equally problematical. To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining. Moreover, provisions of those plans to guard against future contingencies are equally subsumed under the collective-bargaining obligation. Under the Board's

theory, active employees undertake to represent pensioners in order to protect their own retirement benefits, just as if they were bargaining for, say, a cost-of-living escalation clause. But there is a crucial difference. Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again.[20] To the contrary, they are free to decide, for example, that current income is preferable to greater certainty in their own retirement benefits or, indeed, to their retirement benefits altogether. By advancing pensioners' interests now, active employees, therefore, have no assurance that they will be the beneficiaries of similar representation when they retire. The insurance against future contingencies

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[20] Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer. Nothing in *Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952), is to the contrary. In *Howard* we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The reach and rationale of *Howard* are a matter of some conjecture. See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 157–159 (1957). But whatever its theory, the case obviously does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.

This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916–920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.,* 371 U. S. 195, 200–201 (1962); *Lewis* v. *Benedict Coal Corp.,* 361 U. S. 459, 470 (1960).

that they may buy in negotiating benefits for retirees is thus a hazardous and, therefore, improbable investment, far different from a cost-of-living escalation clause that they could contractually enforce in court. See n. 20, *supra*. We find, accordingly, that the effect that the Board asserts bargaining in behalf of pensioners would have on the negotiation of active employees' retirement plans is too speculative a foundation on which to base an obligation to bargain.

Nor does the Board's citation of industrial practice provide any ground for concluding otherwise. The Board states in its brief that "[n]either the bargaining representative nor the active employees . . . can help but recognize that the active employees of today are the retirees of tomorrow—indeed, such a realization undoubtedly underlies the widespread industrial practice of bargaining about benefits of those who have already retired . . . and explains the vigorous interest which the Union has taken in this case." But accepting the Board's finding that the industrial practice exists, we find nowhere a particle of evidence cited showing that the explanation for this lies in the concern of active workers for their own future retirement benefits.

We recognize that "classification of bargaining subjects as 'terms [and] conditions of employment' is a matter concerning which the Board has special expertise." *Meat Cutters* v. *Jewel Tea*, 381 U. S. 676, 685–686 (1965). The Board's holding in this cause, however, depends on the application of law to facts, and the legal standard to be applied is ultimately for the courts to decide and enforce. We think that in holding the "terms and conditions of employment" of active employees to be *vitally* affected by pensioners' benefits, the Board here simply neglected to give the adverb its ordinary meaning. Cf. *NLRB* v. *Brown*, 380 U. S. 278, 292 (1965).

IV

The question remains whether the Company committed an unfair labor practice by offering retirees an exchange for their withdrawal from the already negotiated health insurance plan. After defining "to bargain collectively" as meeting and conferring "with respect to wages, hours, and other terms and conditions of employment," § 8 (d) of the Act goes on to provide in relevant part that "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract" except upon (1) timely notice to the other party, (2) an offer to meet and confer "for the purpose of negotiating a new contract or a contract containing the proposed modifications," (3) timely notice to the Federal Mediation and Conciliation Service and comparable state or territorial agencies of the existence of a "dispute," and (4) continuation "in full force and effect [of] . . . all the terms and conditions of the existing contract . . . until [its] expiration date . . . ." [21]

[21] Section 8 (d) reads in full:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract

The Board's trial examiner ruled that the Company's action in offering retirees a change in their health plan did not amount to a "modification" of the collective-bargaining agreement in violation of § 8 (d), since the pensioners had merely been given an additional option that they were free to accept or decline as they saw fit.

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of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2)–(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." 29 U. S. C. § 158 (d).

The Board rejected that conclusion on the ground that there were several possible ways of adjusting the negotiated plan to the Medicare provisions and the Company "modified" the contract by unilaterally choosing one of them. The Company now urges, in effect, that we adopt the views of the trial examiner. We need not resolve, however, whether there was a "modification" within the meaning of § 8 (d), because we hold that even if there was, a "modification" is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining.

Paragraph (4) of § 8 (d), of course, requires that a party proposing a modification continue "in full force and effect . . . all the terms and conditions of the existing contract" until its expiration. Viewed in isolation from the rest of the provision, that language would preclude any distinction between contract obligations that are "terms and conditions of employment" and those that are not. But in construing § 8 (d), " 'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270, 285 (1956) (quoting *United States* v. *Boisdoré's Heirs,* 8 How. 113, 122). See also *NLRB* v. *Lion Oil Co.,* 352 U. S. 282, 288 (1957). Seen in that light, § 8 (d) embraces only mandatory topics of bargaining. The provision begins by defining "to bargain collectively" as meeting and conferring "with respect to wages, hours, and other terms and conditions of employment." It then goes on to state that "the duty to bargain collectively shall also mean" that mid-term unilateral modifications and terminations are prohibited. Although this part of the section is introduced by a "proviso" clause, see n. 21, *supra,* it quite plainly is to be construed *in pari materia* with the preceding definition. Accordingly, just as § 8 (d) defines the obligation to bar-

gain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement.[22]

The relevant purpose of § 8 (d) that emerges from the legislative history of the Act together with the text of the provision confirms this understanding. The section stems from the 1947 revision of the Act, an important theme of which was to stabilize collective-bargaining agreements. The Senate bill, in particular, contained provisions in §§ 8 (d) and 301 (a) to prohibit unilateral mid-term modifications and terminations and to confer federal jurisdiction over suits for contract violations. See S. 1126, 80th Cong., 1st Sess., §§ 8 (d), 301 (a). The bill also included provisions to make it an unfair labor practice for an employer or labor organization "to violate the terms of a collective-bargaining agreement." *Id.*, §§ 8 (a)(6), 8 (b)(5). In conference the Senate's proposed §§ 8 (d) and 301 (a) were adopted with relatively few changes. See H. R. Conf. Rep. No. 510, *supra,* at 34–35, 65–66. The provisions to make contract violations an unfair labor practice, on the other hand, were rejected with the explanation that "[o]nce parties have made a collective bargaining contract the

[22] In coming to a contrary conclusion, the trial examiner mistakenly relied on *Brotherhood of Painters, Local Union No. 1385,* 143 N. L. R. B. 678 (1963), where the Board held that a union violated § 8 (d) by refusing to execute a written contract containing a permissive term to which it had previously agreed. "The parties did discuss the provision," the Board reasoned, "and for us to hold that the Employers in this case may not insist on the inclusion of this provision in their contract would upset, if not undo, the stabilizing effects of the agreement which was reached after several negotiation meetings." *Id.*, at 680. The union was required to sign the contract at the employers' request, not because § 8 (d) reaches permissive terms, but because the union's refusal obstructed execution of an agreement on mandatory terms. Cf. *NLRB* v. *Katz, supra,* n. 2.

enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, at 42. The purpose of the proscription of unilateral mid-term modifications and terminations in § 8 (d) cannot be, therefore, simply to assure adherence to contract terms. As far as unfair-labor-practice remedies are concerned, that goal was to be achieved through other unfair-labor-practice provisions that were rejected in favor of customary judicial procedures. See *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 510–513 (1962).

The structure and language of § 8 (d) point to a more specialized purpose than merely promoting general contract compliance. The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare. Thus, the party desiring to make a modification or termination is required to serve a written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations. Accordingly, we think we accurately described the relevant aim of § 8 (d) when we said in *Mastro Plastics Corp.* v. *NLRB*, *supra*, at 284, that the provision "seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods . . . ."

If that is correct, the distinction that we draw between mandatory and permissive terms of bargaining fits the statutory purpose. By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining. When a proposed modification is to a permissive term, therefore, the purpose of facilitating accord on the proposal is not at all in point, since the parties are not

required under the statute to bargain with respect to it. The irrelevance of the purpose is demonstrated by the irrelevance of the procedures themselves of § 8 (d). Paragraph (2), for example, requires an offer "to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications." But such an offer is meaningless if a party is statutorily free to refuse to negotiate on the proposed change to the permissive term. The notification to mediation and conciliation services referred to in paragraph (3) would be equally meaningless, if required at all.[23] We think it would be no less beside the point to read paragraph (4) of § 8 (d) as requiring continued adherence to permissive as well as mandatory terms. The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract, see n. 20, *supra,* not in an unfair-labor-practice proceeding.[24]

As a unilateral mid-term modification of a permissive term such as retirees' benefits does not, therefore, violate § 8 (d), the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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[23] The notification required by paragraph (3) is "of the existence of a dispute." Section 2 (9) of the Act defines "labor dispute" to include "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment . . . ." 49 Stat. 450, as amended, 29 U. S. C. § 152 (9). Since controversies over permissive terms are excluded from the definition, a paragraph (3) notice might not be required in the case of a proposed modification to such a term even if § 8 (d) applied.

[24] It does not appear whether the collective-bargaining agreement involved in this cause provided for arbitration that would have been applicable to this dispute. We express no opinion, therefore, on the relevance of such a provision to the question before us.

MAYER *v.* CITY OF CHICAGO

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 70–5040. Argued October 14, 1971—
Decided December 13, 1971

Appellant was convicted on nonfelony charges of violating two city of Chicago ordinances and was sentenced to pay a fine of $250 on each offense. Desiring to appeal, he petitioned the trial court for a free trial transcript to support his appeal on the grounds of insufficient evidence and prosecutorial misconduct. Although the court found that he was indigent, it denied his application on the basis of an Illinois Supreme Court rule which provided for trial transcripts only in felony cases. Other rules provided alternatives to a transcript in the form of a "Settled Statement" or an "Agreed Statement of Facts." Without resorting to either alternative, appellant moved for a free transcript in the State Supreme Court. The motion was denied. *Held:*

1. Although the State must afford the indigent defendant a trial " 'record of sufficient completeness' to permit proper consideration of [his] claims," *Draper* v. *Washington*, 372 U. S. 487, 499, it need not necessarily furnish a complete verbatim transcript, but may provide alternatives that accord effective appellate review. Pp. 193–195.

2. When the defendant's grounds for appeal, as here, make out a colorable need for a complete transcript, the State has the burden of showing that only a portion thereof or an "alternative" will suffice for an effective appeal on those grounds. P. 195.

3. The distinction drawn by the State Supreme Court rule between felony and nonfelony offenses is an "unreasoned distinction" proscribed by the Fourteenth Amendment. Pp. 195–196.

4. The fact that the charges on which the appellant was convicted were punishable by a fine rather than by confinement does not lessen the invidious discrimination against an indigent defendant. Pp. 196–198.

Vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. BURGER, C. J., *post*, p. 199, and BLACKMUN, J., *post*, p. 201, filed concurring opinions.

Henry F. Field argued the cause for appellant. With him on the briefs were *Thomas B. McNeill* and *Robert A. Burt.*

Richard L. Curry argued the cause for appellee. With him on the brief were *William R. Quinlan* and *Edmund Hatfield.*

Vincent Bentivenga and *Paul P. Biebel, Jr.*, filed a brief for the State's Attorney of Cook County, Illinois, as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A jury in the Circuit Court of Cook County, Illinois, convicted appellant on nonfelony charges of disorderly conduct and interference with a police officer in violation of ordinances of the city of Chicago. He was sentenced to a $250 fine on each offense; violation of each ordinance carried a maximum penalty of $500. Desiring to appeal, he petitioned the Circuit Court for a free transcript of the proceedings of his trial to support his grounds of appeal that the evidence was insufficient for conviction and that misconduct of the prosecutor denied him a fair trial.[1] The Circuit Court

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[1] A court reporter was provided at appellant's trial pursuant to the State Court Reporters Act, Ill. Rev. Stat., c. 37, § 651 *et seq.* (1969). It was estimated that the cost of preparing a transcript would be $300. The record refers in some places to a two-day trial and in other places to a three-day trial.

Under Illinois law at the time of appellant's convictions an appeal lay as of right either to the Illinois Supreme Court or to the Illinois Appellate Court, depending upon the nature of the case or the contentions raised. See Constitution of Illinois 1870, Art. 6, §§ 5, 7. If a case was erroneously appealed to the wrong court, it was transferred to the proper court without any loss of rights. Illinois Supreme Court Rule 365, Ill. Rev. Stat., c. 110A, § 365 (1969). Of course, whether an appeal is discretionary or as of right does not

found that he was indigent, but denied his application, stating "that defendant was found guilty of ordinance violations and . . . rule 607 of the Supreme Court applies to felony cases." The reference was to Illinois Supreme Court Rule 607 (b), which in pertinent part provided: "In any case in which the defendant is convicted of a *felony,* he may petition the court in which he was convicted for a report of proceedings at his trial." [2] (Emphasis supplied.) Other Illinois Supreme

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affect an indigent's right to a transcript, since "[i]ndigents must . . . have the same opportunities to invoke the discretion of the" court as those who can afford the costs. *Burns* v. *Ohio,* 360 U. S. 252, 258 (1959).

[2] The full text of Rule 607 (b), Ill. Rev. Stat., c. 110A, § 607 (b) (1969), was as follows:

"Report of Proceedings. In any case in which the defendant is convicted of a felony, he may petition the court in which he was convicted for a report of proceedings at his trial. If the conduct on which the felony case is based was also the basis for a juvenile proceeding which was dismissed so the felony case could proceed, the defendant may include in his petition a request for a report of proceedings in the juvenile proceeding. The petition shall be verified by the petitioner and shall state facts showing that he was at the time of his conviction, and is at the time of filing the petition, without financial means to pay for the report. If the judge who imposed sentence, or in his absence any other judge of the court, finds that the defendant is without financial means with which to obtain the report of proceedings at his trial, he shall order the court reporter to transcribe an original and copy of his notes. The original of the report shall be certified by the reporter and filed with the clerk of the trial court as provided below, and the copy shall be certified by the reporter and delivered to the defendant without charge. The reporter who prepares a report of proceedings pursuant to an order under this rule shall be paid the same fee for preparing the transcript as is provided by law for the compensation of reporters for preparing transcripts in other cases."

Following *Griffin* v. *Illinois,* 351 U. S. 12 (1956), the Illinois Legislature authorized free transcripts for indigents "[u]pon imposition of any sentence in a criminal case." See Ill. Ann. Stat., c. 38,

Court rules, Rules 323 (c) and 323 (d), provided for alternatives to a transcript in the form of a "Settled Statement" or an "Agreed Statement of Facts." [3] Without resorting to either alternative, appellant made a motion in the Illinois Supreme Court for an order that he be

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§ 121–13 (a) and committee comments appended thereto (1964). However, under authority allowing the State Supreme Court, in effect, to amend code provisions governing criminal appeals, *id.*, § 121–1, the court promulgated Rule 607 (b) authorizing transcripts at state expense only for indigents convicted of a felony. The rule was amended effective July 1, 1971, to apply to "any case in which the defendant is convicted of an offense punishable by imprisonment for more than six months." 1971 Illinois Legislative Service, No. 5, p. 1703.

[3] These rules, Ill. Rev. Stat., c. 110A, § 323 (c) and (d) (1969), provided:

"(c) Procedure If No Verbatim Transcript Is Available. If no verbatim transcript of the evidence or proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within seven days after the notice of appeal is filed. Within 21 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within seven days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings.

"(d) Agreed Statement of Facts. The parties by written stipulation may agree upon a statement of the facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings."

These rules were also amended effective July 1, 1971, but not in ways material to this case. See 1971 Illinois Legislative Service, No. 5, p. 1690. Despite the provision limiting use of a "Settled" statement to cases where no verbatim transcript is "available" or "obtainable," the procedure of subsection (c) evidently is permissible even though the court reporter's notes are available for transcription. See Tone, New Supreme Court Rule on Expeditious and Inexpensive Appeals, 53 Ill. B. J. 18, 20 (1964).

furnished a transcript of proceedings without cost. The Supreme Court denied the motion in an unreported order without filing an opinion. We noted probable jurisdiction of appellant's appeal challenging the constitutionality of the limitation of Rule 607 (b) to felony cases. 401 U. S. 906 (1971).

I

Griffin v. *Illinois*, 351 U. S. 12 (1956), is the watershed of our transcript decisions. We held there that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.*, at 19. This holding rested on the "constitutional guaranties of due process and equal protection both [of which] call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Id.*, at 17. We said that "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence . . . ," *id.*, at 17–18, and concluded that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, at 19. Appellee city of Chicago urges that we re-examine *Griffin*. We decline to do so. For "it is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966).[4] Therefore, "[i]n all cases the duty of the State

[4] Our decisions on the question of free transcripts for indigents include: *Wade* v. *Wilson*, 396 U. S. 282 (1970); *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969); *Gardner* v. *California*, 393 U. S. 367 (1969); *Roberts* v. *LaVallee*, 389 U. S. 40 (1967); *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Lane* v. *Brown*, 372 U. S. 477 (1963); *Coppedge* v. *United States*, 369 U. S. 438 (1962); and *Eskridge* v. *Washington Prison Bd.*, 357 U. S. 214 (1958).

is to provide the indigent as adequate and effective an appellate review as that given appellants with funds . . . ." *Draper* v. *Washington*, 372 U. S. 487, 496 (1963). In terms of a trial record, this means that the State must afford the indigent a " 'record of sufficient completeness' to permit proper consideration of [his] claims." *Id.*, at 499 (quoting *Coppedge* v. *United States*, 369 U. S. 438, 446 (1962)).

A "record of sufficient completeness" does not translate automatically into a complete verbatim transcript. We said in *Griffin* that a State "may find other means [than providing stenographic transcripts for] affording adequate and effective appellate review to indigent defendants." 351 U. S., at 20. We considered this more fully in *Draper* v. *Washington*, *supra*, at 495–496:

> "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to

> this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review."

We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an "alternative" will suffice for an effective appeal on those grounds. This rationale underlies our statement in *Draper, supra,* at 498, that:

> "[T]he State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration of petitioners' contentions. The trial judge would have complied with . . . the constitutional mandate . . . in limiting the grant accordingly on the basis of such a showing by the State." [5]

II

The distinction between felony and nonfelony offenses drawn by Rule 607 (b) can no more satisfy the requirements of the Fourteenth Amendment than could the like

[5] See also *Gardner* v. *California,* 393 U. S., at 370 (noting no suggestion made of an adequate substitute for a full transcript); *Eskridge* v. *Washington Prison Bd.,* 357 U. S., at 215 (noting State's failure to show availability of trial notes).

distinction in the Wisconsin law, held invalid in *Groppi* v. *Wisconsin,* 400 U. S. 505 (1971), which permitted a change of venue in felony but not in misdemeanor trials. The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case. The distinction drawn by Rule 607 (b) is, therefore, an "unreasoned distinction" proscribed by the Fourteenth Amendment. *Rinaldi* v. *Yeager, supra,* at 310. That conclusion follows directly from our decision in *Williams* v. *Oklahoma City,* 395 U. S. 458, 459 (1969), rejecting the argument " 'that an indigent person, convicted for a violation of a city ordinance, quasi criminal in nature and often referred to as a petty offense, is [not] entitled to a case-made or transcript at city expense in order to perfect an appeal . . . .' "[6]

III

The city of Chicago urges another distinction to set this case apart from *Griffin* and its progeny. The city notes that the defendants in all the transcript cases previously decided by this Court were sentenced to some term of confinement. Where the accused, as here, is not subject to imprisonment, but only a fine, the city suggests that his interest in a transcript is outweighed by the State's fiscal and other interests in not burdening the appellate process. This argument misconceives the principle of *Griffin* no less than does the line that Rule 607 (b) expressly draws. *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against

[6] It is true, as the city of Chicago argues, that in *Williams* the defendant was effectively denied any right of appeal, whereas here a transcript was not a condition precedent for appeal. The constitutional infirmity in Rule 607 (b) is not the less for that reason. The indigent defendant must be afforded as effective an appeal as the defendant who can pay.

pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969).

We add that even approaching the problem in the terms the city suggests hardly yields the answer the city tenders. The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds. Moreover, the State's long-term interest would not appear to lie in making access to appellate processes from even its most inferior courts depend upon the defendant's ability to pay. It has been aptly said:

> "[F]ew citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people.
>
> "Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts." [7]

Arbitrary denial of appellate review of proceedings of the State's lowest trial courts may save the State some

[7] Murphy, The Role of the Police in Our Modern Society, 26 The Record of the Association of the Bar of the City of New York 292, 293 (1971).

dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice.

IV

We conclude that appellant cannot be denied a "record of sufficient completeness" to permit proper consideration of his claims. We repeat that this does not mean that he is automatically entitled to a full verbatim transcript. He urges that his claims of insufficiency of the evidence and prejudicial prosecutorial misconduct cannot be fairly judged without recourse to the trial record.[8] *Draper* suggests that these are indeed the kinds of claims that require provision of a verbatim transcript.[9] See also *Gardner* v. *California,* 393 U. S. 367 (1969). In *Draper,* however, the State of Washington did not undertake to carry its burden of showing that

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[8] It is not clear whether appellant seeks a full transcript. What he applied for and was denied in the Circuit Court was only "such portion of the trial transcript as the parties may designate." Moreover, he stated in his brief to the State Supreme Court that "it is expected that certain stipulations concerning *voir dire* will be forthcoming. The rest of the transcript up to the end of closing arguments is required."

[9] In *Draper,* 372 U. S., at 496–497, we remarked:

"Petitioners' contentions in the present case were such that they could not be adequately considered by the State Supreme Court on the limited record before it. The arguments about improper foundation for introduction of the gun and coat, for example, could not be determined on their merits—as they would have been on a nonindigent's appeal—without recourse, at a minimum, to the portions of the record of the trial proceedings relating to this point. Again, the asserted failure of proof with respect to identification of the defendants and the allegations of perjury and inconsistent testimony were similarly impossible to pass upon without direct study of the relevant portions of the trial record. Finally, the alleged failure of the evidence to sustain the conviction could not be determined on the inadequate information before the Washington Supreme Court."

something less than a complete transcript would suffice. Here the City of Chicago urges that the Illinois procedures for a "Settled" or "Agreed" statement may provide adequate alternatives. The city also argues that even if a verbatim record is required, less than a complete transcript may assure fair appellate review. We cannot address these questions, since the record before us contains only the parties' conflicting assertions; so far as appears, neither of the Illinois courts below regarded resolution of the dispute to be relevant in light of Rule 607 (b). That this was the view of the Circuit Court is clear. The order of the Supreme Court, however, may not have been based on the rule, but on the ground that appellant had the burden of showing that the alternatives of a "Settled" or "Agreed" statement were inadequate. We hold today that a denial of appellant's motion, either on the basis of the rule, or, in the context of his grounds of appeal, on the basis that he did not meet the burden of showing the inadequacy of the alternatives, would constitute constitutional error.

We are informed that appellant's appeal from his conviction has been docketed in the Illinois Supreme Court and that its disposition has been deferred pending our decision of this case. We therefore vacate the order of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion but add these observations chiefly to underscore that there are alternatives in the majority of cases to a full verbatim transcript of an entire trial. The references to what was said in *Draper* v. *Washington,* 372 U. S. 487 (1963), emphasize the duty of counsel as officers of the court to seek only what is

needed. In most cases, unlike this one, the essential facts are not in dispute on appeal, or if there is dispute it centers on certain limited aspects of the case. One need only examine briefs in appeals to see that at the appellate stage the area of conflict on the facts is generally narrow.

Every busy court is plagued with excessive demands for free transcripts in criminal cases.[1] My own experience over the years indicates that privately employed counsel are usually spartan in their demands because the client must pay his own costs. Unfortunately one consequence of the advent of the Criminal Justice Act and state counterparts is that when costs are paid by the public, counsel are sometimes profligate in their demands,

[1] It is not the increase in number of requested transcripts alone which has resulted in delay. The delay has been caused by the combination of this increase with the failure of the system to increase its ability to produce transcripts. Cf. Committee of Section of Criminal Law of American Bar Association, Appellate Delay in Criminal Cases: A Report, 2 Am. Crim. L. Q. 150, 153 (1964). In the typical situation in federal courts the reporter is an independent contractor selected by the Government to make a verbatim record of the entire proceedings. In some States the court reporter is an employee. In most systems the reporter independently contracts with the parties to transcribe the record at a certain fee per page. Although courts have supervisory power over the reporter, administration of the transcribing of the notes is often left largely if not completely to the discretion of the reporter. See generally Administrative Office of the United States Courts, The Court Reporting System in the United States District Courts 7–47 (1960). With the enormous increase in criminal cases, reporters are often unable to keep up with the demand for transcripts and at the same time continue with regular reporting. Some reporters fail to make adequate arrangements for stenographers to transcribe their notes, which can be done by someone other than the reporter. The failure of courts to give adequate supervision to the work of court reporters accounts for much of the delay in processing appeals. Courts have an obligation to exercise sufficient oversight of reporters to ensure that proceedings are transcribed with dispatch.

or yield their professional judgment to the client's desires. This is more than a matter of costs. An affluent society ought not be miserly in support of justice, for economy is not an objective of the system; the real vice is the resulting delay in securing transcripts and hence determining the appeal. When excessive demands are made by an appellant in order to postpone the day when the appeal is finally determined, because, for example, he is at liberty pending appeal,[2] a lawyer who cooperates is guilty of unprofessional conduct.

I quite agree with MR. JUSTICE BRENNAN that "a full verbatim record where that is necessary . . ." should be provided but judges and lawyers have a duty to avoid abuses that promote delays.

MR. JUSTICE BLACKMUN, concurring.

I concur in the opinion and judgment of the Court. I merely add an observation: The record indicates that in 1969, when the charges were brought against the appellant and he asserted his indigency, he was a third-year student in New York University Medical School. Perhaps, in the intervening two years, the appellant has completed his professional training. Perhaps by now he is even licensed and is earning his living. If so, these will be factors to be considered by the Illinois courts on remand.

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[2] See American Bar Association, Project on Standards for Criminal Justice, Criminal Appeals § 2.3 (Approved Draft 1970), which concludes that "[a]utomatic release pending appeal" is one of the "unacceptable inducements to taking appeals." See also *id.*, § 2.5.

VICTORY CARRIERS, INC., ET AL. *v.* LAW

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

No. 70–54. Argued October 18–19, 1971—
Decided December 13, 1971

State law and not federal maritime law *held* to govern suit by respondent longshoreman who was injured by alleged defect in his stevedore employer's pier-based forklift truck which respondent was operating on the dock to transfer cargo to a point alongside a vessel where it was to be hoisted aboard by the ship's own gear. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206, distinguished. Pp. 204–216.

432 F. 2d 376, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 216.

W. Boyd Reeves argued the cause for petitioners. With him on the briefs were *George F. Wood* and *T. K. Jackson, Jr.*

Ross Diamond, Jr., argued the cause for respondent. With him on the brief was *J. Cecil Gardner.*

E. D. Vickery, Dennis Lindsay, Francis A. Scanlan, and *J. Stewart Harrison* filed a brief for the National Maritime Compensation Committee as *amicus curiae* urging reversal.

David B. Kaplan filed a brief for the American Trial Lawyers Association as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question presented here is whether state law or federal maritime law governs the suit of a longshoreman

injured on a pier while driving a forklift truck which was moving cargo that would ultimately be loaded aboard ship.

The facts are undisputed. When the accident happened, respondent Bill Law, a longshoreman employed by Gulf Stevedore Corp. in Mobile, Alabama, was on the pier driving a forklift loaded with cargo destined for the S. S. *Sagamore Hill,* a vessel owned by petitioner Victory Carriers, Inc., which was tied up at the pier. Law had picked up the load on the dock and was transferring it to a point alongside the vessel where it was to be subsequently hoisted aboard by the ship's own gear. The forklift was owned and under the direction of his stevedore employer. As Law returned toward the pickup point, the overhead protection rack of the forklift came loose and fell on him. He subsequently brought an action in a federal District Court against the ship and Victory Carriers, Inc., claiming that the unseaworthiness of the vessel and the negligence of Victory had caused his injuries. His claim invoked both the diversity jurisdiction of the District Court under 28 U. S. C. § 1332 and its admiralty and maritime jurisdiction under 28 U. S. C. § 1333. Victory filed a third-party complaint against Gulf for indemnity in the event Victory was held liable to Law. The unseaworthiness claim became the critical issue.[1] On cross motions for summary judgment, the District Court gave judgment for petitioners on the ground that Law was not engaged in loading the vessel and that the doctrine of unseaworthiness did not extend to him. The Court of Appeals reversed. Relying on *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946), and *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206

[1] The District Court and the Court of Appeals dealt only with the unseaworthiness claim; the District Court did not pass on the question of whether or not the forklift was in fact defective. 432 F. 2d 376, 378 n. 2 (CA5 1970).

(1963), it held that the fundamental question was whether Law at the time was engaged in loading the *Sagamore Hill* and that since he was so engaged, he should be entitled to prove his allegations of unseaworthiness at a trial. We granted certiorari and now reverse the judgment of the Court of Appeals.

Article III, § 2, cl. 1, of the Constitution of the United States extends the federal judicial power "to all Cases of admiralty and maritime Jurisdiction." Congress has implemented that provision by 28 U. S. C. § 1333 which now provides that the district courts shall "have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Under the saving-to-suitors clause of § 1333, the plaintiff was entitled to assert his claims under the diversity jurisdiction of the District Court, as well as under § 1333 itself, cf. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 410–411 (1953), but under either section the claim that a ship or its gear was unseaworthy would be rooted in federal maritime law, not the law of the State of Alabama. *Id.*, at 409. Whether federal maritime law governed this accident in turn depends on whether this is a case within the admiralty and maritime jurisdiction conferred on the district courts by the Constitution and the jurisdictional statutes. More precisely, the threshold issue is whether maritime law governs accidents suffered by a longshoreman who is injured on the dock by allegedly defective equipment owned and operated by his stevedore employer. We hold that under the controlling precedents, federal maritime law does not govern this accident. Nor, in the absence of congressional guidance, are we now inclined to depart from prior law and extend the reach of the federal law to pier-side accidents caused by a stevedore's pier-based equipment.

The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States. Maritime contracts are differently viewed, but as Mr. Justice Story remarked long ago:

> "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." *Thomas* v. *Lane,* 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813).

The view has been constantly reiterated.[2]

> "The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the

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[2] *Waring* v. *Clarke,* 5 How. 441, 463–464 (1847); *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344, 394 (1848); *The Propeller Commerce,* 1 Black 574, 579 (1862); *The Plymouth,* 3 Wall. 20, 33 (1866); *The Rock Island Bridge,* 6 Wall. 213, 215 (1867); *The Belfast,* 7 Wall. 624, 637 (1869); *Ex parte Easton,* 95 U. S. 68, 72 (1877); *Leathers* v. *Blessing,* 105 U. S. 626, 630 (1882); *Ex parte Phenix Insurance Co.,* 118 U. S. 610, 618 (1886); *Johnson* v. *Chicago & Pacific Elevator Co.,* 119 U. S. 388, 397 (1886); *Panama R. Co.* v. *Napier Shipping Co.,* 166 U. S. 280, 285 (1897); *The Blackheath,* 195 U. S. 361, 367 (1904); *Cleveland Terminal & Valley R. Co.* v. *Cleveland S. S. Co.,* 208 U. S. 316, 319 (1908); *Martin* v. *West,* 222 U. S. 191, 197 (1911); *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59–60 (1914); *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 476 (1922); *T. Smith & Son* v. *Taylor,* 276 U. S. 179, 181 (1928); *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U. S. 36, 41 (1943); *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 409 (1953); *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U. S. 625, 628 (1959); *Hess* v. *United States,* 361 U. S. 314, 318 n. 7 (1960); *Rodrigue* v. *Aetna Casualty & Surety Co.,* 395 U. S. 352, 360–361 (1969);

> transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476 (1922).

The maritime law was thought to reach "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters . . . ." *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 60 (1914). But, accidents on land were not within the maritime jurisdiction as historically construed by this Court.[3] Piers and docks were consistently deemed

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Nacirema Operating Co. v. *Johnson*, 396 U. S. 212, 214–215 (1969); *Thomas* v. *Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813) (Story, J.); *De Lovio* v. *Boit*, 7 F. Cas. 418, 420 (No. 3,776) (CC Mass. 1815) (Story, J.); *Lake Shore & M. S. R. Co.* v. *The Neil Cochran*, 14 F. Cas. 949, 950 (No. 7,996) (ND Ohio 1872); *The Ottawa*, 18 F. Cas. 906, 907 (No. 10,616) (ED Mich. 1872); *Holmes* v. *O. & C. R. Co.*, 5 F. 75, 77 (Ore. 1880); *The Arkansas*, 17 F. 383, 384 (SD Iowa 1883); *The F. & P. M. No. 2*, 33 F. 511, 513 (ED Wis. 1888); *The H. S. Pickands*, 42 F. 239, 240 (ED Mich. 1890); *Hermann* v. *Port Blakely Mill Co.*, 69 F. 646, 647 (ND Cal. 1895); *The Strabo*, 90 F. 110, 113 (EDNY 1898); *Chapman* v. *City of Grosse Pointe Farms*, 385 F. 2d 962, 963 (CA6 1967); *Scott* v. *Eastern Air Lines, Inc.*, 399 F. 2d 14, 31 (CA3 1967) (concurring opinion); *Fireman's Fund American Insurance Co.* v. *Boston Harbor Marina, Inc.*, 406 F. 2d 917, 919 (CA1 1969); *Penn Tanker Co.* v. *United States*, 409 F. 2d 514, 518 (CA5 1969). "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." *Philadelphia, Wilmington, & Baltimore R. Co.* v. *Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209, 215 (1860). "In [maritime] torts . . . jurisdiction [of federal admiralty courts] depends solely upon the place where the tort was committed, which must have been upon the high seas or other navigable waters." *State Industrial Comm'n* v. *Nordenholt Corp.*, 259 U. S. 263, 271 (1922).

[3] *The Plymouth*, *supra*; *The Troy*, 208 U. S. 321 (1908); *Phoenix Construction Co.* v. *The Steamer Poughkeepsie*, 212 U. S. 558 (1908); *T. Smith & Son* v. *Taylor*, *supra*; *Rodrigue* v. *Aetna Casualty & Surety Co.*, *supra*, at 360; *Hastings* v. *Mann*, 340 F. 2d 910 (CA4),

extensions of land;[4] injuries inflicted to or on them were held not compensable under the maritime law. *The Plymouth,* 3 Wall. 20, 36 (1866); *Ex parte Phenix Insurance Co.,* 118 U. S. 610, 618–619 (1886); *Johnson* v. *Chicago & Pacific Elevator Co.,* 119 U. S. 388, 397 (1886); *Cleveland Terminal & Valley R. Co.* v. *Cleveland S. S. Co.,* 208 U. S. 316, 320 (1908). The gangplank has served as a rough dividing line between the state and maritime regimes.

In defense of this boundary and the exclusive jurisdiction of the maritime law, the Court twice rejected congressional efforts to apply state workmen's compensation statutes to shipboard injuries suffered by maritime workers and longshoremen.[5] Accepting these decisions, Congress passed the Longshoremen's and Harbor Work-

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cert. denied, 380 U. S. 963 (1965). "When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer [*sic*] must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied." *State Industrial Comm'n* v. *Nordenholt Corp., supra,* at 272–273.

[4] *Nacirema Operating Co.* v. *Johnson, supra,* at 214–215; *Swanson* v. *Marra Bros., Inc.,* 328 U. S. 1, 6 (1946); *Minnie* v. *Port Huron Terminal Co.,* 295 U. S. 647, 648 (1935); *T. Smith & Son* v. *Taylor, supra,* at 182; *State Industrial Comm'n* v. *Nordenholt Corp., supra,* at 275; 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).

[5] *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149 (1920); *Washington* v. *W. C. Dawson & Co.,* 264 U. S. 219 (1924). These congressional attempts were sparked by an earlier Supreme Court decision, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 (1917), which had held unconstitutional a New York workmen's compensation law as applied to a stevedore injured on the gangplank of a ship.

ers' Compensation Act [6] in 1927, providing a system of compensation for longshoremen injured on navigable waters but anticipating that dockside accidents would remain under the umbrella of state law and state workmen's compensation systems. *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212, 217–219 (1969); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256–257 (1940). The relative roles of state and federal law nevertheless remained somewhat confused on the seaward side of the pier.[7] But shoreward, absent legislation, the line held

[6] 44 Stat. 1424, 33 U. S. C. §§ 901–950. The Act's coverage is limited to those injuries and deaths "occurring upon the navigable waters of the United States (including any dry dock)." 33 U. S. C. § 903 (a).

[7] This confusion may be traced to the Court's modifying the doctrine of *Southern Pacific Co.* v. *Jensen*, *supra*, by preserving certain state remedies for accidents and deaths occurring on navigable waters. See *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921); *Grant Smith-Porter Ship Co.* v. *Rohde*, *supra*; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Davis* v. *Dept. of Labor and Industries*, 317 U. S. 249 (1942); *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962). All of these cases of overlapping state-federal jurisdiction have occurred on the seaward side of the *Jensen* line, however. The Court early upheld the power of States to provide workmen's compensation to longshoremen injured by accidents occurring on the dock, under the theory that since the pier is part of the land, application of state law here would not conflict with the uniform federal maritime law applied on navigable waters. *State Industrial Comm'n* v. *Nordenholt Corp.*, *supra*. In *Nacirema Operating Co.* v. *Johnson*, *supra*, the Court held that by limiting coverage under § 3 (a) of the Act, 33 U. S. C. § 903 (a), to accidents occurring "upon . . . navigable waters," Congress had not intended to cover accidents that occurred on piers permanently affixed to the shore: "*Calbeck* made it clear that Congress intended to exercise its full jurisdiction seaward of the *Jensen* line and to cover all injuries on navigable waters, whether or not state compensation was also available in particular situations. . . . 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." 396 U. S., at 220–221.

fast. The Court refused to permit recovery in admiralty even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks, or other shore-based property. *The Plymouth, supra; Cleveland Terminal & Valley R. Co.* v. *Cleveland S. S. Co., supra; The Troy,* 208 U. S. 321 (1908); *Martin* v. *West,* 222 U. S. 191 (1911).

Congress was dissatisfied with these decisions and passed the Admiralty Extension Act of 1948 specifically to overrule or circumvent this line of cases.[8] The law as enacted provided that "[t]he 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." 62 Stat. 496, 46 U. S. C. § 740. The statute survived constitutional attack in the lower federal courts[9] and was applied without question by this

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[8] 62 Stat. 496, 46 U. S. C. § 740. The House Report on the Admiralty Extension Act stated that the Act was being passed to remedy the "inequities" of cases such as *Cleveland Terminal & Valley R. Co., supra; The Troy, supra;* and *Martin* v. *West, supra,* which had held there was no admiralty jurisdiction to provide a remedy for damage done by ships on navigable water to land structures. H. R. Rep. No. 1523, 80th Cong., 2d Sess., 2 (1948). Congress had also passed the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, providing a statutory remedy for members of a ship's crew injured in the course of their employment. The Act covered crewmen injured ashore as well as aboard and was considered by this Court an extension of the ancient remedy of maintenance and cure which itself was a traditional and important exception to the usual rule that maritime law does not provide remedies for injuries on land. *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra.* Longshoremen, of course, are not covered by the Jones Act.

[9] *United States* v. *Matson Nav. Co.,* 201 F. 2d 610, 614–616 (CA9 1953); *American Bridge Co.* v. *The Gloria O,* 98 F. Supp. 71, 73–74 (EDNY 1951); *Fematt* v. *City of Los Angeles,* 196 F. Supp. 89, 93 (SD Cal. 1961).

Court in *Gutierrez, supra,* to provide compensation for a longshoreman injured on a dock by defective cargo containers being unloaded from a ship located on navigable waters. No case in this Court has sustained the application of maritime law to the kind of accident that occurred in this case. *State Industrial Comm'n* v. *Nordenholt Corp.,* 259 U. S. 263 (1922), has not been overruled. There, the Court held that compensation for a longshoreman injured when he slipped on a dock while stacking bags of cement that had been unloaded from a ship was governed by local law, not federal maritime law.

It is argued, however, that if a longshoreman may recover for unseaworthiness if injured on a ship in the course of the unloading process, *Seas Shipping Co.* v. *Sieracki, supra,* and if he has an unseaworthiness claim for injuries sustained on the pier and caused by the ship's unloading gear, *Gutierrez, supra,* he is also entitled to sue in admiralty when he is injured on the dock by his own employer's equipment at the time he is engaged in the service of a ship located on navigable waters. *Sieracki, supra,* however, did not call into question the extent of federal admiralty and maritime jurisdiction since the accident there occurred on navigable waters.[10] And in *Gutierrez, supra,* federal admiralty jurisdiction was clearly present since the Admiralty Extension Act on its face reached the injury there involved. The decision in *Gutierrez* turned, not on the "function" the stevedore was performing at the time of his injury, but, rather, upon the fact that his

[10] In *Sieracki,* the Court concluded:

"[F]or injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." 328 U. S., at 99 (footnote omitted).

injury was caused by an appurtenance of a ship, the defective cargo containers, which the Court held to be an "injury, to person . . . caused by a vessel on navigable water" which was consummated ashore under 46 U. S. C. § 740. The Court has never approved an unseaworthiness recovery for an injury sustained on land merely because the injured longshoreman was engaged in the process of "loading" or "unloading." [11] *Nacirema Operating Co.* v. *Johnson,* 396 U. S., at 223, a case decided several years after *Gutierrez,* makes this quite clear:

> "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."

See also *Rodrigue* v. *Aetna Casualty & Surety Co.,* 395 U. S. 352, 360 (1969).

We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved. We are dealing here with the intersection of federal and

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[11] In *Gutierrez,* the Court concluded that *"things about a ship,* whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used." 373 U. S., at 213 (emphasis added). In *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396 (1954), aff'g 205 F. 2d 478 (CA9 1953), and *Rogers* v. *United States Lines,* 347 U. S. 984 (1954), rev'g 205 F. 2d 57 (CA3 1954), the Court decided without opinion that an unseaworthiness recovery would be possible to a longshoreman injured by equipment brought aboard ship by the stevedore company. In both these cases, the accident occurred on navigable water: both longshoremen were injured while in the hold of a ship by defective apparatus attached to the ship's gear.

state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts. As the Court declared in *Healy* v. *Ratta,* 292 U. S. 263, 270 (1934), "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." See also *Romero* v. *Int'l Terminal Operating Co.,* 358 U. S. 354, 379–380, and 408 (BRENNAN, J., dissenting and concurring) (1959).

That longshoremen injured on the pier in the course of loading or unloading a vessel are legally distinguished from longshoremen performing similar services on the ship is neither a recent development nor particularly paradoxical. The maritime law is honeycombed with differing treatment for seamen and longshoremen, on and off the ship,[12] and affirmance of the Court of Appeals

[12] The Longshoremen's and Harbor Workers' Compensation Act does not cover seamen (who are defined there as "master[s] or member[s] of a crew of any vessel," 33 U. S. C. § 903 (a)(1)), and the compensation remedy provided by the Longshoremen's Act is a stevedore's exclusive remedy against his employer for shipboard injuries. 33 U. S. C. § 905. Representatives of maritime employees

would not equalize the remedies that both this Court and Congress have recognized are available to longshoremen injured on navigable waters and those injured ashore, whether in service of a ship or not.[13] In part, this differential treatment stems from the geographical and historical accident that personal injuries on land are covered, for the most part, by state substantive law while such injuries on navigable water are generally governed by federal maritime law. These two bodies of law do overlap and interpenetrate in some situations, and the amphibious nature of the longshoreman's occupation creates frequent taxonomic problems. In the present case, however, the typical elements of a maritime cause of action are particularly attenuated: respondent Law was not injured by equipment that was part of the ship's usual gear or that was stored on board, the equipment

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successfully opposed the efforts of Congress to include seamen under the Longshoremen's Act, see *Nogueira* v. *New York, New Haven & Hartford R. Co.*, 281 U. S. 128, 136 (1930); *Warner* v. *Goltra*, 293 U. S. 155, 159–160 (1934), since seamen preferred to remain free to proceed against their employer under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, and under suits for unseaworthiness and/or maintenance and cure. The latter remedy has traditionally been available to seamen but not to longshoremen, *Weiss* v. *Central R. Co.*, 235 F. 2d 309, 311 (CA2 1956), and the Court has stated that the remedies of an employee covered by the Longshoremen's Act and those of a seaman covered under the maritime doctrine of maintenance and cure are mutually exclusive. *Norton* v. *Warner Co.*, 321 U. S. 565, 570 (1944). The Jones Act gives seamen, at their election, the benefit of the provisions of the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51 *et seq.* Longshoremen now have no such election. *Swanson* v. *Marra Bros., Inc.*, 328 U. S., at 7. Although longshoremen may not obtain maintenance and cure, there are certain circumstances under which they may recover for injuries caused by unseaworthiness whether the accident occurred on board ship, *Seas Shipping Co.* v. *Sieracki, supra,* or on the dock, *Gutierrez* v. *Waterman S. S. Corp., supra.*

[13] See, *e. g., Nacirema Operating Co.* v. *Johnson,* 396 U. S., at 217–220.

that injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gangplank. Affirmance of the decision below would raise a host of new problems as to the standards for and limitations on the applicability of maritime law to accidents on land.[14] At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law.

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[14] The Fifth Circuit's expansive definition of loading (432 F. 2d, at 384) would be difficult to delimit. Already, summary judgment has been denied the shipowner where a warehouseman sued on an unseaworthiness theory after he had been injured by a power shovel he was using to transfer grain from a railroad car to a warehouse where it would be subsequently taken on board a ship. *Olvera* v. *Michalos,* 307 F. Supp. 9 (SD Tex. 1968). Summary judgment has also been denied when a longshoreman brought an unseaworthiness suit after he had been injured inside a pier shed; the "squeeze lift" truck he was driving struck an unidentified object on the shed floor causing the steering wheel to spin around and shatter plaintiff's wrist. *McNeil* v. *A/S Havtor,* 326 F. Supp. 226 (ED Pa. 1971). The attempt to define the process of "loading" for purposes of determining whether a longshoreman injured on shore can recover on an unseaworthiness claim has produced substantial confusion in the lower courts; the cases are impossible to rationalize. Denying compensation: *Forkin* v. *Furness Withy & Co.,* 323 F. 2d 638 (CA2 1963), *McKnight* v. *N. M. Paterson & Sons,* 286 F. 2d 250 (CA6 1960), cert. denied, 368 U. S. 913 (1961); *Henry* v. *S. S. Mount Evans,* 227 F. Supp. 408 (Md. 1964); *Sydnor* v. *Villain & Fassio e Compania,* 323 F. Supp. 850 (Md. 1971). Awarding compensation or denying summary judgment for defendant: *Spann* v. *Lauritzen,* 344 F. 2d 204 (CA3), cert. denied, 382 U. S. 938 (1965); *Chagois* v. *Lykes Bros. S. S. Co.,* 432 F. 2d 388 (CA5 1970); *Olvera* v. *Michalos, supra; McNeil* v. *A/S Havtor, supra.* Reliance upon the gangplank line as the presumptive boundary of admiralty jurisdiction, except for cases in which a ship's appurtenance causes damage ashore, recognizes the traditional limitations of admiralty jurisdiction, see nn. 2 and 3, *supra,* and decreases the arbitrariness and uncertainties surrounding amorphous definitions of "loading." Such uncertainties may prejudice both the longshoreman and the employer.

Without necessarily disagreeing with the proposition that the hazards of the longshoreman's occupation make him especially deserving of a remedy dispensing with proof of fault,[15] we are constrained to note that the longshoreman already has a remedy under state workmen's compensation laws that does not depend upon proving derelictions on the part of his employer. Recovery without proving negligence is not the issue here; nor is it the equities of the injured longshoreman's position as against those of the shipowner who has had and exercises no control whatsoever over the use of the stevedore's equipment on the dock. What is at issue is the *amount* of the recovery, not against a shipowner, but against the stevedore employer. As this case illustrates, the shipowner's liability for unseaworthiness would merely be shifted, with attendant transaction costs, to the stevedore by way of a third-party action for indemnity. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). The State's own arrangements for compensating industrial accidents would be effectively circumvented.

Perhaps such laws provide inadequate benefits, but we are poorly positioned to conclude that they do or for that reason to give special remedies to longshoremen when other employees operating forklifts for other employers in perhaps equally hazardous circumstances are

[15] A 1956 survey, based on 1954 data, concluded that the stevedoring occupation had a higher injury frequency rate than any other high-hazard industry studied. National Academy of Sciences-National Research Council, Maritime Cargo Transportation Conference, Longshore Safety Survey Report, Longshore Safety Survey: A Survey of Occupational Hazards in the Stevedore Industry 23 (1956). See also U. S. Dept. of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 1971, p. 345, for a comparison of the work-injury rate (both by severity and frequency) in the marine cargo handling industry with that in other industries. Cf. Note, Risk Distribution and Seaworthiness, 75 Yale L. J. 1174 (1966).

left to the mercies of state law. Claims like these are best presented in the legislative forum, not here.

This is particularly true since extending the constitutional boundaries of the maritime law would not require Congress to make an equivalent extension of the jurisdiction of the federal courts sitting in admiralty. Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution.[16]

Reversed.

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

Gutierrez v. *Waterman S. S. Corp.*, 373 U. S. 206, involved an injury to a longshoreman while he was on the dock unloading the ship. The injury was not inflicted by a defective appliance of the ship. He merely slipped on loose beans spilled on the dock from defective cargo containers belonging to the ship. Here the longshoreman was engaged in a phase of a loading operation; he was on the dock stacking cargo for loading and the appliance causing the injury belonged to the stevedore company.

The Court of Appeals properly concluded that that work was part of the loading process and that therefore the longshoreman was in the service of the ship. That gives pragmatic, realistic meaning to the concept of load-

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[16] Cf., *e. g.*, *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457–458 (1852); *Richardson* v. *Harmon*, 222 U. S. 96, 97 (1911); *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 385–388 (1924); *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21, 52 (1934); *Swanson* v. *Marra Bros., Inc.*, *supra*, at 5; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, *supra*, at 40–41.

ing and avoids the narrow, grudging, hypertechnical definition.

Loading is activity that involves work on the ship and on the dock. Longshoremen are both shipside workers and shoreside workers and move back and forth from deck to dock. At times an individual worker may be using the ship's appliances and a moment later the stevedore's appliances. But the work does not change in character. For example, although prior to his injury Law had normally been involved in loading or unloading, his specific assignments varied. On some days he was assigned to drive a forklift on board ship. On others, such as the day of the injury, he shuttled cargo between various points on the dock during the loading process. Respondent was subject to all the risks and hazards of loading the ship; and the humanitarian policy of the admiralty law has been to allow those who so service the ship to receive the protections usually afforded that class.

Equipment need not belong to the ship to be an appurtenance of the ship; and it may be such even though it belongs to the stevedore. We so held in *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396,[1] over the strenuous dissent of Mr. Justice Burton, joined by Mr. Justice Frankfurter and Mr. Justice Jackson. The critical question is whether the injury occurred during loading or unloading.[2] We there allowed recovery for injury to a longshoreman which occurred while he was loading the ship on the deck and which was caused by a defective block used by the stevedore company. And we followed

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[1] Accord: *Spann* v. *Lauritzen,* 344 F. 2d 204; *Chagois* v. *Lykes Bros. S. S. Co.,* 432 F. 2d 388; *Huff* v. *Matson Navigation Co.,* 338 F. 2d 205; *Thorson* v. *Inland Navigation Co.,* 270 F. 2d 432; *Ace Tractor & Equipment Co.* v. *Olympic S. S. Co.,* 227 F. 2d 274.

[2] See the Appendix to this opinion.

that decision in *Rogers* v. *United States Lines*, 347 U. S. 984, the same three Justices dissenting.

I would adhere to our decisions in the *Petterson* and *Rogers* cases and affirm the judgment of the Court of Appeals.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

This Court's decisions have rather consistently reflected the principle that because loading and unloading of vessels are abnormally dangerous such risks ought to be placed initially upon the shipowners and ultimately passed on through higher prices to the customers of the shipping industry.[1] See *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926); *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52 (1914). The most well-known explication of this principle was advanced in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 93–96 (1946), which held that longshoremen, as well as seamen, were entitled to recover under the doctrine of unseaworthiness for injuries sustained aboard ship:

> "That the liability may not be either so founded or so limited would seem indicated by the stress

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[1] Stevedoring is one of the most accident-prone professions in American industry. According to the National Academy of Sciences-National Research Council, Maritime Cargo Transportation Conference, Longshore Safety Survey 22–23 (1956), hazardous industries have the following accident frequency rates:

Stevedoring	92.3 per million man hours worked
Logging	74.3
Structural Steel Erection	47.5
Saw and Planing Mills	42.0
General Building	37.0

See also New York Shipping Assn., Safety Bureau, Annual Accidents (1965).

the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

. . . . .

"All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to

> work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship. Moreover, his ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. *Florez* v. *The Scotia,* 35 F. 916; *The Gilbert Knapp,* 37 F. 209, 210; *The Seguranca,* 58 F. 908, 909. That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection."

Although subsequent holdings sustaining the applicability of the doctrine of unseaworthiness might alternatively have been grounded in more mechanical rules, the language of the cases has instead been the broader principle explicated in *Sieracki.* For example, in *Reed* v. *The Yaka,* 373 U. S. 410, 414–415 (1963), holding that a longshoreman was not deprived by the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, of his unseaworthiness remedy merely because the shipowner happened also to be his stevedore-employer, the Court relied upon the policy expressed in *Sieracki:*

> "[W]e pointed out several times in the *Sieracki* case, which has been consistently followed since, that a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, *but in the hazards of the work.*" (Emphasis added.)

Similarly, the "humanitarian policy" rather than the more mechanical, albeit historical, maritime tests was the starting point in *Waldron* v. *Moore-McCormack Lines,* 386 U. S. 724, 728 (1967):

> "When this Court extended the shipowner's liability for unseaworthiness to longshoremen performing seamen's work, *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85—either on board or on the pier, *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206, either with the ship's gear or the stevedore's gear, *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396, either as employees of an independent stevedore or as employees of a shipowner *pro hac vice, Reed* v. *The Yaka,* 373 U. S. 410—we noted that 'the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the "humanitarian policy" of the doctrine of seaworthiness,' *id.,* at 413, should prevent the shipowner from delegating, shifting, or escaping his duty by using the men or gear of others to perform the ship's work."

A straightforward application of the *Sieracki* principle to the instant circumstances would clearly warrant recovery by Law, if his allegations are proved at trial, under the doctrine of unseaworthiness. He was driving a forklift laden with cargo which was to be hoisted aboard the S. S. *Sagamore Hill.* As he drove along the dock, a defective overhead rack became disengaged and crashed upon his head. The Court of Appeals correctly concluded that his activity had been part of the loading process and was protected by the *Sieracki* principle. And at least two other circuits have made similar conclusions under analogous conditions. See *Huff* v. *Mat-*

son Navigation Co., 338 F. 2d 205 (CA9 1964); *Spann* v. *Lauritzen*, 344 F. 2d 204 (CA3 1965); see also *Chagois* v. *Lykes Bros. S. S. Co.*, 432 F. 2d 388 (CA5 1970).

By ignoring completely the underlying reasoning of these cases and by focusing instead on the narrow facts involved in each of them, the majority gives short shrift to the policy of distributing loading and unloading risks of personal injury to the users of the shipping industry. The Court places special emphasis on the alignment in this case of three factual elements: (a) an injury to a longshoreman (rather than a seaman), (b) upon a dock (rather than upon a deck), (c) caused by defective equipment supplied by the stevedoring contractor (rather than by the shipowner). Thus the majority finds *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206 (1963), inapposite even though it involved both the first and second conditions,[2] and presumably would view *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396 (1954), inapposite even though it concerned both the first and last conditions.[3] But the mere fact that this Court has never decided a controversy composed of these precise elements is not an adequate reason for excepting such a circumstance from the scope of the *Sieracki* principle.

The majority offers three reasons for the exception. First, the Court seems to argue that the *Sieracki* principle has already been limited by *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212 (1969), holding that Congress did not intend that the Longshoremen's and Harbor Workers' Compensation Act would apply to *any* injury occurring off a ship. In *Johnson*, however, the Court

[2] Accord: *Rogers* v. *United States Lines*, 347 U. S. 984 (1954); *Spann* v. *Lauritzen*, 344 F. 2d 204 (CA3 1965); *Huff* v. *Matson Navigation Co.*, 338 F. 2d 205 (CA9 1964); *Chagois* v. *Lykes Bros. S. S. Co.*, 432 F. 2d 388 (CA5 1970).

[3] Accord: *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555 (CA2 1950).

clearly acknowledged that Congress' constitutional maritime power does not cease at the shoreline. *Id.*, at 223–224. And, obviously, the reach of 28 U. S. C. § 1333, conferring upon district courts original admiralty and maritime jurisdiction, as extended by the Admiralty Extension Act of 1948, 62 Stat. 496, 46 U. S. C. § 740, is not governed by the reach of the Harbor Workers' Act. In fact, the Court, while denying a compensation remedy under the Harbor Workers' Act, noted that an action for unseaworthiness would lie against the ship. 396 U. S., at 223 n. 19.

The primary reason offered to support the majority's exception to the *Sieracki* principle is that it is for Congress rather than the judiciary to determine the adequacy of state workmen's compensation laws, which, under the Court's holding, will now be the only remedy available to a longshoreman injured ashore during loading or unloading by pier-based equipment of the stevedoring contractor. See *Nacirema Operating Co.* v. *Johnson, supra.* While Congress, of course, is better equipped for precision analysis than a judicial forum, the courts have not been unaware that state workmen's compensation statutes provide puny awards compared to jury evaluations of personal injuries. See W. Prosser, The Law of Torts 555 (3d ed. 1964). Limited recovery was thought to have been necessary by most state legislatures in order to offset the imposition against an employer's liability regardless of fault. In keeping with admiralty courts' traditional solicitude for those injured in the maritime trade,[4] the Court did not defer to Congress in other instances approving longshoremen's recoveries even though it might also have been argued in those cases that the Harbor Workers' Act or state schemes

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[4] See *Dixon* v. *The Cyrus,* 7 F. Cas. 755 (No. 3,930) (Pa. 1789). See also *Peterson* v. *The Chandos,* 4 F. 645, 650 (Ore. 1880).

might have been adequate.[5] No reason is suggested why deference is needed in these circumstances. In any event, referring a litigant to Congress is normally appropriate where the Court is reluctant to accept his invitation to upset an established rule. Inasmuch as the *Sieracki-Petterson-Gutierrez* principle would appear to be the controlling precedent, the appropriate referral to the legislative process ought to be Victory Carriers, not Law.

Finally the majority says that: "Affirmance of the decision below would raise a host of new problems as to the standards for and limitations on the applicability of maritime law to accidents on land." Such problems were quickly brushed aside in *Gutierrez, supra,* at 210, in which "[v]arious far-fetched hypotheticals [were] raised, such as a suit in admiralty for an ordinary automobile accident involving a ship's officer on ship business in port, or for someone's slipping on beans that continue to leak from [defective cargo] bags in . . . Denver." Said the Court: "We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U. S. C. § 740 when . . . it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act." As in *Gutierrez,* the accident here occurred on the dock, and the specter of troubling hypotheticals elsewhere ought not to deter landward extension to loading or unloading injuries on the dock. Moreover, if a bright-line test is desirable, then the *Sieracki* policy would be

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[5] *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206 (1963); *Reed* v. *The Yaka*, 373 U. S. 410 (1963); *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396 (1954); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926); *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52 (1914).

less offended by a bright line drawn around both the ship and the dock than by a line cast only about the vessel. Statistical evidence suggests that the great bulk of high-risk maritime activity occurs on the ship and the adjoining pier. National Academy of Sciences—National Research Council, Maritime Cargo Transportation Conference, Longshore Safety Survey 75 (1956). See Comment, Risk Distribution and Seaworthiness, 75 Yale L. J. 1174, 1190 (1966).

BRITT *v.* NORTH CAROLINA

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 70–5041. Argued October 14, 1971—Decided December 13, 1971

Petitioner was convicted of murder a month after his previous trial had ended with a hung jury. Both trials took place in a small town before the same judge and with the same counsel and court reporter, who (as was conceded) was well known to defense counsel and other local lawyers and would have read back his notes to defense counsel before the second trial had he been asked to do so. Between the two trials petitioner, alleging indigency, filed a motion for a free transcript, which the trial court denied. The appellate court affirmed the conviction, holding that an adequate alternative to the transcript was available. *Held:* In the narrow circumstances of this case, a transcript was not needed for petitioner's defense. Pp. 227–230.

8 N. C. App. 262, 174 S. E. 2d 69, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and WHITE, JJ., joined. BLACKMUN, J., filed a statement concurring in the result, *post*, p. 230. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 230.

Robert G. Bowers argued the cause and filed a brief for petitioner.

Christine Y. Denson, Assistant Attorney General of North Carolina, argued the cause for respondent. With her on the brief was *Robert Morgan,* Attorney General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner's three-day murder trial ended in a mistrial when the jury reported a hopeless deadlock. A retrial was scheduled for the following month. In the interim, petitioner filed a motion alleging that he was indigent, and asking for a free transcript of the first trial. The trial court denied his motion, and the North

Carolina Court of Appeals affirmed, stating that the record of the case did not reveal a sufficient need for the transcript. 8 N. C. App. 262, 174 S. E. 2d 69 (1970). The North Carolina Supreme Court denied certiorari. We granted certiorari to determine whether the rule of *Griffin* v. *Illinois*, 351 U. S. 12 (1956), applies in this context. 401 U. S. 973 (1971). We conclude that it does, but that in the narrow circumstances of this case, no violation of that rule has been shown, and therefore we affirm.

Griffin v. *Illinois* and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.[1] The question here is whether the state court properly determined that the transcript requested in this case was not needed for an effective defense.

In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.[2] MR. JUSTICE

[1] *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969); *Gardner* v. *California*, 393 U. S. 367 (1969); *Roberts* v. *LaVallee*, 389 U. S. 40 (1967); *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Eskridge* v. *Washington Prison Board*, 357 U. S. 214 (1958); *Griffin* v. *Illinois*, 351 U. S. 12 (1956).

[2] See *Draper* v. *Washington*, *supra*, at 495–496, and other cases cited n. 1, *supra*.

DOUGLAS suggests that the North Carolina courts refused to order a transcript in this case both because petitioner failed to make a particularized showing of need, and because there were adequate alternative devices available to him.

We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case.[3] As MR. JUSTICE DOUGLAS makes clear, even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses.

But the court below did not use the language of "particularized need." It rested the decision instead on the second factor in the determination of need, that is, the availability of adequate alternatives to a transcript. The second trial was before the same judge, with the same counsel and the same court reporter, and the two trials were only a month apart. In these circumstances, the court suggested that petitioner's memory and that of his counsel should have furnished an adequate substitute for a transcript. In addition, the court pointed to the

[3] In *Griffin*, the Court was able to rely on a concession of need by the State, 351 U. S., at 13–14, 16. In subsequent cases the Court has taken judicial notice of the importance of a transcript in a variety of circumstances, see *Eskridge, supra,* at 215; *Gardner, supra,* at 369–370. Most recently in *Long* and *Roberts* the Court simply found it unnecessary to discuss the question, notwithstanding the fact that in *Roberts* Mr. Justice Harlan argued in dissent that petitioner had suggested no use to which the transcript could have been put, 389 U. S., at 43.

fact that petitioner could have called the court reporter to read to the jury the testimony given at the mistrial, in the event that inconsistent testimony was offered at the second trial.

We have repeatedly rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory or keep exhaustive notes of the testimony given at trial.[4] Moreover, we doubt that it would suffice to provide the defendant with limited access to the court reporter during the course of the second trial. That approach was aptly rejected as "too little and too late" in *United States ex rel. Wilson* v. *McMann,* 408 F. 2d 896, 897 (CA2 1969). At oral argument in this case, however, it emerged that petitioner could have obtained from the court reporter far more assistance than that available to the ordinary defendant, or to the defendant in *Wilson.* The trials of this case took place in a small town where, according to petitioner's counsel, the court reporter was a good friend of all the local lawyers and was reporting the second trial. It appears that the reporter would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request.[5]

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[4] While trial notes might well provide an adequate substitute for a transcript, the failure to make such notes does not bar an indigent prisoner from claiming the right to a free transcript, *Eskridge, supra,* at 215. As for requiring a prisoner to rely on his memory, this Court rejected that as an alternative to a transcript in *Gardner, supra,* at 369–370, and *Williams, supra,* at 459. Indeed, in *Long* we refused to consider any alternatives suggested by the State, on the ground that in that case a transcript was in fact available and could easily have been furnished. 385 U. S., at 194–195. Whether a transcript is similarly available in this case does not appear from the record.

[5] Tr. of Oral Arg. 12. Cf. *Avery* v. *Alabama,* 308 U. S. 444, 450–452 (1940) (Black, J.).

A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. In this case, however, petitioner has conceded that he had available an informal alternative which appears to be substantially equivalent to a transcript.[6] Accordingly, we cannot conclude that the court below was in error in rejecting his claim.

For these reasons the judgment is *Affirmed.*

MR. JUSTICE BLACKMUN concurs in the result, but he would dismiss the petition for certiorari as having been improvidently granted.

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

After the State's first murder prosecution of the petitioner ended in a hung jury in November 1969, Britt was retried, convicted, and sentenced to 30 years' imprisonment. During the interim between the two trials, the petitioner made a showing of indigency and asked that the State provide him with a free transcript of the mistrial. The trial court denied his motion despite Britt's contention that because a more affluent defendant could purchase such a transcript as a matter of right a denial of his request would offend the principle of *Griffin* v. *Illinois,* 351 U. S. 12 (1956). On appeal, the North Carolina Court of Appeals was likewise unconvinced by Britt's equal protection claim and affirmed the trial court's refusal to order a free transcript, stating that

[6] Cf. *Wade* v. *Wilson,* 396 U. S. 282 (1970), in which no such concession was made. In that case it simply appeared from the record that petitioner might have been able to borrow a transcript from the prosecutor, in light of the fact that he had done so in an earlier proceeding. We remanded the case to permit exploration of that possibility.

(a) the petitioner had not made a particularized showing of need, (b) he had been represented by the same lawyer at both trials, and therefore (c) any suspected inconsistencies in prosecution evidence could have been developed by counsel's putting on the court reporter to read earlier testimony of the first trial. Because I am persuaded by Britt's argument I would reverse the decision of the North Carolina Court of Appeals.

I

Griffin v. *Illinois, supra,* at 19, established the now familiar principle that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." While *Griffin* involved only the provision of a free transcript to an indigent on direct appeal, its underlying principle has achieved broader usage. We have witnessed a steady growth of its applications to other transcript cases,[1] to docketing fees,[2] and to right to counsel.[3]

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[1] *Wade* v. *Wilson,* 396 U. S. 282 (1970); *Gardner* v. *California,* 393 U. S. 367 (1969); *Roberts* v. *LaVallee,* 389 U. S. 40 (1967); *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966); *Draper* v. *Washington,* 372 U. S. 487 (1963); *Eskridge* v. *Washington Prison Board,* 357 U. S. 214 (1958); *Ross* v. *Schneckloth,* 357 U. S. 575 (1958); *People* v. *Montgomery,* 18 N. Y. 2d 993, 224 N. E. 2d 730 (1966). An indigent's right to a transcript of grand jury testimony in the federal courts is now protected by the Criminal Justice Act of 1964, at least to the extent that any defendant—whether rich or poor—has access thereto. 18 U. S. C. § 3006A (e)(1). In the Second and Seventh Circuits federal defendants have absolute rights to all grand jury minutes. *United States* v. *Youngblood,* 379 F. 2d 365 (CA2 1967); *United States* v. *Amabile,* 395 F. 2d 47, 53 (CA7 1968). And in all other circuits the grand jury testimony of an individual prosecution witness is discoverable under the recent amendments to the Jencks Act. 18 U. S. C. § 3500 (e)(3).

[2] *Boddie* v. *Connecticut,* 401 U. S. 371 (1971); *Smith* v. *Bennett,* 365 U. S. 708 (1961); *Burns* v. *Ohio,* 360 U. S. 252 (1959).

[3] *Anders* v. *California,* 386 U. S. 738 (1967); *Swenson* v. *Bosler,* 386 U. S. 258 (1967); *Douglas* v. *California,* 372 U. S. 353 (1963); see also *Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

Of these applications, *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), is most analogous to the instant circumstances. In *Roberts*, an indigent defendant before trial asked a state court to provide him with a free transcript of a preliminary hearing at which a key state witness had testified. In *Roberts*, as here, no special showing of need was made, the defendant was represented by the same counsel at all times, and the court reporter could have been called to read back previous testimony. *Id.*, at 43. Nonetheless, over the dissent of Mr. Justice Harlan that no prejudice had been shown, *id.*, at 44, we held that withholding the requested transcript was an invalid interposition of a financial consideration between an indigent prisoner and his right to sue for his liberty. *Id.*, at 42.

Here the request was for a mistrial transcript, whereas in *Roberts* a motion had been made for a preliminary hearing transcript. In the ways in which either might be used I can perceive no differences. In both sets of circumstances it would seem that defendants would be interested in better trial preparation and in better positions from which to challenge discrepancies in government witnesses' stories.[4] For both of these purposes a mistrial transcript would be more valuable than a preliminary hearing recording because the former is a virtual dry run of the entire prosecution's case, information which normally is clothed in top secrecy under the prevailing and restrictive rules against a criminal defendant's discovery.

[4] These two reasons were offered by the Second Circuit to explain why a mistrial transcript might be useful. *United States ex rel. Wilson* v. *McMann*, 408 F. 2d 896 (CA2 1969). Our discussion in *Roberts* did not suggest any ways in which the transcript of the pretrial hearing might have been useful, although our *per curiam* intimated that perhaps counsel desired to have a check against the testimony of a key witness, *Roberts* v. *LaVallee*, *supra*, at 41; nor did the Second Circuit's discussion of the issue, *United States ex rel. Roberts* v. *LaVallee*, 373 F. 2d 49 (CA2 1967).

Perhaps for these considerations the Second Circuit has squarely held that indigent state defendants have an absolute right to free transcripts of previous prosecutions ending in hung juries. *United States ex rel. Wilson* v. *McMann,* 408 F. 2d 896 (CA2 1969). As both here and in *Roberts,* Wilson had made no showing of particular need, had been represented by the same lawyer at all times, and could have called the court reporter to read back previous testimony. And, as here, the defendant had requested a mistrial transcript during the interim between the two prosecutions. The Second Circuit considered *Griffin* and *Roberts* controlling.

The North Carolina Court of Appeals, however, has rejected the *Griffin-Roberts-Wilson* cases and sought refuge in the pre-*Roberts* authority of *Nickens* v. *United States,* 116 U. S. App. D. C. 338, 323 F. 2d 808 (1963), which had emphasized, as did the court below, the defendant's failure to articulate a particular need for a transcript, the continuity of defense counsel, and the availability of the court reporter.[5] I thought that these arguments had been found irrelevant for constitutional purposes under *Griffin-Roberts-Wilson.*

II

The primary rationale offered to support the holding below is that the petitioner failed to make a showing of a particularized need for a mistrial transcript. Presum-

[5] *Nickens* v. *United States,* 116 U. S. App. D. C. 338, 323 F. 2d 808 (1963), was decided before the full development of our transcript cases. The majority opinion in *Nickens* gave the other issues in the case more plenary consideration. Judge Wright concurred in the majority's view that no transcript had been required but only because he believed a motion to obtain a transcript had not been properly raised. *Id.,* at 345, 323 F. 2d, at 815. Also cited in the North Carolina opinion was *Forsberg* v. *United States,* 351 F. 2d 242 (CA9 1965), also a pre-*Roberts* opinion, which relied solely on *Nickens* in denying a mistrial transcript to an indigent. *Id.,* at 248.

ably this rationale flows from the legitimate state interest in avoiding needless fiscal outlays. In related contexts we have rejected the notion that an impoverished accused in the federal courts may be refused a transcript simply because his lawyer is unable to articulate the very subtleties which might be buried in the document he seeks. For example, in *Hardy* v. *United States,* 375 U. S. 277 (1964), we required courts of appeals to order for indigent criminal appellants complete trial transcripts even for the preliminary purpose of determining whether their appeals might present nonfrivolous questions for review and therefore entitle them to *in forma pauperis* relief pursuant to 28 U. S. C. § 1915. We rejected the then-prevailing view that a full transcript for such purposes could only be provided for those appellants able to demonstrate a particular need for all parts thereof. The concurring opinion of four Justices concerning the value of a transcript in appellate advocacy is applicable to the analogous use of a mistrial transcript in formulating retrial strategy:

> "As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. . . .
>
> ". . . No responsible retained lawyer who represents a defendant at trial will rely exclusively on his memory (even as supplemented by trial notes) in composing a list of possible trial errors which delimit his appeal." *Hardy* v. *United States, supra,* at 288 (Goldberg, J., concurring).

Similarly, while counsel is studying mistrial minutes, the precise words used by a witness might trigger mental

processes resulting in legitimate defense strategies which otherwise might be overlooked. Such spontaneity can hardly be forecast and articulated in advance in terms of special or particularized need.

It is unnecessary, however, to speculate as to how often helpful subtleties in mistrial transcripts might actually be found because, as a more general matter, at least two compelling interests would be routinely served by providing paupers with free transcripts, even in cases where counsel were unable to specify the precise nature of the benefits of such discovery. As mentioned earlier, one such interest is that of effective trial preparation by counsel (who may realize that his counterpart, the prosecutor, will employ a similar document supplied at the State's expense during his own trial preparation). The other interest is that of anticipating possible discrepancies in prosecution witnesses' statements and in being prepared immediately to challenge such contradictions. See *Wilson, supra,* at 897. Because wealthier defendants tend to purchase transcripts as a matter of course simply on the strength of these recurring interests, it would appear that these benefits are ordinarily worth the fiscal burden of providing the documents regardless of how the cost of reproducing minutes may be distributed.[6]

When viewed in the broader context of a defendant's complete lack of criminal discovery procedures, the importance of a mistrial transcript becomes even clearer. Many commentators have criticized the persistent common-law prohibition against discovery by criminal de-

[6] Professor Robert Keeton notes that in civil cases involving large amounts of money it is standard practice for lawyers to place "a standing order with the reporter for 'daily copy' of the trial proceedings." R. Keeton, Trial Tactics and Methods 104 (1954). Presumably when wealthy clients are haled before criminal courts rather than before civil ones, their attorneys likewise place such standing orders.

fendants, characterizing present systems as "sporting theories of justice" and complaining of the vast advantage enjoyed by the prosecution in the marshaling of evidence.[7] While some States and the federal system have moved to liberalize defendants' discovery priv-

[7] The excessive disparity between the State and the accused in their respective investigative resources, and the common law's prohibition against discovery have been summarized as follows by one commentator:

"[T]he law enforcement agency is often at the scene of the crime shortly after its commission. While at the scene, the police have better access to witnesses with fresher recollections. They are authorized to confiscate removable evidence. In addition, the financial and investigatory resources of law enforcement agencies permit an extensive analysis of all relevant evidence.

"The defendant has the option of hiring a private investigator. However, the investigator will probably get to the scene long after the occurrence of the crime and after the police have made their investigation and removed all relevant physical evidence. The defendant's investigator may have difficulty viewing the scene if it is on private property. Witnesses may be less accessible; their recollections will probably be less precise. Indeed they may choose not to cooperate at all with the defendant's investigator. However, it may all be irrelevant if, as is often the case, the defendant is unable to afford an investigator or is incarcerated pending trial.

"The defendant is helpless to cope with the uncooperative witness while the prosecutor has numerous means to compel testimony. First, there is the possibility of [a] coroner's inquest or a preliminary hearing. And if the prosecution prefers not to have the defense present, some jurisdictions allow the prosecution to take testimony while the defendant and his attorney are excluded. The uncooperative witness can be subpoenaed to appear before the grand jury and required to testify, again without the presence of the defense. The defense cannot, usually, discover the grand jury minutes.

"Many states require that the defendant give notice of intended alibi or insanity defenses. The prosecution's burden, in bringing a charge, in contrast, has been substantially lessened. Mere recitation of the statute may be a sufficient pleading of the charge. Amendments to the indictment or information are liberally allowed; duplicity and variances are no longer serious defects. Liberal

ileges,[8] the common-law prohibition with limited exceptions still applies in North Carolina.[9] No criminal analogue has been enacted to complement the State's more modern and comprehensive rules of civil discovery.[10] Instead, its judiciary has continued to apply the common law's flat ban and as recently as 1964 has reaffirmed that policy. In *State* v. *Goldberg*, 261 N. C. 181, 134 S. E.

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pleading rules deprive the defendant of effective notice of the circumstances of the offense." Norton, Discovery in the Criminal Process, 61 J. Crim. L. C. & P. S. 11, 13–14 (1970).

See generally Handzel, Criminal Law: Pre-Trial Discovery—The Right of an Indigent's Counsel to Inspect Police Reports, 14 St. Louis U. L. J. 310 (1969); Moore, Criminal Discovery, 19 Hastings L. J. 865 (1968); A State Statute to Liberalize Criminal Discovery, 4 Harv. J. Legis. 105 (1967). Comment, Disclosure and Discovery in Criminal Cases: Where Are We Headed?, 6 Duquesne U. L. Rev. 41 (1967); Golden & Palik, Bibliography: Criminal Discovery, 5 Tulsa L. J. 207 (1968); Symposium: Discovery in Federal Criminal Cases, 33 F. R. D. 47 (1963); Brennan, Criminal Prosecution: Sporting Event or Quest For Truth?, 1963 Wash. U. L. Q. 279.

[8] See Fed. Rules Crim. Proc. 15–17. See also Note, Discovery Procedures Under New York's New Criminal Procedure Law, 38 Brooklyn L. Rev. 164 (1971); Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution, 7 A. L. R. 3d 8 (1966).

[9] Statutory exceptions to the common-law ban in North Carolina may be found at N. C. Gen. Stat. § 8–74 (1969) (depositions of witnesses unable to attend trial); and at § 15–155.4 (Supp. 1969). The latter provision was enacted in 1967 and permits limited discovery of prosecution evidence where (a) good cause is shown for discovery, (b) the prosecution intends to use the evidence at trial. The latter condition would effectively prevent defendants' discovery of evidence which might be favorable. The only reported decisions considering this addition are those in *State* v. *Macon*, 276 N. C. 466, 173 S. E. 2d 286 (1970), affirming 6 N. C. App. 245, 170 S. E. 2d 144 (1969), upholding the refusal of a trial court to permit an accused's inspection of notes which had been made by a specified police officer during the accused's interrogation.

[10] N. C. Gen. Stat. c. 1A (1969).

2d 334 (1964), the North Carolina Supreme Court affirmed a trial court's refusal to order the State Bureau of Investigation to permit a defendant to inspect certain documents in its files. In explaining the ancient rule the court approved the language of Chief Justice Vanderbilt's well-known view of criminal discovery in the leading case of *State* v. *Tune,* 13 N. J. 203, 98 A. 2d 881 (1953):

> " 'In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. . . . To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.' "

State v. *Goldberg, supra,* at 192, 134 S. E. 2d, at 341.[11]

North Carolina's presentation of an anti-discovery policy is evidenced not only in its reluctance to enact a modern code to permit such procedures but also in its occasional one-sided legislation concerning related matters. For example, while a local prosecutor has an absolute right to inspect the files of the State Bureau of Investigation which pertain to one of his local inquiries, an accused may inspect such evidence only upon court order procured for good cause. See N. C. Gen. Stat. § 114–15 (1966). Even a common-law request for a bill of particulars to clarify an indictment normally does not require a prosecutor to divulge names of his witnesses or the nature of his physical or documentary evidence.[12] N. C. Gen. Stat. § 15–143 (1965); *State* v. *Spence,* 271 N. C. 23, 32, 155 S. E. 2d 802, 809 (1967).[13]

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[11] The celebrated opinions in *State* v. *Tune,* 13 N. J. 203, 98 A. 2d 881 (1953), contain a vigorous dissent by Justice (now MR. JUSTICE) BRENNAN who expressed regret over the majority's disregard of the successful implementation of liberal discovery in civil matters.

[12] In another North Carolina retrial situation considered in *State* v. *Overman,* 269 N. C. 453, 153 S. E. 2d 44 (1967), an accused rapist's pretrial request for details concerning the evidence to be presented against him was denied on the ground that he could simply study a transcript of his prior acquittal of a kidnaping charge arising out of the same transaction.

[13] The most comprehensive and recent statement of criminal discovery in North Carolina is A Look At North Carolina's Criminal Discovery System Prepared for North Carolina Governor's Committee on Law and Order, Task Force on Arrest and Apprehension, A. Pye, Chmn. (1970): "Very little use is being made of the new (1967) criminal discovery statute (G. S. 15–155) which is resulting in a paucity of cases dealing with the extent to which it allows discovery. It is unclear whether the attorneys are not aware of

Thus, it is not surprising that Britt's investigative and preparatory resources were puny in contrast to those employed by his accusers. The local police were able to enlist the talent of the State Bureau of Investigation to trace and analyze fingerprint evidence. Investigators were able to study the situs of the murder. At their convenience officers were able to interrogate the incarcerated defendant, eventually eliciting from him an incriminating statement. After the mistrial the prosecutor, unlike Britt's lawyer, had access to a transcript to readjust his trial strategy.

This Court has been sensitive to the persuasive arguments for more liberal rules of criminal discovery.[14] To

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the statute or whether they feel that there is little use in filing a motion under it. . . . Indications are that both these reasons have vitality," *id.*, at 14–15. It continues:

"There is a strong possibility that solicitors (consciously or unconsciously) withhold evidence favorable to the defendant. . . ." *Id.*, at 16.

In addition to the discussion of such procedures in *State* v. *Goldberg*, 261 N. C. 181, 134 S. E. 2d 334 (1964), see *State* v. *Hamilton*, 264 N. C. 277, 141 S. E. 2d 506 (1965) (access to police reports and notes denied); *State* v. *Overman*, *supra*, at 468, 153 S. E. 2d, at 57; see also *Goldman* v. *United States*, 316 U. S. 129 (1942), cited with approval in *Goldberg*, *supra*, at 191, 134 S. E. 2d, at 341, holding that a defendant has no right to inspect memoranda used by prosecution witnesses to refresh their memories. See generally the restatement of the common-law rules of discovery, cited by the *Goldberg* court, *supra*, at 191, 134 S. E. 2d, at 340, in 23 C. J. S., Criminal Law §§ 955 (1) and (2).

[14] See *Pyle* v. *Kansas*, 317 U. S. 213 (1942); *Jencks* v. *United States*, 353 U. S. 657, 668 (1957); *Brady* v. *Maryland*, 373 U. S. 83 (1963). In *Dennis* v. *United States*, 384 U. S. 855, 873 (1966), we required a trial court to allow inspection by a defendant of grand jury minutes, reasoning that: "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact."

the extent that a State permits criminal discovery by its accused, it is our duty to forbid distribution of its fruits according to formulas based on wealth, which, like race, is a suspect classification. *Griffin* v. *Illinois, supra; Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969).

The provision in North Carolina permitting defendants to purchase mistrial minutes is obviously an important exception to the common-law prohibition. A mistrial transcript contains not only prosecution witnesses' names and addresses but their stories under oath and it contains the entire theory of the government's case. Such a document is a complete dossier of the opposing case for which even the most liberalized rules of civil discovery have no equivalent. While this exception endures, the State may not condition its availability upon financial considerations which effectively deprive the poor of this valuable tool.

III

The lower court's opinion suggests that whatever legitimate uses generally might be made of mistrial minutes could alternatively be accomplished by counsel's calling as a witness the court reporter of the previous prosecution. See also *Nickens* v. *United States,* 116 U. S. App. D. C., at 341, 323 F. 2d, at 811. However satisfactorily that suggestion might facilitate impeachment of government witnesses, it should be clear that the procedure would provide no assistance in preparing counsel for trial.

Moreover, the procedure of calling a court reporter to verify hostile witnesses' contradictions has been discredited by trial commentators, including Professor Robert Keeton:

"If you have caught the witness in a contradiction,

it is the more clearly shown if the exact words previously used by the witness are brought to the jury's attention. The effect may extend beyond the bearing of the contradiction on its own subject matter, for the witness may be 'broken down' so that he makes other admissions or the jury disbelieves other parts of his testimony. *Calling upon the reporter to read such prior testimony during the examination, however, is rarely a practicable method of confronting the witness with such contradiction.* Many trial judges will decline to permit the practice because of the great delay usually involved, while the reporter is seaching through his notes in an effort to find the part of the testimony to which you refer. Even if the judge will permit the practice, the wisdom of its use is questionable. The jury and court may grow impatient, and the witness will have been afforded a considerable period of time to think about the matter and be prepared with an explanation or excuse." R. Keeton, Trial Tactics and Methods 103 (1954). (Emphasis added.)

Indeed these hazards were painfully present in *United States ex rel. Wilson* v. *McMann, supra,* in which Wilson's attorney erroneously believed he remembered an inconsistent statement of a prosecution witness who had testified at the prior mistrial. At the second trial the lawyer quizzed the witness concerning this prior remark but the witness denied having ever made it. The judge decided to delay the trial until the reporter of the mistrial could read back the precise words used by the witness. After "considerable delay and perhaps some inconvenience to the jurors" counsel learned that he had been mistaken and that no contradiction, at least on the suspected issue, had existed. *Id.,* at 898.

I am not satisfied that the procedure afforded paupers by the *Nickens* majority is a reasonable substitute for full access to a mistrial transcript. Accordingly, I would hold under the *Griffin-Roberts-Wilson* line of authority that Britt has been denied equal protection of the laws.[15]

I would reverse the judgment below.

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[15] The majority does not disagree that under ordinary circumstances Britt would have been denied equal protection of the laws. The majority, however, distinguishes Britt's case from the routine case because he was tried in a small town where defense counsel was well acquainted with the court reporter. Counsel, reasons the Court, ought to have prevailed upon the reporter between trials to assist in his making notes of the first trial. I believe that these kinds of fortuities ought not to be determinative of constitutional guarantees, especially where it may be difficult afterwards to establish the nature of such alleged relationships.

NORTH CAROLINA *v.* RICE

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

No. 70–77. Argued October 12, 1971—Decided December 14, 1971

Respondent was convicted in a General County Court in North Carolina of driving while intoxicated and was sentenced to nine months' imprisonment and payment of a fine. On appeal, he was tried *de novo* in the Superior Court, found guilty, and given a two-year sentence. The District Court denied habeas corpus, and respondent, who by then had been completely discharged from prison, appealed to the Court of Appeals. That court, relying on *North Carolina* v. *Pearce,* 395 U. S. 711, held that the case was not mooted by respondent's discharge, and that respondent was entitled to have the record of his conviction expunged. *Held: North Carolina* v. *Pearce, supra,* does not require that respondent's conviction be invalidated but only that he be resentenced if the higher sentence imposed after the *de novo* trial was vulnerable under *Pearce.* Since the present record deals with the mootness issue only from the standpoint of conviction *vel non* and does not reveal whether, under state law, benefits accrue to respondent in having his sentence reduced after he has served it, the case is remanded for reconsideration of the mootness question.

434 F. 2d 297, vacated and remanded.

Jacob L. Safron, Assistant Attorney General of North Carolina, argued the cause for petitioner. With him on the brief was *Robert Morgan,* Attorney General. Joining in and adopting the brief were the Attorneys General for their respective States as follows: *Gary K. Nelson* of Arizona, *Ray Thornton* of Arkansas, *Robert L. Shevin* of Florida, *Theodore L. Sendak* of Indiana, *Vern Miller* of Kansas, *John B. Breckinridge* of Kentucky, *James S. Erwin* of Maine, *Francis B. Burch* of Maryland, *A. F. Summer* of Mississippi, *Robert L. Woodahl* of Montana, *Clarence A. H. Meyer* of Nebraska, *Helgi Johanneson* of North Dakota, *Crawford C. Martin* of Texas, *Vernon B. Romney* of Utah, and *Andrew P. Miller* of Virginia.

William W. Van Alstyne argued the cause and filed a brief for respondent.

Briefs of *amici curiae* urging reversal were filed by *John W. Benoit, Jr.*, Deputy Attorney General, for the State of Maine, and by *Vernon B. Romney*, Attorney General, of Utah, *pro se*.

The Prison Research Council filed a brief as *amicus curiae* urging affirmance.

PER CURIAM.

On July 2, 1968, respondent Rice was arrested for driving while intoxicated on a North Carolina state highway. He was tried in the General County Court of Buncombe County, convicted, and sentenced to imprisonment for nine months with sentence suspended upon payment of $100 fine and costs. On appeal he was tried *de novo* in the Superior Court, found guilty, and sentenced to two years' imprisonment. State post-conviction procedures were unavailing. On appeal from denial of federal habeas corpus, the Court of Appeals for the Fourth Circuit held that under *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), "the more drastic sentence on the second trial [was] a denial of Federal due process, in that by discouragement it impinges upon the State-given appeal." 434 F. 2d 297, 300 (1970). Although "[h]e was completely discharged by North Carolina on January 24, 1970 . . . this did not moot the case on habeas corpus" because injurious consequences from the conviction might still obtain. *Ibid.* The judgment was that Rice was entitled to have the record of his conviction expunged. The State's petition for writ of certiorari was granted. 401 U. S. 1008 (1971).

The State claims that *Pearce* does not apply to a situation where the more severe sentence is imposed after a trial *de novo* in its Superior Court. We do not reach that question, however, since the threshold issue of moot-

ness was improperly disposed of by the Court of Appeals. Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case,* 2 Dall. 409 (1792), as interpreted in *Muskrat* v. *United States,* 219 U. S. 346, 351–353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *Oil Workers Unions* v. *Missouri,* 361 U. S. 363, 367 (1960). To be cognizable in a federal court, a suit "must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937). However, "[m]oot questions require no answer." *Missouri, Kansas & Texas R. Co.* v. *Ferris,* 179 U. S. 602, 606 (1900). Mootness is a jurisdictional question because the Court "is not empowered to decide moot questions or abstract propositions," *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116 (1920), quoting *California* v. *San Pablo & Tulare R. Co.,* 149 U. S. 308, 314 (1893); our impotence "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.,* 375 U. S. 301, 306 n. 3 (1964). See also *Powell* v. *McCormack,* 395 U. S. 486, 496 n. 7 (1969). Even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction. *Henry* v. *Mississippi,* 379 U. S. 443, 447 (1965). *Liner* v. *Jafco, Inc., supra,* at 304.

The Court of Appeals held that the case was not moot because it assumed that *Pearce* mandated expunction of Rice's conviction and because the conviction, unexpunged, would have collateral consequences entitling Rice to challenge it. A number of disabilities may attach to a convicted defendant even after he has left prison,[1] and the Court has recognized the standing of such persons to challenge the legality of their convictions even when their sentences have been served.[2] It could not be clearer, however, that *Pearce* does not invalidate the conviction that resulted from Rice's second trial; *Pearce* went no further than to affirm the judgment of a federal court ordering Pearce's release "[u]pon the failure of the state court to *resentence* Pearce within 60 days . . . ." 395 U. S., at 714. (Emphasis added.) *Pearce,* in short, requires only resentencing; the conviction is not *ipso facto* set aside and a new trial required. Even if the higher sentence imposed after Rice's trial *de novo* was vulnerable under *Pearce,* Rice was entitled

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[1] A convicted criminal may be disenfranchised, cf., *e. g.,* Mont. Const., Art. IX, § 2; Mont. Rev. Codes Ann. § 23–302 (1967); Okla. Const., Art. III, § 1; Okla. Stat. Ann., Tit. 26, § 93.1 (Supp. 1971–1972); lose the right to hold federal or state office, cf., *e. g.,* Del. Const., Art. 2, § 21; 18 U. S. C. § 204; be barred from entering certain professions, 7 U. S. C. § 12a (2)(B); D. C. Code Ann. §§ 47–2301 to 47–2350 (1967); be subject to impeachment when testifying as a witness, Ark. Stat. Ann. § 28–605 (1962); Ore. Rev. Stat. § 44.020 (1963); be disqualified from serving as a juror, Idaho Const., Art. 6, § 3, Idaho Code § 2–202 (1948); Nev. Const., Art. 4, § 27, Nev. Rev. Stat. § 6.010 (1967); and may be subject to divorce, W. Va. Code Ann. § 48–2–4 (Supp. 1971). See generally Comment, Civil Disabilities of Felons, 53 Va. L. Rev. 403 (1967); Note, The Effect of Expungement on a Criminal Conviction, 40 S. Cal. L. Rev. 127 (1967).

[2] *Pollard* v. *United States,* 352 U. S. 354, 358 (1957); *United States* v. *Morgan,* 346 U. S. 502, 512–513 (1954); *Fiswick* v. *United States,* 329 U. S. 211, 222 (1946); *Carafas* v. *LaVallee,* 391 U. S. 234, 237–240 (1968).

neither to have his conviction erased nor to avoid the collateral consequences flowing from that conviction and a proper sentence.

Respondent's sole claim under *Pearce* thus related to the sentence he had completely served when he came before the Court of Appeals. A different question of mootness is therefore presented than the Court of Appeals considered. Nullification of a conviction may have important benefits for a defendant, as outlined above, but urging in a habeas corpus proceeding the correction of a sentence already served is another matter. Respondent was first sentenced to nine months, suspended upon payment of a $100 fine; after trial *de novo* he was sentenced to two years. In some jurisdictions, if a defendant is adjudicated guilty, either by conviction or plea, and then is placed on probation, not sentenced, or given a suspended sentence, statutes imposing disabilities for criminal convictions have no application.[3] Elsewhere, however, the sentencing that follows adjudication of guilt is irrelevant for purposes of disability statutes.[4] Since the present record deals with the mootness question only from the standpoint of conviction *vel non* and is otherwise unilluminating as to whether there may be benefits to respondent under North Carolina law in having his sentence reduced after he has served that sentence, it would be inappropriate for us to deal with this issue as it has now emerged. Accordingly, we vacate the judgment of the Court of Appeals and remand the case to that court for reconsideration of the question of mootness.

So ordered.

MR. JUSTICE DOUGLAS would affirm the judgment below on the opinion of the Court of Appeals in 434 F. 2d 297.

[3] See Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 954 n. 97 (1970).

[4] *Ibid.*

WILWORDING ET AL. v. SWENSON, WARDEN

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

No. 70–5308. Decided December 14, 1971

Petitioners' complaints relating to the condition of their confinement were held by the Missouri courts not to be cognizable by means of a petition for habeas corpus. The Court of Appeals affirmed the District Court's subsequent dismissal of the habeas petitions on the ground that 28 U. S. C. § 2254 had not been satisfied because other types of state remedies might be available. *Held:*

1. Section 2254 does not require petitioners to pursue alternative courses suggested by the Court of Appeals since their availability was conjectural and, regardless of the remedy invoked, the state courts have not granted a hearing to state prisoners on the conditions of their confinement.

2. Petitioners were entitled to have their actions treated as claims for relief under the Civil Rights Acts, to which exhaustion requirements do not apply.

Certiorari granted; 439 F. 2d 1331, reversed and remanded.

PER CURIAM.

On the ground that they challenged only their living conditions and disciplinary measures while confined in maximum security at Missouri State Penitentiary, and did not seek their release, petitioners' state habeas corpus petitions were dismissed. The Missouri Supreme Court affirmed. Petitioners then sought federal habeas corpus in the District Court for the Western District of Missouri. The District Court dismissed the petitions and the Court of Appeals for the Eighth Circuit affirmed, 439 F. 2d 1331. Although petitioners had exhausted state habeas relief the Court of Appeals agreed with the District Court that the requirements of 28 U. S. C. § 2254 had not been satisfied because petitioners had not invoked any of a number of possible alternatives to state habeas including "a suit for injunction, a writ

of prohibition, or mandamus or a declaratory judgment in the state courts," or perhaps other relief under the State Administrative Procedure Act. *Id.*, at 1336.

I

Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights. *Fay* v. *Noia,* 372 U. S. 391, 438 (1963). Petitioners are not required to file "repetitious applications" in the state courts. *Brown* v. *Allen,* 344 U. S. 443, 449 n. 3 (1953). Nor does the mere possibility of success in additional proceedings bar federal relief. *Roberts* v. *LaVallee,* 389 U. S. 40, 42–43 (1967); *Coleman* v. *Maxwell,* 351 F. 2d 285, 286 (CA6 1965). Whether the State would have heard petitioners' claims in any of the suggested alternative proceedings is a matter of conjecture; certainly no available procedure was indicated by the State Supreme Court in earlier cases. See *McMichaels* v. *Hancock,* 428 F. 2d 1222, 1223 (CA1 1970). Furthermore, we are not referred to a single instance, regardless of the remedy invoked, in which the Missouri courts have granted a hearing to state prisoners on the conditions of their confinement. In these circumstances § 2254 did not require petitioners to pursue the suggested alternatives as a prerequisite to taking their claims to federal court. As Mr. Justice Rutledge stated in his concurrence in *Marino* v. *Ragen,* 332 U. S. 561, 568 (1947):

> "The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of . . . separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the [alternatives] is appropriate or effective."

II

Moreover, although cognizable in federal habeas corpus, see *Johnson* v. *Avery*, 393 U. S. 483 (1969), petitioners' pleading may also be read to plead causes of action under the Civil Rights Acts, 42 U. S. C. § 1983, and 28 U. S. C. §§ 1343 (3) and 1343 (4), for deprivation of constitutional rights by prison officials. As to like actions, in an exhaustive opinion in *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968), MR. JUSTICE (then Judge) BLACKMUN stated:

> "These actions were instituted in 1966 by handwritten petitions employing varying titles [including 'habeas corpus']. Each plaintiff asked for the appointment of counsel and permission to proceed in forma pauperis. Those requests were granted. Appointed counsel then filed amended complaints which have been treated by all concerned as petitions for injunctive relief under the civil rights statutes, 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3) and (4). We are satisfied as to jurisdiction. We are also satisfied, as were the district judges, that the cases are appropriately to be regarded as class actions within the scope and reach of Rule 23, Fed. R. Civ. P." *Id.*, at 572–573.

Petitioners were therefore entitled to have their actions treated as claims for relief under the Civil Rights Acts, not subject, on the basis of their allegations, to exhaustion requirements. The remedy provided by these Acts "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Damico* v. *California*, 389 U. S. 416 (1967). State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. *Houghton* v. *Shafer*, 392 U. S. 639 (1968). There an inmate's challenge to

the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in "any event, resort to these remedies is unnecessary." *Id.*, at 640. Accordingly, the motions to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.*

It is so ordered.

MR. JUSTICE BLACKMUN concurs in the judgment of the Court and in Part II of the Court's *per curiam* opinion.

MR. CHIEF JUSTICE BURGER, dissenting.

This case is singularly inappropriate for summary reversal without an adequate record, and without briefs

*It appears that petitioners did seek relief under the civil rights statutes before filing their petitions below, and that these claims were denied after a hearing. The dissent asserts that the petition for certiorari concedes "that almost all of the claims involved in those actions underlie the *instant* habeas corpus proceeding." (Emphasis supplied.) We are unable to find that concession in the petition. At page 11 of the petition the following does appear: "Almost all of the complaints presented by [the earlier actions] had been raised in the habeas corpus petitions *originally filed in the State courts* underlying this Petition." (Emphasis supplied.) Indeed, petitioners' counsel in his reply brief disclaims knowledge of what claims were presented in the cases, stating: "As this writer did not participate as counsel in the Civil Rights Act cases and in view of the generalized nature of the claims for relief in the petitions herein, it is not known whether all of the issues intended to be presented by those petitions were presented in the Civil Rights Act cases." Reply Brief 7. Accordingly, we must conclude that it is not clear from the record whether the issues raised in the earlier cases are the same as those presented here. The effect, if any, of those actions upon the instant cases must therefore be determined on remand.

or argument. The Court assumes without citation of authority that further resort to state remedies would be futile; the District Judge, far more familiar than we with the local situation, thought otherwise. The Court does not rest its reversal on this ground, however, for it blandly treats petitioners' habeas corpus petitions as complaints under 42 U. S. C. § 1983, an approach that petitioners' experienced counsel has studiously and appropriately avoided. Petitioners had previously filed complaints expressly under § 1983, which were denied after full hearing. It is conceded in the petition for certiorari that almost all of the claims involved in those actions underlie the instant habeas corpus proceeding; but petitioners' counsel argues that the doctrine of *res judicata* has no application in habeas corpus. The Court does not explain why this argument is not lost if the habeas corpus petitions are treated as complaints under § 1983.

I had previously thought that summary reversal was limited to cases where the error was manifest. Here, however, the Court has challenged the conclusion of the Court of Appeals largely on the basis of surmise and has gone on to reverse on a theory that the Court of Appeals was not asked to consider and presumably could not have considered.

O'KEEFFE, DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, DEPARTMENT OF LABOR *v.* AEROJET-GENERAL SHIPYARDS, INC.

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

No. 71-262. Decided December 14, 1971

Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, permitting a Labor Department Deputy Commissioner "[u]pon his own initiative . . . because of a mistake in a determination of fact" to review a longshoreman's compensation claim within one year after its rejection and issue a new or modified compensation order, *held* to authorize the Deputy Commissioner to correct factual errors revealed by wholly new or cumulative evidence or further reflection on initially submitted evidence.

Certiorari granted; 442 F. 2d 508, reversed and remanded.

PER CURIAM.

Petitioner, a Labor Department Deputy Commissioner, rejected an employee's claim against respondent under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, on the ground that the proofs failed to establish that his disability was related to conditions of his employment. Thereafter petitioner reopened the case pursuant to § 22 of the Act, 33 U. S. C. § 922. On the basis of testimony by the employee's personal physician and a commission-appointed doctor, petitioner concluded, contrary to his initial determination, that the disabling condition had in fact been "materially aggravated and hastened" by the circumstances of employment, and awarded him compensation. The District Court sustained the award but the Court of Appeals for the Fifth Circuit, one judge dissenting, reversed. 442 F. 2d 508. The Court of Appeals held that in the absence of changed conditions or

new evidence clearly demonstrating mistake in the initial determination, the "statute simply does not confer authority upon the Deputy Commissioner to receive additional but cumulative evidence and change his mind." 442 F. 2d, at 513.

Neither the wording of the statute nor its legislative history supports this "narrowly technical and impractical construction." *Luckenbach S. S. Co.* v. *Norton*, 106 F. 2d 137, 138 (CA3 1939). Section 22 of the Act provides:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . ." 33 U. S. C. § 922.

Thus, on its face, the section permits a reopening within one year "because of a mistake in a determination of fact." There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances. The Act at one time did authorize reopening only on the "ground of a change in conditions," 44 Stat. 1437, but was amended in 1934 expressly to "broaden the grounds on which a deputy commissioner can modify an award . . . when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act." S. Rep. No.

588, 73d Cong., 2d Sess., 3–4 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934). The plain import of this amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

Nor does our construction "render meaningless the provision [of § 21 of the Act, 33 U. S. C. § 921] that [a compensation] order becomes final unless proceedings for review are brought within thirty days." *Case* v. *Calbeck*, 304 F. 2d 198, 201 (CA5 1962). The review authorized by § 21 is limited to the legal validity of the award; a district court may set aside an award only if it is "not in accordance with law." Section 21 (b), 33 U. S. C. § 921 (b). The 30-day limit of § 21 is not "rendered meaningless" by setting a different time limit for a redetermination of fact. Moreover, the absence of a provision in § 21 for the judicial review of evidence confirms the need for a broad discretion in the deputy commissioner, to review factual errors in an effort "to render justice under the act."

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

It is so ordered.

SANTOBELLO *v.* NEW YORK

CERTIORARI TO APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 70–98. Argued November 15, 1971—Decided December 20, 1971

After negotiations with the prosecutor, petitioner withdrew his previous not-guilty plea to two felony counts and pleaded guilty to a lesser-included offense, the prosecutor having agreed to make no recommendation as to sentence. At petitioner's appearance for sentencing many months later a new prosecutor recommended the maximum sentence, which the judge (who stated that he was uninfluenced by that recommendation) imposed. Petitioner attempted unsuccessfully to withdraw his guilty plea, and his conviction was affirmed on appeal. *Held:* The interests of justice and proper recognition of the prosecution's duties in relation to promises made in connection with "plea bargaining" require that the judgment be vacated and that the case be remanded to the state courts for further consideration as to whether the circumstances require only that there be specific performance of the agreement on the plea (in which case petitioner should be resentenced by a different judge), or petitioner should be afforded the relief he seeks of withdrawing his guilty plea. Pp. 260–263.

35 App. Div. 2d 1084, 316 N. Y. S. 2d 194, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 263. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and STEWART, JJ., joined, *post*, p. 267.

Irving Anolik argued the cause and filed a brief for petitioner.

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

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the State's failure to keep a commitment concerning

the sentence recommendation on a guilty plea required a new trial.

The facts are not in dispute. The State of New York indicted petitioner in 1969 on two felony counts, Promoting Gambling in the First Degree, and Possession of Gambling Records in the First Degree, N. Y. Penal Law §§ 225.10, 225.20. Petitioner first entered a plea of not guilty to both counts. After negotiations, the Assistant District Attorney in charge of the case agreed to permit petitioner to plead guilty to a lesser-included offense, Possession of Gambling Records in the Second Degree, N. Y. Penal Law § 225.15, conviction of which would carry a maximum prison sentence of one year. The prosecutor agreed to make no recommendation as to the sentence.

On June 16, 1969, petitioner accordingly withdrew his plea of not guilty and entered a plea of guilty to the lesser charge. Petitioner represented to the sentencing judge that the plea was voluntary and that the facts of the case, as described by the Assistant District Attorney, were true. The court accepted the plea and set a date for sentencing. A series of delays followed, owing primarily to the absence of a pre-sentence report, so that by September 23, 1969, petitioner had still not been sentenced. By that date petitioner acquired new defense counsel.

Petitioner's new counsel moved immediately to withdraw the guilty plea. In an accompanying affidavit, petitioner alleged that he did not know at the time of his plea that crucial evidence against him had been obtained as a result of an illegal search. The accuracy of this affidavit is subject to challenge since petitioner had filed and withdrawn a motion to suppress, before pleading guilty. In addition to his motion to withdraw his guilty plea, petitioner renewed the motion to suppress and filed a motion to inspect the grand jury minutes.

These three motions in turn caused further delay until November 26, 1969, when the court denied all three and set January 9, 1970, as the date for sentencing. On January 9 petitioner appeared before a different judge, the judge who had presided over the case to this juncture having retired. Petitioner renewed his motions, and the court again rejected them. The court then turned to consideration of the sentence.

At this appearance, another prosecutor had replaced the prosecutor who had negotiated the plea. The new prosecutor recommended the maximum one-year sentence. In making this recommendation, he cited petitioner's criminal record and alleged links with organized crime. Defense counsel immediately objected on the ground that the State had promised petitioner before the plea was entered that there would be no sentence recommendation by the prosecution. He sought to adjourn the sentence hearing in order to have time to prepare proof of the first prosecutor's promise. The second prosecutor, apparently ignorant of his colleague's commitment, argued that there was nothing in the record to support petitioner's claim of a promise, but the State, in subsequent proceedings, has not contested that such a promise was made.

The sentencing judge ended discussion, with the following statement, quoting extensively from the presentence report:

> "Mr. Aronstein [Defense Counsel], I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence, and there is no need to have any testimony. It doesn't make a particle of difference what the District Attorney says he will do, or what he doesn't do.
>
> "I have here, Mr. Aronstein, a probation report. I have here a history of a long, long serious criminal record. I have here a picture of the life history of this man. . . .

> " 'He is unamenable to supervision in the community. He is a professional criminal.' This is in quotes. 'And a recidivist. Institutionalization—'; that means, in plain language, just putting him away, 'is the only means of halting his anti-social activities,' and protecting you, your family, me, my family, protecting society. 'Institutionalization.' Plain language, put him behind bars.
>
> "Under the plea, I can only send him to the New York City Correctional Institution for men for one year, which I am hereby doing."

The judge then imposed the maximum sentence of one year.

Petitioner sought and obtained a certificate of reasonable doubt and was admitted to bail pending an appeal. The Supreme Court of the State of New York, Appellate Division, First Department, unanimously affirmed petitioner's conviction, 35 App. Div. 2d 1084, 316 N. Y. S. 2d 194 (1970), and petitioner was denied leave to appeal to the New York Court of Appeals. Petitioner then sought certiorari in this Court. Mr. Justice Harlan granted bail pending our disposition of the case.

This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them. The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady* v. *United States,* 397 U. S. 742, 751–752 (1970).

However, all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counseled, absent a waiver. *Moore* v. *Michigan,* 355 U. S. 155 (1957). Fed. Rule Crim. Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record,* the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.[1] The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must

[1] Fed. Rule Crim. Proc. 11 provides:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. *Lynch* v. *Overholser,* 369 U. S. 705, 719 (1962); Fed. Rule Crim. Proc. 11. A court may reject a plea in exercise of sound judicial discretion.

This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

On this record, petitioner "bargained" and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of "letting the left hand know what the right hand is doing" or has done. That the breach of agreement was inadvertent does not lessen its impact.

We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case

to the state courts for further consideration. The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i. e.*, the opportunity to withdraw his plea of guilty.[2] We emphasize that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge.

The judgment is vacated and the case is remanded for reconsideration not inconsistent with this opinion.

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court and add only a word. I agree both with THE CHIEF JUSTICE and with MR. JUSTICE MARSHALL that New York did not keep its "plea bargain" with petitioner and that it is no excuse for the default merely because a member of the prosecutor's staff who was not a party to the "plea bargain" was in charge of the case when it came before the New York court. The staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member. If responsibility could be evaded that way, the prosecution would have designed another deceptive "contrivance," akin to those we condemned in *Mooney* v. *Holohan,* 294 U. S. 103, 112, and *Napue* v. *Illinois,* 360 U. S. 264.

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[2] If the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts.

These "plea bargains" are important in the administration of justice both at the state [1] and at the federal [2] levels and, as THE CHIEF JUSTICE says, they serve an important role in the disposition of today's heavy calendars.

However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, *Duncan* v. *Louisiana*, 391 U. S. 145, to confront one's accusers, *Pointer* v. *Texas*, 380 U. S. 400, to present witnesses in one's defense, *Washington* v. *Texas*, 388 U. S. 14, to remain silent, *Malloy* v. *Hogan*, 378 U. S. 1, and to be convicted by proof beyond all reasonable doubt, *In re Winship*, 397 U. S. 358. Since *Kercheval* v. *United States*, 274 U. S. 220, this Court has recognized that "unfairly obtained" guilty pleas in the federal courts ought to be vacated. In the course of holding that withdrawn guilty pleas were not admissible in subsequent federal prosecutions, the Court opined:

> "[O]n timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence." *Id.*, at 224.

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[1] In 1964, guilty pleas accounted for 95.5% of all criminal convictions in trial courts of general jurisdiction in New York. In 1965, the figure for California was 74.0%. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967).

[2] In 1964, guilty pleas accounted for 90.2% of all criminal convictions in United States district courts. *Ibid.* In fiscal 1970, of 28,178 convictions in the 89 United States district courts, 24,111 were by pleas of guilty or *nolo contendere*. Report of Director of Administrative Office of U. S. Courts, for Period July 1 through Dec. 31, 1970, Table D–4, p. A–26.

Although *Kercheval*'s dictum concerning grounds for withdrawal of guilty pleas did not expressly rest on constitutional grounds (cf. *Frame* v. *Hudspeth*, 309 U. S. 632), *Walker* v. *Johnston*, 312 U. S. 275, clearly held that a federal prisoner who had pleaded guilty despite his ignorance of and his being uninformed of his right to a lawyer was deprived of that Sixth Amendment right, or if he had been tricked by the prosecutor through misrepresentations into pleading guilty then his due process rights were offended. In *Walker*, the petitioner was granted an evidentiary hearing to prove his factual claims in anticipation of vacating the plea. Accord: *Waley* v. *Johnston*, 316 U. S. 101; *Von Moltke* v. *Gillies*, 332 U. S. 708. In *Machibroda* v. *United States*, 368 U. S. 487, the defendant alleged that when he threatened to tell his lawyer of private promises made by an Assistant United States Attorney in exchange for a proposed guilty plea, the prosecutor threatened additional prosecutions. Although the Government denied them, the Court held that if the allegations were true, then the defendant would be entitled to have his sentence vacated and the matter was remanded for an evidentiary hearing.

State convictions founded upon coerced or unfairly induced guilty pleas have also received increased scrutiny as more fundamental rights have been applied to the States. After *Powell* v. *Alabama*, 287 U. S. 45, the Court held that a state defendant was entitled to a lawyer's assistance in choosing whether to plead guilty. *Williams* v. *Kaiser*, 323 U. S. 471. In *Herman* v. *Claudy*, 350 U. S. 116, federal habeas corpus was held to lie where a lawyerless and uneducated state prisoner had pleaded guilty to numerous and complex robbery charges. And, a guilty plea obtained without the advice of counsel may not be admitted at a subsequent state prosecution. *White* v. *Maryland*, 373 U. S. 59. Thus, while plea bargaining is not *per se* unconstitutional, *North Carolina* v. *Alford*, 400 U. S. 25, 37–38, *Shelton* v. *United States*, 242 F. 2d 101,

aff'd *en banc,* 246 F. 2d 571 (CA5 1957), a guilty plea is rendered voidable by threatening physical harm, *Waley* v. *Johnston, supra,* threatening to use false testimony, *ibid.,* threatening to bring additional prosecutions, *Machibroda* v. *United States, supra,* or by failing to inform a defendant of his right of counsel, *Walker* v. *Johnston, supra.* Under these circumstances it is clear that a guilty plea must be vacated.

But it is also clear that a prosecutor's promise may deprive a guilty plea of the "character of a voluntary act." *Machibroda* v. *United States, supra,* at 493. Cf. *Bram* v. *United States,* 168 U. S. 532, 542–543. The decisions of this Court have not spelled out what sorts of promises by prosecutors tend to be coercive, but in order to assist appellate review in weighing promises in light of all the circumstances, all trial courts are now required to interrogate the defendants who enter guilty pleas so that the waiver of these fundamental rights will affirmatively appear in the record. *McCarthy* v. *United States,* 394 U. S. 459; *Boykin* v. *Alabama,* 395 U. S. 238. The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of "involuntariness," while a few permit only specific enforcement. Note: Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 876 (1964). As one author has stated, the basis for outright vacation is "an outraged sense of fairness" when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966).

This is a state case over which we have no "supervisory" jurisdiction; and Rule 11 of the Federal Rules

of Criminal Procedure obviously has no relevancy to the problem.

I join the opinion of the Court and favor a constitutional rule for this as well as for other pending or oncoming cases. Where the "plea bargain" is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to trial on the original charges. One alternative may do justice in one case, and the other in a different case. In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

I agree with much of the majority's opinion, but conclude that petitioner must be permitted to withdraw his guilty plea. This is the relief petitioner requested, and, on the facts set out by the majority, it is a form of relief to which he is entitled.

There is no need to belabor the fact that the Constitution guarantees to all criminal defendants the right to a trial by judge or jury, or, put another way, the "right not to plead guilty," *United States* v. *Jackson,* 390 U. S. 570, 581 (1968). This and other federal rights may be waived through a guilty plea, but such waivers are not lightly presumed and, in fact, are viewed with the "utmost solicitude." *Boykin* v. *Alabama,* 395 U. S. 238, 243 (1969). Given this, I believe that where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage,

the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment. In other words, in such circumstances I would not deem the earlier plea to have irrevocably waived the defendant's federal constitutional right to a trial.

Here, petitioner never claimed any automatic right to withdraw a guilty plea before sentencing. Rather, he tendered a specific reason why, in his case, the plea should be vacated. His reason was that the prosecutor had broken a promise made in return for the agreement to plead guilty. When a prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea. This, it seems to me, provides the defendant ample justification for rescinding the plea. Where a promise is "unfulfilled," *Brady* v. *United States,* 397 U. S. 742, 755 (1970), specifically denies that the plea "must stand." Of course, where the prosecutor has broken the plea agreement, it may be appropriate to permit the defendant to enforce the plea bargain. But that is not the remedy sought here.* Rather, it seems to me that a breach of the plea bargain provides ample reason to permit the plea to be vacated.

It is worth noting that in the ordinary case where a motion to vacate is made prior to sentencing, the government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal. More pointedly, here the State claims no such harm beyond disappointed expec-

*MR. JUSTICE DOUGLAS, although joining the Court's opinion (apparently because he thinks the remedy should be chosen by the state court), concludes that the state court "ought to accord a defendant's preference considerable, if not controlling, weight." Thus, a majority of the Court appears to believe that in cases like these, when the defendant seeks to vacate the plea, that relief should generally be granted.

tations about the plea itself. At least where the government itself has broken the plea bargain, this disappointment cannot bar petitioner from withdrawing his guilty plea and reclaiming his right to a trial.

I would remand the case with instructions that the plea be vacated and petitioner given an opportunity to replead to the original charges in the indictment.

PICARD *v.* CONNOR

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

No. 70–96. Argued November 17, 1971—Decided December 20, 1971

A grand jury returned a murder indictment against a named individual "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest the indictment was amended pursuant to state law to substitute respondent's name for "John Doe." The highest state court affirmed respondent's subsequent conviction, rejecting his challenge to the legality of the indictment made on the ground that the amending procedure did not comply with the statute. Respondent subsequently filed a petition for a writ of habeas corpus in the District Court, which dismissed the petition. The Court of Appeals reversed, holding that the procedure by which respondent was brought to trial was violative of equal protection. The court rejected petitioner's contention that respondent, who had not previously raised the equal protection issue, had not exhausted available state judicial remedies as required by 28 U. S. C. § 2254, holding that respondent had presented the state court with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Held:* The substance of a federal habeas corpus claim must in the first instance be fairly presented to the state courts, and since on the record and argument before it the State's highest court had no fair opportunity to consider and act upon the equal protection claim, the Court of Appeals erred in holding that respondent had exhausted his state remedies. Pp. 275–278.

434 F. 2d 673, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 278.

John J. Irwin, Jr., Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the brief were *Robert H. Quinn*, Attorney General,

Ruth I. Abrams and *Charles E. Chase,* Assistant Attorneys General, and *Garrett H. Byrne.*

James J. Twohig, by appointment of the Court, 402 U. S. 993, argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Court of Appeals for the First Circuit, reversing the District Court's dismissal of respondent's petition for a writ of federal habeas corpus,[1] held that "the procedure by which [respondent] was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws." 434 F. 2d 673, 674 (1970). The Court of Appeals acknowledged that respondent had not attacked his conviction on the equal protection ground, either in the state courts or in his federal habeas petition:

> "[Respondent] did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that [respondent] had not exhausted his state remedy . . . ." *Ibid.*

The Court of Appeals rejected that contention and held that respondent had exhausted available state judicial remedies, as required by 28 U. S. C. § 2254,[2] because he

[1] 308 F. Supp. 843 (Mass. 1970).

[2] Title 28 U. S. C. § 2254 provides in pertinent part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is

had "presented the [state] court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'" *Ibid.* We granted certiorari to consider that ruling in light of the command of § 2254. 402 U. S. 942 (1971). We hold that the State's objection should have been sustained, and we therefore reverse for further proceedings, see *Slayton* v. *Smith, ante,* p. 53, without reaching the merits of the constitutional question decided by the Court of Appeals.[3]

A Massachusetts grand jury returned an indictment for murder against Donald Landry "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest, the indictment was amended in a proceeding pursuant to a fictitious-name statute, Mass. Gen. Laws Ann., c. 277, § 19,[4] to substitute respond-

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either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[3] Respondent does not contend that there are no available state judicial remedies through which he can present the equal protection claim. It appears that Massachusetts provides postconviction procedures adequate to adjudicate that claim, either by motion for a new trial, Mass. Gen. Laws Ann., c. 278, § 29; see *Earl* v. *Commonwealth,* 356 Mass. 181, 248 N. E. 2d 498 (1969), or by writ of error, Mass. Gen. Laws Ann., c. 250; see *Cortellesso* v. *Commonwealth,* 354 Mass. 514, 238 N. E. 2d 516 (1968); *Crowell* v. *Commonwealth,* 352 Mass. 288, 225 N. E. 2d 330 (1967); *Shoppers' World, Inc.* v. *Board of Assessors,* 348 Mass. 366, 376 n. 9, 203 N. E. 2d 811, 819 n. 9 (1965).

[4] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall

ent's name for "John Doe." The Massachusetts Supreme Judicial Court affirmed respondent's subsequent conviction, *sub nom. Commonwealth* v. *Doherty,* 353 Mass. 197, 229 N. E. 2d 267 (1967). Among other grounds of appeal, respondent challenged the legality of the indictment. The gist of respondent's argument, which he also asserted during various trial proceedings, was that the amending procedure did not comply with the statute as construed by the Massachusetts courts, with the result that he had not been lawfully indicted for the crime. See *Commonwealth* v. *Gedzium,* 259 Mass. 453, 156 N. E. 890 (1927).[5] The only suggestions of a claimed denial of a federal right were statements in respondent's brief questioning the continuing validity of the holding in *Gedzium* that the provision of the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" was inapplicable to the States. *Id.,* at 457, 156 N. E., at 891; see *Hurtado* v. *California,* 110 U. S. 516 (1884).[6] We have examined the

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not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

[5] Although the Massachusetts Constitution does not expressly provide for grand jury indictments, the Massachusetts courts have construed Art. XII of the Declaration of Rights to require that "'no person . . . shall be held to answer for a capital or otherwise infamous crime . . . unless he shall have been previously charged on the presentment or indictment of a grand jury.'" *Jones* v. *Robbins,* 74 Mass. 329, 344–345 (1857).

[6] In arguing his first assignment of error:

"[T]he dismissal in the *Gedzium* case of the applicability of the Fifth Amendment provision . . . would appear to be in need of reexamination, in the light of the development by the United States

pretrial, trial, and appellate papers and do not discover any indication of an attack upon the prosecution under the indictment as violative of the Equal Protection Clause of the Fourteenth Amendment.[7]

Supreme Court . . . of the doctrine of applicability of guarantees of the Federal Bill of Rights to the states by virtue of the Fourteenth Amendment." Brief for Connor in the Massachusetts Supreme Judicial Court 13.

In arguing his third and fourth assignments of error:

"As set forth *supra* in the argument in support of the first Assignment, the indictment of 'John Doe' was a nullity because it was a general indictment, not limited to any identifiable individual. Since this is a capital case, the defendant Connor was prosecuted in violation of his constitutional right to due process in that he was put to trial without having been indicted by a Grand Jury." *Id.*, at 14.

[7] Nor did respondent's federal habeas petition assert a denial of equal protection. The petition alleges that "[h]e was brought to trial without indictment or presentment in violation of the Fifth Amendment and of the Massachusetts Constitution, . . . [of] the statutory provisions of [the fictitious-name statute], and of the rule of the common law that an indictment in a capital case . . . forbids any amendment to such an indictment." In his memorandum in support of the petition, respondent argued that the Massachusetts indictment procedure "must be administered in accordance with the principles pertaining to the Grand Jury as established by the law of the land, i. e., in accordance with due process as created by the common law and adopted by our Constitution. . . . In accordance with these principles, since the indictment did not name nor describe [respondent], it was, as to him, a nullity, and remained so after amendment." The District Court, noting that respondent had "argued indiscriminately on the basis of the statutes and constitution of the Commonwealth of Massachusetts, as well as upon federal grounds," 308 F. Supp., at 845 n. 2, considered respondent's contention to be "that the amendment of the indictment to substitute Connor's name for John Doe was a violation of the Fifth Amendment." The court rejected that contention on the ground "that the due process clause of the Fourteenth Amendment does not make applicable to the states the grand jury requirement of the Fifth Amendment." *Id.*, at 845.

It has been settled since *Ex parte Royall,* 117 U. S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. See, *e. g., Nelson* v. *George,* 399 U. S. 224, 229 (1970); *Irvin* v. *Dowd,* 359 U. S. 394, 404–405 (1959); *Ex parte Hawk,* 321 U. S. 114 (1944). The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U. S. C. §§ 2254 (b) and (c),[8] reflects a policy of federal-state comity, *Fay* v. *Noia,* 372 U. S. 391, 419–420 (1963); *Bowen* v. *Johnston,* 306 U. S. 19, 27 (1939), "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson, ante,* p. 249, at 250. We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr* v. *Burford,* 339 U. S. 200, 204 (1950) (overruled in other respects, *Fay* v. *Noia, supra,* at 435–436). It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. See, *e. g., Wilwording* v. *Swenson, supra,* at 250; *Roberts* v. *LaVallee,* 389 U. S. 40, 42–43 (1967); *Brown* v. *Allen,* 344 U. S. 443, 447–450 (1953).

We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," *Ex parte Royall, supra,* at 251, it is not sufficient merely that the federal habeas applicant has

[8] See n. 2, *supra.*

been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See *Darr* v. *Burford, supra,* at 203; *Davis* v. *Burke,* 179 U. S. 399, 401–403 (1900).

Respondent challenged the validity of his indictment at every stage of the proceedings in the Massachusetts courts. As the Court of Appeals pointed out, 434 F. 2d, at 674, this is not a case in which factual allegations were made to the federal courts that were not before the state courts, see, *e. g., United States ex rel. Boodie* v. *Herold,* 349 F. 2d 372 (CA2 1965); *Schiers* v. *California,* 333 F. 2d 173 (CA9 1964), nor a case in which an intervening change in federal law cast the legal issue in a fundamentally different light, see, *e. g., Blair* v. *California,* 340 F. 2d 741 (CA9 1965); *Pennsylvania ex rel. Raymond* v. *Rundle,* 339 F. 2d 598 (CA3 1964). We therefore put aside consideration of those types of cases. The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not.

Until he reached this Court,[9] respondent never contended that the method by which he was brought to trial

[9] The decision of the Court of Appeals prompted respondent, for the first time in any court, to advance the argument in this Court that "since indictment is the only process provided for the finding of probable cause in Massachusetts prior to trial, its denial in

denied him equal protection of the laws. Rather, from the outset respondent consistently argued that he had been improperly indicted under Massachusetts law and, to the extent he raised a federal constitutional claim at all, that the indictment procedure employed in his case could not be approved without reference to whether the Fifth Amendment's requirement of a grand jury indictment applied to the States. He adverted to the Fourteenth Amendment solely as it bore upon that submission.[10] The equal protection issue entered this case only because the Court of Appeals injected it.

We are thus unable to agree with that court that respondent provided the Massachusetts "court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.' " 434 F. 2d, at 674. To be sure, respondent presented all the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts. The Supreme Judicial Court dealt with the arguments respondent offered; we cannot fault that court for failing also to consider *sua sponte* whether the indictment procedure denied respondent equal protection of the laws. Obviously there are instances in which "the ultimate question for disposition," *United States ex rel. Kemp* v. *Pate,* 359 F. 2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. See *Sanders* v. *United States,* 373 U. S. 1, 16 (1963). Hence,

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Connor's case alone was undoubtedly a violation of Connor's federal rights not only as to due process, but also equal protection, under the Fourteenth Amendment, as stated by the Chief Judge of the Circuit Court." Brief for Respondent 15.

[10] Respondent reiterated these contentions in his federal habeas petition. See n. 7, *supra.*

we do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." *Daugharty* v. *Gladden*, 257 F. 2d 750, 758 (CA9 1958); see *Kirby* v. *Warden*, 296 F. 2d 151 (CA4 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. The claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination. See *Rose* v. *Dickson*, 327 F. 2d 27, 29 (CA9 1964); *Morris* v. *Mayo*, 277 F. 2d 103 (CA5 1960). The judgment of the Court of Appeals is therefore reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I think that in this case we carry the rule of exhaustion of state remedies too far. Connor's name was added to the indictment after it was returned by the state grand jury, he being substituted for "John Doe." He raised in his brief before the Supreme Judicial Court of Massachusetts his claim that such a substitution denied him that quantum of due process required by the Fourteenth Amendment "in that he was put to trial without having been indicted by a Grand Jury." [1] He did not refer to the Equal Protection Clause which is also a part of the Fourteenth Amendment. But that is a nicety irrelevant to the maintenance

[1] The Court properly says that respondent tendered the validity of *Commonwealth* v. *Gedzium*, 259 Mass. 453, 156 N. E. 890, to the Supreme Judicial Court of Massachusetts. That, however, was in his first assignment of error. But in his third and fourth assignments of error he alleged that he was prosecuted "in violation of his constitutional right to due process in that he was put to trial without having been indicted by a Grand Jury."

of healthy state-federal relations on which the Court makes the present decision turn. The concept of due process is broad and expansive, and "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe,* 347 U. S. 497, 499. We have thus held that the denial of equal protection, *viz.,* invidious discrimination, may be "so unjustifiable as to be violative of due process." *Ibid.*[2] As MR. JUSTICE BRENNAN said in *Boddie* v. *Connecticut,* 401 U. S. 371, 388 (concurring opinion), "The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection." That is likewise true here.

Moreover, a due process point is plainly raised where an accused claims that no grand jury found "probable cause" to indict him, that its only finding concerned someone unknown at the time.

If Connor had complained of a coerced confession, or of perjured testimony, and the facts on which he relied

[2] The overlap is, of course, not total. *Bolling* v. *Sharpe,* 347 U. S. 497, 499. But the extent to which the two concepts merge has been a subject of debate since Representative John A. Bingham of Ohio, an architect of the Fourteenth Amendment, used the phrases "due process" and "equal protection" interchangeably on the floor of Congress. Cong. Globe, 39th Cong., 1st Sess., 1088–1089. See, *e. g.,* Wilson, The Merging Concepts of Liberty and Equality, 12 Wash. & Lee L. Rev. 182, Antieau, Equal Protection Outside the Clause, 40 Calif. L. Rev. 362, Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341. Compare *Douglas* v. *California,* 372 U. S. 353, and *Griffin* v. *Illinois,* 351 U. S. 12, with *Gideon* v. *Wainwright,* 372 U. S. 335, and *Powell* v. *Alabama,* 287 U. S. 45.

There is apparently a similar controversy in India, whose constitution also contains both a due process and equal protection clause. See, *e. g.,* Narain, Equal Protection Guarantee and the Right of Property Under the Indian Constitution, 15 Int. & Comp. L. Q. 199.

were developed in the state court, the constitutional questions would surely have been sufficiently raised without reference to the precise constitutional provisions involved. The situation here is no different.[3]

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[3] *Daugharty* v. *Gladden*, 257 F. 2d 750 (CA9), which the Court cites, is instructive. Daugharty was an indigent state prisoner. He appealed the denial of state habeas corpus to the intermediate state appellate court, but that court dismissed the appeal because Daugharty could not afford to supply an appellate transcript. He then moved the state supreme court for an order requiring that he be supplied a transcript free of charge, and when that motion was denied, sought federal habeas corpus. The District Judge denied the application for a writ on the grounds Daugharty had failed to exhaust state remedies. Despite the fact that Daugharty never even mentioned the Fourteenth Amendment, much less the Equal Protection Clause, the Court of Appeals held that his motion in the state supreme court satisfied the exhaustion requirement.

"In moving the Oregon Supreme Court for an order requiring that a transcript be supplied without expense to him, Daugharty called attention to his inability to pay for such a record. This provided that court with all of the facts necessary to give application to the constitutional principle upon which appellant relies. . . . [E]xhaustion of state remedies is not to be denied because the Fourteenth Amendment was not specifically mentioned." *Id., at* 758.

Analogously, the Court of Appeals said in the instant case:

"Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his state remedy, citing Needel v. Scafati, 1 Cir., 1969, 412 F. 2d 761, cert. denied 396 U. S. 861, . . . and Subilosky v. Commonwealth, 1 Cir., 1969, 412 F. 2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel*, nor precedent, as in *Subilosky*, that was not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.' United States ex rel. Kemp v. Pate, 7 Cir., 1966, 359 F. 2d 749, 751; *cf.* Wilbur v. Maine, 1 Cir.,

The judges to whom that issue of law is tendered are learned men who we must assume are knowledgeable as to the meaning of due process. A law student who tendered a brief that left due process at large would certainly not be worthy of an "A." But the nicety of analysis which we associate with scholarship has no functional role to play in this area of exhaustion of state remedies. When we go to that extreme, we make a trap out of the exhaustion doctrine which promises to exhaust the litigant and his resources, not the remedies.

I fear that our reluctance to backstop the Court of Appeals in the present case is symptomatic of this Court's trend to sidestep all possible controversies so, as it hopes, to let them disappear. Of course we should remit a litigant to his state tribunal if facts have emerged which were not known at the time of the trial or if intervening decisions have outdated the earlier state decision. No such situation exists here. The facts are simple and uncontested: Connor's name was substituted for John Doe after the indictment was returned. The point of law is clear now and will be no clearer on the remand. Its vulnerability tested by due process was as obvious when the case was before the Supreme Judicial Court of Massachusetts as it now is. I think the Court of Appeals acted responsibly in ruling on it. We should decide the merits here and now. Endless repetitive procedures are encouraged by today's ruling on exhaustion of remedies. I would bring this litigation to an end today by applying the exhaustion-of-remedy rule to terminate rather than multiply procedures that now engulf the state-federal regime.

1970, 421 F. 2d 1327. That is enough to satisfy the requirements of the exhaustion . . . doctrine. Sullivan v. Scafati, 1 Cir., 1970, 428 F. 2d 1023, 1024 n. 1. We therefore turn to the merits." 434 F. 2d 673, 674.

TOWNSEND ET AL. *v.* SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL.

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

No. 70–5021. Argued November 8, 1971—
Decided December 20, 1971*

This class action challenges on equal protection and supremacy grounds an Illinois statute and regulation under which needy dependent children 18 through 20 years old attending high school or vocational training school qualify for benefits under the federally assisted Aid to Families With Dependent Children (AFDC) program, but such children attending a college or university do not qualify. A three-judge District Court upheld the Illinois scheme. *Held:* Under § 402 (a)(10) of the Social Security Act, a state participating plan under the AFDC program must provide that aid to families with dependent children shall be furnished with reasonable promptness to "all eligible" individuals. Since § 406 (a)(2)(B) of the Act makes dependent 18–20-year-olds eligible for benefits whether attending a college or university or a vocational or technical training course, and Congress has authorized no limitation of eligibility standards within the age group, the Illinois program conflicts with that federal statutory provision and violates the Supremacy Clause. Pp. 285–292.

314 F. Supp. 1082, reversed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the result, *post*, p. 292.

Michael F. Lefkow argued the cause and filed briefs for appellants in No. 70–5021. *M. James Spitzer, Jr.*, argued the cause *pro hac vice* for appellants in No. 70–5032. With him on the briefs was *Melvin B. Goldberg*.

*Together with No. 70–5032, *Alexander et al.* v. *Swank, Director, Department of Public Aid of Illinois, et al.*, also on appeal from the same court.

Donald J. Veverka, Assistant Attorney General of Illinois, argued the cause for appellees in both cases. With him on the brief were *William J. Scott,* Attorney General, and *Francis T. Crowe, Bernard Genis,* and *David E. Bradshaw,* Assistant Attorneys General.

Solicitor General Griswold and *Richard B. Stone* filed a brief for the United States as *amicus curiae* urging affirmance in both cases.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellants, two college students and their mothers, brought this class action in the District Court for the Northern District of Illinois alleging that § 4–1.1 of the Illinois Public Aid Code, Ill. Rev. Stat., c. 23, § 4–1.1 (1967) and the implementing Illinois Public Aid Regulation 150 violate the Equal Protection Clause of the Fourteenth Amendment, and, because inconsistent with § 406 (a)(2)(B) of the Social Security Act, 42 U. S. C. § 606 (a)(2)(B), also violate the Supremacy Clause of the Constitution.[1] Under the Illinois statute and regula-

[1] Section 4–1.1 of the Illinois Public Aid Code, Ill. Rev. Stat., c. 23, § 4–1.1 (1967), provides:

"Child Age Eligibility. The child or children must be under age 18, or age 18 or over but under age 21 if in regular attendance in high school or in a vocational or technical training school. 'Regular Attendance,' as used in this Section, means attendance full time during the regular terms of such schools, or attendance part time during such regular terms as may be authorized by rule of the Illinois Department for the purpose of permitting the child to engage in employment which supplements his classroom instruction or which otherwise enhances his development toward a self-supporting status."

Illinois Department of Public Aid Regulation 150 provides:

"Age Requirements:

"A. D. C. Dependent children under 18 years of age, unless 18 through 20 years of age and in regular attendance in high school or vocational or technical training school. (This does not include 18 through 20 year old children in college.)"

tion needy dependent children 18 through 20 years of age who attend high school or vocational training school are eligible for benefits under the federally assisted Aid to Families With Dependent Children (AFDC) program, 42 U. S. C. § 601 *et seq.*, but such children who attend a college or university are not eligible.[2] Section 406 (a)(2) of

[2] Appellant Loverta Alexander lives with her son Jerome in Chicago. Jerome reached his 18th birthday in August 1968 and enrolled in junior college about a month later. In early October a Cook County welfare officer notified Mrs. Alexander that the AFDC benefits received by her since 1963 would be terminated as of November 1, 1968. Though Mrs. Alexander was able to obtain general assistance benefits from the State, the termination of AFDC payments resulted in a loss of $23.52 per month in the family's income. The only reason given by the State for the termination was that Jerome had reached his 18th birthday and was not attending high school or vocational school.

Appellant Georgia Townsend is the sole support of Omega Minor, her only child. Mrs. Townsend, who is disabled, received AFDC benefits for herself and her daughter from 1953 through 1960. Thereafter she received an AFDC grant for Omega, and benefits for herself under the Aid to the Disabled provisions of the Social Security Act, 42 U. S. C. § 1351 *et seq.* In September 1966, Omega enrolled in junior college. Two months later a Cook County welfare officer notified Mrs. Townsend that Omega's monthly AFDC payment would be canceled as of January 1967. While Mrs. Townsend's disability payments were increased to meet her own needs, the loss of AFDC benefits resulted in a reduction of $47.94 per month in family income. Again the only reason given was the failure to comply with the Illinois statute and regulation.

This action was brought by Mrs. Alexander under the Federal Civil Rights Act, 42 U. S. C. § 1983, seeking declaratory and injunctive relief against the termination of her AFDC benefits. Mrs. Townsend intervened as a plaintiff on behalf of herself and her daughter Omega, and as a member of the class described in Mrs. Alexander's complaint. The three-judge court, convened pursuant to 28 U. S. C. §§ 2281, 2284, held that appellants' complaint stated a cause of action under the Civil Rights Act, and was a proper class action under Fed. Rule Civ. Proc. 23. Those holdings are not challenged in this Court.

the Social Security Act, on the other hand, defines "dependent child" to include a child ". . . (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment." A three-judge district court held that neither constitutional contention had merit and sustained the validity of the Illinois statute and regulation. 314 F. Supp. 1082 (1970). We noted probable jurisdiction, 401 U. S. 906 (1971). We hold that the Illinois statute and regulation conflict with § 406 (a)(2)(B) and for that reason are invalid under the Supremacy Clause. We therefore reverse on that ground without reaching the equal protection issue.

I

Section 402 (a)(10) of the Social Security Act provides that state participatory plans submitted under the AFDC program for the approval of the Secretary of the Department of Health, Education, and Welfare (HEW) must provide "that aid to families with dependent children shall be furnished with reasonable promptness to *all eligible* individuals." (Emphasis supplied.) In *King* v. *Smith,* 392 U. S. 309 (1968), we considered whether a State participating in an AFDC program may, consistently with the Supremacy Clause, adopt eligibility standards that exclude from benefits needy dependent children eligible for benefits under applicable federal statutory standards. There was before us in that case a regulation of the Alabama Department of Pensions and Security that treated a man who cohabited with the mother of needy dependent children in or outside the home as a nonabsent "parent" within the federal statute. Since aid can be granted under § 406 (a) of the Federal

Act only if a "parent" of the needy child is continually absent from the home, Alabama's regulation resulted in the ineligibility of the children for benefits. We held that the Alabama regulation defined "parent" in a manner inconsistent with § 406 (a) of the Social Security Act and therefore that in "denying AFDC assistance to [children] on the basis of this invalid regulation, Alabama has breached its federally imposed obligation to furnish 'aid to families with dependent children . . . with reasonable promptness to all eligible individuals . . . .'" 392 U. S., at 333.

Thus, *King* v. *Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that HEW regulations seem to imply that States may to some extent vary eligibility requirements from federal standards.[3] However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402 (a)(10) that aid be furnished "to *all eligible* individuals." (Emphasis supplied.) *King* v. *Smith*, 392 U. S., at 333 n. 34.

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[3] See, *e. g.*, HEW's so-called "Condition X" embodied in a regulation found in 45 CFR § 233.10 (a)(1)(ii), 36 Fed. Reg. 3866:

"The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." See also HEW, Handbook of Public Assistance Administration, pt. IV, 4210 (1962); Note, Welfare's "Condition X," 76 Yale L. J. 1222 (1967).

II

It is next argued that in the case of 18–20-year-old needy dependent children, Congress authorized the States to vary eligibility requirements from federal standards. In other words, it is contended that Congress authorized the States to discriminate between these needy dependent children solely upon the basis of the type of school attended. Our examination of the legislative history has uncovered no evidence that Congress granted the asserted authority. On the contrary, we are persuaded that the history supports the conclusion that Congress meant to continue financial assistance for AFDC programs for the age group only in States that conformed their eligibility requirements to the federal eligibility standards.

Section 406 (a)(2)(B) makes dependent 18–20-year-olds eligible for benefits whether attending a college or university, or attending a course of vocational or technical training. The only discretion written into the statute permits a State to determine, "in accordance with standards prescribed by the Secretary," whether a particular student, without regard to whether his attendance is at a college or vocational school, is a student "regularly attending" a bona fide school.[4] This particularization of the area of state authority is itself cogent evidence that Congress did not also authorize the States to limit eligibility to students attending vocational school.

Nor is there anything in the legislative history of the evolution of § 406 (a)(2)(B) to support appellees' argument.[5] That history does show that whenever Congress

[4] See HEW Handbook, *supra*, n. 3, pt. IV, "Green Sheets," G–3220 (1965); cf. H. R. Conf. Rep. No. 682, 89th Cong., 1st Sess., 69–70 (1965).

[5] The United States, as *amicus curiae*, cites sections of the Social Security Act as supporting Illinois' contention that its college-vocational school distinction is authorized. For example, the United

extended AFDC eligibility to older children—from those under 16 to those 16–17, and finally to those 18–20—Congress left to the individual States the decision whether to participate in the program for the new age group. There is no legislative history, however, to support the proposition that Congress also gave to the individual States an option to tailor eligibility standards within the age group, and thus exclude children eligible under the federal standards.

The original Social Security Act provided aid only to dependent children under the age of 16. 49 Stat. 629. A 1939 amendment extended aid to children age 16–17 "regularly attending school," 53 Stat. 1380. The States were not, however, required to extend their AFDC programs to the 16–17-year age group. See H. R. Rep. No. 728, 76th Cong., 1st Sess., 28–29 (1939). But if a State chose to do so, not a word in the legislative history suggests that it might limit its choice to students attending schools selected by the State, and exclude children of the age group attending other schools.

In 1956 Congress deleted the school attendance requirement and provided for benefits for all dependent children of the 16–17 age group. 70 Stat. 850. The Senate Report on this bill stated that the bill would "*permit* Federal sharing in assistance to such children" and also that the bill would "*make* some additional needy children eligible

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States refers to § 406 (a) which originally defined "dependent child" to include a child living with his "father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt." 49 Stat. 629. A statement by Senator Harrison during debate on this provision, 79 Cong. Rec. 9269, is said to establish that the States were not required to extend assistance for every relative listed in the section. Section 407 (b) is also cited as explicitly reserving to the States a choice whether to participate in certain parts of the AFDC program. But these are express authorizations to depart from federal eligibility standards; there is no express authorization in this case.

for aid." S. Rep. No. 2133, 84th Cong., 2d Sess., 30 (1956). (Emphasis supplied.) The Conference Report stated that the bill would "*eliminate* the requirement that a needy child between 16 and 18 years of age must be regularly attending school in order to be eligible for aid to dependent children." H. R. Conf. Rep. No. 2936, 84th Cong., 2d Sess., 42 (1956). Significantly, nothing in the legislative history of that change indicates that the States were at liberty to continue to limit eligibility to 16–17-year-olds attending school.[6]

The first provision for the age group 18–20 came in 1964 when benefits were authorized but limited to children attending high school or vocational school. 78 Stat. 1042. As in the case of the 1939 amendments extending aid to children 16–17 regularly attending school, the States had the choice whether to participate in this new program; S. Rep. No. 1517, 88th Cong., 2d Sess., 2 (1964), expressly stated that "extension of the program in this manner would be optional with the States." When in 1965 Congress amended § 406 (a)(2)(B) in the form now before us nothing was said to indicate that States that had adopted the 1964 program limited to children attending vocational schools were free to continue that limited program and not extend it to children 18–20 attending a college or university. The relevant Senate Report, S. Rep. No. 404, pt. 1, 89th Cong., 1st Sess., 147 (1965), implies the contrary, stating:

> "Under existing law States, at their option, may continue payments to needy children up to age 21 in the aid to families with dependent children program, providing they are 'regularly attending a high

[6] It appears that some States and the District of Columbia continued to limit payments to 16–17-year-olds attending school and to handicapped children prevented from doing so. HEW Public Assistance Report No. 50, Characteristics of State Public Assistance Plans under the Social Security Act (1964 ed.).

> school in pursuance of a course of study leading to a high school diploma or its equivalent, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.' The committee added an amendment extending this provision so as to include needy children under 21 who are regularly 'attending a school, college, or university.' "

Moreover, the Report notes that one of the purposes of the extension was to bring AFDC in line with the Old Age Survivors and Disability Insurance provisions of the Social Security Act, 42 U. S. C. § 401 *et seq.* Under that program an insured's child is eligible for insurance benefits if he is a full-time student under 22 years of age, and under § 402 (d)(7) this includes a student attending a college or university. S. Rep. No. 404 attributed to the provision under both programs a purpose to "assure, as far as possible, that children will not be prevented from going to school or college because they are deprived of parental support." S. Rep. No. 404, *supra,* at 147. This theme carried through the Conference Committee Report: "This amendment would broaden the type of schools that children over the age of 18 and under the age of 21 may attend and receive aid to families with dependent children payments in which the Federal Government will participate." H. R. Conf. Rep. No. 682, 89th Cong., 1st Sess., 69 (1965).[7]

In sum, when application of AFDC was extended to a new age group—in 1939 to 16–17-year-olds and in 1964 to 18–20-year-olds—Congress took care to make explicit

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[7] HEW itself states: "Within the age limit set by the State, there should be a choice of attending a school, college, or university or taking a course of vocational or technical training for gainful employment." HEW, Handbook of Public Assistance Administration, *supra,* n. 3, pt. IV, "Green Sheets," G–3220 (1965).

that the decision whether to participate was left to the individual States. However, when application of AFDC within the age group was enlarged—in 1956 to all 16–17-year-olds and in 1965 to 18–20-year-olds attending college or a university—the evidence, if not as clear, is that financial support of AFDC programs for the age group was to continue only in States that conformed their eligibility requirements to the new federal standards. Any doubt must be resolved in favor of this construction to avoid the necessity of passing upon the equal protection issue. "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Shapiro* v. *Thompson,* 394 U. S. 618, 641 (1969). Notwithstanding the view of the majority of the District Court, 314 F. Supp., at 1088–1089, we think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause. The majority justified the classification as designed to attain the twin goals of aiding needy children to become employable and self-sufficient, and of insuring fiscal integrity of the State's welfare program. We doubt the rationality of the classification as a means of furthering the goal of aiding needy children to become employable and self-sufficient; we are not told what basis in practical experience supports the proposition that children with a vocational training are more readily employable than children with a college education. And a State's interest in preserving the fiscal integrity of its welfare program by economically allocating limited AFDC resources may not be protected by the device of adopting eligibility requirements restricting the class of children made eligible by federal standards. That interest may be protected by the State's "undisputed power to set the level of benefits . . . ." *King* v. *Smith,* 392

U. S., at 334. See *Dandridge* v. *Williams*, 397 U. S. 471 (1970).[8]

Reversed.

MR. CHIEF JUSTICE BURGER, concurring in the result.

I concur in the result reached by the Court, but add this brief comment. In dealing with these cases—and the other AFDC cases on the Court's docket—it seems appropriate to keep clearly in mind that Title IV of the Social Security Act governs the dispensation of federal funds and that it does no more than that. True, Congress has used the "power of the purse" to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV is in no way mandatory upon the States under the Supremacy Clause. The appropriate inquiry in any case should be, simply, whether the State has indeed adhered to the provisions and is accordingly entitled to utilize federal funds in support of its program. Cf. *Rosado* v. *Wyman*, 397 U. S. 397, 420 (1970). I agree that the answer to that inquiry here must be in the negative; I therefore concur in the result reached by the Court.

[8] The concurring opinion below acknowledged that the reasonable basis for the classification would not be apparent if incentives to learn white- and blue-collar trades and the supply and demand for professional and labor positions were the same. The opinion concluded, however, that the classification could be reasonable in the context of a labor market in which "the skills of manual laborers are in short supply," because in such a market, "as a means of utilizing limited state funds in an effort to channel persons into those employment positions for which the society has great need, the statutory discrimination between college students and post-high school vocational trainees is not purely arbitrary or invidious, but rather, a rational approach designed to correct a perceived problem." 314 F. Supp., at 1091. Apart from the fact that nothing appears about the nature of the market, a classification that channels one class of people, poor people, into a particular class of low-paying, low-status jobs would plainly raise substantial questions under the Equal Protection Clause.

UNITED STATES v. CAMPOS-SERRANO

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

No. 70–46. Argued October 14, 1971—Decided December 20, 1971

Possession of counterfeit alien registration receipt card *held* not an act punishable under 18 U. S. C. § 1546, which prohibits, *inter alia,* the counterfeiting or alteration of, or the possession, use, or receipt of an already counterfeited or altered "immigrant or non-immigrant visa, permit, or other document required for entry into the United States." The primary purpose of an alien registration receipt card is for identification within the United States, and its merely permissible re-entry function under an Immigration and Naturalization Service regulation does not suffice to bring the card within the coverage of the statute. There is a separate statutory provision specifically protecting the integrity of alien registration receipt cards, indicating that the Congress did not intend them to be covered by the more general language of § 1546. Pp. 295–301.

430 F. 2d 173, affirmed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post,* p. 301.

William Bradford Reynolds argued the cause for the United States *pro hac vice.* With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wilson, Beatrice Rosenberg,* and *Roger A. Pauley.*

John J. Cleary, by appointment of the Court, 401 U. S. 990, argued the cause and filed a brief for respondent.

William J. Scott, Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *James B. Zagel* and *Jayne A. Carr,* Assistant Attorneys General, filed a brief for the State of Illinois as *amicus curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent was convicted in a federal district court of possession of a counterfeit alien registration receipt card in violation of 18 U. S. C. § 1546,[1] and sentenced to a three-year prison term.[2] The Court

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[1] The applicable portion of § 1546 reads as follows:

"Whoever . . . knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained . . . .

. . . . . .

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[2] The sentence was suspended, and the respondent was placed on probation for three years "on condition that he return to Mexico and not return to the United States illegally." Pursuant to this sentence, he was remanded to the custody of the Immigration and Naturalization Service for deportation under a previous order. It appears that he is now in Mexico. Clearly, the fact that the respondent is now out of the country does not render this case moot. He is still under the sentence of the District Court and on probation subject to conditions imposed by the District Court. Should he violate those conditions, he will be subject to imprisonment under his continuing criminal sentence.

Eisler v. *United States*, 338 U. S. 189, is irrelevant to this case. There, the *petitioner* fled *voluntarily* from the United States and successfully resisted extradition. We, therefore, declined to consider the merits of his case, just as we have declined over the years to consider the merits of criminal cases in which the party seeking review has escaped "from the restraints placed upon him pursuant to the conviction." *Molinaro* v. *New Jersey*, 396 U. S. 365, 366; *Bonahan* v. *Nebraska*, 125 U. S. 692; *Smith* v. *United States*, 94 U. S. 97. "While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles [the party] to call upon the resources of the

of Appeals reversed the conviction, 430 F. 2d 173, holding that because of the circumstances under which Government agents had acquired the card from the respondent, it had been unconstitutionally admitted against him at the trial under *Miranda* v. *Arizona,* 384 U. S. 436. We granted certiorari. 401 U. S. 936. We do not reach the constitutional issue, however, for we have concluded that the judgment of the Court of Appeals must be affirmed upon a discrete statutory ground. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 347 (Brandeis, J., concurring).[3] We hold that possession of a counterfeit alien registration receipt card is not an act punishable under 18 U. S. C. § 1546.[4]

The statutory provision in question prohibits, *inter alia,* the counterfeiting or alteration of, or the possession, use, or receipt of an already counterfeited or altered "immigrant or nonimmigrant visa, permit, or other document required for entry into the United States." This offense originated in Section 22 (a) of the Immigration Act of 1924,[5] which covered only an "immigration visa or permit." The words "other document required for entry into the United States," were added in 1952 as part of the Immigration and Nationality Act. § 402 (a), 66 Stat. 275. The legislative history of the

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Court for determination of his claims." *Molinaro* v. *New Jersey, supra,* at 366. In the present case, by contrast, the respondent has not fled from the restraints imposed by the District Court pursuant to this conviction. Rather, he is living under those restraints today.

[3] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."

[4] Accord, *United States* v. *Fernandez-Gonzalez* (64 CR 101, ND Ill.) (unpublished opinion). Contrary to the suggestion in the dissenting opinion, our decision on this issue of statutory construction will hardly come as a "surprise" to the parties. The issue was presented to and decided by the Court of Appeals. It was argued and fully briefed before this Court by both parties.

[5] 43 Stat. 165.

1952 Act, however, does not make clear which "other" entry documents the Congress had in mind.[6]

Alien registration receipt cards were first issued in 1941. They are small, simple cards containing the alien's picture and basic identification information.[7] They have no function whatsoever in facilitating the initial entry into the United States. Rather, they are issued *after* an alien has entered the country and taken up residence. Their essential purpose is to effectuate the registration requirement for all resident aliens established in the Alien Registration Act of 1940.[8]

Until 1952, alien registration receipt cards could not even be used to facilitate *re-entry* into the United States by a resident alien who had left temporarily. Such an alien was required to obtain special documents authorizing his re-entry into the country, such as a visa or a re-entry permit.[9] However, in 1952—less than a month

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[6] See H. R. Rep. No. 1365, 82d Cong., 2d Sess.; S. Rep. No. 1137, 82d Cong., 2d Sess.; H. R. Conf. Rep. No. 2096, 82d Cong., 2d Sess. The only one of these reports to make *any* mention whatsoever of the changes in § 1546 was H. R. Rep. No. 1365. It simply stated that "necessary amendments [are made] to other laws . . . . Most of those amendments are in the nature of conforming changes." *Id.*, at 88. It seems most likely that the purpose of the new language in § 1546 was to reach the specialized border-crossing identification cards, authorized as a substitute for a visa or a permit in the Alien Registration Act of 1940. See n. 9 and n. 12, *infra*. At the time H. R. Rep. No. 1365 was published, the alien registration receipt card had no "entry" or "re-entry" function.

[7] The Appendix filed by the Government in this case contains a reproduction of an alien registration receipt card, Form I–151 of the Immigration and Naturalization Service.

[8] See 54 Stat. 673. The statutory provisions for the registration of aliens are now contained in 8 U. S. C. §§ 1301–1306.

[9] Provision for the use of re-entry permits was made in the Immigration Act of 1924, § 10, 43 Stat. 158. The Alien Registration Act of 1940 required that an alien present one of three special documents—a visa, a re-entry permit, or a border-crossing identification card—in order to come into the United States. 54 Stat. 673.

before final enactment of the Immigration and Nationality Act—the Immigration and Naturalization Service promulgated a regulation that allowed resident aliens to use their registration receipt cards for re-entry purposes as a permissible substitute for the specialized documents.[10] The apparent reason for this regulation was to minimize paper work and streamline administrative procedures by giving resident aliens the option of using for re-entry a document already issued and serving other purposes. Thus, the registration receipt cards may now be used in lieu of a visa or a re-entry permit on condition that the holder is returning to the United States after a temporary absence of not more than one year.[11]

The Court of Appeals held that the limited, merely permissible, re-entry function of the alien registration receipt card is sufficient to make it a "document *required* for *entry* into the United States" under § 1546. 430 F. 2d, at 175. We cannot agree. It has long been settled that "penal statutes are to be construed strictly," *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284, 296, and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it," *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222. In § 1546,

[10] The 1952 INS regulation provided that the alien registration receipt card could be used as a permissible substitute for a visa or a re-entry permit in effecting a re-entry into this country from a contiguous country. 17 Fed. Reg. 4921. In 1957, this permissible use of the alien registration receipt card was expanded to include re-entry from noncontiguous nations. 22 Fed. Reg. 6377. The present INS regulation appears in 8 CFR § 211.1 (b).

[11] 8 CFR § 211.1 (b).

Congress did speak in "clear and definite" language. But, taken literally and given its plain and ordinary meaning, that language does not impose a criminal penalty for possession of a counterfeited alien registration receipt card. Alien registration receipt cards *may* be used for *re-entry* by certain persons into the United States. They are not *required* for *entry*.

The canon of strict construction of criminal statutes, of course, "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett*, 348 U. S. 503, 510. If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered. In this spirit, we read § 1546 in conjunction with 8 U. S. C. § 1101 (a)(13)—another part of the 1952 Immigration and Nationality Act—which provides that, under most circumstances, an "entry" into the United States is defined to include a "re-entry." We have held in the past that Congress did not intend these terms to be taken entirely synonymously. *Rosenberg* v. *Fleuti*, 374 U. S. 449. But Congress clearly did intend a significant overlap, and we cannot say that a document usable for "entry" into the United States under § 1546 does not include some documents usable for "re-entry." Nor do we hold that § 1546 applies only to those documents absolutely "required" in order to enter or re-enter the country. To do so would undermine the congressional purpose behind § 1546, since the Immigration and Naturalization Service has not required that presentation of any one particular document be the exclusive condition of crossing our borders.

While the apparent congressional purpose underlying § 1546 would thus seem to bar an uncompromisingly literal construction, the precise language of the provision

must not be deprived of all force. The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute. Accordingly, a "document required for entry into the United States" cannot be construed to include any document whatsoever that the Immigration and Naturalization Service, from time to time, decides may be presented for re-entry at the border. The language of § 1546 denotes a very special class of "entry" documents—documents whose primary *raison d'être* is the facilitation of entry into the country. The phrase, "required for entry into the United States," is descriptive of the nature of the documents; it is not simply an open-ended reference to future administrative regulations.

If, for example, the Immigration and Naturalization Service were to allow the presentation of identification such as a driver's license at the border, the nature of such a license would not suddenly change so that it would fall into the category of a "document required for entry into the United States" under § 1546. To be sure, if a counterfeit driver's license were presented to secure entry or re-entry into the country, the bearer could be prosecuted under 8 U. S. C. § 1325, which provides for the punishment of "[a]ny alien who . . . obtains entry to the United States by a willfully false or misleading representation . . . ." But mere possession of a counterfeit driver's license, far from the border, could not be prosecuted under § 1546. The reason is that a driver's license is not essentially an "entry" document. Rather, its primary purpose is to allow its bearer lawfully to drive a car, and the bearer's possession of a counterfeit license, far from the border, could not be assumed to be related to the policies underlying the 1952 Immigration and Nationality Act.

The same analysis applies to the alien registration receipt card. Its essential purpose is not to secure entry

into the United States, but to identify the bearer as a lawfully registered alien residing in the United States. It is issued to an alien *after* he has taken up residence in this country. It is intended to govern his activities and presence *within* this country. The card has been given a convenient, additional function as a permissible substitute for a visa or re-entry permit in facilitating re-entry into the United States by a resident alien. But, unlike a visa or a re-entry permit,[12] an alien registration receipt card serves this function in only a secondary way. Unlike a visa or a re-entry permit, it is not, by its nature, a "document required for entry into the United States" under § 1546.

This construction of the language of § 1546 is conclusively supported by that section's statutory context. In the 1952 Immigration and Nationality Act, Congress clearly regarded alien registration receipt cards as serving policies separate and distinct from those served by pure "entry" documents. Although, in 1952, those cards could be used as substitutes for visas or re-entry permits, the Congress chose to deal with them separately. In 8 U. S. C. § 1306 (c) and § 1306 (d), it specifically provided for the punishment of one "who procures or attempts to procure registration of himself or another person through fraud" and of one who counterfeits an alien registration receipt card. The fact that the Con-

[12] Visas and re-entry permits are the specialized "entry" documents for which the alien registration receipt card is a permissible substitute under present INS regulations. See n. 10, *supra*.

Border-crossing identification cards are like visas and re-entry permits, and unlike alien registration receipt cards, in that they are specialized documents whose sole purpose and function is to regulate the crossing of our national borders. Hence, the likelihood that Congress in 1952 wished to expand the coverage of § 1546 to reach border-crossing identification cards, see n. 6, *supra*, supports our holding. The expansion mandated by Congress was simply *within* the class of specialized "entry" documents.

gress did not rely on § 1546 to ensure the integrity of alien registration receipt cards indicates that it did not believe that they were covered by that section. Moreover, there is a very specific overlap between § 1546 and § 1306. Both sections explicitly prohibit counterfeiting, and both explicitly prohibit fraud in the acquisition of documents.[13] Unless we assume that § 1306 is mere surplusage, we must conclude that § 1546 covers only specialized "entry" documents, and not alien registration receipt cards specifically covered in § 1306.[14]

For these reasons the judgment is

Affirmed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

The Court today affirms the judgment of the Court of Appeals "upon a discrete statutory ground" and does

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[13] The prohibition of counterfeiting in § 1546 is contained in the first paragraph of that section. See n. 1, *supra*. The prohibition of fraud in the acquisition of documents is contained in the third paragraph of § 1546, which reads as follows:

"Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity . . . .

. . . . . .

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[14] " '[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " *Market Co.* v. *Hoffman*, 101 U. S. 112, 115–116. See *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307–308. To be sure, the overlap between § 1546 and § 1306 is only partial, since § 1546 goes farther than § 1306—prohibiting the possession of counterfeit documents as well as the counterfeiting of documents. But the Congress would hardly have thought it necessary to create any overlap at all, if it had believed alien registration receipt cards were covered by § 1546.

not reach the questions with respect to which certiorari was granted.[1] This statutory ground was rejected by the District Court when it denied a defense motion to dismiss the indictment. It was also rejected by the Court of Appeals. 430 F. 2d 173, 175–176. I would reject it here.

The statutory issue to which the Court retreats is whether an alien registration card is a "document required for entry into the United States," within the meaning of 18 U. S. C. § 1546. The Court holds, somewhat to the surprise of the litigants I am sure, that the card is not such a document, and that Campos-Serrano's indictment, therefore, charged no offense under the statute. I feel that this conclusion has no support either in the statutory language and meaning or in the legislative history, and is certainly not supported by the practice, long in effect, at our Nation's borders.

I

The parent of § 1546 is § 22 (a) of the Immigration Act of 1924. 43 Stat. 165. That statute did not refer to "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States," as § 1546 does today. Instead, it spoke only of "any immigrant visa or permit." Nevertheless, even under the definition of "permit" in this older and narrower statute, Congress specifically included a temporary re-entry paper issued to and used by a resident alien who wished to

[1] "1. Whether the court below unduly extended *Miranda* v. *Arizona*, 384 U. S. 436, by holding, on the facts of this case, that agents of the Immigration and Naturalization Service were required to give respondent warnings before asking him to produce his alien registration card.

"2. Whether an alien registration card is a 'required record' which an alien must produce upon request irrespective of whether he is 'in custody.'" Pet. for Cert. 2.

leave the country for a period of less than one year.[2] Clearly, therefore, the statutory scheme, as far back as 1924, contemplated that knowing possession of an altered document useful only for *re-entering* the United States was punishable as a felony.

The registration card came into being with Title III of the Alien Registration Act of 1940, 54 Stat. 673. At first it served only for identification of the alien who had complied with the registration requirements. Section 30 of the 1940 Act, however, authorized the use of a separate "border-crossing identification card" by a resident alien in order to enable him to return to the United States after temporary travel to a contiguous country.

An INS regulation filed May 29, 1952, provided that a registration card, issued on or after September 10, 1946, "shall constitute a resident alien's border crossing card" and could be used by the alien in effecting re-entry into the United States provided he had not visited any foreign territory other than Canada or Mexico. 17 Fed. Reg. 4921–4922. This was the first time a registration card, as such, was recognized as a re-entry document. But it was so recognized. Five years later its use was expanded with respect to re-entry from nations that were not contiguous. 22 Fed. Reg. 6377 (1957). Its use for this purpose has continued to the present time. 8 CFR § 211.1 (b) (1971).

In addition to this administrative practice, the statutory language itself was expanded. Section 22 (a) of the 1924 Act was repealed in 1948 and simultaneously re-enacted without significant change as 18 U. S. C. § 1546 and as part of that year's general recodification of the federal criminal laws. 62 Stat. 771, 865. Finally, § 1546 was amended to its present form by § 402 (a) of the Immigration and Nationality Act of 1952. 66 Stat. 275.

[2] Sections 28 (k) and 10 of the 1924 Act, 43 Stat. 169 and 158.

There is no room for dispute that the 1952 change served to broaden, not to contract, the number of documents within the prohibition of § 1546. The 1924 reference to "any immigration visa or permit" is obviously but a lesser part of the later and still current phrase, "any immigrant or nonimmigrant visa, permit, or other document required for entry." See *United States* v. *Rodriguez,* 182 F. Supp. 479, 484 n. 3 (SD Cal. 1960), rev'd in part on other grounds, *sub nom. Rocha* v. *United States,* 288 F. 2d 545 (CA9), cert. denied, 366 U. S. 948 (1961). From 1924 until the 1952 legislation, narrower statutory language nevertheless had covered a document used solely for re-entry. Surely nothing in the expanded language of 1952 suggests congressional intent thenceforth to confine the statute to initial-entry documents. Indeed, congressional intent to the contrary, that is, to enlarge the coverage of § 1546, is evident not only from the statute's words but, as well, from the definition of "entry" in the 1952 Act, § 101 (a)(13), 66 Stat. 167, 8 U. S. C. § 1101 (a)(13):

> "The term 'entry' means *any coming of an alien* into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise, except . . . ." (Emphasis supplied.)

From this it inevitably follows that the phrase "document required for entry" embraces a document used for re-entry into the United States. One document of that kind is the alien registration card.[3]

This brief but clear administrative and legislative history, it seems to me, reveals and proves the intent of

[3] The face of the card, Form I–151, bears the recital, "This card will be honored in lieu of a visa and passport on condition that the rightful holder is returning to the United States after a temporary absence of not more than one year and is not subject to exclusion under any provision of the immigration laws."

Congress and the meaning and reach of the statute. The alien registration card, Form I–151, became one of a number of documents specified and accepted and *required* for re-entry.

The Court's opinion, as I read it, seems to accept most of all this, that is, that there is no § 1546 distinction between "entry" and "re-entry," and that an alien registration card is a document "required" for entry into the United States. *Ante,* at 298.

Having made this broad and, to me, sensible reading of § 1546, the Court, however, then reverses direction and conveniently restricts § 1546 to "a very special class of 'entry' documents—documents whose primary *raison d'être* is the facilitation of entry into the country," and it accuses the INS of standing to gain "an open-ended reference to future administrative regulations" if the Government were to prevail here. The reasons for this change of direction are not apparent to me. The Court's comparison of the registration card to a driver's license in this context is wide of the mark. A driver's license has nothing to do with immigration. A registration card has everything to do with immigration. It is authorized under the immigration statutes. It is required of a resident alien. 8 U. S. C. §§ 1301–1306. And for almost two decades it has been a re-entry document.

II

The fact that there may be some overlapping between § 1546 and 8 U. S. C. § 1306 (d) does not prevent the application of § 1546 to the alien registration card.[4] Section 1306 (d) came into being as § 266 (d) of the 1952

[4] Overlapping in federal criminal statutes is not unknown. See, for example, *Sansone* v. *United States,* 380 U. S. 343 (1965); *Gore* v. *United States,* 357 U. S. 386 (1958); *Achilli* v. *United States,* 353 U. S. 373 (1957); *Prince* v. *United States,* 352 U. S. 322 (1957); *Spies* v. *United States,* 317 U. S. 492 (1943).

Act, 66 Stat. 226. It does refer specifically to "an alien registration receipt card," whereas § 1546 has no such specific reference. The two sections, however, have different purposes and relate to different aspects of immigration. Section 266 (d) was a part of the Act's chapter that concerned "Registration of Aliens." It has to do with the implementation and protection of the alien registration scheme. It reached counterfeiting alone. Section 1546, on the other hand, is concerned with entry into the country and with the integrity of documents used in effecting entry. It is not restricted to counterfeiting. It also reaches knowing possession and alteration.

The Court's exclusion of the alien registration card from the reach of § 1546 leaves entirely free from punishment the alteration of a card and the possession of a card with knowledge of its altered or counterfeit character. Surely Congress did not intend to leave that loophole.[5]

I therefore dissent from the Court's affirmance of the judgment of the Court of Appeals upon the "discrete statutory ground." I would decide that issue as the Court of Appeals decided it and I would go on to reach the questions we anticipated when we granted the petition for certiorari.

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[5] The loophole is not closed by 8 U. S. C. § 1325, as the respondent would assert. Section 1325 concerns a very different offense, namely, the actual misuse of the entry document in obtaining entry to the United States. Section 1546, on the other hand, relates to potential misuse of the entry document after gaining entry to the country.

Syllabus

UNITED STATES *v.* MARION ET AL.

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

No. 70–19. Argued November 8, 1971—Decided December 20, 1971

Appellees, claiming that the Government had known of the crimes with which they were charged, the circumstances of the crimes, and appellees' identities for over three years before they were indicted, moved to dismiss on the ground that the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses," and that the delay deprived them of rights to due process of law and a speedy trial as secured by the Fifth and Sixth Amendments. While asserting no specific prejudice, appellees contended that the indictment required memory of many specific acts and conversations occurring several years before and that the delay was due to the prosecutor's negligence or indifference in investigating the case and presenting it to the grand jury. The District Court, after a hearing, granted appellees' motion and dismissed the indictment for "lack of speedy prosecution," having found that the defense was "bound to have been seriously prejudiced" by the three-year delay. The Government took a direct appeal to this Court, which postponed consideration of the question of jurisdiction until the hearing on the merits. *Held:*

1. The motion to dismiss the indictment for lack of a speedy trial was in the nature of a confession and avoidance and constituted a motion in bar by appellees who had not been placed in jeopardy when the District Court entered its order of dismissal. That order was therefore directly appealable to this Court under former 18 U. S. C. § 3731. Pp. 311–312.

2. The Sixth Amendment's guarantee of a speedy trial is applicable only after a person has been "accused" of a crime, which in this case did not occur until appellees (who had not previously been arrested or otherwise charged) were indicted. Pp. 313–320.

3. The relevant statute of limitations provides a safeguard against possible prejudice resulting from pre-accusation delay, and here appellees were indicted within the applicable limitations period. Pp. 320–323.

4. Though the Due Process Clause may provide a basis for dismissing an indictment if the defense can show at trial that prosecutorial delay has prejudiced the right to a fair trial, appellees have not claimed or proved actual prejudice resulting from the delay and their due process claims are therefore speculative and premature. Pp. 325–326.

Reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 326.

Deputy Solicitor General Greenawalt argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wilson, Acting Assistant Attorney General Petersen, Beatrice Rosenberg,* and *Mervyn Hamburg.*

Thomas Penfield Jackson argued the cause for appellees and filed a brief for appellee Marion. *Benjamin Wright Cotten* filed a brief for appellee Cratch.

Alan Y. Cole and *Isaac N. Groner* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal requires us to decide whether dismissal of a federal indictment was constitutionally required by reason of a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment.

On April 21, 1970, the two appellees were indicted and charged in 19 counts with operating a business known as Allied Enterprises, Inc., which was engaged in the business of selling and installing home improvements such as intercom sets, fire control devices, and burglary detection systems. Allegedly, the business was fraudu-

lently conducted and involved misrepresentations, alterations of documents, and deliberate nonperformance of contracts. The period covered by the indictment was March 15, 1965, to February 6, 1967; the earliest specific act alleged occurred on September 3, 1965, the latest on January 19, 1966.

On May 5, 1970, appellees filed a motion to dismiss the indictment "for failure to commence prosecution of the alleged offenses charged therein within such time as to afford [them their] rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States." No evidence was submitted, but from the motion itself and the arguments of counsel at the hearing on the motion, it appears that Allied Enterprises had been subject to a Federal Trade Commission cease-and-desist order on February 6, 1967, and that a series of articles appeared in the Washington Post in October 1967, reporting the results of that newspaper's investigation of practices employed by home improvement firms such as Allied. The articles also contained purported statements of the then United States Attorney for the District of Columbia describing his office's investigation of these firms and predicting that indictments would soon be forthcoming. Although the statements attributed to the United States Attorney did not mention Allied specifically, that company was mentioned in the course of the newspaper stories. In the summer of 1968, at the request of the United States Attorney's office, Allied delivered certain of its records to that office, and in an interview there appellee Marion discussed his conduct as an officer of Allied Enterprises. The grand jury that indicted appellees was not impaneled until September 1969, appellees were not informed of the grand jury's concern with them until March 1970, and the indictment was finally handed down in April.

Appellees moved to dismiss because the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses." They argued that the indictment required memory of many specific acts and conversations occurring several years before, and they contended that the delay was due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury. No specific prejudice was claimed or demonstrated. The District Court judge dismissed the indictment for "lack of speedy prosecution" at the conclusion of the hearing and remarked that since the Government must have become aware of the relevant facts in 1967, the defense of the case "is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968." [1]

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[1] App. 39. The court's oral decision consisted of the following statement: "It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions, they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

"The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

"The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the motion to dismiss." *Ibid.*

The United States appealed directly to this Court pursuant to 18 U. S. C. § 3731 (1964 ed., Supp. V).[2] We postponed consideration of the question of jurisdiction until the hearing on the merits of the case.[3] We now hold that the Court has jurisdiction, and on the merits we reverse the judgment of the District Court.

I

Prior to its recent amendment, 18 U. S. C. § 3731 (1964 ed., Supp. V) authorized an appeal to this Court

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[2] The Criminal Appeals Act, 18 U. S. C. § 3731 (1964 ed., Supp. V), at the time of this appeal, provided in relevant part:

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

The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890, amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This amendment thus terminated the Court's appellate jurisdiction of Government appeals from district court judgments in federal criminal cases. Pending cases were not affected by the amendment, however, since subsection (b) of § 14 provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971; the appellees in this case were indicted on April 21, 1970.

[3] 401 U. S. 934 (1971).

by the United States when in any criminal case a district court sustained "a motion in bar, when the defendant has not been put in jeopardy." It is plain to us that the appeal of the United States is within the purview of this section. Appellees had not been placed in jeopardy when the District Court rendered its judgment. The trial judge based his ruling on undue delay prior to indictment, a matter that was beyond the power of the Government to cure since re-indictment would not have been permissible under such a ruling. The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as the running of the statute of limitations or the denial of a speedy trial. See *United States* v. *Weller*, 401 U. S. 254, 260 (1971). The motion rested on constitutional grounds exclusively, and neither the motion, the arguments of counsel, the Court's oral opinion, nor its judgment mentioned Federal Rule of Criminal Procedure 48 (b), as a ground for dismissal.[4] Our jurisdiction to hear this appeal has been satisfactorily established.

[4] Rule 48 (b) provides that: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint." In any event, it is doubtful that Rule 48 (b) applies in the circumstances of this case, where the indictment was the first formal act in the criminal prosecution of these appellees. See cases cited in n. 11, *infra*.

II

Appellees do not claim that the Sixth Amendment was violated by the two-month delay between the return of the indictment and its dismissal. Instead, they claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused," an event that occurred in this case only when the appellees were indicted on April 21, 1970.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him. "[T]he essential ingredient is orderly expedition and not mere speed." *Smith* v. *United States,* 360 U. S. 1, 10 (1959).

Our attention is called to nothing in the circumstances surrounding the adoption of the Amendment indicating

that it does not mean what it appears to say,[5] nor is there more than marginal support for the proposition that, at the time of the adoption of the Amendment, the prevailing rule was that prosecutions would not be permitted if there had been long delay in presenting a charge.[6] The framers could hardly have selected less

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[5] The history of the speedy trial provision is sparse and unilluminating with respect to the issue before us. See F. Heller, The Sixth Amendment to the Constitution of the United States 31–32, 34 (1951); R. Rutland, The Birth of the Bill of Rights, 1776–1791, p. 202 (1955); I. Brant, The Bill of Rights 223 (1965); Dumbauld, State Precedents for the Bill of Rights, 7 J. Pub. L. 323, 335 n. 91 (1958); Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 484 (1968).

[6] A single case that antedates the Bill of Rights, *Rex* v. *Robinson,* 1 Black. W. 541, 96 Eng. Rep. 313 (K. B. 1765), and three 19th century British cases, *Rex* v. *Marshall,* 13 East 322, 104 Eng. Rep. 394 (K. B. 1811); *Regina* v. *Hext,* 4 Jurist 339 (Q. B. 1840); *Regina* v. *Robins,* 1 Cox's C. C. 114 (Somerset Winter Assizes 1844), are cited for the proposition that the framers intended to protect against pre-indictment delay by enacting the Sixth Amendment. These cases fail to establish a definite rule that the Founders sought to constitutionalize, however, and the Government's argument concerning the history of the Sixth Amendment, while not dispositive, is more persuasive. Brief for the United States 15–18. The Government points out that the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, provided for "more speedy Relief of all Persons imprisoned for any such criminal or supposed criminal Matters" and required that persons jailed for felonies or treason be brought to trial upon their own motion within two terms of court or be discharged on bail. The Act does not allude to delay before arrest. Most of the States that ratified the Bill of Rights had either adopted the British Act or passed a similar law, *Petition of Provoo,* 17 F. R. D. 183, 197 n. 6 (Md.), aff'd *sub nom. United States* v. *Provoo,* 350 U. S. 857 (1955), and many of them had speedy trial provisions in their own constitutions which were modeled on the British Act. Article 8 of the Virginia Declaration of Rights, which may have been the model Madison used for the Sixth Amendment, Rutland, *supra,* n. 5, at 202, secured the right to a speedy trial in "criminal prosecutions" where "a man hath a

appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay. No opinions of this Court intimate support for appellees' thesis,[7] and the courts of appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved.[8]

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right to demand the cause and nature of his accusation." See generally Heller, *supra,* n. 5, at 23. Insofar as this meager evidence is probative at all, it seems to imply that the Sixth Amendment was designed to assure that those accused of crimes would have their trial without undue delay.

[7] This Court has interpreted the Sixth Amendment's speedy trial guarantee in only a small number of cases. See, *e. g., Dickey* v. *Florida,* 398 U. S. 30 (1970); *Smith* v. *Hooey,* 393 U. S. 374 (1969); *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967); *United States* v. *Ewell,* 383 U. S. 116 (1966); *Pollard* v. *United States,* 352 U. S. 354 (1957); *United States* v. *Provoo, supra,* n. 6; *Beavers* v. *Haubert,* 198 U. S. 77 (1905). See also *Smith* v. *United States,* 360 U. S. 1, 10 (1959).

[8] Most courts of appeals have recognized the Sixth Amendment right to a speedy trial only after a prosecution has been formally initiated or have held that the sole safeguard against pre-indictment delay is the relevant statute of limitations: *United States* v. *Feinberg,* 383 F. 2d 60, 65 (CA2 1967); *Carlo* v. *United States,* 286 F. 2d 841, 846 (CA2), cert. denied, 366 U. S. 944 (1961); *Pitts* v. *North Carolina,* 395 F. 2d 182, 185 n. 3 (CA4 1968); *United States* v. *Durham,* 413 F. 2d 1003, 1004 (CA5 1969); *Kroll* v. *United States,* 433 F. 2d 1282, 1286 (CA5 1970), cert. denied, 402 U. S. 944 (1971); *United States* v. *Grayson,* 416 F. 2d 1073, 1076–1077 (CA5 1969); *United States* v. *Wilson,* 342 F. 2d 782, 783 (CA5), cert. denied, 382 U. S. 860 (1965); *Donnell* v. *United States,* 229 F. 2d 560, 567 (CA5 1956); *Harlow* v. *United States,* 301 F. 2d 361, 366 (CA5), cert. denied, 371 U. S. 814 (1962); *Bruce* v. *United States,* 351 F. 2d 318, 320 (CA5 1965), cert. denied, 384 U. S. 921 (1966); *Hoopengarner* v. *United States,* 270 F. 2d 465, 469 (CA6 1959); *United States* v. *Harris,* 412 F. 2d 471, 473 (CA6 1969); *Lothridge* v. *United States,* 441 F. 2d 919, 922 (CA6 1971); *Parker* v. *United States,* 252 F. 2d 680, 681

Legislative efforts to implement federal and state speedy trial provisions also plainly reveal the view that these guarantees are applicable only after a person has

(CA6), cert. denied, 356 U. S. 964 (1958); *Edmaiston* v. *Neil,* 452 F. 2d 494 (CA6 1971); *United States* v. *Panczko,* 367 F. 2d 737, 738–739 (CA7 1966); *Terlikowski* v. *United States,* 379 F. 2d 501, 504 (CA8), cert. denied, 389 U. S. 1008 (1967); *Foley* v. *United States,* 290 F. 2d 562, 565 (CA8 1961); *Benson* v. *United States,* 402 F. 2d 576, 579 (CA9 1968); *Venus* v. *United States,* 287 F. 2d 304, 307 (CA9 1960), rev'd *per curiam* on other grounds, 368 U. S. 345 (1961); *D'Aquino* v. *United States,* 192 F. 2d 338, 350 (CA9 1951), cert. denied, 343 U. S. 935 (1952); *United States* v. *Reed,* 413 F. 2d 338, 340 (CA10 1969), cert. denied *sub nom. Sartain* v. *United States,* 397 U. S. 954 (1970); *Nickens* v. *United States,* 116 U. S. App. D. C. 338, 340, 323 F. 2d 808, 810 (1963), cert. denied, 379 U. S. 905 (1964). Some courts of appeals have stated that pre-indictment delay may be cause for dismissal but they have seemed to treat the question primarily as one of due process (although the Sixth Amendment is occasionally mentioned) and have required a showing of actual prejudice: *Schlinsky* v. *United States,* 379 F. 2d 735, 737 (CA1 1967); *Fleming* v. *United States,* 378 F. 2d 502, 504 (CA1 1967); *United States* v. *Capaldo,* 402 F. 2d 821, 823 (CA2 1968), cert. denied, 394 U. S. 989 (1969); *United States* v. *Simmons,* 338 F. 2d 804, 806 (CA2 1964), cert. denied, 380 U. S. 983 (1965); *United States* v. *Holiday,* 319 F. 2d 775, 776 (CA2 1963); *United States* v. *Hammond,* 360 F. 2d 688, 689 (CA2 1966); *United States* v. *Dickerson,* 347 F. 2d 783, 784 (CA2 1965); *United States* v. *Rivera,* 346 F. 2d 942, 943 (CA2 1965); *United States* v. *Sanchez,* 361 F. 2d 824, 825 (CA2 1966); *United States* v. *Harbin,* 377 F. 2d 78, 79, 80 n. 1 (CA4 1967); *United States* v. *Lee,* 413 F. 2d 910, 912–913 (CA7 1969), cert. denied, 396 U. S. 1022 (1970); *United States* v. *Napue,* 401 F. 2d 107, 114–115 (CA7 1968), cert. denied, 393 U. S. 1024 (1969); *Lucas* v. *United States,* 363 F. 2d 500, 502 (CA9 1966); *Sanchez* v. *United States,* 341 F. 2d 225, 228 n. 3 (CA9), cert. denied, 382 U. S. 856 (1965); *Acree* v. *United States,* 418 F. 2d 427, 430 (CA10 1969). Although *Petition of Provoo,* 17 F. R. D. 183 (Md.), aff'd *sub nom. United States* v. *Provoo,* 350 U. S. 857 (1955), is sometimes cited for the proposition that pre-indictment delay will justify dismissal, the District Court explicitly stated that it considered this delay to be relevant only on the issue of whether the

been accused of a crime. The Court has pointed out that "[a]t the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict." *United States* v. *Cadarr*, 197 U. S. 475, 478 (1905). Since it is "doubtless true that in some cases the power of the Government has been abused and charges have been kept hanging over the

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defendant had been denied a fair trial. 17 F. R. D., at 202. In *Taylor* v. *United States*, 99 U. S. App. D. C. 183, 238 F. 2d 259 (1956), a conviction was vacated where there had been a six-year delay between the crime (housebreaking) and trial, 3½ years of which was a delay between crime and indictment; the defendant had been in prison on another charge during this time, and the defendant was substantially prejudiced in his ability to defend against the housebreaking charge. The Court of Appeals stated: "We do not rely on the mere lapse of time between the commission of the offenses and the date of indictment, considered by itself, for that is governed by the statute of limitations. It is the combination of the factors set forth above [post-indictment delay, prejudice] which motivates our decision." *Id.*, at 186, 238 F. 2d, at 262. In three instances district courts have held, however, that "delay" for Sixth Amendment purposes must be computed from the time of the crime or from the time when the Government considers the defendants' actions criminal, and have dismissed indictments for excessive delay. *United States* v. *Parrott*, 248 F. Supp. 196 (DC 1965); *United States* v. *Wahrer*, 319 F. Supp. 585 (Alaska 1970); *United States* v. *Burke*, 224 F. Supp. 41 (DC 1963). There is a unique line of cases in the District of Columbia Circuit concerning pre-indictment delay in narcotics cases where the Government relies on secret informers and (frequently) on single transactions. These cases take a more rigid stance against such delays, but they are based on the Court of Appeals' purported supervisory jurisdiction and not on the Sixth Amendment. See, *e. g.*, *Ross* v. *United States*, 121 U. S. App. D. C. 233, 238, 349 F. 2d 210, 215 (1965); *Bey* v. *United States*, 121 U. S. App. D. C. 337, 350 F. 2d 467 (1965); *Powell* v. *United States*, 122 U. S. App. D. C. 229, 231, 352 F. 2d 705, 707 (1965); *Tynan* v. *United States*, 126 U. S. App. D. C. 206, 208, 376 F. 2d 761, 763 (1967) (explicitly limiting *Ross*).

heads of citizens, and they have been committed for unreasonable periods, resulting in hardship," the Court noted that many States "[w]ith a view to preventing such wrong to the citizen . . . [and] in aid of the constitutional provisions, National and state, intended to secure to the accused a speedy trial" had passed statutes limiting the time within which such trial must occur after charge or indictment.[9] Characteristically, these statutes to which the Court referred are triggered only when a citizen is charged or accused.[10] The statutes vary greatly in sub-

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[9] The provision the Court dealt with in *Cadarr* was § 939 of the then District of Columbia Code adopted by Congress, 31 Stat. 1342. That section provided that if any person "charged with a criminal offense shall have been committed or held to bail," the grand jury must act within a specified time or the accused would be set free. The provision remains in the present code as § 23–102, 84 Stat. 605, and then, as now, does not purport to reach behind the time of charge, commitment, or holding for bail.

[10] See, *e. g.*, Ill. Rev. Stat., c. 38, § 103–5 (a) (1969); Pa. Stat. Ann., Tit. 19, § 781 (1964); Cal. Pen. Code § 1382 (1970); Va. Code Ann. § 19.1–191 (1960); Nev. Rev. Stat. § 178.556 (1967). A more comprehensive list of such state statutes appears in American Bar Association Project on Standards for Criminal Justice, Speedy Trial 14–15 (Approved Draft 1968). The Administrative Board of the Judicial Conference of the State of New York recently promulgated rules on trial delay and detention which cover defendants who are "held in custody" and which begin computation of delay periods from the date of arrest. Rule 29.1, New York Law Journal, April 30, 1971, p. 1, col. 6. See generally Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476 (1968); Note, Pre-Arrest Delay: Evolving Due Process Standards, 43 N. Y. U. L. Rev. 722 (1968); Note, Constitutional Limits on Pre-Arrest Delay, 51 Iowa L. Rev. 670 (1966); Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587 (1965); Note, Justice Overdue—Speedy Trial for the Potential Defendant, 5 Stan. L. Rev. 95 (1952).

The rules that the Second Circuit *en banc* recently adopted in *United States ex rel. Frizer* v. *McMann*, 437 F. 2d 1312 (CA2 1971), which appear in Appendix, 28 U. S. C. A. (May 1971 Supp.), require trial within a specified period but apply to "all persons held in jail

stance, structure, and interpretation, but a common denominator is that "[i]n no event . . . [does] the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this." Note, The Right to a Speedy Trial, 57 Col. L. Rev. 846, 848 (1957).

No federal statute of general applicability has been enacted by Congress to enforce the speedy trial provision of the Sixth Amendment, but Federal Rule of Criminal Procedure 48 (b), which has the force of law, authorizes dismissal of an indictment, information, or complaint "[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial . . . ." The rule clearly is limited to post-arrest situations.[11]

Appellees' position is, therefore, at odds with long-standing legislative and judicial constructions of the

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prior to trial" and "defendants" in "all other criminal cases." Rule 2. Rule 4 provides that: "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest." See generally Comment, Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 71 Col. L. Rev. 1059 (1971).

Cf. also S. 895, 92d Cong., 1st Sess., a bill intended "[t]o give effect to the sixth amendment right to a speedy trial for persons charged with offenses against the United States." The protections of the bill are engaged "within sixty days from the date the defendant is arrested or a summons is issued, except that if an information or indictment is filed, then within sixty days from the date of such filing." § 3161 (b)(1).

[11] *Nickens* v. *United States, supra,* at 339, 323 F. 2d, at 809; *Harlow* v. *United States, supra; Hoopengarner* v. *United States, supra; United States* v. *Hoffa,* 205 F. Supp. 710, 720–721 (SD Fla. 1962).

speedy trial provisions in both national and state constitutions.

III

It is apparent also that very little support for appellees' position emerges from a consideration of the purposes of the Sixth Amendment's speedy trial provision, a guarantee that this Court has termed "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell,* 383 U. S. 116, 120 (1966); see also *Klopfer* v. *North Carolina,* 386 U. S. 213, 221–226 (1967); *Dickey* v. *Florida,* 398 U. S. 30, 37–38 (1970). Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer* v. *North Carolina, supra;* see also *Smith* v. *Hooey,* 393 U. S. 374, 377–378 (1969). So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge.[12] But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.[13] But this

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[12] In its Standards Relating to Speedy Trial, n. 10, *supra*, at 6, the ABA defined the time at which the beginning of the delay period should be computed as

"the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer." Rule 2.2 (a).

Under the ABA Standards, after a defendant is charged, it is contemplated that his right to a speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; there is no necessity to allege or show prejudice to the defense. Rule 2.1, *ibid.*

[13] Extending a Sixth Amendment right to a period prior to indictment or holding to answer would also create procedural problems: "[W]hile other rights may be violated by delay in arrest or charge, it does not follow that the time for trial should be counted from any date of inaction preceding filing of the charge or holding the defendant to answer. To recognize a general speedy trial right commencing as of the time arrest or charging was possible would have unfortunate consequences for the operation of the criminal justice system. Allowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof. As one court said, 'the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded diligently or otherwise.' [*United States* v. *Port*, Crim. No. 33162, (ND Cal., June 2,

possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case.

The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States* v. *Ewell, supra,* at 122, "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence." *Public Schools* v. *Walker,* 9 Wall. 282, 288 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.[14] As this

1952). Quoted in Note, Justice Overdue—Speedy Trial for the Potential Defendant, 5 Stan. L. Rev. 95, 101–102, n. 34.]" Commentary to Rule 2.2 (a), Speedy Trial, n. 10, *supra,* at 23.

[14] The Court has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose. *United States* v. *Habig,* 390 U. S. 222, 227 (1968). The policies behind civil statutes of limitation are in many ways similar. They "represent a public policy about the privilege to litigate," *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 314 (1945), and their underlying rationale is "to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory." *Missouri, Kansas & Texas R. Co.* v. *Harriman,* 227 U. S. 657, 672 (1913). Such statutes "are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected," *Riddlesbarger* v. *Hartford Insurance Co.,* 7 Wall. 386, 390 (1869), they "promote justice by preventing

Court observed in *Toussie* v. *United States,* 397 U. S. 112, 114–115 (1970):

> "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function.

Since appellees rely only on potential prejudice and the passage of time between the alleged crime and the

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surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 348–349 (1944), and they "are primarily designed to assure fairness to defendants. . . . [C]ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett* v. *New York Central R. Co.,* 380 U. S. 424, 428 (1965). As in the criminal law area, such statutes represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, supra,* at 349.

indictment, see Part IV, *infra*, we perhaps need go no further to dispose of this case, for the indictment was the first official act designating appellees as accused individuals and that event occurred within the statute of limitations.[15] Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.[16] Cf. *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Napue* v. *Illinois*, 360 U. S. 264 (1959). However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution.[17] Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal

[15] "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U. S. C. § 3282.

[16] Brief for the United States 26–27.

[17] A number of courts of appeals have considered the question. See, *e. g.*, *Benson* v. *United States*, 402 F. 2d, at 580; *Schlinsky* v. *United States*, *supra*; *United States* v. *Capaldo*, *supra*; *United States* v. *Lee*, 413 F. 2d, at 913; *United States* v. *Wilson*, *supra*; *United States* v. *Harbin*, 377 F. 2d, at 80; *Acree* v. *United States*, *supra*; *Nickens* v. *United States*, *supra*, at 340 n. 2, 323 F. 2d, at 810 n. 2.

prosecution.[18] To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases.

IV

In the case before us, neither appellee was arrested, charged, or otherwise subjected to formal restraint prior to indictment. It was this event, therefore, that transformed the appellees into "accused" defendants who are subject to the speedy trial protections of the Sixth Amendment.

The 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations here. Appellees have not, of course, been able to claim undue delay pending trial, since the indictment was brought on April 21, 1970, and dismissed on June 8, 1970. Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely

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[18] Cf. *Hoffa* v. *United States*, 385 U. S. 293, 310 (1966):
"There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in the result.

I assume that if the three-year delay in this case had occurred *after* the indictment had been returned, the right to a speedy trial would have been impaired and the indictment would have to be dismissed. I disagree with the Court that the guarantee does not apply if the delay was at the pre-indictment stage of a case.

From March 15, 1965, to February 6, 1967, appellees acting through Allied Enterprises, Inc., sold and installed home intercom, fire control, and burglar detection devices in the District of Columbia metropolitan area. Their business endeavors were soon met with a spate of lawsuits seeking recovery for consumer fraud and, on February 6, 1967, their brief career was ended by a cease-and-desist order entered by the Federal Trade Commission. Public notoriety continued to surround appellees' activities and, in a series of articles appearing in the Washington Post in September and October of 1967, their business was mentioned as being under investigation by the United States Attorney. The special grand jury that was impaneled on October 9, 1967, to investigate consumer fraud did not, however, return an indictment against

appellees. Sometime between the summer of 1968 and January 1969, appellees delivered their business records to the United States Attorney, but an indictment was not returned against them until April 21, 1970. The indictment charged some 19 counts of mail fraud, wire fraud, and transportation of falsely made securities in interstate commerce all between September 3, 1965, and January 19, 1966.

Appellees moved "to dismiss the indictment for failure to commence prosecution . . . within such time as to [satisfy the] . . . rights to due process of law and to a speedy trial . . . ." The United States Attorney sought to excuse the delay, alleging that his office had been understaffed at the time and that it had given priority to other types of crimes. The District Court granted appellees' motion [1] and the United States appealed. 18 U. S. C. § 3731 (1964 ed., Supp. V).

The majority says "that it is either a formal indictment or information or else the actual restraints imposed by

[1] In dismissing the indictment, the District Court said:

"It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions, they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

"The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

"The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the motion to dismiss."

arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision . . . ." *Ante*, at 320.

The Sixth Amendment, to be sure, states that "the accused shall enjoy the right to a speedy and public trial." But the words "the accused," as I understand them in their Sixth Amendment setting, mean only the person who has standing to complain of prosecutorial delay in seeking an indictment or filing an information. The right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pre-indictment delays as it is to post-indictment delays. Much is made of the history of the Sixth Amendment as indicating that the speedy trial guarantee had no application to pre-prosecution delays.

There are two answers to that proposition. First, British courts historically did consider delay as a condition to issuance of an information.

Lord Mansfield held in *Rex* v. *Robinson*, 1 Black. W. 541, 542, 96 Eng. Rep. 313 (K. B. 1765), that the issuance of an information was subject to time limitations: "If delayed, the delay must be reasonably accounted for." In *Regina* v. *Hext*, 4 Jurist 339 (Q. B. 1840), an information was refused where a whole term of court had passed since the alleged assault took place. Accord: *Rex* v. *Marshall*, 13 East 322, 104 Eng. Rep. 394 (K. B. 1811).

Baron Alderson said in *Regina* v. *Robins*, 1 Cox's C. C. 114 (Somerset Winter Assizes 1844), where there was a two-year delay in making a charge of bestiality:

> "It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the

> charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."

Second, and more basically, the 18th century criminal prosecution at the common law was in general commenced in a completely different way from that with which we are familiar today. By the common law of England which was brought to the American colonies, the ordinary criminal prosecution was conducted by a private prosecutor, in the name of the King. In case the victim of the crime or someone interested came forward to prosecute, he retained his own counsel and had charge of the case as in the usual civil proceeding. See G. Dession, Criminal Law, Administration and Public Order 356 (1948). Procedurally, the criminal prosecution was commenced by the filing of a lawsuit, and thereafter the filing of an application for criminal prosecution or rule *nisi* or similar procedure calling for the defendant to show cause why he should not be imprisoned. The English common law, with which the Framers were familiar, conceived of a criminal prosecution as being commenced prior to indictment. Thus in that setting the individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment.[2]

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[2] See 1 J. Stephen, History of the Criminal Law of England 493–496 (1883):

"In England, and, so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons." *Id.*, at 493.

For an annotated version of the inception and evolution of the British system, see M. Schwartz, Cases and Materials on Professional Responsibility and the Administration of Criminal Justice 2–3 (Nat. Council on Legal Clinics 1961).

The right to a speedy trial, which we have characterized "as fundamental as any of the rights secured by the Sixth Amendment," *Klopfer* v. *North Carolina,* 386 U. S. 213, 223, protects several demands of criminal justice: the prevention of undue delay and oppressive incarceration prior to trial; the reduction of anxiety and concern accompanying public accusation; and limiting the possibilities that long delay will impair the ability of an accused to defend himself. *Smith* v. *Hooey,* 393 U. S. 374, 377–378 (1969). See also *People* v. *Prosser,* 309 N. Y. 353, 356, 130 N. E. 2d 891, 894 (1955). The right also serves broader interests:

> "The Speedy Trial Clause protects societal interests, as well as those of the accused. The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. See *Ponzi* v. *Fessenden,* 258 U. S. 254, 264 (1922). Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction." *Dickey* v. *Florida,* 398 U. S. 30, 42 (1970) (BRENNAN, J., concurring).

At least some of these values served by the right to a speedy trial are not unique to any particular stage of the criminal proceeding. See Note, 43 N. Y. U. L. Rev. 722, 725–726 (1968); Note, 77 Yale L. J. 767, 780–783 (1968); Comment, 11 Ariz. L. Rev. 770, 774–776 (1969). Undue delay may be as offensive to the right to a speedy trial before as after an indictment or information. The anx-

iety and concern attendant on public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed, the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance promptly to defend himself in a court of law. Those who are accused of crime but never tried may lose their jobs or their positions of responsibility, or become outcasts in their communities.

The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.[3]

The duty which the Sixth Amendment places on Government officials to proceed expeditiously with crim-

[3] Judge Wright recognized this in his concurring opinion in *Nickens* v. *United States*, 116 U. S. App. D. C. 338, 343, 323 F. 2d 808, 813 (1963):

"Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors."

inal prosecutions would have little meaning if those officials could determine when that duty was to commence. To be sure, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers* v. *Haubert,* 198 U. S. 77, 87 (1905). But it is precisely because this right is relative that we should draw the line so as not to condone illegitimate delays whether at the *pre-* or the *post*-indictment stage.[4]

Our decisions do not support the limitations of the right to a speedy trial adopted in the majority's conclusion that "the [Sixth] amendment [does not extend] to

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[4] "[A] preprosecution delay can result in the loss of physical evidence, the unavailability of potential witnesses, and the impairment of the ability of the prospective defendant and his witnesses to remember the events in question. Indeed, the possibility of such prejudice may be greater in preprosecution-delay cases than in post indictment-delay cases. The typical prospective defendant is probably unaware of the fact that criminal charges will eventually be brought against him. Thus, he will have no reason to take measures to preserve his memory or the memories of his witnesses. 'The importance of these considerations becomes clear when measured against the state's ability to collect and document evidence as it carries out its criminal investigation, thereby preserving its probative firepower until the time of eventual arrest.'

"The causal factor also can be present in a preprosecution delay. Many preprosecution delays are caused by the reluctance of the government to terminate an undercover investigation. If the knowledge obtained by an undercover agent is used as the basis for an arrest or for the issuance of a complaint, the identity of the agent may be exposed and his effectiveness destroyed. Consequently, the government will often delay arresting an individual against whom its case is complete if the agent is still obtaining evidence against other individuals. In such a situation, the government has made a deliberate choice for a supposed advantage. While this advantage is arguably not sought vis-à-vis the defendant asserting the speedy-trial claim, the fact remains that the advantage arises out of a deliberate and avoidable choice on the part of law-enforcement authorities." Note, 20 Stan. L. Rev. 476, 489.

the period prior to arrest." *Ante,* at 321. In *Miranda* v. *Arizona,* 384 U. S. 436, 444 (1966), we held that it was necessary for the police to advise of the right to counsel in the pre-indictment situation where "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." That case, like the present one, dealt with one of the rights enumerated in the Sixth Amendment to which an "accused" was entitled. We were not then concerned with whether an "arrest" or an "indictment" was necessary for a person to be an "accused" and thus entitled to Sixth Amendment protections. We looked instead to the nature of the event and its effect on the rights involved. We applied the *Miranda* rule even though there was no "arrest," but only an examination of the suspect while he was in his bed at his boarding house, the presence of the officers making him "in custody." *Orozco* v. *Texas,* 394 U. S. 324, 327. We should follow the same approach here and hold that the right to a speedy trial is denied if there were years of unexplained and inexcusable pre-indictment delay.

Dickey v. *Florida, supra,* similarly demonstrates the wisdom of avoiding today's mechanical approach to the application of basic constitutional guarantees. While he was in custody on an unrelated federal charge, the petitioner was identified by a witness to the robbery. Petitioner remained in federal custody, but the State did not seek to prosecute him until September 1, 1967, when he moved to dismiss the detainer warrant which had been lodged against him. An information was then filed on December 15, 1967, and petitioner was tried on February 13, 1968. Although the trial took place less than two months after the filing of the information, we held that there had been a denial of the right to a speedy trial because of the delay of more than seven years between the crime and the information.

In a concurring opinion, MR. JUSTICE BRENNAN discussed the broader questions raised by that case:

> "When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable. . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect." 398 U. S., at 51–52.

In the present case, two to three years elapsed between the time the District Court found that the charges could and should have been brought and the actual return of the indictment. The justifications offered were that the United States Attorney's office was "not sufficiently staffed to proceed as expeditiously" as desirable [5] and

[5] The District Judge pointed out that the then Assistant Attorney General had indicated "that he didn't need any more help" and that the United States Attorney retreated from this factual assertion.

that priority had been given to other cases. Appellees say that the present indictment embraces counts such as an allegedly fraudulent telephone conversation made on December 16, 1965. They argue that there is a great likelihood that the recollection of such events will be blurred or erased by the frailties of the human memory. If this were a simpler crime, I think the British precedent which I have cited would warrant dismissal of the indictment because of the speedy trial guarantee of the Sixth Amendment. But we know from experience that the nature of the crime charged here often has vast interstate aspects, the victims are often widely scattered and hard to locate, and the reconstruction of the total scheme of the fraudulent plan takes time. If we applied the simpler rule that was applied in simpler days, we would be giving extraordinary advantages to organized crime as well as others who use a farflung complicated network to perform their illegal activities. I think a three-year delay even in that kind of case goes to the edge of a permissible delay. But on the bare bones of this record I hesitate to say that the guarantee of a speedy trial has been violated. Unless appellees on remand demonstrate actual prejudice, I would agree that the prosecution might go forward. Hence I concur in the result.

UNITED STATES *v.* BASS

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

No. 70–71. Argued October 18, 1971—Decided December 20, 1971

Respondent was convicted of possessing firearms in violation of § 1202 (a)(1) of the Omnibus Crime Control and Safe Streets Act, which provides that a person convicted of a felony "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm . . ." shall be punished as prescribed therein. The indictment did not allege and no attempt was made to show that the firearms involved had been possessed "in commerce or affecting commerce," the Government contending that the statute does not require proof of a connection with interstate commerce in individual cases involving possession or receipt. Doubting its constitutionality if the statute were thus construed, the Court of Appeals reversed. *Held:* It is not clear from the language and legislative history of § 1202 (a)(1) whether or not receipt or possession of a firearm by a convicted felon has to be shown in an individual prosecution to have been connected with interstate commerce. The ambiguity of this provision (which is not only a criminal statute but one whose broad construction would define as a federal offense conduct readily proscribed by the States), must therefore be resolved in favor of the narrower reading that a nexus with interstate commerce must be shown with respect to all three offenses embraced by the provision. Pp. 339–351.

434 F. 2d 1296, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN (except for Part III), STEWART, and WHITE, JJ., joined. BRENNAN, J., filed a separate statement, *post*, p. 351. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 351.

Roger A. Pauley argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Samuel Huntington,* and *Beatrice Rosenberg.*

William E. Hellerstein, by appointment of the Court, 402 U. S. 927, argued the cause for respondent. With him on the brief was *Phylis Skloot Bamberger.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent was convicted in the Southern District of New York of possessing firearms in violation of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a). In pertinent part, that statute reads:

> "Any person who—
>
> "(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both." [1]

The evidence showed that respondent, who had previously been convicted of a felony in New York State, possessed

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[1] Section 1202 (a) reads in full:

"Any person who—

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

"(2) has been discharged from the Armed Forces under dishonorable conditions, or

"(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

"(4) having been a citizen of the United States has renounced his citizenship, or

"(5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

on separate occasions a pistol and then a shotgun. There was no allegation in the indictment and no attempt by the prosecution to show that either firearm had been possessed "in commerce or affecting commerce." The Government proceeded on the assumption that § 1202 (a)(1) banned all possessions and receipts of firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases.

After his conviction,[2] respondent unsuccessfully moved for arrest of judgment on two primary grounds: that the statute did not reach possession of a firearm not shown to have been "in commerce or affecting commerce," and that, if it did, Congress had overstepped its constitutional powers under the Commerce Clause. 308 F. Supp. 1385. The Court of Appeals reversed the conviction, being of the view that if the Government's construction of the statute were accepted, there would be substantial doubt about the statute's constitutionality. 434 F. 2d 1296. We granted certiorari to resolve a conflict among lower courts over the proper reach of the statute.[3] We affirm the judgment of the court below,

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[2] Respondent was acquitted on another count charging him with carrying a firearm during the commission of a felony (the sale of a narcotic drug), a federal offense under 18 U. S. C. § 924 (c)(2).

[3] At this date, six circuits and numerous district courts have decided the issue. The Government's view was adopted in *United States* v. *Cabbler*, 429 F. 2d 577 (CA4 1970), cert. denied, 400 U. S. 901; *United States* v. *Donofrio*, 450 F. 2d 1054 (CA5 1971); *Stevens* v. *United States*, 440 F. 2d 144 (CA6 1971) (one judge dissenting); *United States* v. *Synnes*, 438 F. 2d 764 (CA8 1971); *United States* v. *Daniels*, 431 F. 2d 697 (CA9 1970). The result reached by the Second Circuit in this case has also been reached in *United States* v. *Harbin*, 313 F. Supp. 50 (ND Ind. 1970); *United States* v. *Steed*, No. CR 70–57 (WD Tenn., May 11, 1970); *United States* v. *Phelps*, No. CR 14,465 (MD Tenn., Feb. 10, 1970); *United States* v. *Francis*, No. CR 12,684 (ED Tenn., Dec. 12, 1969).

but for substantially different reasons.[4] We conclude that § 1202 is ambiguous in the critical respect. Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress.

I

Not wishing "to give point to the quip that only when legislative history is doubtful do you go to the statute," [5] we begin by looking to the text itself. The critical textual question is whether the statutory phrase "in commerce or affecting commerce" applies to "possesses" and "receives" as well as to "transports." If it does, then the Government must prove as an essential element of the offense that a possession, receipt, or transportation was "in commerce or affecting commerce"—a burden not undertaken in this prosecution for possession.

While the statute does not read well under either view, "the natural construction of the language" suggests that the clause "in commerce or affecting commerce" qualifies all three antecedents in the list. *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U. S. 345, 348 (1920). Since "in commerce or affecting commerce" undeniably

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[4] In light of our disposition of the case, we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the "mere possession" of firearms; thus, we need not consider the relevance, in that connection, of our recent decision in *Perez* v. *United States*, 402 U. S. 146 (1971). The question whether the definition of "felony" in § 1202 (c)(2) creates a classification violating the Fifth Amendment was not raised in the Government's Petition for Certiorari, and is also not considered here.

[5] Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 543 (1947).

applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three. But although this is a beginning, the argument is certainly neither overwhelming nor decisive.[6]

In a more significant respect, however, the language of the statute does provide support for respondent's reading. Undeniably, the phrase "in commerce or affecting commerce" is part of the "transports" offense. But if that phrase applies *only* to "transports," the statute would have a curious reach. While permitting transportation of a firearm unless it is transported "in commerce or affecting commerce," the statute would prohibit all possessions of firearms, and both interstate and intrastate receipts. Since virtually all transportations, whether interstate or intrastate, involve an accompanying possession or receipt, it is odd indeed to argue that on the one hand the statute reaches all possessions and

[6] Compare *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 218 (1920), with *FTC* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 389–390 (1959); see also 2 J. Sutherland, Statutory Construction § 4921 (3d ed. 1943); K. Llewellyn, The Common Law Tradition 527 (1960).

The Government, noting that there is no comma after "transports," argues that the punctuation indicates a congressional intent to limit the qualifying phrase to the last antecedent. But many leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary. See, *e. g.*, B. Evans & C. Evans, A Dictionary of Contemporary American Usage 103 (1957); M. Nicholson, A Dictionary of American-English Usage 94 (1957); R. Copperud, A Dictionary of Usage and Style 94–95 (1964); cf. W. Strunk & E. White, The Elements of Style 1–2 (1959). When grammarians are divided, and surely where they are cheerfully tolerant, we will not attach significance to an omitted comma. It is enough to say that the statute's punctuation is fully consistent with the respondent's interpretation, and that in this case grammatical expertise will not help to clarify the statute's meaning.

receipts, and on the other hand outlaws only interstate transportations. Even assuming that a person can "transport" a firearm under the statute without possessing or receiving it, there is no reason consistent with any discernible purpose of the statute to apply an interstate commerce requirement to the "transports" offense alone.[7] In short, the Government has no convincing explanation for the inclusion of the clause "in commerce or affecting commerce" if that phrase only applies to the word "transports." It is far more likely that the phrase was meant to apply to "possesses" and "receives" as well as "transports." As the court below noted, the inclusion of such a phrase "mirror[s] the approach to federal criminal jurisdiction reflected in many other federal statutes." [8]

Nevertheless, the Government argues that its reading is to be preferred because the defendant's narrower interpretation would make Title VII redundant with Title IV of the same Act. Title IV, *inter alia*, makes it a

[7] The Government urges that "transports" includes the act of "causing a firearm to be transported," and therefore would connote an offense separate in some cases from "receives" or "possesses." From this, the Government argues that "Congress might have felt that the broader scope of the term 'transports,' as compared to the terms 'receives' or 'possesses,' justified its qualification by the interstate commerce requirement." Brief for the United States 14–15. The Government's view about the comparative breadth of the various offenses certainly does not follow from its definition of "transports." But beyond that, its argument about what Congress "might have felt" is purely speculative, and finds no support in any arguable purpose of the statute. There is certainly no basis for concluding that Congress was less concerned about the transporting and supplying of guns than their acquisition.

[8] 434 F. 2d, at 1298. See, *e. g.*, 18 U. S. C. § 2421 (prostitution); 18 U. S. C. § 1952 (Travel Act); 18 U. S. C. § 1951 (robbery and extortion); 18 U. S. C. § 1231 (strikebreaking); 18 U. S. C. § 1201 (kidnaping); 18 U. S. C. § 1084 (gambling); 18 U. S. C. § 842 (i) (explosives); 15 U. S. C. § 1 *et seq.* (antitrust); 15 U. S. C. § 77e (securities fraud).

crime for four categories of people—including those convicted of a crime punishable for a term exceeding one year—"to ship or transport any firearm or ammunition in interstate or foreign commerce . . . [or] to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U. S. C. §§ 922 (g) and (h). As Senator Long, the sponsor of Title VII, represented to Senator Dodd, the sponsor of Title IV, Title VII indeed does complement Title IV. 114 Cong. Rec. 14774; see also 114 Cong. Rec. 16286. Respondent's reading of Title VII is fully consistent with this view. First, although subsections of the two Titles do address their prohibitions to some of the same people, each statute also reaches substantial groups of people not reached by the other.[9] Secondly, Title VII complements Title IV by punishing a broader class of behavior. Even under respondent's view, a Title VII offense is made out if the firearm was possessed or received "in commerce or affecting commerce"; however, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is

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[9] Title VII limits the firearm-related activity of convicted felons, dishonorable dischargees from the Armed Services, persons adjudged "mentally incompetent," aliens illegally in the country, and former citizens who have renounced their citizenship. See n. 1, *supra*. A felony is defined as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less . . . ." 18 U. S. C. App. § 1202 (c)(2).

Title IV reaches persons "under indictment for, or . . . convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"; fugitives from justice; users or addicts of various drugs; persons adjudicated as "mental defective[s] or . . . committed" to a mental institution. 18 U. S. C. §§ 922 (g) and (h).

limited to the sending or receiving of firearms as part of an interstate transportation.[10]

In addition, whatever reading is adopted, Title VII and Title IV are, in part, redundant. The interstate commerce requirement in Title VII minimally applies to transportation. Since Title IV also prohibits convicted criminals from transporting firearms in interstate commerce, the two Titles overlap under both readings. The Government's broader reading of Title VII does not eliminate the redundancy, but simply creates a larger area in which there is no overlap. While the Government would be on stronger ground if its reading were necessary to give Title VII some unique and independent thrust, this is not the case here. In any event, circumstances surrounding the passage of Title VII make plain that Title VII was not carefully molded to complement Title

[10] Title IV, 18 U. S. C. §§ 922 (g) and (h), is a modified and recodified version of 15 U. S. C. §§ 902 (e) and (f) (1964 ed.), 75 Stat. 757, which in turn amended the original statute passed in 1938, 52 Stat. 1250, 1251. Each amendment enlarged the group of people coming within the Act's substantive prohibitions against transportation or receipt of firearms in interstate commerce. The wording of the substantive offense has remained identical, although the original Act had a provision that possession of a firearm "shall be presumptive evidence that such firearm or ammunition was shipped or transported or received [in interstate or foreign commerce]." That presumption was struck down in *Tot* v. *United States*, 319 U. S. 463 (1943), and the Court there noted:

"[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate." *Id.*, at 466.

While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that the 1968 Act changed the prior approach to the "receipt" offense. See, *e. g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968).

IV. Title VII was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report.[11] The notion that it was enacted to dovetail neatly with Title IV rests perhaps on a conception of the model legislative process; but we cannot pretend that all statutes are model statutes. While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking. In our view, no conclusion can be drawn from Title IV concerning the correct interpretation of Title VII.

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[11] The Omnibus Crime Control and Safe Streets Act of 1968 started its life as a measure designed to aid state and local governments in law enforcement by means of financial and administrative assistance. See H. R. Rep. No. 488, 90th Cong., 1st Sess. (1967). The bill passed the House on August 8, 1967, and went to the Senate. A similar bill was introduced in the Senate (S. 917) and went to the Committee on the Judiciary, which rewrote it completely. See S. Rep. No. 1097, 90th Cong., 2d Sess., *supra*. The amendments included the much-debated provisions regarding the admissibility of confessions, wiretapping, and state firearms control.

On May 17, 1968, Senator Long introduced on the floor his amendment to S. 917, which he designated Title VII. His introductory remarks set forth the purpose of the amendment. 114 Cong. Rec. 13867–13869. About a week later he explained his amendment once again. There was a brief debate; the reaction was favorable but cautious, with "further thought" and "study" being suggested by several favorably inclined Senators who observed some problems with the bill as drafted. Unexpectedly, however, there was a call for a vote and Title VII passed without modification. See 114 Cong. Rec. 14772–14775. The amendment received only passing mention in the House discussion of the bill, 114 Cong. Rec. 16286, 16298, and never received committee consideration or study in the House either.

Other aspects of the meager legislative history, however, do provide some significant support for the Government's interpretation. On the Senate floor, Senator Long, who introduced § 1202, described various evils that prompted his statute. These evils included assassinations of public figures and threats to the operation of businesses significant enough in the aggregate to affect commerce.[12] Such evils, we note, would be most thoroughly mitigated by forbidding every possession of any firearm by specified classes of especially risky people, regardless of whether the gun was possessed, received, or transported "in commerce or affecting commerce." In addition, specific remarks of the Senator can be read to state that the amendment reaches the mere possession of guns without any showing of an interstate commerce nexus.[13] But Senator Long never specifically says that no connection with commerce need be shown in the individual case. And nothing in his statements explains why, if an interstate commerce nexus is irrelevant in individual cases, the phrase "in commerce or affecting commerce" is in the statute at all.[14] But even if Senator

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[12] See 114 Cong. Rec. 13868–13871, 14772–14775.

[13] For example, Senator Long began his floor statement by announcing:

"I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony [or comes within certain other categories] . . . is not permitted to possess a firearm . . . ." 114 Cong. Rec. 13868.

[14] For the same, and additional, reasons, § 1201, which contains the congressional "findings" applicable to § 1202 (a), is not decisive support for the Government. That section reports that:

"The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents,

Long's remarks were crystal clear to us, they were apparently not crystal clear to his congressional colleagues. Meager as the discussion of Title VII was, one of the few Congressmen who discussed the amendment summarized Title VII as "mak[ing] it a Federal crime to take, possess, or receive a firearm across State lines . . . ." 114 Cong. Rec. 16298 (statement of Rep. Pollock).

In short, "the legislative history of [the] Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 483 (1951). Here, as in other cases, the various remarks by legislators "are sufficiently ambiguous insofar as this narrow issue is concerned . . . to invite mutually destructive dialectic," and not much more.

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aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

"(1) a burden on commerce or threat affecting the free flow of commerce,

"(2) a threat to the safety of the President of the United States and Vice President of the United States,

"(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

"(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

The Government argues that these findings would have been "wholly unnecessary" unless Congress intended to prohibit all receipts and possessions of firearms by felons. But these findings of "burdens" and "threats" simply state Congress' view of the constitutional basis for its power to act; the findings do not tell us how much of Congress' perceived power was in fact invoked. That the findings in fact support a statute broader than the one actually passed is suggested by the fact that "in commerce or affecting commerce" does not appear at all in the introductory clause to the "findings," even though § 1202 (a) contains the phrase and concededly reaches only transportation "in commerce or affecting commerce."

FCC v. *Columbia Broadcasting System,* 311 U. S. 132, 136 (1940). Taken together, the statutory materials are inconclusive on the central issue of whether or not the statutory phrase "in commerce or affecting commerce" applies to "possesses" and "receives" as well as "transports." While standing alone, the legislative history might tip in the Government's favor, the respondent explains far better the presence of critical language in the statute. The Government concedes that "the statute is not a model of logic or clarity." Pet. for Cert. 5. After "seiz[ing] every thing from which aid can be derived," *United States* v. *Fisher,* 2 Cranch 358, 386 (1805) (Marshall, C. J.), we are left with an ambiguous statute.

II

Given this ambiguity, we adopt the narrower reading: the phrase "in commerce or affecting commerce" is part of all three offenses, and the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce. This result is dictated by two wise principles this Court has long followed.

First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States,* 401 U. S. 808, 812 (1971). See also *Ladner* v. *United States,* 358 U. S. 169, 177 (1958); *Bell* v. *United States,* 349 U. S. 81 (1955); *United States* v. *Five Gambling Devices,* 346 U. S. 441 (1953) (plurality opinion for affirmance). In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C. I. T. Credit Corp.,*

344 U. S. 218, 221–222 (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931) (Holmes, J.).[15] See also *United States* v. *Cardiff*, 344 U. S. 174 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. Here, we conclude that Congress has not "plainly and unmistakably," *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917), made it a federal crime for

[15] Holmes prefaced his much-quoted statement with the observation that "it is not likely that a criminal will carefully consider the text of the law before he murders or steals . . . ." But in the case of gun acquisition and possession it is not unreasonable to imagine a citizen attempting to "[steer] a careful course between violation of the statute [and lawful conduct]," *United States* v. *Hood*, 343 U. S. 148, 151 (1952). Of course, where there is a state law prohibiting felons from possessing firearms, as in New York State, N. Y. Penal Law § 265.05 (Supp. 1971–1972), it may be unreal to argue that there are notice problems under the federal law. There are many States, however, that do not have their own laws prohibiting felons from possessing firearms. See Geisel, Roll, & Wettick, The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis, 1969 Duke L. J. 647, 652–653. Since ex-offenders in these States are limited only by the federal gun control laws, the notice problem of that law may be quite real.

a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce.

There is a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.[16] Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.[17] This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971). As this Court emphasized only last Term in *Rewis* v. *United States*, *supra*, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In *Rewis*, we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." While we noted there that "[i]t is not for us to weigh the merits of these factors," we went on to conclude that "the fact

[16] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 513 (1940); *United States* v. *Five Gambling Devices*, 346 U. S. 441, 449–450 (1953) (plurality opinion); *FTC* v. *Bunte Bros., Inc.*, 312 U. S. 349, 351, 354–355 (1941); Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 539–540 (1947). Cf. *Auto Workers* v. *Wisconsin Board*, 351 U. S. 266, 274–275 (1956); *Palmer* v. *Massachusetts*, 308 U. S. 79, 83–84 (1939); *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 225–226 (1957).

[17] H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1241 (tent. ed. 1958).

that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach]." 401 U. S., at 812. In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, § 1202 (a) dramatically intrudes upon traditional state criminal jurisdiction. As in *Rewis,* the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government. Absent a clearer statement of intention from Congress than is present here, we do not interpret § 1202 (a) to reach the "mere possession" of firearms.

III

Having concluded that the commerce requirement in § 1202 (a) must be read as part of the "possesses" and "receives" offenses, we add a final word about the nexus with interstate commerce that must be shown in individual cases. The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person "possesses . . . in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of "receiv[ing] . . . in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.[18] This is

[18] This reading preserves a significant difference between the "receipt" offenses under Title IV and Title VII. See *supra,* at 342–343.

not the narrowest possible reading of the statute, but canons of clear statement and strict construction do "not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett,* 348 U. S. 503, 510 (1955). We have resolved the basic uncertainty about the statute in favor of the narrow reading, concluding that "in commerce or affecting commerce" is part of the offense of possessing or receiving a firearm. But, given the evils that prompted the statute and the basic legislative purpose of restricting the firearm-related activity of convicted felons, the readings we give to the commerce requirement, although not all narrow, are appropriate. And consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone.

The judgment is

Affirmed.

MR. JUSTICE BRENNAN joins the judgment of the Court and the opinion except for Part III. No question of the quantum of evidence necessary to establish the Government's prima facie case is before the Court and he would await a case properly presenting that question before deciding it.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

I cannot join the Court's opinion and judgment. Five of the six United States courts of appeals that have passed upon the issue presented by this case have decided it adversely to the position urged by the respondent here. *United States* v. *Cabbler,* 429 F. 2d 577 (CA4 1970), cert. denied, 400 U. S. 901; *United States* v. *Mullins,*

432 F. 2d 1003 (CA4 1970); *United States* v. *Donofrio*, 450 F. 2d 1054 (CA5 1971); *Stevens* v. *United States*, 440 F. 2d 144 (CA6 1971) (one judge dissenting); *United States* v. *Synnes*, 438 F. 2d 764 (CA8 1971); *United States* v. *Wiley*, 438 F. 2d 773 (CA8 1971); *United States* v. *Taylor*, 438 F. 2d 774 (CA8 1971); *United States* v. *Daniels*, 431 F. 2d 697 (CA9 1970); *United States* v. *Crow*, 439 F. 2d 1193 (CA9 1971). Only the Second Circuit stands opposed.[1]

1. The statute, 18 U. S. C. App. § 1202 (a), when it speaks of one "who receives, possesses, or transports in commerce or affecting commerce," although arguably ambiguous and, as the Government concedes, "not a model of logic or clarity," [2] is clear enough. The structure of the vital language and its punctuation make it refer to one who receives, to one who possesses, and to one who transports in commerce. If one wished to say that he would welcome a cat, would welcome a dog, or would welcome a cow that jumps over the moon, he would likely say "I would like to have a cat, a dog, or a cow that jumps over the moon." So it is here.

2. The meaning the Court implants on the statute is justified only by the addition and interposition of a comma after the word "transports." I perceive no warrant for this judicial transfiguration.

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[1] Unappealed district court decisions are in conflict. Those upholding the Government's position include *United States* v. *Davis*, 314 F. Supp. 1161 (ND Miss. 1970); *United States* v. *Vicary*, No. CR 44,205 (ED Mich., June 29, 1970) (*en banc*); *United States* v. *Childress*, No. 8039–R (ED Va., Jan. 6, 1969); *United States* v. *Boggs*, No. 8138 (Wyo., June 17, 1970). Those opposed include *United States* v. *Harbin*, 313 F. Supp. 50 (ND Ind. 1970); *United States* v. *Steed*, No. CR 70–57 (WD Tenn., May 11, 1970); *United States* v. *Phelps*, No. CR 14,465 (MD Tenn., Feb. 10, 1970); *United States* v. *Francis*, No. CR 12,684 (ED Tenn., Dec. 12, 1969).

[2] Pet. for Cert. 5.

3. In the very same statute the phrase "after the date of enactment of this Act" is separated by commas and undeniably modifies each of the preceding words, "receives," "possesses," and "transports." Obviously, then, the draftsman—and the Congress—knew the use of commas for phrase modification. We should give effect to the only meaning attendant upon that use.

4. The specific finding in 18 U. S. C. App. § 1201 [3] clearly demonstrates that Congress was attempting to reach and prohibit every possession of a firearm by a felon; that Congress found that such possession, whether interstate or intrastate, affected interstate commerce; and that Congress did not conclude that intrastate possession was a matter of less concern to it than interstate possession. That finding was unnecessary if Congress also required proof that each receipt or possession of a firearm was in or affected interstate or foreign commerce.

5. Senator Long's explanatory comments reveal clearly the purpose, the intent, and the extent of the legislation:

> "I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony . . . is not permitted to *possess* a firearm . . . .
>
> "It might be well to analyze, for a moment, the logic involved. When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to *possess* firearms in the future, that man would have no right

[3] "§ 1201. Congressional findings and declaration.

"The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons . . . constitutes—

"(1) a burden on commerce or threat affecting the free flow of commerce . . . ."

to *possess* firearms. He would be punished criminally if he is found in *possession* of them." 114 Cong. Rec. 13868 (emphasis supplied).

"So Congress simply finds that the *possession* of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.

"You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce." 114 Cong. Rec. 13869 (emphasis supplied).

"What the amendment seeks to do is to make it unlawful for a firearm—be it a handgun, a machine-gun, a long-range rifle, or any kind of firearm—to be in the *possession* of a convicted felon who has not been pardoned and who has therefore lost his right to *possess* firearms. . . . It also relates to the transportation of firearms.

. . . . . .

"Clauses 1–5 describe persons who, by their actions, have demonstrated that they are dangerous, or that they may become dangerous. Stated simply, they may not be trusted to *possess* a firearm without becoming a threat to society. This title would apply both to hand guns and to long guns.

. . . . . .

"All of these murderers had shown violent tendencies before they committed the crime for which they are most infamous. They should not have been permitted to *possess* a gun. Yet, there is no Federal law which would deny *possession* to these undesirables.

"The killer of Medgar Evers, the murderer of the three civil rights workers in Mississippi, the defendants who shot Captain Lemuel Penn (on a highway while he was driving back to Washington after completion of reserve Military duty) would all be free under present Federal law to acquire another gun and repeat those same sorts of crimes in the future.

. . . . . .

"So, under Title VII, every citizen could *possess* a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of *the right to possess* a firearm in the future except where he has been pardoned by the President or a State Governor and has been expressly authorized by his pardon to possess a firearm.

"It has been said that Congress lacks the power to outlaw *mere possession* of weapons. . . .

". . . The important point is that this legislation demonstrates that *possession* of a deadly weapon by the wrong people can be controlled by Congress, without regard to where the police power resides under the Constitution.

"Without question, the Federal Government does have power to control *possession* of weapons where such *possession* could become a threat to interstate commerce . . . .

"State gun control laws where they exist have proven inadequate to bar *possession* of firearms from those most likely to use them for unlawful purposes. . . .

. . . . . .

"Nor would Title VII impinge upon the rights of citizens generally to *possess* firearms for legitimate and lawful purposes. It deals solely with those

> who have demonstrated that they cannot be trusted to *possess* a firearm—those whose prior acts—mostly voluntary—have placed them outside of our society. . . .
>
> . . . . . .
>
> ". . . I am convinced that we have enough constitutional power to prohibit these categories of people from *possessing,* receiving, or transporting a firearm. . . .
>
> . . . . . .
>
> "This amendment would provide that a convicted felon who participates in one of these marches and *is carrying a firearm* would be violating the law. . . ." 114 Cong. Rec. 14773–14774 (emphasis supplied).

One cannot detect in these remarks any purpose to restrict or limit the type of possession that was being considered for proscription.

6. The Court's construction of § 1202 (a), limiting its application to interstate possession and receipt, shrinks the statute into something little more than a duplication of 18 U. S. C. §§ 922 (g) and (h). I cannot ascribe to Congress such a gesture of nonaccomplishment.

I thus conclude that § 1202 (a) was intended to and does reach all possessions and receipts of firearms by convicted felons, and that the Court should move on and decide the constitutional issue present in this case.

SCHILB ET AL. *v.* KUEBEL ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 70–90. Argued October 12, 1971—Decided December 20, 1971

Illinois law provides three ways in which an accused can secure his pretrial release: (1) personal recognizance; (2) execution of a bail bond, with a deposit of 10% of the bail, all but 10% of which (amounting to 1% of the bail) is returned on performance of the bond conditions, and (3) execution of a bail bond, secured by a full-amount deposit in cash, authorized securities, or certain real estate, all of which is returned on performance of the bond conditions. Appellant Schilb, charged with two traffic offenses, secured pretrial release after depositing 10% of the bail fixed. He was convicted of one offense and acquitted of the other. After he paid his fine, all but 1% of the bail (amounting to $7.50) was refunded. In this class action he thereafter challenged the Illinois system on due process and equal protection grounds, claiming that the 1% retention charge is imposed on only one segment of the class gaining pretrial release, and on the poor but not on the rich; and that its imposition on an accused found innocent constitutes a court cost against the nonguilty. The trial court dismissed Schilb's complaint, and the State Supreme Court affirmed. *Held:*

1. The Illinois bail system does not violate equal protection requirements. Pp. 364–370.

(a) The facts that the State has no safekeeping costs where release is on personal recognizance and has never imposed a charge with respect to a recognizance provide a rational basis for distinguishing that situation from the situations where deposits are made. Though the administrative costs of the deposit systems are substantially the same, other factors afford a rational basis for making no charge under the full-amount-deposit system. *Rinaldi* v. *Yeager*, 384 U. S. 305, distinguished. Pp. 367–369.

(b) There is no indication that the personal recognizance system is not used without regard to the economic status of the accused, or that the full-deposit system actually favors the affluent. Pp. 369–370.

2. No due process denial results from retention of the 1% charge, which is an administrative fee (and not a cost of prosecution), imposed on all—guilty and innocent alike—who seek its

benefit. *Giaccio* v. *Pennsylvania*, 382 U. S. 399, distinguished. Pp. 370–371.

46 Ill. 2d 538, 264 N. E. 2d 377, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and MARSHALL, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 372. DOUGLAS, J., filed a dissenting opinion, *post*, p. 373. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 381.

John J. O'Toole argued the cause for appellants. With him on the briefs were *John C. Castanes* and *Cornelius F. Dore.*

James A. Rooney argued the cause for appellees *pro hac vice.* With him on the brief were *Robert H. Rice* and *Eugene H. Widman.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

John Schilb, of Belleville, Illinois, was arrested on January 16, 1969, and charged (a) with leaving the scene of an automobile accident and (b) with obstructing traffic. In order to gain his liberty pending trial, and in accord with the Illinois bail statutes hereinafter described, Schilb deposited $75 in cash with the clerk of the court. This amount was 10% of the aggregate bail fixed on the two charges ($500 on the first and $250 on the second). At his ensuing trial Schilb was acquitted of the charge of leaving the scene, but was convicted of traffic obstruction. When he paid his fine, the amount Schilb had deposited was returned to him decreased, however, by $7.50 retained as "bail bond costs" by the court clerk pursuant to the statute. The amount so retained was 1% of the specified bail and 10% of the amount actually deposited.

Schilb, by this purported state class action against the court clerk, the county, and the county treasurer, at-

tacks the statutory 1% charge on Fourteenth Amendment due process and equal protection grounds.[1] The Circuit Court of St. Clair County upheld the statute and dismissed the complaint. The Supreme Court of Illinois affirmed, with two justices dissenting. 46 Ill. 2d 538, 264 N. E. 2d 377 (1970). We noted probable jurisdiction. 402 U. S. 928 (1971).

I

The Illinois bail statutes compose Article 110 of the State's Code of Criminal Procedure of 1963, made effective January 1, 1964. This Code complemented Illinois' then new and revised Criminal Code of 1961, made effective January 1, 1962. The work of revision of the theretofore existing statutes was that of a Joint Committee of the Illinois State and Chicago Bar Associations. See 1 Ill. Rev. Stat. 1963, p. 1629.

Prior to 1964 the professional bail bondsman system with all its abuses[2] was in full and odorous bloom in Illinois. Under that system the bail bondsman customarily collected the maximum fee (10% of the amount of the bond) permitted by statute, House Bill No. 734, approved July 17, 1959, Ill. Laws 1959, pp. 1372, 1376, and retained that entire amount even though the accused fully satisfied the conditions of the bond. See *People ex rel. Gendron* v. *Ingram*, 34 Ill. 2d 623, 626, 217 N. E. 2d 803, 805 (1966). Payment of this substantial "premium" was required of the good risk as well as of the bad. The results were that a heavy and irretrievable

[1] Schilb also attacked the statute as violative of Art. II, §§ 2 and 19, of the Illinois Constitution of 1870 (now Art. I, §§ 2 and 12, of the State's 1970 Constitution).

[2] See D. Freed & P. Wald, Bail in the United States: 1964, pp. 34–35 (1964); R. Goldfarb, Ransom 92–126 (1965); Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 U. Ill. L. F. 35.

burden fell upon the accused, to the excellent profit of the bondsman, and that professional bondsmen, and not the courts, exercised significant control over the actual workings of the bail system.

One of the stated purposes of the new bail provisions in the 1963 Code was to rectify this offensive situation. The purpose appears to have been accomplished. It is said that the bail bondsman abruptly disappeared in Illinois "due primarily to the success of the ten percent bail deposit provision." Boyle, Bail Under the Judicial Article, 17 De Paul L. Rev. 267, 272 (1968). See Kamin, Bail Administration in Illinois, 53 Ill. B. J. 674, 680 (1965).

II

Article 110 of the 1963 Code, as it read at the time Schilb was arrested and charged, provided that an eligible accused could obtain pretrial release in one of three ways:

(1) Under § 110–2 he may be released on his personal recognizance.[3]

(2) Under § 110–7 he may execute a bail bond and deposit with the clerk cash equal to only 10% of the bail or $25, whichever is the greater.[4] When bail is made in

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[3] "§ 110–2. Release on Own Recognizance

"When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. . . .

"This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused."

[4] "§ 110–7. Deposit of Bail Security

"(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

. . . . . .

"(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the

this way and the conditions of the bond have been performed, the clerk returns to the accused 90% of the sum deposited. The remaining 10% (1% of the bail) is retained by the clerk "as bail bond costs."

(3) Under § 110–8 he may execute a bail bond and secure it by a deposit with the clerk of the full amount of the bail in cash, or in stocks and bonds authorized for trust funds in Illinois, or by unencumbered nonexempt Illinois real estate worth double the amount of the bail.[5] When bail is made in this way and the conditions of

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cause the clerk of the court shall return to the accused 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited."

Section 110–7 (f) was amended in 1969 by Pub. Act 76–1195, approved Sept. 4, 1969, by Pub. Act 76–1394, approved Sept. 19, 1969, and by Pub. Act 76–1801, approved Oct. 9, 1969. It was further amended in 1970 by Pub. Act 76–2078, approved June 22, 1970, and now reads:

"(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.

"At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record."

[5] "§ 110–8. Cash, Stocks, Bonds and Real Estate as Security for Bail

"(a) In lieu of the bail deposit provided for in Section 110–7 of this Code any person for whom bail has been set may execute the bail bond with or without sureties which bond may be secured:

"(1) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds under the laws of this State; or

"(2) By real estate situated in this State with unencumbered

the bond have been performed, the clerk returns the deposit of cash or stocks or bonds, or releases the real estate, as the case may be, without charge or retention of any amount.

In each case bail is fixed by a judicial officer. Section 110–5 prescribes factors to be considered in fixing the amount of bail.[6] Under § 110–6 either the State or the defendant may apply to the court for an increase or for a reduction in the amount of bail or for alteration of the bond's conditions.[7]

The choice between § 110–7 and § 110–8 is reserved to the accused.

The thinking and intentions of the Joint Committee revisers are apparent from the Committee's comments, as revised by its Chairman, Professor Charles H. Bowman,

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equity not exempt owned by the accused or sureties worth double the amount of bail set in the bond.

. . . . . .

"(f) When the conditions of the bail bond have been performed and the accused has been discharged from his obligations in the cause, the clerk of the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail bond has been secured by real estate the clerk of the court shall forthwith notify in writing the registrar of titles or recorder of deeds and the lien of the bail bond on the real estate shall be discharged."

[6] "§ 110–5. Determining the Amount of Bail

"(a) The amount of bail shall be:

"(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

"(2) Not oppressive;

"(3) Commensurate with the nature of the offense charged;

"(4) Considerate of the past criminal acts and conduct of the defendant;

"(5) Considerate of the financial ability of the accused."

[7] "§ 110–6. Reduction or Increase of Bail

"(a) Upon application by the State or the defendant the court before which the proceeding is pending may increase or reduce the amount of bail or may alter the conditions of the bail bond."

and reproduced in Ill. Ann. Stat., c. 38 (Smith-Hurd ed. 1970).[8]

The parties have stipulated that when bail in a particular case is fixed, the judge's "discretion in such respect

[8] ". . . The provisions of sections 110–7 and 110–8 were designed to severely restrict the activities of professional bail bondsmen and to reduce the cost of liberty to arrested persons awaiting trial. . . ." P. 298.

"The committee realized full well the many arguments advanced in opposition to changing the present system. We were not impressed with any of them. If a person can pay a professional bondsman ten per cent of the bail amount as a fee, he can deposit it with the clerk. At the present time he receives nothing back from the bondsman if he appears for trial; his ten per cent fee is gone. Under the provisions of [§ 110–7 (f)] he gets back ninety per cent of the amount deposited if he appears. The ten per cent of the deposit retained by the county will offset in monetary amount the costs of handling bail bonds (which must be done now anyway), and any loss resulting from the occasional bail jumper where the professional bondsman might now forfeit the amount of the bail. . . ." P. 300.

"This section [§ 110–7] is new and provides the procedure for depositing ten per cent of the amount of bail as security for appearance. However, the bail bond will provide for forfeiture of the full amount of the bail upon non-appearance. In addition, the accused would be subject to the penal provisions for bail jumping. However, subsection (f) provides for a return of ninety per cent of the bail deposit (which amounts to [retention of] one per cent of the amount of bail set by the court in the first instance) to the accused upon compliance with the conditions of the bail bond. The ten per cent of the deposit retained by the clerk is to cover costs of handling bail bonds and deposits." P. 316.

"There is nothing in Article 110 which is intended to work any additional hardship on anyone in the giving of bail. It is designed to permit the continuation of present practices in regard to sheriffs, police officers, etc., taking cash bail or drivers' licenses, and to simplify the procedures in all other cases so as to lessen the ultimate cost of bail to offenders (by thousands of dollars each year) who appear for trial anyway, and to assure to the counties in every case a reasonable amount (one per cent of the total amount of bail set) to cover the cost of time and paper-work involved in handling bail cases." P. 324.

is not guided by statute, rule of court or any definite, fixed standard; various and divers judges in fact fix the amount of bail for the same types of offenses at various and divers amounts, without relationship as to guilt or innocence of the particular defendant in a criminal charge, and without relationship of the particular offense charged and the bail fixed." They have also stipulated, "The actual cost of administering the provisions of said Sections 110–7 and 110–8 are substantially the same but there may probably be a slightly greater cost in the administration of Section 110–8."

III

The Court more than once has said that state legislative reform by way of classification is not to be invalidated merely because the legislature moves one step at a time. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). "Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them. . . . With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 809 (1969). The measure of equal protection has been described variously as whether "the distinctions drawn have some basis in practical experience," *South Carolina* v. *Katzenbach*, 383 U. S. 301, 331 (1966), or whether the legislature's action falls short of "the invidious discrimination," *Williamson* v. *Lee Optical Co.*, 348 U. S., at 489, or whether "any state of facts reasonably may be conceived to justify" the statutory discrimination, *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961); see

United States v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4, 6 (1970), or whether the classification is "on the basis of criteria wholly unrelated to the objective of [the] statute," *Reed* v. *Reed, ante,* p. 71, at 76. But the Court also has refined this traditional test and has said that a statutory classification based upon suspect criteria or affecting "fundamental rights" will encounter equal protection difficulties unless justified by a *"compelling* governmental interest." *Shapiro* v. *Thompson,* 394 U. S. 618, 634, 638 (1969); *Oregon* v. *Mitchell,* 400 U. S. 112, 247 n. 30 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

Bail, of course, is basic to our system of law, *Stack* v. *Boyle,* 342 U. S. 1 (1951); *Herzog* v. *United States,* 75 S. Ct. 349, 351, 99 L. Ed. 1299, 1301 (1955) (opinion of DOUGLAS, J.), and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. *Pilkinton* v. *Circuit Court,* 324 F. 2d 45, 46 (CA8 1963); see *Robinson* v. *California,* 370 U. S. 660, 666 (1962), and *id.,* at 675 (DOUGLAS, J., concurring). But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness. Our concern, instead, is with the 1% cost-retention provision. This smacks of administrative detail and of procedure and is hardly to be classified as a "fundamental" right or as based upon any suspect criterion. The applicable measure, therefore, must be the traditional one: Is the distinction drawn by the statutes invidious and without rational basis? *Dandridge* v. *Williams,* 397 U. S. 471, 483–487 (1970). See *Richardson* v. *Belcher, ante,* p. 78, at 81.

IV

With this background, we turn to the appellants' primary argument. It is threefold: (1) that the 1% reten-

tion charge under § 110–7 (f) is imposed on only one segment of the class gaining pretrial release; (2) that it is imposed on the poor and nonaffluent and not on the rich and affluent;[9] and (3) that its imposition with respect to an accused found innocent amounts to a court cost assessed against the not-guilty person.

We are compelled to note preliminarily that the attack on the Illinois bail statutes, in a very distinct sense, is paradoxical. The benefits of the new system, as compared with the old, are conceded.[10] And the appellants recognize that under the pre-1964 system Schilb's particular bail bond cost would have been 10% of his bail, or $75; that this premium price for his pretrial freedom, once paid, was irretrievable; and that, if he could not have raised the $75, he would have been consigned to jail until his trial. Thus, under the old system the cost of Schilb's pretrial freedom was $75, but under the new it was only $7.50. While acknowledging this obvious benefit of the statutory reform, Schilb and his co-appellants decry the classification the statutes make and present the usual argument that the legislation must be struck down because it does not reform enough.

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[9] Schilb has neither alleged nor shown that he is indigent or that he applied for and was denied release on his personal recognizance. No question of standing, however, was raised in the Illinois courts or here. The Illinois Supreme Court found it unnecessary to pass upon the propriety of the class action. 46 Ill. 2d, at 552, 264 N. E. 2d, at 384.

[10] "QUESTION: Mr. O'Toole [counsel for appellants], [if] you prevail here, do you anticipate the old bond[s]man system will be revised?

"MR. O'TOOLE: Oh no, your Honor . . . that is the furthest thing—we want to make that eminently clear. We believe this to be very good legislation. We feel this aspect of it is wrong. Definitely not, there would not be any reincarnation of the bondsman." Tr. of Oral Arg. 11.

A. It is true that no charge is made to the accused who is released on his personal recognizance. We are advised, however, that this was also true under the old (pre-1964) system and that "Illinois has never charged people out on recognizance." [11] Thus, the burden on the State with respect to a personal recognizance is no more under the new system than what the State had assumed under the old. Also, with a recognizance, there is nothing the State holds for safekeeping, with resulting responsibility and additional paperwork. All this provides a rational basis for distinguishing between the personal recognizance and the deposit situations.

There is also, however, no retention charge to the accused who deposits the full amount of cash bail or securities or real estate. Yet the administrative cost attendant upon the 10% deposit and that upon the full deposit are, by the stipulation, "substantially the same" with, indeed, any higher cost incurred with respect to the full deposit.

This perhaps is a more tenuous distinction, but we cannot conclude that it is constitutionally vulnerable. One who deposits securities or encumbers his real estate precludes the use of that property for other purposes. And one who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of the deposit; presumably, at least, its interim possession by the State accrues to the benefit of the State. Further, the State's protection against the expenses that inevitably are incurred when bail is jumped is greater when 100% cash or securities or real estate is deposited or obligated than when only 10% of the bail amount is advanced. The Joint Committee's and the State Legislature's decision in balancing these opposing considerations in the way that they did cannot be de-

[11] Tr. of Oral Arg. 27.

scribed as lacking in rationality to the point where equal protection considerations require that they be struck down.

Rinaldi v. *Yeager,* 384 U. S. 305 (1966), lends no support to the appellants here. In that case a New Jersey statute imposed the cost of a transcript upon the indigent appellant who had been convicted of a crime and was sentenced to prison and who then was unsuccessful on his appeal. The statute, however, did not impose that cost upon the indigent appellant who likewise was convicted of a crime, and was unsuccessful on his appeal, but who had received a suspended sentence or who had been placed on probation or who had been fined rather than sentenced to prison. The distinction the New Jersey statute drew between appellants was based only upon the nature of their punishment, and the burden was imposed only upon those who were confined. The Court held, and rightly so, that a punishment distinction had no rational connection with a transcript cost and served to deny equal protection to the convicted appellant whose liberty was at issue on the appeal. MR. JUSTICE STEWART, in speaking for the Court, said,

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have

'some relevance to the purpose for which the classification is made.'" 384 U. S., at 308–309 (citations omitted).

The New Jersey distinction thus was invidious and without rationality for it was not related to the fiscal objectives of the statute and rested on no administrative convenience.

B. The poor-man-affluent-man argument centers, of course, in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and in the many later cases that "reaffirm allegiance to the basic command that justice be applied equally to all persons." *Williams* v. *Illinois*, 399 U. S. 235, 241 (1970).

In no way do we withdraw today from the *Griffin* principle. That remains steadfast. But it is by no means certain, as the appellants suggest, that the 10% deposit provision under § 110–7 is a provision for the benefit of the poor and the less affluent and that the full-deposit provision of § 110–8 is one for the rich and the more affluent. It should be obvious that the poor man's real hope and avenue for relief is the personal recognizance provision of § 110–2. We do not presume to say, as the appellants in their brief intimate,[12] that § 110–2 is not utilized by Illinois judges and made available for the poor and the less affluent.

Neither is it assured, as the appellants also suggest, that the affluent will take advantage of the full-deposit provision of § 110–8, with no retention charge, and that the less affluent are relegated to the 10% deposit provision of § 110–7 and the 1% retention charge. The record is silent, but the flow indeed may be the other way. The affluent, more aware of and more experienced in the marketplace, may see the advantage, in these days

[12] "Thus, those least able to afford it, the poor and non-affluent, who have no choice but to remain in jail or deposit 10% of bail, are unconstitutionally 'penalized in a quest for justice due to a lack of wealth.'" Brief for Appellants 16.

of high interest rates, in retaining the use of 90% of the bail amount. A 5% or greater return on this 90% in a short period of time more than offsets the 1% retention charge. In other words, it is by no means clear that the route of § 110–8 is more attractive to the affluent defendant than the § 110–7 route. The situation, therefore, wholly apart from the fact that appellant Schilb himself has not pleaded indigency, is not one where we may assume that the Illinois plan works to deny relief to the poor man merely because of his poverty.

C. The court-cost argument is that the person found innocent but already "put to the expense, disgrace and anguish of a trial" is "then assessed a cost for exercising his right to release pending trial." [13] *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966), is cited. *Giaccio* was a holding that an ancient Pennsylvania statute that permitted the jury to impose court costs upon an acquitted defendant, in order to offset the expenses of prosecution, violated the Due Process Clause because of vagueness and the absence of any standards preventing the arbitrary imposition of costs. The Court thus did not reach the merits, although MR. JUSTICE STEWART and Mr. Justice Fortas, each separately concurring, 382 U. S., at 405, felt that the very imposition of costs upon an acquitted defendant was violative of due process.

Giaccio is not dispositive precedent for the appellants here. Certainly § 110–7 is not subject to attack for vagueness or for lack of standards. Neither is it a vehicle for the imposition of costs of prosecution as was the Pennsylvania statute. Instead, § 110–7 authorizes retention of the 1% as "bail bond costs." This is what that description implies, namely, an administrative cost imposed upon all those, guilty and innocent alike, who

[13] Brief for Appellants 16.

seek the benefit of § 110–7. This conclusion is supported by the presence of the long-established Illinois rule against the imposition of costs of prosecution upon an acquitted or discharged criminal defendant, *Wells* v. *McCullock,* 13 Ill. 606 (1852), and by the Illinois court's own determination, 46 Ill. 2d, at 551–552, 264 N. E. 2d, at 384, that the charge under § 110–7 (f) is an administrative fee and not a cost of prosecution imposed under Ill. Rev. Stat., c. 38, § 180–3 (1969), only upon the convicted defendant.

V

Finally, the appellants would point out that Article 110 has its federal counterpart in § 3 (a) of the Bail Reform Act of 1966, Pub. L. 89–465, 89th Cong., 2d Sess., 80 Stat. 214, and in particular in that portion now codified as 18 U. S. C. § 3146 (a)(3). They note that S. 2840, 88th Cong., 2d Sess., contained a 1% retention provision "to defray bail bond costs" but that a parallel bill, S. 1357, 89th Cong., 1st Sess., as it progressed through Congress, at no time had a provision of that kind. It was S. 1357 that was enacted as Pub. L. 89–465.

The committee reports, S. Rep. No. 750, 89th Cong., 1st Sess., and H. R. Rep. No. 1541, 89th Cong., 2d Sess., accompanying the 1966 Act, and the debates, 112 Cong. Rec. 12488–12504, 12841–12843, make no reference to this change from the earlier S. 2840. In the face of this silence, and without more, and being cognizant of the fact that the federal act, unlike the Illinois one, was not directed against the professional bail bondsman, we are not inclined to read constitutional implications into the absence of the retention provision in the Bail Reform Act of 1966.

Neither are we inclined to read constitutional implications into either the presence or the absence of a

retention provision in corresponding statutes of States other than Illinois. See N. Y. Laws 1936, c. 518, N. Y. Code Crim. Proc. § 586.3 (Supp. 1970–1971), having a 2% fee provision, now replaced by §§ 520.10–520.30 of New York's new Criminal Procedure Law, effective September 1, 1971, without the provision. See Wis. Stat. §§ 969.02 (5) and 969.03 (1)(c) (1969), where a 1% fee is specified but not upon dismissal or acquittal. See Alaska Stat. § 12.30.020 (b)(4) (Supp. 1971); D. C. Code Ann. § 23–1321 (a)(3) (Supp. 1971); and Iowa Code Ann. § 763.16.1c. (Supp. 1971), in each of which a 10% deposit is authorized with no fee-retention provision.

VI

We refrain from nullifying this Illinois statute that, with its companion sections, has brought reform and needed relief to the State's bail system. The judgment of the Supreme Court of Illinois is

Affirmed.

MR. JUSTICE MARSHALL, concurring.

I join the opinion of the Court with a few additional words.

All agree that the central purpose of the statute was to restrict severely the activities of professional bail bondsmen who had customarily collected 10% of the amount of each bond as a fee and retained all of it regardless of what happened. All agree that the new scheme is, in general, an admirable attempt to reduce the cost of liberty for those awaiting trial.

The new scheme dealt only with the class of which appellant Schilb was a member—those persons charged with crimes who under the old system were relegated to professional bondsmen who along with other requirements charged a 10% fee for the bond regardless of

the outcome of the case. This is the only class affected by the new scheme. Members of this class now pay 1% instead of 10%. In the evolving struggle for meaningful bail reform I cannot find the present Illinois move toward that objective to be unconstitutional.

MR. JUSTICE DOUGLAS, dissenting.

Appellant John Schilb brought this class action on behalf of all criminal defendants against whom the Clerk of the Circuit Court of St. Clair County, Illinois, had assessed fees of 10% of the amounts deposited as bail bonds. At issue was Ill. Ann. Stat., c. 38, § 100–7 (a) (1970), which allowed a defendant to be released from custody upon "deposit with the clerk of the court . . . a sum of money equal to 10% of the bail" which had been set by the court. Appellant challenged, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the provision that "the clerk of the court . . . retain as bail bond costs 10% of the amount [so] deposited." *Id.*, at § 110–7 (f). He argued that this was an unconstitutional discrimination because bail bond costs were not imposed upon those who were released on their personal recognizance, *id.*, at § 110–2, or those who deposited cash or other security in the full amount of the bail bond. *Id.*, at § 110–8.

The Circuit Court found the statute constitutional and dismissed the complaint. The Supreme Court of Illinois affirmed the judgment, 46 Ill. 2d 538, 264 N. E. 2d 377; we noted probable jurisdiction, 402 U. S. 928.

The commercial bail bondsman has long been an anathema to the criminal defendant seeking to exercise his right to pretrial release. In theory, courts were to set such amounts and conditions of bonds as were necessary

to secure the appearance of defendants at trial.[1] Cf. *Stack* v. *Boyle*, 342 U. S. 1 (1951). Those who did not have the resources to post their own bond were at the mercy of the bondsman who could exact exorbitant fees and unconscionable conditions for acting as surety.[2] See A. Beeley, The Bail System in Chicago 39 (1927); D. Freed & P. Wald, Bail in the United States: 1964, p. 34 (1964); R. Goldfarb, Ransom 92–126 (1965); Ares & Sturz, Bail and the Indigent Accused, 8 Crime & Delinquency 12 (1962); Boyle, Bail Under the Judicial Article, 17 De Paul L. Rev. 267, 272 (1968); Note, 106 U. Pa. L. Rev. 693 (1958); Note, 102 U. Pa. L. Rev. 1031 (1954). Criminal defendants often paid more in fees to bondsmen for securing their release than they were later to pay in penalties for their crimes. Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 U. Ill. L. F. 35, 36.

Moreover, the commercial bond system failed to provide an incentive to the defendant to comply with the

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[1] A study by the Champaign County Bar Association indicated that bail was often set at a higher amount than necessary to satisfy these objectives:

"Among the bail practices noted in this report were the following: (1) Bonds of $2,000, $3,000, or even $5,000 are fixed in cases where the accused ultimately is fined $50 or less. (2) Permitting an accused to sign his own bond without sureties is rarely allowed. (3) Personal bonds of local citizens who own property or have been local residents for many years are frequently refused. (4) Magistrates frequently fix a bond of $1,000 or so for a minor crime, and when the case is transferred a few days later to the County or Circuit Court by the filing of an information the accused must provide a second bond for the same minor crime." Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 U. Ill. L. F. 35.

[2] In 1962 in Cook County, for example, professional bail bondsmen wrote bonds totaling $18,513,965 entitling them to receive $1,851,396 in fees. These bondsmen, however, paid forfeiture judgments of only $183,938. *Id.*, at 36.

terms of his bond. Whether or not he appeared at trial, the defendant was unable to recover the fee he had paid to the bondsman. "No refund is or was made by the professional surety to a defendant for his routine compliance with the conditions of his bond." Kamin, Bail Administration in Illinois, 53 Ill. B. J. 674, 678 (1965).

It was in response to the abuses and inequities of the commercial bonding system that Illinois enacted the statutory scheme now under attack.[3] The Supreme Court of Illinois indicated "that the central purpose of the legislature . . . was to severely restrict the activities of professional bail bondsmen who customarily collected 10% of the amount of a bond as a fee which was retained whether or not the conditions of the bond were met by the accused." 46 Ill. 2d, at 544, 264 N. E. 2d, at 380. To accomplish this end, it was only necessary to deal with the class represented by appellant. Those defendants who posted security in the full amount of the bail bond or who were free on their own recognizance stood

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[3] The primary argument advanced in favor of retaining the commercial bond system was that the professional bondsman would, at his own expense, track down and recapture a defendant who jumped bail. This argument was found by the Illinois Legislature to have only tenuous factual support:

"As to the value of bondsmen being responsible for the appearance of accused and tracking him down and returning him at the bondsman's expense—the facts do not support this as an important factor. While such is accomplished occasionally without expense to the county, the great majority of bail jumpers are apprehended by the police of this and other states. Since bail jumping is now a distinct and separate crime, and with the nation-wide exchange of information between law enforcement agencies and the F. B. I., the average bail jumper has little chance of escape. The facts show that most of them are recaptured in this state, and even in the same county where they are to appear." Committee Comments—1963, Ill. Ann. Stat., c. 38, p. 300 (Smith-Hurd ed. 1970).

in the same financial position under the new statutory scheme as under the old. No costs have ever been imposed upon them and any security deposited has always been returned upon the satisfaction of the terms of the bond.

Those defendants who under the old system had utilized the services of the professional bondsman are now required to post with the clerk of the court 10% of the face amount of their bonds in order to win their release. The significant difference, however, is that upon satisfaction of the terms of their bonds, § 110–7 now allows them to recover 90% of the amount deposited, while no such recovery was ever had from the commercial bondsman. Rather than paying a fee of 10% of the face amount of the bond, therefore, the cost is now only 1%.

Appellant urges that the new system of pretrial release is constitutionally deficient despite the improvement it has wrought. Appellant first argues that § 110–7 imposes costs upon only one class of criminal defendants without any rational basis for the classification. Next he asserts that the poor and nonaffluent, who have no choice but to remain in jail or deposit 10% of bail, are unconstitutionally penalized due to lack of wealth. Finally, he says that § 110–7 violates the Due Process Clause insofar as it allows costs to be taxed against an accused who is ultimately found innocent.

In response, appellees assert that the classification implements the laudable purpose of eliminating the commercial bail bondsman. Under this view, the 1% fee is no more than the interest charged for allowing an accused his freedom upon payment of only 10% of the amount set as bail. Appellees urge that a system which requires liberal use of an accused's release on his own recognizance, Ill. Ann. Stat., c. 38, § 110–2 (1970), and

which reduces to a fraction of the previous cost the financial burden on those required to post cash bonds, actually benefits the indigent.[4]

I do not reach the question of equal protection but rest my decision on the issue stirred, but not decided, in *Giaccio* v. *Pennsylvania*, 382 U. S. 399. The plaintiff in this action, John Schilb, was charged (1) with leaving the scene of an automobile accident and (2) obstructing traffic. He posted a 10% bond on each charge—one for $50 and one for $25; he was acquitted on the first one and was charged $7.50 on the two bonds.

The 1% charge is a part of the cost of a criminal prosecution, imposed even on an innocent person who is accused of a crime and who is put to the expense and anguish of a trial. *Giaccio* involved a state statute which directed juries "in all cases of acquittals" to determine whether the government or the defendant should pay the costs. 382 U. S., at 400–401. We held the Act unconstitutional on grounds of vagueness. MR. JUSTICE STEWART, concurring, said: "In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law." 382 U. S., at 405.

Mr. Justice Fortas also concurred, saying: "In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." *Ibid.* That is my view on the merits in the instant case.

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[4] Appellees note that a major portion of those defendants who avail themselves of the 10% bail provision are not indigent. A wealthy accused who could afford to pay either 10% or 100% of the amount set as bail might well elect to pay only 10% if the 1% cost thereby imposed would be less than the interest which could be earned if the 90% were retained and invested.

Some costs are the unavoidable consequences of a system of government which is required to proceed against its citizens in a public trial in an adversary proceeding. Yet I see no basis for saying that an accused must bear the costs incurred by the Government in its unsuccessful prosecution of him. Imposition of costs upon individuals who have been acquitted has long been eschewed by our courts. *E. g., State* v. *Brooks,* 33 Kan. 708, 715, 7 P. 591, 596 (1885); *Biester* v. *State,* 65 Neb. 276, 91 N. W. 416 (1902); *Childers* v. *Commonwealth,* 171 Va. 456, 198 S. E. 487 (1938). Some jurisdictions have provided that the imposition of costs upon acquitted individuals is reprehensible. See, *e. g.,* Costs in Criminal Cases Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 48 (1952); Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 31–32 (1963); Goldberg, Equality and Governmental Action, 39 N. Y. U. L. Rev. 205, 223–224 (1964); Note, 1962 Wash. U. L. Q. 76. Where there is such uniform condemnation of a practice as onerous as the imposition of costs upon acquitted defendants, cf. *Leland* v. *Oregon,* 343 U. S. 790, 798 (1952), I would conclude, with JUSTICES STEWART and Fortas in *Giaccio,* that it violates due process.

It is, however, said that the 1% charge is not "a vehicle for the imposition of costs of prosecution" and that it is merely "an administrative cost imposed upon all those, guilty and innocent alike, who seek the benefit of § 110–7." *Ante,* at 370, 370–371. The costs of administering the bail system occur, by definition, only during the course of criminal prosecutions. They are as much an element of the costs of conducting criminal cases as the prosecutor's salary, the fee for docketing an appeal, or the per diem paid to jurors. Nor does the rubric "administrative" require a contrary result. If this were the talisman through which a State could impose its costs upon acquitted defendants, I could see no stopping point

and we might be left with a system in which an acquittal might be nearly as ruinous to the defendant as a conviction.

On the other aspects of the case facts are absent which we would need to know if we are to make an informed judgment on the requirements of equal protection. The discrimination condemned is an "invidious" one, it being recognized over and again that "legislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager,* 384 U. S. 305, 309. The elimination of the professional bondsman seems to me to be a permissible end. The provision for the 10% bond is, in that view, an ameliorating one. The problem on which this record leaves us in the dark is the actual working of that provision and the provision for release on personal recognizance. Not everyone, I assume, is entitled to pretrial release. Equal protection would seem to require that each, whether rich or poor, black or white, is entitled to release on personal recognizance if he meets the requirements of stability, reputation, community ties, and so on. In Illinois the record is silent [5]

[5] The Manhattan Bail Project which has been in operation since 1961 deals only with felony defendants:

"In evaluating whether the defendant is a good parole risk, four key factors are considered: (1) residential stability; (2) employment history; (3) family contacts in New York City; and (4) prior criminal record. Each factor is weighted in points. If the defendant scores sufficient points, and can provide an address at which he can be reached, verification will be attempted. Investigation is confined to references cited in the defendant's signed statement of consent." D. Freed & P. Wald, Bail in the United States: 1964, p. 59 (1964).

From 1961 to 1964 out of 13,000 defendants, 10,000 were interviewed, 4,000 were recommended for release on personal recognizance, and 2,195 were paroled. Of these, only 15 failed to show up in court, a default rate less than seven-tenths of one percent.

If Illinois' experience is comparable, it is understandable why those who pass muster on personal recognizance may be treated more

as to how the system of release on personal recognizance, as contrasted to release on the 10% bond, is in fact administered. The manner of administration may, of course, raise serious equal protection questions. For a statute fair on its face may be administered in an invidious way. As stated in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

But, as I have said, the record contains no factual basis showing the manner of administration of the Illinois system.

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leniently than those who do not qualify for that kind of release. In that connection 60% of those released on personal recognizance in Manhattan were either acquitted or had their cases dismissed, compared with 23% of the others. *Id.*, at 63.

If that were the experience of Illinois, the State certainly could not be charged with making an invidious discrimination against the other group, even though the cost of administering the personal recognizance program was as high as the cost of administering the bail program. Cf. *Richardson* v. *Belcher, ante*, p. 78; *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4 (1970); *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802 (1969); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61 (1913). Cost of administration is only one item for comparison. The lessened burden on the State accruing from the few convictions and the resultant jail term sentences is a factor that a State may take into consideration. Certainly if the Illinois experience parallels the Manhattan experience, we would be hard put to say that Illinois shows an invidious discrimination against those who can only make bail as compared with those who are qualified to be released on personal recognizance.

I would reverse this judgment insofar as it imposed bail bond costs under the criminal charges of which members of the class represented by appellant were acquitted and remand for further proceedings respecting the bail bond costs on the charges on which they were convicted.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In 1963, Illinois enacted new provisions governing bail in criminal cases. Ill. Rev. Stat., c. 38, Art. 110 (1963). These enactments provide that a person charged with a criminal offense may obtain pretrial release in one of four ways.

(1) The accused may be released on his own recognizance. Persons in this class do not pay any costs to cover the administration of their release. § 110–2.

(2) The accused may deposit 10% of the full amount of the bail that has been set. § 110–7. When bail is made in this manner, the clerk of the court ultimately retains as bail costs 1% of the full amount of bail (10% of the amount actually deposited). § 110–7 (f).

(3) The accused may offer cash, stocks or bonds in an amount equivalent to the required bail. No administrative costs are imposed. § 110–8 (a)(1).

(4) The accused may secure double the amount of required bail in unencumbered real estate. Again, no administrative costs are imposed. § 110–8 (a)(2) and (f).

A person must satisfy a judge that he meets certain criteria to be eligible for release on his own recognizance. Otherwise the State allows individuals to choose freely among the three other methods of obtaining pretrial release (assuming the individual has the wherewithal to make a choice).

The 1963 bail provisions of the Illinois Criminal Code represented substantial reforms in the State's procedures for granting pretrial release. The central purpose of the legislation was to restrict severely the activities of pro-

fessional bail bondsmen who had customarily collected 10% of the amount of a bond as a fee, which they retained whether or not the conditions of bond were met by the accused.[1] Before 1963, accused persons who could not obtain release on their own recognizance had no choice but to offer the full amount of the bail that was set. The primary innovation of bail reform was to create a class of "ten-percenters," persons who could gain release by depositing only 10% of the required bail.

Appellant John Schilb was charged with leaving the scene of an accident and obstructing traffic. Bail was set at $500 for the first offense and $250 for the second. As a "ten-percenter," the appellant posted $50 and $25 bonds. He was found guilty of the second charge and not guilty of the first. After these judgments were entered, the State retained $5 and $2.50 respectively, as administrative costs on his bonds. Subsequently, the appellant brought this class action against the clerk of the Circuit Court of St. Clair County, Illinois, alleging that the cost-retention provision of the state bail law, § 110–7 (f), constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment because administrative costs are imposed only on that class of persons who obtain pretrial release by depositing 10% of the required bail. The Illinois Supreme Court ultimately upheld the validity of § 110–7 (f), with two

[1] Other common abuses perpetuated by the bondsman system were overcharges of bail fees, failure to return security pledges to the owner, and retention of money reimbursements for forfeited bond judgments which were later vacated. D. Freed & P. Wald, Bail in the United States: 1964, p. 34 (1964). According to the appellees' brief, the Illinois reforms have apparently put an end to the activities of professional bondsmen. As the Illinois Supreme Court noted: "[T]he ultimate objective of this reform was to regain from professional bondsmen the control of bail releases and restore such control to the courts where it rightfully belongs." 46 Ill. 2d 538, 544, 264 N. E. 2d 377, 380–381 (1970).

justices dissenting. 46 Ill. 2d 538, 264 N. E. 2d 377 (1970).

It is common ground that the Illinois bail reform scheme reflects an admirable attempt to reduce the cost of liberty for those awaiting trial. Chapter 38, § 110–7 (f), does arbitrarily discriminate, however, against the appellant and those similarly situated.[2] As this Court said in *Rinaldi* v. *Yeager,* 384 U. S. 305:

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. . . . [L]egislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Id.,* at 308–309 (citations omitted).

The Court assumes that the rationality of § 110–7 (f)'s classification should be analyzed in relation to the purpose of ending the evils created by the bail bond system. However, while ending those evils is the aim of the whole bail reform, it is not the aim of § 110–7 (f) itself. Rather, the appellees have acknowledged that the purpose of § 110–7 (f) is to cover administrative costs; they have also acknowledged in oral argument that the financial burden on the State is probably as great or

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[2] I would decide this case solely on the ground that the provision in question arbitrarily discriminates between like classes of persons. I would not, therefore, reach the two other arguments urged by the appellants: that the provision arbitrarily favors the rich over the poor and that the provision violates due process by imposing costs on those who are ultimately found to be innocent.

greater for those who use the other methods of obtaining pretrial release.[3] Can the appellees constitutionally justify the selective imposition of administrative costs?[4] I think not.

The Illinois Supreme Court held that there can be no unconstitutional discrimination in the state system of bail release, since each person accused has a choice of method for obtaining pretrial release. 46 Ill. 2d, at

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[3] As the Court notes, the parties have stipulated that the "actual cost of administering the provisions of said Sections 110–7 and 110–8 are substantially the same but there may probably be a slightly higher cost in the administration of Section 110–8." With regard to those released on their own recognizance (under § 110–2) and the "ten-percenters," the appellees acknowledged at oral argument that the administration of release for both classes imposes equal costs on the State:

"MR. ROONEY: We think [those released on their own recognizance] are a little differently situated than those——

"QUESTION: Not expense wise to the system?

"MR. ROONEY: Not expense wise to the system . . . ." Tr. of Oral Arg. 19–20.

[4] The Bail Reform Act of 1966, 18 U. S. C. §§ 3141–3152, a federal law in some ways similar to Illinois' provisions governing bail, provides for "ten-percenters" at the discretion of the judge. However, it imposes no administrative costs on persons seeking pretrial release through the deposit of something less than the full bail required. 18 U. S. C. § 3146 (a)(3). Earlier versions of the legislation had imposed an administrative cost of 1% of the total bail required on those who elected to deposit 10%, S. 2840, 88th Cong., 2d Sess. (1964).

Several States allow persons to obtain pretrial release by depositing a sum less than the full amount set for bail. Two of these, Iowa, Iowa Code Ann. § 763.16.1c (Supp. 1971), and Alaska, Alaska Stat. § 12.30.020 (b)(4) (Supp. 1971), impose no administrative costs. Wisconsin imposes a cost only on those found guilty, Wis. Stat. § 969.03 (1)(c) (1969). New York until recently imposed a flat percentage fee on all who obtain pretrial release, regardless of method chosen. N. Y. Laws 1936, c. 518, and N. Y. Code Crim. Proc. § 586.3 (Supp. 1970–1971). There is now no fee. N. Y. Criminal Procedure Law §§ 520.10–520.30.

548, 264 N. E. 2d, at 382. Those who deposit 10%, said the court, "are not automatically placed in this class . . . by the law. They join only by the exercise of their own volition." Whether many persons accused of crimes can really choose between paying 10% or paying the full amount (or securing double the amount in real estate) is highly debatable.[5] But however that may be, it is clear that not every person accused of a crime is free to choose to be released on his own recognizance. Yet those who are fortunate enough to be so released need pay no costs whatever.

The appellees argue that those who pay only 10% are being given a benefit that justifies imposing a burden. The appellees say that such persons are not required to put up the full amount of the bail set and that the 1% such persons do ultimately pay is a boon by comparison to the 10% of required bail that they would have automatically forfeited to the bondsman under the old procedures governing bail. This justification, however, also fails to distinguish between the "ten-percenters" and those who are released on their own recognizance. Obviously, those released on their own recognizance receive an even greater benefit than those who deposit 10%, since they give no money to the State at any time if they meet the conditions of release.[6]

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[5] The dissent in the Illinois Supreme Court took "judicial notice of the fact that many defendants cannot afford to pay the full amount of the bail." 46 Ill. 2d, at 553, 264 N. E. 2d, at 385. From this basic fact it can be argued that, since many of those accused have no choice but to deposit 10%, the imposition of administrative costs upon that class alone amounts to a violation of the Equal Protection and the Due Process Clauses of the Fourteenth Amendment. *Griffin* v. *Illinois*, 351 U. S. 12.

[6] The appellees contend that those who offer the full amount of bail in cash actually pay an administrative cost because they sacrifice the interest that would accrue on the money. However, this argument totally fails to meet the objection raised with regard to

The appellees attempt to distinguish between those released on their own recognizance and the "ten-per-centers" by noting that the recognizance practice is "historic," whereas the cost-retention provision was recently enacted to end the evils spawned by bail bondsmen.[7] This distinction, however, does not confront the reality that both classes of persons receive benefits and only one class must pay administrative costs. A second attempt to distinguish between those released on their own recognizance and those who deposit 10% turns on the idea that the members of the former class are more "worthy" of the benefit they receive and therefore may rationally be required to pay less. But while the criteria used by judges to determine release on one's own recognizance—*e. g.*, length of residence in the jurisdiction, marital status, employment record, or past criminal record—are obviously relevant to the recognizance decision, they are

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those released on their own recognizance. Moreover, those who offer stocks or bonds or who secure property to obtain their release may not, apparently, lose any income that might accrue on those items during the period before trial. The statutory scheme governing bail does not by its terms provide for the State to receive interest, dividends, or rent on stocks or bonds or land. The record before us is silent on the question of Illinois practice with regard to the benefits that flow from those sources of income before trial. Stocks and bonds are deposited with the clerk of the court, but there is no indication that the accused does not continue to receive earnings. Similarly, the accused gives the State first lien on the real estate offered as bond, but there is no indication that the accused is deprived of the use of the land. Ill. Rev. Stat., c. 38, § 110–8 (1963).

[7] The Court refers to a statement made in oral argument that the State of Illinois has never imposed costs on those who obtain release on their own recognizance. But under the rules governing pretrial release that existed before the 1963 reforms, the State did not impose administrative costs on *anyone* obtaining pretrial release. 46 Ill. 2d 538, 264 N. E. 2d 377. The question here is whether the current, selective imposition of administrative costs by the State is constitutional.

not rationally related to the decision to impose purely administrative costs, especially when such costs are at least as great for those released on their own recognizance as for those required to post bond.

Given the infirmities in the asserted justifications for § 110–7 (f), I think the imposition of administrative costs on only one class of those persons seeking pretrial release violates the Equal Protection Clause of the Fourteenth Amendment. Accordingly, I would reverse the judgment before us.

UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE)

No. 9, Orig. Decided May 31, 1960—Final Decree Entered December 12, 1960—Supplemental Decrees Entered December 13, 1965, and December 20, 1971.

The motion by the United States for the entry of a supplemental decree is granted (*post,* p. 998), and a supplemental decree is entered.

Opinions reported: 363 U. S. 1 and 394 U. S. 11; final decree reported: 364 U. S. 502; supplemental decree reported: 382 U. S. 288.

Solicitor General Griswold argued the cause for the United States on the motion for entry of a supplemental decree as to the State of Louisiana. With him on the motion and memoranda in support thereof were *Assistant Attorney General Kashiwa, George S. Swarth,* and *Jonathan I. Charney.*

Victor A. Sachse, Special Assistant Attorney General, argued the cause for the State of Louisiana in opposition to the motion. With him on the memoranda were *Jack P. F. Gremillion,* Attorney General, *John L. Madden,* Assistant Attorney General, and *Paul M. Hebert, Oliver P. Stockwell, Frederick W. Ellis, William E. Shaddock,* and *W. Thomas Tete,* Special Assistant Attorneys General.

Supplemental Decree

It appearing to the Court that its opinion herein of March 3, 1969, 394 U. S. 11, rejected every ground asserted by the State of Louisiana in support of its claim to rights in the area of the continental shelf hereinafter described, and that no issue as to said area is now pending before the Special Master appointed herein by order of May 19, 1969, 395 U. S. 901; and

It further appearing that substantial revenues derived from lands lying wholly within said area are now being held impounded by the United States pursuant to the parties' Interim Agreement of October 12, 1956, as amended, on file herein, and that there is no reason why the Court should not at this time enter a supple-

mental decree declaring the rights of the United States in the described area and terminating the obligation of the United States to hold impounded the revenues heretofore or hereafter derived from leases of lands lying wholly within the described area:

IT IS ORDERED, ADJUDGED AND DECREED:

1. As against the defendant State of Louisiana and all persons claiming under it, the United States has exclusive rights to explore the area of the continental shelf lying more than one foot seaward of the line described in paragraph 3 hereof, and to exploit the natural resources of said area. The State of Louisiana is not entitled to any interest in such lands, minerals, or resources, and said State, its privies, assigns, lessees and other persons claiming under it are hereby enjoined from interfering with the rights of the United States in such lands, minerals, and resources.

2. All sums now held impounded by the United States under the Interim Agreement of October 12, 1956, as amended, derived from leases of lands lying wholly within the area referred to in paragraph 1 hereof are hereby released to the United States absolutely, and the United States is hereby relieved of any obligation under said agreement to impound any sums hereafter received by it from leases of lands lying wholly within said area.

3. The line referred to in paragraph 1 hereof is described by coordinates in the Louisiana Plane Coordinate System, South Zone, as follows:

	X	Y
BEGINNING AT	2769356.556	575649.806
BY STRAIGHT LINE TO	2790257.937	526389.980
BY ARC CENTERED AT	2779032.000	512013.000
TO	2791384.930	525434.041
BY STRAIGHT LINE TO	2793118.930	523838.041
BY ARC CENTERED AT	2780766.000	510417.000
TO	2794593.837	522312.804
BY STRAIGHT LINE TO	2795886.837	520809.804
BY ARC CENTERED AT	2782059.000	508914.000
TO	2796579.124	519954.164
BY STRAIGHT LINE TO	2799209.124	516495.164

	X	Y
BY ARC CENTERED AT	2784689.000	505455.000
TO	2800440.568	514653.224
BY STRAIGHT LINE TO	2804269.568	508096.224
BY ARC CENTERED AT	2788518.000	498898.000
TO	2804494.998	507698.840
BY STRAIGHT LINE TO	2806027.998	504915.840
BY ARC CENTERED AT	2790051.000	496115.000
TO	2807013.645	502822.304
BY STRAIGHT LINE TO	2808652.645	498677.304
BY ARC CENTERED AT	2791690.000	491970.000
TO	2809151.167	497245.118
BY STRAIGHT LINE TO	2812250.167	486987.118
BY ARC CENTERED AT	2794789.000	481712.000
TO	2812519.378	485996.033
BY STRAIGHT LINE TO	2813932.378	480148.033
BY ARC CENTERED AT	2796202.000	475864.000
TO	2814261.901	478425.093
BY STRAIGHT LINE TO	2815268.901	471324.093
BY ARC CENTERED AT	2797209.000	468763.000
TO	2815426.129	469687.898
BY STRAIGHT LINE TO	2815673.129	464822.898
BY ARC CENTERED AT	2797456.000	463898.000
TO	2815696.593	463894.844
BY STRAIGHT LINE TO	2815695.593	458115.844
BY ARC CENTERED AT	2797455.000	458119.000
TO	2815656.660	456927.864
BY STRAIGHT LINE TO	2815268.660	450998.864
BY ARC CENTERED AT	2797067.000	452190.000
TO	2815170.804	449960.314
BY STRAIGHT LINE TO	2813956.804	440103.314
BY ARC CENTERED AT	2795853.000	442333.000
TO	2813808.964	439123.233
BY STRAIGHT LINE TO	2812677.964	432796.233
BY ARC CENTERED AT	2794722.000	436006.000
TO	2812418.508	431584.141
BY STRAIGHT LINE TO	2810956.508	425733.141
BY ARC CENTERED AT	2793260.000	430155.000
TO	2810698.968	424806.950
BY STRAIGHT LINE TO	2807853.968	415529.950
BY ARC CENTERED AT	2790415.000	420878.000
TO	2807571.652	414683.766
BY STRAIGHT LINE TO	2805321.652	408451.766
BY ARC CENTERED AT	2788165.000	414646.000
TO	2805227.217	408196.195
BY STRAIGHT LINE TO	2803786.217	404384.195
BY ARC CENTERED AT	2786724.000	410834.000
TO	2803319.235	403263.173
BY STRAIGHT LINE TO	2799845.235	395648.173
BY ARC CENTERED AT	2783250.000	403219.000
TO	2798970.928	393968.505

	X	Y
BY STRAIGHT LINE TO	2795393.928	387889.505
BY ARC CENTERED AT	2779673.000	397140.000
TO	2795310.866	387749.772
BY STRAIGHT LINE TO	2793559.866	384833.772
BY ARC CENTERED AT	2777922.000	394224.000
TO	2792248.791	382934.080
BY STRAIGHT LINE TO	2790813.791	381113.080
BY ARC CENTERED AT	2776487.000	392403.000
TO	2789360.151	379480.105
BY ARC CENTERED AT	2774670.000	390293.000
TO	2788262.435	378128.916
BY STRAIGHT LINE TO	2786553.159	375044.826
BY ARC CENTERED AT	2770599.000	383887.000
TO	2785045.121	372750.177
BY STRAIGHT LINE TO	2783941.664	371318.828
BY STRAIGHT LINE TO	2783791.761	371061.536
BY ARC CENTERED AT	2768031.000	380244.000
TO	2780548.119	366975.957
BY STRAIGHT LINE TO	2775735.205	360552.955
BY ARC CENTERED AT	2761138.000	371491.000
TO	2775111.280	359766.382
BY STRAIGHT LINE TO	2773031.020	357287.149
BY ARC CENTERED AT	2757465.000	366796.000
TO	2771721.145	355417.004
BY STRAIGHT LINE TO	2770633.235	354054.018
BY STRAIGHT LINE TO	2770504.786	353847.463
BY ARC CENTERED AT	2755015.000	363480.000
TO	2767787.706	350457.818
BY STRAIGHT LINE TO	2761993.706	344774.818
BY ARC CENTERED AT	2749221.000	357797.000
TO	2760702.849	343623.561
BY STRAIGHT LINE TO	2757790.849	341264.561
BY ARC CENTERED AT	2746309.000	355438.000
TO	2756371.988	340224.338
BY STRAIGHT LINE TO	2773418.101	206994.932
BY ARC CENTERED AT	2755325.000	204680.000
TO	2773307.767	201623.969
BY STRAIGHT LINE TO	2773160.767	200758.969
BY ARC CENTERED AT	2755178.000	203815.000
TO	2773015.068	199999.475
BY STRAIGHT LINE TO	2772420.179	188058.433
BY ARC CENTERED AT	2754263.000	186316.000
TO	2772345.899	183922.675
BY STRAIGHT LINE TO	2771967.899	181066.675
BY ARC CENTERED AT	2753885.000	183460.000
TO	2766173.905	169980.310
BY STRAIGHT LINE TO	2764758.905	168690.310
BY ARC CENTERED AT	2752470.000	182170.000
TO	2763667.122	167770.566
BY STRAIGHT LINE TO	2740620.854	137484.221

	X	Y
BY ARC CENTERED AT	2726105.000	148530.000
TO	2735648.943	132985.471
BY STRAIGHT LINE TO	2719764.466	115956.608
BY ARC CENTERED AT	2701773.000	118961.000
TO	2717763.031	110183.863
BY STRAIGHT LINE TO	2717662.031	109999.863
BY ARC CENTERED AT	2701672.000	118777.000
TO	2714989.110	106312.097
BY ARC CENTERED AT	2701104.000	118141.000
TO	2714747.154	106033.830
BY STRAIGHT LINE TO	2714613.154	105882.830
BY ARC CENTERED AT	2700970.000	117990.000
TO	2712654.457	103983.120
BY ARC CENTERED AT	2699658.000	116782.000
TO	2699042.141	98551.807
BY STRAIGHT LINE TO	2614267.867	73928.355
BY ARC CENTERED AT	2609180.000	91445.000
TO	2597415.825	77505.006
BY STRAIGHT LINE TO	2595525.825	79100.006
BY ARC CENTERED AT	2607290.000	93040.000
TO	2589264.969	90244.022
BY STRAIGHT LINE TO	2573559.774	191491.823
BY STRAIGHT LINE TO	2572517.559	191919.643
BY ARC CENTERED AT	2576174.000	209790.000
TO	2567199.659	193909.810
BY ARC CENTERED AT	2574890.000	210450.000
TO	2566471.962	194268.039
BY STRAIGHT LINE TO	2564468.949	194806.822
BY ARC CENTERED AT	2565940.000	212988.000
TO	2559750.152	195829.765
BY STRAIGHT LINE TO	2559111.844	196060.036
BY ARC CENTERED AT	2562149.000	214046.000
TO	2557271.764	196469.544
BY STRAIGHT LINE TO	2557018.765	196539.748
BY STRAIGHT LINE TO	2552324.142	197552.879
BY ARC CENTERED AT	2556172.000	215383.000
TO	2551363.075	197787.732
BY STRAIGHT LINE TO	2414966.738	172672.945
BY STRAIGHT LINE TO	2410270.288	168699.151
BY STRAIGHT LINE TO	2406006.195	164748.910
BY ARC CENTERED AT	2393610.000	178130.000
TO	2404971.660	163860.034
BY STRAIGHT LINE TO	2397194.660	157668.034
BY ARC CENTERED AT	2385833.000	171938.000
TO	2396858.180	157406.495
BY STRAIGHT LINE TO	2392712.390	154261.048
BY STRAIGHT LINE TO	2389824.019	151967.545
BY ARC CENTERED AT	2376485.000	164409.000
TO	2387438.051	149823.051
BY STRAIGHT LINE TO	2385828.051	148614.051

	X	Y
BY ARC CENTERED AT	2374875.000	163200.000
TO	2382739.005	146741.669
BY STRAIGHT LINE TO	2382462.756	146609.674
BY STRAIGHT LINE TO	2379481.241	144717.970
BY ARC CENTERED AT	2369709.000	160120.000
TO	2378912.544	144371.540
BY STRAIGHT LINE TO	2376898.544	143194.540
BY ARC CENTERED AT	2367695.000	158943.000
TO	2374966.704	142214.534
BY STRAIGHT LINE TO	2373711.682	141668.989
BY ARC CENTERED AT	2364392.000	157349.000
TO	2367742.517	139418.767
BY STRAIGHT LINE TO	2365248.314	138184.960
BY ARC CENTERED AT	2354070.000	152599.000
TO	2349744.041	134878.805
BY STRAIGHT LINE TO	2348371.940	134393.582
BY STRAIGHT LINE TO	2346096.020	133533.975
BY ARC CENTERED AT	2339651.000	150598.000
TO	2344530.100	133022.061
BY STRAIGHT LINE TO	2342882.004	132564.548
BY STRAIGHT LINE TO	2341883.034	132218.265
BY STRAIGHT LINE TO	2334774.627	129342.086
BY ARC CENTERED AT	2327933.000	146251.000
TO	2333793.990	128977.667
BY STRAIGHT LINE TO	2328326.990	127122.667
BY ARC CENTERED AT	2322466.000	144396.000
TO	2326958.626	126717.325
BY STRAIGHT LINE TO	2326905.790	126703.898
BY ARC CENTERED AT	2319608.000	143421.000
TO	2324588.088	125873.409
BY STRAIGHT LINE TO	2322643.088	125321.409
BY ARC CENTERED AT	2317663.000	142869.000
TO	2322367.586	125245.547
BY STRAIGHT LINE TO	2318606.586	124241.547
BY ARC CENTERED AT	2313902.000	141865.000
TO	2314460.343	123632.954
BY STRAIGHT LINE TO	2312762.343	123580.954
BY ARC CENTERED AT	2312204.000	141813.000
TO	2311215.315	123599.221
BY STRAIGHT LINE TO	2309557.315	123689.221
BY ARC CENTERED AT	2310546.000	141903.000
TO	2308711.076	123754.934
BY ARC CENTERED AT	2300326.000	139954.000
TO	2308388.131	123591.809
BY STRAIGHT LINE TO	2306600.131	122710.809
BY ARC CENTERED AT	2298538.000	139073.000
TO	2302488.899	121265.428
BY STRAIGHT LINE TO	2299991.899	120711.428
BY ARC CENTERED AT	2296041.000	138519.000
TO	2295410.988	120289.290

	X	Y
BY STRAIGHT LINE TO	2294513.988	120320.290
BY ARC CENTERED AT	2295144.000	138550.000
TO	2288531.687	121550.101
BY STRAIGHT LINE TO	2287770.687	121846.101
BY ARC CENTERED AT	2294383.000	138846.000
TO	2287412.160	121989.944
BY STRAIGHT LINE TO	2284138.223	122399.427
BY ARC CENTERED AT	2286402.000	140499.000
TO	2283007.179	122577.102
BY STRAIGHT LINE TO	2277807.179	123562.102
BY ARC CENTERED AT	2281202.000	141484.000
TO	2276614.048	123829.824
BY STRAIGHT LINE TO	2270161.048	125506.824
BY ARC CENTERED AT	2274749.000	143161.000
TO	2267618.118	126372.023
BY STRAIGHT LINE TO	2263074.118	128302.023
BY ARC CENTERED AT	2270205.000	145091.000
TO	2262735.940	128449.715
BY STRAIGHT LINE TO	2256980.940	131032.715
BY ARC CENTERED AT	2264450.000	147674.000
TO	2255335.199	131874.012
BY STRAIGHT LINE TO	2251881.284	133866.529
BY STRAIGHT LINE TO	2250291.214	134590.217
BY STRAIGHT LINE TO	2229997.048	129637.207
BY STRAIGHT LINE TO	2228299.063	128761.074
BY ARC CENTERED AT	2219935.000	144971.000
TO	2227466.216	128357.751
BY STRAIGHT LINE TO	2225677.216	127546.751
BY ARC CENTERED AT	2218146.000	144160.000
TO	2222547.419	126458.397
BY STRAIGHT LINE TO	2219572.429	125718.680
BY STRAIGHT LINE TO	2212203.201	123742.459
BY STRAIGHT LINE TO	2203721.663	121100.023
BY ARC CENTERED AT	2198296.000	138515.000
TO	2202940.874	120875.715
BY STRAIGHT LINE TO	2196974.874	119304.715
BY ARC CENTERED AT	2192330.000	136944.000
TO	2195302.266	118947.198
BY STRAIGHT LINE TO	2189988.208	118069.554
BY STRAIGHT LINE TO	2188596.458	117772.421
BY ARC CENTERED AT	2184788.000	135611.000
TO	2185155.886	117374.117
BY ARC CENTERED AT	2182166.000	135368.000
TO	2181100.490	117158.554
BY STRAIGHT LINE TO	2179579.490	117247.554
BY ARC CENTERED AT	2180645.000	135457.000
TO	2177978.852	117412.309
BY STRAIGHT LINE TO	2172699.849	117308.349
BY STRAIGHT LINE TO	2171638.111	117082.068
BY ARC CENTERED AT	2167836.000	134922.000

	X	Y
TO	2168752.572	116704.450
BY STRAIGHT LINE TO	2165393.572	116535.450
BY ARC CENTERED AT	2164477.000	134753.000
TO	2161326.081	116786.616
BY STRAIGHT LINE TO	2160026.671	117014.505
BY STRAIGHT LINE TO	2156272.569	117354.955
BY ARC CENTERED AT	2157920.000	135521.000
TO	2155033.394	117510.260
BY STRAIGHT LINE TO	2149319.763	118425.992
BY ARC CENTERED AT	2147751.000	136599.000
TO	2149162.352	118413.090
BY STRAIGHT LINE TO	2145000.352	118090.090
BY ARC CENTERED AT	2143589.000	136276.000
TO	2143589.000	118035.407
BY STRAIGHT LINE TO	2139529.000	118035.407
BY ARC CENTERED AT	2139529.000	136276.000
TO	2137974.807	118101.740
BY STRAIGHT LINE TO	2136687.713	118211.811
BY STRAIGHT LINE TO	2132677.620	118549.888
BY ARC CENTERED AT	2134210.000	136726.000
TO	2130789.620	118808.962
BY STRAIGHT LINE TO	2129668.620	119022.962
BY ARC CENTERED AT	2133089.000	136940.000
TO	2126158.210	120067.437
BY STRAIGHT LINE TO	2122636.540	121514.043
BY STRAIGHT LINE TO	2122090.600	121683.588
BY STRAIGHT LINE TO	2118739.612	122394.088
BY ARC CENTERED AT	2122523.000	140238.000
TO	2114775.806	123724.363
BY STRAIGHT LINE TO	2111081.806	125457.363
BY ARC CENTERED AT	2118829.000	141971.000
TO	2108033.001	127268.427
BY STRAIGHT LINE TO	2107269.001	127829.427
BY ARC CENTERED AT	2118065.000	142532.000
TO	2103682.105	131313.642
BY STRAIGHT LINE TO	2103291.338	131814.638
BY STRAIGHT LINE TO	2063551.901	176572.248
BY ARC CENTERED AT	2075295.000	190530.000
TO	2059950.518	180667.643
BY ARC CENTERED AT	2071131.000	195080.000
TO	2058843.067	181599.424
BY ARC CENTERED AT	2062055.000	199555.000
TO	2057133.878	181990.781
BY STRAIGHT LINE TO	2053778.878	182930.781
BY ARC CENTERED AT	2058700.000	200495.000
TO	2053474.211	183019.006
BY STRAIGHT LINE TO	2052967.358	183053.121
BY STRAIGHT LINE TO	2051871.023	183006.136
BY ARC CENTERED AT	2051090.000	201230.000
TO	2050844.853	182991.054

	X	Y
BY STRAIGHT LINE TO	2048984.853	183016.054
BY ARC CENTERED AT	2049230.000	201255.000
TO	2048033.279	183053.706
BY STRAIGHT LINE TO	2044865.110	183262.011
BY STRAIGHT LINE TO	2041482.009	183446.456
BY ARC CENTERED AT	2042475.000	201660.000
TO	2037472.505	184118.784
BY STRAIGHT LINE TO	2033138.620	185354.743
BY STRAIGHT LINE TO	2032933.709	185387.056
BY ARC CENTERED AT	2035775.000	203405.000
TO	2029790.979	186173.902
BY STRAIGHT LINE TO	2027400.979	187003.902
BY ARC CENTERED AT	2033385.000	204235.000
TO	2026833.971	187211.391
BY STRAIGHT LINE TO	2023509.988	188490.527
BY STRAIGHT LINE TO	2020958.847	189326.687
BY ARC CENTERED AT	2026640.000	206660.000
TO	2019189.740	190010.289
BY STRAIGHT LINE TO	2016613.211	191163.211
BY STRAIGHT LINE TO	2015795.894	191414.427
BY ARC CENTERED AT	2021155.000	208850.000
TO	2013823.478	192147.664
BY STRAIGHT LINE TO	2010121.478	193772.664
BY ARC CENTERED AT	2017453.000	210475.000
TO	2007660.073	195086.114
BY STRAIGHT LINE TO	2006450.073	195856.114
BY ARC CENTERED AT	2016243.000	211245.000
TO	2002812.039	198902.856
BY STRAIGHT LINE TO	2001329.365	200516.331
BY STRAIGHT LINE TO	1998627.524	203118.747
BY STRAIGHT LINE TO	1996876.875	204647.104
BY ARC CENTERED AT	2008873.000	218388.000
TO	1994484.382	207176.983
BY STRAIGHT LINE TO	1993669.382	208222.983
BY ARC CENTERED AT	2008058.000	219434.000
TO	1992024.459	210736.599
BY STRAIGHT LINE TO	1991723.504	211291.404
BY STRAIGHT LINE TO	1991392.007	211653.006
BY STRAIGHT LINE TO	1987526.734	215291.902
BY ARC CENTERED AT	2000030.000	228573.000
TO	1985880.690	217061.430
BY STRAIGHT LINE TO	1984418.690	218858.430
BY ARC CENTERED AT	1998568.000	230370.000
TO	1982725.876	221328.633
BY STRAIGHT LINE TO	1981279.040	223863.752
BY ARC CENTERED AT	1987818.000	240892.000
TO	1978538.859	225187.963
BY STRAIGHT LINE TO	1913512.136	252159.733
BY ARC CENTERED AT	1914373.000	270380.000
TO	1902085.015	256899.471

	X	Y
BY STRAIGHT LINE TO	1899965.772	257778.490
BY ARC CENTERED AT	1896827.000	275747.000
TO	1895099.636	257588.381
BY ARC CENTERED AT	1882306.000	270590.000
TO	1867537.422	259884.472
BY ARC CENTERED AT	1872418.000	277460.000
TO	1858533.650	265630.205
BY ARC CENTERED AT	1843467.000	275912.000
TO	1848728.806	258446.816
BY ARC CENTERED AT	1835344.000	270839.000
TO	1842206.261	253938.450
BY STRAIGHT LINE TO	1840881.261	253400.450
BY ARC CENTERED AT	1834019.000	270301.000
TO	1817313.904	262975.771
BY STRAIGHT LINE TO	1816821.904	264097.771
BY ARC CENTERED AT	1833527.000	271423.000
TO	1815531.092	274400.671
BY ARC CENTERED AT	1820994.000	291804.000
TO	1808996.684	278064.144
BY ARC CENTERED AT	1809845.000	296285.000
TO	1792971.196	289357.232
BY ARC CENTERED AT	1791584.000	307545.000
TO	1773422.454	305848.689
BY ARC CENTERED AT	1783067.000	321331.000
TO	1771283.720	307407.152
BY ARC CENTERED AT	1782391.000	321876.000
TO	1769316.873	309156.470
BY ARC CENTERED AT	1778769.000	324757.000
TO	1763171.778	315299.416
BY ARC CENTERED AT	1763190.000	333540.000
TO	1762008.035	315337.742
BY STRAIGHT LINE TO	1761238.035	315387.742
BY ARC CENTERED AT	1762420.000	333590.000
TO	1761003.510	315404.490
BY ARC CENTERED AT	1758630.000	333490.000
TO	1751584.928	316664.834
BY STRAIGHT LINE TO	1749526.738	316597.235
BY STRAIGHT LINE TO	1745677.439	316238.492
BY STRAIGHT LINE TO	1741756.932	315744.746
BY STRAIGHT LINE TO	1738097.906	314155.450
BY ARC CENTERED AT	1730831.000	330886.000
TO	1737269.265	313819.425
BY STRAIGHT LINE TO	1733961.536	312571.604
BY STRAIGHT LINE TO	1733064.913	312109.811
BY ARC CENTERED AT	1724713.000	328326.000
TO	1729983.294	310863.376
BY STRAIGHT LINE TO	1729556.701	310734.628
BY STRAIGHT LINE TO	1727510.374	309315.183
BY ARC CENTERED AT	1717114.000	324303.000
TO	1726647.410	308752.009

	X	Y
BY STRAIGHT LINE TO	1721462.901	305573.687
BY STRAIGHT LINE TO	1721351.205	305467.060
BY ARC CENTERED AT	1708756.000	318661.000
TO	1715564.505	301738.722
BY STRAIGHT LINE TO	1713598.505	300947.722
BY ARC CENTERED AT	1706790.000	317870.000
TO	1711470.692	300240.186
BY STRAIGHT LINE TO	1707760.692	299255.186
BY ARC CENTERED AT	1703080.000	316885.000
TO	1706764.569	299020.421
BY STRAIGHT LINE TO	1704364.569	298525.421
BY ARC CENTERED AT	1700680.000	316390.000
TO	1702465.472	298237.002
BY STRAIGHT LINE TO	1698144.472	297812.002
BY ARC CENTERED AT	1696359.000	315965.000
TO	1696238.714	297724.804
BY STRAIGHT LINE TO	1692447.714	297749.804
BY ARC CENTERED AT	1692568.000	315990.000
TO	1691302.392	297793.367
BY STRAIGHT LINE TO	1688714.392	297973.367
BY ARC CENTERED AT	1689980.000	316170.000
TO	1687709.313	298071.292
BY STRAIGHT LINE TO	1684999.313	298411.292
BY ARC CENTERED AT	1687270.000	316510.000
TO	1683392.698	298686.259
BY STRAIGHT LINE TO	1674667.698	300584.259
BY ARC CENTERED AT	1678545.000	318408.000
TO	1674182.260	300696.825
BY STRAIGHT LINE TO	1670983.260	301484.825
BY ARC CENTERED AT	1675346.000	319196.000
TO	1670472.396	301618.537
BY STRAIGHT LINE TO	1666144.396	302818.537
BY ARC CENTERED AT	1671018.000	320396.000
TO	1665216.208	303102.694
BY STRAIGHT LINE TO	1663698.256	303611.957
BY STRAIGHT LINE TO	1662427.081	303960.024
BY STRAIGHT LINE TO	1661678.585	304151.016
BY STRAIGHT LINE TO	1659494.422	304615.679
BY ARC CENTERED AT	1663290.000	322457.000
TO	1659476.114	304619.584
BY STRAIGHT LINE TO	1658119.984	304909.541
BY ARC CENTERED AT	1658887.000	323134.000
TO	1656353.874	305070.155
BY ARC CENTERED AT	1655896.000	323305.000
TO	1652649.679	305355.609
BY STRAIGHT LINE TO	1650183.679	305801.609
BY ARC CENTERED AT	1653430.000	323751.000
TO	1648634.766	306151.995
BY STRAIGHT LINE TO	1647050.638	306583.626
BY ARC CENTERED AT	1649308.000	324684.000

	X	Y
TO	1643681.190	307332.970
BY STRAIGHT LINE TO	1636292.049	308606.828
BY STRAIGHT LINE TO	1627130.174	309806.774
BY STRAIGHT LINE TO	1620756.645	310390.406
BY ARC CENTERED AT	1622420.000	328555.000
TO	1619894.970	310490.021
BY STRAIGHT LINE TO	1614564.970	311235.021
BY ARC CENTERED AT	1617090.000	329300.000
TO	1613147.762	311490.508
BY STRAIGHT LINE TO	1611814.388	311591.352
BY ARC CENTERED AT	1613190.000	329780.000
TO	1609959.518	311827.752
BY STRAIGHT LINE TO	1606069.518	312527.752
BY ARC CENTERED AT	1609300.000	330480.000
TO	1604701.693	312828.518
BY STRAIGHT LINE TO	1604290.346	312866.444
BY ARC CENTERED AT	1605965.000	331030.000
TO	1601324.800	313389.485
BY STRAIGHT LINE TO	1601195.452	313403.353
BY ARC CENTERED AT	1603140.000	331540.000
TO	1598672.218	313855.030
BY STRAIGHT LINE TO	1596369.924	314436.662
BY STRAIGHT LINE TO	1596179.536	314483.099
BY STRAIGHT LINE TO	1592424.426	315063.358
BY ARC CENTERED AT	1595210.000	333090.000
TO	1591478.647	315235.134
BY ARC CENTERED AT	1594075.000	333290.000
TO	1589693.705	315583.406
BY ARC CENTERED AT	1593010.000	333520.000
TO	1589432.725	315633.627
BY STRAIGHT LINE TO	1588107.725	315898.627
BY ARC CENTERED AT	1591685.000	333785.000
TO	1585928.488	316476.568
BY STRAIGHT LINE TO	1584286.461	317022.681
BY STRAIGHT LINE TO	1582201.158	317563.459
BY ARC CENTERED AT	1586780.000	335220.000
TO	1581595.826	317731.616
BY STRAIGHT LINE TO	1576265.826	319311.616
BY ARC CENTERED AT	1581450.000	336800.000
TO	1575360.430	319605.920
BY STRAIGHT LINE TO	1570080.430	321475.920
BY ARC CENTERED AT	1576170.000	338670.000
TO	1569889.483	321544.746
BY STRAIGHT LINE TO	1565349.483	323209.746
BY ARC CENTERED AT	1571630.000	340335.000
TO	1563529.454	323991.794
BY STRAIGHT LINE TO	1563104.470	324202.438
BY STRAIGHT LINE TO	1561073.459	324993.694
BY ARC CENTERED AT	1567695.000	341990.000
TO	1558882.014	326019.699

	X	Y
BY STRAIGHT LINE TO	1558878.845	326020.658
BY ARC CENTERED AT	1564160.000	343480.000
TO	1556225.264	327055.652
BY STRAIGHT LINE TO	1556065.664	327132.756
BY STRAIGHT LINE TO	1553511.012	327893.991
BY ARC CENTERED AT	1558720.000	345375.000
TO	1551769.032	328510.740
BY STRAIGHT LINE TO	1549575.133	329415.002
BY ARC CENTERED AT	1553840.000	347150.000
TO	1546080.537	330642.124
BY STRAIGHT LINE TO	1543910.537	331662.124
BY ARC CENTERED AT	1551670.000	348170.000
TO	1541402.425	333093.656
BY STRAIGHT LINE TO	1540010.551	333646.129
BY ARC CENTERED AT	1546740.000	350600.000
TO	1537926.517	334629.973
BY STRAIGHT LINE TO	1531757.270	337418.384
BY ARC CENTERED AT	1539270.000	354040.000
TO	1530263.411	338178.077
BY STRAIGHT LINE TO	1527498.411	339748.077
BY ARC CENTERED AT	1536505.000	355610.000
TO	1526511.279	340350.748
BY STRAIGHT LINE TO	1526495.252	340356.351
BY ARC CENTERED AT	1532515.000	357575.000
TO	1523958.793	341465.669
BY ARC CENTERED AT	1531240.000	358190.000
TO	1522812.853	342012.780
BY STRAIGHT LINE TO	1516478.301	345312.618
BY STRAIGHT LINE TO	1505571.538	350398.247
BY ARC CENTERED AT	1513280.000	366930.000
TO	1504778.049	350791.968
BY STRAIGHT LINE TO	1493968.049	356486.968
BY ARC CENTERED AT	1502470.000	372625.000
TO	1493740.316	356609.013
BY STRAIGHT LINE TO	1488240.052	359606.990
BY STRAIGHT LINE TO	1483854.587	361809.134
BY ARC CENTERED AT	1492040.000	378110.000
TO	1483320.003	362088.736
BY STRAIGHT LINE TO	1481463.717	363099.069
BY STRAIGHT LINE TO	1472522.370	367321.496
BY STRAIGHT LINE TO	1464631.664	370388.555
BY ARC CENTERED AT	1471240.000	387390.000
TO	1464432.797	370467.198
BY STRAIGHT LINE TO	1461367.007	371700.413
BY STRAIGHT LINE TO	1455040.915	373829.471
BY STRAIGHT LINE TO	1449141.552	375497.695
BY ARC CENTERED AT	1454105.000	393050.000
TO	1447393.776	376088.906
BY STRAIGHT LINE TO	1443223.776	377738.906
BY ARC CENTERED AT	1449935.000	394700.000

	X	Y
TO	1442769.075	377925.950
BY STRAIGHT LINE TO	1437906.346	380003.323
BY STRAIGHT LINE TO	1435141.472	381047.641
BY STRAIGHT LINE TO	1431147.160	382502.176
BY ARC CENTERED AT	1431465.000	400740.000
TO	1426148.360	383291.431
BY STRAIGHT LINE TO	1423703.360	384036.431
BY ARC CENTERED AT	1429020.000	401485.000
TO	1421665.109	384792.942
BY STRAIGHT LINE TO	1421218.470	384903.464
BY ARC CENTERED AT	1425600.000	402610.000
TO	1417427.962	386302.424
BY STRAIGHT LINE TO	1411695.359	388053.764
BY STRAIGHT LINE TO	1406674.661	389181.191
BY STRAIGHT LINE TO	1400158.431	390267.229
BY STRAIGHT LINE TO	1395814.598	390680.732
BY STRAIGHT LINE TO	1390918.652	390971.488
BY ARC CENTERED AT	1392000.000	409180.000
TO	1390574.806	390995.170
BY STRAIGHT LINE TO	1386957.975	390976.807
BY STRAIGHT LINE TO	1385797.206	390941.712
BY STRAIGHT LINE TO	1383281.102	390515.548
BY ARC CENTERED AT	1380235.000	408500.000
TO	1382826.840	390444.486
BY STRAIGHT LINE TO	1380530.215	390114.809
BY STRAIGHT LINE TO	1379792.836	389886.779
BY ARC CENTERED AT	1363392.000	397870.000
TO	1364287.995	379651.426
BY STRAIGHT LINE TO	1363311.995	379603.426
BY ARC CENTERED AT	1362416.000	397822.000
TO	1348021.258	386618.846
BY STRAIGHT LINE TO	1347740.102	386685.385
BY STRAIGHT LINE TO	1339580.030	387874.310
BY STRAIGHT LINE TO	1332310.668	388693.581
BY STRAIGHT LINE TO	1328040.717	388886.344
BY STRAIGHT LINE TO	1323345.435	388897.040
BY STRAIGHT LINE TO	1318623.382	388813.567
BY STRAIGHT LINE TO	1313960.559	388548.345
BY STRAIGHT LINE TO	1309176.109	388113.641
BY STRAIGHT LINE TO	1299212.104	386971.530
BY STRAIGHT LINE TO	1294263.747	386188.550
BY ARC CENTERED AT	1291413.000	404205.000
TO	1293947.880	386141.401
BY STRAIGHT LINE TO	1288688.880	385403.401
BY ARC CENTERED AT	1286154.000	403467.000
TO	1288273.366	385349.949
BY STRAIGHT LINE TO	1282879.366	384718.949
BY ARC CENTERED AT	1280760.000	402836.000
TO	1282342.694	384664.200
BY STRAIGHT LINE TO	1277049.694	384203.200

	X	Y
BY ARC CENTERED AT	1275467.000	402375.000
TO	1276973.676	384196.739
BY STRAIGHT LINE TO	1266567.571	383334.246
BY STRAIGHT LINE TO	1261753.853	382854.687
BY STRAIGHT LINE TO	1256844.970	382176.061
BY STRAIGHT LINE TO	1252081.894	381444.329
BY STRAIGHT LINE TO	1247119.827	380488.609
BY ARC CENTERED AT	1243670.000	398400.000
TO	1246625.928	380400.508
BY STRAIGHT LINE TO	1243865.458	379947.175
BY STRAIGHT LINE TO	1240510.889	379144.329
BY STRAIGHT LINE TO	1238894.264	378640.306
BY STRAIGHT LINE TO	1234691.701	377218.487
BY ARC CENTERED AT	1228846.000	394497.000
TO	1233981.468	376994.252
BY ARC CENTERED AT	1225768.000	393281.000
TO	1230677.055	375713.405
BY STRAIGHT LINE TO	1229077.217	374979.877
BY ARC CENTERED AT	1219065.000	390227.000
TO	1227370.800	373987.144
BY STRAIGHT LINE TO	1226184.927	373380.635
BY STRAIGHT LINE TO	1227213.819	367277.089
BY ARC CENTERED AT	1209227.000	364245.000
TO	1214917.815	346914.857
BY STRAIGHT LINE TO	1213303.815	346384.857

4. Pending further order of the Court or agreement of the parties, leases of lands lying partly within the area above described and partly landward of that area shall be in no way affected by anything contained in this decree, and revenues derived from such leases shall remain subject to impoundment under the Interim Agreement of October 12, 1956, as amended, in the same manner as heretofore.

5. The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to its previous orders or decrees herein or to this decree or to effectuate the rights of the parties in the premises.

Syllabus

SECURITIES AND EXCHANGE COMMISSION v. MEDICAL COMMITTEE FOR HUMAN RIGHTS

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

No. 70–61. Argued November 10, 1971—Decided January 10, 1972

The Court of Appeals, overruling the contentions of the Securities and Exchange Commission (SEC), held that it had jurisdiction to review the SEC's "extremely dubious" determination not to oppose the Dow Chemical Co.'s refusal of respondent shareholder's request to include its proposal for a corporate charter amendment in Dow's proxy statement. Thereafter Dow acquiesced in the request, and at its annual meeting less than 3% of the voting stockholders supported the respondent's proposal, as a result of which the company under an SEC rule may exclude the proposal from its proxy material for a three-year period. *Held:* Since it is extremely doubtful that at the end of that period respondent will resubmit the proposal and Dow will refuse it, the case is now moot. Pp. 405–407.

139 U. S. App. D. C. 226, 432 F. 2d 659, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 407. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Solicitor General Griswold argued the cause for petitioner. With him on the briefs were *Daniel M. Friedman, William Terry Bray, Philip A. Loomis, Jr., David Ferber,* and *Richard E. Nathan.*

Roberts B. Owen argued the cause for respondent. With him on the brief was *Michael Boudin.*

Roger S. Foster and *Charles R. Halpern* filed a brief for the Project on Corporate Responsibility as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Medical Committee for Human Rights acquired by gift five shares of stock in Dow Chemical Co. In March 1968, the Committee's national chairman wrote a letter to the company expressing concern over its policy with respect to the production and sale of napalm. The letter also requested that there be included in the company's proxy statement for 1968 a proposal to amend Dow's Certificate of Incorporation to prohibit the sale of napalm unless the purchaser gives reasonable assurance that the napalm will not be used against human beings. Dow replied that the proposal was too late for inclusion in the 1968 proxy statement and for discussion at that year's annual meeting, but that it would be reconsidered the following year.

In an exchange of letters with Dow in 1969, the Committee indicated its belief that it had a right under Rule 14a–8 of the Securities and Exchange Commission, 17 CFR § 240.14a–8 (1970) (promulgated pursuant to § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended, 15 U. S. C. § 78n (a)), to have its proposal included in the company's proxy statement for consideration by all shareholders. On February 7, 1969, Dow responded that it intended to omit the proposal (somewhat modified) from the 1969 statement under the authority of subsections of the SEC Rule relied on by the Committee that permitted omission of shareholder proposals under two sets of circumstances:

> § 240.14a–8 (c)(2)—"If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes"; or

> § 240.14a–8 (c)(5)—"If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

The Committee requested that Dow's decision be reviewed by the staff of the SEC. On February 18, 1969, the Chief Counsel for the Division of Corporation Finance wrote both Dow and the Committee to inform them that "this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy material." App. 21. The SEC Commissioners granted a request by the Committee that they review the Division's decision and affirmed it. App. 43. The Committee then sought and obtained review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit.

On July 8, 1970, the Court of Appeals held that the decision of the SEC was reviewable under § 25 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78y (a); that while review of Dow's decision was clearly available in district court, review of the SEC's decision could also be obtained in a court of appeals; that the validity of the Commission's determination was extremely dubious, especially in light of its failure to state reasons supporting its conclusion; and that the case should be remanded to the Commission for reconsideration and a statement of reasons. 139 U. S. App. D. C. 226, 432 F. 2d 659. The Commission petitioned for review here, and we granted certiorari on March 22, 1971. 401 U. S. 973.

Events have taken place, subsequent to the decision by the court below, and some subsequent to our decision to grant certiorari, that require that we dismiss this case on the ground that it has now become moot. In January 1971, the Medical Committee again submitted

its napalm resolution for inclusion in Dow's 1971 proxy statement. This time Dow acquiesced in the Committee's request and included the proposal. At the annual stockholder's meeting in May 1971, Dow's shareholders voted on the Committee's proposal. Less than 3% of all voting shareholders supported it, and pursuant to Rule 14a–8 (c)(4)(i), 17 CFR § 240.14a–8 (c)(4)(i), Dow may exclude the same or substantially the same proposal from its proxy materials for the next three years. We find that this series of events has mooted the controversy.

Respondent argues that it will continue to urge the adoption of the proposal and its inclusion in proxy statements, and that it is likely that Dow will reject inclusion in the future as it has in the past. It is true that in permitting the proposal to be included in the 1971 proxy statement Dow stated that it adhered to its opinion that the proposal might properly be omitted and that its inclusion was without prejudice to future exclusion. However, this does not create the controversy that is necessary for us to retain jurisdiction to decide the merits. Whether or not the Committee will actually resubmit its proposal or a similar one in 1974 is purely a matter of conjecture at this point, as is whether or not Dow will accept it. If Dow were likely to repeat its allegedly illegal conduct, the case would not be moot. See *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43 (1944); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953). However, in light of the meager support the proposal attracted, we can only speculate that Dow will continue to include the proposal when it again becomes eligible for inclusion, rather than to repeat this litigation. Thus, we find that "the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968). The case is therefore moot.

"[I]t is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton* v. *Maryland*, 395 U. S. 784, 788 (1969). "Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306 n. 3 (1964); cf. *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952).

Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded to that court for dismissal.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I must dissent from the judgment of the Court that this case has become moot because the Dow Chemical Co. acquiesced in the decision of the Court of Appeals below. The underlying dispute in this case is essentially a private one, between Dow and the Medical Committee for Human Rights, though it has large public overtones. In 1969, Dow refused to submit to its shareholders the Medical Committee's proposal that Dow amend its corporate charter to forbid the manufacture of napalm. Dow refused again in 1970. Only in 1971, after the decision of the Court of Appeals now under review, did Dow permit such a proposal to be submitted for a vote. In doing so, however, Dow resolutely affirmed its right to reject the proposal at any future time.

This gratuitous conduct did not, in my view, moot the controversy. "Mere voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203. If it could,

then a defendant would always be "free to return to his old ways." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632.[1]

But it is said that because of the poor showing made by the proposal when finally submitted, Dow could refuse to resubmit it for three years under SEC proxy rules not at issue in this case. *Ante*, at 406. The Court suggests that it is "purely a matter of conjecture" that the proposal will again be submitted at the expiration of this period, and that Dow will attempt again to reject it. The Court seems to think that Dow's best strategy, given the proposal's poor showing, is to let it go to a vote, rather than undertake protracted litigation. *Ibid.*

This assumption, however, is not only baseless, it is irrelevant. In *Grant*, *supra*, an antitrust violation was charged because of an interlocking directorate. In response to the suits, the interlocking directors resigned,

[1] See also *Walling* v. *Helmerich & Payne*, 323 U. S. 37, where we held that a case involving the legality of "split-day contracts" under the Fair Labor Standards Act was not rendered moot by the defendant company's abandonment of the contracts during the litigation. "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. . . . Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." *Id.*, at 43.

The vitality of this controversy was recognized by the Solicitor General, himself, virtually to the moment of oral argument. While he has abruptly reversed his position, the force of his prior argument remains undiminished. Citing the above quotation from *Walling*, he said:

"The same reasoning [as that of the *Walling* Court] applies to the dispute between respondent and Dow over whether the latter is required to distribute to its shareholders the Committee's proposal. Dow continues to insist that it is not required to distribute the proposal, and even if it does so this year [1971] and the proposal is defeated, Dow may reject it in future years." First Reply Brief for Petitioner 5.

and defendant companies represented to the court their intention not to revive the interlock. We disposed of this argument in summary fashion. "Such a profession does not suffice to make a case moot." *Id.*, at 633. Here, Dow has not even made the minimal representation we rejected in *Grant*, nor is it likely to do so.

This is not a controversy that could not arise again for decades, *Golden* v. *Zwickler*, 394 U. S. 103, or a controversy whose decision could have no possible future effect on the parties, *Atherton Mills* v. *Johnston*, 259 U. S. 13. Dow has for the past four years fought tooth and nail its obligation to include this shareholder proposal. While "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Phosphate Export Assn., supra*, at 203, that is hardly the situation here.

While this litigation is not formally between Dow and the Medical Committee, but between the SEC and the Medical Committee, it does involve a whole panoply of substantive [2] and procedural [3] rights in connection with a corporation's obligation to include shareholder proposals in proxy materials. The modern super-corporations, of which Dow is one, wield immense, virtually unchecked, power. Some say [4] that they are "private governments," whose decisions affect the lives of us all.[5] The philosophy of our times, I think, requires that such

[2] See generally Note, 84 Harv. L. Rev. 700 (1971).

[3] See generally Note, 84 Harv. L. Rev. 835 (1971).

[4] See, *e. g.*, Miller, Toward the "Techno-Corporate" State?—An Essay in American Constitutionalism, 14 Vill. L. Rev. 1 (1968); J. Galbraith, The New Industrial State (1967); A. Berle, Economic Power and the Free Society (1957).

[5] A. Berle has suggested, for example, that

"The recession of 1956 was in part due to the fact that the three principal automobile manufacturers, General Motors, Ford, and Chrysler, sold 8 million cars in the previous year. *The National*

enterprises be held to a higher standard than that of the "morals of the marketplace" which exalts a single-minded, myopic determination to maximize profits as the traditional be-all and end-all of corporate concern. The "public interest in having the legality of the practices settled, militates against a mootness conclusion." *Grant, supra,* at 632.

There is no reason to assume Dow's antipathy to the inclusion of this shareholder proposal will be any less in 1974 than it is today. Perhaps Dow will adopt the advice given to it by the Court. But it is just as likely to decide its superior financial position makes continued litigation the preferable alternative, which may now be conducted under proxy rules more favorable to corporate management [6] than are the present rules.

City Bank Economic Review estimated the 'normal' market for cars at the time at 6 million. The following year the motorcar companies sold only 4 million cars, and, naturally, purchased far less from their suppliers of raw materials, glass, et cetera. The effect on employment was severe." The Three Faces of Power 31 n. 2 (1967).

[6] In this regard, it should be noted that the SEC has recently proposed amendments to its proxy rules which might strengthen Dow's hand. The new rules would permit a company *to refuse to submit for a shareholder vote* any proposal which, *inter alia,*

"(ii) consists of a recommendation, request or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer." Proposed amendment to Rule 14a–8 (c)(2), Securities Exchange Act Release No. 9432, Dec. 22, 1971.

There is substantial sentiment, however, for a more liberal approach to shareholder proxy proposals than is evidenced by the current, much less the proposed, rules. Senator Muskie, for example, introduced a bill in the last Congress, entitled the "Corporate Participation Act," which would have, *inter alia,* barred exclusion of a shareholder proposal "on the ground that such proposal may involve economic, political, racial, religious, or similar issues, unless

This case now joins a growing list of monuments to the present Court's abdication of its constitutional responsibility to decide cases properly within its jurisdiction. See, *e. g.*, *Picard* v. *Connor*, *ante*, p. 270, at 278 (DOUGLAS, J., dissenting); *North Carolina* v. *Rice*, *ante*, p. 244, at 248 (DOUGLAS, J., dissenting statement); *McClanahan* v. *Morauer & Hartzell*, *ante*, p. 16, at 17 (DOUGLAS, J., dissenting). Once again, I dissent.

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the matter or action proposed is not within the control of the issuer." S. 4003, § 2, 91st Cong., 2d Sess. For the view that a corporation should be required to include any shareholder proposal which is a "proper subject" for shareholder action under applicable state law, see Chisum, Napalm, Proxy Proposals and the SEC, 12 Ariz. L. Rev. 463 (1970). See also Note, 84 Harv. L. Rev. 700 (1971).

DIFFENDERFER ET AL. *v.* CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INC., ET AL.

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

No. 70-47. Argued December 6, 1971—Decided January 10, 1972

Appellants brought suit for declaratory and injunctive relief challenging under the Religion Clauses of the First Amendment, a Florida statute to the extent that it authorized a tax exemption for a church parking lot used, *inter alia,* for commercial purposes. *Held:* The subsequent repeal of the challenged statute and enactment of new legislation make the relief sought inappropriate. The District Court's judgment upholding the statute is vacated and the case is remanded with leave to appellants to amend their pleadings if they desire to attack the new statute or show that the old statute retains some force.

316 F. Supp. 1116, vacated and remanded.

Leo Pfeffer argued the cause for appellant Diffenderfer. With him on the brief were *Richard Yale Feder, Irma Robbins Feder,* and *Melvin L. Wulf. Howard J. Hollander* argued the cause and filed a brief for appellant Paul.

Charles M. Whelan argued the cause for appellee Central Baptist Church of Miami. With him on the brief were *Herbert S. Sawyer, Karl B. Block, Jr.,* and *William R. Consedine.*

Franklin C. Salisbury and *Noel H. Thompson* filed a brief for Protestants and Other Americans United for Separation of Church and State as *amicus curiae* urging reversal. *Robert L. Shevin,* Attorney General of Florida, *pro se,* filed a memorandum.

PER CURIAM.

This is an action for a declaratory judgment that Florida Stat. § 192.06 (4) (1967) violates the First Amendment to the Constitution of the United States

insofar as it authorizes a tax exemption for church property used, *inter alia,* as a commercial parking lot, and for an injunction requiring appropriate state and local officials to assess and collect taxes against such property. It is brought by citizens and taxpayers of Dade County, Florida, where the property in question is located. The crux of their complaint is that state aid in the form of a tax exemption for church property used primarily for commercial purposes amounts not only to an establishment of the one religion aided, but also to an inhibition on the free exercise of other religions. A three-judge District Court, convened pursuant to 28 U. S. C. §§ 2281, 2284, upheld the validity of the statute as applied to the property involved herein, 316 F. Supp. 1116 (1970), and plaintiffs appealed to this Court. 28 U. S. C. § 1253. We noted probable jurisdiction on March 1, 1971. 401 U. S. 934.

The Central Baptist Church of Miami, Florida, Inc., is the owner of nearly a full square block of land in downtown Miami which is occupied by church buildings and an offstreet parking lot. The parking facilities are utilized by numerous persons pursuing a variety of church activities. These facilities are also used as a commercial parking lot every day except Sunday. At the time this suit was instituted and decided in the District Court, Fla. Stat. § 192.06 (4) provided for exemption from taxation of:

> "All houses of public worship and lots on which they are situated, and all pews or steps and furniture therein, every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial . . . ."

Prior to the decision of the District Court, the Florida Supreme Court had held, in a case involving the same property as is involved here, that church parking lots

retain their full tax exemption under state law even though they may be used for commercial as well as church purposes. *Central Baptist Church* v. *Dade County,* 216 So. 2d 4 (1968). This led to the constitutional challenge in the District Court.

At its 1971 Regular Session, the Florida Legislature repealed § 196.191 (the 1969 successor to § 192.06) and enacted new legislation, approved June 15, 1971, effective December 31, 1971, which provides, in relevant part, that church property is exempt from taxation only if the property is used predominantly for religious purposes and only "to the extent of the ratio that such predominant use bears to the non-exempt use." Fla. Stat. § 196.192 (2).

We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered. *Hall* v. *Beals,* 396 U. S. 45, 48 (1969); *United States* v. *Alabama,* 362 U. S. 602, 604 (1960); cf. *Thorpe* v. *Housing Authority,* 393 U. S. 268, 281–282 (1969); *Hines* v. *Davidowitz,* 312 U. S. 52, 60 (1941). It is clear that the church parking lot that was the subject of the taxpayers' complaint is no longer fully exempt from taxation. If, in fact, it can be demonstrated that the lot is predominantly used for nonreligious purposes, it will receive no exemption whatever. "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." *Hall* v. *Beals, supra,* at 48.

This is not a case that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911), nor is it the kind of case that may produce irreparable injury if not decided immediately, see, *e. g., Moore* v. *Ogilvie,* 394 U. S. 814 (1969); *Gray* v. *Sanders,* 372 U. S. 368 (1963). The only relief sought in the complaint was a declaratory judgment that

the now repealed Fla. Stat. § 192.06 (4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed.

Because it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly enacted legislation, rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot pending a decision by this Court, *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39, and n. 2 (1950), we vacate the judgment of the District Court and remand the case to the District Court with leave to the appellants to amend their pleadings. *Bryan* v. *Austin*, 354 U. S. 933 (1957).

Judgment will be entered accordingly.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

The extent to which a State may constitutionally authorize a tax exemption for church-owned property used primarily for commercial purposes is a question of substantial national importance, and is squarely presented by appellants' challenge to Fla. Stat. § 192.06 (4) in this case. The Court says, however, that the controversy over the exemption awarded appellee church is moot, appellants having asked only for declaratory relief as to the unconstitutionality of § 192.06 (4), which section was replaced by new legislation, effective December 31, 1971, that substantially narrowed the authorized exemption. Fla. Stat. § 196.192.

I am not as eager as is the Court to hold moot a case on appeal which is justiciable in every respect save for an

intervening change in the underlying law. It does not necessarily follow that there is no longer a live controversy between these parties, even if we assume, *arguendo*, that the new statute satisfies all of appellants' constitutional objections to the old one. Here, appellants argue that should their appeal prevail, the church will be liable for three years' back property taxes, pursuant to Fla. Stat. § 193.23, now § 193.092.[1] If this is so, the controversy would appear vital despite the repeal of § 192.06 (4). Cf. *Powell* v. *McCormack*, 395 U. S. 486; *Bond* v. *Floyd*, 385 U. S. 116. See also Note, 83 Harv. L. Rev. 1672 (1970).

Appellees contest this interpretation of state tax law, arguing from state court decisions that state or local taxing authorities would be estopped from asserting appellee church's liability for back taxes.[2] Neither side, however, can point to a definitive interpretation of the precise point of state law at issue.

In my view, this situation lends itself to the Florida procedures by which this Court and other federal appellate courts may certify unresolved questions of Florida

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[1] Fla. Stat. § 193.092 reads, in pertinent part:

"(1) When it shall appear that an ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of three years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year . . . ."

[2] See, *e. g.*, *City of Naples* v. *Conboy*, 182 So. 2d 412 (Fla. 1965); *Coppock* v. *Blount*, 145 So. 2d 279 (Fla. App. 1962). Appellants, however, construe these cases to hold that back taxation may be estopped on equitable principles only when there are "special circumstances" involved. Appellants contend that the present situation involves no such "special circumstances" that would justify an estoppel under these cases.

law to the State Supreme Court for decision.[3] If a declaration that § 192.06 (4) was unconstitutional would result in tax liability to appellee church, then this case is surely not moot. We have the opportunity to ask the Florida Supreme Court for a definitive answer to this question. I would take advantage of it.

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[3] Certification is authorized by Fla. Stat. § 25.031 (1969):

"The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

The implementing rule is Fla. App. Rule 4.61. We have used this statute before, noting that it demonstrates "rare foresight" on the part of the Florida Legislature. *Clay* v. *Sun Ins. Office*, 363 U. S. 207, 212.

RELIANCE ELECTRIC CO. *v.* EMERSON ELECTRIC CO.

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

No. 70–79. Argued November 10–11, 1971—
Decided January 11, 1972

Respondent, the owner of more than 10% of Dodge Mfg. Co.'s stock, within six months of the purchase thereof sold enough shares to a broker to reduce its holding to 9.96%, for the purpose of immunizing the disposal of the remainder from liability under § 16 (b) of the Securities Exchange Act of 1934. Under that provision a corporation may recover for itself the profits realized by an owner of more than 10% of its shares from a purchase and sale of its stock within any six-month period, provided the owner held more than 10% "both at the time of purchase and sale." *Held:* Under the terms of § 16 (b) respondent is not liable to petitioner (Dodge's successor) for profits derived from the sale of the 9.96% to Dodge within six months of purchase. Pp. 422–427.

434 F. 2d 918, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, *post*, p. 427. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Thomas P. Mulligan argued the cause for petitioner. With him on the briefs were *Patrick J. Amer, Stephen J. Burns,* and *Kenneth S. Teasdale.*

Albert E. Jenner, Jr., argued the cause for respondent. With him on the brief were *Wesley G. Hall, R. H. McRoberts,* and *Thomas C. Walsh.*

Walter P. North argued the cause for the Securities and Exchange Commission as *amicus curiae.* With him on the briefs were *Solicitor General Griswold, Samuel Huntington, Philip A. Loomis, Jr.,* and *Jacob H. Stillman.*

Whitney North Seymour and *John A. Guzzetta* filed a brief for Gulf & Western Industries, Inc., as *amicus curiae*.

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p (b), provides, among other things, that a corporation may recover for itself the profits realized by an owner of more than 10% of its shares from a purchase and sale of its stock within any six-month period, provided that the owner held more than 10% "both at the time of the purchase and sale." [1] In this case, the respondent, the owner of 13.2% of a corporation's shares, disposed of its entire holdings in two sales, both of them within six months of purchase. The

[1] Section 16 (b) provides:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p (b).

The term "such beneficial owner" refers to one who owns "more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 of this title." Securities Exchange Act of 1934, § 16 (a), 15 U. S. C. § 78p (a).

first sale reduced the respondent's holdings to 9.96%, and the second disposed of the remainder. The question presented is whether the profits derived from the second sale are recoverable by the Corporation under § 16 (b). We hold that they are not.

I

On June 16, 1967, the respondent, Emerson Electric Co., acquired 13.2% of the outstanding common stock of Dodge Manufacturing Co., pursuant to a tender offer made in an unsuccessful attempt to take over Dodge. The purchase price for this stock was $63 per share. Shortly thereafter, the shareholders of Dodge approved a merger with the petitioner, Reliance Electric Co. Faced with the certain failure of any further attempt to take over Dodge, and with the prospect of being forced to exchange its Dodge shares for stock in the merged corporation in the near future,[2] Emerson, following a plan outlined by its general counsel, decided to dispose of enough shares to bring its holdings below 10%, in order to immunize the disposal of the remainder of its shares from liability under § 16 (b). Pursuant to counsel's recommendation, Emerson on August 28 sold 37,000 shares of Dodge common stock to a brokerage house at $68 per share. This sale reduced Emerson's holdings in Dodge to 9.96% of the outstanding common stock. The remaining shares were then sold to Dodge at $69 per share on September 11.

After a demand on it by Reliance for the profits realized on both sales, Emerson filed this action seeking a declaratory judgment as to its liability under § 16 (b). Emerson first claimed that it was not liable at all,

[2] The Court of Appeals for the Second Circuit has held that an exchange of shares in one corporation for those of another pursuant to a merger agreement constitutes a "sale" within the meaning of § 16 (b). *Newmark* v. *RKO General, Inc.*, 425 F. 2d 348, 354.

because it was not a 10% owner at the time of the *purchase* of the Dodge shares. The District Court disagreed, holding that a purchase of stock falls within § 16 (b) where the purchaser becomes a 10% owner by virtue of the purchase. The Court of Appeals affirmed this holding, and Emerson did not cross-petition for certiorari. Thus that question is not before us.

Emerson alternatively argued to the District Court that, assuming it was a 10% stockholder at the time of the purchase, it was liable only for the profits on the August 28 sale of 37,000 shares, because after that time it was no longer a 10% owner within the meaning of § 16 (b). After trial on the issue of liability alone, the District Court held Emerson liable for the entire amount of its profits. The court found that Emerson's sales of Dodge stock were "effected pursuant to a single predetermined plan of disposition with the overall intent and purpose of avoiding Section 16 (b) liability," and construed the term "time of . . . sale" to include "the entire period during which a series of related transactions take place pursuant to a plan by which a 10% beneficial owner disposes of his stock holdings" 306 F. Supp. 588, 592.

On an interlocutory appeal under 28 U. S. C. § 1292 (b), the Court of Appeals upheld the finding that Emerson "split" its sale of Dodge stock simply in order to avoid most of its potential liability under § 16 (b), but it held this fact irrelevant under the statute so long as the two sales are "not legally tied to each other and [are] made at different times to different buyers . . . ." 434 F. 2d 918, 926. Accordingly, the Court of Appeals reversed the District Court's judgment as to Emerson's liability for its profits on the September 11 sale, and remanded for a determination of the amount of Emerson's liability on the August 28 sale. Reliance filed a petition for certiorari, which we granted

in order to consider an unresolved question under an important federal statute. 401 U. S. 1008.

II

The history and purpose of § 16 (b) have been exhaustively reviewed by federal courts on several occasions since its enactment in 1934. See, *e. g.*, *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231; *Adler* v. *Klawans*, 267 F. 2d 840; *Blau* v. *Max Factor & Co.*, 342 F. 2d 304. Those courts have recognized that the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great. As one court observed:

> "In order to achieve its goals, Congress chose a relatively arbitrary rule capable of easy administration. The objective standard of Section 16 (b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation. This approach maximized the ability of the rule to eradicate speculative abuses by reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect." *Bershad* v. *McDonough*, 428 F. 2d 693, 696.

Thus Congress did not reach every transaction in which an investor actually relies on inside information. A person avoids liability if he does not meet the statutory definition of an "insider," or if he sells more than six months after purchase. Liability cannot be imposed simply because the investor structured his transaction with the intent of avoiding liability under § 16 (b). The question is, rather, whether the method used to "avoid" liability is one permitted by the statute.

Among the "objective standards" contained in § 16 (b) is the requirement that a 10% owner be such "both at the time of the purchase and sale . . . of the security involved." Read literally, this language clearly contemplates that a statutory insider might sell enough shares to bring his holdings below 10%, and later—but still within six months—sell additional shares free from liability under the statute. Indeed, commentators on the securities laws have recommended this exact procedure for a 10% owner who, like Emerson, wishes to dispose of his holdings within six months of their purchase.[3]

Under the approach urged by Reliance, and adopted by the District Court, the apparent immunity of profits derived from Emerson's second sale is lost where the two sales, though independent in every other respect, are "interrelated parts of a single plan." 306 F. Supp., at 592. But a "plan" to sell that is conceived within six months of purchase clearly would not fall within § 16 (b) if the sale were made after the six months had expired, and we see no basis in the statute for a different result where the 10% requirement is involved rather than the six-month limitation.

The dissenting opinion, *post,* at 442, reasons that "the 10% rule is based upon a conclusive statutory presumption that ownership of this quantity of stock suffices to

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[3] "[A] person who owns 15 percent and wants to sell down to 5 percent should sell 5-plus percent in one transaction and then, after he becomes a holder of slightly less than 10 percent, sell out the remainder." 2 L. Loss, Securities Regulation 1060 (2d ed. 1961).

"[T]he intention of the language was to exclude the second sale in a case where 10% is purchased, 5% sold within three months and the remaining 5% a month later. This latter construction of the Act is, it is believed, the only safe one to rely upon." Seligman, Problems Under the Securities Exchange Act, 21 Va. L Rev. 1, 20 (1934).

provide access to inside information," and that it thus "follows that all sales by a more-than-10% owner within the six-month period carry the presumption of a taint, even if a prior transaction within the period has reduced the beneficial ownership to 10% or below." While there may be logic in this position, it was clearly rejected as a basis for liability when Congress included the proviso that a 10% owner must be such both at the time of the purchase and of the sale. Although the legislative history affords no explanation of the purpose of the proviso, it may be that Congress regarded one with a long-term investment of more than 10% as more likely to have access to inside information than one who moves in and out of the 10% category. But whatever the rationale of the proviso, it cannot be disregarded simply on the ground that it may be inconsistent with our assessment of the "wholesome purpose" of the Act.

To be sure, where alternative constructions of the terms of § 16 (b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders.[4] But a construction of the term "at the time

[4] See, *e. g.*, *Adler* v. *Klawans*, 267 F. 2d 840 (one who is a director at the time of sale need not also have been a director at the time of purchase). In interpreting the terms "purchase" and "sale," courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse. See, *e. g.*, *Bershad* v. *McDonough*, 428 F. 2d 693 (granting of an option to purchase constitutes a "sale"). And in deciding whether an investor is an "officer" or "director" within the meaning of § 16 (b), courts have allowed proof that the investor performed the functions of an officer or director even though not formally denominated as such. *Colby* v. *Klune*, 178 F. 2d 872, 873; cf. *Feder* v. *Martin Marietta Corp.*, 406 F. 2d 260, 262–263. The various tests employed in these cases are used to determine whether a transaction, objectively defined, falls within or without the terms of the statute. In no case is liability predicated upon "considerations of intent, lack of motive, or improper conduct" that are irrelevant in § 16 (b) suits. *Blau* v. *Oppenheim*, 250 F. Supp. 881, 887.

of . . . sale" that treats two sales as one upon proof of a pre-existing intent by the seller is scarcely in harmony with the congressional design of predicating liability upon an "objective measure of proof." *Smolowe* v. *Delendo Corp., supra,* at 235. Were we to adopt the approach urged by Reliance, we could be sure that investors would not in the future provide such convenient proof of their intent as Emerson did in this case. If a "two-step" sale of a 10% owner's holdings within six months of purchase is thought to give rise to the kind of evil that Congress sought to correct through § 16 (b), those transactions can be more effectively deterred by an amendment to the statute that preserves its mechanical quality than by a judicial search for the will-o'-the-wisp of an investor's "intent" in each litigated case.

III

The Securities and Exchange Commission, participating as *amicus curiae,* argues for an interpretation of the statute that both covers Emerson's transaction and preserves the mechanical quality of the statute. Seizing upon a fragment of legislative history—a brief exchange between one of the principal authors of the bill and two members of the Senate Committee during hearings on the bill [5]—the Commission suggests that the sole pur-

[5] That exchange was as follows:

"Senator CAREY. Suppose this stock passed to an estate, and the estate had to raise money?

"Mr. CORCORAN. I do not think, in that case, sir, the statute would apply.

"Senator KEAN. Why not?

"Senator CAREY. The estate is the beneficiary.

"Mr. CORCORAN. I do not believe it would. Certainly the intention was that it should not apply to that sort of a situation." Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency pursuant to S. Res. 84, 56, and 97, 73d Cong., 1st and 2d Sess., pt. 15, p. 6558. It was sometime after this exchange that the bill was revised to add the exemptive provision.

pose of the requirement of 10% ownership at the time of both purchase and sale was to exclude from the statute's coverage those persons who became 10% shareholders "involuntarily," as, for example, by legal succession or by a reduction in the total number of outstanding shares of the corporation. The effect of such an interpretation would be to bring within § 16 (b) all sales within six months by one who has gained the position of a 10% owner through voluntary purchase, regardless of the amount of his holdings at the time of the sale. We cannot accept such a construction of the Act.

In the first place, we note that the SEC's own rules undercut such an interpretation. Recognizing the interrelatedness of § 16 (a) and § 16 (b) of the Act, the Commission has used its power to grant exemptions under § 16 (b) to exclude from liability any transaction that does not fall within the reporting requirements of § 16 (a).[6] A 10% owner is required by that section to report at the end of each month any changes in his holdings in the corporation during that month. The Commission has interpreted this provision to require a report only if the stockholder held more than 10% of the corporation's shares at some time during the month.[7] Thus, a 10% owner who, like Emerson, sells down to 9.96% one month and disposes of the remainder the following month, would presumably be exempt from the reporting requirement and hence from § 16 (b) under the SEC's own rules, without regard to whether he acquired the stock "voluntarily."

But the SEC's argument would fail even if it were not contradicted by the Commission's own previous construction of the Act. As we said in *Blau* v. *Lehman,*

[6] SEC Rule 16a–10, 17 CFR § 240.16a–10.

[7] Form 4, Securities Exchange Act Release No. 6487 (Mar. 9, 1961).

368 U. S. 403, 411, one "may agree that . . . the Commission present[s] persuasive policy arguments that the Act should be broadened . . . to prevent 'the unfair use of information' more effectively than can be accomplished by leaving the Act so as to require forfeiture of profits only by those specifically designated by Congress to suffer those losses." But we are not free to adopt a construction that not only strains, but flatly contradicts, the words of the statute.

The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE concur, dissenting.

On June 16, 1967, Emerson Electric Co., in an attempt to wrest control from the incumbent management, acquired more than 10% of the outstanding common stock of Dodge Manufacturing Co. Dodge successfully resisted the take-over bid by means of a defensive merger with petitioner, Reliance Electric Co. Emerson then sold the shares it had accumulated, within six months of their purchase, for a profit exceeding $900,000.

Because this sale purportedly comprised two "independent" transactions, the first of which reduced Emerson's holdings to 9.96% of the outstanding Dodge common stock, the Court today holds that the profit from the second transaction is beyond the contemplation of § 16 (b) of the Securities Exchange Act.[1] So Emerson

[1] 15 U. S. C. § 78p (b):

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any

need not account to the corporation for these gains. In my view, this result is a mutilation of the Act, contrary to its broad remedial purpose, inconsistent with the flexibility required in the interpretation of securities legislation, and not required by the language of the statute itself.

I

Section 16 (b) is a "prophylactic" rule, *Blau* v. *Lehman*, 368 U. S. 403, 413, whose wholesome purpose is to control the insiders whose access to confidential information gives them unfair advantage in the trading of their corporation's securities.[2]

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period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

[2] "Next comes the everlasting problem of protecting the fellow on the outside from the insider . . . . That is, the problem of protecting the stockholder—and every fellow who buys into the market is a stockholder—who does not know as much about the company as the fellow on the inside. . . . [T]he poor little fellow does not know what he is getting into, and it is just as important in preventing unwarranted and destructive speculation, to have the fellow on the outside protected from the fellow on the inside who is an officer or director of the corporation or a pool with inside information, as

The congressional investigations which led to the enactment of the Securities Exchange Act unearthed convincing evidence that disregard by corporate insiders of their fiduciary positions was widespread and pervasive.[3] Indeed,

> "the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities,"

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it is not to let the little fellow buy too much stock by setting the margins too low." Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 85 (1934) (testimony of Thomas Corcoran).

[3] One particularly glaring example concerned two brothers whose ownership of a little over 10% of a company's stock gave them a controlling interest. Just before the company voted to omit a dividend, the brothers disposed of their holdings for about $16,000,000. When news of the dividend omission became public a short time later, they repurchased an equivalent amount of stock for about $7,000,000, showing a profit of some $9,000,000 on the short-swing deal. S. Rep. No. 792, 73d Cong., 2d Sess., 9 (1934).

Much of the insider abuse involved participation in so-called "pools," which were dummy accounts in a corporation's stock established to buy and sell, at the same time, and at a frenetic pace. By so churning the account, it was often possible to engineer a false impression of immense activity in the stock, and to arrange spectacular, but artificial, price rises. One pool bought and sold almost 1,500,000 shares of RCA stock in a single seven-day period in 1929, at a net profit to its members of almost $5,000,000. S. Rep. No. 1455, 73d Cong., 2d Sess., 32–33, 47 (1934). Another famous pool involved the stock of the American Commercial Alcohol Co. During the summer of 1933, eight insiders and their associates reaped a profit of $300,000 on an investment of $62,000. A third pool, in the stock of the Fox Film Corporation, made $2,000,000 in five months. This pool was notable for the extent to which large stockholders participated. *Id.*, at 55–68. During 1929, over 100 stocks listed on the New York Stock Exchange were subjects of pools. *Id.*, at 32. Insider participation in these pools was ubiquitous. See generally F. Pecora, Wall Street Under Oath (1939).

was reported by the Senate subcommittee charged with the investigation to be "[a]mong the most vicious practices unearthed at the hearings." S. Rep. No. 1455, 73d Cong., 2d Sess., 55 (1934). The subcommittee did not limit its attack to directors and officers.

> "Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others." *Ibid.*

Despite its flagrantly inequitable character, the most respected pillars of the business and financial communities considered windfall profits from "sure-thing" speculation in their own company's stock to be one of the usual emoluments of their position. Cook & Feldman, Insider Trading Under the Securities Exchange Act, 66 Harv. L. Rev. 385, 386 (1953); 10 SEC Ann. Rep. 50 (1944). These abuses were perpetrated by such ostensibly reliable men and institutions as Richard Whitney, President of the New York Stock Exchange,[4] Albert H. Wiggin and the Chase National Bank, of which he was the chief executive officer,[5] and Charles E. Mitchell and the National City Bank, of which he was Chairman of the Board.[6]

Section 16 (b) was drafted to combat these "predatory operations," S. Rep. No. 1455, *supra*, at 68, by removing all possibility of profit from those short-swing insider trades occurring within the statutory period of six

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[4] See SEC, Report on Investigation in the Matter of Richard Whitney Pursuant to Section 21 (a) of the Securities Exchange Act of 1934 (Nov. 1, 1938).

[5] See Pecora, *supra*, n. 3, at 131–188.

[6] *Id.*, at 70–130.

months.[7] The statute is written broadly, and the liability it imposes is strict. Profits are forfeit without proof of an insider's intent to gain from inside information, and without proof that the insider was even privy to such information.[8] *Feder* v. *Martin Marietta Corp.*, 406 F. 2d 260, 262 (CA2).

II

Today, however, in the guise of an "objective" approach, the Court undermines the statute. By the simple expedient of dividing what would ordinarily be a single transaction into two parts—both of which could be performed on the same day, so far as it appears from the Court's opinion—a more-than-10% owner may reap windfall profits on 10% of his corporation's outstanding stock. This result, " 'plainly at variance with the policy of the legislation as a whole,' " *United States* v. *American*

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[7] The six-month period is, as Mr. Corcoran said during the hearings on the bill, a "crude rule of thumb," Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency pursuant to S. Res. 84, 56, and 97, 73d Cong., 1st and 2d Sess., pt. 15, p. 6557. It represents a balance struck between the need to deter short-swings based on inside information and a desire to avoid unduly inhibiting long-term corporate investment. S. Rep. No. 792, 73d Cong., 2d Sess., 6. Six months was hit upon, presumably, on the view that "where the insider is obliged to hold the original security . . . for longer than six months . . . market fluctuations are likely to wipe out his profits." Comment, 117 U. Pa. L. Rev. 1034, 1054 (1969).

[8] "This approach maximized the ability of the rule to eradicate speculative abuses by reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect." *Bershad* v. *McDonough*, 428 F. 2d 693, 696 (CA7).

It is somewhat anomalous that the majority relies on a feature of the statutory scheme designed to broaden its scope in order to insulate from the operation of the statute a device by which the goals of the statute can be largely frustrated.

Trucking Assns., 310 U. S. 534, 543, is said to be required because Emerson, owning only 9.96%, was not a "beneficial owner" of more than 10% within the meaning of § 16 (b) "at the time of" the disposition of this block of Dodge stock.

If § 16 (b) is to have the "optimum prophylactic effect" which its architects intended, insiders must not be permitted so easily to circumvent its broad mandate. We should hold that there was only one sale—a plan of distribution conceived "at the time" Emerson owned 13.2% of the Dodge stock, and implemented within six months of a matching purchase. Moreover, in the spirit of the Act we should presume that *any* such "split-sale" by a more-than-10% owner was part of a single plan of disposition for purposes of § 16 (b) liability.

This construction of "the sequence of relevant transactions," *Bershad* v. *McDonough*, 428 F. 2d 693, 697 (CA7), is not foreclosed by any language in the statute. The statutory definitions of such terms as "purchase," "sale," "beneficial owner," "insider," and "at the time of" are not, as one might infer from the Court's opinion, objectively defined words with precise meanings.

> " 'Whatever the terms "purchase" and "sale" may mean in other contexts,' they should be construed in a manner which will effectuate the purposes of the specific section of the [Securities Exchange] Act in which they are used. SEC v. National Securities, Inc., 393 U. S. 453, 467." *Id.*, at 696.

MR. JUSTICE STEWART, while on the Court of Appeals, explained the manner appropriate for the construction of the statutory definitions in the context of § 16 (b):

> "Every transaction which can reasonably be defined as a purchase will be so defined, if the transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16 (b)." *Ferraiolo* v. *Newman*, 259 F. 2d 342, 345 (CA6).

Applying this salutary approach toward the statutory definitions, the courts have reasoned that, because of the opportunities for abuse inhering in his position, a director must account both for purchases made shortly before his appointment, *Adler* v. *Klawans,* 267 F. 2d 840 (CA2), and for sales made shortly after his resignation, *Feder* v. *Martin Marietta Corp., supra.* "Options," which played such a large role in the manipulative practices disclosed during the 1930's,[9] are not ordinarily thought to be "purchases" or "sales" of the underlying commodity; yet, because of the opportunity for abuse inherent in the device, courts have held that an option can be a "sale," when granted, within the meaning of § 16 (b). *Bershad* v. *McDonough, supra.* But, in order to bring the underlying transaction within the six-month limitation of § 16 (b), an option was also held to be a "purchase" when exercised. *Booth* v. *Varian Associates,* 334 F. 2d 1 (CA1). Similarly, where there was an opportunity for the abuse of inside information, a conversion of debentures into common stock was held to be a "sale"; *Park & Tilford* v. *Schulte,* 160 F. 2d 984 (CA2); but where there was no such opportunity, a similar conversion was held not to be. *Blau* v. *Lamb,* 363 F. 2d 507 (CA2).

The common thread running through the decisions is that whether we approach the problem of this case as a question of "beneficial ownership" at the time of the second transaction, or as a question whether the two transactions were one "sale," it "is not in any event primarily a semantic one, but must be resolved in the light of the legislative purpose—to curb short swing speculation by insiders." *Ferraiolo* v. *Newman, supra,* at 344.

Until today, the federal courts have been almost universally faithful to this philosophy, "even departing where necessary from the literal statutory language."

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[9] See Twentieth Century Fund, Stock Market Control 114–118 (1934).

Feder v. *Martin Marietta Corp., supra,* at 262. Thus, a tender offer, although it may justifiably be described as a series of discrete purchases, has been treated as a single purchase. *Abrams* v. *Occidental Petroleum,* 323 F. Supp. 570, 579 (SDNY), rev'd on other grounds, 450 F. 2d 157 (CA2). And, in order to prevent a construction of the statute whereby

> "it would be possible for a person to purchase a large block of stock, sell it out until his ownership was reduced to less than 10%, and then repeat the process, ad infinitum,"

the phrase "at the time of the purchase and sale," on which the Court places such heavy reliance, was defined to mean "simultaneously with" purchase, and "just prior to" sale. *Stella* v. *Graham-Paige Motors,* 104 F. Supp. 957, 959 (SDNY). As one commentator noted, this holding

> "necessitates a logical inconsistency insofar as the phrase 'at the time of purchase and sale' is treated as meaning the moment after purchase and the moment before sale." Recent Developments, 57 Col. L. Rev. 287, 289.

Yet, as in the present case, "the discrepancy seems slight in view of the broader statutory policies involved." *Ibid.*

Thus, should the broadly remedial statutory purpose of § 16 (b) require it, the literal language of the statute would not preclude an analysis in which the two transactions herein at issue are treated as part of a single "sale."

III

The potential for abuse of inside information in the present case is self-evident. Equally obvious is the fact

that the modern-day insider is no less prone than his counterpart of a generation ago to succumb to the lure of insider trading where windfall profits are in the offing. Indeed, in a survey of "reputable" businessmen, 42% of those responding indicated they would themselves trade on inside information, and 61% believed that the "average" executive would do likewise.[10] Thus, it would appear both that § 16 (b) was directed at such conduct as is herein at issue and that the protection § 16 (b) affords is as necessary today as it was when the statute was enacted.

Despite the fact that the decision below strikes at the vitals of the statute, the Court says it must be affirmed because to treat "two sales as one upon proof of a pre-existing intent by the seller" detracts from the "mechanical quality" of the statute and is "scarcely in harmony with the congressional design of predicating liability upon an 'objective measure of proof.'" *Ante,* at 425.

This "mechanical quality," however, is illusory.

> "There is no rule so 'objective' ('automatic' would be a better word) that it does not require some mental effort in applying it on the part of the person or persons entrusted by law with its application." *Blau* v. *Lamb, supra,* at 520.

Thus, the deterrent value of § 16 (b) depends not so

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[10] Baumhart, How Ethical Are Businessmen?, Harv. Bus. Rev., July-Aug. 1961, p. 6, at 16. The survey had posed the following hypothetical:

"What would you do if . . . as a director of a large corporation, you learned at a board meeting of an impending merger with a smaller company? Suppose this company has had an unprofitable year, and its stock is selling at a price so low that you are certain it will rise when news of the merger becomes public knowledge." *Id.,* at 7.

much on its vaunted "objectivity" as on its "thoroughgoing" qualities.

> "We must suppose that the statute was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty." *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 239 (CA2).

Insiders have come to recognize that "in order not to defeat [§ 16 (b)'s] avowed objective," federal courts will resolve "all doubts and ambiguities against insiders." *Blau* v. *Oppenheim*, 250 F. Supp. 881, 884–885.

Moreover, courts have not shirked this responsibility simply because, as here, such a resolution may require a factual inquiry. In *Blau* v. *Lehman, supra,* this Court said that on an appropriate factual showing, an investment banking firm might be forced to disgorge profits made from short-swing trades in the stock of a corporation on whose board a partner of the firm was "deputized" to sit. *Id.*, at 410. In *Colby* v. *Klune*, 178 F. 2d 872 (CA2), cited by the majority, the court permitted a factual inquiry into the possibility that an individual might be a "de facto" officer or director, although not formally labeled as such. Virtually all courts faced with § 16 (b) problems now inquire into the opportunity for abuse inherent in a particular type of transaction, in order to see if applying the statute would serve its purposes. See, *e. g., Bershad* v. *McDonough, supra; Blau* v. *Max Factor & Co.*, 342 F. 2d 304 (CA9); *Booth* v. *Varian Associates, supra; Ferraiolo* v. *Newman, supra.* And, even under the narrow approach of the majority, I presume it would still be open, in cases like this one, to inquire whether the ostensibly separate sales are "legally

tied." [11] It follows that the necessity of a factual inquiry is no bar to the application of the statute to the present case.

It is beyond question, of course, that a prime concern of the statute was that a requirement of positive proof of an insider's "intent" would render the statute ineffective. Insofar as the District Court's approach appears to place the burden on the plaintiff to demonstrate the existence of a "plan of distribution," it is justifiably open to criticism. The broad sweep of § 16 (b) requires that a minimal burden be placed on putative plaintiffs.

But this goal—elimination of proof problems—is subsidiary to the statute's main aim—curbing insider speculation. Whatever "mechanical quality" the statute possesses, it was intended to ease the plaintiff's burden, not to insulate the insider's profits.

Thus, we should not conclude, as does the majority, that there is no *enforceable* way to combat the potential

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[11] Such an inquiry might well be extensive. The following commentary, aimed at the Court of Appeals decision below, applies with equal force to the majority's approach:

"Even if the statute could be construed as allowing an exception for a severed sale of the final 9.9 percent of stock otherwise within section 16 (b), when are sales to be found separate and independent? The *Emerson* decision provides no guidelines. All it says is: 'The factual question as to whether a particular sale is a separate and independent sale is a matter for decision under the peculiar facts of the particular case. In this regard each case must stand or fall on its own facts.' What facts? What of separate sales to the same vendee? How separate must the parties be—different companies, different corporations, different entities? Must there be an interval between the sales? How long? If *Emerson* is to be followed, would the question be not so much how discreet [*sic*] the sales are as how discreet counsel has been? The inquiry seems to lead away from the legislative intent that all potential violators be held to the full sanctions of section 16 (b)." Recent Decisions, 5 Ga. L. Rev. 584, 590 (footnote omitted).

for sharp practices which inheres in the "split-sale" scheme.

> "[T]he 'objective' or 'rule of thumb' approach need not compel a court to wink at the substantial effects of a transaction which is rife with potential sharp practices in order to preserve the easy application of the short-swing provisions under Section 16 (b). Certainly the interest of simple application of the prohibitions of Section 16 (b) does not carry so far as to facilitate evasion of that provision's function by formalistic devices." *Bershad* v. *McDonough*, *supra*, at 697 n. 5.

A series of sales, spaced close together, is more than likely part of a single plan of disposition. Plain common sense would indicate that Emerson's conduct in the present case had probably been planned, even if there were no confirmation in the form of an admission. It is statistically probable that any series of sales made by a beneficial owner of more than 10%, within six months, in which he disposes of a major part of his holdings, would be similarly connected.

We, therefore, should construe the statute as allowing a rebuttable presumption that any such series of dispositive transactions will be deemed to be part of a single plan of disposition, and will be treated as a single "sale" for the purposes of § 16 (b).[12] Because the burden

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[12] Such a presumption is not a novel suggestion in the interpretation of securities legislation. The Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*, for example, requires that public securities offerings be registered with the SEC. § 5, 15 U. S. C. § 77e. But registration is not required of stock sold in a so-called "private placement." § 4 (2), 15 U. S. C. § 77d (2). The purchaser of such stock, however, cannot avoid the registration requirements when he resells it unless his original purchase was not made "with a view to . . . distribution." § 2 (11), 15 U. S. C. § 77b (11). The difficulties inherent in determining this elusive "view," see 1 L. Loss,

would be on the defendant, not the plaintiff, such a rule would operate with virtually the same less-than-perfectly automatic efficiency that the statute now does, and it would comport far more closely with the statute's broad, remedial sweep than does the approach taken by the Court.

Such a rule would not, moreover, import questions of "intent" into the statutory scheme. Any factual inquiry would involve only an objective analysis of the circumstances of the various dispositions in the series, applying the "various tests" established by the cases "to determine whether a transaction, objectively defined, falls within or without the terms of the statute." *Ante,* at 424 n. 4.

Securities Regulation 665–687 (2d ed. 1961), have prompted the suggestion that there be a rebuttable presumption that a sale made within two years of purchase indicates the original purchase was made with a view to distribution. 4 *id.*, at 2652 (Supplement to 2d ed. 1969); see also The Wheat Report, Disclosure to Investors 165 (CCH 1969).

A similar rebuttable presumption applies in the case of a "controlling person" (as defined in Rule 405, 17 CFR § 230.405 (f)). Such a person need not register his sales under the 1933 Act if in any six-month period they amount to no more than 1% of the issuer's outstanding stock. Rule 154, 17 CFR § 230.154. But, "if a plan exists to effect a series of sales during successive 6 months' periods, such sales cannot be considered in the category of routine trades but must be deemed a distribution not exempted by the rule." Securities Act Release No. 4818, 31 Fed. Reg. 2545 (1966).

Different policies, of course, underlie the 1933 and 1934 Acts. Yet, the above-described provisions of the 1933 Act, like § 16 (b) in the 1934 Act, are aimed at deterring certain transactions because of their inherent opportunities for abuse. The 1933 Act presumptions are based on a judgment that a short-term series of sales is statistically likely to reflect an "intent" to engage in a public distribution without registration. The presumption I would apply in the case of § 16 (b) is justified by a similar statistical likelihood that a series of dispositive transactions, like Emerson's, undertaken within six months of a matching purchase, was pursuant to a "plan of disposition."

Only if a beneficial owner carried an affirmative burden of proof—that his series of dispositive transactions was not of a type that afforded him an opportunity for speculative abuse of his position as an insider—should we say that he was not such a beneficial owner "at the time of . . . sale." [13]

IV

The Court suggests two additional factors militating against Emerson's liability under § 16 (b). First, the Court implies that it is contrary to the SEC's own rules. This argument rests on the power given to the SEC by § 16 (b) to exempt from its scope those transactions that are "not comprehended within the purpose" of the section. Pursuant to this authority, the SEC has promulgated Rule 16a–10, providing that transactions not required to be reported under § 16 (a) are exempt from § 16 (b) as well.

The SEC's reporting requirements are contained in "Form 4." Until recently, this Form required insiders—officers, directors, and more-than-10% owners—only to report transactions occurring in a calendar month in which they met the formal requirements to be denominated such an insider. Emerson sold down to 9.96% in August, then sold out in September. Presumably, it did not have to report the September sale on Form 4, and thus, by operation of Rule 16a–10, the September sale is argued to be exempt from the operations of § 16 (b) as well.

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[13] It is conceded that Emerson could not meet such a burden in the present case. In general, an insider could perhaps defeat the presumption of a plan by showing "changed circumstances" similar to those required to avoid registration requirements under the private offering exemption of the 1933 Act. See 1 Loss, Securities Regulation, *supra*, at 665–673; 4 *id.*, at 2646–2654 (1969).

Inasmuch as the SEC's power to promulgate such a rule is not "a matter solely within the expertise of the SEC and therefore beyond the scope of judicial review," *Greene* v. *Dietz,* 247 F. 2d 689, 692 (CA2), this argument loses substantially all its force after *Feder* v. *Martin Marietta Corp., supra.* There, the court held, in the face of the identical argument that Rule 16a–10 was invalid, insofar as it operated through Form 4 to exempt transactions by ex-directors from liability under § 16 (b). The court reasoned that the limitation of the reporting requirement to the calendar month in which a transaction occurred was "an arbitary . . . [and] unnecessary loophole in the effective operation of the statutory scheme," *id.,* at 269, because it required reporting of some transactions 30 days after an ex-director's resignation, but insulated others taking place the very next day.

Form 4 did, however, extend § 16 (b) liability to at least some transactions occurring after resignation.

> "Therefore, inasmuch as Form 4, a valid exercise of the SEC's power, has already extended § 16 (b) to cover, in part, an ex-director's activities, a less arbitrarily defined reporting requirement for ex-directors is but a logical extension of § 16 (b) coverage, would be a coverage in line with the congressional aims, and would afford greater assurance that the lawmakers' intent will be effectuated." *Ibid.*[14]

This analysis is equally applicable to the reporting requirements of ex-10% owners.

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[14] In response to the *Feder* case, the SEC amended its rules to require disclosure of all transactions by directors and officers within six months prior to their appointment and for six months after their resignations. Rule 16a–1, 17 CFR § 240.16a–1 (d), (e) (as amended, Sept. 30, 1969). Thus, the restrictive reporting requirements relied upon by the majority apply only to beneficial owners, itself an arbitrary distinction.

Second, the Court analogizes Emerson's "plan" to a sale "conceived" during the six-month period but not made until after the expiration of the statutory limitation. The Court incorrectly assumes that such a sale could not fall within § 16 (b). If the "conception" were sufficiently concrete to be construed as a "contract to sell," or an "option," there would indeed be liability. Cf. *Bershad* v. *McDonough, supra.* In any event, the analogy fails because the purposes of the six-month rule are different from the purpose of the 10% rule.

The six-month limitation is based on Congress' estimation that beyond this time period, normal market fluctuations sufficiently deter attempts to trade on inside information. *Blau* v. *Max Factor & Co., supra,* at 308. Thus, it is consistent with the statutory scheme to permit an insider to "plan" a sale within the six-month period that will not take place until six months have passed from a matching purchase.

But the 10% rule is based upon a conclusive statutory presumption that ownership of this quantity of stock suffices to provide access to inside information. *Newmark* v. *RKO General, Inc.,* 425 F. 2d 348 (CA2). The rationale of the six-month rule implies that such information will be presumed to be useful during that length of time. It follows that all sales by a more-than-10% owner within the six-month period carry the presumption of a taint, even if a prior transaction within the period has reduced the beneficial ownership to 10% or below.

V

In sum, neither the statutory language nor the purposes articulated by the majority justify the result reached today. Rather than deprive § 16 (b) of vitality in the course of a vain search for a nonexistent purity of operation, we should reverse the judgment of the Court of Appeals and remand the case for further proceedings.

UNITED STATES *v.* TUCKER

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

No. 70–86. Argued November 11, 1971—Decided January 11, 1972

In imposing sentence upon a defendant convicted of bank robbery, a federal district judge gave explicit consideration to the defendant's record of previous convictions. It was later conclusively determined that two of the previous convictions were constitutionally invalid, having been obtained in violation of *Gideon* v. *Wainwright,* 372 U. S. 335. *Held:* Under these circumstances the Court of Appeals was correct in remanding the case to the District Court for reconsideration of the sentence imposed upon the defendant. Pp. 446–449.

431 F. 2d 1292, affirmed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post,* p. 449. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Allan A. Tuttle argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Richard B. Stone, Beatrice Rosenberg,* and *Mervyn Hamburg.*

William A. Reppy, Jr., by appointment of the Court, *post,* p. 935, argued the cause for respondent. With him on the brief was *William A. Norris,* by appointment of the Court, 403 U. S. 930.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1953 the respondent, Forrest S. Tucker, was brought to trial in a federal district court in California upon a charge of armed bank robbery. He pleaded not guilty. Four female employees of the bank were called as wit-

nesses for the prosecution, and they identified the respondent as the robber. He testified in his own behalf, denying participation in the robbery and offering an alibi defense. To impeach the credibility of his testimony, the prosecution was permitted on cross-examination to ask him whether he had previously been convicted of any felonies. He acknowledged three previous felony convictions, one in Florida in 1938, another in Louisiana in 1946, and a third in Florida in 1950. At the conclusion of the trial the jury returned a verdict of guilty. In the ensuing sentencing proceeding the District Judge conducted an inquiry into the respondent's background, and, the record shows, gave explicit attention to the three previous felony convictions the respondent had acknowledged.[1] The judge then sentenced him to serve 25 years in prison—the maximum term authorized by the applicable federal statute, 18 U. S. C. § 2113 (d).

Several years later it was conclusively determined that the respondent's 1938 conviction in Florida and his 1946

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[1] An FBI agent was present at the sentencing proceeding. The District Judge began the proceeding by stating, "I would like to have the Agent's testimony with respect to the prior convictions."

The agent testified, in relevant part, as follows: "As the defendant said, when he was a juvenile, I believe it was in 1938, he received a ten-year sentence in Florida. . . .

". . . He said there was five years and four months on the chain gang. . . . and he said he actually served two years beyond that. . . .

"In 1950 Mr. Tucker was sentenced to a five year term in the State of Florida, for, I believe it was burglary, and on January the 5, 1951, while in custody in the hospital, he escaped.

"In 1946 he was convicted in the State of Louisiana on a felony charge and given a term of 4 years.

". . . I believe it was a burglary."

conviction in Louisiana were constitutionally invalid. This determination was made by the Superior Court of Alameda County, California, upon that court's finding in a collateral proceeding that those convictions had resulted from proceedings in which the respondent had been unrepresented by counsel, and that he had been "neither advised of his right to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." [2]

Thereafter the respondent initiated the present litigation. Proceeding under 28 U. S. C. § 2255, he filed a motion in the Federal District Court in which he had been convicted in 1953, claiming that introduction at the 1953 trial of evidence of his prior invalid convictions had fatally tainted the jury's verdict of guilt. Upon consideration of the motion, the District Judge agreed that "the use of the constitutionally invalid prior convictions on cross-examination for impeachment purposes was error," but found that the error was harmless beyond a reasonable doubt, in view of the overwhelming trial evidence that the respondent had been guilty of the bank robbery. *Tucker* v. *United States,* 299 F. Supp. 1376. See *Chapman* v. *California,* 386 U. S. 18; *Harrington* v. *California,* 395 U. S. 250.

On appeal, the Court of Appeals for the Ninth Circuit agreed that it had been "firmly proved that the evidence of prior convictions did not contribute to the verdict obtained and that, with respect to the verdict of guilty, the error in receiving such evidence was therefore harmless beyond a reasonable doubt." It went on, however, to find that there was "a reasonable probability that the defective prior convictions may have

[2] The decision of the Superior Court of Alameda County is unreported, but the accuracy of that court's determination is not questioned. See *In re Tucker,* 64 Cal. 2d 15, 409 P. 2d 921; *Tucker* v. *Craven,* 421 F. 2d 139.

led the trial court to impose a heavier prison sentence than it otherwise would have imposed." Accordingly, the appellate court affirmed the refusal to vacate the conviction, but remanded the case to the District Court for resentencing "without consideration of any prior convictions which are invalid under Gideon v. Wainwright, 372 U. S. 335." 431 F. 2d 1292, 1293, 1294. The Government came here with a petition for a writ of certiorari, which we granted. 402 U. S. 942.

The Government asks us to reverse the judgment of the Court of Appeals insofar as it remanded this case to the District Court for resentencing. It argues that a federal district judge has wide and largely unreviewable discretion in imposing sentence, and that in exercising that discretion his relevant inquiry is not whether the defendant has been formally convicted of past crimes, but whether and to what extent the defendant has in fact engaged in criminal or antisocial conduct. Further, the Government argues, in view of other detrimental information about the respondent possessed at the time of sentencing by the trial judge, it is highly unlikely that a different sentence would have been imposed even if the judge had known that two of the respondent's previous convictions were constitutionally invalid. Accordingly, the Government concludes that to now remand this case for resentencing would impose an "artificial" and "unrealistic" burden upon the District Court.

It is surely true, as the Government asserts, that a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come. *United States* v. *Trigg*, 392 F. 2d 860, 864; *Davis* v. *United States*, 376 F. 2d 535, 538; *Cross* v. *United*

States, 354 F. 2d 512, 514; *United States* v. *Doyle,* 348 F. 2d 715, 721; *United States* v. *Magliano,* 336 F. 2d 817, 822; Fed. Rule Crim. Proc. 32 (a)(2). See *Williams* v. *New York,* 337 U. S. 241; *North Carolina* v. *Pearce,* 395 U. S. 711, 723. The Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review. *Gore* v. *United States,* 357 U. S. 386, 393. Cf. *Yates* v. *United States,* 356 U. S. 363.

But these general propositions do not decide the case before us. For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in *Townsend* v. *Burke,* 334 U. S. 736, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Id.,* at 741. The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him.[3] Yet it is now clear that two of those convictions were wholly unconstitutional under *Gideon* v. *Wainwright,* 372 U. S. 335.[4]

We need not speculate about whether the outcome of the respondent's 1938 and 1946 prosecutions would necessarily have been different if he had had the help of a lawyer.[5] Such speculation is not only fruitless, but

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

[4] The respondent's convictions occurred years before the *Gideon* case was decided, but the impact of that decision was fully retroactive. *Pickelsimer* v. *Wainwright,* 375 U. S. 2.

[5] It is worth pointing out, however, that to make the contrary assumption, *i. e.,* that the prosecutions would have turned out exactly the same even if the respondent had had the assistance of counsel, would be to reject the reasoning upon which the *Gideon* decision was based:

"[R]eason and reflection require us to recognize that in our

quite beside the point. For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.[6]

We agree with the Court of Appeals that the answer to this question must be "yes." For if the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding. Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who, beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang.[7] We cannot agree with the Government that a re-evaluation of the re-

adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." 372 U. S., at 344.

[6] The constitutional validity of the respondent's third conviction—in Florida in 1950—has not been determined. The Government states in its brief that it has been informed by the clerk of the Criminal Court of Records of Dade County, Florida, that the respondent had counsel at that trial. The respondent's brief states that the respondent has advised his present counsel that at the 1950 Florida proceeding he specifically asked the judge to appoint counsel for him because of his indigence and that the request was denied.

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

spondent's sentence by the District Court even at this late date will be either "artificial" or "unrealistic." [8]

The *Gideon* case established an unequivocal rule "making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." *Burgett* v. *Texas*, 389 U. S. 109, 114. In *Burgett* we said that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.*, at 115. Erosion of the *Gideon* principle can be prevented here only by affirming the judgment of the Court of Appeals remanding this case to the trial court for reconsideration of the respondent's sentence.

The judgment is affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion, of course, is a fine and acceptable exposition of abstract law. If I felt that it fit Tucker's

[8] As noted above, at 445, and emphasized in the dissenting opinion, the trial judge, in ruling upon the respondent's present § 2255 motion, held that the wrongful use of the invalid previous convictions to impeach the respondent's testimony at the 1953 trial was harmless error, in view of the overwhelming evidence that he was guilty of the bank robbery. But the respondent's guilt of that offense hardly "translates" into an "inescapable" assumption that the trial judge would have imposed a maximum 25-year prison sentence if he had known that the respondent had already been unconstitutionally imprisoned for more than 10 years. It would be equally callous to assume, now that the constitutional invalidity of the respondent's previous convictions is clear, that the trial judge will upon reconsideration "undoubtedly" impose the same sentence he imposed in 1953.

case, I would join it. The Court, however, fails to mention and to give effect to certain facts that, for me, are controlling:

1. At his armed bank robbery trial in May 1953 Tucker was no juvenile. He was 32 years of age and was represented by counsel. A reading of his trial testimony discloses that he was very knowledgeable indeed. Tucker testified on cross-examination at that trial not only as to the fact of three prior state felony convictions, but, as well, as to his engaging in the proscribed conduct underlying two of those convictions. He stated flatly (a) that in 1938 he broke into a garage and took a man's automobile, and (b) that in 1946 he broke into a jewelry store at night.[1] He also acknowledged that, while waiting for transportation to prison in Florida after the third con-

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[1] "Q. . . . . You were convicted in Florida, were you not?
"A. Yes, I was.
"Q. For what?
"A. Automobile theft, breaking and entering.
"Q. What do you mean 'automobile theft, breaking and entering'?
"A. It boils down to this, I was 17 years old, broke into a man's garage, took his automobile, went joy riding in it, received a ten year sentence for it.
"Q. At the age of 17 you received a ten year sentence?
"A. Yes.
"Q. When was that?
"A. 1938.
"Q. You broke into a place and stole a car?
"A. Yes.
"Q. What kind of car did you steal?
"A. '36 Ford.
"Q. Tell us about your other convictions.
"A. 1946 I broke into a jewelry store.
. . .
"Q. Where?
"A. New Orleans.
"Q. Night or day?
"A. Night." Trial Transcript 161–162.

viction, he escaped and went to California using an assumed name.[2] Thus, wholly apart from formal convictions, Tucker conceded criminal conduct on his part on three separate prior occasions.

2. The judge who presided at Tucker's pre-*Gideon* trial for armed bank robbery in 1953 was the Honorable George B. Harris of the United States District Court for the Northern District of California. After Tucker's conviction by a jury Judge Harris imposed the 25-year maximum sentence prescribed by 18 U. S. C. §§ 2113 (a) and 2113 (d). Despite the interim passage of 16 years, Tucker's present petition, filed pursuant to 28 U. S. C. § 2255, also came before the very same Judge Harris, then Chief Judge of the Northern District. The judge denied relief on the ground that the error in the use, for impeachment purposes, of two constitutionally invalid prior convictions was harmless beyond a reasonable doubt (a) because the issue of guilt or innocence was not at all close, (b) because Tucker's testimony "had been successfully impeached by prior inconsistent statements made to the Federal Bureau of Investigation agents, and by rebuttal testimony which demonstrated that portions of [his] testimony [were] improbable and untrue," and

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[2] "Q. Why did you use the name of Rick Bellew, if you did?

"A. Because I was a fugitive from Florida.

"Q. You were a what?

"A. A fugitive.

"Q. A fugitive from what?

"A. I had been sentenced to a term in Florida for the third conviction that you just brought up, and while waiting transportation to prison I was given a chance to—nobody was watching me, and I walked off down there and came out to California.

"Q. Where did you walk away from?

"A. I was having my appendix removed in the hospital . . ." Trial Transcript 166.

". . . [H]e found me guilty and subsequently I escaped and came out here. . . ." Sentencing Transcript 230.

(c) because his "testimony was successfully impeached, and in fact, demolished by additional items." 299 F. Supp. 1376, 1378 (ND Cal. 1969). As to all this, on the issue of guilt, the Court of Appeals agreed, 431 F. 2d 1292, 1293 (CA9 1970), and this Court today does not rule otherwise.

Chief Judge Harris' § 2255 ruling translates for me into something completely inescapable, namely, that in 1953, wholly apart from the 1938 and 1946 convictions, he would have imposed the 25-year maximum sentence anyway. Surely Judge Harris, of all people, is the best source of knowledge as to the effect, if any, of those two convictions in his determination of the sentence to be imposed. Yet the Court speculates that, despite his identity and despite his obvious disclaimer, Judge Harris might have been influenced in his sentencing by the fact of the two prior convictions, rather than by the three criminal acts that Tucker himself acknowledged.

On remand the case presumably will go once again to Judge Harris, and undoubtedly the same sentence once again will be imposed. Perhaps this is all worthwhile and, if so, I must be content with the Court's disposition of the case on general principles. I entertain more than a mild suspicion, however, that this is an exercise in futility, that the Court is merely marching up the hill only to march right down again, and that it is time we become just a little realistic in the face of a record such as this one.

I would reverse the judgment of the Court of Appeals insofar as it remands the case to the District Court for resentencing.

Syllabus

FEDERAL POWER COMMISSION *v.* FLORIDA POWER & LIGHT CO.

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

No. 70–38. Argued November 15, 1971—Decided January 12, 1972

The Federal Power Commission (FPC) properly determined that the transfer of power from Florida Power & Light Co. (FP&L) to another Florida utility's "bus" (a transmission line into which subsidiary lines connect) and the simultaneous transfer of power from that utility's "bus" to a Georgia company gave the FPC jurisdiction over FP&L under § 201 (b) of the Federal Power Act, which grants jurisdiction to the FPC over "the transmission of electric energy in interstate commerce . . . and the sale of electric energy at wholesale in interstate commerce, but . . . not [over] any other sale of electric energy." The FPC's conclusion that FP&L energy was commingled with that of the other Florida utility, and thus was transmitted in interstate commerce, was substantially supported by expert opinion that is in accord with the known facts of electricity, and is sufficient to support its jurisdiction. Pp. 454–469.

430 F. 2d 1377, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 469. STEWART, POWELL, and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Samuel Huntington argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Gordon Gooch,* and *Drexel D. Journey.*

Jefferson D. Giller argued the cause for respondent. With him on the brief were *Leon Jaworski, Jay W. Elston, Harry A. Poth, Jr.,* and *Richard M. Merriman.*

Briefs of *amici curiae* urging reversal were filed by *George Spiegel* and *Melvin Richter* for the Gainesville Utilities Department et al., and by *Northcutt Ely* for the American Public Power Assn.

MR. JUSTICE WHITE delivered the opinion of the Court.

We are asked to determine whether the Federal Power Commission exceeded its statutory authorization when it asserted jurisdiction over the Florida Power & Light Co. Section 201 (b) of the Federal Power Act, as amended, 49 Stat. 847, 16 U. S. C. § 824 (b), grants the Federal Power Commission jurisdiction over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce, but . . . not [over] any other sale of electric energy . . . ." Section 201 (c) defines energy transmitted in interstate commerce as energy "transmitted from a State and consumed at any point outside thereof." [1] In *Connecticut Light & Power Co.* v.

[1] The relevant sections of 16 U. S. C. § 824, stated in full, are as follows:

"(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or

FPC, 324 U. S. 515 (1945), we noted that by this definition the initial jurisdictional determination "was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test." *Id.*, at 529; *FPC* v. *Southern California Edison Co.*, 376 U. S. 205, 209 n. 5 (1964).

In the case now before us the FPC hearing examiner and the Commission itself, utilizing two scientific tests, determined that the Florida Power & Light Co. (FP&L) generates energy that is transmitted in interstate commerce. They therefore held the company subject to the Commission's jurisdiction. Respondent FP&L argues that an alternative model better represents the flow of its electricity; by use of this model it purports to demonstrate that its power has not flowed in interstate commerce. The Court of Appeals for the Fifth Circuit rejected the FPC's tests as "not sufficient to prove the actual transmission of energy interstate." 430 F. 2d 1377, 1383 (1970). It did not approve FP&L's test ("Both [the FPC and the FP&L tests] suffer from the same vice," *id.*, at 1385), but because the FPC must shoulder the burden of proof, its finding of jurisdiction was set aside.

We granted certiorari to determine if either of the FPC's tests provides an acceptable basis at law and a sufficient basis in fact for the establishment of jurisdiction. 401 U. S. 907 (1971).

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over facilities for the transmission of electric energy consumed wholly by the transmitter.

"(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

"(d) The term 'sale of electric energy at wholesale' when used in this subchapter, means a sale of electric energy to any person for resale."

I

FP&L is Florida's largest electric utility. At the time relevant to this litigation it served nearly one million customers, ranked ninth nationally among electric companies in revenues, 14th in investment in gross utility electric plant, and 16th in kilowatt-hour sales. Despite this significant size, the peninsular nature of Florida, the concentration of the company's sales in the southern part of the State,[2] and the recurrent threat of hurricanes which might sever power lines combine to make the operations of the company unusually insular and independent of the operations of like companies in other States. All of FP&L's equipment, including transmission lines, is confined to Florida and none of its lines directly connect with those of out-of-state companies.

FP&L does, however, indirectly connect with out-of-state companies. As a member of the Florida Pool, it is interconnected with the Florida Power Corp. (Corp),[3] the Tampa Electric Co., the Orlando Utilities Commission, and the City of Jacksonville. These interconnected utilities and authorities coordinate their activities and exchange power as circumstances require.[4] In 1964 FP&L transferred over 107 million kwh to Corp

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[2] Seventy-five percent of FP&L's load is concentrated at the southern tip of Florida, some 400 miles south of the Georgia border. Transcript of Proceedings before the FPC 241. Reprinted in App. 2 *et seq.* (hereinafter referred to as (T)).

[3] Corp was before this Court in *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 402 U. S. 515 (1971), in which case its operations are described in some detail. Corp is a public utility subject to the FPC's jurisdiction.

[4] "The purpose of the energy interchanges is to take care of temporary needs. There are no economy sales (sales by a company that can produce lower cost power to a higher cost producer) because fuel costs are similar for all members [of the Florida Pool]." Opinion of the FPC Hearing Examiner, 37 F. P. C. 544, 562.

and received over 61 million kwh from Corp.[5] If power from FP&L flows in interstate commerce it is because Corp interconnects just short of Florida's northern border with Georgia Power Co.[6] and regularly exchanges power with it.[7] Georgia's lines transmit the power out of or into Florida. There are numerous instances in which transfers between Georgia and Corp are recorded as coinciding with transfers between Corp and FP&L.[8]

The Georgia-Corp interconnection serves another function. Corp, FP&L, and the other Florida Pool participants are members of the Interconnected Systems Group (ISG), a national interlocking of utilities that automatically provides power in case of emergencies. In time of emergency this power also would flow through Corp's links with Georgia. To date FP&L has had no occasion to call for ISG power. But when a midwestern utility sustained a 580-megawatt generating loss, a regularly scheduled 8-megawatt FP&L contribution to the Florida Pool coincided with an 8-megawatt contribution from the pool to the ISG system.

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[5] Hearing Exhibit No. 15, p. 1028 (T).

[6] It has other interconnections across state lines, but we concentrate, as did the FPC, on a single Georgia-Corp connection. If FP&L power is shown to flow through this connection the others need not be considered, because jurisdiction is established. See n. 7, *infra.*

[7] Opinion of the FPC Hearing Examiner, 37 F. P. C., at 564.

[8] FPC staff exhibits revealed 42 instances, discovered by meter readings at selected hours over a four-month period, in which a transfer from Georgia to Corp's bus was instantly followed by a transfer from that bus to FP&L. Hearing Exhibits Nos. 18, pp. 1048–1054 (T), and 19, pp. 1055–1059 (T). Five instances of power flow from FP&L to Corp's bus, followed by transmission from that bus to Georgia were recorded over the same period. Hearing Exhibit No. 32, p. 1116 (T). "For example, Staff's Exhibit No. 18, at page 6, graphically demonstrates that on September 28, 1964, at 7:00 o'clock p. m., there was a flow of 51,000 kw of interstate power from Georgia to Corp and an instantaneous flow of 50,000 kw of . . . power from Corp to FPL." Opinion of the FPC, 37 F. P. C., at 550.

These relationships establish the focal issue in this case. The FPC may exercise jurisdiction only if there is substantial evidentiary support for the Commission's conclusion that FP&L power has reached Georgia via Corp or that Georgia's power has reached FP&L because of exchanges with Corp. What happens when FP&L gives power to Corp and Corp gives power to Georgia (or vice versa)? Is FP&L power commingled with Corp's own supply, and thus passed on with that supply, as the Commission contends? Or is it diverted to handle Corp's independent power needs, displacing a like amount of Corp power that is then passed on, as respondent argues? Or, as the Commission also contends, do changes in FP&L's load or generation, or that of others in the interconnected system, stimulate a reaction up and down the line by a signal or a chain reaction that is, in essence, electricity moving in interstate commerce? Upon answer to these questions, jurisdiction rides.

If FP&L were directly involved in power exchanges with Georgia, there would be no serious question about the resolution of this case. Section 201 of the Federal Power Act owes its origin to the determination of this Court that a direct transfer of power from a utility in Rhode Island to a utility in Massachusetts is in interstate commerce. See *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). "Part II [of the Act] is a direct result of *Attleboro*." *United States* v. *Public Utilities Comm'n of California*, 345 U. S. 295, 311 (1953). There can be no doubt that § 201 achieves its end and fills the "Attleboro gap" by giving the FPC jurisdiction over direct exchanges. *Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515 (1945).

Nor would there be any difficulty in resolving this case if the company or companies that stood between FP&L and the out-of-state power companies could be shown to be sometimes no more than a funnel. In

Jersey Central Power & Light Co. v. *FPC*, 319 U. S. 61 (1943), the first of the major FPC jurisdictional cases to be considered by this Court, Jersey Central supplied power to the Public Service Electric & Gas Co. (also a New Jersey company), which in turn had exchange arrangements with Staten Island Edison Corp. (a New York company). The transfer from PSE&G to Staten Island was effected through a "bus"—a transmission line of three conductors into which a number of subsidiary lines connect. The FPC showed through extensive sampling of the logs of the relevant companies, that on at least a dozen occasions when Staten Island drew power from the bus only Jersey Central was supplying the bus. Thus, the intermediate presence of PSE&G was shown to be, in some circumstances, a null factor, and it was established that Jersey Central energy was moving in interstate commerce.

In the litigation before us the record does not disclose situations in which Corp operated as a null or insufficient factor. Thus, the FPC has not in this litigation demonstrated with the clarity and certainty obtaining in the *Jersey Central* case that the energy flows that are a prerequisite to jurisdiction occurred.

This is not, however, the equivalent of saying that the flows did not occur or that there was not substantial evidence for concluding that they did. The Court of Appeals was hardly less emphatic than the Federal Power Commission in its conclusion that FP&L's "proof" that the flows did not occur was unconvincing. The court purported to have no opinion whether the flows had actually occurred. The question that must be resolved, therefore, is whether the evidence presented, though not so certain and convincing as that which the FPC offered in *Jersey Central*, was nonetheless adequate to establish jurisdiction.

We turn first to the conflicting contentions of the parties.

II

The Federal Power Commission followed alternate routes to its conclusion that FP&L energy moved in interstate commerce. The first course, based on what the Commission called the electromagnetic unity of response of interconnected electrical systems, is best represented in the words of the hearing examiner:

> "[N]one of the connected electric systems including that of Florida, Corp, and Georgia has any control over the actual transfers of power at each point of interconnection because of the free flow characteristics of electric networks. . . .
>
> "An electric utility system such as Florida [Power & Light] is essentially an electro-mechanical system to which all operating generators on the interconnected network are interlocked electromagnetically. This means that electric generators, under ordinary operating conditions run either at exactly the same speed or at speeds which will result in a frequency of 60 cycles. No operating generator can change its speed by itself as long as it operates connected to the network. All generators connected to the same network must follow each other as to speed and frequency whenever there is a change in frequency, and the frequency of all interlocked generators is always exactly the same.
>
> . . . . .
>
> "If a housewife in Atlanta on the Georgia system turns on a light, every generator on Florida's system almost instantly is caused to produce some quantity of additional electric energy which serves to maintain the balance in the interconnected system between generation and load. If sensitive enough instruments were available and were to be placed throughout Florida's system the increase in generation by every generator on Florida [Power & Light] could be precisely measured."

The hearing examiner concluded:

> "The cause and effect relationship in electric energy occurring throughout every generator and point on the Georgia, Corp and Florida systems constitutes interstate transmission of electric energy by, to, and from Florida. It is the electromagnetic unity of response of Florida, Corp, Georgia and other interconnecting systems that constitutes the interstate transmission of electric energy by Florida." [9]

By this analysis a change in FP&L's load or generating pattern depletes or adds to the force available in out-of-state lines; therefore FP&L is transmitting energy in interstate commerce.

The alternative analysis by the Commission and its staff experts concentrates on power flow within the "Turner bus"—the point of connection between Corp's and FP&L's systems. Power supplied to the bus from a variety of sources is said to merge at a point and to be commingled just as molecules of water from different sources (rains, streams, etc.) would be commingled in a reservoir. On this basis the FPC need only show (1) FP&L power entering the bus and (2) power leaving the bus for out-of-state destinations at the same moment, in order to establish the fact that *some* FP&L power goes out of State.[10] The FPC purported to make this demonstration by a series of tracing studies.[11]

FP&L objects. The first approach is said to be tech-

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[9] Opinion of the Hearing Examiner, 37 F. P. C., at 567–568.

[10] If any FP&L power has reached Georgia, or FP&L makes use of any Georgia power, no matter how small the quantity, FPC jurisdiction will attach because it is settled that Congress has not "conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not . . . supply such a jurisdictional limitation by construction." *Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515, 536. See also *Pennsylvania Water & Power Co.* v. *FPC*, 343 U. S. 414 (1952).

[11] See Exhibits Nos. 18 and 19, pp. 1048–1059 (T).

nologically sound, but legally insufficient in that it does not demonstrate that any FP&L power flows *in* interstate commerce, but only that it *affects* interstate commerce. Congress, it is argued, could have chosen to grant the FPC jurisdiction over activities affecting commerce, but it clearly did not do so.[12]

The second approach of the FPC purports to meet the standard at law, but according to FP&L it is technologically unsound. A bus is not a point, but rather a tangible, physical three-strand power line, in this case 225 feet in length. It is argued that it is not a general reservoir. Power, according to this argument, enters and is drawn off the line at discrete identifiable points. Power from any given source will not flow further along the line than loads of wattage cumulatively equal to the wattage of the power source. The distribution of entry lines and wattage loads on the Turner bus is said to demonstrate that all of the FP&L's power will be exhausted by Corp's load lines before the point, further down the line, where Georgia's load intervenes. When power flows in the opposite direction (*i. e.*, north to south) again the effect is one of displacement: Georgia's power goes to Corp's loads and the output of Corp's generators is thus displaced to FP&L.

III

We do not find it necessary to approve or disapprove the Federal Power Commission's analysis based on unity

[12] This argument is developed by the dissent in *Jersey Central Power & Light Co.* v. *FPC*, 319 U. S. 61, 78 *et seq.* Note particularly p. 88: "It is interesting to compare, in this connection, other statutes enacted by the same Congress [as the one which enacted Part II of the Federal Power Act]. Three adopted in July and August 1935 covered activities 'affecting' commerce; three, including the Federal Power Act in question, adopted in August 1935 did not cover activities 'affecting' commerce." Thus it was inferred that we are dealing with a particularly "discriminating use of language."

of electromagnetic response. Its alternative assertion that energy commingles in a bus is, in our opinion, sufficient to sustain jurisdiction.

In evaluating this second approach, the courts are called upon to do no more than assess the Commission's judgment of technical facts. If the Commission's conclusion of commingling is not overturned, then the legal consequences are clear.

The conclusion of the FPC that FP&L energy commingled with that of Corp and was transmitted in commerce rested on the testimony of expert witnesses. The major points expounded by these witnesses were probed, and in our opinion not undercut, by the hearing examiner's questions, FP&L's cross-examination, and rebuttal testimony of FP&L witnesses. The hearing examiner found the testimony persuasive and held that his conclusions could be independently reached upon it. A majority of the Commission, reasoning similarly, endorsed these conclusions.

A court must be reluctant to reverse results supported by such a weight of considered and carefully articulated expert opinion. Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on "engineering and scientific" considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact. An appreciation of such different institutional capacities is reflected in the congressional directive defining the terms of judicial review of FPC action: "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Federal Power Act § 313 (b), 16 U. S. C. § 825*l* (b). See *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 402 U. S. 515, 526–529 (1971).

The Court of Appeals appears to have rejected the Commission's conclusions for two reasons. First, it apparently regarded these conclusions as supported by mere speculation rather than evidence. In its view, expert opinion about the nature of reality, however logically compelling, is not fact.[13] Second, even if the Commission's views might be said to be supported by substantial evidence, the Court of Appeals apparently thought it important that the Commission acknowledged that its conclusions rest upon representations of a reality imperfectly understood. From this the Court of Appeals concluded that it was dealing with a "simplified characterization" that, despite the frequent use of that same characterization by other courts of appeals,[14] was too uncertain in its application to any particular situation to be used as the basis for establishing jurisdiction.

We reverse and reinstate the FPC's order because we do not think these points are well taken. As to the Court of Appeals' first reservation, we hold that well-reasoned expert testimony—based on what is known and uncontradicted by empirical evidence—may in and of itself be "substantial evidence" when first-hand evidence on the question (in this case how electricity moves within

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[13] "Neither the examiner nor the Commission treated the commingling theory as a scientific fact depicting accurately what does occur but only as the more adequate way to conceptualize actual occurrences.

"The Commission expert witness Jacobsen acknowledged commingling has never been verified experimentally as fact." 430 F. 2d 1377, 1384–1385.

[14] See principally *Indiana & Michigan Electric Co.* v. *FPC*, 365 F. 2d 180 (CA7), cert. denied, 385 U. S. 972 (1966); *Arkansas Power & Light Co.* v. *FPC*, 368 F. 2d 376 (CA8 1966); *Public Service Co. of Indiana* v. *FPC*, 375 F. 2d 100 (CA7), cert. denied, 387 U. S. 931 (1967); *Cincinnati Gas & Electric Co.* v. *FPC*, 376 F. 2d 506 (CA6), cert. denied, 389 U. S. 842 (1967).

a bus) is unavailable.[15] This proposition has been so long accepted,[16] and indeed has been so often applied specifically to challenges to the FPC's determination of

[15] "Sometimes the reason for tolerating a gap either between evidence and findings or between findings and decision has to do with limitations of human intellects or limitations on the magnitude of investigations that may be conducted in particular circumstances. Not all propositions of fact that are useful and used in the administrative process are susceptible of proof with evidence. Or developing the evidence would be inordinately expensive." 2 K. Davis, Administrative Law Treatise § 16.11, p. 473 (1958).

[16] The weight of such testimony was properly recognized by Lord Mansfield some 190 years ago:

"The facts in this case are not disputed. In 1758 the bank was erected, and soon afterwards the harbour went to decay. The question is, to what has this decay been owing? The defendant says, to this bank. Why? Because it prevents the backwater. That is matter of opinion:—the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause . . . . [T]he parties go down to trial . . . and Mr. Smeaton is called. A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbours, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called. . . . The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. . . . The cause of the decay of the harbour is . . . a matter of science . . . . Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence." *Folkes* v. *Chadd*, 3 Doug. 157, 158–160, 99 Eng. Rep. 589–590 (1782).

Modern analysis follows this perception. See 7 J. Wigmore, Evidence §§ 1917–1929, 1976 (3d ed. 1940 and Supp. 1970).

technical matters, that we do not consider it fairly in dispute. See, *e. g., FPC* v. *Southern California Edison Co.*, 376 U. S. 205, 209 n. 5 (1964); *Travelers' Indemnity Co.* v. *Parkersburg Iron & Steel Co.*, 70 F. 2d 63, 64 (1934); *United States ex rel. Chapman* v. *FPC*, 191 F. 2d 796, 808 (1951), aff'd, 345 U. S. 153 (1953). As Judge Parker said in the Court of Appeals' opinion in the latter case:

> "The [substantial-evidence] rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on controverted matters of hydraulic engineering. It is in just such matters that the findings of the Commission, because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission." 191 F. 2d, at 808.

On affirming, this Court noted,

> "[W]e cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason." 345 U. S., at 171.

The elusive nature of electrons renders experimental evidence that might draw the fine distinctions required by this case practically unobtainable. That does not

mean that expert testimony is insubstantial and that FP&L is beyond federal regulation.

We think the second, related, concern expressed by the Court of Appeals exaggerates the standard of proof required in civil cases such as this. The lower court would apparently require tracing studies showing an energy flow-through like that demonstrated in *Jersey Central.*

We do not think *Jersey Central* sets such high jurisdictional standards. Special circumstances in that case (the occasional operation of PSE&G as a null factor) permitted the FPC to present clear and compelling proof of interstate transactions. But we assessed the FPC's determination, not by the standards of certainty, but rather by the substantial-evidence test.[17] The fact that the FPC was exceptionally convincing in that leading case does not raise the standard that it must meet in all future cases.

Finding no reason in the case law for imposing a standard of certainty, we are not willing to construct one. It is not true, as argued by respondent, that an engineering test of certainty is needed to reserve an area of state jurisdiction. On top of the "engineering and scientific test" that controls this case, the Federal Power Act imposes a "legalistic or governmental" test. Federal jurisdiction may not reach "facilities used in local distribution" of energy. 16 U. S. C. § 824 (b). Thus, state jurisdiction is clearly demarcated and preserved. *Connecticut Light & Power Co.* v. *FPC,* 324 U. S. 515 (1945).

A requirement of tracing studies of the sort demanded by the Court of Appeals—if they are feasible at

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[17] "This evidence, we think, furnishes substantial basis for the conclusion of the Commission that facilities of Jersey Central are utilized for the transmission of electric energy across state lines." *Jersey Central, supra,* n. 12, at 67.

all [18]—would take one to two years to conduct.[19] Even under the FPC's supposedly too easily met criteria of jurisdiction, the FP&L matter took almost four years to pass through Commission proceedings; [20] it has been before the courts for four more years. If the congressionally mandated system is to function meaningfully, the judiciary cannot overwhelm it with unworkably high standards of proof. *New England Divisions Case*, 261 U. S. 184, 197 (1923); *Railroad Comm'n of Wisconsin* v. *Chicago, Burlington & Quincy R. Co.*, 257 U. S. 563, 579 (1922).

We note, moreover, that *Jersey Central* type tracing studies become less feasible as interconnections grow more complicated. *Arkansas Power & Light Co.* v. *FPC*, 368 F. 2d 376, 382 (CA8 1966), quoting 34 F. P. C. 747, 751. The requirement of *Jersey Central* type tracing might encourage the artificial and wasteful complication of interconnections for the purpose of avoiding federal jurisdiction. More important, as interconnections proliferate and energy pools grow larger, jurisdictional hurdles like those erected by the Court of Appeals would become ever more difficult to clear. Thus, the greater the need for regulation, the more likely it would become (under the Court of Appeals' rule) that regulation would not be achieved.

As pointed out by the Court of Appeals for the Sev-

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[18] "Logic would seem to dictate that where the utility is a member of a combination of utilities and has continuous access to an integrated pool of interstate energy, the tracing of out-of-state energy is indeed difficult, burdensome, and perhaps impossible." *Arkansas Power & Light Co.* v. *FPC*, 368 F. 2d, at 382.

[19] *Public Service Co. of Indiana* v. *FPC*, 375 F. 2d, at 104 n. 7.

[20] The final FPC decision was handed down on May 2, 1967. We do not know when the FPC began its investigation of FP&L. But ignoring what must have been an extended period of initial staff work, we observe that the record shows that FP&L was formally notified on October 3, 1963, that in the opinion of the FPC staff it was subject to FPC jurisdiction. Order Initiating Investigation and Hearing 2412 (T).

enth Circuit in an FPC case similar to this one, even in a criminal prosecution where the highest standards of proof are required, guilt may be shown by circumstantial evidence.[21] The FPC has used tracing studies to show what went into and out of the Turner bus at a given moment; it has marshaled expert opinion to suggest what may reasonably be said to have occurred in the bus at the instant of transmission; it has presented this evidence in a closely reasoned and empirically uncontradicted opinion. Recognizing that the men responsible do not now fully understand electricity,[22] though they know how to use it, and use it on an ever-expanding basis, we do not demand more of the Commission than that its conclusions be substantially supported by expert opinion that is in accord with the facts known for certain. The Commission has done enough to establish its jurisdiction.

The decision of the Court of Appeals is reversed and the case is remanded for reinstatement of the order of the Federal Power Commission.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

There can be no doubt that Congress has constitutional power to regulate under the Commerce Clause the inter-

[21] "We reject I&M's fundamental proposition in this case that in order to prevail, the Federal Power Commission must do what I&M claims to be impossible, that is, to prove by either tracing or some other unnamed 'scientific and engineering proof' that out-of-state energy reaches the wholesale customers. We might recall that even in criminal cases, guilt beyond a reasonable doubt often can be established by circumstantial evidence." *Indiana & Michigan Electric Co.* v. *FPC*, 365 F. 2d 180, at 184.

[22] "Nobody can say for certain just how electricity is really transmitted." Opinion of the Hearing Examiner, 37 F. P. C., at 568.

state "commingling" of electric power involved in the instant case. See *Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515, 525–530. The question is whether it has done so.

The Examiner explains the "electromagnetic unity" theory and tells us in electrical engineering terms why that unasserted power of Congress exists:

> "An electric utility system such as [respondent's] is essentially an electro-mechanical system to which all operating generators on the interconnected network are interlocked electromagnetically. This means that electric generators, under ordinary operating conditions, run either at exactly the same speed or at speeds which will result in a frequency of 60 cycles. No operating generator can change its speed by itself as long as it operates connected to the network. All generators connected to the same network must follow each other as to speed and frequency whenever there is a change in frequency, and the frequency of all interlocked generators is always exactly the same.
>
> "The electric systems of [respondent] and all other interconnected systems are essentially alike as to electrical, electromagnetic and electromechanical characteristics. Because they are alike, it is possible to have presently existing interconnected operations on a very large scale, extending from the Rocky Mountains to the Atlantic Ocean and from the Canadian to the Mexican border.
>
> . . . . .
>
> "If a housewife in Atlanta on the Georgia system turns on a light, every generator on [respondent's] system almost instantly is caused to produce some quantity of additional electric energy which serves to maintain the balance in the interconnected system between generation and load." 37 F. P. C. 544, 567–568.

Evidently undesirous of explicitly overruling the proposition that "[m]ere connection determines nothing," *Jersey Central Power & Light Co.* v. *FPC*, 319 U. S. 61, 72 (1943), the Court avoids validating the FPC's electromagnetic unity theory as the jurisdictional hold over the respondent. Instead, relying on the Commission's expertise, the Court purports to hold a narrower ground that actual flows of FP&L's electricity were in fact measured passing out of Florida through the employment of the Commission's "commingled" tracing method. Closer analysis of this latter wizardry, which had previously been rejected by the Commission, *Connecticut Light & Power Co.*, 3 F. P. C. 132 (1942), reveals, however, that actual flows were not in fact measured but were simply hypothesized using an engineering model which, as the dissenting commissioners observed, "[assumed] the fact in issue, and thus [begged] . . . the question of jurisdiction." The conventional tracing method previously used in cases such as this one reached an entirely different result—that no actual interstate flow of FPL power had occurred. *Jersey Central Power & Light Co.* v. *FPC, supra; Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515.

The Commission's abandonment of the conventional test in favor of the commingled method will now mean that every privately owned interconnected facility in the United States (except for those isolated in Texas) is within the FPC's jurisdiction. Both tracing methods assume that a momentary increase in FP&L's generation over its local needs will be passed on to the interconnecting Florida Power Corp. (Corp) system located between FP&L and the state line. The conventional system assumes that such excesses will be absorbed by the first few loads reached in the Corp system and therefore will never cross the state line. On the other hand, the commingled approach assumes that the first load which the FP&L excess

reaches will continue to rely upon other utilities' power to a large extent and therefore will absorb only a part of the FP&L excess. The leftover FP&L excess will then travel to the next load, but again, will only supply part of those consumers' needs, with the remainder passing on to the next load, and so on, until some fractional part of the original FP&L excess crosses the state line. Extending the assumption's application, it is clear that any momentary increase in output by any generator located at any point in the ISG grid will send a surge of power throughout the entire network. If this assumption is approved, then it is difficult to perceive what remains of the *Jersey Central* proposition that "[m]ere connection determines nothing."

These scientific facts are, of course, the basis for the grid systems, much in vogue these days. But the Commission has no authority to order a company to enter a grid. Unless it is done voluntarily, as was true here, the Commission by virtue of § 202 (b) of the Federal Power Act can act only[1] "upon application of any State commission or of any person engaged in the transmission or sale of electric energy." 16 U. S. C. § 824a (b).

A company transmitting electric energy in interstate commerce is subject to regulation by the Commission of its wholesale rates. 16 U. S. C. § 824 (b). But there is no claim here that wholesale selling is involved; and the minuscule nature of the "commingling" that has taken place and its incidental nature are doubtless the reasons why the Commission has not undertaken that phase of regulation. The case is therefore unlike *Pennsylvania Water & Power Co.* v. *FPC*, 343 U. S. 414, 419–420. All that is involved here is an effort to make respondent

[1] Apart from the exigencies of "war." See 16 U. S. C. § 824a (c).

follow the Commission's Uniform System of Accounts.[2] 16 U. S. C. § 825 (a).

Rather than the engineering battle over tracing methods, the central question ought to be whether the "commingling" is so *de minimis* as to warrant the fastening of the federal bureaucracy on this local company. The limited purpose of this legislation was stated clearly in the Senate Report:

> "The decision of the Supreme Court in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83) placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this inter-

[2] This is not a case where state regulation has a hiatus that the federal regime fills. There is not, in other words, a no-man's area here.

Fla. Stat. § 366.05 (1969), authorizes the Florida Power Commission to "prescribe uniform system and classification of accounts for all public utilities, which among other things shall set up adequate, fair and reasonable depreciation rates and charges." A related section includes within the term public utility every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers operating, managing, or controlling any plant or other facility supplying electricity. *Id.*, § 366.02.

The Commission exercises this power. See 1966 Florida Public Service Comm'n Annual Report 11:

"The Accounting and Auditing Department has the responsibility of maintaining surveillance over the books and records of the various companies within the *Electric* . . . industries subject to regulation by the Commission.

"In meeting this responsibility, the Department maintains a comprehensive file of statistical, financial, and accounting data in the form of annual, quarterly, and monthly reports submitted by the various companies. It maintains a continuous examination of these reports and conducts continuing field audits on the company premises to verify the accuracy . . . to determine the compliance of the basic accounting records with the *Uniform System of Accounts prescribed in the Commission's Rules and Regulations.*" (Emphasis supplied.)

> state utility business are equally immune from State control either legally or practically." S. Rep. No. 621, 74th Cong., 1st Sess., 17.[3]

While federal regulation was to be pervasive, once fastened onto a company, Congress expressed an unambiguous policy to preserve and to rely upon effective and adequate state regulation:

> *"The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States.* The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters." *Id.*, at 18 (emphasis supplied).

And this objective is presented in the statute's language:

> "It is hereby declared . . . that Federal regulation . . . is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." Public Utility Holding Company Act of 1935, § 201 (a), 49 Stat. 847.

The Commission does not assert that Florida's regulation of FP&L is inadequate. Each year the Florida Public Service Commission conducts field audits of electric utilities to ensure compliance with its accounting practices and depreciation rates.[4] Other than enhancing the slogan

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[3] *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927), held that even absent federal legislation the Commerce Clause precluded state rate regulation of sales of energy made by a Rhode Island producer of electricity to a Massachusetts distributor. Thus, one purpose of the Act was to fill the "Attleboro gap" in rate regulation.

[4] Inasmuch as virtually every privately owned utility in the United States (save those in Texas) is interwoven with a grid which at some point intersects a state boundary, the Commission's commingled tracing assumption will effectively eliminate electric utility

of "federal leadership" the Commission cites no function which it might better fulfill than the state regime.

The Court's result also runs counter to the expressed desire of Congress to encourage voluntary interconnection. *Id.*, § 202 (a), 49 Stat. 848. Interconnection between two local companies will now subject both to federal jurisdiction if either is also connected to a grid which at some point crosses a state line. To avoid the costs associated with switching from state to federal regulation a utility may now be induced to sever such interconnections. As the dissenting commissioners recognized:

> "[I]nterconnections serve the objective of reliability, and . . . reliability is strongly in the public interest. But with the present near universality of interconnections, it would seem that the Commission's opinion would as likely lead to present connections being broken as to new connections being established or existing connections strengthened." 37 F. P. C., at 559 (1967).

In light of these congressional purposes I would not superimpose federal regulation on top of state regulation in case of *de minimis* transmissions not made by prearrangement or in case of wholesale transactions. In *Jersey Central Power & Light Co.* v. *FPC*, *supra*, at 66–67, we let federal regulation be fastened, though the energy transmitted was "small." Yet the transmissions apparently were neither accidental nor *de minimis*. *Id.*, at 66 n. 4.

In the instant case respondent is a member of the Interconnected Systems Group (ISG) which covers the southeastern and central portions of the United States.

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regulation by States. In light of the congressional intent to avoid this outcome the Court has placed perhaps excessive reliance on the doctrine of judicial deference to agency expertise.

The Commission approved the Examiner's finding that "all 140 members of the ISG operate in parallel and are interlocked electromagnetically; and that FPL [respondent] can receive from or contribute to ISG up to 100 mw. The record further supports the Examiner's findings that FPL normally has no control over the actual transfers of electric power and energy with any particular electric system with which it is interconnected; that since electric energy can be delivered virtually instantaneously when needed on a system at a speed of 186,000 miles per second, such energy can be and is transmitted to FPL when needed from out-of-state generators, and in turn can be and is transmitted from FPL to help meet out-of-state demands; and finally, that there is a cause and effect relationship in electric energy occurring throughout every generator and point on the FPL, Corp, Georgia, and Southern systems which constitutes interstate transmission of electric energy by, to, and from FPL." 37 F. P. C., at 549.

In the instant case apart from the infinitesimal and sporadic exchanges the Commission only found that "FPL [respondent] contributed 8 mw to ISG to assist a midwestern utility which had sustained a 580–mw generator loss." *Ibid.* And that single episode could be measured in terms of seconds only. Such fleeting episodes are not in my view sufficient to displace a state regime with the federal one, since the Congress promised that as much as possible be left to the States. I would not make that a hollow promise.

If we allow federal pre-emption in this case, then we have come full cycle, leaving local authorities control of electric energy only insofar as municipal plants are concerned. The federal camel has a tendency to occupy permanently any state tent.

That may be a wise course; but if so, Congress should make the decision.

Syllabus

LEGO *v.* TWOMEY, WARDEN

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

No. 70–5037. Argued November 11, 1971—
Decided January 12, 1972

Following a pretrial suppression hearing at which conflicting evidence was presented as to the voluntariness of a confession that petitioner had given the police, the trial judge, presumably applying the Illinois preponderance-of-the-evidence standard, held the confession admissible, and it was introduced into evidence at the trial, which resulted in petitioner's conviction. The judge had instructed the jury as to the prosecution's burden of proving guilt but did not instruct that the jury had to find the confession voluntary before it could be used in reaching its verdict. In a habeas corpus proceeding petitioner challenged his conviction. The District Court denied relief, and the Court of Appeals affirmed. Petitioner contends, relying upon *In re Winship*, 397 U. S. 358, that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence, or, alternatively, that the admissibility of the confession as evidence in a criminal trial (quite apart from its probative value) had to be determined by a reasonable-doubt standard to protect the values that exclusionary rules are designed to serve. Petitioner also urges that, even though the trial judge ruled on his coercion claim, he was entitled under *Duncan* v. *Louisiana*, 391 U. S. 145, to have the jury decide that issue anew. *Held:*

1. The hearing on the voluntariness of a confession required by this Court's decision in *Jackson* v. *Denno*, 378 U. S. 368, is not designed to implement the presumption of innocence and enhance the reliability of jury verdicts, but to prevent the use of a coerced confession as violative of due process quite apart from its truth or falsity. Consequently, determining the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of *In re Winship, supra*. Pp. 482–487.

2. Petitioner has not demonstrated that admissibility rulings based on the preponderance-of-evidence standard are unreliable or that imposition of any higher standard under expanded exclusionary rules would be sufficiently productive to outweigh the

public interest in having probative evidence available to juries. Pp. 487–489.

3. The procedure followed here comported with the requirements of *Jackson, supra,* and petitioner was not entitled to have the voluntariness issue which had been resolved by the trial judge also submitted to a jury for its separate consideration. Nor did *Duncan, supra,* change the rule that determining the admissibility of evidence is a function of the court rather than of the jury. Pp. 489–490.

Affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 490. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Nathan Lewin, by appointment of the Court, 402 U. S. 928, argued the cause and filed a brief for petitioner.

James B. Zagel, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *Warren K. Smoot,* Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1964 this Court held that a criminal defendant who challenges the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. *Jackson* v. *Denno,* 378 U. S. 368. While our decision made plain that only voluntary confessions may be admitted at the trial of guilt or innocence, we did not then announce, or even suggest, that the factfinder at a coercion hearing need judge voluntariness with reference to an especially severe standard of proof. Never-

theless, since *Jackson,* state and federal courts have addressed themselves to the issue with a considerable variety of opinions.[1] We granted certiorari in this case to resolve the question. 401 U. S. 992 (1971).

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[1] State courts that have considered the question since *Jackson* have adopted a variety of standards, most of them founded upon state law. Many have sanctioned a standard of proof less strict than beyond a reasonable doubt, including proof of voluntariness by a preponderance of the evidence or to the satisfaction of the court or proof of voluntariness in fact. *E. g., Duncan* v. *State,* 278 Ala. 145, 176 So. 2d 840 (1965); *State* v. *Dillon,* 93 Idaho 698, 471 P. 2d 553 (1970), cert. denied, 401 U. S. 942 (1971); *People* v. *Harper,* 36 Ill. 2d 398, 223 N. E. 2d 841 (1967); *State* v. *Milow,* 199 Kan. 576, 433 P. 2d 538 (1967); *Barnhart* v. *State,* 5 Md. App. 222, 246 A. 2d 280 (1968); *Commonwealth* v. *White,* 353 Mass. 409, 232 N. E. 2d 335 (1967); *State* v. *Nolan,* 423 S. W. 2d 815 (Mo. 1968); *State* v. *White,* 146 Mont. 226, 405 P. 2d 761 (1965), cert. denied, 384 U. S. 1023 (1966); *State* v. *Brewton,* 238 Ore. 590, 395 P. 2d 874 (1964); *Commonwealth ex rel. Butler* v. *Rundle,* 429 Pa. 141, 239 A. 2d 426 (1968); *Monts* v. *State,* 218 Tenn. 31, 400 S. W. 2d 722 (1966); *State* v. *Davis,* 73 Wash. 2d 271, 438 P. 2d 185 (1968).

Other States, using state law or not specifying a basis, require proof beyond a reasonable doubt. *E. g., State* v. *Ragsdale,* 249 La. 420, 187 So. 2d 427 (1966), cert. denied, 385 U. S. 1029 (1967); *State* v. *Keiser,* 274 Minn. 265, 143 N. W. 2d 75 (1966); *State* v. *Yough,* 49 N. J. 587, 231 A. 2d 598 (1967); *People* v. *Huntley,* 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965); *State* v. *Thundershield,* 83 S. D. 414, 160 N. W. 2d 408 (1968); *State ex rel. Goodchild* v. *Burke,* 27 Wis. 2d 244, 133 N. W. 2d 753 (1965), cert. denied, 384 U. S. 1017 (1966).

Two federal courts have held as an exercise of supervisory power that voluntariness must be proved beyond a reasonable doubt. *Ralph* v. *Warden,* 438 F. 2d 786, 793 (CA4 1970), clarifying *United States* v. *Inman,* 352 F. 2d 954 (CA4 1965); *Pea* v. *United States,* 130 U. S. App. D. C. 66, 397 F. 2d 627 (1967); cf. *United States* v. *Schipani,* 289 F. Supp. 43 (EDNY 1968), aff'd, 414 F. 2d 1262 (CA2 1969), cert. denied, 397 U. S. 922 (1970), requiring the Government to prove beyond a reasonable doubt that certain evidence was not tainted by violation of the Fourth Amendment.

Petitioner Lego was convicted of armed robbery in 1961 after a jury trial in Superior Court, Cook County, Illinois. The court sentenced him to prison for 25 to 50 years. The evidence introduced against Lego at trial included a confession he had made to police after arrest and while in custody at the station house. Prior to trial Lego sought to have the confession suppressed. He did not deny making it but did challenge that he had done so voluntarily. The trial judge conducted a hearing, out of the presence of the jury, at which Lego testified that police had beaten him about the head and neck with a gun butt. His explanation of this treatment was that the local police chief, a neighbor and former classmate of the robbery victim, had sought revenge upon him. Lego introduced into evidence a photograph that had been taken of him at the county jail on the day after his arrest. The photograph showed that petitioner's face had been swollen and had traces of blood on it. Lego admitted that his face had been scratched in a scuffle with the robbery victim but maintained that the encounter did not explain the condition shown in the photograph. The police chief and four officers also testified. They denied either beating or threatening petitioner and disclaimed knowledge that any other officer had done so. The trial judge resolved this credibility problem in favor of the police and ruled the confession admissible.[2] At trial, Lego testified in his own behalf. Although he did not dispute the truth of the confession directly, he did tell his version of the events that had transpired at the

[2] In ruling the confession admissible, the judge stated:

"The petitioner has admitted under oath he had a struggle with the complaining witness over the gun; he was wounded, obtained a facial wound. The Officers testified he was bloody at the time he was arrested.

"I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself."

police station. The trial judge instructed the jury as to the prosecution's burden of proving guilt. He did not instruct that the jury was required to find the confession voluntary before it could be used in judging guilt or innocence.[3] On direct appeal the Illinois Supreme Court affirmed the conviction. *People* v. *Lego,* 32 Ill. 2d 76, 203 N. E. 2d 875 (1965).

Four years later petitioner challenged his conviction by seeking a writ of habeas corpus in the United States District Court for the Northern District of Illinois. He maintained that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence. Although the judge had made no mention of the standard he used, Illinois law provided that a confession challenged as involuntary could be admitted into evidence if, at a hearing outside the presence of the jury, the judge found it voluntary by a preponderance of the evidence.[4] In the alternative petitioner argued that the voluntariness question should also have been submitted to the jury for its separate con-

[3] Illinois followed what we described in *Jackson* v. *Denno,* 378 U. S. 368 (1964), as "the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession . . . ." *Id.,* at 378. While the procedures of all the States could not be neatly classified, we noted that some followed the Massachusetts procedure whereby the judge himself first resolves evidentiary conflicts and determines whether a confession is in fact voluntary. If he is unable so to conclude, the confession may not be admitted into evidence. If judged voluntary and therefore admissible, the jury must also determine the coercion issue and is instructed to ignore a confession it finds involuntary. *Id.,* at 378 n. 8. Other States had adopted the New York procedure at issue in *Jackson.* Our decision in *Jackson* cast no doubt upon the orthodox and Massachusetts procedures but did call into question the practice of every State that did not clearly follow one of these procedures. A thorough tabulation of what States did in the wake of *Jackson* appears in 3 J. Wigmore, Evidence 585–593 (J. Chadbourn rev. 1970).

[4] *People* v. *Wagoner,* 8 Ill. 2d 188, 133 N. E. 2d 24 (1956); *People* v. *Thomlison,* 400 Ill. 555, 81 N. E. 2d 434 (1948).

sideration. After first denying the writ for failure to exhaust state remedies, the District Court granted a rehearing motion, concluded that Lego had no state remedy then available to him and denied relief on the merits. *United States ex rel. Lego* v. *Pate,* 308 F. Supp. 38 (1970).[5] The Court of Appeals for the Seventh Circuit affirmed.[6]

I

Petitioner challenges the judgment of the Court of Appeals on three grounds. The first is that he was not proved guilty beyond a reasonable doubt as required by *In re Winship,* 397 U. S. 358 (1970), because the confession used against him at his trial had been proved voluntary only by a preponderance of the evidence. Implicit in the claim is an assumption that a voluntariness hearing is designed to enhance the reliability of jury verdicts. To judge whether that is so we must return to *Jackson* v. *Denno,* 378 U. S. 368 (1964).

In New York prior to *Jackson,* juries most often determined the voluntariness of confessions and hence whether confessions could be used in deciding guilt or innocence. Trial judges were required to make an initial determination and could exclude a confession, but only if it could not under any circumstances be deemed voluntary.[7] When voluntariness was fairly debatable, either because a dispute of fact existed or because reasonable men could have drawn differing inferences from undisputed facts, the question whether the confession violated due process was for the jury. This meant the confession

[5] Respondent makes no contention here that petitioner either waived the right to adjudicate his federal claims or deliberately bypassed state procedures for testing those claims. Cf. *Fay* v. *Noia,* 372 U. S. 391, 439 (1963).

[6] The Seventh Circuit's affirmance is unreported. *United States ex rel. Lego* v. *Pate,* No. 18313 (CA7 Oct. 8, 1970).

[7] A more thorough description of the New York procedure is found in *Jackson* v. *Denno,* 378 U. S., at 377–391.

was introduced at the trial itself. If evidence challenging its voluntariness were adduced, the jury was instructed first to pass upon voluntariness and, if it found the confession involuntary, ignore it in determining guilt. If, on the other hand, the confession were found to be voluntary, the jury was then free to consider its truth or falsity and give the confession an appropriate weight in judging guilt or innocence.

We concluded that the New York procedure was constitutionally defective because at no point along the way did a criminal defendant receive a clear-cut determination that the confession used against him was in fact voluntary. The trial judge was not entitled to exclude a confession merely because he himself would have found it involuntary, and, while we recognized that the jury was empowered to perform that function, we doubted it could do so reliably. Precisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence, we did not believe a jury could be called upon to ignore the probative value of a truthful but coerced confession; it was also likely, we thought, that in judging voluntariness itself the jury would be influenced by the reliability of a confession it considered an accurate account of the facts. "It is now axiomatic," we said,

> "that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers* v. *Richmond,* 365 U. S. 534, and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *New York,* 324 U. S. 401; *Stroble* v. *California,* 343 U. S. 181; *Payne* v. *Arkansas,* 356 U. S. 560. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the con-

> fession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Rogers* v. *Richmond, supra.*" [8]

We did not think it necessary, or even appropriate, in *Jackson* to announce that prosecutors would be required to meet a particular burden of proof in a *Jackson* hearing held before the trial judge.[9] Indeed, the then-established duty to determine voluntariness had not been framed in terms of a burden of proof,[10] nor has it been since *Jackson* was decided.[11] We could fairly assume then, as we can now, that a judge would admit into evidence only those confessions that he reliably found, at least by a preponderance of the evidence, had been made voluntarily.

We noted in *Jackson* that there may be a relationship between the involuntariness of a confession and its unreliability.[12] But our decision was not based in the

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[8] *Jackson* v. *Denno*, 378 U. S., at 376–377.

[9] "Judge" is used here and throughout the opinion to mean a factfinder, whether trial judge or jury, at a voluntariness hearing. The proscription against permitting the jury that passes upon guilt or innocence to judge voluntariness in the same proceeding does not preclude the States from impaneling a separate jury to determine voluntariness. *Jackson* v. *Denno*, 378 U. S., at 391 n. 19.

[10] See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Spano* v. *New York*, 360 U. S. 315 (1959); *Payne* v. *Arkansas*, 356 U. S. 560 (1958).

[11] See, *e. g.*, *Frazier* v. *Cupp*, 394 U. S. 731 (1969); *Boulden* v. *Holman*, 394 U. S. 478 (1969); *Harrison* v. *United States*, 392 U. S. 219 (1968); *Greenwald* v. *Wisconsin*, 390 U. S. 519 (1968); *Clewis* v. *Texas*, 386 U. S. 707 (1967); *Davis* v. *North Carolina*, 384 U. S. 737 (1966); cf. *Procunier* v. *Atchley*, 400 U. S. 446 (1971).

[12] We noted that coerced confessions are forbidden in part because of their "probable unreliability." *Jackson* v. *Denno*, 378 U. S., at 385–386. However, it had been settled when this Court decided *Jackson* that the exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to

slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence. That case was not aimed at reducing the possibility of convicting innocent men.

Quite the contrary, we feared that the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness. The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles. *Rogers* v. *Richmond,* 365 U. S. 534, 540–541 (1961).[13] The procedure we established in *Jackson* was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has

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serve. *Rogers* v. *Richmond,* 365 U. S. 534 (1961). The sole issue in such a hearing is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden. The judge may not take into consideration evidence that would indicate that the confession, though compelled, is reliable, even highly so. *Id.,* at 545. As difficult as such tasks may be to accomplish, the judge is also duty-bound to ignore implications of reliability in facts relevant to coercion and to shut from his mind any internal evidence of authenticity that a confession itself may bear.

[13] In *Jackson,* 378 U. S., at 377–391, we traced the genesis of the view that due process forbids the use of coerced confessions, whether or not reliable. The Court had departed from that view in *Stein* v. *New York,* 346 U. S. 156 (1953), whose premise was that a confession is excludable because of its inherent untrustworthiness. The *Stein* premise was repudiated in *Rogers* v. *Richmond* and *Rogers* was reaffirmed in *Davis* v. *North Carolina,* 384 U. S., at 739, and *Johnson* v. *New Jersey,* 384 U. S. 719, 729 n. 9 (1966). That case continues to serve as the basis for evaluating coercion claims. See cases cited in n. 11, *supra.*

been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.[14] In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief.

Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship*, 397 U. S. 358 (1970). Our decision in *Winship* was not concerned with standards for determining the admissibility of evidence or with the prosecution's burden of proof at a suppression hearing when evidence is challenged on constitutional grounds. *Winship* went no further than to confirm the fundamental right that protects "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. A high standard of proof is

[14] This is the course that petitioner pursued. Cf. *Jackson* v. *Denno*, 378 U. S., at 386 n. 13. Although 18 U. S. C. § 3501 (a) is inapplicable here, it is relevant to note the provisions of that section:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

necessary, we said, to ensure against unjust convictions by giving substance to the presumption of innocence. *Id.*, at 363. A guilty verdict is not rendered less reliable or less consonant with *Winship* simply because the admissibility of a confession is determined by a less stringent standard. Petitioner does not maintain that either his confession or its voluntariness is an element of the crime with which he was charged. He does not challenge the constitutionality of the standard by which the jury was instructed to decide his guilt or innocence; nor does he question the sufficiency of the evidence that reached the jury to satisfy the proper standard of proof. Petitioner's rights under *Winship* have not been violated.[15]

II

Even conceding that *Winship* is inapplicable because the purpose of a voluntariness hearing is not to implement the presumption of innocence, petitioner presses for reversal on the alternative ground that evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt in order to give adequate protection to those values that exclusionary rules are designed to serve. *Jackson* v. *Denno, supra,* an offspring of *Brown* v. *Mississippi,* 297 U. S. 278 (1936), requires judicial rulings on voluntariness prior to admitting confessions. *Miranda* v. *Arizona,* 384

[15] Nothing is to be gained from restating the constitutional rule as requiring proof of guilt beyond a reasonable doubt on the basis of constitutionally obtained evidence and then arguing that rights under *Winship* are diluted unless admissibility is governed by a high standard. Transparently, this assumes the question at issue, which is whether a confession is admissible if found voluntary by a preponderance of the evidence. *United States* v. *Schipani, supra,* n. 1, followed this unsatisfactory course in a Fourth Amendment case but stopped short of basing the decision on the Constitution.

U. S. 436 (1966), excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained. *Weeks* v. *United States*, 232 U. S. 383 (1914), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), make impermissible the introduction of evidence obtained in violation of a defendant's Fourth Amendment rights. In each instance, and without regard to its probative value, evidence is kept from the trier of guilt or innocence for reasons wholly apart from enhancing the reliability of verdicts. These independent values, it is urged, themselves require a stricter standard of proof in judging admissibility.

The argument is straightforward and has appeal. But we are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt.[16] Evidence obtained in violation of the Fourth Amendment has been excluded from federal criminal trials for many years. *Weeks* v. *United States*, *supra*. The same is true of coerced confessions offered in either federal or state trials. *Bram* v. *United States*, 168 U. S. 532 (1897); *Brown* v. *Mississippi*, *supra*. But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. Petitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard. Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evi-

[16] It is no more persuasive to impose the stricter standard of proof as an exercise of supervisory power than as a constitutional rule. Cf. *Ralph* v. *Warden*, *supra*, n. 1, clarifying *United States* v. *Inman*, *supra*, n. 1; *Pea* v. *United States*, *supra*, n. 1.

dence before state juries and by revising the standards applicable in collateral proceedings. Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.

To reiterate what we said in *Jackson:* when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake.[17]

III

We also reject petitioner's final contention that, even though the trial judge ruled on his coercion claim, he was entitled to have the jury decide the claim anew. To the extent this argument asserts that the judge's determination was insufficiently reliable, it is no more persuasive than petitioner's other contentions. To the extent the position assumes that a jury is better suited than a judge to determine voluntariness, it questions the basic assumptions of *Jackson* v. *Denno;* it also ignores

[17] See cases cited in n. 1, *supra.*

that *Jackson* neither raised any question about the constitutional validity of the so-called orthodox rule for judging the admissibility of confessions nor even suggested that the Constitution requires submission of voluntariness claims to a jury as well as a judge. Finally, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which made the Sixth Amendment right to trial by jury applicable to the States, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury. Nor did that decision require that both judge and jury pass upon the admissibility of evidence when constitutional grounds are asserted for excluding it. We are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim.

The decision of the Court of Appeals is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

When the prosecution, state or federal, seeks to put in evidence an allegedly involuntary confession, its admissibility is determined by the command of the Fifth Amendment that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Davis* v. *North Carolina*, 384 U. S. 737, 740 (1966); *Malloy* v. *Hogan*, 378 U. S. 1, 7–8 (1964); *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897). This right against compulsory self-incrimination is the "essential mainstay" of our system of criminal prosecution, *Malloy* v. *Hogan*, *supra*, at 7, "a system in which the State must establish guilt by evidence independently

and freely secured and may not by coercion prove its charge against an accused out of his own mouth," *Rogers* v. *Richmond,* 365 U. S. 534, 541 (1961). What is thereby protected from governmental invasion is, quite simply, "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan, supra,* at 8. Hence, a confession is involuntary and inadmissible unless it is "the product of a rational intellect and a free will." *Blackburn* v. *Alabama,* 361 U. S. 199, 208 (1960); see *Reck* v. *Pate,* 367 U. S. 433, 440 (1961).

Ideally, of course, a defendant's compelled utterance would never be admitted into evidence against him. As we said in *Jackson* v. *Denno,* 378 U. S. 368, 376 (1964), it is "axiomatic" that a criminal conviction cannot stand if it "is founded, in whole or in part, upon an involuntary confession . . . even though there is ample evidence aside from the confession to support the conviction." Yet I doubt that informed observers of the criminal process would deny that at least some compelled utterances slip through, even assuming scrupulous adherence to constitutional standards and the most rigorous procedural protections. *Jackson* was an attempt to move that reality somewhat closer to the ideal. We there rejected the New York rule because it "did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial" and consequently "did not adequately protect [a defendant's] right to be free of a conviction based upon a coerced confession." *Id.,* at 377. As the Court today points out, "[t]he procedure we established in *Jackson* was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances." *Ante,* at 485.

There is no need to dwell upon the importance our American concept of justice attaches to preserving the

integrity of the constitutional privilege. Both the rule that automatically reverses a conviction when an involuntary confession was admitted at trial and the procedure established in *Jackson* for determining whether a confession was voluntary are means to further the end that no utterance of a defendant not the product of his own free choice will be used against him. The Court today reaffirms what we held in *Jackson:* "[W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Ante,* at 489. But the Court goes on to hold that it follows from *Jackson* that "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." *Ibid.* I disagree. In my view, the rationale of *Jackson* requires the conclusion that the preponderance standard does not provide sufficient protection against the danger that involuntary confessions will be employed in criminal trials.

A *Jackson* hearing normally presents the factfinder with conflicting testimony from the defendant and law enforcement officers about what occurred during the officers' interrogation of the defendant. The factfinder's resolution of this conflict is often, as a practical matter, the final resolution of the voluntariness issue. *Jackson, supra,* at 390–391. This case is a typical example. Petitioner testified that he confessed because the police had beaten him; the police testified that there was no beating. As the Court notes, "[t]he trial judge resolved this credibility problem in favor of the police and ruled the confession admissible." *Ante,* at 480. When the question before the factfinder is whether to believe one or the other of two self-serving accounts of what has happened, it is apparent that the standard of persuasion will in many instances be of controlling significance.

See *Speiser* v. *Randall,* 357 U. S. 513, 525–526 (1958). Although the Court suggests "that federal rights have [not] suffered from determining admissibility by a preponderance of the evidence" and that there has been no showing "that admissibility rulings have been unreliable . . . because not based on some higher standard," *ante,* at 488, I do not think it can be denied, given the factual nature of the ordinary voluntariness determination, that permitting a lower standard of proof will necessarily result in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard. The converse, of course, is also true. Requiring the higher standard means that some voluntary confessions will be excluded as involuntary even though they would have been found voluntary under the lower standard.

The standard of proof required for a criminal conviction presents a similar situation, yet we have held that guilt must be established by proof beyond a reasonable doubt. *In re Winship,* 397 U. S. 358, 361–364 (1970); see *id.,* at 370–372 (Harlan, J., concurring.) Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent. Conversely, imposing the burden of proof beyond a reasonable doubt means that more defendants who are in fact guilty are found innocent. It seems to me that the same considerations that demand the reasonable-doubt standard when guilt or innocence is at stake also demand that standard when the question is the admissibility of an allegedly involuntary confession.

We permit proof by a preponderance of the evidence in civil litigation because "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *Id.,* at 371 (Harlan, J., concurring). We do not take that view in criminal cases.

We said in *Winship* that the reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence . . . ." *Id.*, at 363. As Mr. Justice Harlan put it in his concurring opinion, the requirement of proof beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.*, at 372.

If we permit the prosecution to prove by a preponderance of the evidence that a confession was voluntary, then, to paraphrase Mr. Justice Harlan, we must be prepared to justify the view that it is no more serious in general to admit involuntary confessions than it is to exclude voluntary confessions. I am not prepared to justify that view. Compelled self-incrimination is so alien to the American sense of justice that I see no way that such a view could ever be justified. If we are to provide "concrete substance" for the command of the Fifth Amendment that no person shall be compelled to condemn himself, we must insist, as we do at the trial of guilt or innocence, that the prosecution prove that the defendant's confession was voluntary beyond a reasonable doubt.* In my judgment, to paraphrase Mr. Jus-

*My view that the reasonable-doubt standard must be imposed upon the prosecution does not depend upon whether that standard would be more effective than some lower standard in deterring police misconduct. When a defendant challenges his confession as involuntary, "the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary . . . .'" *Malloy* v. *Hogan*, 378 U. S. 1, 7 (1964). It is true that the defendant will frequently allege police misconduct, as petitioner did here. Nevertheless, as we said in *Townsend* v. *Sain*, 372 U. S. 293, 308 (1963), "[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible." (Emphasis in original.)

tice Harlan again, the command of the Fifth Amendment reflects the determination of our society that it is worse to permit involuntary self-condemnation than it is to deprive a jury of probative evidence. Just as we do not convict when there is a reasonable doubt of guilt, we should not permit the prosecution to introduce into evidence a defendant's confession when there is a reasonable doubt that it was the product of his free and rational choice.

I add only that the absolute bar against the admission of a defendant's compelled utterance at his criminal trial is fundamentally an expression of the American commitment to the moral worth of the individual. What we said in *Winship* bears repeating here. "[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*, at 364. I believe that it is just as critical to our system of criminal justice that when a person's words are used against him, no reasonable doubt remains that he spoke of his own free will.

GROPPI *v.* LESLIE, SHERIFF

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

No. 70–112. Argued November 10, 1971—Decided January 13, 1972

Wisconsin legislative resolution citing petitioner for contempt for conduct on the floor of the State Assembly that occurred two days previous to the contempt resolution and sentencing him to confinement *held* violative of due process, since petitioner, who was readily available, was given no notice before the resolution was adopted or afforded any opportunity to respond by way of defense or extenuation. Pp. 499–507.

436 F. 2d 326 and 331, reversed.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

William M. Coffey argued the cause for petitioner. With him on the brief were *Robert J. Lerner, John D. Murray,* and *Steven H. Steinglass.*

Sverre O. Tinglum, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *Robert W. Warren,* Attorney General.

Melvin L. Wulf, Sanford J. Rosen, and *Robert H. Friebert* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ of certiorari to review the holding of the Court of Appeals for the Seventh Circuit, denying petitioner relief in habeas corpus proceedings after the District Court had granted relief.

On October 1, 1969, the Assembly of the Wisconsin Legislature passed a resolution citing petitioner for contempt and directing his confinement in the Dane County

jail for a period of six months or for the duration of the 1969 Regular Session of the legislature, whichever was shorter. The resolution recited that petitioner had, two days previously, led a gathering of people which, by its presence on the floor of the Assembly during a regular meeting in violation of an Assembly Rule, "prevented the Assembly from conducting public business and performing its constitutional duty." The resolution contained a finding that petitioner's actions constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" which the Assembly was authorized to punish under the State Constitution and statutes.[1]

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[1] The text of the October 1 resolution was as follows:

"1969 Spec. Sess. ASSEMBLY RESOLUTION

"Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

"In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

"Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

"(1) Finds James E. Groppi guilty of contempt of the Assembly; and

"(2) In accordance with Section 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

"Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further

The record before us contains little to flesh out the recitations of the contempt resolution with the details of petitioner's conduct on the day of September 29, 1969. The Wisconsin Supreme Court, in its opinion denying petitioner's application for habeas corpus, took judicial notice that petitioner's conduct was designed to protest cuts in the state budget for certain welfare programs, and that the "occupation" of the Assembly chamber by petitioner and his supporters continued from midday to "well toward midnight," during all of which time the Assembly was prevented from conducting its lawful business.[2]

The contempt resolution was adopted without giving notice to petitioner or affording him an opportunity to present a defense or information in mitigation. A copy of the resolution was then served on petitioner who, at the time the resolution was passed, was already confined in the Dane County jail following his arrest on disorderly conduct charges arising out of the same incident as that

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action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

"Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom."

Article IV, § 8, Wisconsin Constitution provides in part:

"Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior . . . ."

Section 13.26, Wis. Stat. (1967), provides in part:

"(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members . . . for . . .

. . . . . .

"(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.

. . . . . .

"(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

[2] On oral argument, counsel for petitioner conceded these facts. The paucity of the record may be attributed to the fact that the District Court acted on the pleadings without an evidentiary hearing.

underlying the resolution.[3] Petitioner's confinement after he was served with the resolution was pursuant to its authority.

Petitioner then commenced actions in both state and federal courts contending that his confinement violated his constitutional rights, and seeking his release. Petitioner's applications for habeas corpus were denied by the Circuit Court for Dane County and the Wisconsin Supreme Court. However, after the state courts had acted, the United States District Court for the Western District of Wisconsin granted petitioner's federal habeas application. The District Court was of the view that petitioner had been denied due process of law guaranteed by the Fourteenth Amendment by the failure of the Assembly to accord him "some minimal opportunity to appear and to respond to a charge" prior to the imposition of punishment for contempt. On appeal, the Court of Appeals reversed the holding of the District Court; the holding of the panel was adopted by a narrowly divided court on rehearing *en banc*. We granted certiorari. For the reasons stated herein, we conclude that petitioner was denied due process of law by the procedures employed in punishing him for contempt, and we reverse the judgment of the Court of Appeals.

I

The past decisions of this Court expressly recognizing the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power. *E. g., Jurney* v. *MacCracken*, 294 U. S. 125 (1935); *Anderson* v. *Dunn*, 6 Wheat. 204 (1821). There is nothing in the Constitution

[3] Tr. of Oral Arg. 4, 27. Petitioner was subsequently tried in County Court on the disorderly conduct charge. He was discharged by the court after the jury was unable to reach a verdict.

that would place greater restrictions on the States than on the Federal Government in this regard. See *Kilbourn* v. *Thompson,* 103 U. S. 168, 199 (1881). We are therefore concerned only with the procedures that the Due Process Clause of the Federal Constitution requires a state legislature to meet in imposing punishment for contemptuous conduct committed in its presence.

This Court has often recognized that the requirements of due process cannot be ascertained through mechanical application of a formula. See, *e. g., Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 894–895 (1961); *Hannah* v. *Larche,* 363 U. S. 420 (1960). Mr. Justice Frankfurter, in another context, aptly stated that due process "is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . ." *Joint Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 162–163 (1951) (concurring opinion). Courts must be sensitive to the nature of a legislative contempt proceeding and the "possible burden on that proceeding" that a given procedure might entail. *Hannah* v. *Larche,* 363 U. S., at 442. Legislatures are not constituted to conduct full-scale trials or quasi-judicial proceedings and we should not demand that they do so although they possess inherent power to protect their own processes and existence by way of contempt proceedings. For this reason, the Congress of the United States, for example, no longer undertakes to exercise its contempt powers in all cases but elects to delegate that function to federal courts. 52 Stat. 942, 2 U. S. C. §§ 192–194.

The potential for disrupting or immobilizing the vital legislative processes of State and Federal Governments that would flow from a rule requiring a full-blown legislative "trial" prior to the imposition of punishment for contempt of the legislature is a factor entitled to very great weight; this is particularly true where the con-

temptuous conduct, as here, is committed directly in the presence of the legislative body. The past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him. See *Jurney* v. *MacCracken,* 294 U. S., at 143–144; *Kilbourn* v. *Thompson,* 103 U. S., at 173, 174; *Anderson* v. *Dunn,* 6 Wheat., at 209–211; *Marshall* v. *Gordon,* 243 U. S. 521, 532 (1917).[4] Such would appear to have been the general practice in colonial times, and in the early state legislatures.[5] This practice more nearly resembles the traditional right of a criminal defendant to allocution prior to the imposition of sentence than it does a criminal prosecution. See *Green* v. *United States,* 365 U. S. 301 (1961).

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[4] See generally 2 A. Hinds, Precedents of the House of Representatives, cc. 51, 52; E. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt (1928).

Hinds discusses an assault by one reporter on another on the floor of the House on June 11, 1836. The House did not proceed immediately to hold the party in contempt, but appointed a select committee to investigate the matter. The contemnor appeared before the committee and admitted his offense. Before it acted on the report of the committee by passing a contempt resolution, the House brought the contemnor before the Bar of the House. Hinds, *supra,* at § 1630. Hinds also discusses numerous instances of "direct" contempts committed by members of the House in which the contemnor was afforded an opportunity to speak in his behalf. See §§ 1642–1643, 1647, 1648, 1650–1653, 1657, 1665.

[5] See M. Clarke, Parliamentary Privilege in the American Colonies 103–105, 109–111 and n. 47, 112–113 (1943); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. Pa. L. Rev. 691, 704–705, 707, 711–712, 716, 718, 719–722, 724–725 (1926).

II

In this case, however, there is no occasion to define or delineate precisely what process is due and must be accorded to a contemnor prior to the legislative imposition of punishment for contemptuous conduct. Here, the Wisconsin Assembly, two days after the conduct had occurred, found petitioner in contempt and sentenced him to confinement without giving him notice of any kind or opportunity to answer. There is no question of his having fled or become otherwise unavailable for, as we have noted, he was confined in the county jail at the time, and could easily have been given notice, if indeed not compelled, to appear before the Assembly. We find little in our past decisions that would shed light on the precise problem, but nothing to give warrant to the summary procedure employed here, coming as it did two days after the contempt. Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are "basic in our system of jurisprudence." *In re Oliver,* 333 U. S. 257, 273 (1948). See, *e. g., Joint Anti-Fascist Committee* v. *McGrath,* 341 U. S., at 143, 164–165, 171–172, 178, 185 (concurring opinions of Black, Frankfurter, DOUGLAS, and Jackson, JJ.); *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948). We have emphasized this fundamental principle where rights of less standing than personal liberty were at stake. *E. g., Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Morgan* v. *United States,* 304 U. S. 1, 18 (1938); *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). In *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306 (1950), the Court stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they

> require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U. S., at 313.

Although this language was addressed to *judicial* adjudication, historical practice would indicate that legislatures themselves have recognized the value of prior notice and hearing in cases of legislative contempt.

In exercise of the right to be heard, however briefly—the length and nature of which would traditionally be left largely to the legislative body—the putative contemnor might establish, for example, that it was a case of mistaken identity, or, also by way of affirmative defense, that he was mentally incompetent.[6] Other matters in explanation or mitigation might lessen the harshness of the legislative judgment or avoid punishment altogether.

III

Wisconsin, however, argues that the power of a legislature to summarily punish for contempts committed in its immediate presence follows logically from the recognized power of courts in that respect. *E. g., Ex parte Terry,* 128 U. S. 289 (1888). Even if it be assumed that courts and legislatures are fully analogous in this respect, the recorded cases dealing with the power of a court to impose summary punishment for contempt committed in its immediate presence show that such power has not ordinarily been exercised under conditions such as those here, with a lapse of two days following the event and without notice or opportunity for hearing of any kind. A legislature, like a court, must, of necessity, possess the power to act "immediately" and "instantly"

[6] In the latter case, a legislative body, like a court, might direct a psychiatric examination. It can be assumed that one so disoriented as not to appreciate the nature of his acts would not be punished for contemptuous conduct.

to quell disorders in the chamber if it is to be able to maintain its authority and continue with the proper dispatch of its business. *In re Oliver*, 333 U. S., at 274–275; *Ex parte Terry*, 128 U. S., at 308, 310; *Johnson* v. *Mississippi*, 403 U. S. 212, 214 (1971); *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 463 (1971). Where, however, the contemptuous episode has occurred two days previously, it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable a legislative body to proceed with its business.

The function of the contempt process by a legislative body is perhaps more related to deterrence of those disposed to create disorders than to restoring order. But the deterrence function can equally be served—perhaps even better—by giving notice and bringing the contemnor before the body and giving opportunity to be heard before being declared in contempt and sentenced.[7]

Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present, of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations.[8] Moreover, in such a situation, the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution. See *Levine* v. *United*

[7] Under circumstances such as those in this case, neither a court nor a legislative body has any obligation to afford a contemnor a forum to expound his political, economic, or social views; but this does not mean that some brief period to present matter specifically in defense, extenuation, or mitigation is not required.

[8] The Court has been careful to limit strictly the exercise of the summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge. See *Johnson* v. *Mississippi*, 403 U. S. 212, 214–215 (1971); *In re Oliver*, 333 U. S. 257, 275–276 (1948).

States, 362 U. S. 610, 613–614 (1960); *Brown* v. *United States,* 359 U. S. 41, 52 (1959); *United States* v. *Sacher,* 182 F. 2d 416, 418 (CA2 1950), aff'd, 343 U. S. 1 (1952). Even in those circumstances, as we have noted, the conduct and utterance might be found excusable by a legislature or a court should it develop that the contemnor was suffering from some mental disorder rendering him unable to conform his conduct to requirements of the law and conventional behavior. Where, however, a legislative body acts two days after the event, in the absence of the contemnor, and without notice to him, there is no assurance that the members of the legislature are acting, as a judge does in a contempt case, on the basis of personal observation and identification of the contemnor engaging in the conduct charged, nor is there any opportunity whatsoever for him to speak in defense or mitigation, if he is in fact the offender.

Ex parte Terry, supra, does not control this case. There the circuit court acted promptly after the contemnor—who was a lawyer—had voluntarily absented himself from the courtroom and while he was present in an adjacent room of the court building. This Court concluded that the contemnor could not defeat the jurisdiction of the circuit court to act as soon as reasonably possible to punish the contempt by his voluntary departure from the courtroom. 128 U. S., at 310–311. The Court reasoned that

> "The departure of the petitioner from the courtroom to another room, near by, in the same building, was his voluntary act. And his departure, without making some apology for, or explanation of, his conduct, might justly be held to aggravate his offence, and to make it plain that, consistently with the public interests, there should be no delay, upon the part of the court, in exerting its power to punish." *Id.,* at 311.

Dealing only with the narrow circumstances present in *Terry,* the Court expressly reserved the question whether the circuit court would have had the power to proceed on a subsequent day without according the contemnor an opportunity to be heard. *Id.,* at 314. By way of contrast, the resolution in this case was, as we have noted, adopted two days after the event and while petitioner was being detained in the county jail in the same city, and hence available to be served with notice. In *Sacher* v. *United States,* 343 U. S. 1 (1952), the Court approved the trial judge's action in waiting until the end of a nine-month trial to summarily hold defense counsel [9] in contempt for breaches committed during the trial. However, the Court was careful to observe that an immediate holding of contempt during the trial might have prejudiced the defendants in the eyes of the jury or otherwise impeded their advocacy. Moreover, the contemnors were present throughout the course of the trial, were repeatedly warned by the trial judge that their conduct was contemptuous, were advised that they could be called to account later,[10] and were given an opportunity to speak.[11]

At a very early stage in our history this Court stated that the legislative contempt power should be limited to "[t]he least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat., at 231; *In re Oliver,* 333 U. S., at 274. While a different result

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[9] One of the contemnors was a layman who had acted as his own lawyer.

[10] 182 F. 2d, at 428.

[11] *Id.,* at 418. Although he imposed sentence before hearing the contemnors, the trial judge would, no doubt have modified his action had their statements proved persuasive. See *United States* v. *Galante,* 298 F. 2d 72, 76 (CA2 1962) (Friendly, J., concurring and dissenting). Modification of contempt penalties is common where the contemnor apologizes or presents matter in mitigation.

might well follow had the Wisconsin Assembly acted immediately upon occurrence of the contemptuous conduct and while the contemnor was in the chamber,[12] or nearby within the Capitol building, as in *Terry*, we conclude that the procedures employed in this case were beyond the legitimate scope of that power because of the absence of notice or any opportunity to respond. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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[12] The present practice of Parliament is described in E. May, The Law, Privileges, Proceedings and Usage of Parliament (17th ed. 1964) as follows:

"When the contempt is committed in the actual view of either House, as, for example, where a witness prevaricates, gives false evidence or refuses to answer, the House proceeds *at once*, without hearing the offender, *unless by way of apology or to manifest his contrition*, to punish him for his contempt." *Id.*, at 133 (emphasis added).

CALIFORNIA MOTOR TRANSPORT CO. ET AL. *v.* TRUCKING UNLIMITED ET AL.

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

No. 70–92. Argued November 10, 1971—Decided January 13, 1972

Respondent highway carriers filed this civil action under § 4 of the Clayton Act for injunctive relief and damages against petitioner highway carriers charging that petitioners conspired to monopolize the transportation of goods by instituting state and federal proceedings to resist and defeat applications by respondents to acquire, transfer, or register operating rights. Respondents alleged that the purpose of the conspiracy was "putting their competitors . . . out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carrier business in California and elsewhere," and deterring respondents from having free and unlimited access to the agencies and the courts. The District Court dismissed the complaint for failure to state a cause of action but the Court of Appeals reversed. *Held:* While any carrier has the right of access to administrative agencies and courts to defeat applications of competitors for certificates as highway carriers, and its purpose to eliminate an applicant as a competitor may be implicit in such opposition, its First Amendment rights are not immunized from regulation when they are used as an integral part of conduct violative of the antitrust laws. If the allegations that petitioners combined to harass and deter respondents from having "free and unlimited access" to agencies and courts, and to defeat that right by massive, concerted, and purposeful group activities are established as facts, a violation of the antitrust laws will have been demonstrated, and it is immaterial that the means used in violation may be lawful. Pp. 509–516.

432 F. 2d 755, affirmed and remanded for trial.

DOUGLAS, J., wrote the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post,* p. 516. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Boris H. Lakusta argued the cause for petitioners. With him on the briefs were *W. D. Benson, John MacDonald Smith,* and *Daniel H. Benson.*

Michael N. Khourie argued the cause and filed a brief for respondents.

Dennis N. Garvey filed a brief for Landmarks Holding Corp. et al. as *amici curiae.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

This is a civil suit under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for injunctive relief and damages instituted by respondents, who are highway carriers operating in California, against petitioners, who are also highway carriers operating within, into, and from California. Respondents and petitioners are, in other words, competitors. The charge is that the petitioners conspired to monopolize trade and commerce in the transportation of goods in violation of the antitrust laws. The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights. These activities, it is alleged, extend to rehearings and to reviews or appeals from agency or court decisions on these matters.

The District Court dismissed the complaint for failure to state a cause of action, 1967 Trade Cas. ¶ 72,298. The Court of Appeals reversed, 432 F. 2d 755. The case is here on a petition for a writ of certiorari, which we granted. 402 U. S. 1008.

The present case is akin to *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127, where a group of trucking companies sued a group of railroads to restrain them from an alleged conspiracy to monopolize

the long-distance freight business in violation of the antitrust laws and to obtain damages. We held that no cause of action was alleged insofar as it was predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement. We rested our decision on two grounds:

> (1) "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.*, at 137.
>
> (2) "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.*, at 138.

We followed that view in *United Mine Workers* v. *Pennington*, 381 U. S. 657, 669–671.

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See *Johnson* v. *Avery*, 393 U. S. 483, 485; *Ex parte Hull*, 312 U. S. 546, 549.

We conclude that it would be destructive of rights of association and of petition to hold that groups with

common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.

We said, however, in *Noerr* that there may be instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U. S., at 144.

In that connection the complaint in the present case alleged that the aim and purpose of the conspiracy was "putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere."

More critical are other allegations, which are too lengthy to quote, and which elaborate on the "sham" theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became "the regulators of the grants of rights, transfers and registrations" to respondents—thereby depleting and diminishing the value of the businesses of respondents and aggrandizing petitioners' economic and monopoly power. See Note, 57 Calif. L. Rev. 518 (1969).

Petitioners rely on our statement in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." 381 U. S., at 670. In the present case, however,

the allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that petitioners "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be "to discourage and ultimately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*.

The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. We said:

> "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." 365 U. S., at 141.

Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker*

Process Equipment v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 175–177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707; *Harman* v. *Valley National Bank*, 339 F. 2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F. 2d 851 (CA9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.

It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490. In that case Missouri enacted a statute banning secondary boycotts and we sustained an injunction against picketing to enforce the boycott, saying:

> "It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U. S., at 502.

In *Associated Press* v. *United States*, 326 U. S. 1, we held that the Associated Press was not immune from the antitrust laws by reason of the fact that the press is under the shelter of the First Amendment. We said:

> "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the

> First Amendment does not sanction repression of that freedom by private interests." *Id.*, at 20.

Accord, *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 139–140. Cf. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600.

The rationale of those cases, when applied to the instant controversy, makes the following conclusions clear: (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.

First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (see *NAACP* v. *Button,* 371 U. S. 415, 444) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. As stated in the opinion concurring in the judgment, that is the essence of those parts of the complaint to which we refer. If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

What the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion. *Walker*

Process Equipment v. *Food Machinery & Chemical Corp.*, 382 U. S., at 174–175. On their face the above-quoted allegations come within the "sham" exception in the *Noerr* case, as adapted to the adjudicatory process.

Accordingly we affirm the Court of Appeals and remand the case for trial.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

In the *Noerr* case [1] this Court held, in a unanimous opinion written by Mr. Justice Black, that a conspiracy by railroads to influence legislative and executive action in order to destroy the competition of truckers in the long-haul freight business was wholly immune from the antitrust laws.[2] This conclusion, we held, was required in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment.[3] Today the Court retreats from *Noerr*, and in the process tramples upon important First Amendment values. For that reason I cannot join the Court's opinion.

In *Noerr* the defendants were joined together in an effort to induce legislative and executive action. Here,

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[1] *Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U. S. 127.

[2] See also *United Mine Workers* v. *Pennington*, 381 U. S. 657, 669–671.

[3] This conclusion, the Court held, was a corollary of our decisions in *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, and *Parker* v. *Brown*, 317 U. S. 341, holding that when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation.

so the complaint alleges, the defendants (petitioners) have joined to induce administrative and judicial action. The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery.[4] But, contrary to implications in the Court's opinion, there are in this case no allegations whatever of any such conduct on the part of the petitioners. And, in the absence of such conduct, I can see no difference, so far as the antitrust laws and the First Amendment are concerned, between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies. *NAACP* v. *Button*, 371 U. S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1; *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217; *United Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576.

The Court concedes that the petitioners' "right of access to the agencies and courts to be heard on applications sought by competitive highway carriers . . . is part of the right of petition protected by the First Amendment." Yet, says the Court, their joint agreement to exercise that right "does not necessarily give them immunity from the antitrust laws." *Ante*, at 513. It is difficult to imagine a statement more totally at odds with *Noerr*. For what that case explicitly held is that the joint exercise of the constitutional right of petition *is* given immunity from the antitrust laws.

While disagreeing with the Court's opinion, I would

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[4] In *Noerr*, the Court emphasized that the defendants' "unethical" conduct did not affect their antitrust immunity for jointly exerting pressure on the Legislative and Executive Branches, 365 U. S., at 141. See, however, *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172.

nonetheless remand this case to the District Court for trial. The complaint contains allegations that the petitioners have:

> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing 'with or without probable cause and regardless of the merits' every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program.

Under these allegations, liberally construed, the respondents are entitled to prove that the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes. Such an intent would make the conspiracy "an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S., at 144.

It is only on this basis that I concur in the judgment of the Court.

HAINES *v.* KERNER ET AL.

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

No. 70–5025. Argued December 6, 1971—Decided January 13, 1972

Prisoner's *pro se* complaint seeking to recover damages for claimed physical injuries and deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording him the opportunity to present evidence on his claims.

427 F. 2d 71, reversed and remanded.

Stanley A. Bass, by appointment of the Court, 401 U. S. 1008, argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, William B. Turner, Alice Daniel,* and *Max Stern.*

Warren K. Smoot, Assistant Attorney General of Illinois, argued the cause for respondents *pro hac vice.* With him on the brief were *William J. Scott,* Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *James B. Zagel, Morton E. Friedman,* and *Jayne A. Carr,* Assistant Attorneys General.

Briefs of *amici curiae* were filed by *Charles H. Baron* for Boston College Center for Corrections and the Law, and by *Julian Tepper* and *Marshall J. Hartman* for the National Law Office of the National Legal Aid and Defender Assn.

PER CURIAM.

Petitioner, an inmate at the Illinois State Penitentiary, Menard, Illinois, commenced this action against the Governor of Illinois and other state officers and prison officials under the Civil Rights Act of 1871, 17 Stat. 13, 42 U. S. C. § 1983, and 28 U. S. C. § 1343 (3), seeking to recover damages for claimed injuries and deprivation of rights while incarcerated under a judgment not challenged here.

Petitioner's *pro se* complaint was premised on alleged action of prison officials placing him in solitary confinement as a disciplinary measure after he had struck another inmate on the head with a shovel following a verbal altercation. The assault by petitioner on another inmate is not denied. Petitioner's *pro se* complaint included general allegations of physical injuries suffered while in disciplinary confinement and denial of due process in the steps leading to that confinement. The claimed physical suffering was aggravation of a preexisting foot injury and a circulatory ailment caused by forcing him to sleep on the floor of his cell with only blankets.

The District Court granted respondents' motion under Rule 12 (b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief could be granted, suggesting that only under exceptional circumstances should courts inquire into the internal operations of state penitentiaries and concluding that petitioner had failed to show a deprivation of federally protected rights. The Court of Appeals affirmed, emphasizing that prison officials are vested with "wide discretion" in disciplinary matters. We granted certiorari and appointed counsel to represent petitioner. The only issue now before us is petitioner's contention that the District Court erred in dismissing his *pro se* complaint without allowing him to present evidence on his claims.

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears

"beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45–46 (1957). See *Dioguardi* v. *Durning,* 139 F. 2d 774 (CA2 1944).

Accordingly, although we intimate no view whatever on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. The judgment is reversed and the case is remanded for further proceedings consistent herewith.

Reversed and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

LOVE *v.* PULLMAN CO.

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

No. 70–5033. Argued November 16, 1971—
Decided January 17, 1972*

Procedure whereby the Equal Employment Opportunity Commission (EEOC), after having received a written charge from a complainant of discrimination in violation of Title VII of the Civil Rights Act of 1964, orally referred it to the appropriate state agency, waited until that agency had terminated its jurisdiction, and then formally filed the charge on behalf of the complainant without having obtained an additional written charge within 30 days of the termination of the state proceedings *held* to satisfy the requirements of §§ 706 (b) and (d) of the Act, which have the purpose of affording state agencies prior opportunity to consider discrimination complaints and ensuring their prompt filing and disposition by the EEOC on exhaustion of the state remedy. Pp. 523–527.

430 F. 2d 49, reversed.

STEWART, J., delivered the opinion of the Court, in which all members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the cases.

Hugh J. McClearn argued the cause for petitioner in No. 70–5033. With him on the brief was *Gail L. Ireland*. *Deputy Solicitor General Wallace* argued the cause for the United States et al. With him on the brief were *Solicitor General Griswold, Acting Assistant Attorney General Norman, David L. Rose, Stanley Hebert,* and *Julia P. Cooper.*

Edward C. Eppich argued the cause and filed a brief for respondent in both cases.

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*Together with No. 70–37, *United States et al.* v. *Pullman Co.*, also on certiorari to the same court.

Nathaniel R. Jones filed a brief for the National Association for the Advancement of Colored People as *amicus curiae* urging reversal in No. 70–5033.

MR. JUSTICE STEWART delivered the opinion of the Court.

A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253,[1] may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief. In this litigation the petitioner employee filed a complaint in the United States District Court for the District of Colorado, alleging that his employer, the respondent Pullman Company, had engaged in employment practices violative of Title VII. The court dismissed the complaint, holding that the statutory prerequisites to the maintenance of the suit had not been met. The Court of Appeals affirmed, 430 F. 2d 49, and we granted certiorari to consider the question of federal law presented. 401 U. S. 907.

The petitioner was employed by the Pullman Company as a "porter-in-charge." In 1963 and again in 1965, he complained to the Colorado Civil Rights Commission, alleging that the porters-in-charge, most of whom, like the petitioner, were Negroes, performed the same functions as conductors, most of whom were white, yet at lower pay. The proceedings of the Colorado Commission terminated in 1965 without reaching a resolution of the controversy satisfactory to the petitioner. On May 23, 1966, the Equal Employment Opportunity Commission received from the petitioner a "letter of inquiry" which complained of this same alleged discrim-

[1] §§ 701–716 (c), 42 U. S. C. §§ 2000e to 2000e–15.

ination. In accord with its usual practice,[2] the Commission treated this letter as a complaint but did not formally file it. Instead, to insure compliance with Title VII's procedural requirements, EEOC orally advised the Colorado Commission that it had received a complaint from the petitioner. By letter of June 1, 1966, the Colorado Commission informed EEOC that it waived the opportunity to take further action on the petitioner's grievance, and the EEOC then proceeded with its own investigation. The investigation resulted in a finding of probable cause to believe that the charge of discrimination was true, but the EEOC was unsuccessful in its attempts to obtain Pullman's voluntary compliance. This lawsuit followed.

The basis for the holding of the Court of Appeals was its finding that the charge of discrimination had not been "filed" with EEOC by the petitioner in conformity with the requirements of the Act.[3] Two such requirements are critical here. Section 706 (b) of the Act, 42 U. S. C. § 2000e–5 (b), provides that where there exists a state or local agency authorized to grant or seek relief against

[2] Title 29 CFR § 1601.11 (b) (1971) provides:

"[A] charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. . . ."

[3] The Court of Appeals first adopted the reasoning of the District Court: The state commission had terminated the proceedings initiated by petitioner in July 1965, and petitioner failed to complain to the EEOC within the 30-day time period prescribed in § 706 (d), 42 U. S. C. § 2000e–5 (d). Regarding this statutory time requirement as jurisdictional, the District Court dismissed the complaint. When the Government entered the case on a petition for rehearing to the Court of Appeals, it pointed out that Title VII had not gone into effect at the time of the events underlying petitioner's applications to the state commission. Thus, the state commission's termination of proceedings in 1965 did not toll the 30-day period for appeal to the EEOC.

employment discrimination, "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ." Section 706 (d), 42 U. S. C. § 2000e–5 (d), requires that the complaint to the EEOC "shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . ."

The EEOC takes the position that these requirements were fulfilled by the procedure followed here, whereby a charge filed with the EEOC prior to exhaustion of the state remedy was referred by it to the state agency, and then formally filed once the state agency indicated that it would decline to take action. The Court of Appeals, on the other hand, regarded this procedure as a "manipulation of the filing date," not contemplated or permitted by the statute or by the EEOC regulations then in force.

We hold that the filing procedure followed here fully complied with the intent of the Act, and we thus reverse the judgment of the Court of Appeals. Nothing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself, nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral.[4]

[4] Respondent cites the following language of § 706 (b), 42 U. S. C. § 2000e–5 (b):

"If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been

Further, we cannot agree with the respondent's claim that the EEOC may not properly hold a complaint in "suspended animation," automatically filing it upon termination of the state proceedings.[5]

We see no reason why further action by the aggrieved party should be required. The procedure complies with the purpose both of § 706 (b), to give state agencies a prior opportunity to consider discrimination complaints, and of § 706 (d), to ensure expedition in the filing and handling of those complaints. The respondent makes no showing of prejudice to its interests. To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality.[6]

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commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

Nothing in this language implies that a state proceeding may not be commenced by an oral complaint; the statute guards against state proceedings that are difficult to commence, not against ones that are easily begun.

[5] The Court of Appeals expressed concern that if EEOC could ignore the requirement of 29 CFR § 1601.11 (b) (1971) that a charge is deemed filed when received, it could file any complaint whenever it chose, thereby nullifying the various statutory time requirements. But the statutory prohibition of § 706 (b) against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt.

[6] See Comment, A Look at *Love v. Pullman*, 37 U. Chi. L. Rev. 181, 188 (1969). When a member of EEOC, rather than an aggrieved party, files a complaint with EEOC, "the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days . . . to remedy the practice alleged." Title VII, § 706 (c), 42 U. S. C. § 2000e–5 (c). It is clear that Congress found nothing wrong, in this circumstance, with EEOC's holding the charge in abeyance until a state agency is given the chance to act. There is no reason to think that Congress would disapprove this procedure when complaints are initiated by

Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

The judgment is

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

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aggrieved parties; the difference in wording between § 706 (b) and § 706 (c) seems to be only a reflection of the different persons who initiate the charge. Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1214 n. 117 (1971).

TRBOVICH *v.* UNITED MINE WORKERS OF AMERICA ET AL.

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

No. 71–119. Argued November 18, 1971—Decided January 17, 1972

Petitioner union member sought unsuccessfully to intervene pursuant to Fed. Rule Civ. Proc. 24 (a) in litigation brought by the Secretary of Labor under Title IV of the Labor-Management Reporting and Disclosure Act to set aside an election of union officers for violations of the Act. Petitioner, who initiated the entire enforcement proceeding with his complaint to the Secretary, sought to present evidence and argument in support of the Secretary's election challenge, and to urge additional grounds for setting the election aside. *Held:*

1. There is nothing in the language of Title IV of the Act or its legislative history to bar intervention by a union member in a post-election enforcement suit, so long as that intervention is limited to claims of illegality presented by the Secretary's complaint. Pp. 530–537.

2. Intervention under Rule 24 (a) is warranted for this petitioner, as he may have a valid complaint about the performance of the Secretary, who protects not only the rights of individual union members but also the public interest in free and democratic union elections, two functions that may not always dictate the same approach to the conduct of the litigation. Pp. 537–539.

Reversed and case remanded to the District Court with directions to allow limited intervention.

MARSHALL, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 539. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Joseph L. Rauh, Jr., argued the cause for petitioner. With him on the briefs were *John Silard, Elliott C. Lichtman, Joseph A. Yablonski,* and *Clarice R. Feldman.*

Solicitor General Griswold argued the cause for respondent Secretary of Labor. With him on the brief were *Assistant Attorney General Gray, Harry R. Sachse, Walter H. Fleischer, Raymond D. Battocchi, Richard F. Schubert, George T. Avery,* and *Beate Bloch. Edward L. Carey, Harrison Combs, Willard P. Owens, Charles L. Widman,* and *M. E. Boiarsky* filed a brief for respondent United Mine Workers of America.

Melvin L. Wulf and *Sanford Jay Rosen* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Secretary of Labor instituted this action under § 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 534, 29 U. S. C. § 482 (b), to set aside an election of officers of the United Mine Workers of America (UMWA), held on December 9, 1969. He alleged that the election was held in a manner that violated the LMRDA in numerous respects,[1] and he sought an order requiring a new election to be held under his supervision.

Petitioner, a member of the UMWA, filed the initial complaint with the Secretary that eventually led him to file this suit. Petitioner now seeks to intervene in the litigation, pursuant to Fed. Rule Civ. Proc. 24 (a), in order (1) to urge two additional grounds for setting aside

[1] The complaint alleged that the Union violated the Act by, *inter alia,* failing to use secret ballots, permitting campaigning at the polls, denying candidates the right to have observers at polling places and at the counting of ballots, subjecting members to reprisals in connection with their election activities, failing to conduct elections in some locals, and using union assets to promote the candidacy of the incumbents.

the election,[2] (2) to seek certain specific safeguards with respect to any new election that may be ordered,[3] and (3) to present evidence and argument in support of the Secretary's challenge to the election. The District Court denied his motion for leave to intervene, on the ground that the LMRDA expressly stripped union members of any right to challenge a union election in the courts, and gave that right exclusively to the Secretary. *Hodgson* v. *United Mine Workers*, 51 F. R. D. 270 (1970). The Court of Appeals affirmed on the basis of the District Court opinion, 77 L. R. R. M. 2496 (CADC 1971). We granted certiorari to determine whether the LMRDA imposes a bar to intervention by union members under Rule 24, in a suit initiated by the Secretary. *Post*, p. 880.[4] We conclude that it does not, and we remand the case to the District Court with directions to permit intervention.

I

The LMRDA was the first major attempt of Congress to regulate the internal affairs of labor unions.[5] Having conferred substantial power on labor organizations, Con-

[2] Petitioner alleged as additional violations of the Act (1) that the Union required members to vote in certain locals, composed entirely of pensioners, which petitioner claims are illegally constituted under the UMWA Constitution; and (2) that the incumbent president improperly influenced the pensioners' vote by bringing about a pension increase just before the election.

[3] Petitioner asks the court to order the Union to disband the pensioner locals, to publish a ruling to the effect that the president breached his fiduciary duty by bringing about the pension increase, and to establish new comprehensive rules to govern future elections.

[4] We expedited consideration of this case in view of the fact that the litigation is presently pending in the District Court and it has not been stayed.

[5] See generally Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960).

gress began to be concerned about the danger that union leaders would abuse that power, to the detriment of the rank-and-file members. Congress saw the principle of union democracy as one of the most important safeguards against such abuse, and accordingly included in the LMRDA a comprehensive scheme for the regulation of union elections.

Title IV of the statute establishes a set of substantive rules governing union elections, LMRDA § 401, 29 U. S. C. § 481, and it provides a comprehensive procedure for enforcing those rules, LMRDA § 402, 29 U. S. C. § 482. Any union member who alleges a violation may initiate the enforcement procedure. He must first exhaust any internal remedies available under the constitution and bylaws of his union. Then he may file a complaint with the Secretary of Labor, who "shall investigate" the complaint. Finally, if the Secretary finds probable cause to believe a violation has occurred, he "shall . . . bring a civil action against the labor organization" in federal district court, to set aside the election if it has already been held, and to direct and supervise a new election. With respect to elections not yet conducted, the statute provides that existing rights and remedies apart from the statute are not affected. But with respect to an election already conducted, "[t]he remedy provided by this subchapter . . . shall be exclusive." LMRDA § 403, 29 U. S. C. § 483.

The critical statutory provision for present purposes is § 403, 29 U. S. C. § 483, making suit by the Secretary the "exclusive" post-election remedy for a violation of Title IV. This Court has held that § 403 prohibits union members from initiating a private suit to set aside an election. *Calhoon* v. *Harvey*, 379 U. S. 134, 140 (1964). But in this case, petitioner seeks only to participate in a pending suit that is plainly authorized by the statute; it cannot be said that his claim is

defeated by the bare language of the Act. The Secretary, relying on legislative history, argues that § 403 should be construed to bar intervention as well as initiation of a suit by the members. In his view the legislative history shows that Congress deliberately chose to exclude union members entirely from any direct participation in judicial enforcement proceedings under Title IV. The Secretary's argument rests largely on the fact that two alternative proposals figured significantly in the legislative history of Title IV, and each of these rejected bills would have authorized individual union members to bring suit. In the words of the District Court:

> "We think the fact that Congress considered two alternatives—suit by union members and suit by the Secretary—and then chose the latter alternative and labelled it 'exclusive' deprives this Court of jurisdiction to permit the former alternative via the route of intervention." 51 F. R. D., at 272.

That argument misconceives the legislative history and misconstrues the statute. A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones, and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court. The alternative proposals were rejected simply because they failed to accomplish these objectives. There is no evidence whatever that Congress was opposed to participation by union members

in the litigation, so long as that participation did not interfere with the screening and centralizing functions of the Secretary.

The enforcement provisions of Title IV originated in a bill introduced by Senator John Kennedy in 1958. That bill, S. 3751, provided for suit by the Secretary as the exclusive remedy for violation of the rules relating to union elections. Senator Kennedy described the bill as a "modest proposal," one which would protect union members "without undue interference in the internal affairs of what I believe are essentially private institutions—that is, American trade unions." 104 Cong. Rec. 7954. The Senate passed an expanded version of the bill, S. 3974, which retained the original enforcement scheme, and reflected a continuing legislative interest in minimizing judicial interference with union elections. See S. Rep. No. 1684, 85th Cong., 2d Sess., 12–15 (1958). That bill was defeated in the House of Representatives, 104 Cong. Rec. 18288, but essentially the same enforcement scheme was retained the following year in S. 1555, the Kennedy-Ervin bill which was ultimately passed by both Houses and enacted into law.

In the Senate, the principal advocate of a provision authorizing individual union members to bring suit was Senator Barry Goldwater. He introduced a bill, S. 748, endorsed by the Administration, that would have authorized both the Secretary and the members to file suit to enforce the rules relating to union elections.[6] During

[6] The Goldwater-Administration bill provided that a member could file suit with respect to any violation of the election title unless that claimed violation was the subject of a pending action by the Secretary. It also provided that enforcement suits could be filed in either state or federal courts. The question of member suits was, throughout the debates, intertwined with the question of preserving pre-existing state remedies, since prior to the enact-

the Senate Hearings, a number of witnesses compared the enforcement provisions of the two bills. The primary objection to the provision for member suits in the Goldwater bill was that it might lead to multiple litigation in multiple forums, and thereby impose on the union the severe burden of mounting multiple defenses. A related objection was that the Goldwater bill failed to interpose a screening mechanism between the dissatisfied union member and the courtroom, and thereby imposed on the union the burden of responding to frivolous complaints.

Perhaps the most vehement opposition to the Goldwater bill came from the AFL–CIO. Its spokeman, Andrew Biemiller, testified that "[t]he bill would result in placing union officers in a straitjacket since they could be haled into court, virtually without limitation, to defend union policies or programs in suits brought against them by any dissident union member [or] minority group." Hearings on S. 505 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess., 567 (1959); see also *id.*, at 578–579 (analysis of S. 748 by Arthur J. Goldberg, then special counsel to the AFL–CIO). Mul-

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ment of the LMRDA the only remedy for illegal election conduct was a member suit in state court.

Pre-existing state remedies presented the additional problem, not relevant here, of multiple litigation that was not only inconvenient as a matter of procedure but also in conflict as a matter of substance, for the state remedies related to state-defined rights that were not always identical to the new rights defined in the LMRDA. The debates reflect great concern with the proper relationship between state and federal remedies, and much less concern with the relationship between private and public enforcement. See, *e. g.*, S. Rep. No. 187, 86th Cong., 1st Sess., 19–22, 101–104 (1959) (majority and minority views); Hearings on H. R. 3540 et al. before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 4, p. 1611 (1959) (analysis of S. 1555 by Sen. Goldwater), reprinted at 105 Cong. Rec. 10102.

tiple litigation and unnecessary harassment, then, were seen as the principal evils of the provision for member suits. And it was precisely those evils that the draftsmen of the Kennedy-Ervin bill sought to avoid. According to Professor Archibald Cox, who was a principal consultant to the draftsmen, the Kennedy proposal made suit by the Secretary the exclusive post-election remedy in order to "centralize control of the proceedings," to adjudicate the validity of an election "once and for all in one forum," and to avoid "unnecessary harassment of the union on one side and . . . friendly suits aimed at foreclosing the Secretary's action on the other." *Id.*, at 135.

Thus, when the Senate Committee reported out the Kennedy-Ervin bill rather than its competitor, it is reasonable to infer that the Committee, and later the Senate, regarded the provision for exclusive enforcement by the Secretary as a device for eliminating frivolous complaints and consolidating meritorious ones. There is no basis whatever for the further conclusion suggested by the Secretary, that the Senate opposed any form of direct participation by union members in Title IV enforcement litigation.

The legislative history in the House of Representatives provides even less support for the Secretary's position. The House initially rejected the Senate bill and passed an alternative authorizing only union members, and not the Secretary, to bring suit to enforce the election title of the bill. H. R. 8342, see H. R. Rep. No. 741, 86th Cong., 1st Sess., 15–17 (1959). Even Senator Goldwater, the leading advocate of member suits, thought the House bill inferior to the Senate bill in this regard, because the matter of election violations was too important to be left exclusively to the vagaries of private enforcement. 105 Cong. Rec. 16489 (comparison of House and Senate bills by Sen. Goldwater). The Conference Committee and the House ultimately adopted the Senate's enforce-

ment provisions, thereby affirming the need for public enforcement of Title IV. See H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 35 (1959). That action, however, can in no sense be read as a rejection of all forms of private participation in enforcement litigation, since the House at no time considered the possibility that union members might assist the Secretary rather than displace him.

With respect to litigation by union members, then, the legislative history supports the conclusion that Congress intended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary. Only if intervention would frustrate either of those objectives can the statute fairly be read to prohibit intervention as well as initiation of suits by members.

II

Intervention by union members in a pending enforcement suit, unlike initiation of a separate suit, subjects the union to relatively little additional burden.[7] The principal intrusion on internal union affairs has already been accomplished, in that the union has already been summoned into court to defend the legality of its election. Intervention in the suit by union members will not subject the union to burdensome multiple litigation, nor will it compel the union to respond to a new and potentially groundless suit. Thus, at least insofar

[7] For the origins and development of the procedural device of intervention, see Moore & Levi, Federal Intervention, 45 Yale L. J. 565 (1936), 47 Yale L. J. 898 (1938); Developments in the Law—Multi-party Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 897–906, 988–992 (1958). The distinction between intervention and initiation is thoughtfully discussed in Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 726–729 (1968).

as petitioner seeks only to present evidence and argument in support of the Secretary's complaint, there is nothing in the language or the history of the LMRDA to prevent such intervention.

The question is closer with respect to petitioner's attempt to add to the Secretary's complaint two additional grounds for setting aside the union election. These are claims that the Secretary has presumably determined to be without merit. Hence, to require the union to respond to these claims would be to circumvent the screening function assigned by statute to the Secretary. We recognize that it is less burdensome for the union to respond to new claims in the context of the pending suit than it would be to respond to a new and independent complaint. Nevertheless, we think Congress intended to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary. Accordingly, we hold that in a post-election enforcement suit, Title IV imposes no bar to intervention by a union member, so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint.[8]

III

Finally, the Secretary argues that even if the LMRDA does not bar intervention, petitioner has no right to

[8] This limitation, however, applies only to the claimed grounds for setting aside the old election, and not to the proposed terms of any new one that may be ordered. For if the court finds merit in the Secretary's complaint and sets the election aside, then the statute requires the court to direct a new election in conformity with the constitution and bylaws of the union, and the requirements of Title IV. Since the court is not limited in this regard to consideration of remedies proposed by the Secretary, there is no reason to prevent the intervenors from assisting the court in fashioning a suitable remedial order. Cf. *Hodgson* v. *Steelworkers*, 403 U. S. 333, 344 (WHITE, J., dissenting).

intervene under the terms of Fed. Rule Civ. Proc. 24 (a). Rule 24 (a)(2) gives one a right to intervene if (1) he claims a sufficient interest in the proceedings, and (2) that interest is not "adequately represented by existing parties." [9]

The Secretary does not contend that petitioner's interest in this litigation is insufficient; he argues, rather, that any interest petitioner has is adequately represented by the Secretary. The court below did not reach this question, in light of its threshold determination that Rule 24 had no application to the case. Nevertheless, we think it clear that in this case there is sufficient doubt about the adequacy of representation to warrant intervention.[10]

The Secretary contends that petitioner's only legally cognizable interest is the interest of all union members in democratic elections, and he says that interest is identical with the interest represented by the Secretary in Title IV litigation. Hence he argues that petitioner's interest must be adequately represented unless the court is prepared to find that the Secretary has failed to perform his statutory duty. We disagree.

The statute plainly imposes on the Secretary the duty to serve two distinct interests, which are related, but not identical. First, the statute gives the individual

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[9] Fed. Rule Civ. Proc. 24 (a):

"Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[10] The requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal. See 3B J. Moore, Federal Practice ¶ 24.09–1 [4] (1969).

union members certain rights against their union, and "the Secretary of Labor in effect becomes the union member's lawyer" for purposes of enforcing those rights. 104 Cong. Rec. 10947 (remarks of Sen. Kennedy). And second, the Secretary has an obligation to protect the "vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.*, 389 U. S. 463, 475 (1968). Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of "his lawyer." Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24 (a)(2).

The judgment is reversed and the case is remanded to the District Court with directions to allow limited intervention in accordance with this opinion.

So ordered

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting in part.

I join the opinion of the Court to the extent that it holds that Title IV of the Landrum-Griffin Act does not bar intervention by union members, pursuant to Fed. Rule Civ. Proc. 24 (a), in suits initiated by the Secretary of Labor challenging union elections. I differ from the majority, however, in that I would also permit the union members in this case to raise their additional

grounds* for setting aside the disputed election. In my view, the limited intervention granted by the majority serves neither the purpose of the liberalizing 1966 amendments to Rule 24, nor the twin purposes of Title IV—to preserve unions from a multiplicity of frivolous election challenges, and also to centralize in a single proceeding such litigation as might be warranted with respect to a single election.

Here, the Secretary has served his screening function. He has decided that petitioner's election challenge is meritorious. The Court concedes, moreover, that the burden on the union to defend against the additional claims would not be particularly burdensome, compared to the onus of an independent action. *Ante,* at 537. These claims relate squarely to the election whose legality the union must defend. I would permit them to be heard.

*These claims both related to alleged manipulation of pensioners by the incumbents. One claim attacked so-called "bogus" locals, composed entirely of pensioners, which were "run" by the incumbents. The second claim was that the union president attempted improperly to influence the pensioners' vote by arranging for increased pension benefits just before the election.

BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM *v.* NEW LEFT EDUCATION PROJECT ET AL.

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

No. 70-55. Argued December 6, 1971—Decided January 24, 1972

Three-judge district court was improperly convened under 28 U. S. C. § 2281 to consider constitutionality of appellant's rules for campus distribution of certain kinds of literature and for dues solicitation from members of political organizations since challenged rules do not have statewide applicability or effectuate statewide policy but affect only the few of the State's higher education institutions that are under appellant's jurisdiction; and the appeal from that court's judgment should therefore have been taken to the Court of Appeals and not this Court. Pp. 542-545.

326 F. Supp. 158, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 545. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

W. O. Shultz II, Assistant Attorney General of Texas, argued the cause for appellant. With him on the brief were *Crawford C. Martin*, Attorney General, *Nola White*, First Assistant Attorney General, *Alfred Walker*, Executive Assistant Attorney General, and *J. C. Davis*, *Pat Bailey*, and *James C. McCoy*, Assistant Attorneys General.

David R. Richards argued the cause for appellees. With him on the brief was *Melvin L. Wulf*.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case comes here on direct appeal from the ruling of a three-judge court declaring unconstitutional and enjoining enforcement of two sections of the Rules and

Regulations of appellant Board of Regents of the University of Texas System. 326 F. Supp. 158 (1970). We postponed consideration of our jurisdiction to a hearing on the merits. 401 U. S. 935 (1971). For reasons explained below, we have concluded that we lack jurisdiction of this appeal.

This litigation began when the Board of Regents sued the New Left Education Project and certain individuals in a Texas court. In that suit, the Regents sought to restrain defendants from distributing a newspaper and making either commercial or noncommercial solicitations on the Austin campus of the University of Texas except in compliance with appellant's rules. Defendants countered by bringing this federal suit to enjoin further state court proceedings on the ground that the rules that the Regents sought to enforce abridged defendants' First Amendment rights. A three-judge court met and determined that it was properly convened pursuant to 28 U. S. C. § 2281. It then permitted certain other organizations and individuals, including appellees here, to join the suit as plaintiffs and dismissed the action as to those involved in the state court adjudication. Thereafter, the court granted summary judgment in favor of appellees, declaring unconstitutional and permanently enjoining enforcement of two rules, Regents' Rules & Regs., c. VI, pt. 1, §§ 6.11, 6.12 (App. 173), governing the campus distribution of certain kinds of literature and the solicitation of dues from members of political organizations.

We have jurisdiction to review directly the lower court's order granting an injunction only if the case was one required to be heard and determined by a three-judge court. 28 U. S. C. § 1253. Such a court is required where the challenged statute or regulation, albeit created or authorized by a state legislature, has statewide application or effectuates a statewide policy. But a single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import. *Moody*

v. *Flowers,* 387 U. S. 97 (1967); *Rorick* v. *Board of Commissioners,* 307 U. S. 208 (1939); *Ex parte Public National Bank,* 278 U. S. 101 (1928); *Ex parte Collins,* 277 U. S. 565 (1928). This rule achieves the congressional purpose of saving statewide regulatory legislation from invalidation through ordinary federal court equity suits, minimizes the burden that the three-judge court places upon the federal judiciary, and avoids unduly expanding the Court's carefully limited appellate jurisdiction. *Phillips* v. *United States,* 312 U. S. 246, 250 (1941). Thus, the "term 'statute' in § 2281 does not encompass local ordinances or resolutions," *Moody* v. *Flowers, supra,* at 101, nor does it include a state statute having only a local impact, even if administered by a state official. *Rorick* v. *Board of Commissioners, supra.*

Appellant Board of Regents was created by the Texas Legislature and is charged with governing those educational institutions in the University of Texas System. Texas Rev. Civ. Stat. Ann., Art. 2585 (1965). This governance, which specifically includes a rulemaking power, *ibid.,* extends to but three of the 23 four-year state colleges and universities listed in the Higher Education Coordinating Act of 1965, *id.,* Art. 2919e–2, § 2 (Supp. 1970–1971): the University of Texas at Austin, El Paso, and Arlington.[1] In addition to the 20 senior colleges and universities for which appellant bears no responsibility, Texas has at least 31 public junior colleges that are not within the University of Texas System. *Ibid.* It is true that the Board of Regents governs numerous medical and other specialized schools and branches, *id.,* Arts. 2603e to 2603i, 2606b to 2606d, but these are only some of the specialized institutions that Texas denominates as agencies of higher education.

[1] Appellant also mentions the University of Texas at San Antonio and of the Permian Basin but does not take issue with appellees' contention that these schools are merely in the planning stage (Brief for Appellees 2 n. 1).

Id., Art. 2919e–2, §§ 2 (e)–(g) (Supp. 1970–1971). It is therefore apparent that the Regents' rulemaking power and the rules at issue in this litigation extend to but a fraction of the campuses in the Texas system of higher public education. These rules can scarcely be described as matters of statewide concern or expressions of a statewide policy when a large percentage of Texas colleges and universities are unaffected by them and could not be affected by any pronouncement that a federal court might make on their constitutionality. There is no suggestion or indication of any kind that the Regents' rules are similar to those for other schools or are required by or express statewide policy.[2]

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[2] It has long been settled that a three-judge court is proper even in a suit against a local official, although localized in his geographic activities and mode of his selection, when he is engaged in enforcing a policy of statewide application whose constitutionality is challenged. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935); *Rorick* v. *Board of Commissioners*, 307 U. S. 208, 212 (1939). The thrust of our more recent decision in *Alabama State Teachers Assn.* v. *Alabama Public School and College Authority*, 393 U. S. 400 (1969), is to the same effect. The issue there was a legislative direction to the Alabama Public School and Housing Authority to issue bonds for the construction of a public university in Montgomery, Alabama. Appellants challenged that action, although having a local impact, as expressive of an official, statewide policy to maintain a racially identifiable, dual system of education, and the District Court denied relief. The dissent on the merits from summary affirmance, disagreeing with Mr. Justice Harlan's dissent on jurisdictional grounds, agreed that a statewide policy was sufficiently implicated to sustain the jurisdiction of the three-judge court and the direct appeal here. *Board of Visitors* v. *Norris*, *post*, p. 907, aff'g 327 F. Supp. 1368 (ED Va. 1971), rests upon the same basis. In *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950), the Court entertained an appeal from the judgment of a three-judge District Court upholding an Oklahoma statute providing that Negroes, though admissible to white graduate schools, must get that education on a segregated basis.

Nothing in the record before us in this case indicates that the regulations challenged here represent general state policy, reflect a

The situation here is comparable to that in *Moody* v. *Flowers, supra,* where we held that three-judge courts were improperly convened to consider challenges to a state statute applying to a particular county and to a county charter based upon a state statute. The fact that several campuses over which the Board of Regents has jurisdiction are located in different parts of the State does not in our view make their rules of general applicability for the purpose of 28 U. S. C. § 2281. These rules, applying only to some of the higher educational institutions of the State, are of limited significance and do not partake of the quality and dignity of those state statutes or policies that three-judge courts were designed to consider. We are persuaded that a contrary view of this case would be inconsistent with our oft-repeated admonition that the three-judge court statute is to be strictly construed. *E. g., Allen* v. *State Board of Elections,* 393 U. S. 544 (1969); *Phillips* v. *United States,* 312 U. S., at 251.

Since the three-judge court was improperly convened, appeal lies not here but to the Court of Appeals for the Fifth Circuit. So that appellant may be able, if it desires, to perfect a timely appeal, we vacate the judgment below and remand the case with instruction that the court enter a fresh decree. *Phillips* v. *United States, supra,* at 254.

Judgment vacated and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

When I authored *Moody* v. *Flowers,* 387 U. S. 97, I thought I was writing a chapter on federalism within

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statutory command, or apply to more than a fraction of the Texas higher educational institutions. It is thus difficult to understand the dissent's reliance on the *Alabama, Norris,* and *McLaurin* cases.

a State. Cities, counties, and the State as a whole constitute that federalism. The three-judge-court statute, 28 U. S. C. § 2281, speaks of "the enforcement, operation or execution of any State statute." A city ordinance or a county regulation does not meet that requirement, and so the county regulations involved in *Moody* did not satisfy the statute though enacted by the State. If the source of the authority is state action, the statute is presumably satisfied, since normally, of course, state laws have an impact on activities in every city and every county. But where a state law is not of "statewide concern" and involves only "legislation affecting a locality" (*Rorick* v. *Board of Commissioners,* 307 U. S. 208, 213), then the policy of 28 U. S. C. § 2281 is deemed not served.

But a State's university system, involving, as does this one, 17 institutions, is plainly of "statewide concern" even though not every county has a university.[1]

In addition to its supervision of the University of Texas at Austin, Texas Rev. Civ. Stat. Ann., Art. 2584 *et seq.,* and the other institutions included in the 17 that are in the state university system,[2] the Board of Regents also oversees a number of other major institutions of higher education within Texas' university and college system: University of Texas at El Paso, *id.,* Art. 2633, University of Texas at Arlington, *id.,* Art. 2620a, University of

[1] During oral argument, counsel for appellant indicated that its authority extended over some "17 component institutions in the system," stretching from El Paso on the far western tip of the State, to Galveston on the Gulf Coast, and from San Antonio in the south to Dallas in the north. Tr. of Oral Arg. 6–7. "[A]t the University of Texas at Austin alone," counsel told us, "there are 40,000 students, and over 7,000 employees on a 265-acre campus. When you include all the other campuses and institutions, I'm hard put to say how many people are involved; but many, many thousands." *Id.,* at 10.

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

Texas at San Antonio, *id.*, Art. 2606c–3, University of Texas at Dallas, *id.*, Art. 2606c–3.1, University of Texas of the Permian Basin, *id.*, Art. 2606c–4, Institutes for Urban Studies in the Dallas-Ft. Worth area and in Houston, *id.*, Art. 2606d, as well as other institutions of learning. *E. g., id.*, Art. 2585d (3).

The matter involves more than state "legislation affecting a locality": it concerns a university system with campuses scattered across the State and serving the educational needs of those from every city, from every county, who seek undergraduate or graduate education.[3]

Since the case is properly here, I would reach the merits.

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[3] That a "statewide concern" sufficient to require a three-judge court is present is evidenced by *Alabama State Teachers Assn.* v. *Alabama Public School and College Authority*, 393 U. S. 400 (1969), a case of recent vintage which the Court must overrule to reach its result today. There, we sustained a three-judge-court action dealing with state bonding authority for a single college in a single town. See also *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950) (three-judge court required for action relating to single state graduate school). The present case is an even stronger one for the convention of a three-judge court because the rules in issue touch upon the freedom of expression in colleges and universities in all four corners of the State of Texas.

And see *Board of Visitors* v. *Norris*, *post*, p. 907, aff'g 327 F. Supp. 1368 (ED Va. 1971), decided about three months ago. There, the three-judge court struck down as unconstitutional a single item in a state act dealing with but one of the State's colleges. This Court unanimously affirmed that judgment.

Alabama State Teachers Assn., *McLaurin*, and *Norris* did not, as is suggested by the majority, depend upon the existence of a pervasive state policy of segregation extending beyond the educational institutions there involved. The statewide concern which justified the convention of the three-judge courts in those cases, cf. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935), was the unconstitutional manner in which state institutions, serving the entire State, were being operated. That same kind of operation of statewide institutions is alleged in the present case.

UNITED STATES *v.* CHAS. PFIZER & CO., INC., ET AL.

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

No. 70–72. Argued January 12, 1972—Decided January 24, 1972

426 F. 2d 32, affirmed by an equally divided Court.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General McLaren, Harry R. Sachse, Howard E. Shapiro,* and *Harry G. Sklarsky.*

John E. F. Wood argued the cause for respondents. With him on the brief for Chas. Pfizer & Co., Inc., were *Judson A. Parsons, Jr., J. Paul McGrath, Paul Sherman,* and *Arthur G. Connolly. Roy W. McDonald, Ralstone R. Irvine,* and *Richard Y. Holcomb* filed a brief for respondent American Cyanamid Co. *Merrell E. Clark, Jr.,* and *Henry J. Zafian* filed a brief for respondent Bristol-Myers Co.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

Per Curiam

CONNOR ET AL. *v.* WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL.

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

No. 71-221. Decided January 24, 1972

Appellants challenge a federal court-ordered reapportionment plan for the 1971 elections of Mississippi state legislators, which permitted a total variance of approximately 19% between the largest and smallest House and Senate districts. The court plan also provided for temporary multi-member districts to fill about one-fifth of the seats in 1971, but ordered the appointment of a Special Master in January 1972 to determine the feasibility of dividing these into equal-population districts for the 1975 and 1979 elections. *Held:*

1. Even if it be assumed that congressional redistricting decisions of this Court, which appellants rely on, are controlling here, it does not follow that the 1971 elections should be invalidated, and in the circumstances of this case those elections will not be disturbed.

2. Further consideration is inappropriate until completion of the proceedings to consider creation of single-member districts.

330 F. Supp. 506, vacated in part, and remanded.

PER CURIAM.

After determining that the reapportionment plan for the State Senate and House of Representatives, passed by the Mississippi Legislature in January 1971, failed to comply with the Equal Protection Clause because of a total variance of 26% between the largest and the smallest senatorial district (a determination that was not appealed),[1] the District Court fashioned its own plan for

[1] A three-judge court has twice previously voided apportionment plans enacted by the Mississippi Legislature because they embodied impermissible population variances. *Connor* v. *Johnson,* 279 F. Supp. 619 (SD Miss. 1966), aff'd, 386 U. S. 483 (1967) (appeal limited to congressional districting). This Court has already considered an interlocutory appeal in the instant case. *Connor* v. *Johnson,* 402 U. S. 690, 403 U. S. 928 (1971).

the quadrennial elections for both Houses scheduled for 1971, and these elections were held under the court's plan. *Connor* v. *Johnson,* 330 F. Supp. 506 (SD Miss. 1971). Appellants now challenge the constitutionality of the court's plan, contending that a total variance of 18.9% between the largest and smallest Senate district and one of 19.7% between the largest and smallest House district require that the court's districting plan be voided, a new plan instituted, and new elections held.[2]

Appellants rely on our recent cases invalidating congressional redistricting statutes that contained total variations of 5.97%, *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), and of 13.1%, *Wells* v. *Rockefeller,* 394 U. S. 542 (1969), between the largest and the smallest districts. These decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment.

But conceding, *arguendo,* that the District Court's plan does not precisely square with Fourteenth Amendment requirements, it does not necessarily follow that the 1971 elections must be invalidated and new elections ordered. *Mann* v. *Davis,* 238 F. Supp. 458 (ED Va. 1964), aff'd *sub nom. Hughes* v. *WMCA,* 379 U. S. 694 (1965); *Toombs* v. *Fortson,* 241 F. Supp. 65, 71 (ND Ga. 1965), aff'd, 384 U. S. 210 (1966); *Drum* v. *Seawell,* 249 F. Supp.

[2] There are 52 seats in the State Senate and 122 seats in the State House of Representatives. According to the 1970 census, Mississippi has a population of 2,216,912, making the ideal single-member Senate district one containing 42,633 persons and the ideal single-member House district one containing 18,171 persons. Under the court's plan, Senate district 29 (46,719 persons, one Senator) is 9.6% underrepresented, and district 19 (77,320 persons, two Senators) is 9.3% overrepresented. House district 18 (32,772 persons, two Representatives) is 9.8% overrepresented, and House district 3 (59,912 persons, three Representatives) is 9.9% underrepresented.

877, 881–882 (MDNC 1965), aff'd, 383 U. S. 831 (1966). In the circumstances of this case, we decline to disturb these elections.

The prospective validity of the plan for the 1975 elections, absent legislative action, poses different issues, but we need not decide those questions at the present time. Under the District Court plan, approximately one-fifth of the seats in both Houses were filled by at-large elections from temporary countywide districts in 1971.[3] The District Court retained jurisdiction over these three counties and ordered that a Special Master be appointed in January 1972 to "take testimony and make findings as to whether the Counties of Hinds, Harrison, and Jackson may feasibly be divided into districts of substantially equal numbers in population for the elections of 1975 and 1979." 330 F. Supp., at 519. Such proceedings should go forward and be promptly concluded, for, as this Court has emphasized, "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor* v. *Johnson,* 402 U. S. 690, 692 (1971). Pending completion of those proceedings, we deem it inappropriate to give further consideration to this case. If we are to consider the applicability of *Preisler* and *Wells* to state legislative districts, it would be preferable to have before us a final judgment with respect to the

[3] Legislators elected from temporary multi-member districts:

	Senators	*Representatives*
Hinds County	5	12
Harrison County	3	7
Jackson County	2	6*
	10	25

*With George County.

Thus, 10 out of 52 Senators (19%) and 25 out of 122 Representatives (21%) were elected from temporary multi-member districts in 1971.

entire State.[4] To accomplish this result and to preserve the right to appeal from such a judgment, the judgment of the District Court is vacated, except insofar as it applied to the 1971 elections, and the case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

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[4] Meanwhile, it is possible that the state legislature will adopt a plan of its own. During the course of this litigation, the District Court has emphasized that "the exercise of this unavoidable judicial duty [drafting an apportionment plan] cannot, *does not, and will not in any way tie the hands of the Legislature at any time* to adopt and enact any plan of its own for the reapportionment of its membership so long as it complies with Constitutional requirements." *Connor* v. *Johnson*, 265 F. Supp. 492, 494 (SD Miss. 1967) (emphasis in original). This Court has frequently emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds* v. *Sims*, 377 U. S. 533, 586 (1964). See also *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966); *Ely* v. *Klahr*, 403 U. S. 108, 114 n. 6 (1971).

IN RE LITTLE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT DIVISION, GENERAL COURT OF JUSTICE, COUNTY OF FORSYTH, NORTH CAROLINA

No. 71-244. Decided January 24, 1972

Petitioner defended himself at his criminal trial when his motion for continuance, by reason of another trial engagement of his retained counsel, was denied. The court adjudged petitioner in contempt for stating in summation after the close of evidence that the court was biased and had prejudged his case, and that petitioner was a political prisoner. *Held:* Petitioner's statements did not constitute criminal contempt, as they were not uttered in a boisterous tone, did not actually disrupt the court proceeding, or constitute an imminent threat to the administration of justice. *Holt* v. *Virginia,* 381 U. S. 131.

Certiorari granted; reversed.

PER CURIAM.

Petitioner was convicted of committing a direct contempt of a judge of the District Court Division of the Forsyth County, North Carolina, General Court of Justice. He was sentenced to 30 days in jail as summary punishment authorized by General Statutes of North Carolina §§ 5–1 (1) and 5–6. He sought habeas corpus in the Superior Court Division of the General Court. That court denied relief after hearing oral argument but without receiving evidence. Both the North Carolina Court of Appeals and the North Carolina Supreme Court denied review by certiorari.

Neither the order of the District Court nor the judgment of the Superior Court details the events leading to the conviction. The petition recites these events, however, and the State's response does not challenge the accuracy of the recital. Petitioner's trial on a charge of carrying a concealed weapon was scheduled for March

8, 1971, in the District Court at Winston-Salem. Petitioner appeared and filed a written motion for continuance by reason of another trial engagement of his retained counsel in Charlotte. The trial judge denied the motion and proceeded with the trial. Without benefit of counsel petitioner attempted to defend himself. In summation following the close of the evidence petitioner made statements that the court was biased and had prejudged the case and that petitioner was a political prisoner. The trial judge adjudged petitioner in contempt for these statements. The court's order recites that "[t]he Court at this point informed the [petitioner] that he was in contempt as the Court felt that these remarks were very disrespectful and tended to subvert and prevent justice," and further recites that "[t]he Court concludes on the foregoing facts that the conduct of the [petitioner] and the words spoken by him in the presence of the Court were contemptuous, that they reflected on the integrity of the Court and tended to subvert and prevent justice."

The order also recites, "As the defendant was being removed from the courtroom by deputy sheriff [following the contempt adjudication], he spoke out and called the undersigned presiding judge a M----- F-----." This language in a courtroom is, of course, reprehensible and cannot be tolerated. But this was not relied upon by either the District Court or the Superior Court for the conviction and sentence and the State defends the conviction in this Court without any reference to it. We therefore also lay it aside for the purpose of our decision.

The Superior Court had the District Court order before it but no other evidence. The Superior Court judgment tracks the statutory language in reciting that petitioner's statements "directly tended to interrupt its proceedings and to impair the respect due the District Court's authority," and, further, the District Court's

conclusion that the statements " 'reflected on the integrity of the Court and tended to subvert and prevent justice' amounted to a finding by the District Court that the words were wilful and intentionally used and that the words used tended to interrupt the Court's proceedings and to impair the respect due its authority." *

We hold that in the context of this case petitioner's statements in summation did not constitute criminal contempt. The court's denial of the continuance forced petitioner to argue his own cause. He was therefore clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause. *In re McConnell,* 370 U. S. 230 (1962). There is no indication, and the State does not argue, that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding. Therefore, "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig* v. *Harney,* 331 U. S. 367, 376 (1947). "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown* v. *United States,* 356 U. S. 148, 153 (1958).

*Section 5–1 (1) makes punishable for contempt "[d]isorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority."

The reversal of this conviction is necessarily required under our holding in *Holt* v. *Virginia,* 381 U. S. 131 (1965). There attorneys filed motions that the trial judge recuse himself and for a change of venue, alleging that the judge was biased. The motion for change of venue alleged that the judge intimidated and harassed the attorneys' client. The court adjudged the attorneys in contempt for filing these motions. We reversed for reasons also applicable here:

> "It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties. Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part." *Id.,* at 136.

The petition for certiorari is granted and the judgment is reversed.

It is so ordered.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring.

I agree with the Court's disposition of the case but something more needs to be said.

A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except on full ventilation of the facts. Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record. Some measure of the flavor of what really occurred in this episode, and of the petitioner's attitude and demeanor, how his spoken words impressed those present, may be

gleaned from the events and utterances described in the Court's *per curiam* opinion.

The North Carolina court is, of course, free to promptly summon this petitioner before it and, observing the strictures of *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971), issue process requiring him to show cause why he should not be held in contempt for the conduct and utterances following the contempt adjudication.

UNITED STATES *v.* STANDARD OIL CO. OF CALIFORNIA

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

No. 71–527. Decided January 24, 1972

Section 3 of the Sherman Act applies to the unorganized Territory of American Samoa. Cf. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253. 330 F. Supp. 371, reversed.

PER CURIAM.

The United States sought injunctive relief against appellee, alleging that appellee combined and conspired to restrain and monopolize the distribution and sale of petroleum products in American Samoa, in violation of § 3 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 3.[1] The District Court for the Northern District of California dismissed the complaint for lack of jurisdiction on the ground that American Samoa is not a "Territory of the United States" within the meaning of § 3. 330 F. Supp. 371 (1971). The United States has appealed pursuant to the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We note probable jurisdiction and reverse.

American Samoa is a group of seven small islands in the South Pacific. Treaties with Great Britain and Ger-

[1] Section 3 provides in pertinent part:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

many recognize the claims of the United States to the islands. 31 Stat. 1878, T. S. No. 314. By Act of Congress, 45 Stat. 1253, 48 U. S. C. § 1661, powers to govern the islands are vested in the President, who has delegated the authority to the Secretary of the Interior, Exec. Order No. 10264, 16 Fed. Reg. 6417.

The District Court distinguished between "organized" and other Territories, holding that only the former are Territories within § 3 and that American Samoa is not "organized." [2]

Section 3 extends to "any Territory of the United States." Congress, of course, did not have Samoa in mind when it enacted the Sherman Act. Yet, as this Court pointed out in holding that Puerto Rico is within the coverage of § 3, "that is not enough. It is necessary to go further and to say that if the acquisition of that insular dependency had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257 (1937). There is no more reason to think that Congress would have done so for Samoa than for Puerto Rico. The Court stressed in *Puerto Rico* that Congress intended by § 3 "to exert all the power it possessed in respect of the subject matter—trade and commerce," and the Court therefore found it

> "equally reasonable to conclude that Congress intended to include all territories to which its powers might extend. The same reason which requires the utmost liberality of construction in respect of the word 'trade,' also requires the same degree of liberality of construction in respect of the word 'territory'; and we hold, accordingly, that the word 'territory' was used in its most comprehensive sense, as em-

[2] An "organized" Territory is one in which a civil government has been established by an Organic Act of Congress.

> bracing all organized territories, whether incorporated into the United States or not, including Puerto Rico." *Id.*, at 259.

There is no question that Congress has power to apply the Sherman Act to Samoa. Because "Congress intended to include all Territories to which its powers might extend," it follows that Samoa is a "Territory" within the meaning of § 3. We are not persuaded by the District Court's distinction, for purposes of § 3, between organized and unorganized Territories. The Court held in *Puerto Rico* that " 'territory' was used in its most comprehensive sense"; the Court's further reference to "organized territories" was simply an application of that construction to the facts of the case, for Puerto Rico was an organized Territory, as well as a response to the contention that Puerto Rico could not be included within § 3 because it was not an "incorporated" Territory. We discern no reason, and appellee suggests none, why Congress would have wished to exclude unorganized Territories from the coverage of § 3.

Reversed.

Per Curiam

UNITED STATES v. CHRISTIAN ECHOES NATIONAL MINISTRY, INC.

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

No. 71-565. Decided January 24, 1972

Appellee, a nonprofit religious corporation, brought this refund suit, claiming that it was entitled to tax-exempt status under § 501 (c) (3) of the 1954 Internal Revenue Code. The District Court held that under the facts adduced at trial appellee qualified for exemption. It went on, however, to conclude that the Internal Revenue Service (IRS) in revoking that exemption violated (1) free exercise requirements by analyzing each activity of appellee and classifying it as "religious" or "political," and (2) due process requirements by singling appellee out, among all other religious organizations, for investigation and exemption revocation without supporting evidence. *Held:* This Court has no jurisdiction to entertain the direct appeal that the Government seeks to take under 28 U. S. C. § 1252 from the District Court's decision, which did not hold § 501 (c) (3) unconstitutional as a whole or as applied, but was merely directed at the method and means by which the IRS enforced § 501 (c) (3) in this case.

Vacated and remanded.

PER CURIAM.

This case began when the Internal Revenue Service revoked the tax-exempt status of the appellee, a nonprofit religious corporation. The appellee had previously enjoyed a tax exemption under § 501 (c) (3) of the 1954 Internal Revenue Code, 26 U. S. C. § 501 (c) (3). This section defines exempt organizations, in pertinent part, as:

> "Corporations . . . organized and operated exclusively for religious . . . purposes . . . , no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legisla-

> tion, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

The appellee's exemption under this provision was revoked on three grounds: (1) that the appellee was not operated exclusively for religious purposes, (2) that it had engaged in substantial activity aimed at influencing legislation, and (3) that it had intervened in political campaigns on behalf of candidates for public office.

The appellee paid the taxes assertedly owed and then filed the present suit for a refund in Federal District Court, claiming that it was entitled to an exempt status under § 501 (c)(3) of the Code. The case was heard by a single District Judge sitting without a jury. The judge ultimately decided that the appellee was entitled to tax-exempt status and to a refund of the taxes paid.[1]

The District Court rejected all three grounds on which the Internal Revenue Service had revoked the appellee's exempt status. It found, as fact, (1) that the appellee's "activities have been directed toward achieving its religious goals," (2) that "[w]ith the exception of support of the proposed Becker Amendment to the United States Constitution relating to voluntary prayer and Bible reading in public schools, [the appellee] has not engaged in attempts to influence legislation," and (3) that the appellee "has not endorsed a political candidate, and has not instructed its followers as to how to vote but only to vote." On the basis of its findings of fact, the court concluded as law that the appellee fell within the terms of § 501 (c)(3). That ended the case. But the District Court nonetheless went on to discuss certain constitutional issues.

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[1] The findings of fact and conclusions of law of the District Court in this case, entered on June 24, 1971, are not officially reported.

In its conclusions of law, the court stated that the First Amendment prohibits both the Government and the courts from determining whether a religious organization is operated for exclusively religious purposes, and is thus eligible for tax-exempt status, by analyzing each and every activity of the organization and classifying it as "religious" or "political." In this case, the court said, the Internal Revenue Service conducted and relied upon such an analysis in revoking the appellee's exemption and, for that reason, the Service denied the free exercise of religion to the appellee. The District Court also stated that the Internal Revenue Service violated the appellee's right to due process of law by singling it out, among all other religious organizations, for investigation and exemption revocation "without evidence to support its action."

The United States seeks to appeal the decision of the single District Judge directly to this Court. It argues that we have jurisdiction under 28 U. S. C. § 1252. That jurisdictional provision allows a direct appeal to the Supreme Court from the decision of "any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States . . . is a party." Such a direct appeal is allowed whether the Act of Congress was declared unconstitutional "as a whole" or simply "as applied." *Fleming* v. *Rhodes,* 331 U. S. 100, 102–103. The findings and conclusions of the District Court in the present case, however, reveal that it did not hold § 501 (c)(3) unconstitutional in either of these ways. Hence, we must dismiss this appeal for want of jurisdiction.

The "basis" of the District Court's decision, *United States* v. *Raines,* 362 U. S. 17, 20, was that, under the facts adduced at trial, the appellee qualified for exempt status under § 501 (c)(3). The court did not question or even consider the constitutionality of § 501 (c)(3) "as

a whole." Nor does any part of its opinion hold that the section was unconstitutional "as applied." Indeed, the court in this case would hardly have found the appellee to be qualified for an exemption under § 501 (c)(3), only to hold that the section could not be validly applied in the first place.

The District Court's commentary on the denial of due process to the appellee was directed simply to the *method* by which § 501 (c)(3) was enforced [2]—not to its basic applicability. The court held that the Internal Revenue Service may not discriminate in applying the section. This holding restricts freewheeling enforcement and may make it more difficult to revoke certain tax exemptions. But it does not call into question the validity of the underlying statute. Under § 1252, direct appeal to the Supreme Court is authorized only in the latter situation.

Similarly, the District Court's commentary on the denial of the appellee's First Amendment rights was directed to the particular interpretation given to § 501 (c)(3) by the Internal Revenue Service in this case and to its means of enforcing that interpretation. At most, the court's reasoning on this point can be read to construe § 501 (c)(3) narrowly so as to avoid a First Amendment problem.[3] The court refused to interpret

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[2] By far the greatest portion of the District Court's findings of fact are directed to the detailed history of the Government's investigation of the appellee's exempt status.

[3] For example, the District Court stated:

"43. [The appellant] has characterized certain of [the appellee's] activities during the years involved in this suit as urging the public to contact members of legislative bodies for the purpose of proposing, supporting or opposing legislation. [The appellee] has characterized the same activities as taking stands on issues of the day concerning matters which it construes to threaten its religious beliefs. The Court finds that these activities have resulted from [the appellee's] religious beliefs and were merely incidental to the

and apply the section to require an analysis of the "religious" or "non-religious" character of every activity by a concededly religious organization, because such an interpretation and application would infringe the right to free exercise of religion. It stated that the Internal Revenue Service had already gone too far in its enforcement of this interpretation. But the statement that the *Service* violated the appellee's First Amendment rights is not the same as a holding that *Congress* did so in enacting § 501 (c)(3). The court avoided holding that the section itself was unconstitutional "as applied"—*i. e.*, that the section, by its own terms, infringed constitutional freedoms in the circumstances of the particular case. Rather, it held that the Service had misinterpreted § 501 (c)(3) and that the section must be narrowly construed.[4] Although the construction was

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exercise of its religion and the expression and dissemination of its understanding of biblical concepts. The Court further finds that any such activities by [the appellee] were insubstantial in relationship to the totality of [the appellee's] activities.

"44. [The appellant], in describing and characterizing [the appellee's] activities as political and non-religious, has in fact indicated a disagreement with the content and nature of what [the appellee] has said and written. [The appellant] has thereby sponsored its own definitions of 'religion' and 'religious.' Such definitions by [the appellant] are impermissable [*sic*]. . . .

"45. [The appellee's] expression of opinion on 'current issues or issues of the day' is not an act contemplated by prohibition against intervention in political campaigns or legislation and is not a violation of the provisions of Internal Revenue Code."

[4] A similar distinction has been drawn in the context of the three-judge district court statute, 28 U. S. C. § 2281. "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action." *Ex parte Bransford,* 310 U. S. 354, 361.

based on a constitutional premise, it did not amount to a holding that an Act of Congress is unconstitutional, as contemplated by § 1252. To the contrary, the District Court construed the section so as to save its constitutionality.

Our interpretation of the District Court's conclusions of law does not, of course, indicate approval of those conclusions. The issue is not before us. We hold only that there is an absence of appellate jurisdiction under § 1252.

The judgment is vacated and the case remanded to the District Court for the entry of a fresh decree, so that the appellant may appeal to the United States Court of Appeals for the Tenth Circuit.

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

BRADLEY *v.* UNITED STATES

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

No. 71-5431. Decided January 24, 1972

Certiorari granted; 447 F. 2d 264, vacated and remanded to the District Court with directions to dismiss the indictment.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

The judgment is vacated and the case is remanded to the United States District Court for the Southern District of Iowa with directions to dismiss the indictment. *Durham* v. *United States,* 401 U. S. 481 (1971).

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent for the reasons stated in MR. JUSTICE BLACKMUN'S dissenting opinion in *Durham* v. *United States,* 401 U. S. 481, 483–485 (1971).

Reporter's Note

The next page is purposely numbered 801. The numbers between 567 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1970, THROUGH JANUARY 27, 1972

Cases Dismissed In Vacation

No. 70–5139. Green *v.* California. Sup. Ct. Cal. Petition for writ of certiorari dismissed July 14, 1971, pursuant to Rule 60 of the Rules of this Court. Reported below: 3 Cal. 3d 981, 479 P. 2d 998.

No. 70–5104. McGhee *v.* Pennsylvania. Super. Ct. Pa. Petition for writ of certiorari dismissed July 27, 1971, pursuant to Rule 60 of the Rules of this Court.

No. 70–100. Col-An Entertainment Corp. et al. *v.* Harper et al. Appeal from D. C. N. D. Fla. dismissed August 20, 1971, pursuant to Rule 60 of the Rules of this Court. Reported below: 325 F. Supp. 447. [Probable jurisdiction noted, 402 U. S. 941.]

No. 70–177. United States *v.* International Telephone & Telegraph Corp. Appeal from D. C. Conn. dismissed August 23, 1971, pursuant to Rule 60 of the Rules of this Court. Reported below: 306 F. Supp. 766.

No. 70–5374. Ameeriar et ux. *v.* Immigration and Naturalization Service. C. A. 3d Cir. Petition for writ of certiorari dismissed September 2, 1971, pursuant to Rule 60 of the Rules of this Court. Reported below: 438 F. 2d 1028.

No. 71–5199. Kopolsky *v.* United States. C. A. 2d Cir. Petition for writ of certiorari dismissed September 3, 1971, pursuant to Rule 60 of the Rules of this Court. Reported below: 443 F. 2d 1178.

No. 70–62. Amalgamated Clothing Workers of America, AFL–CIO *v.* Prepmore Apparel, Inc., et al.

C. A. 5th Cir. Writ of certiorari dismissed September 15, 1971, pursuant to Rule 60 of the Rules of this Court. Reported below: 431 F. 2d 1004. [Certiorari granted, 401 U. S. 993.]

No. 71–5079. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed September 29, 1971, pursuant to Rule 60 of the Rules of this Court.

OCTOBER 6, 1971

Dismissal Under Rule 60

No. 70–5147. MASSEY *v.* GEORGIA. Sup. Ct. Ga. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 227 Ga. 257, 181 S. E. 2d 71.

OCTOBER 12, 1971

Dismissal Under Rule 60

No. 70–8. UNITED STATES *v.* JOHNSON. C. A. 9th Cir. Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 425 F. 2d 630. [Certiorari granted, 400 U. S. 990.]

Affirmed on Appeal

No. 70–157. ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Colo. Reported below: 321 F. Supp. 353.

No. 70–329. SYUFY ENTERPRISES *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 333 F. Supp. 1100.

No. 70–328. UNITED FEDERATION OF POSTAL CLERKS *v.* BLOUNT, POSTMASTER GENERAL. Affirmed on appeal from D. C. D. C. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 325 F. Supp. 879.

No. 71–63. JURAS *v.* MEYERS ET AL. Appeal from D. C. Ore. Motion of appellees for leave to proceed *in forma pauperis* granted. Motion of Harold O. Swank et al. for leave to intervene and to adopt jurisdictional statement denied. Judgment affirmed. Reported below: 327 F. Supp. 759.

Appeals Dismissed

No. 70–111. WALL ET AL. *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of a properly presented federal question.

No. 70–201. LEVIN ET AL. *v.* TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRIDGEWATER ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 57 N. J. 506, 274 A. 2d 1.

No. 70–226. MARYLAND COMMUNITY DEVELOPERS, INC. *v.* STATE ROADS COMMISSION OF MARYLAND. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 261 Md. 205, 274 A. 2d 641.

No. 70–296. SPELLERBERG *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question.

No. 70–331. SECOND UNITED PRESBYTERIAN CHURCH OF JOHNSTOWN *v.* PRESBYTERY OF ALBANY. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 28 N. Y. 2d 772, 269 N. E. 2d 918.

No. 71–31. KINNEY CAR CORP. ET AL. *v.* CITY OF NEW YORK ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 28 N. Y. 2d 741, 269 N. E. 2d 829.

No. 70–5140. COLE *v.* NIGRO, JUDGE. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 471 S. W. 2d 933.

No. 71–59. HERSHBERGER ET UX. *v.* CITY OF TROY ET AL. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 27 Mich. App. 123, 183 N. W. 2d 430.

No. 71–193. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 79 Wash. 2d 288, 484 P. 2d 1146.

No. 70–133. STRASBOURG *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument.

No. 70–214. PINSON, ADMINISTRATOR *v.* CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument.

No. 71–18. PACHECO *v.* PACHECO. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 246 So. 2d 778.

No. 71–5023. HAYNES ET AL. *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 28 N. Y. 2d 764, 269 N. E. 2d 915.

No. 71–197. ROGOFF *v.* ANDERSON ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL are of the opinion that probable jurisdiction should be noted and case set for oral argument.

No. 70–178. DEMARTINO ET UX. *v.* SCARPETTA ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 28 N. Y. 2d 185, 269 N. E. 2d 787.

No. 70–5172. QUARLES *v.* TEXAS ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 70–5190. CLARK *v.* CRAVEN, WARDEN. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 437 F. 2d 1202.

No. 71–131. RAMOS, AKA RAYMOND *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 258 La. 1, 245 So. 2d 335.

No. 71–181. WATKINS ET AL. *v.* GROVER, TRUSTEE IN BANKRUPTCY. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–5071. TAYLOR ET AL. *v.* DONALDSON. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 227 Ga. 496, 181 S. E. 2d 340.

No. 70–237. BEAUFORT TRANSFER CO. ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. E. D. Mo. dismissed for failure to docket case within time prescribed by Rule 13 of the Rules of this Court. *Shapiro* v. *Doe,* 396 U. S. 488. Reported below: 324 F. Supp. 649.

Vacated and Remanded on Appeal

No. 70–146. SOUTHERN GOVERNORS' CONFERENCE ET AL. *v.* UNITED STATES ET AL.; and

No. 70–147. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. Appeals from D. C. E. D. La. Judgment vacated and cases remanded with directions to dismiss proceedings as moot insofar as they involve formulation of terms of remand to the Interstate Commerce Commission.

No. 70–184. POPE ET AL. *v.* HAIMOWITZ ET AL. Appeal from D. C. M. D. Fla. Judgment vacated and case remanded with directions to dismiss proceedings as moot. Reported below: 325 F. Supp. 550.

Certiorari Granted—Vacated and Remanded, or Reversed

No. 70–114. HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, CALIFORNIA *v.* GROVE PRESS, INC. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of *Perez* v. *Ledesma,* 401 U. S. 82. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

No. 70–122. BURGIN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari granted and judgment reversed. *Redrup* v. *New York,* 386 U. S. 767. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent. Reported below: 255 S. C. 237, 178 S. E. 2d 325.

No. 70–164. POLICE JURY OF THE PARISH OF VERMILION *v.* HEBERT. Sup. Ct. La. Certiorari granted and judgment reversed. *Cipriano* v. *City of Houma,* 395 U. S. 701; *City of Phoenix* v. *Kolodziejski,* 399 U. S. 204; and *Stewart* v. *Parish School Board of the Parish of St. Charles,* 400 U. S. 884. Reported below: 258 La. 41, 245 So. 2d 349.

No. 70–5078. LATHAM *v.* TYNAN, COMMISSIONER OF MOTOR VEHICLES OF CONNECTICUT. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bell* v. *Burson,* 402 U. S. 535. Reported below: 435 F. 2d 1248.

Miscellaneous Orders

No. A–285 (71–377). ELIAS, CORRECTIONAL SUPERINTENDENT *v.* CATENA. C. A. 3d Cir. Reported below: 449 F. 2d 40; and

No. A–342. UNITED STATES EX REL. ANNALORO *v.* ELIAS, CORRECTIONAL SUPERINTENDENT. Pending appeal to C. A. 3d Cir. Motion for stay in Application No. A–285 granted, and counter application for bail denied. Application for bail in Application No. A–342 presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of the motion or applications.

MR. JUSTICE DOUGLAS, dissenting.

These are applications for bail in cases from the Court of Appeals for the Third Circuit, in *Catena* pending certiorari to this Court and in *Annaloro* pending appeal to the Court of Appeals. Each applicant was convicted by a state court for refusing to testify before a grand jury. Each sought habeas corpus in the federal court; and in the *Catena* case, 449 F. 2d 40, the Court of Appeals held that the applicant was unconstitutionally detained.

Concededly, the *Annaloro* case is on all fours with *Catena,* although the Court of Appeals has not yet heard the merits.

The underlying question in these cases is whether the immunity to which a witness is entitled who refuses to testify because of the Self-Incrimination Clause of the Fifth Amendment is "transactional" immunity or "use" immunity. The question is one that was stirred last Term in *Piccirillo* v. *New York,* 400 U. S. 548. As MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and I concluded in that case, the constitutional requirement calls for "transactional" immunity. *Id.,* at 550–551, 562, *et seq.* That plainly is the law as it now stands, *ibid.;* and the Court of Appeals so held. Since applicants were granted only "use" immunity and refused to testify on that ground, they have wrongfully been imprisoned. They are therefore being held unconstitutionally and should be discharged pending review of the cases.

We have noted jurisdiction in No. 69–4, *Zicarelli* v. *New Jersey State Commission of Investigation,* 401 U. S. 933, which raises the same question. But since *Malloy* v. *Hogan,* 378 U. S. 1, held that the Fourteenth Amendment applied the Self-Incrimination Clause to the States as fully as to the Federal Government, it will require a reversal in direction by this Court and a dilution of *Malloy* to say that these applicants are lawfully detained.

I would follow settled law until it is changed and meanwhile discharge these prisoners on suitable bail.*

*"A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U. S. C. § 2251.

No. A–311 (70–51). WHITCOMB, GOVERNOR OF INDIANA, ET AL. *v.* AFFELDT ET UX. Appeal from D. C. N. D. Ind. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–385. INMATES OF ATTICA CORRECTIONAL FACILITY *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Application for temporary restraining order or injunction presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

MR. JUSTICE DOUGLAS, dissenting.

Applicants, state prisoners currently incarcerated at Attica State Prison,[1] brought a class action in the District Court, under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3), alleging systematic violations of their constitutional rights by prison officials and state authorities in the aftermath of the Attica uprising of September 9–13, 1971. They requested, *inter alia,* that state officials be enjoined from questioning any prisoners concerning the uprising unless *Miranda* warnings[2] were given and counsel present. The District Court denied this request, while reserving rulings on other requested relief arising from

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[1] Subsequent to the retaking of the prison on September 13, all inmates who had not been freed from their cells were transferred to other institutions. The current prison population at Attica consists only of prisoners who had previously been assigned to Cell Block D, which was the block involved in the uprising.

[2] *Miranda* v. *Arizona,* 384 U. S. 436, held that the subject of custodial interrogation must be clearly advised that he has a right to remain silent, and that anything he says may be used against him in court. He must be clearly informed that he has a right to consult with an attorney, to have an attorney present during interrogation, and, if he is indigent, to have an attorney appointed to represent him. Statements elicited without these warnings having been given are inadmissible against the subject at trial.

charges of beatings, threats, interference with access to counsel, and destruction of legal materials.[3] The question, however, was certified for appeal to the Court of Appeals, and is at present awaiting a decision there.

This is a case in which the public interest runs high and which raises grave questions concerning procedures for law enforcement that comport with the Constitution. The need for an immediate, authoritative determination of the prisoners' claims is paramount. It would serve no interest of the public, or of judicial order, for that determination to await the exhaustion of remedies in the lower courts.

Miranda is part of a prisoner's bill of rights. In a recent case *Miranda* was applied where a federal agent questioned a prisoner who was at the time serving a state sentence on a different crime. The Solicitor General argued that *Miranda* was not applicable to that situation. We disagreed and, speaking through Mr. Justice Black, said:

> "The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is 'in custody' in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the

[3] The District Court, on October 6, 1971, dismissed the remainder of the prisoners' claims. Were an appeal of these claims presently docketed in the Court of Appeals, I would consolidate them so that the entire case could be disposed of at one time.

person is in custody." *Mathis* v. *United States*, 391 U. S. 1, 4–5.

I would treat the application before us as a petition for certiorari, and bring to this Court for summary disposition the entire matter pending in the Court of Appeals. See, *e. g.*, *Wilson* v. *Girard*, 354 U. S. 524, 928; *Ex parte Quirin*, 317 U. S. 1.

No. A–389. ALLGOOD ET AL. *v.* BREWER ET AL. Application for stay of order of District Court for the Eastern District of Virginia presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. ——. JACKSON ET AL. *v.* ELLINGTON ET AL. D. C. W. D. Tenn. Motion of appellee Canale to dismiss cause pursuant to Rule 14 (3) of the Rules of this Court granted.

No. 45, Orig. WASHINGTON ET AL. *v.* GENERAL MOTORS CORP. ET AL. Motion of Heart Disease Research Foundation et al. for leave to intervene and to participate in oral argument denied. Motion of Attorney General of California for leave to participate in oral argument as *amicus curiae* denied. [For earlier orders herein, see, *e. g.*, 403 U. S. 949.]

No. 154, October Term, 1970. JAMES ET AL. *v.* VALTIERRA ET AL.; and

No. 226, October Term, 1970. SHAFFER *v.* VALTIERRA ET AL., 402 U. S. 137. Motions of appellees to be relieved of costs denied.

No. 281, October Term, 1970. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL., 402 U. S. 1. Pursuant to motion of petitioners to tax costs herein, it is ordered that one-half of the taxable costs herein shall be allowed to petitioners, to be paid by respondents.

No. 68–5009. SCHNEBLE *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, 403 U. S. 952.] Motion to use record in No. 1070, Misc., October Term, 1967 [*Schneble* v. *Florida,* 392 U. S. 298], granted.

No. 68–5027. AIKENS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 69–5003. FURMAN *v.* GEORGIA. Sup. Ct. Ga.;
No. 69–5030. JACKSON *v.* GEORGIA. Sup. Ct. Ga.; and
No. 69–5031. BRANCH *v.* TEXAS. Ct. Crim. App. Tex.
Motions of James V. Bennett et al., National Association for the Advancement of Colored People et al., Synagogue Council of America and its Constituents et al., and American Civil Liberties Union for leave to file briefs as *amici curiae* granted. Motion of respondent in No. 68–5027 for leave to proceed on original record granted. [Certiorari granted, 403 U. S. 952.]

No. 69–4. ZICARELLI *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Appeal from Sup. Ct. N. J. [Probable jurisdiction noted, 401 U. S. 933.] Motion of National District Attorneys Assn. et al. for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 69–5. D. H. OVERMYER CO., INC., OF OHIO ET AL. *v.* FRICK CO. Ct. App. Ohio, Lucas County. [Certiorari granted, 401 U. S. 992.] Motions of Ohio State Legal Services Assn. et al. for leave to file a brief as *amici curiae* and to dispense with printing granted.

No. 69–5001. MOORE *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, 403 U. S. 953.] Motion of petitioner to proceed on original record granted. Motion of NAACP Legal Defense & Educational Fund, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 69–5035. JOHNSON *v.* LOUISIANA. Appeal from Sup. Ct. La. [Probable jurisdiction noted, 400 U. S. 900.] Motion of appellant for additional time for oral argument denied.

No. 70–2. UNITED STATES *v.* 12 200-FT. REELS OF SUPER 8MM. FILM ET AL. (PALADINI, CLAIMANT). Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, 403 U. S. 930.] Thomas H. Kuchel, Esquire, of Beverly Hills, California, a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 70–4. REED *v.* REED, ADMINISTRATOR. Appeal from Sup. Ct. Idaho. [Probable jurisdiction noted, 401 U. S. 934]; and

No. 70–5026. ALEXANDER *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 401 U. S. 936.] Motion of National Federation of Business & Professional Women's Clubs, Inc., for leave to file a brief as *amicus curiae* granted.

No. 70–18. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeal from D. C. N. D. Tex.; and

No. 70–40. DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL. Appeal from D. C. N. D. Ga. Motions of National Legal Program on Health Problems of the Poor et al., American Ethical Union et al., Planned Parenthood Federation of America, Inc., et al., American Association of University Women et al., New Women Lawyers et al., Robert L. Sassone, and State Communities Aid Assn. for leave to file briefs as *amici curiae* granted. Motion of appellants for additional time for oral argument in No. 70–18 denied. Motion of American College of Obstetricians and Gynecologists et al. for leave to file a brief as *amici curiae* in No. 70–40 granted. [Probable jurisdiction postponed, 402 U. S. 941.]

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No. 70–6. SWARB ET AL. *v.* LENNOX ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 401 U. S. 991.] Motion of Pennsylvania Credit Union League for leave to participate in oral argument as *amicus curiae* denied. Motion of Pennsylvania Bankers Assn. for leave to file a brief as *amicus curiae* granted.

No. 70–9. YOUNGER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. *v.* GILMORE ET AL. Appeal from D. C. N. D. Cal. [Probable jurisdiction postponed, 401 U. S. 906.] Motion of appellees for appointment of counsel granted. It is ordered that John E. Wahl, Esquire, of San Francisco, California, be, and he is hereby, appointed to serve as counsel for appellees in this case.

No. 70–19. UNITED STATES *v.* MARION ET AL. Appeal from D. C. D. C. [Probable jurisdiction postponed, 401 U. S. 934.] Motion of appellee Cratch for leave to proceed *in forma pauperis* granted. Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as *amicus curiae* denied.

No. 70–34. SIERRA CLUB *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. [Certiorari granted, 401 U. S. 907.] Motion of American National Cattlemen's Assn. et al. for leave to file a brief as *amici curiae* granted. Motion of petitioner for additional time for oral argument denied.

No. 70–47. DIFFENDERFER ET AL. *v.* CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INC., ET AL. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 401 U. S. 934.] Motion of appellant Diffenderfer for additional time for oral argument denied.

No. 70–54. VICTORY CARRIERS, INC., ET AL. *v.* LAW. C. A. 5th Cir. [Certiorari granted, 401 U. S. 936.] Motion of National Maritime Compensation Committee for leave to file an untimely brief as *amicus curiae* denied.

No. 70–57. UNITED STATES *v.* CALDWELL. C. A. 9th Cir. [Certiorari granted, 402 U. S. 942.] Motion of respondent for additional time for oral argument denied. Motions of Washington Post Co. et al., and New York Times et al. for leave to participate in oral argument as *amici curiae* denied.

No. 70–85. BRANZBURG *v.* HAYES ET AL., JUDGES. Ct. App. Ky.; and

No. 70–94. IN RE PAPPAS. Sup. Jud. Ct. Mass. Motion of the Solicitor General to participate in oral argument as *amicus curiae* in support of respondents in each case granted. The Solicitor General allotted 15 minutes for his argument and counsel for petitioner allotted 15 additional minutes to argue in each case. Motions of American Newspaper Guild, AFL–CIO, CLC, and American Newspaper Publishers Assn. for leave to file briefs in No. 70–85 as *amici curiae* granted. [Certiorari granted, 402 U. S. 942.]

No. 70–60. SUPERINTENDENT OF INSURANCE OF NEW YORK *v.* BANKERS LIFE & CASUALTY CO. ET AL. C. A. 2d Cir. [Certiorari granted, 401 U. S. 973.] Motion to substitute Ruth M. Garvin as Executrix of Estate of George K. Garvin in place of George K. Garvin, deceased, granted.

No. 70–73. MILLER *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct., County of Orange. [Probable jurisdiction noted, 401 U. S. 992.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 70–77. NORTH CAROLINA *v.* RICE. C. A. 4th Cir. [Certiorari granted, 401 U. S. 1008.] Motion of Prison Research Council for leave to file a brief as *amicus curiae* granted.

No. 70–75. MOOSE LODGE No. 107 *v.* IRVIS ET AL. Appeal from D. C. M. D. Pa. [Probable jurisdiction postponed, 401 U. S. 992.] Motions of Washington State Federation of Fraternal, Patriotic, City & Country Clubs, Lawyers' Committee for Civil Rights Under Law, Benevolent & Protective Order of Elks of the United States, and American Jewish Committee et al. for leave to file briefs as *amici curiae* granted.

No. 70–78. AFFILIATED UTE CITIZENS OF UTAH ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. [Certiorari granted, 402 U. S. 905.] Motions of Ute Indian Tribe of Uintah and Ouray Reservations et al., and Native American Rights Fund for leave to file briefs as *amici curiae* granted. Upon consideration of motion of the Solicitor General for additional time for oral argument, petitioners allotted 40 minutes for oral argument; the Solicitor General allotted 20 minutes and other respondents allotted 20 minutes for oral argument.

No. 70–88. S&E CONTRACTORS, INC. *v.* UNITED STATES. Ct. Cl. [Certiorari granted, 402 U. S. 971.] Motion of American Bar Assn. for leave to participate in oral argument as *amicus curiae* denied.

No. 70–90. SCHILB ET AL. *v.* KUEBEL ET AL. Appeal from Sup. Ct. Ill. [Probable jurisdiction noted, 402 U. S. 928.] Motion of Frederick Douglas Andrews for leave to file a brief as *amicus curiae,* to dispense with printing, and for leave to participate in oral argument as *amicus curiae* denied.

No. 70–113. FORD MOTOR CO. *v.* UNITED STATES ET AL. Appeal from D. C. E. D. Mich. [Probable jurisdiction noted, 403 U. S. 903.] Joint motion for additional time for oral argument granted, and both appellant and appellees granted 15 additional minutes for oral argument.

No. 70–97. NORFOLK & WESTERN RAILWAY CO. *v.* NEMITZ ET AL. C. A. 6th Cir. [Certiorari granted, 402 U. S. 994.] Motion of United Transportation Union for leave to file a brief as *amicus curiae* denied.

No. 70–250. CARLESON, DIRECTOR OF DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* REMILLARD ET AL. Appeal from D. C. N. D. Cal. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Motion for reinstatement of stay of injunctive order denied. Reported below: 325 F. Supp. 1272.

No. 70–5305. DIGESUALDO ET AL. *v.* SHEA, DIRECTOR OF DEPARTMENT OF SOCIAL SERVICES, ET AL. Appeal from D. C. Colo. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 71–183. AGUA CALIENTE BAND OF MISSION INDIANS ET AL. *v.* COUNTY OF RIVERSIDE, CALIFORNIA. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 442 F. 2d 1184.

No. 70–5033. LOVE *v.* PULLMAN CO. C. A. 10th Cir. [Certiorari granted, 401 U. S. 907.] Motion of National Association for Advancement of Colored People for leave to file a brief as *amicus curiae* granted.

No. 70–5039. FUENTES ET AL. *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 401 U. S. 906, *sub nom. Fuentes* v. *Faircloth.*] Motions of National Consumer Law Center and Urban Law Institute for leave to file a brief as *amici curiae* and to dispense with printing granted.

No. 70–5045. LINDSEY ET AL. *v.* NORMET ET AL. D. C. Ore. [Probable jurisdiction noted, 402 U. S. 941.] Motions of Legal Services of Greater Miami, Inc., New Hampshire Legal Assistance, Memphis & Shelby County Legal Services Assn., Inc., June Brooks, Vermont Legal Aid, Inc., Western Center on Law & Poverty, Legal Aid Society of Louisville, Legal Aid Bureau, Inc., Community Action for Legal Services, Inc., et al., and Allen County Legal Aid Society et al. for leave to file briefs as *amici curiae,* granted. THE CHIEF JUSTICE and MR. JUSTICE MARSHALL would deny these motions.

No. 70–239. KAZUBOWSKI ET AL. *v.* DOLAR, AKA KAZUBOWSKI, ET AL.; and

No. 70–321. KAZUBOWSKI *v.* RAY, SHERIFF, ET AL. Motions for leave to file petitions for writs of certiorari and other relief denied.

No. 70–5257. JACKSON *v.* PERINI, CORRECTIONAL SUPERINTENDENT; and

No. 70–5338. DAUGHERTY *v.* CRAVEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 70–5115. CARTER *v.* UNITED STATES COURT OF CLAIMS;

No. 70–5196. WATSON *v.* GOODWIN, U. S. DISTRICT JUDGE; and

No. 71–90. KAZUBOWSKI ET AL. *v.* ALLOY, CHIEF JUSTICE, APPELLATE COURT OF ILLINOIS. Motions for leave to file petitions for writs of mandamus denied.

No. 70–5366. TATUM *v.* STECKLER, CHIEF JUDGE, U. S. DISTRICT COURT; and

No. 71–5003. THERIAULT *v.* MISSISSIPPI. Motions for leave to file petitions for writs of mandamus denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 70–5164. GUNSTON *v.* SUPERIOR COURT, COUNTY OF ALAMEDA, CALIFORNIA. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 70–304. LEWIS ET AL. *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.; and

No. 70–343. KELLY ET AL. *v.* UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, ET AL. (UNION OIL COMPANY OF CALIFORNIA, REAL PARTY IN INTEREST). Motions for leave to file petitions for writs of mandamus and/or certiorari denied.

No. 71–139. ORMENTO *v.* MACMAHON, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 70–118. SMITH ET AL. *v.* DISTRICT COURT OF OKLAHOMA COUNTY ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 70–69. UNITED STATES *v.* ORITO. Appeal from D. C. E. D. Wis. Probable jurisdiction noted. Reported below: 338 F. Supp. 308.

No. 70–212. NORTHEAST AIRLINES, INC., ET AL. *v.* NEW HAMPSHIRE AERONAUTICS COMM'N ET AL. Appeal from Sup. Ct. N. H. Probable jurisdiction noted. Reported below: 111 N. H. 5, 273 A. 2d 676.

No. 70–161. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WRIGHT ET AL.; and

No. 70–5211. WRIGHT ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeals from D. C. D. C. Motion of appellants in No. 70–5211 for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 321 F. Supp. 383.

No. 70–5064. JEFFERSON ET AL. *v.* HACKNEY, COMMISSIONER OF PUBLIC WELFARE, ET AL. Appeal from D. C. N. D. Tex. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

No. 70–5106. GRAYNED *v.* CITY OF ROCKFORD. Appeal from Sup. Ct. Ill. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Case consolidated with No. 70–87 [*Police Department of the City of Chicago* v. *Mosley*, certiorari granted, *infra*] and a total of one hour allotted for oral argument. Reported below: 46 Ill. 2d 492, 263 N. E. 2d 866.

Certiorari Granted

No. 70–99. EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT ET AL. *v.* DELTA AIRLINES, INC., ET AL. Sup. Ct. Ind. Certiorari granted. Reported below: —— Ind. ——, 265 N. E. 2d 27.

No. 70–188. WRIGHT ET AL. *v.* COUNCIL OF THE CITY OF EMPORIA ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 442 F. 2d 570.

No. 70–251. JOSEPH *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 438 F. 2d 1233.

No. 70–286. IOWA BEEF PACKERS, INC. *v.* THOMPSON ET AL. Sup. Ct. Iowa. Certiorari granted. Reported below: 185 N. W. 2d 738.

No. 70–295. FIRST NATIONAL CITY BANK *v.* BANCO NACIONAL DE CUBA. C. A. 2d Cir. Certiorari granted. Reported below: 442 F. 2d 530.

No. 70–305. COMMISSIONER OF INTERNAL REVENUE *v.* FIRST SECURITY BANK OF UTAH, N. A., ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 436 F. 2d 1192.

No. 70–87. POLICE DEPARTMENT OF THE CITY OF CHICAGO ET AL. *v.* MOSLEY. C. A. 7th Cir. Certiorari granted. Case consolidated with No. 70–5106 [*Grayned* v. *City of Rockford*, probable jurisdiction noted, *supra*] and a total of one hour allotted for oral argument. Reported below: 432 F. 2d 1256.

No. 70–267. NATIONAL LABOR RELATIONS BOARD *v.* SCRIVENER, DBA AA ELECTRIC CO. C. A. 8th Cir. Motion to dispense with printing respondent's brief and certiorari granted. Reported below: 435 F. 2d 1296.

No. 70–130. UNITED STATES *v.* SCOTLAND NECK CITY BOARD OF EDUCATION ET AL.; and

No. 70–187. COTTON ET AL. *v.* SCOTLAND NECK CITY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari granted. Cases consolidated and a total of one and one-half hours allotted for oral argument. Reported below: 442 F. 2d 575.

No. 70–5112. WEBER *v.* AETNA CASUALTY & SURETY CO. ET AL. Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 257 La. 424, 242 So. 2d 567.

No. 70–5122. DUNCAN *v.* TENNESSEE. Sup. Ct. Tenn. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 224 Tenn. 712, 462 S. W. 2d 491.

No. 70–5388. LOPER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition which reads as follows:

"1. Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?"

Reported below: 440 F. 2d 934.

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No. 71–123. NATIONAL LABOR RELATIONS BOARD *v.* BURNS INTERNATIONAL SECURITY SERVICES, INC. (FORMERLY KNOWN AS WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.), ET AL.; and

No. 71–198. BURNS INTERNATIONAL SECURITY SERVICES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari granted in No. 71–123. Certiorari granted in No. 71–198 limited to Question 2 presented by the petition which reads as follows:

"2. In such a proceeding, may a sub-contractor who is awarded a contract to provide services at a facility be held to be a successor of the previous sub-contractor and required to bargain with the union representing the previous sub-contractor's employees, where: (a) there is a total absence of dealings between the two sub-contractors; (b) the previous sub-contractor's performance at the facility constitutes a small portion of its total business, the balance of which was not affected by the change of sub-contractors; (c) the performance of the contract is integrated into the new sub-contractor's previously existing business; (d) there is a change in supervision at the facility by the new sub-contractor; and (e) within six months after the awarding of the contract the previous sub-contractor's employees constitute less than a majority of employees employed at the facility?"

Cases consolidated and a total of one hour allotted for oral argument. Reported below: 441 F. 2d 911.

Certiorari Denied. (See also Nos. 70–178, 70–5172, 70–5190, 71–131, 71–181, and 71–5071, *supra.*)

No. 70–101. O'DELL *v.* GARRETT, EXECUTRIX, ET AL. Ct. App. N. M. Certiorari denied. Reported below: 82 N. M. 240, 478 P. 2d 568.

No. 70–115. MCVEAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 1120.

No. 70–107. WEBSTER *v.* OFFSHORE FOOD SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1191.

No. 70–116. DOWELL *v.* BEECH ACCEPTANCE CORP., INC., ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 3d 544, 476 P. 2d 401.

No. 70–119. BLEVINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 1385.

No. 70–121. LEE *v.* COUNTY COURT OF ERIE COUNTY ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 2d 432, 267 N. E. 2d 452.

No. 70–126. RHOADES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 12 Cal. App. 3d 720, 90 Cal. Rptr. 794.

No. 70–129. CLARK *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 26 Mich. App. 475, 182 N. W. 2d 632.

No. 70–132. RIGGS *v.* UNITED STATES;
No. 70–134. AMICK *v.* UNITED STATES;
No. 70–135. NASH *v.* UNITED STATES;
No. 70–5136. MAYNE *v.* UNITED STATES;
No. 70–5228. WYMER ET AL. *v.* UNITED STATES; and
No. 70–5321. BRODERICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 439 F. 2d 351.

No. 70–136. F. D. RICH CO., INC., ET AL. *v.* ACME GRANITE & TILE CO., A DIVISION OF PIPER & GREENHALGH, INC., ET AL.; and
No. 70–137. ACME GRANITE & TILE CO., A DIVISION OF PIPER & GREENHALGH, INC. *v.* F. D. RICH CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 549.

No. 70–124. BEAUDINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 1320.

No. 70–138. KIRKER ET AL. *v.* MOORE, GOVERNOR OF WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 436 F. 2d 423.

No. 70–139. ALOISIO ET AL. *v.* UNITED STATES; and
No. 70–259. BARTOLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 705.

No. 70–150. LIPSEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 2d 974.

No. 70–151. KRAEMER ET AL. *v.* PUBLIC EMPLOYMENT RELATIONS BOARD ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 297, 316 N. Y. S. 2d 88.

No. 70–155. DEVERS ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 260 Md. 360, 272 A. 2d 794.

No. 70–156. ESCUTE *v.* DELGADO, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 70–158. INJECT-O-METER MANUFACTURING CO., INC. *v.* NORTH PLAINS FERTILIZER & CHEMICAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 1138.

No. 70–160. LUROS ET AL. *v.* CALIFORNIA; and
No. 71–82. STURMAN ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 3d 84, 480 P. 2d 633.

No. 70–162. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 1133.

No. 70–163. VARNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 1195 and 441 F. 2d 386.

No. 70–166. GOLDMAN *v.* UNITED STATES; and
No. 70–194. CATALANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 439 F. 2d 1100.

No. 70–168. KLEIN *v.* SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 70–169. UNITED TRANSPORTATION UNION ET AL. *v.* ATLANTA & WEST POINT RAIL ROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 73.

No. 70–170. RHINEHART *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 718.

No. 70–171. ANDREWS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 155.

No. 70–175. HEALD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 70–182. LUCKENBACH OVERSEAS CORP. *v.* OZGA. C. A. 2d Cir. Certiorari denied.

No. 70–181. BERKE *v.* LEHIGH MARINE DISPOSAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 1073.

No. 70–183. REYNOLDS METALS CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 194 Ct. Cl. 309, 438 F. 2d 983.

No. 70–186. TOP SHIPPERS ASSN., INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 501.

No. 70–189. CALLAHAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 439 F. 2d 852.

No. 70–190. POPPENHEIMER ET AL. *v.* CITY OF MEMPHIS ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 70–191. SANDELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 488.

No. 70–192. SACRAMENTO COCA-COLA BOTTLING CO., INC. *v.* CHAUFFEURS, TEAMSTERS & HELPERS, LOCAL 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 1096.

No. 70–195. XYDAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 184, 445 F. 2d 660.

No. 70–196. UMPQUA RIVER NAVIGATION CO. *v.* OREGON ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: —— Ore. ——, 478 P. 2d 631.

No. 70–198. DOWELL ET AL. *v.* ACHESON ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 155, 269 N. E. 2d 571.

No. 70–200. UNION CARBIDE CORP. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 71–76. NATIONAL LABOR RELATIONS BOARD *v.* UNION CARBIDE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 440 F. 2d 54.

No. 70–203. WESTERN FIDELITY CORP. ET AL. *v.* INSURANCE COMPANY OF NORTH AMERICA. C. A. 10th Cir. Certiorari denied. Reported below: 437 F. 2d 752.

No. 70–204. ZOLLMAN ET AL. *v.* SYMINGTON WAYNE CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 438 F. 2d 28.

No. 70–205. CAINE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 454.

No. 70–206. PETERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 1313.

No. 70–207. LEVY *v.* MICHIGAN. Ct. App. Mich. and/or Sup. Ct. Mich. Certiorari denied. Reported below: 28 Mich. App. 339, 184 N. W. 2d 325.

No. 70–208. MILLER *v.* SPEIGHT. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 781.

No. 70–213. GROENDYKE TRANSPORT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 981.

No. 70–216. INTERNATIONAL PAPER CO. *v.* FEDERAL POWER COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 1349.

No. 70–217. ANSTED *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 1020.

No. 70–219. MUNCASTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 70–224. HOLCOMB *v.* CESSNA AIRCRAFT CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 1150.

No. 70–225. FALK ET AL., DBA DRUCKER & FALK *v.* HODGSON, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 439 F. 2d 340.

No. 70–229. INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA *v.* HODGSON, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 1113.

No. 70–230. CRANDALL *v.* UNITED STATES;
No. 70–5277. GORDON *v.* UNITED STATES;
No. 70–5284. DIXON *v.* UNITED STATES;
No. 70–5300. FANNING *v.* UNITED STATES;
No. 70–5301. MARMORSTEIN ET AL. *v.* UNITED STATES; and
No. 70–5313. SCHIKEVITZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 858.

No. 70–231. TOWN OF HARRISON *v.* MYERS, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 293.

No. 70–232. INDEPENDENT BROKER-DEALERS' TRADE ASSN. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 142 U. S. App. D. C. 384, 442 F. 2d 132.

No. 70–234. FIRST NATIONAL BANK OF COMMERCE, FORMERLY NATIONAL BANK OF COMMERCE IN NEW ORLEANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 809.

No. 70–235. BUBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 405.

No. 70–236. HENDERSON, EXECUTOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 436 F. 2d 1281.

No. 70–245. PICCHIONE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 440 F. 2d 170.

No. 70–238. DuNord Cafe, Inc., et al. *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 70–241. Texaco Inc. *v.* Gizzi et al. C. A. 3d Cir. Certiorari denied. Reported below: 437 F. 2d 308.

No. 70–247. Lyman Printing & Finishing Co., a Division of M. Lowenstein & Sons *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. Reported below: 437 F. 2d 1356.

No. 70–248. Harrison et al. *v.* Prather. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1168.

No. 70–252. International Union of Operating Engineers *v.* Metropolitan Paving Co., Inc., et al. C. A. 10th Cir. Certiorari denied. Reported below: 439 F. 2d 300.

No. 70–253. Deere & Co. *v.* Hesston Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 904.

No. 70–254. Smith Tug & Barge Co. et al. *v.* Columbia-Pacific Towing Corp. et al. Sup. Ct. Wash. Certiorari denied. Reported below: 78 Wash. 2d 975, 482 P. 2d 769.

No. 70–255. Warner et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 821.

No. 70–256. Aguirre et al. *v.* Citizens Casualty Company of New York. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 141.

No. 70–257. Cox *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 86.

No. 70–260. King *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 70–258. DIEHL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 705.

No. 70–264. J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 514.

No. 70–268. PATAT ET AL. *v.* DAY COMPANIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1343.

No. 70–269. JOHNSTON ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 227 Ga. 387, 181 S. E. 2d 42.

No. 70–270. PORTER ET AL. *v.* UNITED STATES; and
No. 70–298. FULLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 441 F. 2d 755.

No. 70–271. ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE) *v.* MAROCEANO COMPANIA NAVIERA S. A. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 854.

No. 70–273. KAPPEL ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 437 F. 2d 1222.

No. 70–275. LAFER *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 58 N. J. Super. 94, 275 A. 2d 150.

No. 70–276. D. J. MCQUESTION & SONS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 194 Ct. Cl. 522, 439 F. 2d 181.

No. 70–277. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, LOCAL NO. 1 *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 438 F. 2d 679.

No. 70–278. GLOUNER ET AL. *v.* CALIFORNIA EX REL. DEPARTMENT OF PUBLIC WORKS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 70–281. WALLACE ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 439 F. 2d 757.

No. 70–282. HOMEMAKERS, INC. *v.* CHICAGO HOME FOR THE FRIENDLESS. C. A. 7th Cir. Certiorari denied.

No. 70–288. A. ZERKOWITZ & Co., INC. *v.* UNITED STATES. C. C. P. A. Certiorari denied. Reported below: 58 C. C. P. A. (Cust.) 72, 438 F. 2d 1240.

No. 70–289. ROSE *v.* ROSE ET AL. Ct. App. Mich. Certiorari denied.

No. 70–292. HYMAN-MICHAELS CO. ET AL. *v.* NATIONAL CARGO BUREAU, INC. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 803.

No. 70–293. ALLESSANDRINI, AKA ALESS *v.* AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 439 F. 2d 699.

No. 70–294. CITY OF LOS ANGELES *v.* SHELL OIL CO. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 3d 108, 480 P. 2d 953.

No. 70–302. FIORINO *v.* NEW ENGLAND SCHOOL OF LAW ET AL. C. A. 1st Cir. Certiorari denied.

No. 70–306. TOBAR ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 443 F. 2d 835.

No. 70–307. BECHTEL CORP. *v.* NEW JERSEY; and
No. 70–309. COLONIAL PIPELINE CO. *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 70–310. PHILLIPS, ADMINISTRATRIX *v.* FIRST NATIONAL CITY BANK OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 440 F. 2d 1342.

No. 70–312. GOODMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 810.

No. 70–318. HARRIS ET AL. *v.* SAMUELS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 748.

No. 70–323. KENDALL HOUSE APARTMENTS, INC. *v.* DEPARTMENT OF REVENUE ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 245 So. 2d 221.

No. 70–324. MATHIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 249 Ark. 1081, 464 S. W. 2d 48.

No. 70–325. TRAVELERS INSURANCE CO. *v.* SMITH, EXECUTRIX. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 373.

No. 70–327. RUST *v.* COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 14 Cal. App. 3d 530, 92 Cal. Rptr. 329.

No. 70–332. UHRIG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 443 F. 2d 239.

No. 70–333. UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES & CANADA, LOCAL UNION No. 189 *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 408.

No. 70–334. DU PAGE UTILITY CO. *v.* ILLINOIS COMMERCE COMMISSION. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 550, 267 N. E. 2d 662.

No. 70–335. ELECTRONIC COMPONENTS FOR INDUSTRY CO. ET AL. *v.* ELECTRONIC COMMUNICATIONS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 487.

No. 70–337. HY-LAN FURNITURE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 437 F. 2d 1356.

No. 70–340. HANCOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1285.

No. 70–341. TAGGART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 727.

No. 70–345. SKILLMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 442 F. 2d 542.

No. 70–346. GEO. A. CLARK & SON, INC. *v.* NOLD ET UX. Sup. Ct. S. D. Certiorari denied. Reported below: 85 S. D. 468, 185 N. W. 2d 677.

No. 70–348. RATH *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 70–349. SPEESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 440 F. 2d 1164.

No. 70–350. EASTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 441 F. 2d 425.

No. 70–355. LOWE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 452.

No. 70–356. GORDON *v.* ADCOCK. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 261.

No. 70–5081. SUGGS, AKA FERGUSON *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 11 Cal. App. 3d 982, 90 Cal. Rptr. 300.

No. 70–5071. ROGERS *v.* ADAMS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 435 F. 2d 1372.

No. 70–5086. ALLEN *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 1160.

No. 70–5088. KIRBY *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 435 F. 2d 684.

No. 70–5089. SACCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 780.

No. 70–5090. ANGLIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 70–5094. DWYER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 437 F. 2d 1355.

No. 70–5096. SHER *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5098. SWEENEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 748, 314 N. Y. S. 2d 891.

No. 70–5099. LONGORIA *v.* COMSTOCK, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 70–5100. GIBSON ET AL. *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 70–5103. MILLER *v.* TWOMEY, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 70–5105. MARQUEZ *v.* CONNECTICUT. App. Div., Cir. Ct. Conn. Certiorari denied. Reported below: 6 Conn. Cir. 390, 273 A. 2d 730.

No. 70–5107. VISCONTI *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5108. HAWKINS *v.* BREWER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 70–5110. BOJASKI *v.* HAYNES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 70–5111. EDGEWORTH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 70–5113. WYCHE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 70–5114. SCHOOLCRAFT *v.* HAYNES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 70–5116. BROWN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 13 Cal. App. 3d 876, 91 Cal. Rptr. 904.

No. 70–5117. FALLANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 685.

No. 70–5119. BAILLEAUX *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 4 Ore. App. 462, 479 P. 2d 245.

No. 70–5120. HELMICK *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 321.

No. 70–5121. BRYANT *v.* BLACKWELL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 70–5123. SMITH *v.* MUNICIPAL COURT, OAKLAND-PIEDMONT JUDICIAL DISTRICT, ALAMEDA COUNTY. Sup. Ct. Cal. Certiorari denied.

No. 70–5127. PIEZE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 243 So. 2d 442.

No. 70–5126. VICKERS *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 70–5128. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 1251.

No. 70–5129. RAINEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 70–5130. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 1081.

No. 70–5131. SIMUEL *v.* UNITED STATES; and
No. 70–5134. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 439 F. 2d 687.

No. 70–5132. BAZZELLE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 130 Ill. App. 2d 131, 264 N. E. 2d 457.

No. 70–5133. FINCH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 425, 266 N. E. 2d 97.

No. 70–5137. CASIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 440 F. 2d 1203.

No. 70–5141. KONIGSBERG *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 70–5143. CHAPMAN *v.* MOSELEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 70–5144. BLUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 300.

No. 70–5145. LUND *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 266 A. 2d 869.

No. 70–5149. REEVES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 462 S. W. 2d 926.

No. 70–5150. MANLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 437 F. 2d 1250.

No. 70–5151. MCCABE, AKA CASE *v.* RODGERS. C. A. D. C. Cir. Certiorari denied.

No. 70–5152. WHITTY *v.* WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 436 F. 2d 401.

No. 70–5155. FORTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 1235.

No. 70–5156. SIMPSON *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 70–5159. JOHNSON *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 70–5160. MANNING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1105.

No. 70–5163. MULLINS *v.* MOYNAHAN, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 70–5167. DICKINSON *v.* BRIDGES, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 70–5168. SMITH *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied.

No. 70–5169. BROWN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 461 S. W. 2d 920.

No. 70–5171. SHEA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 70–5174. MILLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 647.

No. 70–5175. HUTTER *v.* DOOR COUNTY CHAMBER OF COMMERCE. C. A. 7th Cir. Certiorari denied.

No. 70–5176. TERRELL *v.* POWELL, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Pa. Certiorari denied.

No. 70–5177. GLUCKSMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 1082, 316 N. Y. S. 2d 193.

No. 70–5179. PIPITO *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 49 Wis. 2d 565, 182 N. W. 2d 466.

No. 70–5181. HOLMES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 34 App. Div. 2d 735, 309 N. Y. S. 2d 1009.

No. 70–5182. CHASE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 70–5183. KLINE *v.* RUSSELL, JUDGE. C. A. 4th Cir. Certiorari denied.

No. 70–5184. MAKAL *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 104 Ariz. 476, 455 P. 2d 450.

No. 70–5186. SERIO, AKA BEARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 827.

No. 70–5412. ROSE, AKA CARR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 832.

No. 70–5189. GAY *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 70–5192. SPENCER *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 1136.

No. 70–5191. LANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 70–5193. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 978.

No. 70–5194. GREEN *v.* GOVERNOR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 70–5195. WALLACE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5197. SWEENEY *v.* SHERIDAN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 70–5199. MARTS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 1358.

No. 70–5205. METHVIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 584.

No. 70–5206. TYSON *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 70–5209. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 1223.

No. 70–5212. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 70–5216. ZICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 70–5218. HOWARD *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5219. FOUNTAIN *v.* REDEVELOPMENT LAND AGENCY. Ct. Cl. Certiorari denied. Reported below: 192 Ct. Cl. 495, 427 F. 2d 759.

No. 70–5222. LATHROP ET AL. *v.* OKLAHOMA CITY HOUSING AUTHORITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 438 F. 2d 914.

No. 70–5223. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 70–5224. BULLOCK *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 70–5225. HALL *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 70–5226. SMALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 70–5227. MAGEE *v.* SUPERIOR COURT OF MARIN COUNTY. C. A. 9th Cir. Certiorari denied.

No. 70–5230. LOPEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 23, 268 N. E. 2d 628.

No. 70–5232. REAMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 277 N. C. 391, 178 S. E. 2d 65.

No. 70–5234. MCDONALD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 259.

No. 70–5235. DORROUGH *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1063.

No. 70–5237. MARTIN *v.* MICHIGAN; and
No. 70–5242. MARTIN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 70–5238. WINTON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 70–5239. BENNETT *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 70–5240. MORALES *v.* DEEGAN, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5241. KENNEDY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 70–5243. GREEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 70–5244. ARMSBURY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 74.

No. 70–5245. CASAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 462 S. W. 2d 581.

No. 70–5247. PIPER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 70–5251. VIGIL *v.* HANRATTY ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 82 N. M. 275, 480 P. 2d 165.

No. 70–5253. CRACKENBERGER *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 70–5254. THURMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 1323.

No. 70–5255. STUCKEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 441 F. 2d 1104.

No. 70–5256. CHANDLER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 70–5258. WILLIAMS *v.* HAYNES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 70–5259. REAM *v.* OHIO. Ct. App. Ohio, Hardin County. Certiorari denied.

No. 70–5260. HARPER *v.* CICCONE, MEDICAL CENTER DIRECTOR. C. A. 8th Cir. Certiorari denied.

No. 70–5261. CANNON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 70–5262. JORDAN *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 70–5263. LOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 335.

No. 70–5264. BURLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1199.

No. 70–5265. PITTMAN ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 906.

No. 70–5268. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 440 F. 2d 1291.

No. 70–5270. BRANDYBERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 2d 226.

No. 70–5271. GIBSON *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 70–5272. CLAUSSER *v.* FIRST NATIONAL BANK OF ARIZONA, ADMINISTRATOR, ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 106 Ariz. 554, 479 P. 2d 697.

No. 70–5273. BOYDEN *v.* COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. Reported below: 142 U. S. App. D. C. 351, 441 F. 2d 1041.

No. 70–5275. BROWN *v.* VAN DER VOORT, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 70–5279. HERRINGTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 440 F. 2d 1041.

No. 70–5278. SHORTS *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 70–5280. PAGE *v.* UNITED STATES C. A. 9th Cir. Certiorari denied. Reported below: 437 F. 2d 440.

No. 70–5283. DAVIS, AKA BROWN *v.* EIDE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 1077.

No. 70–5285. HOLLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 106, 444 F. 2d 981.

No. 70–5286. ROSSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 242.

No. 70–5287. ARCHAMBAULT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 441 F. 2d 281.

No. 70–5289. JAMES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 70–5290. KARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 697.

No. 70–5292. MCDONALD *v.* METROPOLITAN TRAFFIC AND PARKING COMMISSION ET AL. C. A. 6th Cir. Certiorari and other relief denied.

No. 70–5293. WINEGAR *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 70–5294. WRIGHT *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 70–5298. BOYER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 511, 267 N. E. 2d 880.

No. 70–5299. OAKCRUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 441 F. 2d 1157.

No. 70–5303. KOHLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1076.

No. 70–5306. CAFFEY *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 438 F. 2d 1238.

No. 70–5309. BAYLESS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 186 Neb. 530, 184 N. W. 2d 634.

No. 70–5311. HATZMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 1082, 317 N. Y. S. 2d 294.

No. 70–5315. MORGAN *v.* WEST VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 70–5316. PENNINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 145.

No. 70–5320. BUICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 70–5322. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 441 F. 2d 1158.

No. 70–5324. NEWTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 622.

No. 70–5325. WILLIAMSON *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 549.

No. 70–5327. ARNDT ET AL. *v.* UNITED STATES DISTRICT COURT FOR DISTRICT OF NEBRASKA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 437 F. 2d 1206.

No. 70–5328. SERRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 442 F. 2d 923.

No. 70–5332. HILL *v.* DUTTON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 34.

No. 70–5335. REYNOLDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 70–5337. DODD *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 868.

No. 70–5340. BRYANT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 70–5341. JASSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 442 F. 2d 1054.

No. 70–5342. OVALLE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 442 F. 2d 698.

No. 70–5345. BUONOMO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 441 F. 2d 922.

No. 70–5349. JAMES *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5350. STARNES ET AL. *v.* ERICKSON, WARDEN. Sup. Ct. S. D. Certiorari denied. Reported below: 85 S. D. 489, 186 N. W. 2d 502.

No. 70–5352. GOODSEAL *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 186 Neb. 359, 183 N. W. 2d 258.

No. 70–5353. SCHOEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 931.

No. 70–5354. NANCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 617.

No. 70–5357. FALLANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 70–5355. MENDOZA-ACOSTA, AKA AQUILAR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 143, 430 F. 2d 516.

No. 70–5358. LEIFERMANN *v.* SECRETARY OF THE ARMY ET AL. C. A. 4th Cir. Certiorari denied.

No. 70–5359. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 441 F. 2d 412.

No. 70–5360. ROBINSON *v.* UNITED STATES; and
No. 70–5365. MOWBRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 442 F. 2d 517.

No. 70–5362. WEINSTEIN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 442 Pa. 70, 274 A. 2d 182.

No. 70–5363. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 70–5364. MANUEL *v.* AMERICAN NATIONAL TRUST ET AL. C. A. 7th Cir. Certiorari denied.

No. 70–5368. DELANCEY *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 70–5369. HAGGERTY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 70–5370. REICH *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 186 Neb. 289, 183 N. W. 2d 223.

No. 70–5371. GEBHART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 1252.

No. 70–5372. CEPELIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 63.

No. 70–5373. DEBOW *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 193 Ct. Cl. 499, 434 F. 2d 1333.

No. 70–5380. TRUITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1070.

No. 70–5382. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 70–5383. WRIGHT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 70–5386. BUTLER *v.* THOMAS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 440 F. 2d 992.

No. 70–5387. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 157.

No. 70–5390. SHAW *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5391. WRIGHT *v.* SLAUGHTER ET AL., DBA DOCTORS BUSINESS BUREAU OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 70–5392. TILLERY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 107 Ariz. 34, 481 P. 2d 271.

No. 70–5393. BEREZANSKI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 70–5396. CROW *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 465 S. W. 2d 478.

No. 70–5402. WADE *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 70–5403. CALO *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 70–5404. CAPELLO *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 70–5408. WATSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 442 F. 2d 1273.

No. 70–5410. WORKMAN *v.* OHIO. Ct. App. Ohio, 8th Jud. Dist. Certiorari denied.

No. 70–5411. PARKER *v.* WALSH, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied.

No. 70–5413. STATEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 70–5414. RHODES *v.* WOLFF, WARDEN. Sup. Ct. Neb. Certiorari denied.

No. 70–5415. JEFFERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 70–5416. WILSON *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 70–5419. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 70–5420. STEELE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 70–5421. SOKAL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 912, 317 N. Y. S. 2d 264.

No. 70–5422. JOHNSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 70–5423. STEWARD *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 58 N. J. 334, 277 A. 2d 391.

No. 70–5424. CANADA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 107 Ariz. 66, 481 P. 2d 859.

No. 70–5425. WARD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 48 Ill. 2d 117, 268 N. E. 2d 692.

No. 70–5426. ELLIOTT *v.* DOLLAR GENERAL CORP. ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 70–5427. MADDOX *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 70–5429. BROWN *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 70–5430. BRISBANE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 784, 270 N. E. 2d 329.

No. 70–5432. COLE *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 70–5433. GILES *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 70–5434. HUGHES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 12.

No. 70–5435. PUGACH *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 1073.

No. 70–5436. ALBERS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 71–2. HORVATH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 440 F. 2d 1221.

No. 71–5. SCHOOL COMMITTEE OF LEYDEN *v.* MASSACHUSETTS COMMISSIONER OF EDUCATION. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 267 N. E. 2d 226.

No. 71–6. SADRZADEH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 389.

No. 71–7. WATSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 15 Cal. App. 3d 28, 92 Cal. Rptr. 860.

No. 71–8. GOWER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 187.

No. 71–13. BOYLE ET AL. *v.* LAVELLA. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 35, 444 F. 2d 910.

No. 71–14. EDWARDS *v.* EDWARDS. Ct. App. Colo. Certiorari denied. Reported below: 481 P. 2d 432.

No. 71–19. INTERCONTINENTAL PROMOTIONS, INC. *v.* MIAMI BEACH FIRST NATIONAL BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1356.

No. 71–20. ALO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 439 F. 2d 751.

No. 71–21. HEARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 443 F. 2d 856.

No. 71–22. D'AVANZO *v.* UNITED STATES; and
No. 71–44. FALCONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 443 F. 2d 1224.

No. 71–23. WOMACK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–24. UPPER ALLEGHENY SAND & GRAVEL CO., INC. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 356.

No. 71–26. QUINN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 940.

No. 71–25. STAMAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 443 F. 2d 860.

No. 71–27. LECCI *v.* LOONEY ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–28. D. H. OVERMYER CO., INC., ET AL. *v.* LOFLIN, DBA LOFLIN SAND & GRAVEL CO. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1213.

No. 71–29. WILKERSON ET UX. *v.* MURRAY ET AL. Sup. Ct. Mo. Certiorari denied.

No. 71–33. ZANNINO ET AL. *v.* UNITED STATES; and
No. 71–34. STRAUSS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 443 F. 2d 986.

No. 71–35. HARPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 911.

No. 71–37. GEIGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 688.

No. 71–39. WABNIK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 444 F. 2d 203.

No. 71–42. BORNSTEIN *v.* UNITED STATES; and
No. 71–43. GROSSGOLD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 742.

No. 71–46. KELCHNER *v.* SUMMERLIN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 131, 445 F. 2d 201.

No. 71–48. WESTERN-PACIFIC DREDGING CORP. *v.* WILLIAMSON. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 65.

No. 71–47. WORTH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–49. LOCAL UNION No. 18, INTERNATIONAL UNION OF OPERATING ENGINEERS *v.* HODGSON, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 485.

No. 71–50. STANLEY, CHIEF JUDGE, U. S. DISTRICT COURT *v.* TIGHTS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 441 F. 2d 336.

No. 71–51. LAGERQUIST ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 256 S. C. 69, 180 S. E. 2d 882.

No. 71–52. TAITANO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 467.

No. 71–55. KOSKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 443 F. 2d 1167.

No. 71–56. MERRYMAN ET AL. *v.* PRICE ET AL., TRUSTEES. App. Ct. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 259 N. E. 2d 883.

No. 71–58. ORTON *v.* MISSOURI EX INF. DANFORTH, ATTORNEY GENERAL. Sup. Ct. Mo. Certiorari denied. Reported below: 465 S. W. 2d 618.

No. 71–60. HOWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 246 So. 2d 95.

No. 71–64. STUKENBORG ET AL. *v.* TELEDYNE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1069.

No. 71–67. CHARLEROI-MONESSEN HOSPITAL *v.* PETTY, GUARDIAN. C. A. 3d Cir. Certiorari denied. Reported below: 437 F. 2d 955.

No. 71–65. PUCHI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 697.

No. 71–69. WEBSTER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 442 F. 2d 1340.

No. 71–70. WESTINGHOUSE ELECTRIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 440 F. 2d 7.

No. 71–71. MATALON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 1215.

No. 71–72. JERNEK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 869.

No. 71–73. GREENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 444 F. 2d 369.

No. 71–74. CONELL *v.* UNITED STATES; and

No. 71–75. SMALLWOOD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 535.

No. 71–77. FARRELL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1165 and 443 F. 2d 355.

No. 71–79. NEW YORK *v.* MINICONE ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 279, 270 N. E. 2d 300.

No. 71–85. RUMFELT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 445 F. 2d 134.

No. 71–87. HERRING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–88. THE CYGNUS ET AL. *v.* MERRILL-STEVENS DRY DOCK CO. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 269.

No. 71–91. UNDERWRITERS AT LLOYDS LONDON ET AL. *v.* ALCOA STEAMSHIP CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 250.

No. 71–94. PENNINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 249.

No. 71–95. SHOUP VOTING MACHINE CORP. *v.* DATAMEDIA COMPUTER SERVICE, INC.; and

No. 71–128. AVM CORP. *v.* DATAMEDIA COMPUTER SERVICE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 604.

No. 71–96. MADDEN *v.* MADDEN ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 269 N. E. 2d 89.

No. 71–98. JOHN S. BARNES CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied.

No. 71–99. SPERING *v.* TEXAS BUTADIENE & CHEMICAL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 434 F. 2d 677.

No. 71–100. GLASSER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 443 F. 2d 994.

No. 71–102. MCANDREW ET AL. *v.* SELECTIVE SERVICE BOARD NO. 22 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 2d 534.

No. 71–104. IN RE REILLY. C. A. 7th Cir. Certiorari denied. Reported below: 442 F. 2d 26.

No. 71–106. CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA ET AL. *v.* HODGSON, SECRETARY OF LABOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 442 F. 2d 159.

No. 71–105. KUDER ET AL. *v.* FIRST WISCONSIN TRUST CO. Sup. Ct. Wis. Certiorari denied. Reported below: 51 Wis. 2d 189, 186 N. W. 2d 311.

No. 71–108. INGALLS SHIPBUILDING DIVISION OF LITTON SYSTEMS, INC. *v.* AMERICAN ZINC CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1100.

No. 71–111. CRAWFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 444 F. 2d 1404.

No. 71–112. GEBHART ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 441 F. 2d 1261.

No. 71–113. RYBA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 441 F. 2d 1137.

No. 71–122. FARLAND ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–127. EARLY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 166.

No. 71–129. ILLINOIS STATE TRUST CO., GUARDIAN, ET AL. *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 497.

No. 71–134. GIBSON *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 784.

No. 71–135. JOHN W. MCGRATH CORP. *v.* CABOT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 476.

No. 71–140. EDGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 444 F. 2d 1372.

No. 71–136. INSURANCE COMPANY OF NORTH AMERICA *v.* PRIETO. C. A. 6th Cir. Certiorari denied. Reported below: 442 F. 2d 1033.

No. 71–137. FREMONT *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and/or 10th Jud. Dist. Certiorari denied.

No. 71–142. KIRSNER ET AL. *v.* FLEISCHMANN ET AL. Ct. App. Md. Certiorari denied. Reported below: 261 Md. 164, 274 A. 2d 339.

No. 71–144. CHAMBERS *v.* CHAMBERS. Sup. Ct. La. Certiorari denied. Reported below: 259 La. 246, 249 So. 2d 896.

No. 71–146. CRAVEN, WARDEN *v.* ALESI. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 975.

No. 71–149. ALLEN *v.* BANKERS TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–154. TOUGHER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1148.

No. 71–155. SNOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–156. CHESTNUT ET AL. *v.* CRIMINAL COURT OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 442 F. 2d 611.

No. 71–160. LEVIN SERVICE CO. ET AL. *v.* DAVIDSON EXCAVATING, INC. Sup. Ct. Ohio. Certiorari denied.

No. 71–163. KOMATZ CONSTRUCTION, INC. *v.* WESTERN UNION TELEGRAPH CO. Sup. Ct. Minn. Certiorari denied. Reported below: 290 Minn. 129, 186 N. W. 2d 691.

No. 71–164. VIRGINIA STAGE LINES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 441 F. 2d 499.

No. 71–166. CARTER *v.* CONNECTICUT MUTUAL LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 136.

No. 71–167. ST. PAUL AT CHASE CORP. *v.* MANUFACTURERS LIFE INSURANCE COMPANY OF TORONTO. Ct. App. Md. Certiorari denied. Reported below: 262 Md. 192, 278 A. 2d 12.

No. 71–168. HENDERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–172. CHRYSLER CORP. *v.* VAUGHN, GUARDIAN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 442 F. 2d 619.

No. 71–174. MAL BROS. CONTRACTING CO. ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 444 F. 2d 615.

No. 71–176. VISERTO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71–177. CHILDERS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 442 F. 2d 1299.

No. 71–179. COTTONWOOD MALL SHOPPING CENTER, INC. *v.* UTAH POWER & LIGHT CO. C. A. 10th Cir. Certiorari denied. Reported below: 440 F. 2d 36.

No. 71–180. SPATA ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 442 F. 2d 1013.

No. 71–185. ACFALLE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 2d 913.

No. 71–187. STEVENSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 445 F. 2d 25.

No. 71–186. LOCAL 281, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA ET AL. *v.* BACKO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 176.

No. 71–188. CLAUSEN ET AL. *v.* NORTHERN TRUST CO. C. A. 8th Cir. Certiorari denied.

No. 71–189. INLAND TRUCKING CO. ET AL., DBA OSHKOSH READY MIX CO., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 562.

No. 71–191. CLUTTERBUCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 839.

No. 71–196. LEE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 448 F. 2d 604.

No. 71–199. KERPELMAN *v.* BOARD OF PUBLIC WORKS OF MARYLAND ET AL. Ct. App. Md. Certiorari denied. Reported below: 261 Md. 436, 276 A. 2d 56.

No. 71–202. HARKEY ET AL. *v.* DEWETTER, MAYOR OF EL PASO, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 828.

No. 71–203. FASSOULIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 13.

No. 71–204. FLORIDA *v.* ENGLANDER. Sup. Ct. Fla. Certiorari denied. Reported below: 246 So. 2d 746.

No. 71–208. MCDANIEL ET AL. *v.* DUDLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 303.

No. 71–272. GEORGIA ET AL. *v.* NATIONAL DEMOCRATIC PARTY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 145 U. S. App. D. C. 102, 447 F. 2d 1271.

No. 71–207. BIESKE ET AL. *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 272 A. 2d 357.

No. 71–331. YEAGER, PRINCIPAL KEEPER *v.* SMITH. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 164.

No. 71–5004. RUBY *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 71–5007. LUDLOW *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 71–5010. WEAVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 437 F. 2d 431.

No. 71–5011. RUSSELL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 545, 268 N. E. 2d 123.

No. 71–5012. MCDUFFIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 1163.

No. 71–5013. WELTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 439 F. 2d 824.

No. 71–5015. GIRARD *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5017. WATERS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 343, 270 N. E. 2d 700.

No. 71–5018. BROWN *v.* MCLEAN, JUDGE. C. A. 3d Cir. Certiorari denied.

No. 71–5020. SHEETS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 353.

No. 71–5021. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 377.

No. 71–5022. GRAMES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–5025. PETERSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 255 S. C. 579, 180 S. E. 2d 341.

No. 71–5028. PULLEY *v.* NORVELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5031. ADAMS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 832.

No. 71–5037. O'DELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 34 App. Div. 2d 702, 309 N. Y. S. 2d 716.

No. 71–5038. HANNA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 107 Ariz. 85, 482 P. 2d 452.

No. 71–5041. BALOGH *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 71–5042. STODDARD *v.* STODDARD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 71–5043. COON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 279.

No. 71–5045. CLEVENGER *v.* CONTE. Sup. Ct. Wash. Certiorari denied.

No. 71–5047. HARRIS ET AL. *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL. Sup. Ct. App. Va. Certiorari denied.

No. 71–5049. OWENS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 501, 267 N. E. 2d 588.

No. 71–5048. GORNICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 448 F. 2d 566.

No. 71–5055. LAWRENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 652.

No. 71–5056. DEVORCE *v.* DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT, COMANCHE COUNTY DIVISION. Ct. Crim. App. Okla. Certiorari denied.

No. 71–5057. BENOIT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 71–5060. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 442 F. 2d 318.

No. 71–5061. LOIODICI *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5065. STORNINI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 443 F. 2d 833.

No. 71–5066. CURAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–5067. PORCHIA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–5070. RAINEY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 863, 271 N. E. 2d 231.

No. 71–5072. SULLIVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 813.

No. 71–5074. POPE *v.* WILLIAMS. C. A. 3d Cir. Certiorari denied.

No. 71–5076. WASHINGTON *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5077. LILLY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 71–5080. HURD *v.* DIMENTO & SULLIVAN. C. A. 1st Cir. Certiorari denied. Reported below: 440 F. 2d 1322.

No. 71–5083. PRENTISS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–5086. GUZMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5093. NEWSOME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 444 F. 2d 109.

No. 71–5098. REYNAUD *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied.

No. 70–83. WELLS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Riverside. Motion to dispense with printing petition granted. Certiorari denied.

No. 70–140. NOLTE *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 440 F. 2d 1124.

No. 70–242. ADICKES ET AL. *v.* MURPHY ET AL. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 436 F. 2d 540.

No. 70–326. JOHNSTON *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 440 F. 2d 389.

No. 71–12. TATASCIORE *v.* NEW JERSEY. Super. Ct. N. J. Motion to dispense with printing petition granted. Certiorari denied. Reported below: See 58 N. J. 334, 277 A. 2d 391.

No. 70–351. DILLON *v.* UNITED STATES. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–66. GUON *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 442 F. 2d 1021.

No. 71–169. BERTRAND, ADMINISTRATRIX *v.* FOREST OIL CORP. ET AL. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 441 F. 2d 809.

No. 71–175. FERNANDEZ *v.* PARKER, WARDEN. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 443 F. 2d 594.

No. 70–103. WILSON, WARDEN, ET AL. *v.* ALLISON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 434 F. 2d 646.

No. 70–174. ROBBINS, WARDEN *v.* RASTROM. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 440 F. 2d 1251.

No. 70–311. SWENSON, WARDEN *v.* HUNTER. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 442 F. 2d 625.

No. 71–200. NEW ROCHELLE MUNICIPAL HOUSING AUTHORITY ET AL. *v.* KING ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 442 F. 2d 646.

No. 70–104. JAVOR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 836.

No. 70–144. NEWSWEEK, INC. *v.* VANDENBURG. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 378.

No. 70–172. WOOSLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 440 F. 2d 1280.

No. 70–176. ROSENSPAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 905.

No. 70–180. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 1213.

No. 70–185. SANDERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 439 F. 2d 296.

No. 70–227. YI AU LAU ET AL. *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; and

No. 70–243. TIT TIT WONG ET AL. *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 144 U. S. App. D. C. 147, 445 F. 2d 217.

No. 70–199. BALL *v.* BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinon that certiorari should be granted. Reported below: 442 F. 2d 408.

No. 70–218. SMITH ET AL. *v.* BOARD OF EDUCATION OF PINELLAS COUNTY, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 1209.

No. 70–240. ANDERSON *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 912.

No. 70–246. GOULET *v.* MUNICIPAL COURT OF PASADENA JUDICIAL DISTRICT, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 70–261. SCOTT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 70–287. JACKS *v.* NEW JERSEY;

No. 70–308. FELDMAN *v.* NEW JERSEY; and

No. 70–317. LEUTY *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 70–297. JEFFERSON COUNTY TEACHERS ASSN. ET AL. *v.* BOARD OF EDUCATION OF JEFFERSON COUNTY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 463 S. W. 2d 627.

No. 70–266. TATAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 439 F. 2d 1300.

No. 70–330. THARPE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 443 F. 2d 12.

No. 70–347. ROBERTS *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 456 F. 2d 819.

No. 70–5085. STEWART *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 11 Cal. App. 3d 242, 89 Cal. Rptr. 707.

No. 70–5087. OLDEN *v.* POPE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 431 F. 2d 905.

No. 70–5091. WRIGHT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 70–5146. BEASLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 1279.

No. 70–5185. KELLEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 107 Ariz. 8, 480 P. 2d 658.

No. 70–5210. WALKER *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 70–5307. FRIEDLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 855.

No. 70–5333. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 442 F. 2d 1327.

No. 71–10. COLEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 1299.

No. 71–57. EDWIN L. WIEGAND CORP. *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–68. BAILEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 439 F. 2d 723.

No. 71–145. PICKNEY ET AL. *v.* ORO DAM CONSTRUCTORS ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 806.

No. 71–147. RHEINGANS *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 345.

No. 71–192. JOHNSON *v.* OIL TRANSPORT CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 440 F. 2d 109.

No. 71–5019. TYMCIO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5064. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 444 F. 2d 1037.

No. 70–109. VUITCH *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 10 Md. App. 389, 271 A. 2d 371.

No. 70–197. KELLEY *v.* UNION PACIFIC RAILROAD CO. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: —— Ore. ——, 481 P. 2d 56.

No. 70–5231. BOYDEN *v.* COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 70–5252. HOLT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 435 F. 2d 1278.

No. 70–5297. GIDMARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 440 F. 2d 773.

No. 71–3. POPPENHEIMER ET AL. *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 71–62. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 441 F. 2d 950.

No. 71–97. ORLANDO ET AL. *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1039.

No. 70–125. CITY OF CARMEL-BY-THE-SEA *v.* PARR. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 3 Cal. 3d 861, 479 P. 2d 353.

No. 70–211. J. C. PENNEY CO., INC. *v.* UNITED STATES TREASURY DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 439 F. 2d 63.

No. 70–5153. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 434 F. 2d 212.

No. 70–131. CALIFORNIA *v.* ELLER TELECASTING COMPANY OF ARIZONA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 13 Cal. App. 3d 296, 91 Cal. Rptr. 468.

No. 70–5157. THERIAULT *v.* HARRIS, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 70–5215. LINEHAN *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 437 F. 2d 395.

No. 71–158. GEORGIA-PACIFIC CORP. *v.* U. S. PLYWOOD-CHAMPION PAPERS, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 446 F. 2d 295.

No. 70–165. ESTATE OF LION ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 56.

No. 70–320. JORDAN ET AL. *v.* MONTGOMERY WARD & CO., INC. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 442 F. 2d 78.

No. 70–313. AMBROSE DISTRIBUTING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 439 F. 2d 720.

No. 70–5102. BLOETH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 35 App. Div. 2d 848, 318 N. Y. S. 2d 264.

No. 70–167. SIGELBAUM *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. Reported below: 435 F. 2d 1313.

No. 70–209. AIUPPA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 440 F. 2d 893.

No. 70–202. KROGER CO. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 438 F. 2d 1372.

No. 70–338. COTLER DRUGS, INC., ET AL. *v.* CHAS. PFIZER & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 440 F. 2d 1079.

No. 70–339. SOUTHERN RAILWAY CO. *v.* TROUTMAN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 441 F. 2d 586.

No. 70–222. COMPUTER SEARCHING SERVICE CORP. *v.* RYAN, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 439 F. 2d 6.

No. 70–274. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL *v.* NORTHWEST AIRLINES, INC. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 442 F. 2d 246.

No. 70–233. HELFENBEIN ET AL. *v.* INTERNATIONAL INDUSTRIES, INC., ET AL. C. A. 8th Cir. Motion of respondents to strike petitioners' supplemental brief and certiorari denied. Reported below: 438 F. 2d 1068.

No. 70–244. BOSHES ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 7th Cir. Motion of Consumers Union of U. S., Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

No. 70–299. UNITED STATES *v.* AFRAN TRANSPORT CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 213.

No. 70–300. NEZ PERCE TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. 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. Reported below: 194 Ct. Cl. 490.

No. 70–316. NICOLAS ET UX. *v.* MCINTYRE, TRUSTEE, ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Motions to dispense with printing petition and brief in opposition granted. Certiorari denied.

No. 70–319. LINSCOTT *v.* MILLERS FALLS CO. ET AL. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 440 F. 2d 14.

No. 71–126. SCHNEIDER *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 1320.

No. 70–5124. STANSBERRY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. Reported below: 47 Ill. 2d 541, 268 N. E. 2d 431.

No. 70–5367. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 440 F. 2d 1332.

No. 71–45. MARTIN *v.* PACIFIC NORTHWEST BELL TELEPHONE CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 441 F. 2d 1116.

No. 71–54. MOORE BUSINESS FORMS, INC. *v.* UARCO, INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 440 F. 2d 580.

No. 71–118. MASSILLON-CLEVELAND-AKRON SIGN CO. *v.* GOLDEN STATE ADVERTISING CO., INC., ET AL. C. A. 9th Cir. Motion of General Tire & Rubber Co. and Cleveland Patent Law Assn. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 444 F. 2d 425.

No. 71–150. GLOBE LIQUOR CO. *v.* FOUR ROSES DISTILLERS CO. Sup. Ct. Del. It appearing that the judgment of the Supreme Court of Delaware rests upon an independent and adequate state ground, certiorari denied. Reported below: —— Del. ——, 281 A. 2d 19.

No. 71–178. DANNER *v.* OHIO. Sup. Ct. Ohio. Motion to dispense with printing respondent's brief granted. Certiorari denied.

No. 71–5026. GRIFFIN *v.* OHIO. Sup. Ct. Ohio. Motion to amend petition granted. Certiorari denied.

No. 71–5051. CHACON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 436 F. 2d 411 and 443 F. 2d 1171.

Rehearing Denied

No. 76, October Term, 1970. AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA ET AL. *v.* LOCKRIDGE, 403 U. S. 274;

No. 153, October Term, 1970. TILTON ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., 403 U. S. 672;

No. 323, October Term, 1970. COOLIDGE *v.* NEW HAMPSHIRE, 403 U. S. 443;

No. 1273, October Term, 1970. STAFFORD *v.* MICHIGAN, 402 U. S. 968;

No. 1442, October Term, 1970. CLEMENT A. EVANS & CO., INC. *v.* A. M. KIDDER & CO., INC., ET AL., 402 U. S. 988;

No. 1467, October Term, 1970. ITT LAMP DIVISION OF INTERNATIONAL TELEPHONE & TELEGRAPH CORP. *v.* MINTER, COMMISSIONER OF DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS, 402 U. S. 933;

No. 1469, October Term, 1970. HOMART DEVELOPMENT CO. *v.* DIAMOND ET AL., 402 U. S. 988;

No. 1504, October Term, 1970. GIANNATTI ET AL. *v.* COUNTY OF LOS ANGELES, 402 U. S. 992;

No. 1546, October Term, 1970. HOHENSEE ET AL. *v.* SCIENTIFIC LIVING, INC., ET AL., 402 U. S. 1012;

No. 1547, October Term, 1970. GENERAL RADIO CO. *v.* KEPCO, INC., 402 U. S. 1008; and

No. 1574, October Term, 1970. LOWE *v.* YOUNG, 402 U. S. 1006. Petitions for rehearing denied.

No. 1632, October Term, 1970. HUGHES TOOL CO. *v.* INGERSOLL-RAND CO., 403 U. S. 918;

No. 1654, October Term, 1970. GINZBURG *v.* UNITED STATES, 403 U. S. 931;

No. 1676, October Term, 1970. GAMBOCZ *v.* ELLMYER ET AL., 403 U. S. 919;

No. 1692, October Term, 1970. MACDONALD *v.* SHAWNEE COUNTRY CLUB, INC., ET AL., 403 U. S. 932;

No. 1746, October Term, 1970. NATIONAL GYPSUM CO. ET AL. *v.* UNITED STATES GYPSUM CO., 403 U. S. 923;

No. 5022, October Term, 1970. SPECK *v.* ILLINOIS, 403 U. S. 946;

No. 5250, October Term, 1970. BOSTIC *v.* UNITED STATES, 402 U. S. 547;

No. 6545, October Term, 1970. LOMAX *v.* UNITED STATES, 401 U. S. 995;

No. 6684, October Term, 1970. VAN HOOK *v.* LLOYD, PENITENTIARY SUPERINTENDENT, 403 U. S. 920;

No. 6794, October Term, 1970. GRIJALVA *v.* UNITED STATES, 402 U. S. 1012;

No. 6857, October Term, 1970. CASTLE *v.* MOSELEY, WARDEN, 403 U. S. 908;

No. 6884, October Term, 1970. GUNZBURGER *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 403 U. S. 934;

No. 6905, October Term, 1970. VARRELLA *v.* VARRELLA, 403 U. S. 909;

No. 6909, October Term, 1970. WOLFF *v.* BUCHKOE, WARDEN, 403 U. S. 909;

No. 6924, October Term, 1970. LANE ET AL. *v.* PATE, WARDEN, ET AL., 403 U. S. 921;

No. 6935, October Term, 1970. HYLER ET AL. *v.* REYNOLDS METALS CO. ET AL., 403 U. S. 912;

No. 6951, October Term, 1970. HILLERY *v.* NELSON, WARDEN, 403 U. S. 921; and

No. 6975, October Term, 1970. SNYDER *v.* TENNESSEE, 403 U. S. 935. Petitions for rehearing denied.

No. 89, October Term, 1970. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL., 403 U. S. 602. Motion for supplemental opinion and petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

No. 130, October Term, 1970. WENZEL *v.* UNITED STATES, 402 U. S. 981;

No. 132, October Term, 1970. MILLANG *v.* UNITED STATES, 402 U. S. 981;

No. 1457, October Term, 1970. MCMILLAN *v.* FEDERAL NATIONAL MORTGAGE ASSN., 402 U. S. 936;

No. 1531, October Term, 1970. DAVIS *v.* MEMBERS OF SELECTIVE SERVICE BOARD NO. 30 OF DALLAS, TEXAS, ET AL., 402 U. S. 999;

No. 1550, October Term, 1970. SILK *v.* KLEPPE, ADMINISTRATOR OF SMALL BUSINESS ADMINISTRATION, ET AL., 402 U. S. 1012; and

No. 1568, October Term, 1970. BEAN ET AL. *v.* ILLINOIS, 402 U. S. 1009. Motions to dispense with printing petitions for rehearing granted. Petitions for rehearing denied.

No. 299, October Term, 1970. COHEN *v.* CALIFORNIA, 403 U. S. 15. Motion of Charles H. Keating, Jr., for leave to file a brief as *amicus curiae* in support of rehearing granted. Petition for rehearing denied.

No. 1613, October Term, 1970. GOTTESMAN ET AL. *v.* GENERAL MOTORS CORP. ET AL., 403 U. S. 911. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 5006, October Term, 1970. MATHIS *v.* NEW JERSEY, 403 U. S. 946; and

No. 5011, October Term, 1970. FUNICELLO *v.* NEW JERSEY, 403 U. S. 948. Motions for clarification and petitions for rehearing denied.

No. 1447, October Term, 1970. ANDREWS *v.* UNITED STATES, 402 U. S. 995;

No. 1479, October Term, 1970. CONSOLIDATION COAL CO. *v.* SOUTH-EAST COAL CO., 402 U. S. 983;

No. 1483, October Term, 1970. UNITED MINE WORKERS OF AMERICA *v.* SOUTH-EAST COAL CO., 402 U. S. 983;

No. 5102, October Term, 1970. CHATFIELD *v.* CALIFORNIA, 402 U. S. 951;

No. 5606, October Term, 1970. LEVIN *v.* PROBATION DEPARTMENT OF CITY OF NEW YORK, 400 U. S. 907;

No. 6703, October Term, 1970. SUMMERS *v.* TEXAS, 403 U. S. 933; and

No. 6806, October Term, 1970. KNUCKLES ET AL. *v.* PRASSE, CORRECTION COMMISSIONER, ET AL., 403 U. S. 936. Motions for leave to file petitions for rehearing denied.

No. 1622, October Term, 1970. WHDH, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., 403 U. S. 923. Motion to supplement petition granted. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and petition.

No. 6908, October Term, 1970. THERIAULT *v.* HARRIS, WARDEN, 403 U. S. 923. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Assignment Orders

Pursuant to the provisions of Title 28 U. S. C. § 42, it is ordered that MR. JUSTICE STEWART be, and he is hereby, temporarily assigned to the Fifth Circuit as Circuit Justice; and

That MR. JUSTICE MARSHALL be, and he is hereby, temporarily assigned to the Second Circuit as Circuit Justice.

OCTOBER 19, 1971

Dismissal Under Rule 60

No. 71–229. UNITED STATES *v.* DIONISIO ET AL. C. A. 7th Cir. Petition for writ of certiorari as to respondent Smith dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 442 F. 2d 276.

Appeals Dismissed

No. 70–149. STEENHOEK ET AL. *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. Reported below: 182 N. W. 2d 377.

No. 71–86. ASSOCIATED HOME BUILDERS OF THE GREATER EAST BAY, INC. *v.* CITY OF WALNUT CREEK ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 4 Cal. 3d 633, 484 P. 2d 606.

No. 71–5024. AQUAFREDDA *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question.

No. 71–5108. CHELEY ET AL. *v.* PARHAM, DIRECTOR OF DEPARTMENT OF FAMILY AND CHILDREN SERVICES. Appeal from D. C. N. D. Ga. dismissed for failure to docket case within time prescribed by Rule 13 of the Rules of this Court. *Shapiro* v. *Doe,* 396 U. S. 488. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 324 F. Supp. 678.

Certiorari Granted—Vacated and Remanded

No. 71–5128. GAINES *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of suggestion of the Solicitor General in the Memorandum for the United States. Reported below: 441 F. 2d 1122.

No. 71–15. CONNECTICUT STATE BOARD OF PAROLE *v.* BEY. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded to the United States District Court for the District of Connecticut with directions to dismiss as moot. *United States* v. *Munsingwear,* 340 U. S. 36. Reported below: 443 F. 2d 1079.

Miscellaneous Orders

No. A–356 (71–595). NICHOL, DISTRICT ATTORNEY OF DANE COUNTY, ET AL. *v.* KENNAN ET AL. D. C. W. D. Wis. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, denied without prejudice to an application for stay to three-judge district court.

No. 70–18. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeal from D. C. N. D. Tex. [Probable jurisdiction postponed, 402 U. S. 941.] Motion of Women for the Unborn et al. for leave to file a brief as *amici curiae* granted.

No. 70–52. UNITED STATES *v.* MISSISSIPPI CHEMICAL CORP. ET AL. C. A. 5th Cir. [Certiorari granted, 401 U. S. 908.] Motion of M. F. A. Central Cooperative et al. for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 71–5102. CUNNINGHAM *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 70–5418. GUY *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 71–32. FLOOD *v.* KUHN ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 443 F. 2d 264.

No. 71–119. TRBOVICH *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. D. C. Cir. Certiorari granted.

Certiorari Denied

No. 68–5014. GARRISON *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 405 F. 2d 696.

No. 70–179. LOMBARDINO *v.* HEYD, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 1027.

No. 70–221. LICAVOLI *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 1182.

No. 70–262. CARTER *v.* MOREHOUSE PARISH SCHOOL BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 380.

No. 70–5154. BLACKBURN ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 13 Cal. App. 3d 424, 91 Cal. Rptr. 538.

No. 70–5170. GOLUB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 70–5334. HERRERA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 82 N. M. 432, 483 P. 2d 313.

No. 70–5348. MAULDIN *v.* HENRY ET AL. C. A. 4th Cir. Certiorari denied.

No. 70–5356. MOREFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 70–5378. SINGAL *v.* R. J. REYNOLDS TOBACCO CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 70–5384. WILLIAMS *v.* VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 438 F. 2d 1085.

No. 70–5407. SANASSARIAN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 703.

No. 71–4. FRONTIER CONTACT LENSES, INC., ET AL. *v.* PLASTIC CONTACT LENS CO. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 67.

No. 71–38. TUCKER *v.* MOLLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 1400.

No. 71–116. CARACCI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 173.

No. 71–120. CENTRAL GULF STEAMSHIP CORP. *v.* SAMMON. C. A. 2d Cir. Certiorari denied. Reported below: 442 F. 2d 1028.

No. 71–130. PACIFIC WESTBOUND CONFERENCE ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1303.

No. 71–133. HOLLAND *v.* HOLLAND. Sup. Ct. Ohio. Certiorari denied.

No. 71–148. JOHN KALIN FUNERAL HOME, INC., DBA LACEY FUNERAL HOME *v.* FULTZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 1342.

No. 71–152. ELLIOTT ET AL. *v.* HOBERMAN ET AL.; and No. 71–252. MOONEY ET AL. *v.* HOBERMAN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 530 and 970, 267 N. E. 2d 886 and 272 N. E. 2d 81.

No. 71–165. BRIDWELL, AKA BRADLEY *v.* UNITED STATES; and

No. 71–303. PAULDINO, AKA PARKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 443 F. 2d 1108.

No. 71–171. WHITFIELD ET AL. *v.* KLEIN INDEPENDENT SCHOOL DISTRICT ET AL. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 463 S. W. 2d 232.

No. 71–210. WILSON ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1103.

No. 71–211. DON RHOADES CORP. *v.* AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. Sup. Ct. N. M. Certiorari denied. Reported below: 82 N. M. 659, 486 P. 2d 68.

No. 71–213. HAYES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 472.

No. 71–216. WEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–217. SAWYER *v.* ATLANTIC DISCOUNT CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 442 F. 2d 349.

No. 71–220. POPE, ADMINISTRATRIX *v.* MOORE-MCCORMACK LINES, INC. Sup. Jud. Ct. Mass. Certiorari denied.

No. 71–222. DEMASI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 251.

No. 71–223. IANNACCONE ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 612, 273 N. E. 2d 136.

No. 71–228. TRANSIT CASUALTY CO. ET AL. *v.* SECURITY TRUST CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 788.

No. 71–231. SPALITTA, GUARDIAN *v.* NATIONAL AMERICAN BANK OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 291.

No. 71–234. THOMPSON ET UX. *v.* HOFFMAN. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 71–235. THOMPSON *v.* COUNTY BOARD OF SCHOOL TRUSTEES OF DUPAGE COUNTY ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 130 Ill. App. 2d 660, 265 N. E. 2d 168.

No. 71–236. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 861.

No. 71–241. HUMBLE OIL & REFINING CO. *v.* DOMERACKI. C. A. 3d Cir. Certiorari denied. Reported below: 443 F. 2d 1245.

No. 71–5009. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5036. SALVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 474.

No. 71–5062. BAKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 442 F. 2d 1024.

No. 71–5088. EDWARDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 440 F. 2d 1293.

No. 71–5089. DZIALAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 212.

No. 71–5090. LOGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 826.

No. 71–5095. QUILES *v.* FRITZ, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5106. KEENY *v.* SECRETARY OF THE ARMY. C. A. 8th Cir. Certiorari denied.

No. 71–5107. WELCH *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5109. BUSH *v.* MORRIS, DISTRICT ATTORNEY OF SUMTER COUNTY, ET AL. Sup. Ct. Ga. Certiorari denied.

No. 71–5110. MATTHEWS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 267 A. 2d 826.

No. 71–5111. LOTT *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5112. MONTGOMERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 694.

No. 71–5116. VITORATOS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5117. BOGDAN *v.* RODRIGUEZ, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–5118. HOHLWEILER, ADMINISTRATOR *v.* PENNSYLVANIA RAILROAD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 436 F. 2d 1382.

No. 71–5119. HOPPER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–5122. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5123. ROOTS *v.* UNITED STATES;
No. 71–5147. MCNEIL *v.* UNITED STATES; and
No. 71–5227. BONEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5129. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5130. LANDMAN *v.* UNITED STATES BOARD OF PAROLE. C. A. 4th Cir. Certiorari denied.

No. 71–5131. BAKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 444 F. 2d 1290.

No. 71–5133. MCCONKEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 444 F. 2d 788.

No. 71–5134. DUMENIGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 253.

No. 71–5135. RANKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 443 F. 2d 380.

No. 71–5142. LEWIS *v.* LEGISLATIVE BODY OF THE 91ST CONGRESS OF THE UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 70–148. DEBOSE *v.* THE LOPPERSUM ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 438 F. 2d 642.

No. 70–5158. SOUTHERS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–103. GOODYEAR TIRE & RUBBER CO. *v.* H. K. PORTER CO., INC. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 437 F. 2d 244.

No. 71–5155. RIGDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 70–152. MINNEAPOLIS FEDERATION OF TEACHERS, LOCAL NO. 59 *v.* SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL. Sup. Ct. Minn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 288 Minn. 496, 182 N. W. 2d 887.

No. 71–132. MOTOR CITY METAL TREATING, INC. *v.* KOLENE CORP. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 440 F. 2d 77.

No. 71–5014. ORTEGA-MOJARO *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 441 F. 2d 658.

No. 71–5050. AUTRY *v.* WILEY ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 440 F. 2d 799.

No. 71–5101. WARREN *v.* GOVERNMENT NATIONAL MORTGAGE ASSN. ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 443 F. 2d 624.

No. 71–5149. PERCY *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 443 F. 2d 1232.

No. 70–263. LEE ET AL. *v.* RUNGE. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 579.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner Lee infringed respondent's copyright and a verdict was rendered against her. Petitioner argued that because the congressional power over copyrights and patents stemmed from the same constitutional provision, they both should be governed by the same standard. Thus, petitioner contended that the copyright was invalid because the book in question lacked "novelty," but the Court of Appeals rejected this argument saying that the appropriate standard for a copyright was "originality" and that the respondent's book met this criterion.[1] The standard of copyrightability presents an important question concerning the scope of Congress' enumerated powers. It has not heretofore been decided by this Court [2] and, arguably, it was wrongly decided by the courts below.

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[1] *Runge* v. *Lee*, 441 F. 2d 579, 581 (CA9 1971):

"The standard of 'novelty' urged by appellants is applicable to patents, but not copyrights. The copyright standard is one of 'originality':

" 'The requirements for the "originality" necessary to support a copyright are modest. The author must have created the work by his own skill, labor and judgment, contributing something "recognizably his own" to prior treatments of the same subject. However, neither great novelty nor superior artistic quality is required.' " Quoting *Doran* v. *Sunset House Dist. Corp.*, 197 F. Supp. 940, 944 (SD Cal. 1961), aff'd, 304 F. 2d 251 (CA9 1962).

[2] *Mazer* v. *Stein*, 347 U. S. 201, dealt only with the statutory standards for copyrightability because the constitutional questions were not raised until oral argument. Respondent's reliance upon *Mazer* as an expression of the constitutional standards for copyrights is therefore misplaced. Those cases in which we have considered the constitutional ramifications of the copyright power have not dealt with the standard of copyrightability. *E. g.*, *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239; *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53. See also Note, 68 Harv. L. Rev. 517 (1955).

In 1961, respondent published and copyrighted a book entitled Face Lifting by Exercise. This book explained how isometric facial exercises could be used to preserve the appearance of youth. It was based on respondent's study of anatomy, physical therapy, and magazine and newspaper articles, but there is nothing in the record to indicate that the ideas it contained constituted anything more than "selecting the last piece to put into the last opening in a jig-saw puzzle." *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, 335. It was merely a repetition of the existing state of the art. During 1962, petitioner was employed in respondent's beauty salon and we may assume that it was during this time that petitioner first read respondent's book and learned of respondent's facial exercises. In 1965, petitioner published The Joyce Lee Method of Scientific Facial Exercises. It contained a system of facial exercises strikingly similar to respondent's and, even though it was unquestionably expressed in petitioner's own language, we may safely conclude that it was based on respondent's book. An action for copyright infringement was made out, therefore, if the respondent's copyright was valid and if it embraced the ideas in her book.

The constitutional power over copyrights is found in the same clause that governs the issuance of patents: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, cl. 8. Many of the same interests underlie both grants of power. The Federalist No. 43. While this Court has not had many occasions to consider the constitutional parameters of copyright power, we have indicated that the introductory clause, "To promote the Progress of Science and useful Arts," acts as a limit on Congress'

power to grant monopolies through patents. In *Graham* v. *John Deere Co.*, 383 U. S. 1, 5–6, we said:

> "The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the 'useful arts.' It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it 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 the 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. And it is in this light that patent validity 'requires reference to a standard written into the Constitution.'" (Citations omitted.)

In *Mazer* v. *Stein*, 347 U. S. 201, 219, we indicated that the copyright power is also governed by this same introductory phrase: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and

inventors in 'Science and useful Arts.'" See also *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 249. In other contexts, we have also shown that patents and copyrights stand on the same footing. *E. g., United States* v. *Paramount Pictures*, 334 U. S. 131, 158; *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 401. No reason can be offered why we should depart from the plain import of this grant of congressional power and apply more lenient constitutional standards to copyrights than to patents.[3] Indeed, for reasons which will later be considered, a copyright may have to meet greater constitutional standards for validity than a patent. The limitations set forth in *Graham* v. *John Deere Co.*, therefore, apply with at least equal force to copyrights. Cf. *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 59.

An author's "Writing" or an inventor's "Discovery" can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain. The congressional power to grant monopolies for "Writings and Discoveries" is likewise limited to that which accomplishes the stated purpose of promoting "the Progress of Science and useful Arts." No distinction is made in the constitutional language between copyrights and patents and I would not create one by judicial gloss. Where, as here, a writer has published a book which compiles and applies infor-

[3] Statutory support for the distinction made by the courts below is, at best, flimsy. It is true that the standards of "novelty," 35 U. S. C. § 102, and "non-obviousness," 35 U. S. C. § 103, are embodied in the patent statutes. "Originality," however, is not set forth in the copyright laws as a sufficient measure of copyrightability and it owes its development solely to the courts. *E. g., Du Puy* v. *Post Telegram Co.*, 210 F. 883 (CA3 1914); *Edward Thompson Co.* v. *American Law Book Co.*, 122 F. 922 (CA2 1903). A longstanding, but erroneous, pattern of statutory interpretation may not be spared from the force of a constitutional mandate by reason of its longevity. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

mation available to all men, should that writer have a monopoly on the ideas in that book through a copyright issued merely because the words used were the author's own?

Patents which did not serve the broad goals of furthering scientific advancement and bettering the lot of mankind (*Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 154–155 (DOUGLAS, J., concurring)) have been held invalid because they lacked utility, did no more than combine existing inventions, were obvious to someone schooled in the art, or sought to monopolize ideas within the public domain. *Graham* v. *John Deere Co., supra; Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp., supra; Hotchkiss* v. *Greenwood,* 11 How. 248. It is not obvious that respondent's system of facial exercises was patentable under these standards. It arguably amounted to nothing more than an application of existing knowledge based upon sources available to all men. We have repeatedly held that patents so devoid of novelty were invalid. To create a monopoly under the copyright power which would not be available under the patent power would be to betray the common birthright of all men at the altar of hollow formalisms.

The application of the constitutional standard of "novelty" will not "invalidate the copyright in a substantial portion of all literary works, where novelty as distinguished from originality is a very rare commodity," as one commentator has suggested.[4] If Johann Spies'

[4] M. Nimmer on Copyright 33 n. 7a (1971). Professor Nimmer seems to have retreated somewhat from this view, however. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970). Even if it were assumed that the application of the "novelty" standard curtailed the monopoly afforded by the copyright, it has recently been demonstrated that this would not seriously affect the publishing

Historia von Dr. Johann Fausten, Christopher Marlowe's The Tragical History of Dr. Faustus, Goethe's Faust and all the other countless operatic, symphonic, dramatic, and literary versions of the Faustian legend were published for the first time today, copyright protection could well be extended to all. "[A] copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself." *Mazer* v. *Stein, supra,* at 217. The manner in which the words or musical notes are combined to recount the Faustian legend could well satisfy the constitutional requirement of novelty even though the broad ideas they describe may be part of the public domain. This question is not before us in the present case, however, because the manner of expression used by petitioner was unquestionably her own and it was only the ideas of respondent that were used.[5]

Serious First Amendment questions would be raised if Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas. See Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970). The framers of the Bill of Rights added the guarantees of freedom of speech and of the press because they did not feel them to be sufficiently protected by the original Constitution. This liberty is necessary if we are to have free, open, and lively debate of political and social ideas. The "public

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industry nor would it disserve the interests underlying the copyright power. Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970).

[5] I recognize that if copyright protection prevented only literal copying, the clever plagiarist could avoid its sanctions by changing irrelevant words. Protecting the manner of expression, however, cannot be allowed to become the tail that wags the dog.

interest in having the fullest information available on the murder of President Kennedy," for example, led one court to conclude that photographs of the assassination were not entitled to the full range of copyright protection. *Time, Inc.* v. *Bernard Geis Associates,* 293 F. Supp. 130, 146 (SDNY 1968). The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained. We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect.

Application of the novelty standard does not require that a person whose literary work is used by another be left without a remedy. We deal here only with the extent of Congress' enumerated constitutional powers. Quite different questions would be raised by actions for unfair competition or conversion of a common-law property interest. *International News Service* v. *Associated Press,* 248 U. S. 215. Similarly, different questions would be involved had Congress acted pursuant to other enumerated powers. Cf. *Missouri* v. *Holland,* 252 U. S. 416. The respondent's rights are limited to that which is necessary to "promote the Progress of Science and useful Arts." This requires a level of "novelty" which respondent arguably has not satisfied.

I would grant certiorari and set the case for argument.

No. 70–5331. HULL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1165.

MR. JUSTICE DOUGLAS, dissenting.

On the morning of September 22, 1968, the petitioner and a companion, both Americans, were walking westward along Highway 94 near Tecate, California, and were three-fourths of a mile from the Mexican border. Two federal customs agents stopped them, learned their iden-

tities, directed the pair to walk in roadside dust, and concluded that their shoeprints were similar to those the officers had seen only hours earlier in sand "traps" some 50 yards south of the highway.[1] Suspecting the two of smuggling contraband, the agents detained them while reinforcements arrived and backtracked in search of contraband which officers believed might have been hidden along the pair's path. During the probe two knapsacks containing marihuana were found at a spot 100 yards east of the point where the two had been stopped and near the trail which officers believed had been left by the petitioner and his companion. The officers then formally arrested them and afterwards traced what they suspected to be the pair's footprints to a railroad tunnel nearer the border leading into Mexico.

The two were convicted of smuggling marihuana, in a trial before a jury. The Government was unable to produce direct evidence that the defendants had actually crossed the border via the railroad tunnel. In fact, all the agents could claim was that they had traced what they believed to be the defendants' footprints into the mouth of the tunnel. Furthermore, no direct evidence was adduced to show, assuming the pair had crossed the border, that they had crossed with marihuana. Given the lack of direct evidence on any of these matters, however, the Government understandably desired to be more persuasive.

To shore up its case the Government introduced, over objection, testimony of an agent that the locality of these events had been "possibly the hottest spot on the Mexican border for smuggling." He was permitted to tell of his participation in six prior, unrelated investiga-

[1] A "trap" is a sandy area brushed smooth at regular intervals and used to alert border patrols that persons have recently traversed the area on foot.

tions of other persons' smuggling activities. On four of these occasions, said the officer, arrestees had been tracked by their footprints and had been found possessing marihuana. On two other occasions, aliens had been caught unlawfully entering the United States. Apparently, the point the prosecution wished to convey was that using the tunnel was a favorite *modus operandi* for sneaking aliens and hemp into the United States. The Government now attempts to justify this testimony on the theory that it tended to rebut the possibility that the pair had merely been hitchhiking. As a second justification, the Government contends the remarks helped establish the "signcutting" credentials of the agent by showing that his tracking skills had proved successful on prior occasions.[2]

I would reverse the case and order a new trial.

The witness' view on the criminal tendencies of persons found near the border was not relevant to any fact at issue in the trial. It was merely an attempt to construct a supposed class of suspect persons to which it appeared the petitioner belonged. Courts have been hesitant to admit statistical evidence of this nature because of the ease with which it can be abused.[3] Only after many

[2] "Signcutting" is the art of tracking the path of persons traveling in open spaces.

[3] Judicial history is replete with examples of misapplied statistics in criminal cases. One prominent example was the conviction of Captain Alfred Dreyfus in France in 1899. He was accused of writing state secrets and conveying his inscriptions to German spies. The prosecution attempted to show that Dreyfus had penned the letter, by introducing lexicographical experts' opinions. The prosecutor was successful in persuading the jury that there had been an "amazing" frequency of graphical similarities between the letters and others known to have been written by Dreyfus. But, as a panel of experts later pointed out, there was nothing statistically remarkable about the existence of the similarities. For the view that counsel for Dreyfus and the government commissioner failed

years of improvements were evidences of fingerprints, firearms ballistics, and radar data admitted in prosecutions. And, evidence of blood tests for identification purposes or polygraph readings still face an uncertain future in our courts.[4] We have here an attempt by the Government to impute to a class of persons criminal tendencies simply on the strength of one custom agent's anecdotal experiences in four prior investigations. The attempt was not relevant since a rational juror could not have sensibly used the information.[5]

The jury might have suspected the two simply as marihuana users who had been hitchhiking along the highway and who had hidden the contraband upon seeing

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to comprehend any of the witness' mathematical speculation, see A. Charpentier, The Dreyfus Case 52–53 (J. May transl. 1935). A more recent American case is that of *People* v. *Collins*, 68 Cal. 2d 319, 438 P. 2d 33 (1968), in which the prosecutor at trial said he showed that only one in 12 million people could, as the defendant did, match the description of the perpetrator of a robbery. The California Supreme Court ultimately pointed out, among other criticisms of the mathematical demonstration, that in a population of 24 million the prosecutor's assumption would lead to the conclusion that there were *two* persons matching the description, which alone should have established reasonable doubt. These cases and others misapplying statistics are discussed in Tribe, Trial By Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1338 (1971).

[4] As to the case of breathalizers, radar trackings of automobiles, polygraphs, blood tests for identification purposes, fingerprinting and ballistics tests, see C. McCormick, Evidence, c. 20 (1954); Finkelstein & Fairley, A Comment on Trial By Mathematics, 84 Harv. L. Rev. 1801 (1971); Tribe, A Further Critique of Mathematical Proof, 84 Harv. L. Rev. 1810 (1971); Tribe, Trial By Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971); and Finkelstein & Fairley, A Bayesian Approach to Identification Evidence, 83 Harv. L. Rev. 489 (1970).

[5] See Committee on Rules of Practice and Procedure, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, Rule 401, 51 F. R. D. 315, 342.

the customs agents' automobile. Under these circumstances it would have been understandable for the Government to desire to show that a high proportion of persons found with hemp near the Mexican border in fact had recently brought their supply personally from Mexico. It may well be that such is the case. But that proposition does not follow from the four instances recalled by the customs agent. In *Leary* v. *United States,* 395 U. S. 6, 30 (1969), we noted the increasing harvests of domestic crops of marihuana. And, of course, it would not follow that all possessors even of foreign grown *cannabis* personally import their supply. In short, the Government offered an unbalanced and incomplete picture of the ways in which persons under circumstances such as these had obtained their marihuana.

It is no answer that the defendant was free to challenge the Government's general view of statistical probabilities by presenting other explanations of the circumstances or by impeaching the Government's expert witness. We should not impose upon an accused the burden of independently generating probabilistic evidence and employing experts to study the criminal tendencies of a subgroup of the population. The Government should live up to higher standards and not be allowed to convict people of crimes on suspicion alone.

I would reverse and order a new trial.

No. 71–80. BETO, CORRECTIONS DIRECTOR *v.* HERNANDEZ. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 443 F. 2d 634.

No. 71–93. HOWARD ET AL. *v.* FLORIDA EAST COAST RAILWAY CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: See 318 F. Supp. 720.

No. 71–206. DUN & BRADSTREET, INC. *v.* GROVE, TRUSTEE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 438 F. 2d 433.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner, Dun & Bradstreet, Inc., publishes credit reports available by private subscription. Because Altoona Clay Products, Inc., was a sizable concern it became a subject of analysis by the petitioner. From time to time the petitioner issued confidential financial studies of Altoona which were requested by the subject's creditors and suppliers.

In early January 1963, one of Dun & Bradstreet, Inc.'s, employees discovered in the judgment index of Blair County, Pennsylvania, an unsatisfied entry of $60,000 against Altoona Clay Products Company, a predecessor and defunct enterprise which had been operated by those controlling the subject. On January 3, 1963, the petitioner issued an analysis concerning Altoona, noting this find, but failing to state that the unpaid judgment was against an entirely different firm, at least technically, so that its creditors and suppliers were led to believe that the outstanding liability was owed by Altoona. The error was retracted by Dun & Bradstreet, Inc., in April 1963, but respondent Grove, a trustee in bankruptcy presiding over Altoona's estate, claims that the financial demise of his ward was worked during the interim misunderstanding.

After protracted litigation initiated in the District Court on diversity jurisdiction, involving a prior appeal and remand, a jury, applying Pennsylvania libel law, awarded $110,000 in "general damages" to the trustee in bankruptcy. No special damages were found. The District Court, however, entered a judgment *n. o. v.* in favor of Dun & Bradstreet, Inc., on the ground that *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), pro-

scribed libel judgments under such circumstances of innocent error.

The respondent appealed this order to the Third Circuit, which reversed, reinstating the verdict and holding that "the doctrine of New York Times v. Sullivan does not extend to private credit reports, and that any allegations of defamation concerning such reports are properly subject to the libel laws of the several states." 438 F. 2d 433, 438. The opinion issued by the Third Circuit distinguished *New York Times* on three grounds: (a) unlike Sullivan, the subject of these private reports, Altoona, had no access to the same medium to correct the error; (b) unlike the civil rights struggle, the confidential nature of these nonpublic reports fell outside the realm of *public* debate; and (c) unlike *New York Times,* the dispute here was factual in nature, not a difference of opinion.

I would grant certiorari and hear argument on the question whether we should reverse the Third Circuit's holding, not because it misreads the *New York Times* case, but because libel and slander awards are no longer constitutionally permissible elements of American law.

It is clear that the First Amendment would proscribe any attempt to enact a federal libel law, notwithstanding the Alien and Sedition Act (1 Stat. 596) to the contrary.[1] I do not suppose that anyone considered at the time of its adoption whether the Fourteenth Amendment meant that state courts could no longer participate in libel and slander awards. But I have expressed the idea before that "constitutional law is not frozen as of a particular

[1] Of the constitutionality of the Sedition Act of 1798, Mr. Justice Holmes said, "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed." *Abrams* v. *United States,* 250 U. S. 616, 630 (1919) (dissenting opinion).

moment of time." *Rosenblatt* v. *Baer*, 383 U. S. 75, 90 (1966). Thus, after it was settled in *Stromberg* v. *California*, 283 U. S. 359 (1931), that the Fourteenth Amendment incorporated the First's freedoms of expression, it followed, in my view, that state libel laws were displaced by the same prohibition that had forbidden federal libel laws.

Accordingly, it is difficult to see how it is within our province to hold that both intentional and reckless falsehoods are outside constitutionally protected discussion. That question has been decided to the contrary by constitutional draftsmen believing that even false statements perform an important function. Whether intentional, whether false, all opinions and allegations in this forensic community are catalytic elements which tend to cause us to react, to rethink, and to reply. And even if deliberate untruths were unworthy of protection, it would be counterproductive, as Madison warned, enunciating his views on the Sedition Act, to attempt to adjudicate which were true and which were not:

> "Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press,*

> *they have never yet been devised in America.*" 6 Writings of James Madison, 1790–1802, p. 336 (Hunt ed. 1906).

Thus under our system the libeled may rebut their accusers and presumably those who care about the debate will listen; but repair to the courts for damages no longer is constitutionally permissible.

The wisdom of an absolute prohibition against libel recoveries has been demonstrated by the subsequent experience with the rule announced in *New York Times Co.* v. *Sullivan, supra.* Although the common law of libel had fallen into relative disuse, it was revived by the Civil Rights Movement of the last decade which generated heated accusations and, in turn, resort by the defamed to sympathetic state courts to penalize with spectacular awards "outside agitators" who had published criticisms. In the *New York Times* case, the plaintiff obtained a half-million-dollar judgment from an Alabama jury against the New York Times which had published an advertisement in support of civil rights workers in Alabama, which seemed to be critical of Sullivan. Thus for the first time after it had become clear that First Amendment freedoms were incorporated into the Fourteenth, this Court considered the extent to which awarding libel damages had to yield to the protection of a free press.[2]

Mr. Justice Black, in my view, correctly stated that "the minimum guarantee of the First Amendment" is that the press has an "*unconditional* right to say what [it] pleases about public affairs." *Id.*, at 297 (emphasis added). The majority, however, felt it necessary to "balance" the state interests underlying libel awards

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[2] The issue presented in *New York Times* had also been considered by the Court in *Schenectady Union Publishing Co.* v. *Sweeney*, 316 U. S. 642 (1942) (equally divided vote).

against the countervailing constitutional values of free expression, producing an actual-malice test to be applied where public officials were criticized. *Id.*, at 283. I have continually reiterated my agreement with Mr. Justice Black, but, even if a balancing approach were appropriate, I also believe that the seven years since *New York Times* demonstrate that an improper balance was struck.

There is a strong argument that the reasons which led the *New York Times* majority to reject broader liability of publishers *a fortiori* should also have compelled absolute immunity for defamatory comment. If the common-law tests had been too elusive to protect First Amendment interests then the actual-malice test has proved neither to be more precise nor to be a better guardian. Proof of knowledge that a statement is false requires slippery proof of a mental state, as does a showing of reckless disregard. Seldom is evidence clear on these issues and a local jury asked to "weigh all the circumstances" can continue under this evanescent test to penalize unpopular speech. The formula is not made stronger by placing the burden of proof on the plaintiff or by requiring "convincing clarity" in the degree of proof. These haunting defects have been implicitly recognized on at least ten recent occasions, including the *New York Times* case, wherein majorities declined to remand for further jury proceedings but instead in each case examined the record, weighed the evidence, found it insufficient, and absolved the publisher.[3]

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[3] *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971); *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971); *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265 (1971); *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U. S. 6 (1970); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968); *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967); *Associated Press* v. *Walker*, 388 U. S. 130 (1967); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); see also *Garrison* v. *Louisiana*, 379 U. S. 64

Moreover, the rationale for permitting even limited liability seems dubious. The actual-malice standard, it is said, permits liability because "calculated falsehoods" are not constitutionally protected. *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964). But, as mentioned earlier, even untrue remarks may have positive effects upon the quality of our re-examination process. Moreover, if the rough-and-tumble of debate is the best vehicle for producing approximations of factual truth or preferred opinion, then courts have no business making premature and interim evaluations of contested statements' merits.

Finally, a factor which the *New York Times* majority failed to gauge properly was the interest of judicial administration in avoiding continuing readjustment of constitutional doctrine. On 16 occasions since and including that case this Court has attempted to clarify the appropriate balance from circumstance to circumstance.[4] The narrow focus on "public officials" [5] was broadened to include "public figures" [6] and most recently has been expanded to statements of "general or public in-

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(1964), which relied on *New York Times* to invalidate a criminal libel statute, thereby precluding a jury retrial. That the actual-malice test provides inadequate protection against whimsical juries has been pointed out by four Justices. See *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 70–71 (1966) (Fortas, J., dissenting); *New York Times Co.* v. *Sullivan*, *supra*, at 293 (Black, J., concurring), 297–298 (Goldberg, J., concurring in result); *Garrison* v. *Louisiana*, *supra*, at 81 (DOUGLAS, J., concurring).

[4] In addition to the citations in n. 3, see *Ocala Star-Banner Co.* v. *Damron*, 401 U. S. 295 (1971); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966); *Henry* v. *Collins*, 380 U. S. 356 (1965).

[5] *New York Times Co.* v. *Sullivan*, *supra*.

[6] *Curtis Publishing Co.* v. *Butts*, *supra*.

terest." [7] The latter, more blurred focus, as Justices Harlan, MARSHALL, and STEWART recently observed, will further require this Court to poll itself with increasing regularity to determine what events are of sufficient general or public interest to deserve protection. *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 62, 81 (1971). Thus in *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), an obscure family's captivity by escaped convicts propelled them into the "public spotlight," and, similarly, in *Rosenbloom* v. *Metromedia, Inc., supra,* a majority felt that an arrest of a magazine salesman was sufficiently "public" to endow a radio station with greater protection for an erroneous newscast that his arrest had been for selling obscene material. It is evident that this *ad hoc* approach has backed the Court into the same subjective quagmire which has trapped the judiciary in the obscenity cases.

Decisions subsequent to *New York Times* [8] have both tightened the actual-malice test and expanded its displacement of the common law. The logical extension of these decisions should in time eliminate entirely libel and slander recoveries from American jurisprudence.

I am unpersuaded by the notion that because the petitioner's publications were commercial in nature they deserved less or no First Amendment protection. It is

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[7] *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S., at 43.

[8] It is evident that the transition from "public official" to "public figure" to "events of public or general interest" has substantially broadened the instances in which the actual-malice test is applicable. At the same time the actual-malice test has been tightened by virtually eliminating reckless disregard as a component. The Court in *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S., at 83, 84, defined "reckless disregard" to mean a "'high degree of awareness of . . . probable falsity.'" But even though the Court in the abstract has gone far toward eliminating libel, in practice, juries remain able to justify libel penalties under the nebulous "actual malice" test.

true that *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), held that business advertisements and commercial matters fell outside sanctioned expression, but as I suggested in *Cammarano* v. *United States*, 358 U. S. 498, 513–515 (1959) (concurring opinion), that holding was ill-conceived and has not weathered subsequent scrutiny. Only two years after *Valentine* we held that a municipality could not apply its flat license tax to an evangelist who earned his livelihood by selling religious tracts door to door. Similarly, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 499 (1952), disposed of the view that because cinemas were profit enterprises their films were somehow deprived of full First Amendment status. And, in the field of libel we were unanimous in the *New York Times* case in rejecting the argument that because defamatory comment had been printed as an advertisement for profit it was less deserving of protection. *New York Times Co.* v. *Sullivan*, *supra*, at 265–266. Surely we have eroded *Valentine* to the extent that it held a commercial *form* of publication negated the applicability of the First Amendment. Nor, in my view, should commercial *content* be controlling. The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources.[9] W. Baumol, Economic Theory and

[9] Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc.*, *supra*, arising out of a squabble over whether a vendor had sold obscene magazines.

Operations Analysis 249–256 (1961); A. Braff, Microeconomic Analysis 259–275 (1969); R. Dorfman, Prices and Markets 128–136 (3d ed. 1967).

The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication. There is no doubt that an adverse credit rating can injure a subject. But one injured can inform his suppliers and creditors that a report is misleading. Indeed, in this case, Dun & Bradstreet, Inc., was willing to print a retraction. It is difficult to credit the claim that the "general damages" suffered by the respondent resulted from the short-term confusion between the mispublication and the retraction. In any event, in my view, it has been predetermined that such speculative costs of unfettered communication are preferable to the chill upon free expression that libel laws impose.

I would grant certiorari and set the case for oral argument.

No. 71–215. IN RE AVALLONE. Sup. Ct. N. M. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 83 N. M. 189, 490 P. 2d 235.

Rehearing Denied

No. 648, Misc., October Term, 1959. IN RE WILSON, 362 U. S. 947; and

No. 1257, October Term, 1970. SAVILLE ET AL. *v.* UNITED STATES, 403 U. S. 955. Motions for leave to file petitions for rehearing denied.

No. 883, Misc., October Term, 1967. PARKER *v.* MARYLAND ET AL., 390 U. S. 982, 1018, 393 U. S. 903, 397 U. S. 1003. Motion for leave to file fourth petition for rehearing denied.

No. 498, October Term, 1967. COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* FOUR COUNTIES WATER USERS ASSN. ET AL., 389 U. S. 1049, 390 U. S. 976. Motion for leave to file second petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

OCTOBER 26, 1971

Affirmed on Appeal

No. 71–170. BOARD OF VISITORS OF THE COLLEGE OF WILLIAM & MARY IN VIRGINIA ET AL. *v.* NORRIS ET AL. Affirmed on appeal from D. C. E. D. Va. Reported below: 327 F. Supp. 1368.

Appeal Dismissed

No. 71–271. LAWSON ET AL. *v.* BOARD OF EDUCATION OF THE VESTAL CENTRAL SCHOOL DISTRICT ET AL. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that question of jurisdiction should be postponed to hearing of case on the merits. Reported below: 35 App. Div. 2d 878, 315 N. Y. S. 2d 877.

Certiorari Granted—Reversed. (See No. 70–5135, *ante*, p. 4.)

Miscellaneous Orders

No. A–247. REALE *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. Ct. App. N. Y. Application for extension of time within which to file petition for writ of certiorari presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE STEWART is of the opinion that the application should be granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

No. 70–2. UNITED STATES *v.* 12 200-FT. REELS OF SUPER 8MM. FILM ET AL. (PALADINI, CLAIMANT). Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, 403 U. S. 930.] Motion of Christopher W. Walker for leave to file a brief as *amicus curiae* granted.

No. 70–6. SWARB ET AL. *v.* LENNOX ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 401 U S. 991.] Motion of David A. Scholl for leave to argue orally *pro hac vice* on behalf of appellants granted. Motion of Pennsylvania Credit Union League for reconsideration of order denying leave to argue orally as *amicus curiae* denied. Motion of American Bankers Assn. for leave to file a brief as *amicus curiae* granted. Motion of Pennsylvania Land Title Assn. for leave to argue orally as *amicus curiae* denied.

No. 70–34. SIERRA CLUB *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. [Certiorari granted, 401 U. S. 907.] Motion of County of Tulare for leave to argue orally as *amicus curiae* denied.

No. 70–54. VICTORY CARRIERS, INC., ET AL. *v.* LAW. C. A. 5th Cir. [Certiorari granted, 401 U. S. 936.] Motion of American Trial Lawyers Assn. for leave to file an untimely brief as *amicus curiae* granted.

No. 70–5009. JACKSON *v.* INDIANA. Sup. Ct. Ind. [Certiorari granted, 401 U. S. 973.] Motion of American Association on Mental Deficiency et al. for leave to file a brief as *amicus curiae* denied.

No. 70–5039. FUENTES ET AL. *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 401 U. S. 906, *sub nom. Fuentes* v. *Faircloth.*] Motion of Bruce S. Rogow for leave to permit C. Michael Abbott to argue orally *pro hac vice* on behalf of appellants granted.

No. 70–5138. PARHAM ET AL. *v.* CORTESE ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 402 U. S. 994, *sub nom. Epps* v. *Cortese.*] Motion of David A. Scholl for leave to argue orally *pro hac vice* on behalf of appellants granted.

No. 71–119. TRBOVICH *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 880.] Motion to expedite granted.

No. 71–259. KAZUBOWSKI ET AL. *v.* DOLAR, AKA KAZUBOWSKI, ET AL. Motion for leave to file petition for certiorari and other relief denied.

No. 71–273. VICK *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE, ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Certiorari Granted

No. 71–107. ATLANTIC COAST LINE RAILROAD CO. *v.* ERIE LACKAWANNA RAILROAD CO. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 442 F. 2d 694.

No. 71–162. BOARD OF REGENTS OF STATE COLLEGES ET AL. *v.* ROTH. C. A. 7th Cir. Certiorari granted. Reported below: 446 F. 2d 806.

No. 71–247. RABE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari granted. Reported below: 79 Wash. 2d 254, 484 P. 2d 917.

Certiorari Denied

No. 70–145. WOOLDRIDGE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 459 S. W. 2d 404.

No. 70–5161. PATTON *v.* CHEW, DIRECTOR, PROBATION AND PAROLE BOARD OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 70–154. PRUETT *v.* TEXAS ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 70–5165. MEADE *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 438 F. 2d 323.

No. 70–5166. HAIRE *v.* SARVER, CORRECTIONS COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 437 F. 2d 1262.

No. 70–5178. ROYSTER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 57 N. J. 472, 273 A. 2d 574.

No. 70–5180. HINKLE *v.* SMITH, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 70–5187. RILEY *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 434 F. 2d 649.

No. 70–5204. STREETS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 962.

No. 70–5208. KEYES *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 70–5217. HEATH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 249 Ark. 217, 459 S. W. 2d 420.

No. 70–5220. JACOBS ET AL. *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 224 Tenn. 106, 450 S. W. 2d 581.

No. 70–5229. GOLDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 941.

No. 70–5246. JOHNSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 540, 268 N. E. 2d 123.

No. 70–5236. HOOKS *v.* COLBATH. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1068.

No. 70–5274. MENDEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 94, 268 N. E. 2d 778.

No. 70–5296. BURRY *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 70–5317. JONES *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 440 F. 2d 685.

No. 70–5347. CHAPMAN *v.* CARDWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied.

No. 70–5401. NEWLAND *v.* UNITED STATES;
No. 71–5027. HARRISON ET AL. *v.* UNITED STATES; and
No. 71–5161. SCHAEFER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 441 F. 2d 1204.

No. 71–151. WASOFF *v.* AMERICAN AUTOMOBILE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 268.

No. 71–161. KERR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–195. CONSOLIDATION COAL CO. ET AL. *v.* DISABLED MINERS OF SOUTHERN WEST VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 442 F. 2d 1261.

No. 71–219. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–242. ROGERS ET AL. *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–233. General Drivers & Dairy Employees, Local Union No. 563, et al. *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied.

No. 71–253. Bonistall *v.* Braden et al. C. A. 6th Cir. Certiorari denied. Reported below: 442 F. 2d 342.

No. 71–255. Santa Fe Pacific Railroad Co. *v.* Cord et al. Ct. App. Ariz. Certiorari denied. Reported below: 14 Ariz. App. 254, 482 P. 2d 503.

No. 71–260. McGregor, dba McGregor World Travel Service *v.* Air Transport Association of America et al. C. A. 2d Cir. Certiorari denied.

No. 71–261. American Federation of Musicians of the United States and Canada, AFL–CIO, et al. *v.* Harrah's Club, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 471.

No. 71–268. Eckert *v.* United States; and
No. 71–5315. Zamora *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 974.

No. 71–267. Gargallo *v.* Gargallo. Sup. Ct. Ohio. Certiorari denied.

No. 71–270. Ken Aker, Inc. *v.* Girard Trust Bank. Cir. Ct. W. Va., Kanawha County. Certiorari denied.

No. 71–274. Winston-Salem/Forsyth County Board of Education *v.* Scott et al. C. A. 4th Cir. Certiorari denied. Reported below: 444 F. 2d 99.

No. 71–275. Antonello et al. *v.* City of San Diego. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 16 Cal. App. 3d 161, 93 Cal. Rptr. 820.

No. 71–277. Price *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 447 F. 2d 23.

No. 71–278. BODNAR *v.* BODNAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1103.

No. 71–280. SCHOOL DISTRICT OF THE CITY OF PONTIAC, INC., ET AL. *v.* DAVIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 443 F. 2d 573.

No. 71–281. BLACK ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 741.

No. 71–282. STONEHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1167.

No. 71–283. GORE ET AL. *v.* AMERICAN MOTORISTS INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 10.

No. 71–286. S. F. H., INC., FORMERLY SAM FORTAS HOUSEFURNISHING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 444 F. 2d 139.

No. 71–5016. PLOTTS *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 1376.

No. 71–5033. MORI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 240.

No. 71–5068. YOUNGBLOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5082. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 1199.

No. 71–5091. TEAGUE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5092. EL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 443 F. 2d 925.

No. 71–5096. FRIEDLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 855.

No. 71–5136. MAGEE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 71–5137. VESTAL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 71–5138. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 439 F. 2d 325.

No. 71–5140. STARR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5143. WAX *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5145. SCHERER *v.* DAVIS. C. A. 9th Cir. Certiorari denied.

No. 71–5146. MIRIN, DBA STRIP CAB CO. *v.* TAXICAB AUTHORITY OF CLARK COUNTY, NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1123.

No. 71–5151. CHAPA *v.* BRITISH PETROLEUM CORP. ET AL. Sup. Ct. App. Va. Certiorari denied.

No. 71–5152. DEFLUMER *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 443 F. 2d 940.

No. 70–5162. YOUNG *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 439 F. 2d 426.

No. 70–5200. PERRY *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 759.

No. 70–5201. FUNCHESS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 255 S. C. 385, 179 S. E. 2d 25.

No. 70–5214. YANCIE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–125. LANGONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 636.

No. 71–209. BALL *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–225. KIRALY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 291.

No. 71–250. BAKER *v.* MONROE COUNTY BAR ASSN. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 28 N. Y. 2d 977, 272 N. E. 2d 337.

No. 71–5125. DORROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 440 F. 2d 1336.

No. 71–212. HOOVER ACADEMY, INC. *v.* WRIGHT ET AL. C. A. 5th Cir. Motion to dispense with printing petition and motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 441 F. 2d 447.

No. 71–5148. TINCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 440 F. 2d 312.

No. 71–251. BERTUCCELLI *v.* BELLAMY. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–258. BRIGGS, SUPERINTENDENT OF SCHOOLS, ET AL. *v.* CALLOWAY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 443 F. 2d 296.

No. 71–264. BOOTH *v.* LEMONT MANUFACTURING CORP. ET AL. C. A. 7th Cir. Motion of petitioner to dispense with printing appendix granted. Certiorari denied. Reported below: 440 F. 2d 385.

No. 71–276. ZELKER, CORRECTIONAL SUPERINTENDENT *v.* RANDAZZO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. Reported below: 444 F. 2d 625.

No. 71–5132. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 443 F. 2d 341.

NOVEMBER 1, 1971

Dismissals Under Rule 60

No. 71–117. CHARLESTON *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

No. 71–5388. SMITH *v.* METZNER, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 5, 1971

Miscellaneous Order

No. A–483. COMMITTEE FOR NUCLEAR RESPONSIBILITY, INC., ET AL. *v.* SCHLESINGER, CHAIRMAN OF ATOMIC ENERGY COMMISSION, ET AL. C. A. D. C. Cir. Application for injunction presented to THE CHIEF JUSTICE, and by him referred to the Court, set down for oral argument at 9:30 a. m. on November 6, 1971.

NOVEMBER 6, 1971

Miscellaneous Order

No. A–483. COMMITTEE FOR NUCLEAR RESPONSIBILITY, INC., ET AL. *v.* SCHLESINGER, CHAIRMAN OF ATOMIC ENERGY COMMISSION, ET AL. C. A. D. C. Cir. Application for Injunction in Aid of Jurisdiction, having been considered by the Court on oral argument and on the papers and documents submitted by the parties, is hereby denied. See: —— U. S. App. D. C. ——, ——, ——, 463 F. 2d 783, 788, 796.

David Sive argued the cause for applicants. With him on the application for injunction were *Harold P. Green* and *Thomas B. Stoel, Jr.*

Solicitor General Griswold argued the cause for respondents.

MR. JUSTICE DOUGLAS.

I would grant the injunction so that the case can be heard on the merits. The most serious question tendered is whether the Atomic Energy Commission (AEC) has satisfied the mandate of the National Environmental

Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.* By § 102 (2)(C) of that Act,[1] 42 U. S. C. § 4332 (2)(C), Congress directed each agency of the Federal Government to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

I agree with the Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission,* 146 U. S. App. D. C. 33, 39, 449 F. 2d 1109, 1115, that "if the decision [under NEPA] was reached [by AEC] procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse."

That opinion, rendered on July 23, 1971, by a panel consisting of Judges Wright, Tamm, and Robinson, found that AEC's procedures in this nuclear area did not comply with the Act and that its entire approach

[1] Guidelines for agency action are provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed. Reg. 7724.

to the environmental problems in the nuclear field violated the Act.

Another panel of the same Court of Appeals, composed of Judges Bazelon, Leventhal, and Robinson, said in the instant case, after examining *in camera* the relevant environmental documents,

> "We are left with difficult questions about the validity of the AEC's environmental statement.[2] But a hurried review of several hundred pages of technical documents cannot provide a satisfactory basis for resolving this litigation." —— U. S. App. D. C. ——, ——, 463 F. 2d 796, 798.

In that opinion the Court of Appeals did not approve the findings of the District Court that the order complies with the Act, saying, "In our view the case does present a substantial question as to the legality of the proposed test."

I have added in an appendix some apparently obvious defects in AEC's Impact Statement (hereafter sometimes I. S.).

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[2] As the Court of Appeals held in an earlier opinion in this case, —— U. S. App. D. C. ——, ——, 463 F. 2d 783, 786, Congress did not intend, by approving funds for the Cannikin detonation, to repeal the NEPA as it applied to the test.

"On the contrary, there is an affirmative indication that at least some of the Congressmen voting for the authorization and appropriations measures specifically contemplated that the claim of illegality remained for resolution by the courts."

See Remarks of Rep. Price, 117 Cong. Rec. H6785, July 15, 1971:

"This matter is before the court. I submit that if there has been any violation of the law, the court will supply the appropriate remedy."

Other federal courts have similarly concluded that congressional appropriations for a project subject to NEPA are not to be taken as expressing any view with respect to compliance with NEPA. *Environmental Defense Fund* v. *Corps of Engineers*, 325 F. Supp. 749, 762–763.

We plainly do not have time to resolve this question between now and the scheduled detonation. Accordingly, I would grant the injunction so that a full Court can consider the case on the merits.

APPENDIX TO OPINION OF DOUGLAS, J.

In the *Calvert Cliffs* case the Court of Appeals held that the procedural rules adopted by AEC for the preparation of Environmental Impact Statements did not meet statutory requirements. And in the October 5, 1971, opinion by the Court of Appeals in the instant case it is held that "*responsible* opposing views" on environmental damage "need be included" in the Impact Statement in the form of "a meaningful reference that identifies the problem at hand for the responsible official." — U. S. App. D. C. —, —, 463 F. 2d 783, 787.

The Act requires that reports from federal agencies required by the Act and the guidelines of the Council on Environmental Quality (CEQ) to be consulted with respect to the preparation of an Impact Statement, which are adverse to the project with respect to which their views are sought, must be released as part of the Impact Statement prepared by the agency responsible for the project.

Here, several such reports were not disclosed. The existence of these reports became known through newspaper stories and debates on the floor of Congress. These reports were the subject of the discovery proceedings which caused such a long delay in this litigation. The reports in question included those of:

(a) Russell Train, Chairman of CEQ;

(b) Edward E. David, Jr., Director of Office of Science and Technology (OST);

(c) William D. Ruckelshaus, Administrator of Environmental Protection Agency (EPA); and

(d) Glenn T. Seaborg, Chairman of the AEC.

The CEQ guidelines specifically state that the exemptions in the Freedom of Information Act, 5 U. S. C. § 552, are not applicable to agency comments made in the course of consultations with reference to the preparation of an Impact Statement. The Act and § 7 of the guidelines direct that an agency charged with the preparation of an Impact Statement "consult with, and obtain the comment on the environmental impact of the action of, Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved." 36 Fed. Reg. 7725. The EPA is specifically designated to be one of the agencies within the contemplation of § 7, *ibid.* And under § 10 (f) of the regulations, the AEC would be the agency "responsible for making the statement and the comments received available to the public pursuant to the provisions of the Freedom of Information Act." *Id.*, at 7726. Besides the express designation of the EPA, the argument is compelling that the other agencies in question have "special expertise" and, in the case of the AEC, "jurisdiction by law" concerning the various environmental effects to be expected from an underground nuclear explosion.

Once noncompliance with the NEPA is shown, the federal courts have uniformly held that injunctive relief is appropriate.

Disclosure of these statements to the public by any federal agency which has "special expertise with respect to any environmental impact involved" is indeed required by § 102 (2)(C) of the Act. And the courts have consistently held that a defect in the Impact Statement presents a justiciable question and is the basis for equitable relief. *West Virginia Highlands Conservancy* v. *Island Creek Coal Co.*, 441 F. 2d 232; *Environmental Defense Fund* v. *Corps of Engineers*, 325 F. Supp. 749, 759; *Wilderness Society* v. *Hickel*, 325 F. Supp. 422.

Seismic Dangers:

According to the Impact Statement, "No significant environmental impact can be expected from the seismic activity caused by the CANNIKIN test." I. S. 3. Two sorts of seismic effects are at issue. First, there is the possibility that the explosion might trigger a natural earthquake of greater force than the bomb itself. The Impact Statement asserts that:

> "The possibility of the CANNIKIN test 'triggering' an earthquake with seismic energy comparable to or greater than that produced by the explosion itself is very unlikely. Since the understanding of earthquake mechanisms is still developing and is not yet sufficient for exact calculations, the possibility of such an occurrence cannot be ruled out. However, foremost seismologists have asserted that an explosion at Amchitka will not trigger a large earthquake . . . unless the occurrence of such an event is imminent, very near to the test site." *Ibid.*

This conclusion is based on nothing more than an assertion to this effect by "[a] panel of eminent scientists and engineers . . . acting as consultants to the AEC," *id.*, at 54, which was presumably based, in turn, on

> "the size and location of the CANNIKIN explosion, considered along with the size and frequency of naturally occurring earthquakes and the experience gained by observation of past nuclear detonations and aftershocks." *Id.*, at 3.

That more should be required is clear from the heretofore secret memorandum written by Russell Train of the CEQ (hereafter Train memo), the agency charged with the broadest statutory authority in establishing national environmental policy.

According to Mr. Train,

> "All the earthquakes triggered by underground explosions in the various Nevada tests released substantially less energy than the explosion itself. If one could establish that this is a necessary condition then there would be no apprehension with regard to the CANNIKIN event. Unfortunately, this is not the case. The magnitude of the triggered earthquakes will depend on the state of strain in the crust in the general region at which the underground explosion is set off. Extrapolation from the Nevada experience is uncertain because of the fundamentally different geologic setting between Nevada and the Aleutians. Further, experience with MILROW [a one-megaton underground detonation set off on Amchitka in 1969] does not provide a sure basis for extrapolation. In the highly nonlinear phenomena involved in earthquake generation, there may be a threshold value of the strain that must be exceeded prior to initiation of a large earthquake." Train memo 4.

Mr. Train goes on to explain that "great earthquakes" (those with a force of 8.0 or more on the Richter scale) are now considered to result from the cumulative effects of a series of smaller shocks. (CANNIKIN is expected to register about 7.0 on the Richter scale.) Referring specifically to great earthquakes occurring within the past few years in Chile and Alaska, he notes that the theoretical explanation for these events justifies a concern that the force of CANNIKIN, which would be the largest underground device exploded by man, might surpass the "threshold" required to trigger a great quake.

> "The suggested explanation of the Chilean and Alaskan earthquakes in terms of a succession of smaller earthquakes would support this interpretation. In

> this model a number of lock points stabilize a fault. Once one lock point is broken, sufficient energy may be released to break other lock points. If the stored strain energy is large, then the triggered earthquake could be of much greater magnitude than the triggering event. The underground explosion could serve as the first domino of the row of dominoes leading to a major earthquake. The major fault in the general region of Amchitka is thought to be some 40 km. beneath the test shot. The strain field will certainly be altered at this depth by the underground explosion. Observations on the BENHAM event [a one-megaton detonation at the Nevada test sites] showed strains exceeding tidal strains at 29 km." *Ibid.*

The CANNIKIN yield may be as high as five times that of the BENHAM and MILROW devices.

The "lock-point" theory is also explained in a statement by J. W. Hadley (hereafter Hadley memo), which had also been suppressed until this week. The theory is nowhere discussed, nor even "alluded to," in the Impact Statement.

A further misleading conclusion in the Impact Statement is that CANNIKIN could not trigger a natural quake unless that quake "is imminent, very near to the test site." The documents revealed this week indicate there is a possibility that earthquakes may be triggered by a rise in underground fluid levels, or by artificial loading of the earth's crust. Presumably, the fluid lubricates the rock along a fault line, thus enhancing the potential for slippage. A series of earthquakes along a dormant fault near Denver has been definitely attributed to the pumping of waste water deep into the earth by the Rocky Mountain Arsenal. Train memo 2–3.

> "A second example is found in the case of earthquakes associated with large lakes or reservoirs. As

> a result of loading of the earth's crust by these large bodies of water or by the modification of the groundwater flow or for some other reason not yet understood, substantial earthquakes have been associated with construction of large artificial lakes. A recent earthquake near Koyna Dam in India located in an area that is not normally seismic killed about 200 people. Similarly, many small earthquakes occurred when Lake Mead was filled." *Id.*, at 3.

Increased subsurface fluid pressure will be one result of CANNIKIN.

> "[T]he explosion will alter the pressure regime in the groundwater. The water pressure in the rocks interstices will increase due to the compaction of the ground around the cavity. . . . This increase in the fluid pressure will reduce the friction between fracture separated blocks. The effect would be greatest on faults oriented parallel to the residual compressive stresses resulting from the test explosion. Thus, it is possible that the mechanism involved in the Denver earthquake would raise the probability of triggering a large earthquake." *Ibid.*

Thus, it would appear that "imminence" may not be necessary for CANNIKIN to trigger a large earthquake. This possibility is not mentioned in the Impact Statement.

The Impact Statement also fails to consider the long-term effects of the CANNIKIN device on the geology. "The creation of a large cavity together with a later collapse of the chimney produces permanent changes in the strain field. . . . However, the strain field resulting from an underground explosion cannot be calculated with any precision because of the dependence of the field on the detailed geology which is largely unknown at any given location." *Ibid.*

Not only does the Impact Statement fail to assess the possible effects of permanent changes in the strain field, but it represents that the geologic conditions at Amchitka have been fully explored. I. S. 19.

Perhaps the most striking deception of the Impact Statement, in light of the Train memo, is its attempt to represent that professional opinion is unanimous that there is no real danger that CANNIKIN will trigger a large earthquake. According to Mr. Hadley, however,

> "Qualified scientific opinion is in good agreement that the possibility of triggering a large earthquake by CANNIKIN is remote, but real. . . . Variation of technical opinion from this position is minor." Hadley memo 6.

The second seismic effect which might result from CANNIKIN is a tsunami, or tidal wave. According to the Impact Statement, "the possibility of the CANNIKIN explosion or an earthquake causing a damaging tsunami (seismic sea wave) is even more unlikely [than the triggering of a great earthquake]." I. S. 3. The Train memo itself points out, "Large earthquakes in the near vicinity of Amchitka have not caused destructive tsunamis in the past." Train memo 4. Train goes on, however: "[A]s in the case of earthquakes it is not possible at this time to assess quantitatively the probability of a tsunami following the explosion." *Id.*, at 4–5. Another heretofore suppressed statement, that of Dr. W. G. Van Dorn, entitled Probability of Tsunami Generation and Connection with CANNIKIN, indicates the author to be as deeply concerned about the danger from the explosion as the "well-qualified geophysicists" who believe that the risks are great, and whose views are contained in an attachment to the Train memo. Those views remain suppressed. Considering the awesome destructive capabilities of even a

"small" tsunami, and its ability to retain its destructive force thousands of miles from its source, it would seem incumbent upon the drafters of the Impact Statement to explore in greater detail the sources of such responsible concern.

Venting:

The second category of environmental hazards from the CANNIKIN event are those relating to the danger that radioactive material from the explosion might escape to the surface. The most serious problem is the effect on groundwater movement, for the water table on Amchitka extends almost to the surface.

According to the analysis of the Impact Statement, the most probable mode of groundwater circulation by which radionuclides might escape into the sea would take "a thousand years or more." I. S. 24. The least likely

> "involves the very unlikely assumption that the water within the cavity-chimney system becomes completely mixed [with radionuclides, predominately tritium], coupled with a second unlikely assumption that the flow through the rock occurs only through a system of interconnecting fractures. Estimates using these assumptions indicate contaminated water would reach the sea in . . . some three years after the explosion. This would introduce tritiated [radioactive] water into the ocean with an initial concentration about 1,200 times that of the RCG [recommended concentration guideline] for water." *Ibid.*

Indeed, the Impact Statement thinks it far more probable that only "some small fraction of the tritiated water" will "move upward in the chimney rubble." And only relatively near the surface will increased perme-

ability provide a path to the sea. The Impact Statement estimates that no tritium would be released into the water for over a hundred years through this mechanism. *Ibid.*

The Train memo, however, relying on calculations from the United States Geological Survey, comes to a different conclusion.

> "Water in the chimney would move to the sea at a rate dependent on the hydraulic head, the permeability of existing aquifers and permeability of any new fractures opened up by the explosion. USGS calculations indicate a time for such movement might be as short as one to two years. These are short times and are inconsistent with estimates made by AEC that tritium will be discharged into the ocean only 145 years after the explosion. . . . If the shorter times (5 to 10 years) postulated above are correct then the level of radioactivity in the groundwater entering the ocean would be in excess of ten thousand to one hundred thousand maximum permissible concentration for water." Train memo 5.

Thus, the judgment of the Chairman of the Council on Environmental Quality is that it is likely, if not probable, that within 10 years of CANNIKIN, radioactive water of concentrations perhaps 100,000 times permitted maximums will reach the sea near Amchitka. Inasmuch as this estimate is 100 times greater than their own, I should think it would require consideration by the drafters of the Impact Statement.

Another document shown to the applicants herein for the first time this week supports the Train analysis:

> "[I]t must also be admitted, and this is the basis for the Council on Environmental Quality's [Train's]

> comments on CANNIKIN, that the rubble chimney constitutes a highly permeable vertical short circuit of the groundwater system, and that the hydrological measurements indicate zones of fairly permeable rock higher in the section." M. Merritt, The Ground Water Problem at Amchitka 1–2.

The USGS recognized that its water migration time scale was highly inconsistent with that of the AEC; in so doing, it reaffirmed its original position:

> "It should be emphasized that the foregoing analysis is heavily weighed in favor of the worst case. However, it is difficult to conceive of conditions which might improve the outlook significantly." USGS, Effects Evaluation Report—Cannikin Event.

The AEC was aware of the USGS position with respect to groundwater migration. It simply ignored it.

More disturbing than the failure of the Impact Statement to meet the arguments advanced by its critics, perhaps, is a deliberate distortion, in certain instances, of those opposing views. Thus, the statement argues that even were the "extreme case" to occur, and radioactive water migrate to the sea within a few years,

> "dilution of that water by the sea water would take place rapidly. With the seeping water being swept up by the passing ocean current and mixed through tidal action and wave action, oceanographers have estimated that there would be an effective dilution factor of about 100,000 within a few hours. In this manner, the sea water tritium would quickly dilute to levels comparable to those freshwater levels acceptable for lifetime use by humans." I. S. 25.

Compare this use of the dilution figure with that of Train:

> "Even if the dilution is as great as a hundred thousand, there is the possibility of concentration of tri-

tium well above background levels in various steps of the food chain." Train memo 5.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant a temporary restraining order pending applicants' filing of a petition for certiorari and action by the Court on the petition. The question to be presented is whether the detonation of CANNIKIN would be illegal if the Atomic Energy Commission did not comply with the mandate of § 102 (2)(C) of the National Environmental Policy Act of 1969. The Court of Appeals did not accept the holding of the District Court that the Commission had complied with § 102 (2)(C), stating, "In our view the case does present a substantial question as to the legality of the proposed test." The oral argument confirmed this view. In that circumstance, to avoid mootness, the Commission must be enjoined from proceeding with CANNIKIN until the Court decides whether to review the question of its legality.

No. A–465. HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC. C. A. 2d Cir. It is ordered that the stay of mandate heretofore granted by MR. JUSTICE MARSHALL be, and it is hereby, continued pending further order of this Court. MR. JUSTICE MARSHALL dissents.

NOVEMBER 9, 1971

Affirmed on Appeal

No. 71–332. BOND ET AL. *v.* FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL. Affirmed on appeal from D. C. N. D. Ga. Reported below: 334 F. Supp. 1192.

No. 71–336. UNITED DAIRY FARMERS COOPERATIVE ASSN. *v.* MILK CONTROL COMMISSION OF PENNSYLVANIA ET AL. Affirmed on appeal from D. C. M. D. Pa. Reported below: 335 F. Supp. 1008.

Appeals Dismissed

No. 70–5269. BARNES *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 257 La. 1017, 245 So. 2d 159.

No. 71–326. LOWE *v.* LOWE. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 123 Ga. App. 525, 181 S. E. 2d 715.

No. 71–340. BRANTON ET AL. *v.* PARKER, TREASURER OF LOUISIANA, ET AL. Appeal from Sup. Ct. La. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of substantial federal question. Reported below: 259 La. 279, 249 So. 2d 908.

No. 71–348. MEALEY ET AL. *v.* CITY OF LARAMIE ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 485 P. 2d 1019.

No. 71–360. UNITED AIR LINES, INC. *v.* MICHIGAN ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 384 Mich. 837.

No. 71–5170. WOOD ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 4 Cal. 3d 288, 481 P. 2d 823.

Certiorari Granted—Vacated and Remanded. (See also No. 71–5679, *ante*, p. 28.)

No. 71–5239. HARLESS *v.* TURNER, WARDEN. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *Coolidge* v. *New Hampshire*, 403 U. S. 443. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN dissent.

Miscellaneous Orders

No. —. FRIEDLAND *v.* JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT EN BANC. Request for reconsideration of application for extraordinary relief denied.

No. A–404. SKAGGS *v.* DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES OF CALIFORNIA ET AL. Super. Ct. Cal., County of Los Angeles. Application for stay presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–462. DUNCANTELL *v.* INGRAHAM, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. A–379 (71–549). GIAMO *v.* FLORIDA. Sup. Ct. Fla. Application for stay denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). Motion of the United States for entry of a supplemental decree as to the State of Louisiana is set down for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier orders herein, see, *e. g.*, 403 U. S. 950.]

No. 17, Orig. NEBRASKA *v.* IOWA. Report of Special Master received and filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days thereafter. [For earlier orders herein, see, *e. g.*, 393 U. S. 910.]

No. 27, Orig. OHIO *v.* KENTUCKY. Motion for leave to file amended bill of complaint referred to Special Master. [For earlier orders herein, see, *e. g.*, 385 U. S. 803.]

No. 30, Orig. MICHIGAN *v.* OHIO. Report of Special Master received and ordered filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days thereafter. [For earlier orders herein, see, *e. g.*, 386 U. S. 1029.]

No. 51, Orig. FOUNDING CHURCH OF SCIENTOLOGY *v.* CROMER ET AL. Motion for leave to file bill of complaint denied.

No. 53, Orig. ALABAMA *v.* CONNALLY, SECRETARY OF THE TREASURY, ET AL. Motion for leave to file bill of complaint denied.

No. 68–5027. AIKENS *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 69–5003. FURMAN *v.* GEORGIA. Sup. Ct. Ga.;

No. 69–5030. JACKSON *v.* GEORGIA. Sup. Ct. Ga.; and

No. 69–5031. BRANCH *v.* TEXAS. Ct. Crim. App. Tex. [Certiorari granted, 403 U. S. 952.] Motion of Edmund G. Brown et al. for leave to file a brief as *amici curiae* granted.

No. 70–14. COLE, STATE HOSPITAL SUPERINTENDENT, ET AL. *v.* RICHARDSON. Appeal from D. C. Mass. [Probable jurisdiction noted, 403 U. S. 917.] Motion of Harold Hestnes to permit Stephen H. Olesky to argue orally *pro hac vice* on behalf of appellee granted.

No. 70–6. SWARB ET AL. *v.* LENNOX ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 401 U. S. 991.] Motion of appellants to dispense with printing reply brief granted. Motion of the Attorney General of Pennsylvania for additional time for oral argument denied. Conditional motion of Pennsylvania Bankers Assn. for leave to present oral argument as *amicus curiae* denied.

No. 70–18. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeal from D. C. N. D. Tex.; and

No. 70–40. DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL. Appeal from D. C. N. D. Ga. Motions of Certain Physicians, Professors & Fellows of the American College of Obstetrics & Gynecology and the National Right to Life Committee for leave to file briefs as *amici curiae* granted. Motion of Ferdinand Buckley for leave to file a brief as *amicus curiae* in No. 70–40 granted. [Probable jurisdiction postponed, 402 U. S. 941.]

No. 70–36. PERRY ET AL. *v.* SINDERMANN. C. A. 5th Cir. [Certiorari granted, 403 U. S. 917.] Motion of American Federation of Teachers for leave to file a brief as *amicus curiae* granted.

No. 70–54. VICTORY CARRIERS, INC., ET AL. *v.* LAW. C. A. 5th Cir. [Certiorari granted, 401 U. S. 936.] Motions of National Maritime Compensation Committee for reconsideration and for leave to file a brief as *amicus curiae* granted.

No. 70–75. MOOSE LODGE NO. 107 *v.* IRVIS ET AL. Appeal from D. C. M. D. Pa. [Probable jurisdiction postponed, 401 U. S. 992.] Motion of the Attorney General of Pennsylvania for additional time for oral argument denied.

No. 70–79. RELIANCE ELECTRIC CO. *v.* EMERSON ELECTRIC CO. C. A. 8th Cir. [Certiorari granted, 401 U. S. 1008.] Motion of Gulf & Western Industries, Inc., for leave to file a brief as *amicus curiae* granted.

No. 70–86. UNITED STATES *v.* TUCKER. C. A. 9th Cir. [Certiorari granted, 402 U. S. 942.] Motion to appoint co-counsel on behalf of respondent and for William A. Reppy, Jr., to present oral argument in this case granted. It is ordered that William A. Reppy, Jr., Esquire, of Durham, North Carolina, a member of the Bar of this Court, be, and he is hereby, appointed to serve as co-counsel for respondent.

No. 70–92. CALIFORNIA MOTOR TRANSPORT CO. ET AL. *v.* TRUCKING UNLIMITED ET AL. C. A. 9th Cir. [Certiorari granted, 402 U. S. 1008.] Motion of Landmarks Holding Corp. et al. for leave to file a brief as *amici curiae* granted.

No. 70–113. FORD MOTOR CO. *v.* UNITED STATES ET AL. Appeal from D. C. E. D. Mich. [Probable jurisdiction noted, 403 U. S. 903.] Motion of Zenith Vinyl Fabrics Corp. for leave to file a brief as *amicus curiae* granted.

No. 70–5025. HAINES *v.* KERNER ET AL. C. A. 7th Cir. [Certiorari granted, 401 U. S. 954.] Motion of Joel M. Flaum et al. for leave to permit Warren K. Smoot to argue orally *pro hac vice* on behalf of respondents granted.

No. 70–5032. ALEXANDER ET AL. *v.* SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 401 U. S. 906.] Motion of Ronald J. Offenkrantz for leave to permit M. James Spitzer, Jr., to argue orally *pro hac vice* granted.

No. 70–5082. CARTER ET AL. *v.* STANTON, DIRECTOR, MARION COUNTY DEPARTMENT OF PUBLIC WELFARE, ET AL. Appeal from D. C. S. D. Ind. [Probable jurisdiction noted, 402 U. S. 994.] Motion to postpone oral argument denied.

No. 70–5138. PARHAM ET AL. *v.* CORTESE ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, *sub nom. Epps* v. *Cortese,* 402 U. S. 994.] Motion of the Attorney General of Pennsylvania for additional time for oral argument denied.

No. 71–83. STRAIT *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Motion to dispense with printing petitioner's reply brief granted.

No. 71–119. TRBOVICH *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 880.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 71–157. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* UNITED STATES ET AL. D. C. N. J. Motion of John J. McMullen for leave to file a brief as *amicus curiae* and to dispense with printing granted.

No. 71–5159. WHITE *v.* CARDWELL, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 70–5188. RIDDELL *v.* HAMILTON ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 71–5265. THERIAULT *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 71–227. UNITED STATES ET AL. *v.* ALLEGHENY-LUDLUM STEEL CORP. ET AL. Appeal from D. C. W. D. Pa. Probable jurisdiction noted. Reported below: 325 F. Supp. 352.

Certiorari Granted

No. 71–308. UNITED STATES *v.* BYRUM, EXECUTRIX. C. A. 6th Cir. Certiorari granted. Reported below: 440 F. 2d 949.

No. 71–322. THE BREMEN ET AL. *v.* ZAPATA OFF-SHORE CO. C. A. 5th Cir. Certiorari granted. Reported below: 428 F. 2d 888 and 446 F. 2d 907.

No. 70–5344. WILLIS *v.* PRUDENTIAL INSURANCE CO. OF AMERICA. Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 227 Ga. 619, 182 S. E. 2d 420.

No. 71–5172. DUKES *v.* WARDEN, CONNECTICUT STATE PRISON. Sup. Ct. Conn. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 161 Conn. 337, 288 A. 2d 58.

Certiorari Denied. (See also Nos. 70–5269 and 71–326, *supra.*)

No. 70–5248. WILLIAMS *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 70–5302. GARDNER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 70–5318. PILGRIM *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 440 F. 2d 788.

No. 70–5329. KUPCZYK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 70–5406. KAPELUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–61. WECHSLER *v.* GOTTLIEB ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 510.

No. 71–101. BERNIKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 686.

No. 71–214. UNITED BONDING INSURANCE CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 444 F. 2d 742.

No. 71–232. NALLE CLINIC *v.* SCHULTZ, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 444 F. 2d 17.

No. 71–248. SAITTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 830.

No. 71–266. BAKER ET AL., TRUSTEES *v.* UNITED TRANSPORTATION UNION, LOCAL 63E. C. A. 6th Cir. Certiorari denied. Reported below: 443 F. 2d 131.

No. 71–287. PALISADES PAGEANTS, INC. *v.* MISS AMERICA PAGEANT. C. C. P. A. Certiorari denied. Reported below: —— C. C. P. A. (Pat.) ——, 442 F. 2d 1385.

No. 71–289. ZAHN ET AL. *v.* SECURITY PACIFIC NATIONAL BANK, EXECUTOR, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 16 Cal. App. 3d 106, 93 Cal. Rptr. 810

No. 71–290. KILTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–291. MCNABB *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 221.

No. 71–299. HENDERSON, DBA HENDERSON PLUMBING & HEATING CO. *v.* PLUMBERS LOCAL NO. 8, AFL, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 471 S. W. 2d 929.

No. 71–294. NEW YORK *v.* RUPPERT. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 519, 272 N. E. 2d 493.

No. 71–297. SCHAEFER *v.* LEONE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 443 F. 2d 182.

No. 71–307. ALLEN *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 71–309. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 443 F. 2d 912.

No. 71–311. NETSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 744.

No. 71–314. ADCOCK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 447 F. 2d 1337.

No. 71–320. AMPEX CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 442 F. 2d 82.

No. 71–321. DREWRYS LIMITED U. S. A., INC., ET AL. *v.* BARTMESS. C. A. 7th Cir. Certiorari denied. Reported below: 444 F. 2d 1186.

No. 71–324. MCCREA, JUDGE *v.* SPERRY ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 79 Wash. 2d 69, 483 P. 2d 608.

No. 71–330. COUNTY ASPHALT, INC. *v.* LEWIS WELDING & ENGINEERING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 444 F. 2d 372.

No. 71–333. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 194 Ct. Cl. 297, 437 F. 2d 981.

No. 71–341. PARISH ET AL. *v.* MARYLAND & VIRGINIA MILK PRODUCERS ASSN., INC., ET AL.. Ct. App. Md. Certiorari denied. Reported below: 261 Md. 618, 277 A. 2d 19.

No. 71–342. LOUISIANA *v.* PATOUT ET AL. Sup. Ct. La. Certiorari denied. Reported below: 258 La. 1159, 249 So. 2d 167.

No. 71–345. DE CURTIS ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No 71–351. PSG Co. *v.* EL SALTO, S. A. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 477.

No. 71–354. BRODY ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 1148.

No. 71–355. PULITZER PUBLISHING CO. *v.* LAZIER. Sup. Ct. Mo. Certiorari denied. Reported below: 467 S. W. 2d 900.

No. 71–356. CITY TRADE & INDUSTRIES, LTD. *v.* ALLAHABAD BANK, LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 451.

No 71–359. PEREZ *v.* DUNCAN. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 557.

No. 71–362. KAPELSKI *v.* PURCELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 444 F. 2d 380.

No. 71–367. FORCHELLI ET AL. *v.* HART, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 1018.

No. 71–368. GOLSEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 445 F. 2d 985.

No. 71–366. TIDEWATER OIL CO. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–370. SCAGLIONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 182.

No. 71–371. KEOGH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 440 F. 2d 737.

No. 71–372. LAW RESEARCH SERVICE, INC., ET AL. *v.* BLAIR & CO., GRANBERY MARACHE, INC. C. A. 2d Cir. Certiorari denied. Reported below: 442 F. 2d 1346.

No. 71–376. KINNEAR-WEED CORP. *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 631.

No. 71–383. NUNNELLEY ET AL. *v.* MILLER ET AL. Ct. App. Ky. Certiorari denied. Reported below: 468 S. W. 2d 298.

No. 71–386. RICE GROWERS' ASSOCIATION OF CALIFORNIA *v.* COUNTY OF YOLO. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 17 Cal. App. 3d 227, 94 Cal. Rptr. 847.

No. 71–395. STONE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 71–397. CAPITAL ELECTRIC POWER ASSN. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 71–399. AMOCO PRODUCTION CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 444 F. 2d 328.

No. 71–413. PHELPS DODGE REFINING CORP. *v.* ROBLEDO ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–416. STOUT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–414. VULCAN MATERIALS CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 690.

No. 71–417. LA-TEX SUPPLY CO. *v.* FRUEHAUF TRAILER DIVISION, FRUEHAUF CORP. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 1366.

No. 71–429. SOHIO PETROLEUM CO. *v.* OIL TRANSPORT CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 435.

No. 71–5034. FAIR *v.* LO SCALZO ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 244 So. 2d 433.

No. 71–5046. MACKEY *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 71–5156. FRAME *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 71.

No. 71–5157. THROWER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5158. BRIDDLE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 443.

No. 71–5163. POE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 48 Ill. 2d 506, 272 N. E. 2d 28.

No. 71–5165. HOLT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 145 U. S. App. D. C. 185, 448 F. 2d 1108.

No. 71–5166. JANKORD *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 290 Minn. 168, 186 N. W. 2d 530.

No. 71–5168. SLOBEN *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 71–5167. HARVIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 199, 445 F. 2d 675.

No. 71–5173. BRETTI *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 1042.

No. 71–5176. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 681.

No. 71–5177. MCCRAY *v.* SOLOMON, U. S. DISTRICT JUDGE; and

No. 71–5279. MCCRAY *v.* BELLONI, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–5178. NEMETH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5180. CHALK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 441 F. 2d 1277.

No. 71–5181. HARRELSON, AKA STOUGHTENBOROUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 442 F. 2d 290.

No. 71–5182. MILANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 443 F. 2d 1022.

No. 71–5183. READ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 842.

No. 71–5187. RAINWATER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 339.

No. 71–5188. CLEMONS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5190. AVILA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 792.

No. 71–5193. EDWARDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 1286.

No. 71–5195. DAPPER *v.* WITT. C. A. 9th Cir. Certiorari denied.

No. 71–5196. WION *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–5200. DINGEE *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 71–5201. TEAGUE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71–5202. RATOW *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 4 Wash. App. 321, 481 P. 2d 20.

No. 71–5203. SCHAFFER *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 71–5204. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 118.

No. 71–5205. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5206. PRADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5208. HAWKINS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–5209. LEVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 1101.

No. 71–5210. RAY *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 71–5211. DURGIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 308.

No. 71–5212. STEVENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 304.

No. 71–5213. CAMPBELL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5214. RIDGILL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 71–5219. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 560.

No. 71–5221. MESSINA *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 71–5222. GENNARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 940.

No. 71–5224. HUGHES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 1283.

No. 71–5230. SECONDINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5233. WESTFALL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5234. HALL *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5235. GROVE *v.* RIZZOLO. C. A. 3d Cir. Certiorari denied. Reported below: 441 F. 2d 1153.

No. 71–5237. SENFELD *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 71–5238. TERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 579.

No. 71–5240. MCKEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 446 F. 2d 974.

No. 71–5241. PICKELL *v.* REED ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 898.

No. 71–5243. WILLIAMS *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5244. JOLLEY *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1245.

No. 71–5245. ANGLIN *v.* DIRECTOR, PATUXENT INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 439 F. 2d 1342.

No. 71–5246. BICKFORD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 445 F. 2d 829.

No. 71–5248. FINLEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5249. SCRUGGS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5250. BANKSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 864.

No. 71–5251. GRIGGS *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 481 P. 2d 388.

No. 71–5252. HITCHCOCK *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 46.

No. 71–5254. CAFFEY *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 71–5256. HUBER ET VIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 363.

No. 71–5257. BRADLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 447 F. 2d 224.

No. 71–5258. BOND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5259. BOYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 44.

No. 71–5260. WEIS *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5261. KRESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 358.

No. 71–5264. POLILLO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 70–342. MACPHERSON *v.* BOSTON & MAINE CORP. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and judgment reversed. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500. Reported below: 439 F. 2d 1089.

No. 70–5399. RICHARDSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 248 So. 2d 530.

No. 71–184. PORTELA *v.* UNITED STATES;

No. 71–381. ALEXANDER *v.* UNITED STATES;

No. 71–396. MARTI *v.* UNITED STATES; and

No. 71–5215. MANARITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and cases set for oral argument. Reported below: 448 F. 2d 583.

No. 71–17. TUMMINELLO *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 10 Md. App. 612, 272 A. 2d 77.

No. 71–226. JERSEY CITY EDUCATION ASSN. ET AL. *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 115 N. J. Super. 42, 278 A. 2d 206.

No. 71–292. BALLEW ET AL. *v.* ROBINSON ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 447 F. 2d 584.

No. 71–302. RATLIFF ET AL. *v.* COOPER LABORATORIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 745.

No. 71–310. LYZUN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 1043.

No. 71–317. SWORDS, ADMINISTRATRIX *v.* AMERICAN SEALANES, INC. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 443 F. 2d 1324.

No. 71–358. EPTON *v.* NENNA, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 363.

No. 71–365. STRAHAN *v.* STRAHAN ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 528.

No. 71–388. HALCON INTERNATIONAL, INC. *v.* MONSANTO AUSTRALIA LTD. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 156.

No. 71–455. RAGLAND ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–5153. COUMING *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 445 F. 2d 555.

No. 71–5169. CHRISTY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 448.

No. 71–5186. BROWN *v.* MOSELEY, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–5236. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 1274.

No. 71–5253. PARLER *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–5226. DOCKERY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 145 U. S. App. D. C. 9, 447 F. 2d 1178.

No. 71–5247. CUNNINGHAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 194.

No. 71–89. EVANS THEATRE CORP. ET AL. *v.* SLATON ET AL. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 227 Ga. 377, 180 S. E. 2d 712.

No. 71–194. PAN AMERICAN WORLD AIRWAYS, INC. *v.* DIAZ. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 442 F. 2d 385.

No. 71–230. NEWARK TEACHERS UNION ET AL. *v.* BOARD OF EDUCATION OF NEWARK. Super. Ct. N. J. Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Motion to dispense with printing petitioners' reply brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 114 N. J. Super. 306, 276 A. 2d 175.

No. 71–285. ANDERSON ET AL. *v.* UNITED STATES. Ct. Cl. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 193 Ct. Cl. 670, 436 F. 2d 1008.

No. 71–218. GROUNDS ET AL. *v.* NORTHERN NATURAL GAS CO. ET AL. C. A. 10th Cir. Certiorari denied as out of time. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 441 F. 2d 704.

No. 71–301. FRANKLIN ET AL. *v.* NEW JERSEY. Super. Ct. N. J. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–325. FRAUHIGER *v.* OHIO. C. A. 6th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–334. JOHNSON ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 467 S. W. 2d 247.

No. 71–338. ELLIS ET AL. *v.* HARADA ET AL. Sup. Ct. Hawaii. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–343. SMITH ET AL. *v.* ORISCELLO, SHERIFF. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–361. UNITED STATES *v.* SCHMID. Ct. Cl. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted and case set for oral argument. Reported below: 193 Ct. Cl. 780, 436 F. 2d 987.

No. 71–363. BECKMAN INSTRUMENTS, INC. *v.* REEVES INSTRUMENT CORP. ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 263.

No. 71–305. KAZUBOWSKI *v.* RAY, SHERIFF, ET AL. C. A. 7th Cir. Application for stay and motion to amend petition denied. Certiorari and other relief denied.

No. 71–378. FLICKINGER *v.* ELECTRIC CONSTRUCTION CO., INC. Sup. Ct. Ariz. Motion of National Association of Contractors Licensing Agencies for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 107 Ariz. 222, 485 P. 2d 547.

No. 71–389. BLAINE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion for the Government to furnish list of pending similar controversies and certiorari denied. Reported below: 441 F. 2d 917.

No. 71–5266. THERIAULT *v.* PITTMAN, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 70–115. MCVEAN *v.* UNITED STATES, *ante*, p. 822. Petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Claims beginning November 29, 1971, and ending June 30, 1972, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

NOVEMBER 10, 1971

Dismissals Under Rule 60

No. 71–124. GULF SHORES LEASING CORP. *v.* AVIS RENT-A-CAR SYSTEM, INC. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 441 F. 2d 1385.

No. 71–205. BERMAN *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 16, 1971

Appeals Dismissed

No. 70–5249. VAN GELDERN *v.* CALIFORNIA ADULT AUTHORITY. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 70–5428. SOWDER *v.* CITY OF CINCINNATI. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–5280. PERRY *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 464 S. W. 2d 660.

No. 71–5282. DUNDON *v.* JESMER. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 29 N. Y. 2d 5, 271 N. E. 2d 905.

Certiorari Granted—Reversed. (See No. 70–5213, *ante,* p. 55.)

Certiorari Granted—Reversed or Vacated, and Remanded. (See No. 70–108, *ante,* p. 53, No. 70–353, *ante,* p. 69, No. 70–5343, *ante,* p. 59, and No. 71–5294, *ante,* p. 67.)

Miscellaneous Orders

No. A–453 (71–5633). OBA *v.* UNITED STATES. C. A. 9th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion of Florida Council of 100, Inc., for leave to file a brief as *amicus curiae* granted. [For earlier orders herein, see, *e. g.,* 403 U. S. 949.]

No. 70–5388. LOPER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. [Certiorari granted, *ante,* p. 821.] Motion of petitioner to have A. C. Turner et al., acting members of the Board of Pardons and Paroles of Texas, joined as parties respondent granted. Motion of petitioner for the appointment of counsel granted. It is ordered that John T. Cabaniss, Esquire, of Houston, Texas, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 71–5267. MORRISON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and

No. 71–5278. SMITH *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–5044. WELCH *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. Motion to amend petition granted. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 71–83. STRAIT *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 445 F. 2d 843.

No. 71–288. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 144 U. S. App. D. C. 72, 444 F. 2d 947.

No. 71–300. ANDREWS *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 441 F. 2d 1222.

No. 71–5313. BROOKS *v.* TENNESSEE. Ct. Crim. App. Tenn. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions III and IV, presented by the petition, which read as follows:

"III. The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth Amendment and Fourteenth Amendment of the Federal Constitution and Article I, Section 9 of Tennessee Constitution.

"IV. Code section 40–2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution."

Reported below: —— Tenn. App. ——, —— S. W. 2d ——.

Certiorari Denied. (See also Nos. 70–5249, 70–5428, and 71–5280, *supra.*)

No. 70–5118. BURK *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 82 N. M. 466, 483 P. 2d 940.

No. 70–5295. PATTILLO *v.* WILSON ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 227 Ga. 530, 181 S. E. 2d 830.

No. 70–5142. MITCHELL *v.* HOCKER, WARDEN. Sup. Ct. Nev. Certiorari denied.

No. 70–5281. RODRIGUEZ *v.* AGNEW, HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 70–5310. MILES *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 206 Kan. 748, 481 P. 2d 1020.

No. 70–5375. LIPTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 70–5381. JUSTUS *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 70–5389. KITCHEN *v.* CRAWFORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 442 F. 2d 1345.

No. 70–5409. UTSLER *v.* ERICKSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 440 F. 2d 140.

No. 71–5005. BROOKS *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 71–5075. BROOKS *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 71–5087. DENMARK *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5218. CLEMONS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 235, 445 F. 2d 711.

No. 71–5229. IVERSON *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 187 N. W. 2d 1.

No. 71–5268. RUSHING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5269. MORRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 445 F. 2d 1233.

No. 71–5270. LEWIS *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 71–5271. STELLY *v.* QUICK MANUFACTURING CO. ET AL. Sup. Ct. La. Certiorari denied.

No. 71–5272. TITUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 577.

No. 71–5273. BODMER *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied.

No. 71–5276. MADDOX *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 445 F. 2d 269.

No. 71–5281. MURDOCK *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 48 Ill. 2d 362, 270 N. E. 2d 21.

No. 71–5283. BABER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 145 U. S. App. D. C. 98, 447 F. 2d 1267.

No. 71–5284. HICKS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–5285. SLATER *v.* TARVER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 71–5288. TOSATTO *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 107 Ariz. 231, 485 P. 2d 556.

No. 71–5290. WOODARD *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 103.

No. 71–5291. CHUBBS *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–5292. LEPERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 810.

No. 71–5293. JACOBS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 1076.

No. 71–5295. BARBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 442 F. 2d 517.

No. 71–5296. BADGER *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5299. FAVELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 383.

No. 71–5300. GILBREATH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 445 F. 2d 810.

No. 71–5301. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5303. MAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 900.

No. 71–5304. DELEGGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 444 F. 2d 1046.

No. 71–5307. SUBILOSKY *v.* MOORE, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 443 F. 2d 334.

No. 71–5310. LITTLE *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 765.

No. 71–5314. WILLAMETZ *v.* TEECE ET AL. C. A. 1st Cir. Certiorari denied.

No. 71–5316. TUZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 70–5361. CALLAHAN ET AL. *v.* SLAYTON, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 23.

No. 71–5052. GINSBERG *v.* LEVITT, COMPTROLLER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 36 App. Div. 2d 82, 318 N. Y. S. 2d 620.

No. 71–5275. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 562.

No. 71–5287. CROUCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 442 F. 2d 427.

Rehearing Denied

No. 70–176. ROSENSPAN *v.* UNITED STATES, *ante*, p. 864. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 70–5235. DORROUGH *v.* TEXAS, *ante*, p. 840;

No. 70–5253. CRACKENBERGER *v.* UNITED STATES, *ante*, p. 841;

No. 70–5367. MORALES *v.* UNITED STATES, *ante*, p. 873; and

No. 71–5012. McDUFFIE *v.* UNITED STATES, *ante*, p. 859. Motions for leave to file petitions for rehearing denied.

No. 70–5153. THERIAULT *v.* UNITED STATES, *ante*, p. 869. Motion for leave to file petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1588, October Term, 1970. SEARS, ROEBUCK & CO. ET AL. *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL., 403 U. S. 905;

No. 70–131. CALIFORNIA *v.* ELLER TELECASTING COMPANY OF ARIZONA, *ante*, p. 869;

No. 70–158. INJECT-O-METER MANUFACTURING CO., INC. *v.* NORTH PLAINS FERTILIZER & CHEMICAL, INC., *ante*, p. 824;

No. 70–213. GROENDYKE TRANSPORT, INC. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 827;

No. 70–217. ANSTED *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL., *ante*, p. 827;

No. 70–248. HARRISON ET AL. *v.* PRATHER, *ante*, p. 829;

No. 70–5140. COLE *v.* NIGRO, JUDGE, *ante*, p. 804;

No. 70–5146. BEASLEY *v.* UNITED STATES, *ante*, p. 866;

No. 70–5169. BROWN *v.* KENTUCKY, *ante*, p. 837;

No. 70–5172. QUARLES *v.* TEXAS ET AL., *ante*, p. 805;

No. 70–5190. CLARK *v.* CRAVEN, WARDEN, *ante*, p. 805;

No. 70–5196. WATSON *v.* GOODWIN, U. S. DISTRICT JUDGE, *ante*, p. 818;

No. 70–5199. MARTS ET AL. *v.* UNITED STATES, *ante*, p. 839;

No. 70–5272. CLAUSSER *v.* FIRST NATIONAL BANK OF ARIZONA, ADMINISTRATOR, ET AL., *ante*, p. 842;

No. 70–5279. HERRINGTON *v.* UNITED STATES, *ante*, p. 842;

No. 70–5284. DIXON *v.* UNITED STATES, *ante*, p. 828;

No. 70–5292. MCDONALD *v.* METROPOLITAN TRAFFIC AND PARKING COMMISSION ET AL., *ante*, p. 843;

No. 70–5300. FANNING *v.* UNITED STATES, *ante*, p. 828; and

No. 70–5301. MARMORSTEIN ET AL. *v.* UNITED STATES, *ante*, p. 828. Petitions for rehearing denied.

No. 71–7. WATSON *v.* CALIFORNIA, *ante*, p. 850;

No. 71–19. INTERCONTINENTAL PROMOTIONS, INC. *v.* MIAMI BEACH FIRST NATIONAL BANK ET AL., *ante*, p. 850;

No. 71–47. WORTH *v.* UNITED STATES, *ante*, p. 852;

No. 71–54. MOORE BUSINESS FORMS, INC. *v.* UARCO, INC., *ante*, p. 873;

No. 71–63. JURAS *v.* MEYERS ET AL., *ante*, p. 803;

No. 71–118. MASSILLON-CLEVELAND-AKRON SIGN CO. *v.* GOLDEN STATE ADVERTISING CO., INC., ET AL., *ante*, p. 873;

No. 71–134. GIBSON *v.* MISSOURI PACIFIC RAILROAD CO., *ante*, p. 855;

No. 71–149. ALLEN *v.* BANKERS TRUST CO. ET AL., *ante*, p. 856;

No. 71–175. FERNANDEZ *v.* PARKER, WARDEN, *ante*, p. 863;

No. 71–192. JOHNSON *v.* OIL TRANSPORT CO., INC., ET AL., *ante*, p. 868;

No. 71–5019. TYMCIO *v.* OHIO, *ante*, p. 868;

No. 71–5022. GRAMES *v.* MICHIGAN, *ante*, p. 860;

No. 71–5042. STODDARD *v.* STODDARD, *ante*, p. 860;

No. 71–5057. BENOIT *v.* UNITED STATES, *ante*, p. 861;

No. 71–5060. JOHNSON *v.* UNITED STATES, *ante*, p. 861;

No. 71–5080. HURD *v.* DIMENTO & SULLIVAN, *ante*, p. 862;

No. 71–5107. WELCH *v.* CARDWELL, WARDEN, *ante*, p. 884; and

No. 71–5111. LOTT *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT, *ante*, p. 884. Petitions for rehearing denied.

No. 71–20. ALO *v.* UNITED STATES, *ante*, p. 850. Motion for disclosure and petition for rehearing denied.

No. 70–5197. SWEENEY *v.* SHERIDAN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL., *ante*, p. 839. Petition for rehearing and other relief denied.

NOVEMBER 17, 1971

Dismissal Under Rule 60

No. 71–460. CHAPMAN, AKA GARDNER *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 19, 1971

*Miscellaneous Orders**

No. A–507. HAMMOND ET AL. *v.* BROWN ET AL. C. A. 6th Cir. Application for stay presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS, believing that the Ohio anti-rioting statutes, Ohio Rev. Code Ann. §§ 2923.52 to 2923.54 (Supp. 1970), on their face seem overly broad and *prima facie* infringe on freedom of expression protected by the First Amendment, would grant stay for reasons stated in his dissenting opinion in *Younger* v. *Harris*, 401 U. S. 37, 58.

No. A–516. HANRAHAN *v.* STATE ELECTORAL BOARD OF ILLINOIS ET AL.; and

No. A–523. GERMANO ET AL. *v.* STATE ELECTORAL BOARD OF ILLINOIS. D. C. N. D. Ill. Applications for stay presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these applications.

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*For order amending the Court's Rules, see *post*, p. 1066.

NOVEMBER 22, 1971

Affirmed on Appeal

No. 71–5337. FULLINGTON ET AL. *v.* SHEA, DIRECTOR, COLORADO DEPARTMENT OF SOCIAL SERVICES, ET AL. Appeal from D. C. Colo. Motion for leave to proceed *in forma pauperis* granted and judgment affirmed. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 320 F. Supp. 500.

Appeal Dismissed

No. 71–5363. KIRKWOOD *v.* WINSTEAD, COMMISSIONER OF PUBLIC WELFARE, ET AL. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 246 So. 2d 557.

Miscellaneous Orders

No. A–520. IN RE DISBARMENT OF SAMPLES. It is ordered that Franklin P. Samples, of Huntsville, Alabama, be suspended from the practice of law in this Court and that a rule 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. A–521. IN RE DISBARMENT OF FREEL. It is ordered that Frederick J. Freel, of Kansas City, Missouri, be suspended from the practice of law in this Court and that a rule 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. A–522. IN RE RESIGNATION OF PRATT. The request of John E. Pratt, of Boynton Beach, Florida, that his name be stricken from the roll of attorneys admitted to practice in this Court is granted.

No. 70–34. SIERRA CLUB *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. [Certiorari granted, 401 U. S. 907.] Motion of Environmental Defense Fund for leave to file reply brief as *amicus curiae* granted.

No. 70–153. UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. (PLAMONDON ET AL., REAL PARTIES IN INTEREST). C. A. 6th Cir. [Certiorari granted, 403 U. S. 930.] Motion of Plamondon et al. for leave to proceed *in forma pauperis* granted.

No. 70–5025. HAINES *v.* KERNER ET AL. C. A. 7th Cir. [Certiorari granted, 401 U. S. 954.] Motion of Boston College Center for Corrections & the Law for leave to file a brief as *amicus curiae* and motion to dispense with printing granted.

No. 71–93. HOWARD ET AL. *v.* FLORIDA EAST COAST RAILWAY CO., INC., ET AL., *ante*, p. 897. Motion of respondent Florida East Coast Railway Co., Inc., for damages denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. A–411 (71–384). KLEIN *v.* BOWER ET AL. C. A. 2d Cir. Application for vacation of preliminary injunction denied.

No. 71–5321. KINNELL *v.* GAFFNEY, WARDEN; and No. 71–5334. NEWMAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 71–5078. PETERS *v.* KIFF, WARDEN. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 441 F. 2d 370.

Certiorari Denied

No. 70–5282. LITTLEJOHN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 130 Ill. App. 2d 1064, 266 N. E. 2d 358.

No. 70–5330. SCHILL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 50 Wis. 2d 473, 184 N. W. 2d 858.

No. 70–5339. KNOWLES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 130 Ill. App. 2d 78, 264 N. E. 2d 716.

No. 70–5351. TURLEY *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 443 F. 2d 1313.

No. 70–5385. RUTHERFORD *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 186 Neb. 581, 185 N. W. 2d 449.

No. 71–5032. REYNOLDS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 71–5039. MILLER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 246 So. 2d 169.

No. 71–5053. HARDIN *v.* UNITED STATES; and
No. 71–5434. HARDIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: No. 71–5434, 446 F. 2d 148.

No. 71–5054. OAKES *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 129 Vt. 241, 276 A. 2d 18.

No. 71–5058. WOODS ET UX. *v.* DEPARTMENT OF SOCIAL SERVICES. Ct. Sp. App. Md. Certiorari denied. Reported below: 11 Md. App. 10, 272 A. 2d 92.

No. 71–5059. NEWMAN *v.* ESTELLE, WARDEN. Sup. Ct. Mont. Certiorari denied. Reported below: 156 Mont. 502, 484 P. 2d 276.

No. 71–5063. FAHY ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 13 Cal. App. 3d 808, 92 Cal. Rptr. 451.

No. 71–5084. MATTHEWS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 468 S. W. 2d 313.

No. 71–5207. BROOKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 71–5320. GEPHART *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 319.

No. 71–5322. PERRY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5323. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 445 F. 2d 421.

No. 71–5324. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–5325. PANZAVECCHIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 1293.

No. 71–5328. VERDUGO-MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 1351.

No. 71–5329. HARDEN, AKA BROWN *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5330. MISENHIMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–5331. BRYANT ET AL. *v.* CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 353.

No. 71–5332. RUBIN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–5333. MEACHUM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5338. TONSUL ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 71–5340. WASHINGTON *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 87.

No. 71–5341. STAFFORD *v.* NAA EMPLOYEES FEDERAL CREDIT UNION ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5344. WISEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 792.

No. 71–5345. LIPSCOMB *v.* CHENAULT. C. A. 6th Cir. Certiorari denied.

No. 71–5346. HICKS *v.* PICARD, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 71–5347. POPE *v.* HENDRICK, PRISONS SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 71–5348. CRISPIN *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 233.

No. 71–5350. CLARK *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5351. WILKINSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 26 Ohio St. 2d 185, 271 N. E. 2d 242.

No. 71–5354. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 70–5233. DONALDSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari.

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

The Court today denies certiorari to a black man who stands convicted by an all-white jury which had been selected through a process which petitioner alleges methodically excluded members of minority racial groups. The most pernicious of the practices used to exclude black and Chicano jurors was what purported to be an intelligence test which, because of its cultural bias and its blatant unreliability, excluded nearly 50% of the otherwise qualified prospective jurors from minority groups. We would all agree that the brand of justice received in our courts should not depend upon the color of one's skin and that the selection of jury panels should not be tainted by the exclusion of racial groups. With all respect, I fear precisely that result has obtained in the case.

Petitioner was convicted of the unlawful possession of marihuana. The State's evidence consisted of the testimony of two white police officers that they observed and smelled petitioner smoking a marihuana cigarette and that he dropped the cigarette on the ground before he was arrested. Petitioner steadfastly denied his guilt. He offered witnesses who "testified that, because of an obstruction, it was not possible to see" the area where

petitioner was allegedly smoking marihuana, who supported his story "that no one was smoking marihuana," and who gave credence to the apparent theory of the defense that a black man was being framed by white police officers. *People* v. *Donaldson,* Crim. No. 17615 (Ct. App. Cal., Dec. 21, 1970, unpublished opinion).

The issue for the jury was the relative credibility of two white police officers and the four black defense witnesses. Cf. Note, 79 Yale L. J. 531 (1970). That this question was close is indicated by the fact that after some 5¼ hours of deliberation the jury reported itself deadlocked eight-to-four and an *Allen* charge was then given. See *Allen* v. *United States,* 164 U. S. 492 (1896). It took an additional hour of deliberation before the jury resolved the credibility issue against petitioner and returned a verdict of guilty.

On appeal, the California Court of Appeal affirmed the conviction, holding that petitioner, as a black, had no standing to challenge the exclusion of Chicanos from the jury panel,[1] that the exclusion of racial minorities was unintentional and that, in any event, it did not deny equal protection of the laws. The Supreme Court of California denied a petition for a hearing and petitioner now seeks a writ of certiorari.

The culturally biased intelligence test used in this case excludes almost half of the otherwise qualified prospective jurors from minority groups. It is also argued that members of racial minority groups are effectively barred from jury service by (1) the selection of prospec-

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[1] Such reasoning is contrary to *Ballard* v. *United States,* 329 U. S. 187, 195 (1946), where we said, "[R]eversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

tive jurors solely from voter registration lists despite the significantly lower incidence of registration by blacks and Chicanos, (2) the absence of any follow-up procedures to correct for the high frequency with which blacks and Chicanos fail to respond to jury service notices, and (3) the token $5 per diem paid jurors which precludes those in low economic strata from serving as jurors.[2]

Petitioner concludes that "[i]n the 1968 South District Jury Draw [from which his jury was selected], the cumulative effect of the . . . selection procedures . . . was such that the percentage selected from a white middle-class comparison area was *13 times* as great as the percentage selected from a low-income black comparison area, and the exclusion of low-income Mexican-Americans was *virtually total.*"[3] The opinion of the Court of Appeal and the argument of the respondent do not, in my mind, sufficiently rebut the prima facie showing petitioner has made that he has been denied the equal protection of the laws by his conviction by a jury selected

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[2] Even if it were assumed that these exclusions were the unavoidable consequences of Los Angeles' method of jury selection, it does not follow that jury panels must be racially unrepresentative of the community. The names of prospective jurors are selected by a computer from voter registration lists. With modern sampling techniques, it would be a simple matter to program the computer so that its initial selection of names would—after the operation of these exclusions—yield a racially representative jury panel. Mills, A Statistical Study of Occupations of Jurors in a United States District Court, 22 Md. L. Rev. 205, 214 (1962).

"A selection system which is economically and racially unbalanced by the application of juror quality tests can produce representative panels if a larger percentage of those population segments which tend to fail the tests is considered for jury service so that a fair proportion of their members survive the selection process." Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235, 315 (1968).

[3] See Appendix to this opinion.

through racially biased procedures.[4] "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." *Smith* v. *Texas*, 311 U. S. 128, 132 (1940). It would seem enough, therefore, to reverse this conviction out of hand because of the racial bias built into the jury selection and because of the improper legal standard applied by the court below.

The test in question was drafted in 1935 and it consists of some 33 questions designed to measure vocabulary and reading comprehension. The Jury Commissioner testified that it was administered "[t]o see if a prospective juror has sufficient knowledge of the English language," but expert scientific testimony indicated that the test was "not a good measure . . . of average verbal ability." The author of the examination, Psychology Professor Dr. Neil Warren, testified that he validated the test and established the passing score by administering it to some 100 to 200 white middle-class college students. Over the years, the test questions themselves have remained unchanged despite changes in the common vocabulary.[5] At some point, however, the test was divided into two parts and, for some inexplicable reason, the passing grade was changed. Dr. Warren testified that these changes would "reduce the reliability to the point where [he] would not want to condone the results." Another expert witness testified that the test was "completely arbitrary to use in its present form."

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[4] The Court of Appeal argues, for example, that "[t]he poor, the Blacks and Mexican-Americans have the power to register to vote, and voter registration is free and relatively uncomplicated." Be this as it may, this argument is unresponsive to petitioner's contention that jurors are selected from lists which are racially unbalanced.

[5] Evidence was adduced at trial which indicated that, even apart from the unsupported changes in the grading of the examination, the test was likely invalid solely because of its vintage and the unrepresentative sample used to validate it in 1935.

While the test may have been unreliable as a measure of juror competence, it effectively excluded minority group members from jury service. The rate of failure in minority group areas was almost four times that in a white, middle-class comparison area:

Area	*Failure Rate*
Long Beach (white, middle-class)....	13% (14/106)
Wilmington (48% Spanish surname) and San Pedro (41% Mexican-American and 11% black).....	45% (23/51)
Central Long Beach (55% black)....	48% (12/25)
District-wide	18% (349/1937)

It would seem that this device is ill-suited to serve any legitimate state interest and does serve to exclude from jury panels significantly disproportionate numbers of minority groups. The Constitution does not, of course, require racially balanced juries because, in our pluralistic society, a group of 12 men and women could not possibly represent all of the ethnic, racial, and economic groups which compose our diverse culture. *Swain* v. *Alabama,* 380 U. S. 202, 208 (1965); *Cassell* v. *Texas,* 339 U. S. 282, 286–287 (1950); *Akins* v. *Texas,* 325 U. S. 398 (1945). What the Constitution demands, however, is that no such groups be consciously excluded from the selection process. See *Hill* v. *Texas,* 316 U. S. 400, 404 (1942); *Smith* v. *Texas,* 311 U. S. 128, 130 (1940); 5 U. S. Commission on Civil Rights Report, Justice 89–103 (1961).

What the facts might show after oral argument, no one knows. I would hold constitutionally infirm a conviction returned by a jury from which a disproportionately large number of minority group members were excluded through the use of a culturally biased intelligence test where the test is shown to be unreliable as a measure of jury competence. There is a prima facie showing that this test is vulnerable. Accordingly, I would grant the petition for a writ of certiorari.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

A comparison of the number of jurors approved from white, Chicano, and black residential areas indicates the discriminatory effect of the jury selection method used here:

	Long Beach (white, middle-class)	*Wilmington* (48% Spanish surname)	*Central Long Beach* (55% black)
Median family income	$14,252	$6,584	$6,534
Total population	20,215	36,796	26,400
Population over 21	11,522	18,002	13,423
Registered voters (percent of those over 21)	8,991 (78%)	8,945 (41%)	5,747 (43%)
Notices sent (percent of registered voters)	315 (3.50%)	163 (1.82%)	110 (1.91%)
Responses received (percent of notices)	216 (65%)	68 (42%)	46 (42%)
Approved by jury commission	83	13	12

No. 70–5379. RIDDELL *v.* RHAY, PENITENTIARY SUPERINTENDENT. Sup. Ct. Wash. Certiorari denied. Reported below: 79 Wash. 2d 248, 484 P. 2d 907.

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

Over the dissents of JUSTICES Black, BRENNAN, and MARSHALL, and myself, this Court last Term held that statements elicited in violation of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), may nevertheless be used to impeach the credibility of a defendant whose testimony in his own behalf is inconsistent with those statements. *Harris* v. *New York,* 401 U. S. 222 (1971). Denial of certiorari in this case illustrates the rewards that flow to those police interrogators who, deliberately or otherwise, ignore the restrictions placed upon them by *Miranda*—restrictions necessary to safeguard the privilege against self-incrimination and to insure the reliability of statements elicited in the police-dominated atmosphere of an incommunicado custodial interrogation.

Petitioner Riddell was convicted in state court of assault. The facts are undisputed. In the course of an argument over the conduct of a neighbor's dog, a rifle carried by Mr. Riddell discharged, the bullet striking his neighbor in the foot. The only real issue at trial was that of intent. Testifying in his own defense, Mr. Riddell said he did not intend that the rifle go off, and did not have his finger on the trigger when it fired. On cross-examination, however, the prosecution was permitted to confront Mr. Riddell with a statement elicited from him, in violation of *Miranda,* in which he told the police "I cocked the hammer and pulled the trigger. I thought the rifle was aimed towards the ground and only intended to scare Mr. Lewis." This statement was virtually a direct admission of the only element of the offense at issue; and though it was introduced for the

"limited purpose" of "impeachment," it was certain to have a prejudicial, if not conclusive, effect on the jury.

The possibility of using illegally obtained incriminating statements at trial, for any purpose, raises grave questions concerning police noncompliance with *Miranda*. It is undeniable that *Miranda* was predicated in part upon a deep concern for discouraging coercive police practices. Eleven pages of the opinion are devoted to an examination of police interrogation procedures. They compel the conclusion that

> "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U. S., at 467.

It is, of course, just this kind of testimonial compulsion that the Fifth Amendment, made applicable to the States by the Fourteenth, proscribes.

There is widespread agreement that police interrogation procedures are sensitive to the mandates of the courts:

> "[T]he predominant incentive for interrogation is to obtain evidence for use in court. Consequently, police conduct in this area is likely to be responsive to judicial rules governing the admissibility of that evidence. 'There can be no doubt,' the President's Crime Commission reported, that the Supreme Court's rulings about interrogation procedures 'had much to do with the fact that today the third degree is almost nonexistent.' "

Oaks, Studying The Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 722 (1970). See also J. Wilson, Varieties of Police Behavior (1968). Thus, to the extent that the use of incriminating statements elic-

ited in violation of constitutional safeguards is prohibited, the police have no incentive to attempt to circumvent those safeguards.

There is the view that the use of *Miranda*-violative statements does not affect the "fundamental fairness" of the courtroom trial.* I cannot accept this position. The lesson of *Miranda* is that the effective determination of guilt all too often rests on the ruses and stratagems employed in an incommunicado police interrogation, not on the evidence and testimony elicited in the impartial surroundings of a trial court.

Yet, after *Harris*, there is no longer any real incentive for police to obey *Miranda*. Credibility is always an issue when an accused takes the stand in his own defense. The license granted by the *Harris* majority to use *Miranda*-violative statements for impeachment purposes, therefore, foreshadows the possible use of tainted statements in almost every case. This opens the door to a calculated risk by police interrogators. If, in response to *Miranda* warnings, an accused indicates he wishes to have an attorney present during questioning, the request may be ignored with virtual impunity. If a damaging statement is thereafter forthcoming, it may almost certainly be used against the accused if he later elects to take the stand in his own defense. Moreover, the risk

*This view is reflected in draft legislation recently submitted by the Justice Department to the Senate Subcommittee on Constitutional Rights. The proposed legislation would restrict federal habeas corpus relief to constitutional rights which have as their "primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction." Habeas Corpus Amendments of the Department of Justice, Letter to Hon. Sam J. Ervin, Jr., Oct. 19, 1971, Appendix ii. The covering letter expressly refers to the use of *Miranda*-violative statements as a claim which would be barred under the proposed amendments. Letter 16. But see Dershowitz & Ely, *Harris* v. *New York*, 80 Yale L. J. 1198 (1971).

is minimal that the inability to use the statement in the prosecution's case in chief will result in a dismissal of the charges or a directed verdict of acquittal. Unlike other situations in which exclusionary rules operate to exclude illegally obtained physical evidence, it is seldom that a prima facie case requires corroboration from the lips of the accused.

The accused may take cold comfort in the fact that if he does take the stand, the tainted statements may only be used for "impeachment." We have often noted the impossible task that faces a jury instructed to close its eyes to the fact that evidence introduced for a limited purpose is highly damaging on the ultimate issue of guilt as well. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States,* 336 U. S. 440, 453 (Jackson, J., concurring). See also *Spencer* v. *Texas,* 385 U. S. 554, 575 (opinion of Warren, C. J.). Cf. *Bruton* v. *United States,* 391 U. S. 123; *Jackson* v. *Denno,* 378 U. S. 368.

It is no answer to say, as did the majority in *Harris,* that the privilege against self-incrimination "cannot be construed to include the right to commit perjury." 401 U. S., at 225. As we said in *Miranda,* the presence of counsel during police questioning may help "to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." 384 U. S., at 470. A statement made in the inherently coercive, police-dominated atmosphere denounced in *Miranda* is not so reliable that we can safely ignore its implicit involuntariness and the critical burden the use of such a statement places upon the exercise of the Fifth Amendment privilege.

The exclusionary rule is a recognition that the vision of law enforcement authorities is often narrowed by

their total immersion in the never-ending war against crime. If we permit the legitimate desire to win that war to undermine constitutional guarantees of liberty, our victory will indeed be fleeting. I would grant this petition.

No. 71–5029. SINGLETON *v.* DEEGAN, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted to review question whether search of bedroom bureau was incident to arrest of petitioner in basement when he was at time of the search outside house in a police car.

No. 71–5030. HUFFMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–5317. MCCORMICK *v.* SELECTIVE SERVICE LOCAL BOARD NO. 41 ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–5326. FELAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–5336. SANNEY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument.

No. 71–5343. MACIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 54.

No. 71–5349. BUCHANAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 1379.

No. 71–5352. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 1292.

No. 71–5040. MCKENZIE *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied as untimely.

No. 71–5319. KING *v.* SADDLEBACK JUNIOR COLLEGE DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that certiorari should be granted and case set for oral argument. Reported below: 445 F. 2d 932.

Rehearing Denied

No. 70–219. MUNCASTER *v.* UNITED STATES, *ante*, p. 827;

No. 70–5180. HINKLE *v.* SMITH, GOVERNOR OF TEXAS, ET AL., *ante*, p. 910;

No. 71–270. KEN AKER, INC. *v.* GIRARD TRUST BANK, *ante*, p. 912; and

No. 71–5125. DORROUGH *v.* UNITED STATES, *ante*, p. 915. Petitions for rehearing denied.

No. 70–5192. SPENCER *v.* EYMAN, WARDEN, *ante*, p. 838;

No. 70–5212. BROOKS *v.* UNITED STATES, *ante*, p. 839; and

No. 70–5364. MANUEL *v.* AMERICAN NATIONAL TRUST ET AL., *ante*, p. 846. Motions for leave to file petitions for rehearing denied.

NOVEMBER 24, 1971

Dismissal Under Rule 60

No. 71–323. TERRY *v.* CALIFORNIA. Sup. Ct. Cal. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 4 Cal. 3d 911, 484 P. 2d 1375.

DECEMBER 3, 1971

Miscellaneous Order

No. A–577. CHANDLER, U. S. DISTRICT JUDGE *v.* O'BRYAN. C. A. 10th Cir. Application for extension of time to file petition for writ of certiorari and stay of mandate presented to MR. JUSTICE WHITE, and by him referred to the Court, granted. It is ordered that the time for filing petition for writ of certiorari be extended, and the mandate be stayed until January 7, 1972. If petition for writ of certiorari be filed on or before January 7, 1972, then mandate is further stayed pending disposition of petition for writ of certiorari. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

DECEMBER 7, 1971

Affirmed on Appeal

No. 70–12. BARTLEY ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. E. D. Ky. Judgment holding constitutional § 224 of the Social Security Act, 42 U. S. C. § 424a, affirmed. MR. JUSTICE DOUGLAS dissents on basis of his dissent in *Richardson* v. *Belcher, ante,* p. 78, at 84. Reported below: 311 F. Supp. 876.

No. 71–306. CARLESON, DIRECTOR OF DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* TAYLOR ET AL. Appeal from D. C. N. D. Cal. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 330 F. Supp. 85.

Appeals Dismissed

No. 71–436. EMHART CORP. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 443 Pa. 397, 278 A. 2d 916.

No. 71–457. VILLAGE OF WEST MILWAUKEE ET AL. *v.* AREA BOARD OF VOCATIONAL, TECHNICAL & ADULT EDUCATION (DISTRICT 9). Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 51 Wis. 2d 356, 187 N. W. 2d 387.

No. 71–475. HOFFMAN *v.* CARSON, SHERIFF, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 250 So. 2d 891.

Miscellaneous Orders

No. A–544. DADURIAN *v.* UNITED STATES. C. A. 1st Cir. Application for bail and/or stay of mandate presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE STEWART is of the opinion that the application should be granted.

No. 70–18. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeal from D. C. N. D. Tex. [Probable jurisdiction postponed, 402 U. S. 941.] Motion of appellee to postpone oral argument denied.

No. 70–55. BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM *v.* NEW LEFT EDUCATION PROJECT ET AL. Appeal from D. C. W. D. Tex. [Probable jurisdiction postponed, 401 U. S. 935.] Motion of appellant to postpone oral argument denied.

No. 70–5015. ARGERSINGER *v.* HAMLIN, SHERIFF. Sup. Ct. Fla. [Certiorari granted, 401 U. S. 908.] Motion of Bruce S. Rogow for leave to permit J. Michael Shea to argue orally *pro hac vice* on behalf of petitioner granted.

No. 70–5025. HAINES *v.* KERNER ET AL. C. A. 7th Cir. [Certiorari granted, 401 U. S. 954.] Motions of National Law Office of the National Legal Aid & Defenders Assn. for leave to file a brief as *amicus curiae* and to dispense with printing granted.

No. 70–5146. BEASLEY *v.* UNITED STATES, *ante*, p. 866. Order dated November 16, 1971 [*ante*, p. 960], denying petition for rehearing is vacated pending further order of this Court.

Probable Jurisdiction Noted

No. 71–11. JAMES, JUDICIAL ADMINISTRATOR, ET AL. *v.* STRANGE. Appeal from D. C. Kan. Probable jurisdiction noted. Reported below: 323 F. Supp. 1230.

No. 71–422. LAKE CARRIERS' ASSN. ET AL. *v.* MACMULLAN ET AL. Appeal from D. C. E. D. Mich. Probable jurisdiction noted. Reported below: 336 F. Supp. 248.

Certiorari Granted

No. 70–220. CAPLIN, TRUSTEE *v.* MARINE MIDLAND GRACE TRUST CO. OF NEW YORK. C. A. 2d Cir. Certiorari granted. Reported below: 439 F. 2d 118.

No. 70–314. BRUNETTE MACHINE WORKS, LTD. *v.* KOCKUM INDUSTRIES, INC. C. A. 9th Cir. Certiorari granted. Reported below: 442 F. 2d 420.

No. 71–41. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL–CIO *v.* FLAIR BUILDERS, INC. C. A. 7th Cir. Certiorari granted. Reported below: 440 F. 2d 557.

No. 71–81. UNITED STATES *v.* BISWELL. C. A. 10th Cir. Certiorari granted. Reported below: 442 F. 2d 1189.

No. 71–257. GRUBBS, DBA T. R. GRUBBS TIRE & APPLIANCE *v.* GENERAL ELECTRIC CREDIT CORP. C. A. 5th Cir. Certiorari granted. Reported below: 447 F. 2d 286.

No. 71–431. IMMIGRATION AND NATURALIZATION SERVICE *v.* VITALES. C. A. 9th Cir. Certiorari granted. Reported below: 443 F. 2d 343.

No. 71–452. HEALY ET AL. *v.* JAMES ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 445 F. 2d 1122.

Certiorari Denied. (See also No. 71–436, *supra.*)

No. 70–285. ALPHA CHI OMEGA ET AL. *v.* RADER. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 469.

No. 70–301. PHELPS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 462 S. W. 2d 310.

No. 71–109. SWANQUIST ET AL. *v.* LIVINGSTON ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–159. FIRST NATIONAL BANK IN PALM BEACH ET AL., TRUSTEES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 480.

No. 71–279. PALLADIO, INC. *v.* DIAMOND, COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL CONSERVATION OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 440 F. 2d 1319.

No. 71–344. 16,179 MOLSO ITALIAN .22 CALIBER WINLEE DERRINGER CONVERTIBLE STARTER GUNS ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 443 F. 2d 463.

No. 71–350. MIAMI BEACH FIRST NATIONAL BANK, EXECUTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 475.

No. 71–380. IRONWORKERS LOCAL 86 ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 544.

No. 71–384. KLEIN *v.* BOWER ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–390. BESSESEN ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 445 F. 2d 463.

No. 71–393. DOWELL ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 145.

No. 71–394. LLOYD ET UX. *v.* CITY OF FORT PIERCE. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 71–398. THOMPSON ET UX. *v.* CLARK ET AL. Sup. Ct. Ill. Certiorari denied.

No. 71–402. OTTO *v.* HOUSTON BELT & TERMINAL RAILWAY CO. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 219.

No. 71–406. MISCHLICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 445 F. 2d 1194.

No. 71–407. POLISHER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: See 11 Md. App. 555, 276 A. 2d 102.

No. 71–409. COLLINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 445 F. 2d 653.

No. 71–432. COBB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 1174.

No. 71–410. PIPKIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 17 Cal. App. 3d 190, 94 Cal. Rptr. 595.

No. 71–418. MILLER ET AL. *v.* WINTERS; and
No. 71–426. THOMAS ET AL. *v.* WINTERS. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 65.

No. 71–423. SQUELLA-AVENDANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 575.

No. 71–450. MULLIN ET AL. *v.* CITY OF MANSFIELD ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 26 Ohio St. 2d 129, 269 N. E. 2d 602.

No. 71–459. ISBRANDTSEN TANKERS, INC. *v.* PRESIDENT OF INDIA. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 1198.

No. 71–484. INDEPENDENT SOAP & CHEMICAL WORKERS OF KANSAS CITY *v.* CUNNINGHAM ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 207 Kan. 812, 486 P. 2d 1316.

No. 70–215. LOFTY *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 440 F. 2d 1144.

No. 71–1. CRAIG *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–84. HILL ET AL. *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 439 F. 2d 1016.

No. 71–382. WANAMAKER *v.* RILEY. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–391. SHAFER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 579.

No. 71–420. WEST MORRIS REGIONAL BOARD OF EDUCATION *v.* SILLS, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 58 N. J. 464, 279 A. 2d 609.

No. 71–449. VAN MARK PRODUCTS CORP. ET AL. *v.* TAPCO PRODUCTS CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 420.

No. 71–5105. BENJAMIN *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–240. BRIGHT ET AL. *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 441 F. 2d 479.

No. 71–357. J. L. SIMMONS CO., INC. *v.* LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, ET AL. C. A. D. C. Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 144 U. S. App. D. C. 20, 444 F. 2d 895.

No. 71–441. JONES ET AL. *v.* VOGEL ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 443 F. 2d 257.

Rehearing Denied

No. 70–156. ESCUTE *v.* DELGADO, WARDEN, *ante*, p. 824;

No. 70–157. ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL. *v.* UNITED STATES ET AL., *ante*, p. 802;

No. 70–289. ROSE *v.* ROSE ET AL., *ante*, p. 831;

No. 70–340. HANCOCK *v.* UNITED STATES, *ante*, p. 833; and

No. 71–62. RAMIREZ *v.* UNITED STATES, *ante*, p. 869. Petitions for rehearing denied.

DECEMBER 14, 1971

Dismissals Under Rule 60

No. 71–467. SAVE MORE OF GARY, INC. *v.* UNITED STATES. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 442 F. 2d 36.

No. 71–5439. ROBINSON *v.* SIGLER, WARDEN. Appeal from Sup. Ct. Neb. dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 187 Neb. 144, 187 N. W. 2d 756.

Affirmed on Appeal

No. 71–478. WEAVER, DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, ET AL. *v.* DOE ET AL. Appeal from D. C. N. D. Ill. Motion of appellee Doe for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 332 F. Supp. 61.

Appeal Dismissed

No. 71–349. EGER *v.* FLORIDA STATE BOARD OF DENTISTRY. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question.

Certiorari Granted—Reversed

No. 71–190. HARTSTEIN *v.* MISSOURI. Sup. Ct. Mo. Certiorari granted and judgment reversed. *Redrup* v. *New York,* 386 U. S. 767 (1967). THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN dissent. Reported below: 469 S. W. 2d 329.

No. 71–443. WIENER ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Diego. Certiorari granted and judgment reversed. *Redrup* v. *New York,* 386 U. S. 767 (1967). THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN dissent.

Certiorari Granted—Reversed and Remanded. (See No. 70–5308, *ante,* p. 249, and No. 71–262, *ante,* p. 254.)

Miscellaneous Orders

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). Motion of State of Louisiana for relief pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier orders herein, see, *e. g., ante,* p. 932.]

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Report of Special Master received and filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days thereafter. [For earlier orders herein, see, *e. g.,* 401 U. S. 931.]

No. A–482. BABBITZ *v.* MCCANN, DISTRICT ATTORNEY OF MILWAUKEE COUNTY, WISCONSIN, ET AL. C. A. 7th Cir. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the stay should be granted.

No. A–342. UNITED STATES EX REL. ANNALORO *v.* ELIAS, CORRECTIONAL SUPERINTENDENT. Pending appeal to C. A. 3d Cir. Renewed application for bail pending appeal denied. MR. JUSTICE DOUGLAS is of the opinion that bail should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. A–578. DIXON, TREASURER OF ILLINOIS, ET AL. *v.* SKOLNICK ET AL. Pending appeal to C. A. 7th Cir. Application for stay and other relief presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. 70–92. CALIFORNIA MOTOR TRANSPORT CO. ET AL. *v.* TRUCKING UNLIMITED ET AL. C. A. 9th Cir. [Certiorari granted, 402 U. S. 1008.] Motion for leave to file supplemental brief after argument granted.

No. 70–295. FIRST NATIONAL CITY BANK *v.* BANCO NACIONAL DE CUBA. C. A. 2d Cir. [Certiorari granted, *ante*, p. 820.] Request for additional time for oral argument denied.

No. 71–162. BOARD OF REGENTS OF STATE COLLEGES ET AL. *v.* ROTH. C. A. 7th Cir. [Certiorari granted, *ante*, p. 909.] Motion of American Federation of Teachers for leave to file a brief as *amicus curiae* granted.

No. 71–415. COLORADO RIVER WATER CONSERVATION DISTRICT *v.* ROCKY MOUNTAIN POWER CO. ET AL. Sup. Ct. Colo. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: —— Colo. ——, 486 P. 2d 438.

No. 71–5120. RIDDELL *v.* HAMILTON, CHIEF JUSTICE, SUPREME COURT OF WASHINGTON. Motion for leave to file petition for writ of mandamus denied.

No. 71–5382. TURNER *v.* COX, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted

No. 71–110. GELBARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion to supplement petition denied. Certiorari granted. Reported below: 443 F. 2d 837.

No. 71–263. UNITED STATES *v.* EGAN ET AL. C. A. 3d Cir. Motion of respondent Walsh for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 450 F. 2d 199.

No. 71–5097. HUFFMAN *v.* BOERSEN. Sup. Ct. Neb. Motion for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied

No. 70–5207. WILSON *v.* COX, ACTING WARDEN. C. A. 6th Cir. Certiorari denied.

No. 70–5250. RICHARDSON *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 1231.

No. 70–5314. JACKSON *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 70–5398. CAUGHLIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 3d 461, 482 P. 2d 211.

No. 71–138. DONAHUE *v.* CALIFORNIA JUSTICE COURT FOR THE KLAMATH-TRINITY JUDICIAL DISTRICT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 15 Cal. App. 3d 557, 93 Cal. Rptr. 310.

No. 71–387. HERALD CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 444 F. 2d 430.

No. 71–392. KAHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–419. BATES INDUSTRIES, INC. *v.* DAYTONA SPORTS CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1110.

No. 71–424. HAYUTIN *v.* COLORADO STATE DEPARTMENT OF HIGHWAYS. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 485 P. 2d 896.

No. 71–433. RICHARDSON *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–440. GREAT SOUTHWEST WAREHOUSES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 61.

No. 71–442. PHILPOTT, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. *v.* HILL. C. A. 7th Cir. Certiorari denied. Reported below: 445 F. 2d 144.

No. 71–456. HUMPHREYS, TRUSTEE *v.* NISSHO AMERICAN CORP. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 1096.

No. 71–461. MENDELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 639.

No. 71–466. MILLS *v.* SMALL. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 249.

No. 71–468. UNITED AIR LINES, INC. *v.* SPROGIS. C. A. 7th Cir. Certiorari denied. Reported below: 444 F. 2d 1194.

No. 71–469. HENDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 960.

No. 71–472. DUGAN ET AL. *v.* DIEBER. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–470. ERWIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 445 F. 2d 1035.

No. 71–477. FIRST REGULAR BAPTIST CHURCH OF FRANKLIN, OHIO *v.* INSURANCE CO. OF NORTH AMERICA. C. A. 6th Cir. Certiorari denied. Reported below: 444 F. 2d 279.

No. 71–483. DONALD *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 601.

No. 71–491. KANESHIRO, AKA HIGA, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 1266.

No. 71–493. RAMZY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 1184.

No. 71–505. TUCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–511. CRISTOL ET AL. *v.* CITY OF MIAMI BEACH ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 246 So. 2d 595.

No. 71–535. FREEDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 1387.

No. 71–538. CITY OF DETROIT *v.* GARMENT CORP. OF AMERICA. Ct. App. Mich. Certiorari denied. Reported below: 32 Mich. App. 715, 189 N. W. 2d 72.

No. 71–5069. WILLIAMS *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5085. STEVENSON *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 71–5113. MAGEE *v.* CONTI, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–5124. PETERSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: —— Nev. ——, 483 P. 2d 204.

No. 71–5174. MCNEIL *v.* DIRECTOR, PATUXENT INSTITUTION. C. A. 4th Cir. Certiorari denied.

No. 71–5360. BALC *v.* ARDELEAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–5362. ORTIZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 445 F. 2d 1100.

No. 71–5366. MAHLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 1172.

No. 71–5372. STRADER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 71–5373. NYSTROM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 1350.

No. 71–5376. WOLLWEBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 295.

No. 71–5377. WILLIAMS *v.* CARLSON, DIRECTOR OF U. S. BUREAU OF PRISONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–5378. CHANEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 571.

No. 71–5380. GALDEIRA ET AL. *v.* RICHARDSON ET AL. Sup. Ct. Hawaii and 1st Cir. Ct. Hawaii. Certiorari denied.

No. 70–5312. LAKE *v.* HALE, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 440 F. 2d 1191.

No. 71–115. EGENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 441 F. 2d 441.

No. 71–173. STEVENS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 467 S. W. 2d 10.

No. 71–400. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 129.

No. 71–523. WILHOIT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 279 A. 2d 505.

No. 71–5356. STINNETT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 468 S. W. 2d 784.

No. 71–5381. LUCAS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 28 N. Y. 2d 761, 269 N. E. 2d 914.

No. 71–319. JOHNSON ET AL. *v.* MOSES ET AL. C. A. 1st Cir. Motion of Investment Company Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 445 F. 2d 369.

No. 71–453. SWORD ET AL. *v.* FOX ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 1091.

No. 71–454. DELOME *v.* UNION BARGE LINE CO. ET AL. C. A. 5th Cir. Motion of American Trial Lawyers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 444 F. 2d 225.

No. 71–462. BRICKER *v.* SCEVA SPEARE MEMORIAL HOSPITAL. Sup. Ct. N. H. Motion of American College of Legal Medicine for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 111 N. H. 276, 281 A. 2d 589.

No. 71–465. BOWMAN, TRUSTEE IN BANKRUPTCY *v.* BAY AREA PAINTERS' TRUST FUND. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 447 F. 2d 1106.

No. 71–5342. MANNING *v.* UNITED STATES. C. A. 2d Cir. Motion for leave to file supplemental brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 448 F. 2d 992.

No. 71–5374. ORTIZ *v.* BETO, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted and case set for oral argument.

No. 71–471. SLAYTON, PENITENTIARY SUPERINTENDENT *v.* LEVINE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 444 F. 2d 525.

No. 71–5375. STANLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted and case set for oral argument. Reported below: 446 F. 2d 374.

Rehearing Denied

No. 70–119. BLEVINS *v.* UNITED STATES, *ante*, p. 823;

No. 70–154. PRUETT *v.* TEXAS ET AL., *ante*, p. 910;

No. 70–5071. ROGERS *v.* ADAMS, WARDEN, *ante*, p. 834;

No. 70–5317. JONES *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, *ante*, p. 911;

No. 71–289. ZAHN ET AL. *v.* SECURITY PACIFIC NATIONAL BANK, EXECUTOR, ET AL., *ante*, p. 938;

No. 71–326. LOWE *v.* LOWE, *ante*, p. 931;

No. 71–376. KINNEAR-WEED CORP. *v.* HUMBLE OIL & REFINING CO., *ante*, p. 941;

No. 71–5016. PLOTTS *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante*, p. 913; and

No. 71–5168. SLOBEN *v.* NEW YORK, *ante*, p. 942. Petitions for rehearing denied.

No. 71–219. HAWKINS *v.* UNITED STATES, *ante*, p. 911. Motion for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Sixth Circuit during the week of February 7, 1972, and for such additional time in advance thereof to prepare for the trial of cases, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

DECEMBER 20, 1971

Order Appointing Marshal

It is ordered by the Court that Frank M. Hepler be, and he is hereby, appointed Marshal of this Court effective January 1, 1972.

Affirmed on Appeal

No. 70–315. RESOLUTE INSURANCE CO. ET AL. *v.* SEVENTH JUDICIAL DISTRICT COURT OF OKLAHOMA COUNTY ET AL. Affirmed on appeal from D. C. W. D. Okla. Reported below: 336 F. Supp. 497.

No. 71–425. COIT ET AL. *v.* GREEN ET AL. Affirmed on appeal from D. C. D. C. Reported below: 330 F. Supp. 1150.

Appeals Dismissed

No. 71–296. FIRST MERCANTILE CONSUMER DISCOUNT CO. ET AL. *v.* HENRY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and case set for oral argument.

No. 71–329. CORSETTI, DBA DICK'S MARKET *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 71–5379. HEIDEL *v.* ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE ET AL. Appeal from Sup. Ct. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted and case set for oral argument.

No. 71–5414. HARDEMAN *v.* CALIFORNIA ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 445 F. 2d 258.

Miscellaneous Orders

No. A–611. HOLT *v.* CITY OF RICHMOND ET AL. C. A. 4th Cir. Application to vacate stay order presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the stay should be vacated.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). Motion of the United States for entry of supplemental decree as to State of Louisiana granted. [For supplemental decree and counsel, see *ante,* p. 388.] [For earlier orders herein, see, *e. g., ante,* p. 932.]

No. 52, Orig. UNITED STATES *v.* FLORIDA. Report of Special Master upon motion by the United States to dismiss counterclaim and deny demand for jury trial filed by State of Florida is received, filed, and adopted by the Court. [For earlier order, see 403 U. S. 950, *sub nom. United States* v. *Louisiana et al. (Louisiana Boundary Case).*]

No. 71–269. NATIONAL BREWING CO. *v.* CALDWELL ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 443 F. 2d 1044.

No. 71–5097. HUFFMAN *v.* BOERSEN. Sup. Ct. Neb. [Certiorari granted, *ante,* p. 990.] Motion of petitioner for appointment of counsel granted. It is ordered that Leo Eisenstatt, Esquire, of Omaha, Nebraska, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 71–123. NATIONAL LABOR RELATIONS BOARD *v.* BURNS INTERNATIONAL SECURITY SERVICES, INC. (FORMERLY KNOWN AS WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.), ET AL.; and

No. 71–198. BURNS INTERNATIONAL SECURITY SERVICES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 822.] Motion of respondent International Union, United Plant Guard Workers of America, for additional time for oral argument granted and 15 minutes allotted to the Union for that purpose. Burns International Security Services, Inc., allotted 15 additional minutes for oral argument.

No. 70–5015. ARGERSINGER *v.* HAMLIN, SHERIFF. Sup. Ct. Fla. [Certiorari granted, 401 U. S. 908.] Case restored to calendar for reargument. The Solicitor General is invited to file a brief expressing the views of the United States.

Probable Jurisdiction Noted

No. 71–36. CALIFORNIA ET AL. *v.* LARUE ET AL. Appeal from D. C. C. D. Cal. Probable jurisdiction noted. Reported below: 326 F. Supp. 348.

Certiorari Granted

No. 70–5276. MUREL ET AL. *v.* BALTIMORE CITY CRIMINAL COURT ET AL. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 436 F. 2d 1153.

No. 71–5103. MORRISSEY ET AL. *v.* BREWER, WARDEN, ET AL. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 443 F. 2d 942.

No. 71–5144. MCNEIL *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Motion for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also Nos. 71–5379 and 71–5414, *supra.*)

No. 70–336. BURKE ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 131 Ill. App. 2d 76, 266 N. E. 2d 547.

No. 70–5173. THOMPSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 70–5346. RINGO *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–30. FORTIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–153. STEINBERG *v.* PENNSYLVANIA;

No. 71–201. McCLOSKEY & Co., INC., ET AL. *v.* PENNSYLVANIA; and

No. 71–374. PENNSYLVANIA *v.* McCLOSKEY ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 443 Pa. 117, 277 A. 2d 764.

No. 71–245. DePANICIS ET AL. *v.* DEPARTMENT OF PUBLIC SAFETY, TOWN OF NUTLEY. Super. Ct. N. J. Certiorari denied. Reported below: See 58 N. J. 93, 275 A. 2d 149.

No. 71–284. MITCHELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 258 La. 427, 246 So. 2d 814.

No. 71–312. SMITH *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 50 Wis. 2d 460, 184 N. W. 2d 889.

No. 71–408. UNITED STATES *v.* CONNECTICUT MUTUAL LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 136.

No. 71–412. CATALANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 1095.

No. 71–385. PRINTING SPECIALTIES & PAPER PRODUCTS UNION No. 447, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AFL–CIO *v.* PRIDE PAPERS-AARONSON BROS. PAPER CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 361.

No. 71–438. FIELDS *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71–447. ALLEGHENY AIRLINES, INC. *v.* LEMAY, ADMINISTRATOR. C. A. 7th Cir. Certiorari denied. Reported below: 448 F. 2d 1341.

No. 71–451. MACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5001. PREWITT *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5081. CARTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 71–5104. RAMOS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 71–5115. WROTH *v.* GUERRERO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5126. ALEXANDER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: —— Ore. App. ——, 480 P. 2d 729.

No. 71–5164. FREEMAN *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 443 F. 2d 493.

No. 71–5189. MARNIN *v.* VUKCEVICH, PRISON SUPERINTENDENT. Sup. Ct. N. J. Certiorari denied.

No. 71–5223. SALAZAR *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 441 F. 2d 834.

No. 71–5191. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 14 Cal. App. 3d 881, 92 Cal. Rptr. 660.

No. 71–5308. EGGLESTON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 15 Cal. App. 3d 1026, 93 Cal. Rptr. 776.

No. 71–5383. LIPSCOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–5385. OLIVER *v.* GOVERNOR OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 442 F. 2d 1347.

No. 71–5387. WHALEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 445 F. 2d 1401.

No. 71–5389. BRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 178.

No. 71–5390. MADELEY *v.* SHORT ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–5392. BENNETT *v.* DISTRICT DIRECTOR OF INTERNAL REVENUE ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–5393. MCCAINE *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 71–5394. SHAPPELL *v.* MARTIN-MARIETTA CORP. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1262 and 442 F. 2d 1351.

No. 71–5397. LEWIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 443 Pa. 305, 279 A. 2d 26.

No. 71–5398. BETHEA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 30.

No. 71–5401. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5402. QUEEN, AKA ARNOLD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 445 F. 2d 358.

No. 71–5403. CRONAN *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 444 F. 2d 51.

No. 71–5404. LONGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 305.

No. 71–5406. SAULSBURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 4.

No. 71–5408. LOTHRIDGE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 441 F. 2d 919.

No. 71–53. REDWOOD *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–265. WALTER, DBA CLASSIC ART THEATRES I & II ET AL. *v.* SLATON ET AL. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 227 Ga. 676, 182 S. E. 2d 464.

No. 71–339. KERSHAW *v.* TENNESSEE. Sup. Ct. Tenn. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–428. BACALL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1050.

No. 71–141. COLLIGAN ET AL. *v.* ACTIVITIES CLUB OF NEW YORK, LTD., AKA NEW YORK WINTER SKI CLUB, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 442 F. 2d 686.

No. 71–435. RYAN *v.* TARR, DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 560.

No. 71–5312. HENDERSON *v.* CITY OF KANSAS CITY. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 468 S. W. 2d 48.

No. 71–293. GOHAM ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Motion to dispense with printing petition and reply brief granted. Certiorari denied. Reported below: 187 Neb. 35 and 48, 187 N. W. 2d 305 and 298.

No. 71–421. TEXAS GULF SULPHUR CO. ET AL. *v.* MITCHELL ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 446 F. 2d 90.

No. 71–313. PAGE, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. *v.* WILLIAMS ET AL. C. A. 7th Cir. Motion of respondents Alexander et al. for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 71–327. TEXAS GULF SULPHUR CO. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION;

No. 71–328. HUNTINGTON *v.* SECURITIES AND EXCHANGE COMMISSION;

No. 71–346. CRAWFORD *v.* SECURITIES AND EXCHANGE COMMISSION; and

No. 71–347. HOLYK ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted in No. 71–327. MR. JUSTICE BLACKMUN is of the opinion that certiorari should be granted limited to Question 5 in No. 71–346 and limited to Questions 6 and 7 in No. 71–347. Reported below: 446 F. 2d 1301.

No. 71–446. HAMMOND LEAD PRODUCTS, INC. *v.* UNITED STATES (VALLS, REAL PARTY IN INTEREST). C. C. P. A. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 58 C. C. P. A. (Cust.) 129, 440 F. 2d 1024.

No. 71–458. CITY OF TEXARKANA ET AL. *v.* CIVIL AERONAUTICS BOARD. C. A. D. C. Cir. Motion for leave to file copies of decisions of Administrative Agency as an unprinted appendix granted. Certiorari denied. Reported below: 144 U. S. App. D. C. 94, 444 F. 2d 969.

No. 71–5531. LIPSCOMB *v.* WARDEN, ATLANTA PENITENTIARY, ET AL. C. A. 5th Cir. Motion for leave to supplement petition granted. Certiorari denied. Reported below: 444 F. 2d 1055.

Rehearing Denied

No. 70–5146. BEASLEY *v.* UNITED STATES, *ante*, p. 866;

No. 71–302. RATLIFF ET AL. *v.* COOPER LABORATORIES, INC., ET AL., *ante*, p. 948;

No. 71–336. UNITED DAIRY FARMERS COOPERATIVE ASSN. *v.* MILK CONTROL COMMISSION OF PENNSYLVANIA ET AL., *ante*, p. 930;

No. 71–414. VULCAN MATERIALS CO. *v.* UNITED STATES, *ante*, p. 942;

No. 71–5109. BUSH *v.* MORRIS, DISTRICT ATTORNEY OF SUMTER COUNTY, ET AL., *ante*, p. 884; and

No. 71–5181. HARRELSON, AKA STOUGHTENBOROUGH *v.* UNITED STATES, *ante*, p. 943. Petitions for rehearing denied.

DECEMBER 22, 1971

Dismissal Under Rule 60

No. 71–427. LORILLARD CORP. ET AL. *v.* ROBINSON ET AL. C. A. 4th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 444 F. 2d 791.

JANUARY 6, 1972

Dismissals Under Rule 60

No. 70–344. MORGAN *v.* UNITED STATES FIDELITY & GUARANTY CO. Sup. Ct. Miss. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 245 So. 2d 587.

No. 71–78. WATSON *v.* BIRDSONG ET AL. C. A. 6th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

No. 71–5720. LANE *v.* TEXAS. Ct. Crim. App. Tex. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 471 S. W. 2d 854.

No. 71–445. TOBACCO WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* ROBINSON ET AL. C. A. 4th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 444 F. 2d 791.

JANUARY 7, 1972

Miscellaneous Order. (For Court's order making allotment of Justices, see *ante*, p. III.)

JANUARY 10, 1972

Affirmed on Appeal

No. 71–474. LYNCH, DBA BREWSTER PRODUCTS *v.* BLOUNT, POSTMASTER GENERAL, ET AL. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE DOUGLAS would note probable jurisdiction and set the case for oral argument. Reported below: 330 F. Supp. 689.

Appeals Dismissed

No. 71–337. BROWN *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: —— Colo. ——, 485 P. 2d 500.

No. 71–463. KADANS *v.* COLLINS, CHIEF JUSTICE, SUPREME COURT OF NEVADA, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would treat the appeal papers as a petition for writ of certiorari and grant the petition. Reported below: 441 F. 2d 657.

No. 71–569. CAROLYNE *v.* YOUNGSTOWN STATE UNIVERSITY ET AL. Appeal from Ct. App. Ohio, Mahoning County, dismissed for want of substantial federal question.

No. 71–571. GENERAL MOTORS CORP. *v.* CITY OF LOS ANGELES. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 5 Cal. 3d 229, 486 P. 2d 163.

No. 71–5297. SEKERES *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 48 Ill. 2d 431, 270 N. E. 2d 7.

Vacated and Remanded on Appeal

No. 70–5305. DIGESUALDO ET AL. *v.* SHEA, DIRECTOR OF DEPARTMENT OF SOCIAL SERVICES, ET AL. Appeal from D. C. Colo. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Townsend* v. *Swank, ante,* p. 282.

Certiorari Granted—Vacated and Remanded

No. 70–5047. MULLINS *v.* UNITED STATES. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Bass, ante,* p. 336. MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissents for reasons stated in his dissenting opinion in *United States* v. *Bass, supra,* at 351. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition. Reported below: 432 F. 2d 1003.

No. 70–64. LYKES BROS. STEAMSHIP CO., INC. *v.* CHAGOIS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Victory Carriers, Inc.* v. *Law, ante,* p. 202. MR. JUSTICE DOUGLAS dissents from remand. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case. Reported below: 432 F. 2d 388.

No. 70–5073. WILEY *v.* UNITED STATES;

No. 70–5074. TAYLOR *v.* UNITED STATES; and

No. 70–5095. SYNNES *v.* UNITED STATES. C. A. 8th Cir. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *United States* v. *Bass, ante,* p. 336. MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissents for the reasons stated in his dissenting opinion in *United States* v. *Bass, supra,* at 351. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of these motions and petitions. Reported below: No. 70–5073, 438 F. 2d 773, No. 70–5074, 438 F. 2d 774, and No. 70–5095, 438 F. 2d 764.

No. 70–5267. CROW *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Bass, ante,* p. 336. MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissents for the reasons stated in his dissenting opinion in *United States* v. *Bass, supra,* at 351. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition. Reported below: 439 F. 2d 1193.

No. 71–5335. MADRIL *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Bass, ante,* p. 336. MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissents for the reasons stated in his dissenting opinion in *United States* v. *Bass, supra,* at 351. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition. Reported below: 445 F. 2d 827.

No. 70–5048. WARDEN *v.* JANKOWSKI ET AL. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Mayer* v. *City of Chicago, ante,* p. 189. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition.

No. 70–5092. COLBERT ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Mayer* v. *City of Chicago, ante,* p. 189. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition.

No. 70–5397. KEEVER *v.* BAINTER, JUDGE. Sup. Ct. Iowa. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Marion, ante,* p. 307. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition. Reported below: 186 N. W. 2d 133.

Certiorari Dismissed

No. 71–5473. MILLER *v.* OHIO. Ct. App. Ohio, Wayne County. Certiorari dismissed, it appearing that petitioner died on November 1, 1971.

Miscellaneous Orders

No. A–357. BELL *v.* UNITED STATES. D. C. E. D. Tex. Application for reconsideration of bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–574. SMITH *v.* NEW YORK. Ct. App. N. Y. Application for bail denied.

No. A–659. CHASON *v.* UNITED STATES. C. A. 2d Cir. Renewed application for stay and bail denied.

No. 70–36. PERRY ET AL. *v.* SINDERMANN. C. A. 5th Cir. [Certiorari granted, 403 U. S. 917.] Request for two counsel to argue on behalf of petitioners denied.

No. 70–72. UNITED STATES *v.* CHAS. PFIZER & CO., INC., ET AL. C. A. 2d Cir. [Certiorari granted, 402 U. S. 942.] Motion of respondents for additional time for oral argument and for three counsel to argue denied. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 70–74. PIPEFITTERS LOCAL UNION NO. 562 ET AL. *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 402 U. S. 994.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 70–5012. MILTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. [Certiorari granted, 403 U. S. 904.] Motion of J. Robert Olian for leave to argue *pro hac vice* on behalf of respondent granted.

No. 70–105. HANRAHAN *v.* DOE ET AL.; and

No. 70–106. HEFFERNAN, GUARDIAN *v.* DOE ET AL. Appeals from D. C. N. D. Ill. Motion of appellees to vacate stay order entered by MR. JUSTICE MARSHALL on February 10, 1971, denied.

No. 70–153. UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. (PLAMONDON ET AL., REAL PARTIES IN INTEREST). C. A. 6th Cir. [Certiorari granted, 403 U. S. 930.] Motion of respondents for additional time for oral argument granted and a total of two hours allotted for oral argument. The Solicitor General allotted one hour to argue on behalf of the United States; counsel for named respondent allotted one-half hour and counsel for unnamed respondents allotted one-half hour for oral argument. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 70–286. IOWA BEEF PACKERS, INC. *v.* THOMPSON ET AL. Sup. Ct. Iowa. [Certiorari granted, *ante*, p. 820.] Motion requesting writ of certiorari be dismissed as improvidently granted deferred to hearing of case on the merits.

No. 70–5039. FUENTES ET AL. *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 401 U. S. 906, *sub nom. Fuentes* v. *Faircloth.*] Motion for leave to cite supplemental authority granted.

No. A–666; 71–5277. CARTER *v.* COURT OF CRIMINAL APPEALS OF TEXAS. Application for stay of further court proceedings presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted.

No. 70–5058. LYNCH ET AL. *v.* HOUSEHOLD FINANCE CORP. ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, 401 U. S. 935.] Motion of appellants for leave to file supplemental brief after argument granted.

No. 71–247. RABE *v.* WASHINGTON. Sup. Ct. Wash. [Certiorari granted, *ante*, p. 909.] Motions of National Association of Theatre Owners, Inc., and Motion Picture Association of America, Inc., for leave to file briefs as *amici curiae* granted.

No. 71–5396. DUHART ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 71–5305. CIPOLLA *v.* WARDEN, KANSAS STATE PENITENTIARY, ET AL. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted.

No. 71–464. KADANS *v.* FOLEY, U. S. DISTRICT JUDGE, ET AL.; and

No. 71–5425. LAUGHLIN *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 70–250. CARLESON, DIRECTOR OF DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* REMILLARD ET AL. Appeal from D. C. N. D. Cal. Motion of appellee Remillard for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 325 F. Supp. 1272.

No. 71–16. MITCHELL, ATTORNEY GENERAL, ET AL. *v.* MANDEL ET AL. Appeal from D. C. E. D. N. Y. Probable jurisdiction noted. Reported below: 325 F. Supp. 620.

No. 71–404. COLTEN *v.* KENTUCKY. Appeal from Ct. App. Ky. Probable jurisdiction noted. Reported below: 467 S. W. 2d 374.

No. 71–5445. SHADWICK *v.* CITY OF TAMPA. Appeal from Sup. Ct. Fla. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 250 So. 2d 4.

Certiorari Granted

No. 70–223. CENTRAL HARDWARE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 439 F. 2d 1321.

No. 71–237. MANCUSI, CORRECTIONAL SUPERINTENDENT *v.* STUBBS. C. A. 2d Cir. Certiorari granted. Reported below: 442 F. 2d 561.

No. 71–506. UNITED STATES ET AL. *v.* MIDWEST VIDEO CORP. C. A. 8th Cir. Certiorari granted. Reported below: 441 F. 2d 1322.

No. 71–517. COMBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. Reported below: 446 F. 2d 515.

No. 71–564. DISTRICT OF COLUMBIA *v.* CARTER. C. A. D. C. Cir. Certiorari granted. Reported below: 144 U. S. App. D. C. 388, 447 F. 2d 358.

No. 70–283. ADAMS, WARDEN *v.* WILLIAMS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 441 F. 2d 394.

Certiorari Denied. (See also Nos. 71–463 and 71–5297, *supra.*)

No. 70–159. DEUTSCH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 651.

No. 70–5288. Ross et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 1355.

No. 70–5319. Polsky *v.* New Mexico. Ct. App. N. M. Certiorari denied. Reported below: 82 N. M. 393, 482 P. 2d 257.

No. 71–335. Wolberg *v.* Oregon. Ct. App. Ore. Certiorari denied. Reported below: —— Ore. App. ——, 483 P. 2d 104.

No. 71–353. Gumen et al. *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 3d 62, 485 P. 2d 785.

No. 71–375. Thayer *v.* California. App. Dept., Super. Ct. Cal., County of Orange. Certiorari denied.

No. 71–401. De la Parra *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 71–476. Carzoli *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 774.

No. 71–479. Mareno et vir *v.* Westchester Rockland Newspapers, Inc., et al. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–487. Seaman *v.* New Jersey. Super. Ct. N. J. Certiorari denied. Reported below: 114 N. J. Super. 19, 274 A. 2d 810.

No. 71–489. Allied Pilots Assn. *v.* Civil Aeronautics Board et al.; and

No. 71–550. American Airlines, Inc. *v.* Civil Aeronautics Board et al. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 891.

No. 71–494. Urban *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 641.

No. 71–488. SIMMS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–490. BURCH *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 58 N. J. 599, 279 A. 2d 684.

No. 71–495. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS (AFL–CIO) ET AL. *v.* UNITED AIRCRAFT CORP. Sup. Ct. Conn. Certiorari denied. Reported below: 161 Conn. 79, 285 A. 2d 330.

No. 71–497. KOTSAK *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 71–501. EDGAR, COMMISSIONER OF EDUCATION OF TEXAS, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–502. ESTATE OF FRIED *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 979.

No. 71–503. WHITCOMB *v.* GENERAL DYNAMICS CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 443 F. 2d 630.

No. 71–504. NEWS-JOURNAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 447 F. 2d 65.

No. 71–508. HENNING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 774.

No. 71–510. PACIFIC MARITIME ASSN. ET AL. *v.* LOCAL 13, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION. C. A. 9th Cir. Certiorari denied. Reported below: 441 F. 2d 1061.

No. 71–509. MELTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–512. DISTRICT 20, UNITED MINE WORKERS OF AMERICA *v.* SAMS. Sup. Ct. Ala. Certiorari denied. Reported below: 287 Ala. 312, 251 So. 2d 613.

No. 71–513. COBUZZI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 161 Conn. 371, 288 A. 2d 439.

No. 71–514. IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS & NEBRASKA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 195 Ct. Cl. 365.

No. 71–522. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 195 Ct. Cl. 343, 444 F. 2d 1102.

No. 71–526. FREED *v.* ERIE LACKAWANNA RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 619.

No. 71–528. AMALGAMATED LOCAL UNION 355 ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 71–529. BLACKBURN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 1089.

No. 71–530. KELLER *v.* DRAVO CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1239.

No. 71–531. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 917.

No. 71–534. KALEEL ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–536. WILKINS, ADMINISTRATRIX *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC.; and

No. 71–542. AMERICAN EXPORT ISBRANDTSEN LINES, INC. *v.* WILKINS, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 480.

No. 71–537. ANSUL CO. ET AL. *v.* UNIROYAL, INC.; and

No. 71–539. UNIROYAL, INC. *v.* LOUISVILLE CHEMICAL CO. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 872.

No. 71–541. WHITAKER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 1371.

No. 71–543. VON ZAMFT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–544. SALYER LAND CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (KINGS COUNTY DEVELOPMENT CO., REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–545. UNITED STATES STEEL CORP. *v.* BLAIR. C. A. 3d Cir. Certiorari denied. Reported below: 444 F. 2d 1390.

No. 71–546. LOS ANGELES NEWSPAPER GUILD, LOCAL 69, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 1173.

No. 71–547. JIMENEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–552. PHILADELPHIA NEWSPAPER PRINTING PRESSMEN'S UNION LOCAL NO. 16 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 443 F. 2d 863.

No. 71–549. GIAMO *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 245 So. 2d 116.

No. 71–551. GOLDSTEIN *v.* FLORIDA STATE BOARD OF DENTISTRY. C. A. 5th Cir. Certiorari denied.

No. 71–556. UNITED STATES STEEL CORP. *v.* PECK. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 891.

No. 71–557. DEUTSCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 98.

No. 71–560. LEDES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–562. EATON *v.* HOBSON. C. A. 6th Cir. Certiorari denied.

No. 71–566. FISHBEIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 1201.

No. 71–570. BURLINGTON INDUSTRIES, INC. *v.* THIOKOL CHEMICAL CORP.; and

No. 71–585. THIOKOL CHEMICAL CORP. *v.* BURLINGTON INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 1328.

No. 71–622. BODE ET AL. *v.* NATIONAL DEMOCRATIC PARTY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 146 U. S. App. D. C. 373, 452 F. 2d 1302.

No. 71–5006. COFFMAN ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, 466 S. W. 2d 241.

No. 71–5175. DUCKSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 255 S. C. 372, 179 S. E. 2d 40.

No. 71–568. ALOMAR *v.* DWYER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 447 F. 2d 482.

No. 71–5216. SMITH *v.* HENRY, PRISON ADMINISTRATOR, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–5220. JAMES *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 94 Idaho 101, 482 P. 2d 76.

No. 71–5263. SCHERER *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 1176.

No. 71–5289. EVANS *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 782.

No. 71–5298. FERRIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 219 Pa. Super. 329, 275 A. 2d 391.

No. 71–5306. FLEMING *v.* PATE, WARDEN, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 48 Ill. 2d 426, 270 N. E. 2d 4.

No. 71–5311. BROOKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 71–5353. PARKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 48 Ill. 2d 232, 269 N. E. 2d 484.

No. 71–5410. RICHARDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5411. SPEARS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 895.

No. 71–5412. WATKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5413. THIBADOUX *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5415. SHUFORD *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. Ct. App. N. Y. Certiorari denied.

No. 71–5416. DODD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 444 F. 2d 1402.

No 71–5417. BOWLES *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5420. GRAY *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 71–5422. SIMPSON *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 71–5424. DE VYVER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 753.

No. 71–5426. RODRIQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 859.

No. 71–5427. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 998.

No. 71–5428. LIPSCOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 485.

No. 71–5429. COPELAND, AKA KING *v.* BEARD, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 1393.

No. 71–5430. LEEPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 281.

No. 71–5432. ALDRIDGE *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 71–5435. CLEMONS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 71–5433. LANDMAN *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 274.

No. 71–5436. AGERS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 71–5437. SHABAZZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 77.

No. 71–5438. PRESTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 808.

No. 71–5451. JOHNSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 71–5452. GUZMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 1137.

No. 71–5453. CAMERLIN *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 277 A. 2d 291.

No. 71–5454. CHAMBERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–5455. BRADLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5456. SHELEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 455.

No. 71–5457. OSUNA-SANCHEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 566.

No. 71–5458. FLETCHER *v.* SHULTZ, SHERIFF, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 567.

No. 71–5460. RICHARDSON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 71–5461. SOWUL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 1103.

No. 71–5463. GRUBB ET AL. *v.* WORKMEN'S COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–5469. BARBOUR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 278 N. C. 449, 180 S. E. 2d 115.

No. 71–5471. BENNETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 638.

No. 71–5472. BLANKS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–5475. CAGLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 70–193. RUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 442 F. 2d 498.

No. 70–280. SUMMERLIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted and judgment reversed.

No. 70–5060. CAMPOS-SERRANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 430 F. 2d 173.

No. 71–480. TOBIAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 227.

No. 71–482. SEWELL *v.* GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 545.

No. 71–516. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 349.

No. 71–524. THUGUT *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: See 58 N. J. 601, 279 A. 2d 686.

No. 71–532. CITY OF DETROIT ET AL. *v.* SOCOMET, INC. Ct. App. Mich. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 33 Mich. App. 626, 190 N. W. 2d 551.

No. 71–540. CRAMER ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 210.

No. 71–5231. TURLEY *v.* ADAMS, JUDGE. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5232. DIXON *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: —— Ore. App. ——, 481 P. 2d 629.

No. 71–5467. WALKER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 26 Ohio St. 2d 221, 271 N. E. 2d 567.

No. 71–5468. SUTTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 916.

No. 71–481. 3,317.39 ACRES OF LAND, MORE OR LESS, IN JEFFERSON COUNTY, ARKANSAS, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioners to defer consideration denied. Certiorari denied. Reported below: 443 F. 2d 104.

No. 71–499. MASCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 447 F. 2d 1111.

No. 71–500. BIRRELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 447 F. 2d 1168.

No. 71–518. COUCH, ADMINISTRATRIX *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. Sup. Ct. Okla. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted and judgment reversed. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.

No. 71–520. MCKENDRICK, CORRECTIONAL SUPERINTENDENT *v.* RIVERA. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 448 F. 2d 30.

No. 71–5357. SANTOS *v.* NEW YORK STATE BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 441 F. 2d 1216.

No. 71–555. McINTYRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 71–567. ARREDONDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 447 F. 2d 976.

No. 71–5444. CARLOUGH *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 445 F. 2d 864.

No. 71–5447. BEALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 977.

Rehearing Denied

No. 1593, October Term, 1970. SOCIETE INDUSTRIES MECHANIQUES ALLIES *v.* LEWIS, U. S. DISTRICT JUDGE, 403 U. S. 905; and

No. 71–388. HALCON INTERNATIONAL, INC. *v.* MONSANTO AUSTRALIA LTD., *ante*, p. 949. Motions for leave to file petitions for rehearing denied.

No. 70–97. NORFOLK & WESTERN RAILWAY CO. *v.* NEMITZ ET AL., *ante*, p. 37;

No. 70–5164. GUNSTON *v.* SUPERIOR COURT, COUNTY OF ALAMEDA, CALIFORNIA, *ante*, p. 819;

No. 70–5295. PATTILLO *v.* WILSON ET AL., *ante*, p. 955;

No. 71–264. BOOTH *v.* LEMONT MANUFACTURING CORP. ET AL., *ante*, p. 916; and

No. 71–398. THOMPSON ET UX. *v.* CLARK ET AL., *ante*, p. 984. Petitions for rehearing denied.

No. 71–5052. GINSBERG *v.* LEVITT, COMPTROLLER OF NEW YORK, *ante*, p. 959; and

No. 71–5337. FULLINGTON ET AL. *v.* SHEA, DIRECTOR, COLORADO DEPARTMENT OF SOCIAL SERVICES, ET AL., *ante*, p. 963. Petitions for rehearing denied.

JANUARY 11, 1972

Dismissals Under Rule 60

No. 70–265. SMITH ET AL. *v.* BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA ET AL.; and

No. 70–5431. EL-HAQQ ET AL. *v.* BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA ET AL. Appeals from D. C. D. C. dismissed pursuant to Rule 60 of the Rules of this Court.

JANUARY 17, 1972

Affirmed on Appeal

No. 70–5377. BURR ET AL. *v.* SMITH, SECRETARY OF DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Affirmed on appeal from D. C. W. D. Wash. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 322 F. Supp. 980.

No. 71–519. SPENCER ET AL. *v.* KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Affirmed on appeal from D. C. N. J. Reported below: 326 F. Supp. 1235.

MR. JUSTICE DOUGLAS, dissenting.

The black students in this case want nothing more than to receive the same quality of education from our public schools as is enjoyed by the whites. To deny them that equality is to sanction the dispensation of public benefits according to the invidious classification of race.

Appellants sought to convene a three-judge District Court in order to challenge the constitutionality of New Jersey's statutory scheme establishing the boundaries of school districts. They argue that by establishing school district lines to coincide with the boundaries of the State's political subdivisions, cf. N. J. Rev. Stat. § 18A:8–1, the State imposed upon the public schools patterns of racial imbalance in violation of the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U. S. C. § 1983. It is said in reply that New Jersey prescribes school district boundaries only in conformity with municipal boundaries. There is, however, a showing that at times a black has to walk further to his school than the white school in his neighborhood. The remedy is redistricting. We have sponsored that process to protect the right to vote. *Reynolds* v. *Sims,* 377 U. S. 533. The right to education in the environment of a multi-racial community seems equally fundamental.

The result, according to appellants, is an inferior education for students of minority races—something this Court has long condemned. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sweatt* v. *Painter,* 339 U. S. 629; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337. See also *Plessy* v. *Ferguson,* 163 U. S. 537; *Yick Wo* v. *Hopkins,* 118 U. S. 356. Appellants sought either a redistricting or an appropriate racial balance in the public schools so that educational opportunity would not be determined by race, cf. *Gomperts* v. *Chase, post,* p. 1237, or compensatory educational programs to correct the inferior schooling given minority students. The District Court in that case had rejected this approach, however, and dismissed the complaint, finding refuge in *de facto* segregation. 329 F. Supp. 1192.

If any form of state-imposed segregation is proved, then the racially homogeneous residential neighborhoods

and the consequent racial imbalance in schools would seem to be the result of state action.* " 'It is a question of the power of the State as a whole,' " Mr. Justice Brandeis

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*In this case the white exodus to the suburbs and the resultant surrender of the inner city to the blacks is evident. "In 1910, 73 per cent of the Negro population of the United States were rural; in 1960, 73 per cent were urban." K. Taeuber & A. Taeuber, Negroes in Cities 1 (1965). That shift in residential patterns has been both encouraged and facilitated by federal, state, and local actions. In a recent statement to the Senate Subcommittee on Education, the United States Commission on Civil Rights indicated how pervasive this governmental influence is:

"Even in those instances where school segregation is a result of housing patterns with no apparent complicity of school officials, government at all levels—local, State, or Federal—invariably is heavily implicated. Historically, racial zoning ordinances imposed by local law were a formidable factor in creating and maintaining racially exclusive neighborhoods. Although such ordinances were held unconstitutional as early as 1917, some communities continued to enforce them, even as late as the 1950s.

"Judicial enforcement by State courts of racially restrictive covenants has been another important factor. Although these covenants were private agreements to exclude members of designated minority groups, the fact that they were enforceable by the courts gave them maximum effectiveness. Not until 1948 was the judicial enforcement of such covenants held unconstitutional, and not until 1953 was their enforcement by way of money damages held unlawful. Racially restrictive covenants no longer are judicially enforceable, but they still appear in deeds and the residential patterns they helped to create still persist.

"Various exercises of local governmental authority, such as decisions on building permits, the location of sewer and water facilities, building inspection standards, zoning and land use requirements, and the power of eminent domain have been used to exclude minority group members from designated neighborhoods and even from entire communities.

"The Federal Government, principally through its public housing and FHA mortgage insurance programs, has been all too often a willing partner in the creation and perpetuation of racially segregated neighborhoods, even to the point of insisting upon them. Until the

said. "[T]he powers of the several state officials must be treated as if merged in a single officer." *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 244–245 (1931). The Constitution condemns "discrimination, whether accomplished ingeniously or ingenuously," *Smith* v. *Texas,* 311 U. S. 128, 132 (1940), and where there has been any such discrimination our "objective [is] . . . to eliminate from the public schools *all vestiges* of state-imposed segregation." *Swann* v. *Board of Education,* 402 U. S. 1, 15 (1971) (emphasis added).

There is, moreover, an ancient American doctrine that as, if, and when public facilities are separate for the races

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late 1940s, for example, FHA insisted on racially restrictive covenants to insure against integrated housing developments. Until 1962 when the Executive Order on Equal Opportunity in Housing was issued, the agency continued willingly to do business with discriminatory builders and developers. The Public Housing Administration permitted its funds to be used for the creation and perpetuation of segregated housing projects well after the courts had made it clear that such practices were in violation of the Constitution. Other Federal programs, such as the highway and urban renewal programs, which involve massive displacement and relocation, also have had the effect of intensifying residential segregation.

"The point we are making is that the current situation we face, in which most minority group children attend school in isolation from children of the majority group, is *not* accidental or purely *de facto*. In many cases, it has resulted in whole or in substantial part from an accumulation of governmental actions. Thus the categorical distinction between *de jure* and *de facto* segregation is not as clear-cut as it would appear. Upon closer examination, there is probably little legal substance to the concept of *de facto* school segregation. Further, in the Commission's view, the Government has a moral as well as legal responsibility to undo the segregation it has helped to create and maintain. There is no statute of limitations by which government in its many forms can be exonerated from its past misdeeds or relieved of its current obligations." Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., 352–354 (1970).

they must be equal. *Plessy* v. *Ferguson, supra,* held that a State could maintain separate facilities for different races providing the facilities were equal. We have long since repudiated the notion that a State may maintain racially distinct facilities for the races, because classifications based upon race are invidious and thus violative of the Fourteenth Amendment. But there can be *de facto* segregation without the State's being implicated in the creation of the dual system and it is in such situations that *Plessy*'s mandate that separate facilities be equal has continuing force. Our conclusion in *Brown* v. *Board of Education,* 347 U. S. 483, 495, that "[s]eparate educational facilities are inherently unequal," has been convincingly borne out by scholarly studies. *E. g.,* J. Coleman, Equality of Educational Opportunity (1966); Harvard Educational Review, Equal Educational Opportunity (1969); Alexander & Campbell, Peer Influences on Adolescent Educational Aspirations and Attainments, 29 Am. Socio. Rev. 568 (1964). This inequality led Senator Mondale to conclude:

> "In 1968, there were more than 43 million children in our public elementary and secondary schools. 9 million were from minority groups: 6.3 million were black; 2 million were of Spanish origin; 194,000 were from Oriental backgrounds; 178,000 were American Indian.
>
> "Most of these children are from families living in poverty. The vast majority are deprived of a decent education throughout their lives. They go to schools which are inferior—educationally, financially, and physically. They are years behind in achievement. Few go on to higher education." 117 Cong. Rec. 10750.

Senator Javits recently summarized the problem: "Whatever you call it, 'de facto segregation,' 'racial un-

balance,' or 'the absence of intergroup activity,' it is a serious block to effective education for children of minority groups anywhere in the country, especially in the north and central part of the country where you don't have the established social order of segregation." Hearings on Emergency School Aid Act of 1970 before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 91st Cong., 2d Sess., 21 (1970).

I would note probable jurisdiction and set the case for oral argument.

No. 71–5729. LIPPITT *v.* CIPOLLONE ET AL. Affirmed on appeal from D. C. N. D. Ohio. Reported below: 337 F. Supp. 1405.

MR. JUSTICE DOUGLAS, dissenting.

In the 1970 Ohio primary election, appellant voted as a Republican and was a candidate for the Republican nomination to the House of Representatives from the 22d Congressional District of Ohio. Political allegiances change and, in the upcoming election, appellant seeks the nomination to Congress of the American Independent Party. He is prevented from pursuing this nomination, however, by an intricate statutory scheme. Central to this scheme is a statute which provides, with various exceptions not relevant here, *e. g.*, Ohio Rev. Code Ann. § 3517.013 *et seq.* (Supp. 1970), that "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Ohio Rev. Code Ann. § 3513.191 (1960). Other provisions also being attacked require those working for primary candidates or signing their nominating petitions to be members of the party in which nomination is sought, *id.*, § 3513.05 (Supp. 1970).

No one disputes that Ohio's statutory scheme prevents appellant from seeking the nomination of the party of his choice before 1974. Appellees, however, defend this limitation of freedom, saying that it is necessary to ensure "the formation of recognizable, relatively stable political parties with their own leadership, goals and philosophies." They conclude, "The protection of these purposes is a legitimate State concern." The District Court adopted this rationale:

> "The compelling State interest the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent 'raiding' of one party by members of another party and to preclude candidates from '. . . altering their political party affiliations for opportunistic reasons.' State ex rel. Bible v. Board of Elections, 22 O. S. 2d 57, 258 N. E. 2d 227 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as 'invidious discrimination' as defined in *Williams* [v. *Rhodes,* 393 U. S. 23 (1968)]." 337 F. Supp. 1405, 1406 (ND Ohio 1971).

Not only does the denial of appellant's right to seek the nomination of the American Independent Party in 1972 seriously impair his right of political expression, but the "compelling State interest" advanced by the appellees and accepted by the court below seems alien to our political and constitutional heritage. The right to run for public office seems a fundamental one.

The Ohio laws deny appellant that liberty, insofar as the 1972 election is concerned.

While I doubt that any state interest can be so compelling as to justify an impairment of associational freedoms in the area of philosophy—political or other-

wise*—the reasons advanced by the court below require an answer. The District Court and the appellees see a compelling state interest in the need to preserve the status quo and to preserve political stability. This interest, it is argued, is secured by creating impediments to changes in party allegiance. Our history is replete with instances in which politicians—having become disenchanted with their previous parties or perhaps only for the "opportunistic" reasons condemned by the court below—have changed from one party to another. This list includes Teddy Roosevelt, Strom Thurmond, Wayne Morse, John Lindsay, George Wallace, and a host of others. Though these breaks from past political ties add vitality to our political process, Ohio makes it very difficult.

I would note probable jurisdiction and put the case down for early argument.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE POWELL:

We are three of the four who dissent from the affirmance of the judgment of the District Court in this case. In the circumstances present here, however, we do not insist that the case be set down for oral argument.

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*In *Williams* v. *Rhodes*, 393 U. S. 23, 39–40 (separate opinion), I said:

"Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. It is unnecessary to decide whether Ohio has an interest, 'compelling' or not, in abridging those rights because 'the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.' Appellees would imply that 'no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgment.' I reject that suggestion." (Citations omitted.)

Vacated and Remanded on Appeal

No. 70–5266. LLOYD ET AL. *v.* THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY. Appeal from Sup. Ct. Utah. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Boddie* v. *Connecticut*, 401 U. S. 371 (1971).

Appeal Dismissed

No. 71–5318. GARNER *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 71–596. SCRAP LOADERS, INC. *v.* PACIFIC COAST SHIPPING CO., LIBERIA; and

No. 71–602. PACIFIC COAST SHIPPING CO., LIBERIA *v.* RYAN. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494 (1971), and *Victory Carriers, Inc.* v. *Law*, *ante*, p. 202. Reported below: 448 F. 2d 525.

Certiorari Granted—Reversed

No. 71–5368. DEMINO *v.* NEW YORK. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment reversed. *Price* v. *Georgia*, 398 U. S. 323 (1970). Reported below: 29 N. Y. 2d 602, 273 N. E. 2d 133.

Miscellaneous Orders

No. 70–88. S&E CONTRACTORS, INC. *v.* UNITED STATES. Ct. Cl. [Certiorari granted, 402 U. S. 971.] Case restored to calendar for reargument.

No. A–562. GARNER *v.* UNITED STATES. C. A. D. C. Cir. Application for reconsideration of denial of bail presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–640 (71–595). NICHOL, DISTRICT ATTORNEY OF DANE COUNTY, ET AL. *v.* KENNAN ET AL. Appeal from D. C. W. D. Wis. Application for stay of interlocutory injunction and of further proceedings presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 68–5027. AIKENS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 69–5003. FURMAN *v.* GEORGIA. Sup. Ct. Ga.;
No. 69–5030. JACKSON *v.* GEORGIA. Sup. Ct. Ga.; and
No. 69–5031. BRANCH *v.* TEXAS. Ct. Crim. App. Tex. [Certiorari granted, 403 U. S. 952.] Motion of American Civil Liberties Union for leave to participate in oral argument as *amicus curiae* denied.

No. 71–609. TERMINAL FREIGHT HANDLING CO. ET AL. *v.* SOLIEN. C. A. 8th Cir. Motion to defer consideration granted. Reported below: 444 F. 2d 699.

No. 71–5103. MORRISSEY ET AL. *v.* BREWER, WARDEN, ET AL. [Certiorari granted, *ante*, p. 999.] Motion of petitioners for appointment of counsel granted. It is ordered that W. Don Brittin, Jr., Esquire, of Des Moines, Iowa, be, and he is hereby, appointed to serve as counsel for petitioners in this case.

Certiorari Granted

No. 71–507. KEYES ET AL. *v.* SCHOOL DISTRICT No. 1, DENVER, COLORADO, ET AL. C. A. 10th Cir. Certiorari granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 445 F. 2d 990.

No. 71–492. LLOYD CORP., LTD. *v.* TANNER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 446 F. 2d 545.

No. 71–559. UNITED STATES *v.* FULLER ET UX. C. A. 9th Cir. Certiorari granted. Reported below: 442 F. 2d 504.

No. 71–315. DEEPSOUTH PACKING CO., INC. *v.* LAITRAM CORP. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition, which reads as follows:

"1. Is an apparatus claim of a United States patent directed to a combination of elements, each of which is old, infringed under 35 U. S. C. § 271 (a) when:

"(a) although the individual elements are manufactured in the United States,

"(b) the individual elements are never assembled in the United States, and

"(c) the first and only assembly of the elemental parts into an operable combination or apparatus occurs, and all testing, adjustment, modification and use of the assembled apparatus is conducted in, a foreign country?"

Reported below: 443 F. 2d 936.

No. 71–573. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* NELMS ET AL. C. A. 4th Cir. Certiorari granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 442 F. 2d 1163.

No. 71–5255. BARKER *v.* WINGO, WARDEN. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 442 F. 2d 1141.

Certiorari Denied. (See also No. 71–5318, *supra.*)

No. 71–369. SHAW *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 412.

No. 71–254. WESTMORELAND *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 246 So. 2d 487.

No. 71–574. NEMELKA ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 166.

No. 71–577. MUNICIPAL COURT OF EAST LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, ET AL. *v.* PERRINE ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 3d 656 and 669, 488 P. 2d 648 and 656.

No. 71–579. KROFT *v.* COX ET AL. Sup. Ct. Ark. Certiorari denied.

No. 71–581. THE SANTA ROSA ET AL. *v.* LOOMIS. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 105.

No. 71–582. FROMMHAGEN *v.* GLAZER. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 338.

No. 71–584. PATRICK *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 249 So. 2d 667.

No. 71–587. FRANKLIN TOWNSHIP *v.* BOROUGH OF DELMONT. Commonwealth Ct. of Pa. Certiorari denied. Reported below: 2 Pa. Commw. 310, 279 A. 2d 387.

No. 71–590. VEGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 447 F. 2d 698.

No. 71–591. RAWLS *v.* CONDÉ NAST PUBLICATIONS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 313.

No. 71–592. GIZA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–597. ANGLE, DBA KANSAS REFINED HELIUM CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 167, 445 F. 2d 237.

No. 71–598. MANTZARIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–601. OZARK AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 441 F. 2d 892.

No. 71–603. NOWAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 448 F. 2d 134.

No. 71–607. DECAVALCANTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 139.

No. 71–610. TOWN PARK HOTEL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 446 F. 2d 878.

No. 71–612. VON POPPENHEIM *v.* PORTLAND BOXING & WRESTLING COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 1047.

No. 71–614. SEVERSON ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 631.

No. 71–5141. CLARKE *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 853.

No. 71–5150. DOWLINGTZON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–5160. SMILEY *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 1026.

No. 71–5154. GOLDMAN *v.* CITY OF ST. LOUIS. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5198. GASKINS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 10 Md. App. 666, 272 A. 2d 413.

No. 71–5358. IN RE JONES. C. A. 8th Cir. Certiorari denied.

No. 71–5361. BROWN *v.* HIRST. C. A. 4th Cir. Certiorari denied. Reported below: 443 F. 2d 899.

No. 71–5386. CRITTENDON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 71–5476. OPPENHEIMER *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 71–5477. GRAY *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5478. LARA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 469 S. W. 2d 177.

No. 71–5479. TODARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 64.

No. 71–5480. PROCTOR ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5481. STEVENSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 486 P. 2d 646.

No. 71–5482. MCCRAY *v.* UNITED STATES MARSHAL FOR THE DISTRICT OF KANSAS ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–5485. KENDALL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 249 So. 2d 657.

No. 71–5483. JONES *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5487. CESARIO *v.* DAVISON ET UX. C. A. 7th Cir. Certiorari denied.

No. 71–5488. OLIVER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–5489. WALKER *v.* KINNEARY, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 71–5491. HENRY *v.* JOHNSON, ADMINISTRATOR OF VETERANS' ADMINISTRATION. C. A. 5th Cir. Certiorari denied.

No. 71–5492. MONTEIRO *v.* PICARD, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 443 F. 2d 311.

No. 71–5493. SANDOVAL ET AL. *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5494. HILL, ADMINISTRATRIX *v.* OHIO COUNTY ET AL. Ct. App. Ky. Certiorari denied. Reported below: 468 S. W. 2d 306.

No. 71–5495. DUNMORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 1214.

No. 71–5496. ANDREWS *v.* NORTH CAROLINA. Super. Ct. N. C., Wake County. Certiorari denied.

No. 71–5498. BAUGUESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5499. O'NEAL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 111.

No. 71–498. OLFF *v.* EAST SIDE UNION HIGH SCHOOL DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 932.

MR. JUSTICE DOUGLAS, dissenting.

It seems incredible that under our federalism a State can deny a student education in its public school system unless his hair style comports with the standards of the school board.

Some institutions in Asia require their enrollees to shave their heads. Would we sustain that regulation if imposed by a public school?

Would we sustain a public school regulation requiring male students to have crew cuts?

The present regulation—to some at least—seems as extreme as the examples given. It provides:

> "Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and shall not cover the ears, and it shall not extend below the collar in back."

Robert Olff, a 15-year-old boy speaking through his mother, has a full panoply of constitutional rights, though he is a minor. We said in *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 511:

> "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

Moreover, a parent's control over the child, though not absolute, as witness our decisions placing sanctions against child labor, is pervasive. We said in *Prince* v. *Massachusetts*, 321 U. S. 158, 166:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose

> primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."

Hair style is highly personal,[1] an idiosyncrasy which I had assumed was left to family or individual control and was of no legitimate concern to the State. It seems to me to be as much a purely private choice as was the family-student decision, sustained against a State's prohibition, to study the German language in a public school. *Meyer* v. *Nebraska*, 262 U. S. 390. That family-student right, the Court held, was included within "liberty" as the word is used in the Fourteenth Amendment. *Id.*, at 400. Opposed there—as in the present case—is the authoritarian philosophy favoring regimentation. The Court said:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the rela-

[1] Feelings run high among people concerning hair styles. Yet as Professor Chafee said:

"This breach of the peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence. The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at 'Fruitlands,' not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up. A man does not become a criminal because some one else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence." Z. Chafee, Free Speech in the United States 151–152 (1942).

> tion between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." *Id.*, at 402.

The word "liberty" is not defined in the Constitution. But, as we held in *Griswold* v. *Connecticut*, 381 U. S. 479, it includes at least the fundamental rights "retained by the people" under the Ninth Amendment. *Id.*, at 484. One's hair style, like one's taste for food, or one's liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people.[2] That is not to say that the police power of the state is powerless to deal with known evils. An epidemic of lice might conceivably authorize a shearing of locks. Other like crises might be imagined. But I see no way of allowing a State to set hair styles for patrons of its schools, any more than it could establish a welfare system only for men with crew cuts and women with bobbed

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[2] "This Court takes judicial notice that hairstyles have altered from time to time throughout the ages. Samson's locks symbolically signified his virility. Many of the Founding Fathers of this country wore wigs. President Lincoln grew a beard at the suggestion of a juvenile female admirer. Chief Justice Hughes' beard furnished the model for the frieze over the portico of the Supreme Court of the United States proclaiming 'equal justice under law.' Today many of both the younger and older generations have avoided the increased cost of barbering by allowing their locks or burnsides to grow to greater lengths than when a haircut cost a quarter of a dollar.

"Whether hair styles be regarded as evidence of conformity or of individuality, they are one of the most visible examples of personality. This is what every woman has always known. And so have many men, without the aid of an anthropologist, behavioral scientist, psychiatrist, or practitioner of any of the fine arts or black arts." *Richards* v. *Thurston*, 304 F. Supp. 449, 451.

hair.[3] Once these lines are drawn, a serious question of equal protection of the law is raised.[4]

The federal courts are in conflict and the decisions in disarray.[5] We have denied certiorari where the lower

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[3] In the 1920's the fad turned to short hair:

"To conservatives, short-haired women were as much 'radicals and freaks of society' as long-haired musicians, artists, and anarchists. Some saw in bobbed hair a symbol of all the ills of the age, ranging from jazz, short skirts, sexy movies, the automobile, and prohibition to such threats as 'Freudian psychology' and the 'growing cult of the so-called free woman.' The boyish bob, followed by the shingle and bingle which shaved the nape of the neck, and then by the curly bob and spit curls, were all part of what the older generation denounced as 'Flaming Youth.'

"Preachers took to pulpits to warn that 'a bobbed woman is a disgraced woman.' In a Missouri courtroom, a mother pleading for the return of her six children who had been living with a guardian heard the oldest of them testify to the judge: 'We don't believe mother is a Christian woman. She bobs her hair.' Men divorced their wives over bobbed hair. Other males banded together with vows to give up shaving until wives agreed to let their hair grow out again. A large department store fired all bobbed haired employees and a hospital discharged bobbed haired nurses." W. Severn, The Long And Short of It 122 (1971).

[4] In *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. 252, an alien Chinese was allowed to recover damages under the Civil Rights Act against the sheriff of San Francisco for cutting his hair "to an uniform length of one inch from the scalp" on entering a prison to serve a five-day sentence for a petty offense. The Circuit Court, speaking through Mr. Justice Field, held that the ordinance made an invidious discrimination against the Chinese ("only the dread of the loss of his queue will induce a Chinaman to pay his fine," *id.,* at 255) and was a cruel and unusual punishment. *Ibid.*

[5] "Long hair" cases have occasioned a deep division in the circuits. There is a conflict as to the extent that a student's interest in his hair style enjoys constitutional protection, compare *Breen* v. *Kahl,* 419 F. 2d 1034 (CA7 1969), and *Richards* v. *Thurston,* 424 F. 2d 1281 (CA1 1970), with *Ferrell* v. *Dallas Ind. School Dist.,* 392 F. 2d 697 (CA5 1968), and *Jackson* v. *Dorrier,* 424 F. 2d 213 (CA6 1970). Where it has been found to exist, there is a split as to the constitutional basis for such protection. Compare *Breen, supra,* with

court has sustained the school board [6] and also where it has overruled the board.[7] The question tendered is of great personal concern to many and of unusual constitutional importance which we should resolve. I would grant this petition and set the case for argument.

No. 71–5500. CASH *v.* MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–5501. SHERIS *v.* MORTON ET AL. Sup. Ct. N. H. Certiorari denied. Reported below: 111 N. H. 66, 276 A. 2d 813.

No. 71–5503. COUNTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1377.

Richards, supra. And there is a conflict as to the showing necessary by the school board to justify a hair regulation even among those circuits permitting such a justification. Compare the decision of the Ninth Circuit in the present case, and its companion, *King* v. *Saddleback Jr. College Dist.*, 445 F. 2d 932 (1971), with *Griffin* v. *Tatum*, 425 F. 2d 201 (CA5 1970).

Not only is the conflict deep and irreconcilable, but the issue is a recurrent one. There are well over 50 reported cases squarely presenting the issue, students having won in about half of them. In addition to the 37 cases cited in Note, 84 Harv. L. Rev. 1702, 1703 n. 4 (1971), see, *e. g., King* v. *Saddleback Jr. College Dist., supra; Valdes* v. *Monroe County Bd. of Public Instruction*, 325 F. Supp. 572 (SD Fla. 1971); *Axtell* v. *LaPenna*, 323 F. Supp. 1077 (WD Pa. 1971); *Parker* v. *Fry*, 323 F. Supp. 728 (ED Ark. 1971); *Alberda* v. *Noell*, 322 F. Supp. 1379 (ED Mich. 1971); *Lambert* v. *Marushi*, 322 F. Supp. 326 (SD W. Va. 1971); *Martin* v. *Davison*, 322 F. Supp. 318 (WD Pa. 1971); *Dawson* v. *Hillsborough County, Florida School Board*, 322 F. Supp. 286 (MD Fla. 1971); *Karr* v. *Schmidt*, 320 F. Supp. 728 (WD Tex. 1970); *Freeman* v. *Flake*, 320 F. Supp. 531 (Utah 1970); *Lansdale* v. *Tyler Jr. College*, 318 F. Supp. 529 (ED Tex. 1970); *Alexander* v. *Thompson*, 313 F. Supp. 1389 (CD Cal. 1970).

[6] See, *e. g., Jackson* v. *Dorrier, supra*, cert. denied, 400 U. S. 850.

[7] See, *e. g., Breen* v. *Kahl, supra*, cert. denied, 398 U. S. 937.

No. 71–5502. EVANS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 447 F. 2d 129.

No. 71–5504. FEURTADO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 249 So. 2d 440.

No. 71–5506. CALABRO, AKA CALABRONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5507. LEGREE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 918, 271 N. E. 2d 699.

No. 71–5509. BURT *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 59 N. J. 156, 279 A. 2d 850.

No. 71–5512. ESOCOBAR *v.* ROBERTS, DISTRICT ATTORNEY OF BRONX COUNTY, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 594, 272 N. E. 2d 898.

No. 70–173. ALUMINUM CO. OF AMERICA ET AL. *v.* WOODS EXPLORATION & PRODUCING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 1286.

No. 71–121. PRO-FOOTBALL, INC., ET AL. *v.* HECHT ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 144 U. S. App. D. C. 56, 444 F. 2d 931.

No. 71–578. PORTER ET AL. *v.* LYNCH. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 446 F. 2d 225.

No. 71–5514. McGovern *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 266.

No. 71–580. Kellis *v.* United States. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 445 F. 2d 863.

No. 71–606. Collins *v.* Black, Conservation Center Superintendent. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–583. Tucker *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 71–594. Zizzo *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 857.

No. 71–613. Melancon *v.* RMK-BRJ, a Joint Venture. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 449 F. 2d 1289.

No. 71–5185. Kearney *v.* Fritz, Correctional Superintendent, et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 71–5484. Pryor *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1273.

No. 71–5508. Honore *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 31.

No. 71–604. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 447 F. 2d 1124.

No. 71–608. C. T. S. Co., INC. *v.* CORNWELL QUALITY TOOLS CO.; and

No. 71–697. CORNWELL QUALITY TOOLS CO. *v.* C. T. S. Co., INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted in No. 71–608. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 446 F. 2d 825.

No. 71–5162. PADILLA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 107 Ariz. 134, 483 P. 2d 549.

No. 71–5286. SOSTRE *v.* OSWALD, COMMISSIONER OF CORRECTIONS, ET AL. C. A. 2d Cir. Motion of Wisconsin Judicare for leave to file a brief as *amicus curiae* and to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 442 F. 2d 178.

No. 71–5405. ROBINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

On March 4, 1964, petitioner was arraigned in the United States District Court on charges of prison escape and accompanying assaults. Counsel was appointed that day, and after petitioner and the attorney assured the court they had had sufficient time earlier in the day to

confer, the court accepted petitioner's guilty pleas. On June 22, 1964, petitioner returned for sentencing, and the following occurred:

> "The Court: Mr. Robbins [*sic*], when [last] before the Court, was represented by appointed counsel, Mr. Sheldon Crossette, a member of the bar of Wyandotte County and of this Court.
>
> "I excused Mr. Corssette [*sic*] from further representation of Mr. Robbins [*sic*] since he is in Kansas City and this hearing is in Leavenworth.
>
> . . . . .
>
> "Mr. Robbins [*sic*], do you desire that other counsel be appointed to represent you at this hearing?
>
> "Defendant Robbins [*sic*]: No.
>
> "The Court: You understand that you have the right to have counsel?
>
> "Defendant Robbins [*sic*]: Yes.
>
> "The Court: And you waive that right?
>
> "Defendant Robbins [*sic*]: Yes, sir."

Petitioner was then sentenced to consecutive five-year terms of imprisonment on two counts and a concurrent five-year term on a third, all to follow any sentence then being served.

Petitioner subsequently filed a motion in the sentencing court to vacate sentence under 28 U. S. C. § 2255, contending, first, that in summarily relieving his appointed attorney, the trial court had denied him his constitutional right to the assistance of counsel and, second, that he had not validly waived his right to counsel. In particular, petitioner alleges that he did not accept the court's offer to appoint new counsel for fear of angering the court, and because he did not think a new attorney, unfamiliar with the case, could help him. The District Court in an unreported order denied relief without a

hearing, on the ground that the records of the case "conclusively" demonstrated a valid waiver. The Court of Appeals for the Tenth Circuit affirmed in an unreported *per curiam* opinion.

The principles governing this case are well established. Petitioner, of course, had a constitutional right to counsel at his sentencing proceedings. *McConnell* v. *Rhay,* 393 U. S. 2 (1968); *Mempa* v. *Rhay,* 389 U. S. 128 (1967). Although the Constitution "does not require that under all circumstances counsel be forced upon a defendant," *Carter* v. *Illinois,* 329 U. S. 173, 174–175 (1946), a waiver of the right to counsel is valid only if it is voluntarily and understandingly made. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).

> "The fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of . . . all . . . facts essential to a broad understanding of the whole matter." *Von Moltke* v. *Gillies,* 332 U. S. 708, 724 (1948).

Moreover, " 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.' " *Johnson* v. *Zerbst, supra,* at 464. See also, *e. g., Carnley* v. *Cochran,* 369 U. S. 506 (1962); *Moore* v. *Michigan,* 355 U. S. 155 (1957); *Von Moltke* v. *Gillies, supra; Glasser* v. *United States,* 315 U. S. 60 (1942). Finally, petitioner was entitled to "a prompt hearing" on his motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner [was] entitled to no relief . . . ." 28 U. S. C. § 2255. See, *e. g., Sanders* v. *United States,* 373 U. S. 1 (1963).

Whether petitioner was properly denied a hearing presents a serious question. Nothing in the record suggests, let alone demonstrates "conclusively," that petitioner's statement of waiver of new counsel at sentencing was made "with an apprehension of . . . all . . . facts essential to a broad understanding of the whole matter." *Von Moltke* v. *Gillies, supra,* at 724. Nothing reveals an awareness on his part that the offer of new counsel was more than "a mere procedural formality," *id.*, at 722—that counsel would have been appointed not merely to stand by his side while the court pronounced sentence. Nothing indicates an appreciation that a continuance might have been granted to permit new counsel to familiarize himself with the case and render the services that this Court has said are integral to " 'the very integrity of the fact-finding process.' " *McConnell* v. *Rhay, supra,* at 3. On the contrary, the record offers some support for petitioner's allegation that, although he wanted meaningful representation, he felt he could not press for it without antagonizing the court.

Moreover, the record is silent on any waiver of error in the dismissal of petitioner's already appointed attorney, and that dismissal itself raises substantial constitutional questions. In *Vellucci* v. *United States,* 430 F. 2d 188 (1970), the Court of Appeals for the Sixth Circuit held it to be plain error for a trial judge to excuse the defendant's attorney before sentencing. The Court of Appeals below distinguished *Vellucci* on the ground that the defendant there, unlike petitioner here, was not offered new counsel. But an unaccepted offer of new counsel can hardly render harmless any error in dismissing an already appointed attorney.

Lawyers are not necessarily fungible goods, to be replaced at the whim of the court. Counsel's prior experience in a case, his familiarity with the facts and prior proceedings, and the position of trust he may have

gained with the defendant are factors arguing for continued representation by the same attorney. This case is barren of any indication that the interests of petitioner were considered in the dismissal of his appointed counsel. I would accordingly grant this petition for certiorari.

No. 71–5459. POLK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 1.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs.

I would grant certiorari in this case. Prison censorship of mail discovered a letter written by an inmate which at the trial of the inmate was used to convict him. The evils of censorship are thus compounded. The right of privacy protected by the Bill of Rights (*Griswold* v. *Connecticut,* 381 U. S. 479) is re-emphasized when government is dealing with a captive audience (see *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467–469 (dissenting opinion)). It includes, *inter alia,* the sanctity of thought and belief of the individual that is protected by the First and Fifth Amendments. As Mr. Justice Holmes said in *Milwaukee Pub. Co.* v. *Burleson,* 255 U. S. 407, 437 (dissenting) "the use of the mails is almost as much a part of free speech as the right to use our tongues." Under our regime the right to use the mail free of censorship is basic whether the censor be a federal official working for the post office or a federal official working for the Department of Justice. The problem is squarely raised here, free from all problems of prison security.

Rehearing Denied

No. 71–262. O'KEEFFE, DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, DEPARTMENT OF LABOR *v.* AEROJET-GENERAL SHIPYARDS, INC., *ante,* p. 254; and

No. 71–393. DOWELL ET UX. *v.* UNITED STATES, *ante,* p. 984. Petitions for rehearing denied.

No. 71–443. WIENER ET AL. *v.* CALIFORNIA, *ante*, p. 988;

No. 71–5081. CARTER *v.* TEXAS, *ante*, p. 1001; and

No. 71–5392. BENNETT *v.* DISTRICT DIRECTOR OF INTERNAL REVENUE ET AL., *ante*, p. 1002. Petitions for rehearing denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit during the period beginning April 3, 1972, and ending April 7, 1972, and for such additional time in advance thereof to prepare for the trial of cases, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit during the period beginning April 10, 1972, and ending April 14, 1972, and for such additional time in advance thereof to prepare for the trial of cases, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JANUARY 24, 1972

Affirmed on Appeal

No. 71–679. DUNN, DIRECTOR OF WELFARE OF CITY OF NEW HAVEN, ET AL. *v.* RIVERA ET AL. Appeal from D. C. Conn. Motion of appellee Rivera for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 329 F. Supp. 554.

No. 71–595. NICHOL, DISTRICT ATTORNEY OF DANE COUNTY, ET AL. *v.* KENNAN ET AL. Affirmed on appeal from D. C. W. D. Wis. THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would dismiss the appeal for failure to comply with Rule 13 (1).

No. 71–620. WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES *v.* LOPEZ ET AL. Affirmed on appeal from D. C. W. D. N. Y.

Certiorari Granted—Vacated and Remanded. (See also No. 71–5431, *ante*, p. 567.)

No. 71–5419. PIPER *v.* HAUCK, SHERIFF, ET AL. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Haines* v. *Kerner*, *ante*, p. 519.

Certiorari Granted—Reversed. (See No. 71–244, *ante*, p. 553.)

Miscellaneous Orders

No. A–657. DOHERTY *v.* UNITED STATES. C. A. 9th Cir. Reapplication for bail denied.

No. A–677 (71–864). FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE ET AL. C. A. D. C. Cir. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 70–45. UNITED STATES *v.* BREWSTER. Appeal from D. C. D. C. [Probable jurisdiction postponed, 401 U. S. 935]; and

No. 70–5061. KIRBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. [Certiorari granted, 402 U. S. 995.] Cases restored to calendar for reargument.

No. A–336 (70–5101). PATLER *v.* VIRGINIA. Sup. Ct. App. Va. Renewed application for bail denied.

No. A–521. IN RE DISBARMENT OF FREEL. It having been reported to the Court that Frederick J. Freel, of Kansas City, Missouri, has been indefinitely suspended from the practice of law by the Supreme Court of Missouri, duly entered April 15, 1971, and this Court by order of November 22, 1971 [*ante*, p. 963], having suspended the said Frederick J. Freel from the practice of 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, and that a response has been filed;

IT IS ORDERED that the said Frederick J. Freel be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 68–5027. AIKENS *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 69–5003. FURMAN *v.* GEORGIA. Sup. Ct. Ga.; and

No. 69–5030. JACKSON *v.* GEORGIA. Sup. Ct. Ga. [Certiorari granted, 403 U. S. 952.] Motion of the State of Alaska for leave to file a brief as *amicus curiae* granted. Motions of the District Attorney for the Eastern Circuit of Georgia for leave to file briefs as *amicus curiae* in Nos. 69–5003 and 69–5030 denied.

No. 71–600. STATE BOARD OF ELECTION COMMISSIONERS ET AL. *v.* EVERS ET AL. Appeal from D. C. S. D. Miss. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 327 F. Supp. 640.

No. 71–650. MINNESOTA *v.* NORTHERN STATES POWER CO. Appeal from C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 447 F. 2d 1143.

No. 71–5144. McNeil *v.* Director, Patuxent Institution. Ct. Sp. App. Md. [Certiorari granted, *ante*, p. 999.] Motion of petitioner 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 petitioner in this case.

No. 71–5497. Herron *v.* Wainwright, Corrections Director. Motion for leave to file petition for writ of habeas corpus denied.

No. 71–588. Dixie Mining Co. *v.* Bazelon, Chief Judge, U. S. Court of Appeals, et al. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 71–5523. Butenko *v.* Alldredge, Warden, et al. Motion for leave to file petition for writ of mandamus denied. Mr. Justice Marshall took no part in the consideration or decision of this motion.

No. 71–630. Curtis, U. S. District Judge, et al. *v.* United States Court of Appeals for the Ninth Circuit. Motion for leave to file petition for writ of prohibition denied.

Certiorari Granted

No. 71–5139. Ham *v.* South Carolina. Sup. Ct. S. C. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1, presented by the petition, which reads as follows:

"1. Whether the trial judge's refusal to examine the jurors on *voir dire* as to whether petitioner's race or pretrial publicity would affect their ability to render a fair verdict violated petitioner's right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the Constitution?"

Reported below: 256 S. C. 1, 180 S. E. 2d 628.

No. 71–224. SWENSON, WARDEN *v.* STIDHAM. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 443 F. 2d 1327.

No. 71–496. WARD *v.* VILLAGE OF MONROEVILLE. Sup. Ct. Ohio. Certiorari granted. Reported below: 27 Ohio St. 2d 179, 271 N. E. 2d 757.

Certiorari Denied

No. 71–576. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 337.

No. 71–611. HYDE *v.* UNITED STATES;

No. 71–618. GANTT *v.* UNITED STATES; and

No. 71–625. FLOWERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 815.

No. 71–616. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12, ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO (ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., ET AL., REAL PARTIES IN INTEREST). Super Ct. Cal., County of San Diego. Certiorari denied.

No. 71–617. GOLAY & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 290.

No. 71–623. KEE MING HSU *v.* HART, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied.

No. 71–626. GORDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 100.

No. 71–632. HODGDON *v.* SECURITIES AND EXCHANGE COMMISSION; and

No. 71–637. HAIGHT ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 71–631. CURTIS, U. S. DISTRICT JUDGE, ET AL. *v.* MUNOZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 1176.

No. 71–633. CITY MESSENGER SERVICE OF HOLLYWOOD, INC., DBA CITY MESSENGER AIR EXPRESS AND/OR C. M. A. X. *v.* CAPITOL RECORDS DISTRIBUTING CORP. C. A. 6th Cir. Certiorari denied. Reported below: 446 F. 2d 6.

No. 71–634. DOBBS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–635. STEAD *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 444 F. 2d 713.

No. 71–636. COMPANIA ANONIMA VENEZOLANA DE NAVEGACION (VENEZUELAN LINE) *v.* WESTINGHOUSE ELECTRIC INTERNATIONAL CO. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 1339.

No. 71–638. WASHINGTON TRUST BANK, TRUSTEE, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 1235 and 1232.

No. 71–639. WATSON CHAPEL SCHOOL DISTRICT NO. 24 ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 933.

No. 71–643. ROSS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–644. SANTOBELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–645. SMITH ET AL. *v.* SCRIVNER-BOOGAART, INC. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 1014.

No. 71–646. SYSTEM COUNCIL T–4 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 446 F. 2d 815.

No. 71–647. JAMES E. SIMON CO., INC. *v.* ARDELT-HORN CONSTRUCTION CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 820.

No. 71–648. D'EUGENIO *v.* SLATTERY CONSTRUCTION CO., INC. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–649. CAAMANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–656. MASIELLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 1324.

No. 71–660. TATUM ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–663. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 263.

No. 71–5127. HARDEE *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5339. MORGAN *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5391. BRADFORD *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5474. LINEBERGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 444 F. 2d 122.

No. 71–5486. GEPPI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–5518. PERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–5520. BUSH *v.* HORNE, JUDGE. Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 1, 183 S. E. 2d 754.

No. 71–5521. BUSH *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 123 Ga. App. 584, 181 S. E. 2d 917.

No. 71–5522. BETHEA *v.* REID ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 445 F. 2d 1163.

No. 71–5524. LOGAN *v.* CORRECTIONAL SUPERINTENDENT, WALLKILL PRISON. C. A. 2d Cir. Certiorari denied.

No. 71–5526. DELLINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5527. WESTON, AKA WALLACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 626.

No. 71–5529. QUIMBY, AKA DEARDORFF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–5530. SPINELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 646.

No. 71–5533. CEFALO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 71–5534. OLIVER *v.* HARRISON COUNTY CLERK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 442 F. 2d 421.

No. 71–5536. WICKLINE *v.* BROOKS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 446 F. 2d 1391.

No. 71–5537. BARBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–5538. KENNON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 465.

No. 71–5539. SCHERER *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 1176.

No. 71–5542. POOL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 442 F. 2d 1340.

No. 71–5546. DUNLEAVAY *v.* ROCKEFELLER CENTER, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 70–290. GAS LIGHT COMPANY OF COLUMBUS *v.* GEORGIA POWER CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 440 F. 2d 1135.

No. 70–5049. BURNS *v.* SWENSON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 430 F. 2d 771.

No. 70–5072. HARPER ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: See 127 Ill. App. 2d 420, 262 N. E. 2d 298.

No. 71–295. GIBBS ET AL. *v.* SEXTON. C. A. 5th Cir. Motion of respondent to dispense with printing brief granted. Certiorari denied. Reported below: 446 F. 2d 904.

No. 71–238. NORTHERN NATURAL GAS CO. ET AL. *v.* MOBIL OIL CORP. ET AL.; and

No. 71–243. PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 441 F. 2d 704.

No. 71–437. AMATO ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari and reverse. *Redrup* v. *New York,* 386 U. S. 767. Reported below: 49 Wis. 2d 638, 183 N. W. 2d 29.

No. 71–619. BLAYLOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1307.

No. 71–621. AMERICAN MANUFACTURERS MUTUAL INSURANCE CO. ET AL. *v.* AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 1131.

No. 71–5543. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 539.

No. 71–627. MYERS, CORRECTIONAL SUPERINTENDENT *v.* GOCKLEY. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 450 F. 2d 232.

No. 71–652. SMITH *v.* UNITED STATES. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–5171. CUNNINGHAM *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 443 F. 2d 195.

No. 71–5532. PATTERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 447 F. 2d 424.

No. 71–5541. THERIAULT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 447 F. 2d 1361.

Rehearing Denied

No. 70–54. VICTORY CARRIERS, INC., ET AL. *v.* LAW, *ante*, p. 202;

No. 71–327. TEXAS GULF SULPHUR CO. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION, *ante*, p. 1005;

No. 71–328. HUNTINGTON *v.* SECURITIES AND EXCHANGE COMMISSION, *ante*, p. 1005;

No. 71–346. CRAWFORD *v.* SECURITIES AND EXCHANGE COMMISSION, *ante*, p. 1005;

No. 71–347. HOLYK ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION, *ante*, p. 1005;

No. 71–421. TEXAS GULF SULPHUR CO. ET AL. *v.* MITCHELL ET AL., *ante*, p. 1004;

No. 71–5105. BENJAMIN *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante*, p. 986;

No. 71–5126. ALEXANDER *v.* OREGON, *ante*, p. 1001; and

No. 71–5531. LIPSCOMB *v.* WARDEN, ATLANTA PENITENTIARY, ET AL., *ante*, p. 1005. Petitions for rehearing denied.

No. 71–218. GROUNDS ET AL. *v.* NORTHERN NATURAL GAS CO. ET AL., *ante,* p. 951. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 71–390. BESSESEN ET UX. *v.* UNITED STATES, *ante,* p. 984. Motion for leave to file and to dispense with printing petition for rehearing and other relief denied.

No. 71–5316. TUZO *v.* UNITED STATES, *ante,* p. 958. Motion for leave to file petition for rehearing denied.

JANUARY 27, 1972

Miscellaneous Order

No. A–760. BULLOCK, SECRETARY OF STATE OF TEXAS *v.* WEISER ET AL. D. C. N. D. Tex. Application for stay of judgment presented to MR. JUSTICE POWELL, and by him referred to the Court, granted.

AMENDMENTS OF RULES OF THIS COURT

ORDER

IT IS ORDERED that the Rules of the Supreme Court of the United States be, and the same are hereby, amended by revising paragraph 1 of Rule 16 to read as follows:

"Within thirty days after receipt of the jurisdictional statement, unless the time is enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34, the appellee may file a printed motion to dismiss, or motion to affirm. In cases where the United States or any agency, officer or employee thereof is the appellee, the appellee shall have an additional twenty days to file said motions. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss."

It is further ordered that paragraph 1 of Rule 24 be revised by adding the following sentence to the said paragraph:

"In cases where the United States or any agency, officer or employee thereof is the respondent, the respondent shall have an additional twenty days to file the said opposing brief."

NOVEMBER 22, 1971.

REPORTER'S NOTE

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 immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM JULY 27, 1971, THROUGH JANUARY 31, 1972

MAHAN *v.* HOWELL

ON APPLICATION FOR STAY

No. A–84. Decided July 27, 1971*

Stay of three-judge District Court judgment in Virginia reapportionment case is denied, as MR. JUSTICE BLACK does not believe that four Justices are likely to note probable jurisdiction, in view of fact that District Court order revising many of the electoral districts was substantially unanimous and delay incident to review might further postpone important state elections.

See: 330 F. Supp. 1138.

MR. JUSTICE BLACK, Acting Circuit Justice.

These cases, presented to THE CHIEF JUSTICE and assigned to me for action in his absence, challenge the judgment of a federal three-judge court holding unconstitutional in part an Act of the General Assembly of the State of Virginia providing for reapportionment of its State Senate and House of Delegates. The cases were filed in different three-judge district courts and were consolidated for trial in the District Court for the Eastern District of Virginia. In an opinion written by Circuit Judge Bryan, the consolidated court held parts of the legislative Act unconstitutional and invalid and proceeded to write a reapportionment measure changing the boundaries of approximately half of the House districts and staying the effectiveness of the Act insofar as the court's opinion had altered it. As written by the

*Together with No. A–83, *City of Virginia Beach* v. *Howell et al.*, also on application for stay of same judgment.

court the redistricting order decreases representational disparity between the several House districts from 16.4% to 7.2%. In its consideration of the General Assembly's Senate districting formula, the court found it necessary to effect only one change to make allowances for the residences of naval personnel stationed in the Norfolk-Virginia Beach area.

The motion here is for a stay of the District Court's order pending appeal. In considering questions of this kind an individual Member of the Court to whom the matter is presented should give due consideration to the fact that the four District Judges' order was substantially unanimous [1] and that the two judges who were subsequently requested to stay their order refused to do so. A single Justice, of course, must also weigh the substantiality of the questions presented in light of this Court's prior decisions, *e. g., Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969); *Wells* v. *Rockefeller,* 394 U. S. 542 (1969). Moreover, it is settled that unless a judge considering the application believes it reasonably probable that four Members of the Court will vote to hear such an appeal the requested stay should not be granted.[2] Here, therefore, the basic thing for me to consider is whether four Members of the Court are likely to vote in favor of granting this appeal when the matter is given consideration.

On due consideration, I am unable to say that four

[1] Judge Lewis filed a separate concurring and dissenting opinion. He fully agreed with all aspects of the ruling with the exception of the court's refusal to create a 10-member multi-member district in Fairfax County.

[2] *Board of School Comm'rs* v. *Davis,* 84 S. Ct. 10, 11 L. Ed. 2d 26 (1963); *Organized Village of Kake* v. *Egan,* 80 S. Ct. 33, 4 L. Ed. 2d 34 (1959); *Edwards* v. *New York,* 76 S. Ct. 1058, 1 L. Ed. 2d 17 (1956).

Members would so vote. The case is difficult; the facts are complicated; the four District Court Judges deciding the case had no difficulty in reaching their conclusion on the constitutional questions or in devising a plan to correct the deficiencies they found; the delay incident to review might further postpone important elections to be held in the State of Virginia should the stay be granted. These and other considerations which need not be stated lead me to believe that four Members of the Court are not likely to grant an appeal and therefore I decline to enter an order which would in effect stay the judgment of the consolidated three-judge court.

NATIONAL LABOR RELATIONS BOARD *v.* GETMAN ET AL.

ON APPLICATION FOR STAY

No. A–109. Decided July 27, 1971

Stay of District Court's order under the Freedom of Information Act, 5 U. S. C. § 552 (a)(3), that National Labor Relations Board (NLRB) provide respondents with certain records concerning labor representation elections denied, the Act providing no exception authorizing the NLRB's refusal to produce the requested records.

MR. JUSTICE BLACK, Acting Circuit Justice.

Respondents, two law professors who are undertaking a study of labor representation elections, applied for and obtained an order from the United States District Court for the District of Columbia requiring the National Labor Relations Board to provide respondents "with names and addresses of employees eligible to vote in approximately 35 elections to be designated by (respondents)." Respondents base their claim to the information on the language of the Freedom of Information Act, 5 U. S. C. § 552 (a)(3), which requires that a Government agency "on request for identifiable records . . . shall make the records promptly available to any person." The Government has filed an application seeking a stay of the order of the District Court. This application was assigned to me in the absence of THE CHIEF JUSTICE.

The Government applies for a stay on the ground that the District Court order requiring the Board to comply with the Freedom of Information Act and deliver the records in question to respondents would interfere with the representation election procedures under the National Labor Relations Act, 49 Stat. 449, as amended. The Board was created by Congress and Congress has

seen fit to make identifiable records of the Board and other Government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the Board to refuse promptly to turn over the requested records. I deny the application for stay without prejudice to the Government to present its application to another Member of this Court.

It is so ordered.

EDGAR ET AL. *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A-95. Decided July 29, 1971

Stay of Court of Appeals' judgment affirming District Court's order directing applicants to take affirmative action to eliminate all vestiges of discrimination from Texas public schools is denied, as the order does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch.

See: 321 F. Supp. 1043 and 330 F. Supp. 235.

MR. JUSTICE BLACK, Circuit Justice.

The Commissioner of Education of the State of Texas and the Texas Education Agency make application for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Eastern District of Texas, which directed the applicants to take certain affirmative action to eliminate all vestiges of discrimination from the public schools within the State. The State of Texas provides for the supervision of state education and the distribution of state educational funds through the Texas Education Agency under the direction of the Commissioner of Education. The United States brought this action against applicants on March 6, 1970, to enforce Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d *et seq.*, and the Fourteenth Amendment of the United States Constitution. The District Court, on April 20, 1971, issued its order directing the Commissioner and the Texas Education Agency to take certain specified steps to withhold funds and accreditation from school districts which failed to

meet their constitutional obligation to eliminate remaining vestiges of the dual school system. The District Court order dealt with the areas of student transfers, changes in school district boundaries, school transportation, extracurricular activities, faculty and staff practices, student assignments, curricula and compensatory education. The United States Court of Appeals for the Fifth Circuit, with certain minor alterations, unanimously affirmed the order of the District Court. The Commissioner and the Texas Education Agency then applied to the Fifth Circuit for a stay of its order pending action by this Court on the applicants' petition for certiorari yet to be filed. The Court of Appeals refused the stay. The application for stay has now been presented to me as the Circuit Justice for the Fifth Circuit.

It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch. *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 437–438 (1968); see *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971); *United States* v. *Montgomery County Board of Education,* 395 U. S. 225 (1969). I cannot say that four Members of this Court are likely to vote to hear this case and undo what has been ordered by the District Court and Court of Appeals below.

My views need not be expressed at length. The question of granting certiorari will have to be decided by this Court when the petition properly reaches us. For me, as one Member of this Court, to grant a stay now would mean inordinate delay and would unjustifiably further postpone the termination of the dual school system that the order below was intended to accomplish. The Dis-

trict Court's opinion and order are comprehensive and well reasoned. In my judgment the facts found by the District Court, which do not appear to be materially disputed by the applicants, fully justify the order.

Under these circumstances I deny the stay and let the matter await final decision before the full Court when the petition for certiorari is properly presented for consideration. The stay is denied.

It is so ordered.

RUSSO *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A–159. Decided August 16, 1971

Where the United States Attorney represented that no wiretaps had been used in the case being investigated by the grand jury, and where the applicant grand jury witness presented no evidence or probable cause for believing that his wires or the wires of others had been tapped or his privacy otherwise invaded, applicant's civil contempt sentence for refusal to answer questions propounded by the grand jury would not be stayed pending a petition for a writ of certiorari where the sole ground for the refusal was the allegation that wiretaps had been used.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant has been sentenced in a civil contempt proceeding for refusal to answer questions before a grand jury. Judge Barnes of the Court of Appeals for the Ninth Circuit issued a stay until August 9, 1971, to permit an application for a further stay to this Court. MR. JUSTICE BLACK continued the stay until August 16, 1971, so that I would have time to consider the matter at my home in Goose Prairie, Washington.

I have gone over the application and the opposition filed by the United States, and I deny the stay.

The principal question sought to be raised concerns the standing of grand jury witnesses, under the Omnibus Crime Control and Safe Streets Act of 1968, to raise the question whether the appearance and examination of a witness before a grand jury resulted from illegal electronic surveillance.*

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*Title 18 U. S. C. § 2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing,

The question is an important one on which there seems to be conflict among the Circuits. Compare *In re Evans,* 146 U. S. App. D. C. 310, 452 F. 2d 1239, and *In re Egan,* 450 F. 2d 199 (CA3) (both holding that a grand jury witness has standing to object to illegal wiretaps), with *Bacon* v. *United States,* 446 F. 2d 667 (CA9), and *United States* v. *Parnas,* 443 F. 2d 837 (CA9) (to the contrary). But in this case, the United States represented to the District Court that "no wiretaps of any kind were used in this case." Applicant, so far as I can ascertain, did not present any evidence of or indicate probable cause for believing (or even suspecting) that his wires had been tapped or that wires of others had been tapped with the result that his privacy had been implicated. There must be some credible evidence that the prosecution violated the law before ponderous judicial machinery is invoked to delay grand jury proceedings.

Denied.

It is so ordered.

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or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Title 18 U. S. C. § 2518 (10) (a) provides, in part:

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

CORPUS CHRISTI SCHOOL DISTRICT ET AL. *v.* CISNEROS ET AL.

ON APPLICATION FOR REINSTATEMENT OF STAY

No. A–192. Decided August 19, 1971

Stay of District Court's order to stop alleged school discrimination practices, vacated by Court of Appeals, is reinstated to permit action on the merits since case presents questions that should be considered by the full Court.

MR. JUSTICE BLACK, Circuit Justice.

The District Judge in this case ordered the Corpus Christi Independent School District to stop alleged historical practices of discrimination against school children on the basis of race or color. He directed how this was to be accomplished, saying at the same time that he would grant no stays of his order. The school district asked the court to stay its order and a stay was granted by a different district judge who had been assigned to hear the application. The plaintiffs, parents of the students allegedly discriminated against, then asked the United States Court of Appeals for the Fifth Circuit to vacate the stay. A panel of two Circuit Court judges did vacate the stay. The school district then applied to me as a single Justice to reinstate the stay issued by the District Court for the Southern District of Texas. The Solicitor General of the United States has joined in requesting me as a single Justice to reinstate that stay. If I reinstate the stay, the District Court's order will not go into effect until the Fifth Circuit or this Court has had an opportunity to pass on it.

It is apparent that this case is in an undesirable state of confusion and presents questions not heretofore passed on by the full Court, but which should be. Under these circumstances, which present a very anomalous, new, and

confusing situation, I decline as a single Justice to upset the District Court's stay and, therefore, I reinstate it without expressing any view as to the wisdom or propriety of the Solicitor General's position. The stay will be reinstated pending action on the merits in the Fifth Circuit or action by the full Court.

LOPEZ *v.* UNITED STATES

ON APPLICATION FOR BAIL PENDING APPEAL

No. A–132. Decided August 23, 1971

Applicant, whose conscientious objector claim matured after receipt of his induction notice, was convicted for refusing to submit to induction. He thereafter sought modification of his sentence to enable him to submit to induction and obtain from the Army a ruling on his claim. He asserts Army regulations in force at the time of his induction did not permit such in-service review, and that the relief he seeks is implicitly authorized by *Ehlert* v. *United States,* 402 U. S. 99. His appeal now pending in the Court of Appeals concerns the propriety of such a procedure. *Held:* Applicant should be released on his own recognizance pending disposition of his appeal.

See: 322 F. Supp. 852.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant Lopez was indicted and convicted for refusing to submit to induction. He claimed at trial that he was entitled to a hearing before his local board on his conscientious objector claim which had matured after receipt of the induction notice. At the time applicant received his order to report for induction, however, the law in the Ninth Circuit did not allow the filing of an application for exemption as a conscientious objector after an induction notice had been issued.[1] We noted in *Ehlert* v. *United States,* 402 U. S. 99 (1971), decided after applicant's conviction, that the Army agreed a draftee could have a hearing on such a claim after induction; and we held that such a hearing, though post-induction, satisfied the requirements of the Military

[1] *Ehlert* v. *United States,* 422 F. 2d 332 (CA9 1970), aff'd, 402 U. S. 99 (1971), which set forth the Ninth Circuit rule, was decided Feb. 2, 1970. Applicant received his notice of induction Mar. 3, 1970, and failed to submit Mar. 17, 1970.

Selective Service Act of 1967. Relying on this opinion, the Court of Appeals affirmed Lopez' conviction.

Applicant claims, however, that Army regulations in force at the time of his induction date did not permit him the post-induction hearing to which we held Ehlert was entitled,[2] and he now seeks a modification of his sentence which will enable him to submit to induction and to obtain thereafter the Army's ruling on his conscientious objector claim. The appeal now waiting argument in the Court of Appeals concerns the propriety of such a procedure. The question seems to me a substantial one, and applicant has proved himself to be bailworthy, as he has twice before been ordered released on his personal recognizance in connection with this litigation. Pending disposition of the appeal, applicant Lopez should be released on his personal recognizance in the form and manner provided at an earlier stage of this litigation.

It is so ordered.

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[2] From Nov. 9, 1962, until Aug. 15, 1970, Army Regulation AR 635–20, ¶ 3 (b), provided that requests for discharge after entering military service would not be favorably considered when based "solely on conscientious objection which existed, but which was not claimed *prior to induction,* enlistment, or entry on active duty or active duty for training." (Emphasis supplied.)

GUEY HEUNG LEE ET AL. *v.* JOHNSON ET AL.

ON APPLICATION FOR STAY PENDING APPEAL

No. A–203. Decided August 25, 1971

Application for stay of District Court's order reassigning pupils of Chinese ancestry to other San Francisco public schools to correct past patterns of *de jure* racial segregation is denied as school desegregation plan offered by school board and approved by District Court seems well within established legal bounds.

See: 339 F. Supp. 1315.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicants are Americans of Chinese ancestry, who seek a stay of a Federal District Court's order reassigning pupils of Chinese ancestry to elementary public schools in San Francisco. The order was made in a school desegregation case, the San Francisco Unified School District having submitted a comprehensive plan for desegregation which the District Court approved.

There are many minorities in the elementary schools of San Francisco; and while the opinion of the District Court mentions mostly the blacks, there are in addition to whites, Chinese, Japanese, Filipinos, and Americans both of African and Spanish ancestry. The schools attended by the class here represented are filled predominantly with children of Chinese ancestry—in one 456 out of 482, in another 230 out of 289, and in a third, 1,074 out of 1,111.

Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry.* That was the classic case of *de jure* segrega-

*Until 1947, the California Education Code provided:

"§ 8003. *Schools for Indian children, and children of Chinese, Japanese, or Mongolian parentage: Establishment.* The governing board of any school district may establish separate schools for

tion involved in *Brown* v. *Board of Education*, 347 U. S. 483, relief ordered, 349 U. S. 294. Schools once segregated by state action must be desegregated by state action, at least until the force of the earlier segregation policy has been dissipated. "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15. The District Court in the present case made findings that plainly indicate the force of the old policy has persisted: "[T]he school board . . . has drawn school attendance lines, year after year, knowing that the lines maintain or heighten racial imbalance . . . ." And further, that no evidence has been tendered to show that since *Brown I* "the San Francisco school authorities had ever changed any school attendance line for the purpose of reducing or eliminating racial imbalance." *Johnson* v. *San Francisco Unified School District*, 339 F. Supp. 1315, 1318–1319 (ND Cal. 1971).

Brown v. *Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. See *Yick Wo* v. *Hopkins*, 118 U. S. 356. The theme of our school desegregation cases extends to all

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Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage.

"§ 8004. *Same: Admission of children into other schools.* When separate schools are established for Indian children or children of Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school."

These provisions were eventually repealed. 1947 Cal. Stats., c. 737, § 1.

racial minorities treated invidiously by a State or any of its agencies.

It is not for me to approve or disapprove the plan; that is a matter that goes to the merits and the appeal has not been heard. The plan, however, has earmarks of a thoughtful plan, at least measured by some of the thoughtful concerns of the Chinese community. The District Court ruled:

> "Bi-lingual classes are not proscribed. They may be provided in any manner which does not create, maintain or foster segregation.
>
> "There is no prohibition of courses teaching the cultural background and heritages of various racial and ethnic groups. While such courses may have particular appeal to members of the particular racial or ethnic group whose background and heritage is being studied, it would seem to be highly desirable that this understanding be shared with those of other racial and ethnic backgrounds." 339 F. Supp., at 1322.

And the District Court concluded:

> "The Judgment and Decree now to be entered is of less consequence than the spirit of community response. In the end, that response may well be decisive in determining whether San Francisco is to be divided into hostile racial camps, breeding greater violence in the streets, or is to become a more unified city demonstrating its historic capacity for diversity without disunity.
>
> "The school children of San Francisco can be counted upon to lead the way to unity. In this and in their capacity to accept change without anger, they deserve no less than the whole-hearted support of all their elders." 339 F. Supp., at 1323.

The decree has been strenuously opposed. Upon application by applicants, the Court of Appeals for the Ninth Circuit entered a temporary stay pending a hearing in the District Court. Four days later, however, the Court of Appeals vacated that stay *sua sponte*. The District Court then denied the stay. Thereupon a different three-judge panel of the Court of Appeals heard oral argument on the motions for a stay and denied those motions.

I see no reason to take contrary action. So far as the overriding questions of law are concerned the decision of the District Court seems well within bounds. See *Keyes* v. *Denver School District*, 396 U. S. 1215 (BRENNAN, J., in chambers). It would take some intervening event or some novel question of law to induce me as Circuit Justice to overrule the considered action of my Brethren of the Ninth Circuit.

Application for stay denied.

JEFFERSON PARISH SCHOOL BOARD ET AL. *v.* DANDRIDGE ET AL.

ON APPLICATION FOR STAY

No. A–231. Decided August 30, 1971

There being no more than the normal difficulties incident to the transition from a dual to a unitary school system, there is no basis for staying the District Court's order to desegregate the Jefferson Parish, Louisiana, public schools, which have been involved in litigation for seven years.

MR. JUSTICE MARSHALL, Circuit Justice.

On August 10, 1971, the Federal District Court for the Eastern District of Louisiana ordered the Jefferson Parish School Board to implement, beginning on August 31, 1971, the plan for desegregation of the public schools of said parish which had been submitted to the court eight days earlier. Having been denied stays of that order by the District Court and the United States Court of Appeals for the Fifth Circuit, the Board seeks a stay here.

Hearing was had in the District Court on the feasibility of beginning the desegregation process without delay. The evidence there adduced demonstrated that the parish would undoubtedly experience those difficulties normally incident to the transition from a dual to a unitary school system. Recognizing the existence of these difficulties, the District Court nonetheless correctly applied the law as developed by this Court in concluding:

> "The fact that a temporary, albeit difficult, burden may be placed on the School Board in the initial administration of the plan or the fact that some schools may not begin the school year in a routinely smooth fashion does not justify in these circumstances the continuation of a less than unitary school system and the resulting denial of an equal educa-

tional opportunity to a certain segment of the Parish school children."

The devastating, often irreparable, injury to those children who experience segregation and isolation was noted 17 years ago in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). This Court has repeatedly made it clear beyond any possible doubt that, absent some extraordinary circumstances, delay in achieving desegregation will not be tolerated. See, *e. g.*, *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U. S. 226 (1969); *Keyes* v. *Denver School District*, 396 U. S. 1215 (1969) (BRENNAN, J., in chambers).

There are no unusual circumstances in this case. The schools involved have been mired in litigation for seven years. Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. The rights of children to equal educational opportunities are not to be denied, even for a brief time, simply because a school board situates itself so as to make desegregation difficult.

The stay is accordingly denied.

WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION *v.* SCOTT ET AL.

ON APPLICATION TO STAY ORDER OF COURT OF APPEALS PENDING WRIT OF CERTIORARI

No. A–233 (71–274). Decided August 31, 1971

Following the decision in *Swann* v. *Board of Education,* 402 U. S. 1, the Court of Appeals remanded this school desegregation case to the District Court with instructions to obtain a new plan from the School Board to give effect to *Swann*. The Board, considering itself required to do so, submitted, under protest, a revised plan designed "to achieve a racial balance" throughout the system. On July 26, 1971, the District Court accepted the plan for the school year commencing August 30, 1971. On August 23 the Board applied for the instant stay, to which response was received on August 26. The Board has stated, as to travel time, merely that the "average time" of travel is one hour. The stay is denied, as on this inadequate record it cannot be determined with assurance whether the lower courts correctly read *Swann*'s holdings negating any constitutional requirements of racial balance or racial quotas and suggesting limits for student transportation.

See: 444 F. 2d 99.

MR. CHIEF JUSTICE BURGER, Circuit Justice.

The Board of Education of the Forsyth County, North Carolina, school system has applied for a stay of a decision of the United States Court of Appeals for the Fourth Circuit, dated June 10, 1971, and subsequent orders of the United States District Court for the Middle District of North Carolina entered pursuant thereto, pending disposition of the Board's petition for writ of certiorari to review the decision of the Court of Appeals. The operative order of the District Court is dated July 26, 1971; it adopts a plan for pupil assignment designed to desegregate the public schools of Forsyth County.

The affected schools were already scheduled to open Monday, August 30.

The application for a stay was filed August 23, 1971, and the response thereto on August 26, 1971, making that date the earliest possible date for this Court or a Justice to act on the stay.

The background is of some importance.

Respondents, who are Negro pupils and parents in the school system, commenced action alleging that the School Board was operating a dual school system, and seeking appropriate relief. The school system embraces both rural and urban areas in a county school system. The District Court found that in December 1969 there were 67 schools in the system with approximately 50,000 students. The total student population was 72.5% white and 27.5% Negro. Of the schools, 15 were all-Negro and seven were all-white. Of the remaining schools, 31 had less than 5% of the minority race. The school system was operated under a geographical attendance zone system, with freedom-of-choice transfer provisions for all students regardless of race.

Prior to this Court's holding in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), the plaintiffs submitted a plan devised by their consultant, Dr. Larsen; it was designed to achieve as closely as possible a mathematical racial balance in all of the schools of the system equal to that in the system as a whole. It employed satellite zoning and extensive cross-busing. The District Court rejected the plan as not constitutionally required and unduly burdensome.

The School Board then submitted its plan for the 1970–1971 school year to the court for approval. It retained geographic zoning and freedom-of-choice transfer provisions, but with certain modifications allowing priority to majority-to-minority transfers and increasing the racial "balance" of several schools. The District

Court in 1970 approved the Board's plan, subject to alterations which prevented minority-to-majority transfers, made changes affecting three attendance zones, and added a requirement that the Board create "innovative" programs designed to increase racial contact of students.

In rejecting the Larsen plan and approving the modified Board plan, the District Court found that the boundaries of the attendance zones had been drawn in good faith and without regard to racial considerations, and to ensure that, so far as possible, pupils attended the schools nearest their home, taking into account physical barriers, boundaries, and obstacles that might endanger children in the course of reaching their schools. The District Court at that time was of the view that the "neighborhood" school concept could not be the basis of assignment if residence in a neighborhood was denied or compelled because of race, but went on to find that the racial concentration of Negroes was not caused by public or private discrimination or state action but by economic factors and the desire of Negroes to live in their own neighborhoods rather than in predominately white neighborhoods. That finding has not been reviewed. Finally, the District Court found that the School Board had acted consistently in good faith, and was of the view that good faith "is a vital element in properly evaluating local judgment in devising compliance plans." 317 F. Supp. 453, 476 (1970).

The District Court's order was rendered in the summer of 1970 and all parties appealed to the Court of Appeals for the Fourth Circuit. While that appeal was pending, this Court decided *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), and related cases. See *Davis* v. *Board of School Commissioners of Mobile County,* 402 U. S. 33 (1971); *McDaniel* v. *Barresi,*

402 U. S. 39 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43 (1971).

In light of the *Swann* holding, the Court of Appeals by *per curiam* opinion *en banc* remanded this and several other cases to their respective district courts with instructions to receive from the school boards new plans "which will give effect to *Swann* and *Davis*." 444 F. 2d 99, 100 (1971). In its remand, the Court of Appeals stated in part:

> "It is now clear, we think, that in school systems that have previously been operated separately as to the races by reason of state action, 'the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.' *Davis, supra,* at 37.
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> . . . . .
>
> "If the district court approves a plan achieving less actual desegregation than would be achieved under an alternate proposed plan it shall find facts that are thought to make impracticable the achieving of a greater degree of integration, especially if there remain any schools all or predominately of one race.
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> . . . . .
>
> "In *Winston-Salem/Forsyth County,* the school board may fashion its plan on the Larsen plan with necessary modifications and refinements or adopt a plan of its choice which will meet the requirements of *Swann* and *Davis*." 444 F. 2d, at 100–102.

On remand, the District Court interpreted the order of the Court of Appeals to mean that because the State of North Carolina formerly had state-enforced dual school systems, declared unconstitutional in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), the pupil

assignment plan in Forsyth County had to be substantially revised to "achieve the greatest possible degree of desegregation." It concluded that:

> "Despite the substantial difference between the findings of this Court, which formed the predicate for this Court's June 25, 1970 opinion in this case, and the findings which form the predicate of the decision of the District Court in *Swann,* it is apparent that it is as 'practicable' to desegregate all the public schools in the Winston-Salem/Forsyth County system as in the Charlotte-Mecklenburg system and that the appellate courts will accept no less. Consequently, this Court can approve no less. . . ."

The District Court then ordered the School Board to comply with the time schedule set by the Court of Appeals in submitting the required plan. Just why the District Judge undertook an independent, subjective analysis of how his case compared factually with the *Swann* case—something he could not do adequately without an examination of a comprehensive record not before him—is not clear.

The school authorities, declaring that they considered themselves "required" to do so, adopted a revised pupil assignment plan which was expressly designed "*to achieve a racial balance* throughout the system which will be acceptable to the Court." (Emphasis added.) Prior to the adoption of the revised plan, the school system transported about 18,000 pupils per day in about 216 buses. The drafters of the revised plan estimated that it would require at a minimum, with use of staggered school openings, 157 additional buses to transport approximately 16,000 additional pupils.

The Board submitted the plan to the District Court under protest and voiced strong objections to its adoption. A Board resolution submitted with the plan stated

in conclusion that it was submitted to "accomplish *the required objective* of achieving a racial balance in the public schools . . . [but it] is not a sound or desirable plan, and should not be required . . . ." (Emphasis added.) On July 26, 1971, the District Court accepted the plan, noting that it was "strikingly similar" to the Larsen plan which it had previously refused to implement as not constitutionally required.

On August 23, the School Board applied to me, as Circuit Justice, for a stay pending disposition by the Court of its petition for writ of certiorari, filed the same day, seeking review of the remand order of the Court of Appeals; the response was received, as previously noted, August 26, 1971. The Board states that it has not applied previously to either the District Court or the Court of Appeals for a stay because the language of the decisions and orders of those courts makes it clear that neither would grant a stay and because there was not time to do so prior to the opening of the new school year.

In its present posture this stay application, like that presented to MR. JUSTICE BLACK and acted on by him August 19, 1971, in *Corpus Christi Independent School District* v. *Cisneros, ante,* p. 1211, "is in an undesirable state of confusion . . . ."

To begin with, no reasons appear why this application was not presented to me at an earlier date, assuming that I accept the explanation tendered for failure to present it to the Court of Appeals. The time available between receipt of the application and response and the opening of the school term August 30 was not sufficient to deal adequately with the complex issues presented. The application for stay is further weakened by the absence of specific allegations as to the time of travel or other alleged hardships involved in the added bus transportation program. Specific reference to the travel time in

relation to the age and grade of particular categories of students is not disclosed. To assert, as the applicants do, that the "average time" of travel is one hour conveys very little enlightenment to support an application to stay the order of a District Court, however reluctantly entered by that court, especially an order dealing with a school term opening so soon after the motion was first presented. The "average" travel time may be generally relevant but whether a given plan trespasses the limits on school bus transportation indicated in *Swann*, 402 U. S., at 29, 30, 31, cannot be determined from a recital of a "one hour average" travel time.[1]

The Board's resolution reciting that it was adopting the revised plan under protest, on an understanding that it was *required* to achieve a fixed "racial balance" that reflected the total composition of the school district is disturbing. It suggests the possibility that there may be some misreading of the opinion of the Court in the *Swann* case. If the Court of Appeals or the District Court read this Court's opinion as requiring a fixed racial balance or quota, it would appear to have overlooked specific language of the opinion in the *Swann* case to the contrary. Rather than trying to interpret or characterize a holding of the Court, a function of the Court itself, I set forth verbatim the issues seen by the Court

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[1] By way of illustration, if the record showed—to take an extreme example of a patent violation of *Swann*—that the average time was *three* hours daily or that some were compelled to travel three hours daily when school facilities were available at a lesser distance, I would not hesitate to stay such an order forthwith until the Court could act, at least as to the students so imposed on. The burdens and hardships of travel do not relate to race; excessive travel is as much a hardship on one race as another. The feasibility of a transfer program to give relief from such a patently offensive transportation order as the one hypothesized, would also be relevant.

in *Swann* and the essence of the Court's disposition of those issues:

> "The central issue in this case is that of student assignment, and there are essentially four problem areas:
>
> "(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;
>
> "(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
>
> "(3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and
>
> "(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation." 402 U. S., at 22.

After discussing the problem, the opinion concluded:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, *that approach would be disapproved and we would be obliged to reverse.* The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U. S., at 24. (Emphasis added.)

Nothing could be plainer, or so I had thought, than *Swann*'s disapproval of the 71%–29% racial composition found in the *Swann* case as the controlling factor in assignment of pupils, simply because that was the racial composition of the whole school system. Elsewhere in the *Swann* opinion we had noted the necessity for a district court to determine what in fact was the racial balance as an obvious and necessary starting point to

decide whether in fact any violation existed; we concluded, however, that "the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." 402 U. S., at 25.

Since the second aspect of this case falls within the fourth question postulated by the Court in *Swann* it may be useful to refer to the Court's response to that question. After noting that 18 million students were transported to schools by bus in this country in 1969–1970, the Court concluded:

> "The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, *Davis, supra.* The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.
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> . . . . .
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> ". . . In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.
>
> "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary

> with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." 402 U. S., at 29–31.

No prior case had dealt directly with bus transportation of students in this context or the limits on the use of transportation as part of a remedial plan, or with racial balancing.

This case is further complicated by what seems to me some confusion respecting the standards employed and the findings made by the District Court and the terms of the remand order of the Court of Appeals. Under *Swann* and related cases of April 20, 1971, as in earlier cases, judicial power can be invoked only on a showing of discrimination violative of the constitutional standards declared in *Brown* v. *Board of Education,* 347 U. S. 483 (1954). In findings dated June 25, 1970, the District Court sent the case back to the School Board for changes to eliminate the dual school system; it approved the plan submitted subject to several modifications. The modified plan was before the Court of Appeals when this Court decided the *Swann* case. The Court of Appeals in its remand following the decision in *Swann* did not reverse the District Court's findings, but, rather, directed reconsideration in light of *Swann.* In the circumstances that was an appropriate step. The present status of the findings is not clear to me, but the District Court on reconsideration following the remand seems to have thought that it was compelled to achieve a fixed racial balance reflecting the composition of the total county system. The explicit language of the Court's opinion in *Swann* suggests a possible confusion on this point. I do

not attempt to construe that language, but simply recite it verbatim: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U. S., at 24.

On the record now before me it is not possible to conclude with any assurance that the District Court in its order dated July 26, 1971, and the Court of Appeals in its remand dated June 10, 1971, did or did not correctly read this Court's holding in *Swann* and particularly the explicit language as to a requirement of fixed mathematical ratios or racial quotas and the limits suggested as to transportation of students. The record being inadequate to evaluate these issues, even preliminarily for the limited purposes of a stay order, and the heavy burden for making out a case for such extraordinary relief being on the moving parties, I am unwilling to disturb the order of the District Court dated July 26, 1971, made pursuant to the remand order of the Court of Appeals which is sought to be reviewed here.[2]

The application for stay is denied.

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[2] In their petition for a writ of certiorari in this Court, the petitioners have elected to seek review here of the remand order of the Court of Appeals of June 10, 1971, rather than having the substantive order of the District Court dated July 26, 1971, first reviewed in the Court of Appeals.

HARRIS *v.* UNITED STATES

ON APPLICATION FOR BAIL PENDING APPEAL

No. A-145. Decided August 31, 1971

In the circumstances of this case, the application for bail pending appeal from a narcotics conviction should not be denied since applicant's appellate contentions concerning the nature and quantum of proof are not frivolous and there is no substantial evidence that he is a flight risk.

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for bail pending appeal to the Court of Appeals for the Ninth Circuit. Both the District Court and the Court of Appeals have previously denied similar applications, and their action is entitled to great deference. *Reynolds* v. *United States,* 80 S. Ct. 30, 4 L. Ed. 2d 46 (1959). Nevertheless, "where the reasons for the action below clearly appear, a Circuit Justice has a non-delegable responsibility to make an independent determination of the merits of the application." *Id.,* at 32, 4 L. Ed. 2d, at 48. Fed. Rule Crim. Proc. 46 (a)(2); 18 U. S. C. §§ 3146, 3148. Accord, *Sellers* v. *United States,* 89 S. Ct. 36, 21 L. Ed. 2d 64 (1968). While there is no automatic right to bail after convictions, *Bowman* v. *United States,* 85 S. Ct. 232, 13 L. Ed. 2d 171 (1964), "[t]he Command of the Eighth Amendment that 'Excessive bail shall not be required . . .' *at the very least* obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." *Sellers, supra,* at 38, 21 L. Ed. 2d, at 66. The Bail Reform Act of 1966, 18 U. S. C. §§ 3146, 3148, further limits the discretion of a court or judge to deny bail, as it provides that a person *shall* be entitled to bail pending appeal, if that appeal is not frivolous or taken for delay, or "unless the court or judge has reason to believe that no one or more

conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." § 3148.

Applying these principles, my examination of the papers submitted by applicant and by the Solicitor General in opposition persuade me that the Government has not met its burden of showing that bail should be denied.

The primary ground upon which the Solicitor General opposes bail is that "[t]here are no substantial questions raised" by the appeal. It is true that the questions raised relate primarily to evidentiary matters. It is settled, however, that these are within the purview of review of an application of this kind, and that they may raise nonfrivolous—indeed, even "substantial"—questions. See, *e. g., Wolcher* v. *United States,* 76 S. Ct. 254, 100 L. Ed. 1521 (1955).

Applicant principally argues that there was no evidence in the record from which an inference is permissible that he knew that a truck guided by him and a co-defendant, in a separate vehicle, from one location in Los Angeles to another location in that city contained unlawfully imported narcotics. It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process. See *Adderley* v. *Florida,* 385 U. S. 39, 44 (1966). See also *Johnson* v. *Florida,* 391 U. S. 596 (1968); *Thompson* v. *Louisville,* 362 U. S. 199 (1960). The quantum and nature of proof constitutionally required to support an inference of knowledge in narcotics offenses is not always an easy question. Cf. *Turner* v. *United States,* 396 U. S. 398 (1970); *Leary* v. *United States,* 395 U. S. 6 (1969). Applicant cites a case from the Ninth Circuit as a factually similar example in which a conviction for a narcotics offense was reversed for lack of proof of knowledge that another possessed the contraband. While I

express no opinion on the merits of the analogy, Circuit Justices have granted bail pending appeal based in part on similar claims of failure of proof. See, *e. g.*, *Brussel* v. *United States,* 396 U. S. 1229 (1969).

Applicant also challenges the hearsay testimony of an informer as to a Tijuana phone number given to him by a reputed Mexican narcotics trafficker. Other evidence demonstrated that applicant's codefendant called this number several times prior to the importation of the contraband in July 1969. The implication, presumably, is that the prior calls were made to arrange the shipment. The hearsay declaration, however, was made over a year after the codefendant's phone calls occurred, and the common scheme sought to be proven had been terminated. Under these circumstances, the admissibility of this declaration as a hearsay exception is not free from doubt. Cf. *Fiswick* v. *United States,* 329 U. S. 211 (1946).

Assuming this testimony is otherwise admissible, applicant argues it is not the "best evidence" of the registration of the phone number. While it is true that Mexican phone company records were beyond the subpoena power of the court, and that courts have held that secondary evidence may be used without further ado in such a case, see, *e. g.*, *Hartzell* v. *United States,* 72 F. 2d 569 (CA8 1934), applicant's argument is nevertheless not without merit:

> "[T]he policy of the original document requirement, and probably the weight of reason, supports the view of those courts equally numerous who demand . . . that before secondary evidence is used, the proponent must show either that he has made reasonable efforts without avail to secure the original from its possessor, or circumstances which persuade the court that such efforts would have been fruitless."

C. McCormick, Evidence § 202, p. 415 (1954), and cases cited. It is noteworthy in this regard that the District Court rejected evidence offered by applicant tending to show that the phone number in question was not registered to the purported narcotics trafficker before December 1970.

I cannot say that these contentions are all frivolous. The District Judge stated in his opinion denying bail that "[n]o objections were interposed to the telephone calls to Tiajuana [*sic*] made by co-defendant." He made no mention, however, of applicant's challenge to the hearsay declaration of the Mexican narcotics trafficker. If this challenge should prevail, "it might well tip the scales in defendant's favor, as it goes to the heart of the case." *Wolcher, supra,* at 255, 100 L. Ed., at 1523.*

Where an appeal is not frivolous or taken for delay, bail "is to be denied only in cases in which, from substantial evidence, it seems clear that the right to bail

*Applicant also renewed at trial, and raises here, a question of substantial nature which was before this Court last Term. The District Court in this case entered a pretrail order suppressing the contraband found in the truck. However, the Ninth Circuit reversed, on an interlocutory appeal by the Government. It felt that the actions of the customs agents constituted an "extended border search," justified by the fact that the truck had been under continuous surveillance from the time it crossed the Mexican border. I granted a stay of the Court of Appeals' interlocutory judgment pending disposition of the petition for certiorari; partly because of questions concerning the propriety of the interlocutory procedure, but also because of the differing approaches used by the Ninth and the Fifth Circuits to justify extended border searches. *Harris* v. *United States,* 400 U. S. 1211 (1970). The full Court, however, denied certiorari. *Harris* v. *United States,* 400 U. S. 1000 (1971). This action does not necessarily indicate a view as to the merits of either of the questions above. Possibly the interlocutory posture of the case was the determining factor. Nevertheless, applicant's Fourth Amendment claims have not been considered in the decision to grant this application. Cf. *Drifka* v. *Brainard,* 89 S. Ct. 434, 21 L. Ed. 2d 427 (1968).

may be abused or the community may be threatened by the applicant's release." *Leigh* v. *United States*, 82 S. Ct. 994, 996, 8 L. Ed. 2d 269, 271 (1962); accord, *Rehman* v. *California*, 85 S. Ct. 8, 13 L. Ed. 2d 17 (1964). According to the Solicitor General, the District Judge denied bail in part because "there was reason to believe that defendant, who had no employment, would not respond to required future appearances and would be a danger to the community." Applicant's Bail Reform Act form indicates, however, that he is a self-employed auto mechanic making $150 per week, that he has lived in Los Angeles for the past eight years, that he has several relatives, including his mother and a sister, living there, and that he has never failed to make a required court appearance while on bail. The moving papers further indicate that applicant was at liberty after sentencing, pursuant to a stay of execution granted by the Court of Appeals, and that he voluntarily submitted to the authorities upon the expiration of the stay. There is not such "substantial evidence" in this record to justify denying bail on the ground that applicant is a flight risk.

Furthermore, a far stronger showing of danger to the community must be made than is apparent from this record to justify a denial of bail on that ground. See, *e. g.*, *United States* v. *Erwing*, 280 F. Supp. 814 (ND Cal. 1968). Accordingly, bail should be granted pending disposition of the appeal in this case, pursuant to the standards set forth in the Bail Reform Act.

It is so ordered.

GOMPERTS ET AL. *v.* CHASE ET AL.

ON APPLICATION FOR INJUNCTION PENDING FILING OF A PETITION FOR WRIT OF CERTIORARI

No. A-245. Decided September 10, 1971

Although Sequoia Union High School District in San Mateo, California, maintains school facilities for blacks that are inferior to those that it maintains for whites, in apparent violation of *Plessy* v. *Ferguson,* 163 U. S. 539, application for a preliminary injunction pending petition for a writ of certiorari is denied where school is scheduled to open in three days and where the school schedule may be imperiled by further delay.

See: 329 F. Supp. 1192.

MR. JUSTICE DOUGLAS, Circuit Justice.

I have reluctantly concluded to deny the motion for a preliminary injunction. Though the equities are on the side of the applicants, the application comes late, the school year opens Monday next, and the alternative to the present inadequate plan may be complete confusion. An opinion is being filed in Washington, D. C.

William O. Douglas
Yakima, Washington

This case—before me on a motion for a preliminary injunction which both the District Court and the Court of Appeals for the Ninth Circuit have denied—presents novel and unresolved issues of constitutional law, which have been argued at the hearing this day at Yakima, Washington. The Board of Trustees of Sequoia Union High School District in San Mateo County, California, designed and approved a high school integration plan dated June 24, 1970, to become effective September 13, 1971, when the school year opens. It was designed to effect the substantial integration of blacks, Chicanos,

and whites. The county was divided in opinion on the matter, and as the result of an election in the spring of 1971, new school trustees were chosen who helped make up a new majority which modified the Board's earlier action. That is the plan of the Board, dated July 7, 1971. It is argued that the modifications will substantially restore the prior-existing segregated high school regime. It is said in reply that the modified plan is based on voluntary transfers which it is hoped will mean that some 600 whites will move into black schools and some 400 blacks will move into white schools. The mandatory aspect of the June 24, 1970, plan was suspended for the school year 1971–1972. This action was brought by blacks and whites under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 to end the racially segregated school regime. The case has not been heard on the merits and, as I have indicated, the new school year starts in less than a week.

If this were the classical *de jure* school segregation, the injunction plainly should be granted. But the precise contours of *de jure* segregation have not been drawn by the Court. Historically, it meant the existence of state-created dual school systems. That is to say, *de jure* segregation was a mandate by the legislature, carried into effect by a school board, whereby students were assigned to schools solely by race. *E. g., Gong Lum* v. *Rice,* 275 U. S. 78; *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528. As I indicated the other day in my opinion in *Guey Heung Lee* v. *Johnson, ante,* p. 1215, California had such a dual system until recent years. In the *Guey Heung Lee* case it was apparent that the force of that custom had not been spent even though the statute providing for the establishment of separate schools had been repealed, because the San Francisco School Board continued meticulously to draw racial lines in spite of the repeal of the statute.

So far as I can tell, a different history has prevailed in San Mateo County, or at least it is not apparent from this record that California's earlier dual school system shaped the existing San Mateo school system. The main argument now is that other state action created *de jure* segregation in San Mateo County:

> (1) California's Bayshore Freeway effectively isolated the blacks and resulted in a separate and predominantly black high school.
>
> (2) State planning groups fashioned and built the black community around that school.
>
> (3) Realtors—licensed by the State—kept "white property" white and "black property" black.
>
> (4) Banks chartered by the State shaped the policies that handicapped blacks in financing homes other than in black ghettoes.
>
> (5) Residential segregation, fostered by state enforced restrictive covenants, resulted in segregated schools.

Whether any of these factors add up to *de jure* segregation in the sense of that state action we condemned in *Brown* v. *Board of Education,* 347 U. S. 483, is a question not yet decided.

If I assume, *arguendo,* that they do not establish *de jure* segregation, another troublesome question remains. There can be *de facto* segregation without the State's being implicated in the actual creation of the dual system. But even when there is *de facto* segregation, the problem is not necessarily resolved.

Plessy v. *Ferguson,* 163 U. S. 537, decided in 1896, held that public facilities could be separate for the races provided they were equal. If San Mateo County maintains a public school for blacks that is not equal to the one it maintains for whites, is there a remedy? There is a showing here that the State is maintaining a

segregated school system for the blacks and Chicanos that is inferior to the schools it maintains for the whites.

Prior to *Brown* v. *Board of Education,* we held over and again that a black offered inferior public education to that which the State gave the whites must be admitted to the white school. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sweatt* v. *Painter,* 339 U. S. 629; *Sipuel* v. *Board of Regents of the University of Oklahoma,* 332 U. S. 631; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.

Must not a school board fashion a plan that makes the majority race, and not the minority races alone, share in the unequal facilities designed by the State for part of its educational regime and make sure that the minorities, to the extent feasible, have the opportunity to share the superior facilities with the majority?

There is evidence in this case that Ravenswood High School—the one that is predominantly black—is an inferior school. In fact, the Department of Health, Education, and Welfare reported in 1969 that: "The quality of educational services and opportunities provided at Ravenswood High School does not meet the level of that provided in the other schools in the District." The California Association of School Administrators, the California School Boards Association, and the California Teachers Association in May 1969 made a similar report entitled Sequoia Union High School District. The plan of June 24, 1970, was designed to rectify that situation. The plan of July 7, 1971, however, modified the earlier plan and takes, at most, only minimal steps towards equalizing the educational opportunities at the district's high schools.

The remedies, if any, that are available where school segregation is *de facto* and not *de jure* are not yet clear. But *Plessy* v. *Ferguson* has not yet been overruled on its mandate that separate facilities be equal. Where

public schools for blacks or Chicanos are not equal to schools for whites, I see no answer to the argument that school boards can rectify the situation among the races by designing a system whereby the educational inequalities are shared by the several races. That seems to me to be an acceptable alternative to removing the inequalities through an upgrading of the subnormal school.

As I understand this case, the July 7, 1971, plan presumptively collides with the basic principle of equal protection expressed in *Plessy* v. *Ferguson*. Under normal circumstances the injunction should therefore issue. The difficulty is that this is September 10 and the San Mateo schools open on September 13. No one knows what plan would be substituted by the school board for the July 7, 1971, plan should I issue the stay. The June 24, 1970, plan is no longer a plan of the school board. The time is so short that further delay may indeed imperil the new school year. I have, therefore, reluctantly concluded that the lateness of the hour makes it inappropriate for me to grant the interim relief.

It is so ordered.

PRYOR *v.* UNITED STATES

ON APPLICATION FOR STAY OF MANDATE OR, IN THE ALTERNATIVE, FOR CONTINUATION OF BAIL PENDING CERTIORARI

No. A–403. Decided October 29, 1971

Since three members of the Court have manifested their willingness in the past to consider certain aspects of constitutional questions arising from conscription for a presidential war, bail shall be continued in this case, which involves one such issue, pending disposition of applicant's petition for certiorari.

See: 448 F. 2d 1273.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant is a Jehovah's Witness who was convicted for failing to report for civilian work in lieu of induction. The Court of Appeals for the Ninth Circuit affirmed his conviction, rejecting, *inter alia*, applicant's argument that forced alternate service in the absence of a congressional declaration of war violated his rights under the First Amendment. He seeks a stay of the mandate of the Court of Appeals or, in the alternative, a continuation of bail pending disposition of his petition for certiorari.

I have expressed at length my view that the constitutional questions raised by conscription for a presidential war are justiciable, substantial, and should be reviewed by this Court. *Hart* v. *United States*, cert. denied, 391 U. S. 956 (DOUGLAS, J., dissenting); *Holmes* v. *United States*, cert. denied, 391 U. S. 936 (DOUGLAS, J., dissenting). MR. JUSTICE BRENNAN, this term, has also dissented from the denial of certiorari in cases raising this issue. See, *e. g.*, *Thompson* v. *United States*, cert. denied, *ante*, p. 916; *Gidmark* v. *United States*, cert. denied, *ante*, p. 868. MR. JUSTICE STEWART has in the past indicated a willingness to consider aspects of the problem. *Holmes*

v. *United States, supra* (Memorandum of STEWART, J.). There are now two vacant seats on the Court. Moreover, three out of seven are enough to grant a petition for certiorari.

In light of the foregoing, I no longer feel precluded, *Drifka* v. *Brainard,* 89 S. Ct. 434, 21 L. Ed. 2d 427, from granting such relief as is requested here. Bail will therefore be continued in the same amount and under the same conditions as presently in effect, pending disposition of the petition for certiorari.

It is so ordered.

KADANS *v.* COLLINS ET AL.

ON APPLICATION FOR TEMPORARY RELIEF

No. A–784 (71–463). Decided January 31, 1972

Application for temporary relief allowing petitioner to practice law pending consideration of petition for rehearing by the Court denied by JUSTICE DOUGLAS, because of the nature of the relief requested and because he was not one of the majority who voted to deny the petition for certiorari.

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MR. JUSTICE DOUGLAS, Circuit Justice.

The petition for certiorari in this case was denied by the Court on January 10, 1972, MR. JUSTICE BRENNAN and I noting that we voted to grant. *Ante,* p. 1007.

Petitioner now asks me for temporary relief allowing him to practice law pending consideration by the Court on a petition for rehearing. The difficulty is that the grant of that relief would in effect be a partial grant of relief sought in the petition for certiorari. I, one of the dissenting Justices, am barred by our Rule 58 (1) from voting on a petition for rehearing, those petitions being considered only by those "who concurred in the judgment or decision." Unless one of the majority who voted to deny votes to reopen the case, the dissenters take no part. If one who voted to deny changes his mind and votes to grant the petition, then of course the entire Court participates. But in light of this rule and in light of our practice and in consideration of the nature of the relief that is being asked of me, I herewith deny the application.

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Appointment of counsel—Court of Appeals—Petition for certiorari.—Where Court of Appeals (apparently on basis of inapplicability of court rule) denied motion of petitioner as claimed indigent for appointment of counsel to assist in preparing petition for writ of certiorari, case remanded for reconsideration of motion in light of any relevant provisions of Criminal Justice Act. Doherty v. United States, p. 28.

CRIMINAL LAW. See **Aliens; Appeals; Appointment of Counsel; Bail,** 1–2; **Certiorari; Confessions; Conscientious Objectors; Constitutional Law,** I; II, 2–4; III, 2–3; IV; **Contempt,** 2–3; **Criminal Justice Act; Evidence; Federal-State Relations; Habeas Corpus,** 1; **Indigents; Jurisdiction,** 3; **Mootness,** 1; **Omnibus Crime Control and Safe Streets Act; Pleas; Procedure,** 1–2, 5–6, 10, 12; **Sentences,** 1–2; **Statute of Limitations,** 2; **Transcripts,** 1–2.

CROSS-EXAMINATION. See **Automobile Accidents; Constitutional Law,** II, 1.

DAMAGES. See **Admiralty; Longshoremen; Prisoners; Procedure,** 7.

DANGER TO COMMUNITY. See **Bail,** 2.

DECEDENTS' ESTATES. See **Constitutional Law,** III, 1.

DECEPTIVE DEVICES. See **Securities Exchange Act of 1934,** 1.

DECLARATORY RELIEF. See **Mootness,** 3; **Procedure,** 8.

DE FACTO SEGREGATION. See **School Desegregation,** 4.

DEFENDANT'S RECORD. See **Procedure,** 10; **Sentences,** 1.

DEFENSE. See **Constitutional Law,** II, 3; **Contempt,** 2.

DEFRAUDING CREDITORS. See **Securities Exchange Act of 1934,** 1.

DE JURE SEGREGATION. See **School Desegregation,** 1, 4.

DELAY. See **Constitutional Law,** III, 5; **Procedure,** 11; **School Desegregation,** 4.

DELAY IN PROSECUTION. See **Constitutional Law,** II, 4; IV; **Jurisdiction,** 3; **Statute of Limitations,** 2.

DEPENDENT CHILDREN. See **Constitutional Law,** V; **Social Security Act,** 1–2.

DEPRIVATION OF RIGHTS. See **Prisoners; Procedure,** 7.

DEPUTY COMMISSIONERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

DESEGREGATION. See **Procedure,** 9; **School Desegregation,** 1–5.

DESEGREGATION PLANS. See **School Desegregation,** 6.

DESTROYING COMPETITION. See **Antitrust Acts,** 1.

DETERMINATION OF ADMISSIBILITY. See **Confessions; Evidence; Procedure,** 2.

DIRECT APPEALS. See Jurisdiction, 2; Procedure, 3.

DISABILITY CLAIMS. See Longshoremen's and Harbor Workers' Compensation Act.

DISCIPLINARY CONFINEMENT. See Prisoners; Procedure, 7.

DISCRIMINATION. See Appeals; Constitutional Law, III, 1–2; Indigents; Procedure, 9; School Desegregation; Transcripts.

DISCRIMINATION IN EMPLOYMENT. See Civil Rights Act of 1964; Equal Employment Opportunity Commission.

DISRUPTING COURT. See Contempt, 3.

DISSENTING JUSTICES. See Rehearings.

DISTRIBUTION OF LITERATURE. See Jurisdiction, 4.

DISTRICT COURTS. See Jurisdiction, 4.

DISTRICT JUDGES. See Jurisdiction, 2; Procedure, 3.

DISTRICTS. See Constitutional Law, III, 4.

DOCKETS. See Federal-State Relations; Procedure, 6.

DOCKS. See Admiralty; Longshoremen.

DOUBLE JEOPARDY. See Constitutional Law, I.

DOW CHEMICAL CO. See Mootness, 2.

DRAFT. See Certiorari; Conscientious Objectors; Procedure, 1.

DRILLING RIGS. See Outer Continental Shelf Lands Act; Statute of Limitations, 1.

DRIVERS' LICENSES. See Automobile Accidents; Constitutional Law, II, 1.

DRIVING WHILE INTOXICATED. See Mootness, 1; Sentences, 2.

DRUGS. See Appointment of Counsel; Bail, 2; Criminal Justice Act.

DRUNK DRIVING. See Mootness, 1; Sentences, 2.

DUAL SCHOOL SYSTEMS. See School Desegregation, 3, 5.

DUE PROCESS. See Automobile Accidents; Bail, 1; Confessions; Constitutional Law, II, 1–5; III, 3; IV; Contempt, 2; Evidence; Jurisdiction, 1, 3; Procedure, 2; Statute of Limitations, 2.

EDUCATION. See School Desegregation, 5.

EDUCATIONAL INSTITUTIONS. See Jurisdiction, 4.

ELECTIONS. See **Constitutional Law**, III, 5; **Freedom of Information Act**; **Intervention**; **Labor-Management Reporting and Disclosure Act**; **National Labor Relations Board**, Procedure, 11.

ELECTORAL DISTRICTS. See **Constitutional Law**, III, 5; **Procedure**, 11.

ELECTRIC UTILITIES. See **Administrative Procedure**; **Federal Power Commission.**

ELECTRONIC SURVEILLANCE. See **Contempt**, 1; **Procedure**, 4.

ELIGIBILITY FOR AID. See **Constitutional Law**, V; **Social Security Act**, 1.

EMPLOYEE HEALTH INSURANCE. See **National Labor Relations Act**, 1, 4.

EMPLOYEE PROTECTION. See **Interstate Commerce Act**; **Railroad Mergers.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964**; **Equal Employment Opportunity Commission**; **Interstate Commerce Act**; **National Labor Relations Act**, 1, 3–4; **Railroad Mergers.**

ENERGY TRANSMISSIONS. See **Administrative Procedure**; **Federal Power Commission.**

ENFORCEMENT PROCEEDINGS. See **Intervention**; **Labor-Management Reporting and Disclosure Act.**

ENJOINING STATE COURTS. See **Injunctions**, 1–2; **National Labor Relations Act**, 2.

ENTRY PERMITS. See **Aliens.**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See also **Civil Rights Act of 1964.**

Civil Rights Act—State agency—Jurisdiction.—Procedure whereby EEOC, after having received written complaint of discrimination in violation of the Act, orally referred it to appropriate state agency, waited until that agency terminated jurisdiction, and then formally filed charge on behalf of complainant without having obtained additional written charge within 30 days of termination of state proceeding, satisfies requirements of §§ 706 (b) and (d) of the Act. Love v. Pullman Co., p. 522.

EQUAL-POPULATION DISTRICTS. See **Constitutional Law**, III, 4.

EQUAL PROTECTION OF THE LAWS. See **Appeals; Bail,** 1; **Constitutional Law,** II, 2; III, 1–5; V; **Habeas Corpus,** 1; **Indigents; Procedure,** 5, 11; **School Desegregation,** 1–3, 5; **Social Security Act,** 1; **Transcripts,** 1.

ESTATES. See **Constitutional Law,** III, 1.

EVIDENCE. See also **Bail,** 2; **Confessions; Constitutional Law,** I; **Intervention; Labor-Management Reporting and Disclosure Act; Longshoremen's and Harbor Workers' Compensation Act; Parole; Prisoners; Procedure,** 2, 7.

Admissibility rulings—Preponderance of the evidence—Confessions.—Petitioner has not demonstrated that admissibility rulings based on preponderance-of-the-evidence standard are unreliable or that imposition of any higher standard under expanded exclusionary rules would be sufficiently productive to outweigh public interest in having probative evidence available to juries. Lego v. Twomey, p. 477.

EXCEPTIONS. See **Freedom of Information Act; Injunctions,** 1–2; **National Labor Relations Act,** 2; **National Labor Relations Board.**

EXCLUSIONARY RULES. See **Confessions; Evidence; Procedure,** 2.

EX-CONVICTS. See **Parole.**

EXEMPTIONS. See **Jurisdiction,** 1.

EXHAUSTION OF REMEDIES. See **Civil Rights Acts; Federal-State Relations; Habeas Corpus,** 1–2; **Procedure,** 5–6.

EXHAUSTION OF STATE REMEDIES. See **Civil Rights Act of 1964; Equal Employment Opportunity Commission.**

EXPERT OPINION. See **Administrative Procedure; Federal Power Commission.**

EXPUNCTION OF CONVICTION. See **Mootness,** 1; **Sentences,** 2.

EXTENUATION. See **Constitutional Law,** II, 3; **Contempt,** 2.

FAIR TRIALS. See **Constitutional Law,** II, 4; IV; **Jurisdiction,** 3; **Statute of Limitations,** 2.

FAMILY AID. See **Constitutional Law,** V; **Social Security Act,** 1.

FAMILY INCOME. See **Social Security Act,** 2.

FEDERAL AGENCIES. See **Injunctions**, 1–2; **National Labor Relations Act**, 2.

FEDERAL MARITIME LAW. See **Admiralty**; **Longshoremen.**

FEDERAL PAROLE BOARD. See **Parole.**

FEDERAL POWER COMMISSION. See also **Administrative Procedure.**

Jurisdiction — Interstate commerce — Electrical energy. — FPC's conclusion that transfer of Florida Power & Light Co. energy to another Florida utility's "bus" (transmission line into which subsidiary lines connect) and simultaneous transfer of power from that utility's "bus" to Georgia company was transmission in interstate commerce, was substantially supported by expert opinion that is in accord with known facts of electricity, and is sufficient to support its jurisdiction. FPC v. Florida Power & Light Co., p. 453.

FEDERAL RULES OF CIVIL PROCEDURE. See **Intervention**; **Labor-Management Reporting and Disclosure Act.**

FEDERAL-STATE RELATIONS. See also **Admiralty**; **Constitutional Law**, V; **Habeas Corpus**, 1; **Injunctions**, 1–2; **Jurisdiction**, 2; **Longshoremen**; **National Labor Relations Act**, 2; **Outer Continental Shelf Lands Act**; **Procedure**, 3, 5–6; **Social Security Act**, 1–2; **Statute of Limitations**, 1.

Habeas corpus—Retention on docket.—Court of Appeals, having determined that state remedies had not been exhausted by respondent, whose habeas corpus petition alleged that he had been tried and sentenced by senile state judge, should not have made implications as it did as to merits of delicate subject involved, and absent special circumstances, should not have ordered District Court, which had dismissed petition, to retain case on docket until respondent had sought state court relief. Slayton v. Smith, p. 53.

FEES. See **Bail**; **Constitutional Law**, II, 2; III, 3.

FELLOW EMPLOYEES. See **Parole.**

FELONIES. See **Appeals**; **Constitutional Law**, III, 2; **Indigents**; **Transcripts**, 1.

FELONS. See **Omnibus Crime Control and Safe Streets Act.**

FIFTH AMENDMENT. See **Automobile Accidents**; **Constitutional Law**, I; II, 1, 4; IV; **Jurisdiction**, 3; **Statute of Limitations**, 2.

FINES. See **Appeals**; **Constitutional Law**, III, 2; **Indigents**; **Transcripts**, 1.

FIREARMS. See **Omnibus Crime Control and Safe Streets Act.**

FIRST AMENDMENT. See **Antitrust Acts**, 1; **Certiorari**; **Jurisdiction**, 1; **Mootness**, 3; **Procedure**, 1, 8.

FIXED STRUCTURES. See **Outer Continental Shelf Lands Act**; **Statute of Limitations**, 1.

FLIGHT RISK. See **Bail**, 2.

FLORIDA. See **Administrative Procedure**; **Federal Power Commission**; **Mootness**, 3; **Procedure**, 8.

FORGED IMMIGRATION DOCUMENTS. See **Aliens.**

FORKLIFT TRUCKS. See **Admiralty**; **Longshoremen.**

FORMER JEOPARDY. See **Constitutional Law**, I.

FOURTEENTH AMENDMENT. See **Appeals**; **Automobile Accidents**; **Bail**, 1; **Confessions**; **Constitutional Law**, II, 1–3; III, 1–5; V; **Contempt**, 2; **Evidence**; **Habeas Corpus**, 1; **Indigents**; **Procedure**, 2, 5, 9, 11; **School Desegregation**, 1–3, 5; **Social Security Act**, 1; **Transcripts.**

FRAUD. See **Securities Exchange Act of 1934**, 1.

FREE AND UNLIMITED ACCESS. See **Antitrust Acts**, 1.

FREEDOM OF INFORMATION ACT. See also **National Labor Relations Board.**

NLRB records—Labor representation elections—Denial of stay.—Stay of District Court's order under the Act that NLRB provide respondents with certain records concerning labor representation elections denied, the Act providing no exception authorizing the refusal to produce the requested records. NLRB v. Getman (BLACK, J., in chambers), p. 1204.

FREE EXERCISE CLAUSE. See **Jurisdiction**, 1.

FREE TRANSCRIPTS. See **Appeals**; **Constitutional Law**, III, 2; **Indigents**; **Procedure**, 12; **Transcripts**, 1–2.

FULL-DEPOSIT BAIL. See **Bail**, 1; **Constitutional Law**, II, 2; III, 3.

GEORGIA. See **Administrative Procedure**; **Federal Power Commission.**

GOOD FAITH. See **Constitutional Law**, I.

GOVERNMENT RECORDS. See **Freedom of Information Act**; **National Labor Relations Board.**

GRAND JURIES. See **Contempt**, 1; **Procedure**, 4.

GUILTY PLEAS. See **Pleas.**

HABEAS CORPUS. See also **Civil Rights Acts; Federal-State Relations; Procedure,** 5–6.

1. *Exhaustion of remedies—Amendment of "John Doe" indictment—Equal protection of the laws.*—Substance of federal habeas corpus claim must in first instance be fairly presented to state courts, and since on record and argument before it Massachusetts' highest court had no fair opportunity to consider and act on the equal protection claim, the Court of Appeals erred in holding that respondent had exhausted his state remedies. Picard v. Connor, p. 270.

2. *State prisoners—Conditions of confinement—Exhaustion of remedies.*—Section 2254 of Title 28 U. S. C. does not erect insuperable barriers to invocation of federal habeas corpus and does not require petitioners to pursue alternative state courses suggested by Court of Appeals since their availability was conjectural, and regardless of remedy invoked, state courts have not granted hearing to state prisoners on conditions of their confinement. Wilwording v. Swenson, p. 249.

HARASSMENT. See **Antitrust Acts,** 1.

HEALTH, EDUCATION, AND WELFARE. See **Social Security Act,** 2.

HEALTH INSURANCE. See **National Labor Relations Act,** 1, 4.

HEARINGS. See **Automobile Accidents; Conscientious Objectors; Constitutional Law,** II, 1; **National Labor Relations Act,** 3.

HEARSAY. See **Bail,** 2.

HIGHER EDUCATION INSTITUTIONS. See **Jurisdiction,** 4.

HIGH SCHOOL STUDENTS. See **Constitutional Law,** V; **Social Security Act,** 1.

HIGHWAY CARRIERS. See **Antitrust Acts,** 1.

HUNG JURY. See **Procedure,** 12; **Transcripts,** 2.

IDAHO. See **Constitutional Law,** III, 1.

IDENTIFICATION OF ALIENS. See **Aliens.**

IDENTITY. See **Constitutional Law,** I.

ILLINOIS. See **Appeals; Bail,** 1; **Confessions; Constitutional Law,** II, 2; III, 2–3; V; **Evidence; Indigents; Prisoners; Procedure,** 2, 7; **Social Security Act,** 1; **Transcripts,** 1.

IMMIGRATION AND NATIONALITY ACT. See **Aliens.**

IMMIGRATION DOCUMENTS. See **Aliens.**

IMMINENT THREAT. See **Contempt**, 3.

IMPRISONMENT. See **Civil Rights Acts**; **Habeas Corpus**, 2.

INADEQUATE RECORD. See **School Desegregation**, 6.

INCREASED SENTENCES. See **Mootness**, 1; **Sentences**, 2.

INDICTMENTS. See **Constitutional Law**, II, 4; IV; **Habeas Corpus**, 1; **Jurisdiction**, 3; **Procedure**, 5; **Statute of Limitations**, 2.

INDIGENTS. See also **Appeals**; **Appointment of Counsel**; **Constitutional Law**, III, 2; **Criminal Justice Act**; **Procedure**, 12; **Transcripts**, 1–2.

Free trial transcripts—Effective review.—Although Illinois must afford indigent defendant a trial " 'record of sufficient completeness' to permit proper consideration of [his] claims," *Draper* v. *Washington*, 372 U. S. 487, 499, it need not necessarily furnish a complete verbatim transcript, but may provide alternatives that accord effective appellate review. Mayer v. City of Chicago, p. 189.

INDUCTION. See **Certiorari**; **Procedure**, 1.

INDUCTION NOTICE. See **Conscientious Objectors.**

INFORMATION. See **Freedom of Information Act**; **National Labor Relations Board.**

INJUNCTIONS. See also **Jurisdiction**, 2; **National Labor Relations Act**, 2; **Procedure**, 3; **School Desegregation**, 4.

1. *Enjoining state court proceedings—NLRB.*—For purpose of preventing frustration of National Labor Relations Act, NLRB has implied authority to obtain federal injunction against state court action pre-empted by the Act; such an injunction falls within exception to 28 U. S. C. § 2283 recognized in *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, for suits brought by the United States, and fact that party moving for injunction is a federal agency and not the Attorney General is irrelevant. NLRB v. Nash-Finch Co., p. 138.

2. *Unfair labor practices—Enjoining state court proceedings.*—Since action here does not seek to restrain unfair labor practices against which NLRB has issued complaint but is based on general doctrine of pre-emption, the exception in 28 U. S. C. § 2283 for matters "necessary in aid of its jurisdiction" is inapplicable. NLRB v. Nash-Finch Co., p. 138.

INJUNCTIVE RELIEF. See **Mootness**, 3; **Procedure**, 8.

INJURIES. See **Admiralty**; **Longshoremen**; **Outer Continental Shelf Lands Act**; **Prisoners**; **Procedure**, 7; **Statute of Limitations**, 1.

INJURY TO INVESTORS. See **Securities Exchange Act of 1934**, 1.

IN-SERVICE DETERMINATIONS. See **Conscientious Objectors.**

INSIDE INFORMATION. See **Securities Exchange Act of 1934**, 2.

INSURANCE BENEFITS. See **National Labor Relations Act**, 1, 4.

INSURANCE COMPANIES. See **Securities Exchange Act of 1934**, 1.

INTERLOCUTORY INJUNCTIONS. See **Jurisdiction**, 2; **Procedure**, 3.

INTERNAL REVENUE SERVICE. See **Jurisdiction**, 1.

INTERRUPTING LEGISLATURE. See **Constitutional Law**, II, 3; **Contempt**, 2.

INTERSTATE COMMERCE. See **Administrative Procedure**; **Federal Power Commission**; **Omnibus Crime Control and Safe Streets Act.**

INTERSTATE COMMERCE ACT. See also **Railroad Mergers.**

Section 5(2)(f)—Railroad merger—Protection of employees.—Section 5 (2) (f) provides mandatory compensation protection for railroad employees affected by a consolidation, and the ICC's approval of a pre-merger collective agreement becomes a "condition" of the ICC's approval of a consolidation under that section. The section's "notwithstanding" proviso affords the machinery for the terms of a pre-merger collective agreement and thus supplies one minimum measure of the required fairness. Norfolk & Western R. Co. v. Nemitz, p. 37.

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Act**; **Railroad Mergers.**

INTERSTATE GRIDS. See **Administrative Procedure**; **Federal Power Commission.**

INTERSTATE POWER TRANSMISSION. See **Administrative Procedure**; **Federal Power Commission.**

INTERVENING LEGISLATION. See **Mootness**, 3; **Procedure**, 8.

INTERVENTION. See also **Labor-Management Reporting and Disclosure Act.**

Union elections—Secretary of Labor—Complainant.—Intervention under Fed. Rule Civ. Proc. 24 (a) is warranted for this petitioner, who initiated the enforcement proceeding with his complaint to the

INTERVENTION—Continued.

Secretary, as he may have a valid complaint about the performance of the Secretary, who protects not only rights of individual union members but also the public interest in free and democratic union elections, two functions that may not always dictate the same approach to conduct of the litigation. Trbovich v. Mine Workers, p. 528.

INVALID CONVICTIONS. See **Procedure**, 10; **Sentences**, 1.

INVESTORS. See **Securities Exchange Act of 1934**, 1.

JAILS. See **Prisoners; Procedure**, 7.

JEFFERSON PARISH. See **School Desegregation**, 3.

JEHOVAH'S WITNESSES. See **Certiorari; Procedure**, 1.

JEOPARDY. See **Constitutional Law**, I; II, 4; IV; **Jurisdiction**, 3; **Statute of Limitations**, 2.

JOB ASSIGNMENTS. See **National Labor Relations Act**, 3.

"JOHN DOE" INDICTMENTS. See **Habeas Corpus**, 1; **Procedure**, 5.

JUDGES. See **Confessions; Evidence; Federal-State Relations; Pleas; Procedure**, 2, 6.

JURIES. See **Confessions; Evidence; Procedure**, 2.

JURISDICTION. See also **Administrative Procedure; Admiralty; Antitrust Acts**; 2; **Civil Rights Act of 1964; Constitutional Law**, II, 4; IV; **Equal Employment Opportunity Commission; Federal Power Commission; Injunctions; Longshoremen; Mootness**, 2; **National Labor Relations Act**, 2; **Procedure**, 3; **Statute of Limitations**, 2.

1. *Revocation of tax exemption—Nonprofit religious corporation—Unconstitutionality of statute.*—This Court has no jurisdiction to entertain direct appeal that Government seeks to take under 28 U. S. C. § 1252 from District Court's decision, which did not hold 26 U. S. C. § 501 (c)(3) unconstitutional as a whole or as applied, but was merely directed at the method and means by which the Internal Revenue Service enforced that section in this case. United States v. Christian Echoes Ministry, p. 561.

2. *Supreme Court—Direct appeal—Order of district judge.*—This Court has no jurisdiction under 28 U. S. C. § 1253 to entertain direct appeal from temporary restraining order issued under 28 U. S. C. § 2284 (3) by single district judge after he had certified request for designation of three-judge court to hear suit for permanent relief. Hicks v. Pleasure House, Inc., p. 1.

JURISDICTION—Continued.

3. *Supreme Court—Motion to dismiss indictment—Pre-accusation delay.*—Motion to dismiss indictment for lack of speedy trial was in nature of confession and avoidance and constituted motion in bar by appellees who had not been placed in jeopardy when District Court ordered dismissal. That order was therefore directly appealable to this Court under former 18 U. S. C. § 3731. United States v. Marion, p. 307.

4. *Three-judge courts — Campus activities — Statewide policy.* — Three-judge court was improperly convened under 28 U. S. C. § 2281 to consider constitutionality of rules for campus distribution of certain literature and for dues solicitation from members of political organizations, since challenged rules do not have statewide applicability or effectuate statewide policy; and appeal from that court's judgment should have been taken to Court of Appeals and not this Court. Board of Regents v. New Left Educ. Project, p. 541.

JURISDICTIONAL DISPUTES. See **National Labor Relations Act**, 3.

JUSTICIABILITY. See **Certiorari; Procedure**, 1.

LABOR. See **Injunctions; National Labor Relations Act**, 2–3.

LABOR DEPARTMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT. See also **Intervention.**

Union elections — Secretary of Labor — Intervention. — There is nothing in the language of Title IV of the Act or its legislative history to bar intervention by union member in a post-election enforcement suit, so long as that intervention is limited to claims of illegality presented by the Secretary's complaint. Trbovich v. Mine Workers, p. 528.

LABOR UNIONS. See **Freedom of Information Act; Interstate Commerce Act; National Labor Relations Board; Railroad Mergers.**

LACHES. See **Outer Continental Shelf Lands Act; Statute of Limitations.**

LEGISLATIVE RESOLUTIONS. See **Constitutional Law**, II, 3; **Contempt**, 2.

LEGISLATURES. See **Constitutional Law**, III, 4.

LESSER-INCLUDED OFFENSES. See **Pleas.**

LICENSES. See **Automobile Accidents; Constitutional Law**, II, 1.

LIQUIDATORS. See **Securities Exchange Act of 1934**, 1.

LITERATURE DISTRIBUTION. See **Jurisdiction**, 4.

LOADING CARGO. See **Admiralty; Longshoremen.**

LOAN COLLATERAL. See **Securities Exchange Act of 1934**, 1.

LONGSHOREMEN. See also **Admiralty; Longshoremen's and Harbor Workers' Compensation Act.**

Loading ship—Injury on pier.—State law and not federal maritime law governs suit by longshoreman injured by alleged defect in his stevedore employer's pier-based forklift truck that he was operating on dock to transfer cargo to point alongside vessel where it was to be hoisted aboard by ship's own gear. Victory Carriers, Inc. v. Law, p. 202.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Deputy Commissioners — Reconsideration of longshoreman's claim.—Section 22 of the Act, permitting a Labor Department Deputy Commissioner "[u]pon his own initiative . . . because of a mistake in a determination of fact" to review compensation claim within one year after rejection and issue new or modified compensation order, authorizes Deputy Commissioner to correct factual errors revealed by wholly new or cumulative evidence or further reflection on initially submitted evidence. O'Keeffe v. Aerojet-General Shipyards, p. 254.

LOUISIANA. See **Outer Continental Shelf Lands Act; School Desegregation**, 3; **Statute of Limitations**, 1.

MAILING BOMBS. See **Constitutional Law**, I.

MALAPPORTIONMENT. See **Constitutional Law**, III, 4.

MANDATORY PRIORITIES. See **Constitutional Law**, III, 1.

MANDATORY SUBJECT OF BARGAINING. See **National Labor Relations Act**, 1, 4.

MANIPULATIVE SCHEMES. See **Securities Exchange Act of 1934**, 1.

MARIHUANA. See **Appointment of Counsel; Criminal Justice Act.**

MARITIME LAW. See **Admiralty; Longshoremen.**

MASSACHUSETTS. See **Habeas Corpus**, 1; **Procedure**, 5.

MEDICARE. See **National Labor Relations Act**, 1, 4.

MERGERS. See **Interstate Commerce Act; Railroad Mergers.**

MEXICO. See **Bail**, 2.

MILITARY SELECTIVE SERVICE ACT. See **Conscientious Objectors.**

MILITARY SERVICE. See **Certiorari; Procedure**, 1.

MISSISSIPPI. See **Constitutional Law**, III, 4.

MISSOURI. See **Civil Rights Acts; Habeas Corpus**, 2.

MISTAKES OF FACT. See **Longshoremen's and Harbor Workers' Compensation Act.**

MISTRIALS. See **Procedure**, 12; **Transcripts**, 2.

MONOPOLIES. See **Antitrust Acts**, 2.

MONOPOLIZING TRANSPORTATION. See **Antitrust Acts**, 1.

MOOTNESS. See also **Procedure**, 8; **Sentences**, 2.

1. *Increased sentence—Completion of sentence—Reconsideration.*—*North Carolina* v. *Pearce*, 395 U. S. 711, does not require that respondent's conviction be invalidated but only that he be resentenced if higher sentence imposed after *de novo* trial was vulnerable under *Pearce*. Since record deals with mootness only from standpoint of conviction *vel non* and does not reveal whether under state law benefits accrue in having sentence reduced after it has been served, case remanded for reconsideration of mootness question. North Carolina v. Rice, p. 815.

2. *Proxy statements—Stockholder's proposal—Conjecture.*—Since it is extremely doubtful that, at the end of three-year period during which Dow Chemical Co. can exclude defeated stockholder proposal from its proxy statement pursuant to SEC rule, respondent will resubmit the proposal and Dow will refuse it, case is now moot. SEC v. Medical Committee for Human Rights, p. 403.

3. *Repeal of statute—New legislation.*—Subsequent repeal of statute authorizing tax exemption for church parking lot used for commercial purposes and enactment of new legislation make relief sought inappropriate. District Court's judgment is vacated and case remanded with leave to appellants to amend pleadings if they desire to attack new statute or show that old one retains some force. Diffenderfer v. Central Baptist Church, p. 412.

MOTIONS IN BAR. See **Constitutional Law**, II, 4; IV; **Jurisdiction**, 3; **Statute of Limitations**, 2.

MOTORISTS. See **Automobile Accidents; Constitutional Law**, II, 1.

MOTOR VEHICLE SAFETY RESPONSIBILITY ACT. See **Automobile Accidents; Constitutional Law**, II, 1.

MULTI-MEMBER DISTRICTS. See **Constitutional Law**, III, 4.

MUNICIPAL ORDINANCES. See **Appeals**; **Constitutional Law**, III, 2; **Indigents**; **Transcripts**, 1.

MURDER. See **Constitutional Law**, I; **Habeas Corpus**, 1; **Procedure**, 5, 12; **Transcripts**, 2.

NARCOTICS. See **Bail**, 2.

NATIONAL LABOR RELATIONS ACT. See also **Injunctions**, 1–2.

1. *Collective bargaining—Retirees' benefits.*—Retirees' benefits are not, within the meaning of §§ 8 (a) (5) and 8 (d) of the Act, a mandatory subject of bargaining as "terms and conditions of employment" of the retirees, as term "employee" excludes retirees. Chemical Workers v. Pittsburgh Glass, p. 157.

2. *Injunctions—Enjoining state court proceedings—Pre-emption.*—For purpose of preventing frustration of National Labor Relations Act, NLRB has implied authority to obtain federal injunction against state court action pre-empted by the Act; such an injunction falls within exception of 28 U. S. C. § 2283 recognized in *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, for suits brought by the United States, and fact that party moving for injunction is a federal agency and not the Attorney General is irrelevant. NLRB v. Nash-Finch Co., p. 138.

3. *Jurisdictional dispute—Agreement to arbitrate—"Parties to the dispute."*—Employers here, both of which have substantial financial stakes in the outcome of the proceeding under § 10 (k) of the Act, were "parties to the dispute" within the meaning of that provision and the NLRB was empowered to determine the jurisdictional dispute where the competing unions, but not the employers, had agreed upon a voluntary method of adjustment. NLRB v. Plasterers' Union, p. 116.

4. *Mandatory subject of bargaining—Retirees' benefits—Active employees.*—Retirees' benefits are not a mandatory subject of bargaining as "terms and conditions of employment" of the active employees in the bargaining unit. Relationship that NLRB asserted exists between bargaining in behalf of retirees and negotiation of active employees' retirement plans is too speculative a foundation on which to base obligation to bargain. Chemical Workers v. Pittsburgh Glass, p. 157.

NATIONAL LABOR RELATIONS BOARD. See also **Freedom of Information Act.**

Freedom of Information Act—Board records—Denial of stay.—Stay of District Court's order under the Act that NLRB provide

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respondents with certain records concerning labor representation elections denied, the Act providing no exception authorizing the refusal to produce the requested records. NLRB v. Getman (BLACK, J., in chambers), p. 1204.

NEEDY CHILDREN. See **Constitutional Law**, V; **Social Security Act**, 1.

NEW JERSEY. See **Social Security Act**, 2.

NEXUS WITH INTERSTATE COMMERCE. See **Omnibus Crime Control and Safe Streets Act.**

NONFELONY OFFENSES. See **Appeals**; **Constitutional Law**, III, 2; **Indigents**; **Transcripts.**

NONPROFIT RELIGIOUS CORPORATIONS. See **Jurisdiction**, 1.

NONREIMBURSABLE FUNDS. See **Social Security Act**, 2.

NORFOLK & WESTERN RAILROAD. See **Interstate Commerce Act**; **Railroad Mergers.**

NORTH CAROLINA. See **Procedure**, 12; **School Desegregation**, 6; **Transcripts**, 2.

NOT-GUILTY PLEAS. See **Pleas.**

NOTICE. See **Constitutional Law**, II, 3; **Contempt**, 2.

NOTICE OF INDUCTION. See **Conscientious Objectors.**

OBSCENITY. See **Jurisdiction**, 2; **Procedure**, 3.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT. See also **Contempt**, 1; **Procedure**, 4.

Possession of firearms—Convicted felons—Nexus with interstate commerce.—It is not clear from language and legislative history of § 1202 (a)(1) of the Act whether or not receipt or possession of firearm by convicted felon has to be shown in individual prosecution to have been connected with interstate commerce. Ambiguity of provision must therefore be resolved in favor of narrower reading that nexus with interstate commerce must be shown with respect to all offenses embraced by the provision. United States v. Bass, p. 336.

ON-THE-JOB CONTACTS. See **Parole.**

OPERATION OF JAILS. See **Prisoners**; **Procedure**, 7.

OPPORTUNITY TO DEFEND. See **Constitutional Law**, II, 3; **Contempt**, 2.

ORDINANCES. See **Appeals; Constitutional Law,** III, 2; **Indigents; Transcripts.**

ORGANIZED TERRITORIES. See **Antitrust Acts,** 2.

ORGANIZING CAMPAIGNS. See **Injunctions,** 1–2; **National Labor Relations Act,** 2.

OUTER CONTINENTAL SHELF LANDS ACT. See also **Statute of Limitations.**

Personal injury action—Statute of limitations.—The Act, as interpreted in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352, requires that a State's statute of limitations be applied to actions for personal injuries occurring on fixed structures on the Outer Continental Shelf. Fact that Louisiana statute is "prescriptive" does not make it inapplicable as federal law under the Act, and a federal court may not apply a laches test to preclude application of the state time limitation. Chevron Oil Co. v. Huson, p. 97.

PARKING LOTS. See **Mootness,** 3; **Procedure,** 8.

PAROLE.

Violation of parole—Fellow employees.—Court of Appeals erred in holding that mere on-the-job contacts with fellow employees with police records is sufficient evidence of parole violation, in the absence of a clear directive of Federal Parole Board to that effect. Arciniega v. Freeman, p. 4.

"PARTIES TO THE DISPUTE." See **National Labor Relations Act,** 3.

PAYMENTS TO VENDORS. See **Social Security Act,** 2.

PENNSYLVANIA RAILROAD. See **Interstate Commerce Act; Railroad Mergers.**

PERSONAL INJURIES. See **Outer Continental Shelf Lands Act; Statute of Limitations,** 1.

PERSONAL RECOGNIZANCE. See **Bail,** 1; **Conscientious Objectors; Constitutional Law,** II, 2; III, 3.

PETITION FOR CERTIORARI. See **Appointment of Counsel; Criminal Justice Act; Rehearings.**

PETROLEUM PRODUCTS. See **Antitrust Acts,** 2.

PICKETING. See **Injunctions,** 1–2; **National Labor Relations Act,** 2–3.

PIERS. See **Admiralty; Longshoremen.**

PLAN OF DESEGREGATION. See **School Desegregation,** 1, 4, 6.

PLASTERERS. See **National Labor Relations Act**, 3.

"PLEA BARGAINING." See **Pleas.**

PLEAS.

Agreement on guilty plea—Prosecutor's promise—Recommendation as to sentence.—Interests of justice and proper recognition of prosecution's duties in relation to promises made in connection with "plea bargaining" require that judgment be vacated and case remanded to state courts for further consideration as to whether circumstances require only that there be specific performance of the agreement on the plea (that the prosecutor would make no recommendation as to sentence), or petitioner should be afforded relief he seeks of withdrawing his guilty plea. Santobello v. New York, p. 257.

POLICE RECORDS. See **Parole.**

POLITICAL ACTIVITIES. See **Jurisdiction**, 1.

POLITICAL SOLICITATIONS. See **Jurisdiction**, 4.

POOR PERSONS. See **Appeals; Constitutional Law**, III, 2; **Indigents; Procedure**, 12; **Transcripts**, 1–2.

POSSESSION OF COUNTERFEIT DOCUMENTS. See **Aliens.**

POSSESSION OF FIREARMS. See **Omnibus Crime Control and Safe Streets Act.**

POST-INDUCTION HEARINGS. See **Conscientious Objectors.**

POWER TRANSMISSION. See **Administrative Procedure; Federal Power Commission.**

PRACTICE OF LAW. See **Rehearings.**

PRE-ACCUSATION DELAYS. See **Constitutional Law**, II, 4; IV; **Jurisdiction**, 3; **Statute of Limitations**, 2.

PRE-EMPTION. See **Injunctions**, 1–2; **National Labor Relations Act**, 2.

PREJUDICE. See **Constitutional Law**, II, 4; IV; **Jurisdiction**, 3; **Statute of Limitations**, 2.

PREPONDERANCE OF THE EVIDENCE. See **Confessions; Evidence; Procedure**, 2.

PRESCRIPTIVE STATUTES. See **Outer Continental Shelf Lands Act; Statute of Limitations.**

PRESIDENTIAL WAR. See **Certiorari; Procedure**, 1.

PRETRIAL RELEASE. See **Bail**, 1; **Constitutional Law**, II, 2; III, 3.

PREVIOUS CONVICTIONS. See **Procedure**, 10; **Sentences**, 1.

PRIORITIES. See **Constitutional Law**, III, 1.

PRISONERS. See also **Procedure**, 7.

Damages for deprivation of rights—Disciplinary punishment—Dismissal of claim.—Prisoner's *pro se* complaint seeking to recover damages for injuries and deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording him opportunity to present evidence on his claims. Haines v. Kerner, p. 519.

PRISONERS' COMPLAINTS. See **Civil Rights Acts**; **Habeas Corpus**, 2.

PRIVACY. See **Contempt**, 1; **Procedure**, 4.

PROBABLE JURISDICTION. See **Constitutional Law**, III, 5; **Procedure**, 11.

PROBATE CODE. See **Constitutional Law**, III, 1.

PROCEDURAL DUE PROCESS. See **Automobile Accidents**; **Constitutional Law**, II, 1.

PROCEDURE. See also **Appeals**; **Appointment of Counsel**; **Bail**, 1; **Certiorari**; **Civil Rights Act of 1964**; **Civil Rights Acts**; **Confessions**; **Conscientious Objectors**; **Constitutional Law**, I; II, 2; III, 2–5; **Contempt**, 1; **Criminal Justice Act**; **Equal Employment Opportunity Commission**; **Evidence**; **Federal-State Relations**; **Habeas Corpus**, 1–2; **Indigents**; **Injunctions**, 1–2; **Intervention**; **Jurisdiction**, 2, 4; **Labor-Management Reporting and Disclosure Act**; **Mootness**, 1–3; **National Labor Relations Act**, 2–3; **Outer Continental Shelf Lands Act**; **Pleas**; **Prisoners**; **School Desegregation**, 2; **Sentences**, 1–2; **Statute of Limitations**, 1; **Transcripts**, 1–2.

1. *Certiorari—Conscription for presidential war—Bail.*—Since three Members of the Court have manifested their willingness in the past to consider certain aspects of constitutional questions arising from conscription for a presidential war, bail is continued in this case, which involves one such issue, pending disposition of applicant's petition for certiorari. Pryor v. United States (DOUGLAS, J., in chambers), p. 1242.

2. *Determination of admissibility—Confessions—Trial judge.*—Procedure followed here comported with requirements of *Jackson* v. *Denno*, 378 U. S. 368, and petitioner was not entitled to have issue of voluntariness of his confession, which had been resolved by trial judge, also submitted to jury for its separate consideration. Nor did

PROCEDURE—Continued.

Duncan v. *Louisiana,* 391 U. S. 145, change rule that determining admissibility of evidence is function of court rather than of the jury. Lego v. Twomey, p. 477.

3. *Direct appeal—Order of district judge—Jurisdiction.*—This Court has no jurisdiction under 28 U. S. C. § 1253 to entertain direct appeal from temporary restraining order issued under 28 U. S. C. § 2284 (3) by single district judge after he had certified request for designation of three-judge court to hear suit for permanent relief. Hicks v. Pleasure House, Inc., p. 1.

4. *Grand jury witness—Refusal to answer—Wiretaps.*—Where prosecutor represented that no wiretaps had been used in case being investigated by grand jury, and where witness presented no evidence or probable cause for believing wires had been tapped, witness' civil contempt sentence for refusal to answer grand jury's questions would not be stayed pending petition of certiorari where sole ground for refusal was allegation of wiretapping. Russo v. United States (DOUGLAS, J., in chambers), p. 1209.

5. *Habeas corpus—Exhaustion of remedies—Equal protection of the laws.*—Substance of federal habeas corpus claim must in first instance be fairly presented to state courts, and since on record and argument before it Massachusetts' highest court had no fair opportunity to consider and act on the equal protection claim, the Court of Appeals erred in holding that respondent had exhausted his state remedies. Picard v. Connor, p. 270.

6. *Habeas corpus—Federal-state relations—Retention on docket.*—Court of Appeals, having determined that state remedies had not been exhausted by respondent, whose habeas corpus petition alleged that he had been tried and sentenced by senile state judge, should not have made implications as it did as to merits of delicate subject involved, and absent special circumstances, should not have ordered District Court, which had dismissed petition, to retain case on docket until respondent had sought state court relief. Slayton v. Smith, p. 53.

7. *Prisoner's complaint — Damages for injuries — Dismissal of claim.*—Prisoner's *pro se* complaint seeking to recover damages for injuries and deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording him opportunity to present evidence on his claims. Haines v. Kerner, p. 519.

8. *Repeal of statute—Amendment of pleadings.*—Subsequent repeal of statute authorizing tax exemption for church parking lot used for commercial purposes and enactment of new legislation make

PROCEDURE—Continued.

relief sought inappropriate. District Court's judgment is vacated and case remanded with leave to appellants to amend pleadings if they desire to attack new statute or show that old one retains some force. Diffenderfer v. Central Baptist Church, p. 412.

9. *School desegregation—Stay.*—Stay of District Court's order to stop alleged school discrimination practices, vacated by Court of Appeals, is reinstated to permit action on the merits since case presents questions which should be considered by the full Court. Corpus Christi School District v. Cisneros (BLACK, J., in chambers), p. 1211.

10. *Sentence—Previous convictions—Invalidity of convictions.*—Where judge in imposing sentence gave explicit consideration to defendant's record of previous convictions, two of which were later determined to be constitutionally invalid, case is remanded for reconsideration of sentence. United States v. Tucker, p. 443.

11. *Supreme Court—Probable jurisdiction—Denial of stay.*—Stay of three-judge District Court judgment in Virginia reapportionment case is denied, as JUSTICE BLACK does not believe that four Justices are likely to note probable jurisdiction in view of fact that District Court order revising electoral districts was substantially unanimous and delay incident to review might further postpone important state elections. Mahan v. Howell (BLACK, J., in chambers), p. 1201.

12. *Transcripts—Retrial—Adequate alternative.*—In narrow circumstances here, where retrial took place in small town before same judge and same counsel and court reporter, who (as was conceded) was well known to counsel and would have read back his notes to defense counsel before second trial had he been asked to do so, a transcript of previous trial was not needed, as adequate alternative was available. Britt v. North Carolina, p. 226.

PROFITS. See **Securities Exchange Act of 1934**, 2.

PROOF. See **Bail**, 2.

PROPOSALS FOR PROXIES. See **Mootness**, 2.

PROSECUTIONS. See **Constitutional Law**, II, 4; IV; **Jurisdiction**; **Statute of Limitations**, 2.

PROSECUTORS. See **Pleas.**

PROTECTING EMPLOYEES. See **Interstate Commerce Act**; **Railroad Mergers.**

PROXY STATEMENTS. See **Mootness**, 2.

PUBLIC INTEREST. See **Intervention**; **Labor-Management Reporting and Disclosure Act.**

PUBLIC SCHOOLS. See **School Desegregation**, 5.

PUBLIC WELFARE. See **Constitutional Law**, V; **Social Security Act**, 1.

PUNISHMENT. See **Appeals**; **Constitutional Law**, III, 2; **Indigents**; **Prisoners**; **Procedure**, 7; **Transcripts**, 1.

PURCHASE OF STOCK. See **Securities Exchange Act of 1934**, 2.

RACIAL BALANCE. See **School Desegregation**, 6.

RACIAL DISCRIMINATION. See **Procedure**, 9; **School Desegregation**, 1–6.

RACIAL QUOTAS. See **School Desegregation**, 6.

RAILROAD MERGERS. See also **Interstate Commerce Act.**

Employee protection — Interstate Commerce Commission approval.—Section 5 (2) (f) of the Interstate Commerce Act provides mandatory compensation protection for railroad employees affected by a consolidation, and the ICC's approval of a pre-merger collective agreement becomes a "condition" of the ICC's approval of a consolidation under that section. The section's "notwithstanding" proviso affords the machinery for the terms of a pre-merger collective agreement and thus supplies one minimum measure of the required fairness. Norfolk & Western R. Co. v. Nemitz, p. 37.

RATIONAL BASIS. See **Constitutional Law**, II, 5.

REAPPORTIONMENT. See **Constitutional Law**, III, 5; **Procedure**, 11.

REAPPORTIONMENT PLANS. See **Constitutional Law**, III, 4.

REASONABLE-DOUBT STANDARD. See **Confessions**; **Evidence**; **Procedure**, 2.

RECOGNIZANCE. See **Bail**, 1; **Constitutional Law**, II, 2; III, 3.

RECOMMENDATIONS AS TO SENTENCE. See **Pleas.**

RECONSIDERATION OF CLAIMS. See **Longshoremen's and Harbor Workers' Compensation Act.**

RECORD. See **School Desegregation**, 6.

RECORD OF DEFENDANT. See **Procedure**, 10; **Sentences**, 1.

RECORDS. See **Freedom of Information Act**; **National Labor Relations Board.**

REDUCTION IN BENEFITS. See **Constitutional Law**, II, 5.

REDUCTION OF SENTENCE. See **Mootness**, 1; **Sentences**, 2.

RE-ENTRY PERMITS. See **Aliens.**

REFUND OF BAIL DEPOSIT. See **Bail,** 1; **Constitutional Law,** II, 2; III, 3.

REGENTS' RULES. See **Jurisdiction,** 4.

REGULATIONS. See **Conscientious Objectors; Social Security Act,** 2.

REHEARINGS.

Dissenting Justices—Supreme Court rules—Application for temporary relief.—Application for temporary relief allowing petitioner to practice law pending consideration of petition for rehearing by the Court denied by MR. JUSTICE DOUGLAS, because of the nature of the relief requested and because he was not one of the majority who voted to deny the petition for certiorari. Kadans v. Collins (DOUGLAS, J., in chambers), p. 1244.

REIMBURSABLE FUNDS. See **Social Security Act,** 2.

RELEASE ON BAIL. See **Bail,** 1; **Constitutional Law,** II, 2; III, 3.

RELIEF. See **Antitrust Acts,** 1; **Civil Rights Acts; Federal-State Relations; Habeas Corpus,** 2; **Injunctions,** 1–2; **Mootness,** 3; **National Labor Relations Act,** 2; **Pleas; Procedure,** 6, 8; **Rehearings.**

RELIGION CLAUSES. See **Mootness,** 3; **Procedure,** 8.

RELIGIOUS CORPORATIONS. See **Jurisdiction,** 1.

REMEDIES. See **Civil Rights Act of 1964; Civil Rights Acts; Equal Employment Opportunity Commission; Federal-State Relations; Habeas Corpus,** 2; **Outer Continental Shelf Lands Act; Procedure,** 6; **Statute of Limitations,** 1.

RENEGOTIATION OF CONTRACTS. See **National Labor Relations Act,** 1, 4.

REPEAL OF STATUTE. See **Mootness,** 3; **Procedure,** 8.

REPORTERS. See **Procedure,** 12; **Transcripts,** 2.

REPRESENTATION ELECTIONS. See **Freedom of Information Act; National Labor Relations Board.**

RESOLUTIONS. See **Constitutional Law,** II, 3; **Contempt,** 2.

RESTRAINT OF TRADE. See **Antitrust Acts,** 1–2.

RETENTION CHARGE. See **Bail,** 1; **Constitutional Law,** II, 2; III, 3.

RETENTION ON DOCKET. See **Federal-State Relations; Procedure,** 6.

RETIRED EMPLOYEES. See **National Labor Relations Act,** 1, 4.

RETRIALS. See **Procedure,** 12; **Transcripts,** 2.

RETROACTIVITY. See **Outer Continental Shelf Lands Act; Statute of Limitations,** 1.

RETROSPECTIVITY. See **Outer Continental Shelf Lands Act; Statute of Limitations,** 1.

REVIEW. See **Jurisdiction,** 2; **Procedure,** 3.

REVOCATION OF PAROLE. See **Parole.**

REVOCATION OF TAX EXEMPTION. See **Jurisdiction,** 1.

RIGHT TO COUNSEL. See **Procedure,** 10; **Sentences,** 1.

RISK OF FLIGHT. See **Bail,** 2.

RULES. See **Appeals; Appointment of Counsel; Constitutional Law,** III, 2; **Criminal Justice Act; Indigents; Jurisdiction,** 4; **Mootness,** 2; **Rehearings; Transcripts,** 1.

RULES OF CIVIL PROCEDURE. See **Intervention; Labor-Management Reporting and Disclosure Act.**

SAFEKEEPING COSTS. See **Bail,** 1; **Constitutional Law,** II, 2; III, 3.

SALARY SUPPLEMENTS. See **Interstate Commerce Act; Railroad Mergers.**

SALE OF STOCK. See **Securities Exchange Act of 1934,** 2.

SAMOA. See **Antitrust Acts,** 2.

SANDUSKY LINE. See **Interstate Commerce Act; Railroad Mergers.**

SAN FRANCISCO. See **School Desegregation,** 1.

SAN MATEO. See **School Desegregation,** 4.

SCHOOL BOARDS. See **School Desegregation,** 1, 4.

SCHOOL DESEGREGATION. See also **Procedure,** 9.

1. *Chinese ancestry—De jure segregation—Denial of stay.*—Application for stay of District Court's order reassigning pupils of Chinese ancestry to other San Francisco public schools to correct past patterns of *de jure* racial segregation is denied, as desegregation plan offered by school board seems well within established legal bounds. Guey Heung Lee v. Johnson (DOUGLAS, J., in chambers), p. 1215.

SCHOOL DESEGREGATION—Continued.

2. *Corpus Christi schools—Elimination of discrimination—Stay reinstated.*—Stay of District Court's order to stop alleged school discrimination practices, vacated by Court of Appeals, is reinstated to permit action on the merits since case presents questions which should be considered by the full Court. Corpus Christi School District v. Cisneros (BLACK, J., in chambers), p. 1211.

3. *Jefferson Parish schools—Transition to unitary system—Normal difficulties.*—There being no more than normal difficulties incident to transition to unitary school system, there is no basis for staying District Court's order to desegregate Jefferson Parish public schools, which have been involved in litigation for seven years. Jefferson Parish School Board v. Dandridge (MARSHALL, J., in chambers), p. 1219.

4. *San Mateo schools—Unequal facilities—Denial of injunction.*—Although San Mateo, California, maintains school facilities for blacks that are inferior to those it maintains for whites, in apparent violation of *Plessy* v. *Ferguson,* 163 U. S. 539, application for preliminary injunction pending petition for writ of certiorari is denied where school is scheduled to open in three days and where school schedule may be imperiled by further delay. Gomperts v. Chase (DOUGLAS, J., in chambers), p. 1237.

5. *Texas public schools—Elimination of racial discrimination.*—Stay of Court of Appeals' judgment affirming District Court's order directing applicants to take affirmative action to eliminate all vestiges of discrimination from Texas schools denied, as the order does no more than endeavor to realize directive of Fourteenth Amendment and decisions of this Court. Edgar v. United States (BLACK, J., in chambers), p. 1206.

6. *Winston Salem schools—Travel time—Inadequate record.*—Stay of Court of Appeals' order in this school desegregation case denied, as on this inadequate record it cannot be determined with assurance whether lower courts correctly read holding of *Swann* v. *Board of Education,* 402 U. S. 1, as negating any constitutional requirements of racial balance or racial quotas and suggesting limits for student transportation. Winston Salem/Forsyth County Bd. of Ed. v. Scott (BURGER, C. J., in chambers), p. 1221.

SCHOOLING. See **Constitutional Law,** V; **Social Security Act,** I.

SEASONAL EMPLOYMENT. See **Interstate Commerce Act; Railroad Mergers.**

SECRETARY OF LABOR. See **Intervention; Labor-Management Reporting and Disclosure Act.**

SECURITIES. See **Securities Exchange Act of 1934**, 1.

SECURITIES AND EXCHANGE COMMISSION. See **Mootness**, 2.

SECURITIES EXCHANGE ACT OF 1934.

1. *Section 10 (b)—Sale of security—Deceptive device.*—Section 10 (b) prohibits the use of any deceptive device in the "sale" of any security by "any person," and it is irrelevant that investor was a corporation rather than an individual; that the fraud was perpetrated by a corporate officer and outside collaborators; that the transaction was not conducted through a securities exchange or an organized market; that proceeds due seller were misappropriated; and that creditors of defrauded corporate seller may be ultimate victims. Supt. of Insurance v. Bankers Life & Cas. Co., p. 6.

2. *Short-swing profits—Sale of stock—Unsuccessful takeover bid.*—Under § 16 (b) of the Act respondent is not liable for profits derived from sale of 9.96% of stock, after a previous disposition of shares for purpose of immunizing disposal of 9.96% from liability, as § 16 (b) provides that corporation may recover profits realized by owner of more than 10% of its shares from purchase and sale of its stock within six-month period, provided owner held more than 10% "both at time of purchase and sale." Reliance Electric Co. v. Emerson Electric Co., p. 418.

SEGREGATION. See **Procedure**, 9; **School Desegregation**, 1–5.

SELECTIVE SERVICE REGULATIONS. See **Conscientious Objectors.**

SENILITY. See **Federal-State Relations; Procedure**, 6.

SENTENCE BY LEGISLATURE. See **Constitutional Law**, II, 3; **Contempt**, 2.

SENTENCES. See also **Federal-State Relations; Mootness**, 1; **Pleas; Procedure**, 6, 10.

1. *Defendant's record—Invalid convictions.*—Where judge in imposing sentence gave explicit consideration to defendant's record of previous convictions, two of which were later determined to be constitutionally invalid, case is remanded for reconsideration of sentence. United States v. Tucker, p. 443.

2. *Trial de novo—Increased sentence—Mootness.*—*North Carolina* v. *Pearce*, 395 U. S. 711, does not require that respondent's conviction be invalidated but only that he be resentenced if higher sentence imposed after *de novo* trial was vulnerable under *Pearce*. Since record deals with mootness only from standpoint of conviction *vel non* and does not reveal whether under state law benefits accrue

SENTENCES—Continued.

in having sentence reduced after it has been served, case remanded for reconsideration of mootness question. North Carolina v. Rice, p. 244.

"SETTLED STATEMENT." See **Appeals; Constitutional Law,** III, 2; **Indigents; Transcripts,** 1.

SEX DISCRIMINATION. See **Constitutional Law,** III, 1.

SHERMAN ACT. See **Antitrust Acts,** 2.

SHIPPING. See **Admiralty; Longshoremen.**

SHORT-SWING PROFITS. See **Securities Exchange Act of 1934,** 2.

SINGLE-MEMBER DISTRICTS. See **Constitutional Law,** III, 4.

SIXTH AMENDMENT. See **Constitutional Law,** II, 4; IV; **Jurisdiction,** 3; **Statute of Limitations,** 2.

SMUGGLING. See **Appointment of Counsel; Bail,** 2; **Criminal Justice Act.**

SOCIAL SECURITY ACT. See also **Constitutional Law,** II, 5; V.

1. *Aid to families with dependent children—College students—Supremacy Clause.*—Under § 402 (a)(10) of the Act, a state plan under the AFDC program must provide that aid to families with dependent children shall be furnished to "all eligible" individuals. Since § 406 (a)(2)(B) makes dependent 18–20-year-olds eligible for benefits whether attending college or a vocational or technical training course, and Congress has authorized no limitation of eligibility standards within the age group, Illinois' program disqualifying college students conflicts with the federal statute and violates the Supremacy Clause. Townsend v. Swank, p. 282.

2. *Payments to vendors—Nonreimbursable funds—Aid to families with dependent children.*—Section 406 does not prohibit New Jersey from making payments directly to vendors who provide goods or services to beneficiaries of AFDC program if such payments are made solely from nonreimbursable state funds. Engelman v. Amos, p. 23.

SOLICITATIONS ON CAMPUS. See **Jurisdiction,** 4.

SOLITARY CONFINEMENT. See **Prisoners; Procedure,** 7.

SPECIFIC PERFORMANCE. See **Pleas.**

SPEEDY TRIAL. See **Constitutional Law,** II, 4; IV; **Jurisdiction,** 3; **Statute of Limitations,** 2.

STATE ASSEMBLY. See **Constitutional Law,** II, 3; **Contempt,** 2.

STATE COURT RULES. See **Appeals; Constitutional Law,** III, 2; **Indigents; Transcripts,** 1.

STATE COURTS. See **Federal-State Relations; Procedure,** 6.

STATE FUNDS. See **Social Security Act,** 2.

STATE LEGISLATURES. See **Constitutional Law,** III, 4.

STATEMENT OF FACTS. See **Appeals; Constitutional Law,** III, 2; **Indigents; Transcripts,** 1.

STATEMENTS. See **Contempt,** 3.

STATE PENITENTIARIES. See **Prisoners; Procedure,** 7.

STATE REMEDIES. See **Civil Rights Act of 1964; Civil Rights Acts; Equal Employment Opportunity Commission; Habeas Corpus,** 2.

STATEWIDE POLICY. See **Jurisdiction,** 4.

STATUTE OF LIMITATIONS. See also **Constitutional Law,** II, 4; IV; **Jurisdiction,** 3; **Outer Continental Shelf Lands Act.**

1. *Personal injury action—Outer Continental Shelf Lands Act.*—Louisiana's one-year statute of limitations should not bar respondent's action for injury sustained on fixed structure on Outer Continental Shelf since retroactive application of that statute under *Rodrigue* v. *Aetna Casualty & Surety Co.,* 395 U. S. 352, would deprive respondent of any remedy at all on the basis of the unforeseeable superseding legal doctrine of that decision. Chevron Oil Co. v. Huson, p. 97.

2. *Speedy trial—Pre-accusation delay.*—Relevant statute of limitations provides a safeguard against possible prejudice resulting from pre-accusation delay, and here appellees were indicted within the applicable limitations period. United States v. Marion, p. 307.

STATUTES. See **Mootness,** 3; **Procedure,** 8.

STATUTORY CONSTRUCTION. See **Omnibus Crime Control and Safe Streets Act.**

STAY. See **Certiorari; Constitutional Law,** III, 5; **Contempt,** 1; **Freedom of Information Act; National Labor Relations Board; Procedure,** 1, 4, 9, 11; **School Desegregation,** 1–3, 5–6.

STEVEDORES. See **Admiralty; Longshoremen; Longshoremen's and Harbor Workers' Compensation Act.**

STOCKHOLDERS' PROPOSALS. See **Mootness,** 2.

STOCK SALES. See **Securities Exchange Act of 1934,** 1.

STUDENT TRANSPORTATION. See **School Desegregation,** 6.

SUCCESSIVE PROSECUTIONS. See **Constitutional Law**, I.

SUMMATION. See **Contempt**, 3.

SUPERINTENDENT OF INSURANCE. See **Securities Exchange Act of 1934**, 1.

SUPERSEDING LEGAL DOCTRINE. See **Outer Continental Shelf Lands Act**; **Statute of Limitations**, 1.

SUPREMACY CLAUSE. See **Constitutional Law**, V; **Social Security Act**, 1.

SUPREME COURT. See also **Jurisdiction**, 1–2, 4; **Procedure**, 3.

1. Allotment of Justices, p. III.

2. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Second Circuit, p. 1054.

3. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Sixth Circuit, p. 996.

4. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Eighth Circuit, p. 1054.

5. Assignment of Mr. Justice Reed (retired) to United States Court of Claims, p. 952.

6. Assignment of MR. JUSTICE STEWART as Circuit Justice for the Fifth Circuit, p. 877.

7. Assignment of MR. JUSTICE MARSHALL as Circuit Justice for the Second Circuit, p. 877.

8. Appointment of Marshal, p. 997.

SUPREME COURT RULES. See **Rehearings.**

SURVEILLANCE. See **Contempt**, 1; **Procedure**, 4.

SUSPENSION OF LICENSES. See **Automobile Accidents**; **Constitutional Law**, II, 1.

TAKEOVER BIDS. See **Securities Exchange Act of 1934**, 2.

TAXES. See **Jurisdiction**, 1.

TAX EXEMPTIONS. See **Jurisdiction**, 1; **Mootness**, 3; **Procedure**, 8.

TELEPHONE CALLS. See **Bail**, 2.

TEMPORARY RELIEF. See **Rehearings.**

TEMPORARY RESTRAINING ORDERS. See **Jurisdiction**, 2; **Procedure**, 3.

TERMS AND CONDITIONS OF EMPLOYMENT. See **National Labor Relations Act**, 1, 4.

TERRITORIES. See **Antitrust Acts**, 2.

TEXAS. See **Jurisdiction**, 4; **Procedure**, 9; **School Desegregation**, 2, 5.

THREATS TO ADMINISTRATION OF JUSTICE. See **Contempt**, 3.

THREE-JUDGE COURTS. See **Jurisdiction**, 2, 4; **Procedure**, 3.

TIJUANA. See **Bail**, 2.

TILE SETTERS. See **National Labor Relations Act**, 3.

TIMELINESS. See **Constitutional Law**, II, 4; IV; **Jurisdiction**, 3; **Outer Continental Shelf Lands Act**; **Statute of Limitations**, 1–2.

TRAFFIC OFFENSES. See **Bail**, 1; **Constitutional Law**, II, 2; III, 3.

TRANSCRIPTS. See also **Appeals**; **Constitutional Law**, III, 2; **Indigents**; **Procedure**, 12.

1. *Appeals—Effective review—Free trial transcripts.*—Although Illinois must afford indigent defendant a trial "'record of sufficient completeness' to permit proper consideration of [his] claims," *Draper* v. *Washington*, 372 U. S. 487, 499, it need not necessarily furnish a complete verbatim transcript but may provide alternatives that accord effective appellate review. Mayer v. City of Chicago, p. 189.

2. *Retrial—Court reporter's notes—Adequate alternatives.*—In narrow circumstances here, where retrial took place in small town before same judge and same counsel and court reporter, who (as was conceded) was well known to counsel and would have read back his notes to defense counsel before second trial had he been asked to do so, a transcript of previous trial was not needed as adequate alternative was available. Britt v. North Carolina, p. 226.

TRANSMISSION OF ELECTRICITY. See **Administrative Procedure**; **Federal Power Commission.**

TRANSPORTATION. See **Antitrust Acts**, 1; **Interstate Commerce Act**; **Railroad Mergers**; **School Desegregation**, 6.

TRAVEL TIME. See **School Desegregation**, 6.

TRIAL DE NOVO. See **Mootness**, 1; **Sentences**, 2.

TRIALS. See **Constitutional Law**, I; II, 4; IV; **Federal-State Relations**; **Jurisdiction**, 3; **Procedure**, 6, 12; **Statute of Limitations**, 2; **Transcripts**, 2.

TRIAL TRANSCRIPTS. See **Appeals**; **Constitutional Law**, II, 2; **Indigents**; **Procedure**, 12; **Transcripts**, 1–2.

TRUCKERS. See **Antitrust Acts**, 1.

UNCONSTITUTIONALITY. See **Jurisdiction**, 1.

UNEQUAL FACILITIES. See **School Desegregation**, 4.

UNFAIR LABOR PRACTICES. See **Injunctions**, 1–2; **National Labor Relations Act**, 2–3.

UNINSURED MOTORISTS. See **Automobile Accidents**; **Constitutional Law**, II, 1.

UNION ELECTIONS. See **Intervention**; **Labor-Management Reporting and Disclosure Act.**

UNIONS. See **Injunctions**, 1–2; **Interstate Commerce Act**; **National Labor Relations Act**, 1–4; **Railroad Mergers.**

UNITARY SCHOOL SYSTEMS. See **School Desegregation**, 3, 5.

UNITED STATES. See **Injunctions**, 1–2; **National Labor Relations Act**, 2.

UNITED STATES TREASURY BONDS. See **Securities Exchange Act of 1934**, 1.

UNIVERSITY OF TEXAS. See **Jurisdiction**, 4.

UNORGANIZED TERRITORIES. See **Antitrust Acts**, 2.

UNSEAWORTHINESS. See **Admiralty**; **Longshoremen.**

UTAH. See **Automobile Accidents**; **Constitutional Law**, II, 1.

VARIANCES. See **Constitutional Law**, III, 4.

VENDOR PAYMENTS. See **Social Security Act**, 2.

VESSELS. See **Admiralty**; **Longshoremen.**

VIOLATION OF PAROLE. See **Parole.**

VIRGINIA. See **Constitutional Law**, III, 5; **Procedure**, 11.

VOCATIONAL STUDENTS. See **Constitutional Law**, V; **Social Security Act**, 1.

VOLUNTARINESS. See **Confessions**; **Evidence**; **Procedure**, 2.

VOTING STOCKHOLDERS. See **Mootness**, 2.

WELFARE ASSISTANCE. See **Constitutional Law**, V; **Social Security Act**, 1.

WELFARE PAYMENTS. See **Social Security Act**, 2.

WEST VIRGINIA. See **Constitutional Law**, II, 5.

WINSTON SALEM. See **School Desegregation**, 6.

WIRETAPS. See **Contempt**, 1; **Procedure**, 4.

WISCONSIN. See **Constitutional Law,** II, 3; **Contempt,** 2.

WITHDRAWAL OF PLEA. See **Pleas.**

WITNESSES. See **Contempt,** 1; **Procedure,** 4.

WORDS AND PHRASES.

1. *"In commerce or affecting commerce."* § 1202 (a), Omnibus Crime Control and Safe Streets Act. United States v. Bass, p. 336.

2. *"Parties to the dispute."* § 10 (k), National Labor Relations Act. NLRB v. Plasterers' Union, p. 116.

3. *"Terms and conditions of employment."* § 8 (d), National Labor Relations Act. Chemical Workers v. Pittsburgh Glass, p. 157.

WORK ASSIGNMENTS. See **National Labor Relations Act,** 3.

WORKMEN'S COMPENSATION. See **Admiralty; Constitutional Law,** II, 5; **Longshoremen.**