

ORDERS FROM FEBRUARY 22 THROUGH  
APRIL 17, 1972

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FEBRUARY 22, 1972

*Affirmed on Appeal*

No. 71-533. NATIVE AMERICAN CHURCH OF NAVAJO-LAND, INC., ET AL. v. ARIZONA CORPORATION COMMISSION. Affirmed on appeal from D. C. Ariz. Reported below: 329 F. Supp. 907.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

This is a direct appeal from the order of a three-judge District Court, convened pursuant to 28 U. S. C. § 2281,<sup>1</sup> denying appellants' prayer for injunctive relief. Jurisdiction over the appeal is based upon 28 U. S. C. § 1253.<sup>2</sup> If the three-judge court were improperly convened, however, the appeal lies not to this Court, but to the Court of Appeals. *Moody v. Flowers*, 387 U. S. 97. My anal-

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<sup>1</sup> Title 28 U. S. C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

<sup>2</sup> Title 28 U. S. C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

DOUGLAS, J., dissenting

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ysis leads me to conclude that a three-judge court was not required, so I would dismiss this appeal.

The controversy involves the efforts of appellant Native American Church of Navajoland, Inc., to obtain a certificate of incorporation from the Arizona Corporation Commission. According to Arizona law, "Any number of persons may associate themselves together and become incorporated for the transaction of any *lawful* business." Ariz. Rev. Stat. Ann. § 10-121 (emphasis supplied). The Commission refused to issue the certificate for the reason that it believed appellant Church's proposed Articles of Incorporation revealed that the organization had an *unlawful* purpose for incorporating, that being "to work for unity in the use of Peyote, as a Sacrament and as a means of divine healing through its Divine Power." It appears to be conceded that the Commission's decision was prompted by the fact that the use, possession, and sale of peyote is made a misdemeanor by Ariz. Rev. Stat. Ann. § 36-1061, and because peyote is subject to regulation as a "dangerous drug" under Ariz. Rev. Stat. Ann. §§ 32-1964 (A)(7), 32-1965, and 32-1975. Appellants then sought declaratory and injunctive relief from the District Court.

Two injunctions were sought. The first asked that the Corporation Commission be enjoined from refusing to grant appellants a certificate of incorporation "for failure to comply with" Ariz. Rev. Stat. Ann. §§ 10-121 and 36-1061. Insofar as this prayer asked to enjoin Commission action taken under color of Ariz. Rev. Stat. Ann. § 10-121, however, it was insufficient to require a three-judge court. Nowhere in their complaint did appellants attack the constitutionality of § 10-121, either on its face or as applied. Indeed, they concede its constitutionality before this Court, stating explicitly that it is "neutral in scope and application." (Reply Brief for Appellants 4.) But, as has been long held, an action to en-

join the allegedly unconstitutional result reached by the Commission in the exercise of its authority under § 10-121 would not sustain the jurisdiction of a three-judge court. *Phillips v. United States*, 312 U. S. 246; *Ex parte Bransford*, 310 U. S. 354; *Ex parte Hobbs*, 280 U. S. 168.

"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*, *supra*, at 361.<sup>3</sup>

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<sup>3</sup> We have recently employed this very distinction in analyzing our jurisdiction under an analogous statute. In *United States v. Christian Echoes National Ministry, Inc.*, 404 U. S. 561, the Government attempted to take a direct appeal from the decision of a one-judge district court that the Internal Revenue Service had improperly revoked Christian Echoes' tax exemption as a religious organization under § 501 (c)(3) of the Code (because of alleged political activity). Our jurisdiction over the appeal depended on the constitutionality of § 501 (c)(3) "as applied," having been called into question by the District Judge's opinion. 28 U. S. C. § 1252. Despite the fact that the District Judge found the Service's interpretation of § 501 (c)(3) violated Christian Echoes' First Amendment rights, we held that his commentary did *not* constitute a finding that the statute was unconstitutional "as applied."

"[T]he 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. . . . The court refused to interpret 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

Moreover, a three-judge court was not required to hear appellants' challenge to the Commission's alleged "enforcement" of the Arizona drug law which was attacked as unconstitutional. The Commission is not authorized by state law to enforce criminal statutes. Its authority extends only to the enforcement of the negative implications of Ariz. Rev. Stat. Ann. § 10-121. Its opinion that the use of peyote in religious sacraments is an unlawful purpose for incorporation does not reflect an official position on the part of those state officers who are charged with law enforcement that members of the Native American Church can be arrested for observing the tenets of their religion. Section 2281 requires that appellants' action be one to restrain "the action of any officer of such State in the enforcement or execution of such statute" and this requirement cannot be circumvented "by join-

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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. Although the construction was based on a constitutional premise, it did not amount to a holding that an Act of Congress is unconstitutional . . . ." *Id.*, at 564-566.

Similarly, the fact that the Arizona Corporation Commission might have infringed appellants' First Amendment rights in its interpretation of the phrase "lawful business" in Ariz. Rev. Stat. Ann. § 10-121 does not mean that appellants' commentary on this action called into question the constitutionality of § 10-121 "as applied." As in *Christian Echoes*, "[a]lthough the [attack] was based on a constitutional premise, it did not amount to a [claim] that [the statute] is unconstitutional," *supra*, at 565-566. Rather, it was merely a challenge to "allegedly erroneous administrative action," *Ex parte Bransford*, 310 U. S. 354, 361.

ing, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute," *Wilentz v. Sovereign Camp*, 306 U. S. 573, 579-580. This prayer, therefore, was also insufficient to require a three-judge court.

Appellants' second prayer for injunctive relief seems at first glance to cure the above-mentioned defects. It prays that the Governor of Arizona "and his subordinate officials, agents, and employees" be restrained from enforcing the Arizona drug laws against appellants "in any way which infringes upon their right to the free exercise of their religion." The difficulty is that, taking the complaint "as we find it," *Moody v. Flowers, supra*, at 104, it nowhere appears that the challenged statutes have ever been, are now, or ever will be enforced against appellants. The complaint, and the motion to dismiss filed in response thereto, permit the inference that Arizona already purports to except the Native American Church from the operation of the challenged laws.<sup>4</sup> An amended complaint might not be open to this criticism. But we require that the substantiality of the federal question presented appear from the face of the pleadings that

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<sup>4</sup> Thus, appellee's motion to dismiss, filed in the court below, contained an affidavit from an official of the Narcotics Enforcement Division of the Arizona Department of Public Safety, wherein he averred that he has been with the Department "since 1966 and during that time they have never arrested any members of the Native American Church of Navajoland where such members were holding an alleged religious ceremony and where there was present at such ceremony only Indians."

At least one Arizona court, moreover, has explicitly ruled that its narcotics statute could not constitutionally be applied to members of the Native American Church. *Arizona v. Attakai*, Cr. No. 4098, Coconino County, July 26, 1960. The State's appeal in *Attakai* was dismissed by the Arizona Supreme Court.

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are filed, not those which might have been. *Oklahoma Gas Co. v. Packing Co.*, 292 U. S. 386; *Arneson v. Denny*, 25 F. 2d 988; *Bunce v. Williams*, 159 F. Supp. 325.

Appellants' failure to come under § 2281 might appear to rest on a view of pleading at a variance with the liberal notions which are said to underlie the Federal Rules. But, as we have often remarked, it is § 2281 which is at variance with our notions of orderly federal procedures. It is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips v. United States*, *supra*, at 251.

We should vacate the judgment below and remand for the entry of a fresh decree, so that appellants might pursue their appropriate remedy in the Court of Appeals. *Moody v. Flowers*, *supra*; *Phillips v. United States*, *supra*.

No. 71-561. *KOEHLER ET AL. v. OGILVIE, GOVERNOR OF ILLINOIS, ET AL.* Affirmed on appeal from D. C. N. D. Ill.

No. 71-658. *QUINCY COLLEGE & SEMINARY CORP. ET AL. v. BURLINGTON NORTHERN, INC., ET AL.* Affirmed on appeal from D. C. N. D. Ill. Reported below: 328 F. Supp. 808.

No. 71-770. *PRINSBURG COOP FERTILIZER CO. ET AL. v. UNITED STATES ET AL.*; and

No. 71-786. *STERNER INDUSTRIES, INC. v. UNITED STATES ET AL.* Affirmed on appeal from D. C. Minn.

No. 71-664. *CLOUD ET AL. v. DEITZ ET AL.* Affirmed on appeal from D. C. E. D. Ky. Mr. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

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*Appeals Dismissed*

No. 71-657. HAWAIIAN LAND CO., LTD. v. DIRECTOR OF TAXATION OF HAWAII. Appeal from Sup. Ct. Hawaii dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 53 Haw. 45, 487 P. 2d 1070.

No. 71-726. JORDAN v. MEISSEN ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 29 N. Y. 2d 661, 274 N. E. 2d 444.

No. 71-767. KAWITT ET AL. v. MAHIN, DIRECTOR OF REVENUE OF ILLINOIS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 49 Ill. 2d 73, 271 N. E. 2d 35.

No. 71-735. REY v. UNITED STATES. 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. Reported below: 441 F. 2d 727.

No. 71-822. KING v. CITY OF SAN BERNARDINO ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71-746. HARGROVE v. NEWSOME ET AL. Appeal from Sup. Ct. Tenn. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Tenn. —, 470 S. W. 2d 348.

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No. 71-831. *GIORDANO ET AL. v. STUBBS ET AL.* 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: 228 Ga. 75, 184 S. E. 2d 165.

No. 71-838. *PHOENIX NEWSPAPERS, INC., ET AL. v. CHURCH.* Appeal from Super. Ct. Ariz., County of Maricopa, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71-5558. *NEWSOME v. NEW YORK.* Appeal from App. Term, Sup. Ct. N. Y., 2d and 11th Jud. Dists., 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.* (See also No. 70-5075, *ante*, p. 1, and No. 71-352, *ante*, p. 9.)

No. 71-298. *ROSENGART v. LAIRD, SECRETARY OF DEFENSE, ET AL.* C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of suggestions of the Solicitor General and upon independent examination of entire record. Reported below: 449 F. 2d 523.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST concur, dissenting.

The Court vacates the judgment of the Court of Appeals, 449 F. 2d 523, and directs that the Court of Appeals consider the views of the United States presented in this case. Finding the suggestions of the United States unacceptable, I dissent from today's judgment.

In its memorandum filed October 13, 1971, in response to the petition for certiorari, the United States asserted that in passing on petitioner's conscientious objector's claim the Army considered petitioner's opposition to war to be sincere and rejected the claim solely because peti-

tioner's views did not qualify as religious under the standards of *Welsh v. United States*, 398 U. S. 333 (1970). It was therefore error, the United States urged, for the Court of Appeals to have put aside the *Welsh* issue and to have affirmed the denial of habeas corpus on insincerity grounds after making an "independent search of the administrative record" to discover a basis in fact for such a judgment.

These assertions were incredible. The Army Review Board, in its final order entered on September 10, 1970, denying the conscientious objector claim, unanimously found that "1LT Rosengart's purported conscientious objector beliefs are not truly held; and that any objection to war in any form he might sincerely hold is based solely on philosophical views and sociological experiences." The plain meaning of this order is that the Board both found that petitioner was not sincere and determined that his views were solely philosophical and sociological.

The Court of Appeals so read the Board's order, saying "[t]he Board found that any conscientious objection held by Rosengart was based solely on philosophical views and sociological experiences (a curious finding in the light of *Welsh*) and that Rosengart's 'purported conscientious [objector] beliefs are not truly held.'" *Supra*, at 528. The Court of Appeals then put aside the issue of whether petitioner's beliefs were religious within the meaning of the Act and affirmed the denial of habeas corpus after agreeing with the District Court that there was a basis in fact for a conclusion of insincerity because the record "cast a cloud upon the sincerity of his professed deeply-held beliefs of conscientious objection." *Ibid.*

There was nothing untoward in the way the Court of Appeals approached the case, particularly since the United States in its October 13 memorandum flatly asserted that there was indeed sufficient evidence in the

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record to support the judgment of insincerity and that "under normal circumstances, such evidence would, in our view, provide ample factual basis for a denial of petitioner's application for discharge."

When asked for further response, the United States filed a supplemental memorandum on December 10, 1971, modifying its position. It now concedes the dual basis of the Board's order and that "[v]iewed solely in light of the September 10 Board decision, the majority's conclusion in this regard is not unwarranted." It also reveals that "[i]ndeed, such a result was suggested by the government's argument below . . . ." Nevertheless, although again not disagreeing "with the conclusion reached by the majority below that there was basis in fact on this record to sustain a finding of 'insincerity' with respect to petitioner's claimed opposition to war," the Government's position in the Court of Appeals is characterized as placing "undue emphasis on the final recommendation of the Army Review Board." It is now urged that the Board's September 10 decision be read in conjunction with its earlier decisions and that in context the Board be deemed to have found petitioner to be sincere.

I find nothing to commend the Government's position in this case. It would be one thing if it forthrightly supported petitioner's sincerity. It is quite another thing to assert that the record supports a judgment of insincerity, and then, notwithstanding this concession, to urge setting aside the final order of the Army Review Board which plainly found petitioner insincere and which the United States does not straightforwardly argue was beyond the power of the Board.

No. 71-5709. *JIMENEZ v. BETO, CORRECTIONS DIRECTOR*. 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*, 404 U. S. 519.

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No. 71-757. *KING ET AL. v. JONES ET AL.* C. A. 6th Cir. Certiorari granted. Judgment of the Court of Appeals vacated and case remanded to the District Court for the Northern District of Ohio with directions to dismiss proceedings as moot. Reported below: 450 F. 2d 478.

*Miscellaneous Orders*

No. A-520. *IN RE DISBARMENT OF SAMPLES.* It having been reported to the Court that Franklin P. Samples of Huntsville, Alabama, has been disbarred from the practice of law by the Supreme Court of Alabama, duly entered September 1, 1971, and this Court by order of November 22, 1971 [404 U. S. 963], having suspended the said Franklin P. Samples 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 the time within which to file a return to the rule has expired;

IT IS ORDERED that the said Franklin P. Samples 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. A-771. *PESOLI ET AL. v. MURPHY ET AL.* C. A. 7th Cir. Application for temporary injunction presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted as to applicant Pesoli, he having been suspended solely on the ground that he invoked the self-incrimination clause of the Fifth Amendment.

No. A-775. *CULADO v. UNITED STATES.* C. A. 2d Cir. Application for stay of mandate presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

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No. A-816. BULLOCK, SECRETARY OF STATE OF TEXAS *v.* WEISER ET AL. D. C. N. D. Tex. Motion of appellees to advance and expedite and to dispense with printing denied.

No. A-822. THORBUS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A-838. WOODSUM *v.* BOYD ET AL. D. C. M. D. Fla. Application for stay order presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. 69-5003. FURMAN *v.* GEORGIA; and

No. 69-5030. JACKSON *v.* GEORGIA. Sup. Ct. Ga. [Certiorari granted, 403 U. S. 952.] Motion of respondent for leave to file supplemental brief, after argument, 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 leave to participate in oral argument denied.

No. 70-5015. ARGERSINGER *v.* HAMLIN, SHERIFF. Sup. Ct. Fla. [Certiorari granted, 401 U. S. 908.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and a total of 20 minutes allotted for that purpose.

No. 70-5276. MUREL ET AL. *v.* BALTIMORE CITY CRIMINAL COURT ET AL. C. A. 4th Cir. [Certiorari granted, 404 U. S. 999.] Motion of petitioners for additional time for oral argument denied. MR. JUSTICE STEWART is of the opinion that the motion should be granted. Motion for additional counsel to argue on behalf of petitioners granted.

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No. 70-5112. *WEBER v. AETNA CASUALTY & SURETY CO. ET AL.* Sup. Ct. La. [Certiorari granted, 404 U. S. 821.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 71-224. *SWENSON, WARDEN v. STIDHAM.* C. A. 8th Cir. [Certiorari granted, 404 U. S. 1058.] Motion of respondent for appointment of counsel granted. It is ordered that Mark M. Hennelly, Esquire, of St. Louis, Missouri, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 71-247. *RABE v. WASHINGTON.* Sup. Ct. Wash. [Certiorari granted, 404 U. S. 909.] Motion of Morality in Media, Inc., for leave to file a brief as *amicus curiae* granted.

No. 71-404. *COLTEN v. KENTUCKY.* Appeal from Ct. App. Ky. [Probable jurisdiction noted, 404 U. S. 1014.] Motion of M. Curran Clem, Esquire, for leave to permit Robert W. Willmott, Jr., Esquire, to argue orally *pro hac vice* on behalf of appellee granted.

No. 71-801. *COUNTY OF ALAMEDA ET AL. v. CALIFORNIA WELFARE RIGHTS ORGANIZATION ET AL.* Appeal from Sup. Ct. Cal. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 5 Cal. 3d 730, 488 P. 2d 953.

No. 71-834. *McCLANAHAN v. ARIZONA TAX COMMISSION.* Appeal from Ct. App. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 14 Ariz. App. 452, 484 P. 2d 221.

No. 71-5656. *PHILPOTT ET AL. v. ESSEX COUNTY WELFARE BOARD.* Sup. Ct. N. J. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 59 N. J. 75, 279 A. 2d 806.

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No. 71-5423. MOSES ET AL. v. WASHINGTON. Sup. Ct. Wash. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 79 Wash. 2d 104, 483 P. 2d 832.

No. 71-982. HALL, SECRETARY OF HUMAN RELATIONS AGENCY, ET AL. v. VILLA ET AL. Sup. Ct. Cal. Motion of Attorney General of California for accelerated consideration of petition and to postpone oral argument in No. 70-5064 [*Jefferson v. Hackney*, probable jurisdiction noted, 404 U. S. 820] denied. Reported below: 6 Cal. 3d 227, 490 P. 2d 1148.

No. 71-5078. PETERS v. KIFF, WARDEN. C. A. 5th Cir. [Certiorari granted, 404 U. S. 964.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 71-5255. BARKER v. WINGO, WARDEN. C. A. 6th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of J. Chester Porter, Esquire, for leave to permit James E. Milliman, Esquire, to argue orally *pro hac vice* on behalf of petitioner granted.

No. 71-5677. JUSTICE v. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. Motion for leave to file and petition for writ of habeas corpus denied.

No. 71-5582. GERARDI v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Motion for leave to file petition for writ of mandamus denied.

#### *Probable Jurisdiction Noted*

No. 71-666. UNITED STATES v. GLAXO GROUP LTD. ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 328 F. Supp. 709.

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No. 71-703. UNITED STATES *v.* FIRST NATIONAL BANCORPORATION, INC., ET AL. Appeal from D. C. Colo. Probable jurisdiction noted. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 329 F. Supp. 1003.

No. 71-749. UNITED STATES *v.* KRAS. Appeal from D. C. E. D. N. Y. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 331 F. Supp. 1207.

*Certiorari Granted*

No. 71-678. EXECUTIVE JET AVIATION, INC., ET AL. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 448 F. 2d 151.

No. 71-485. GOTTSCHALK, ACTING COMMISSIONER OF PATENTS *v.* BENSON ET AL. C. C. P. A. Motions of Information Industry Assn., International Business Machines Corp., and Business Equipment Manufacturers Assn. for leave to file briefs as *amici curiae* granted. Certiorari granted. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of these motions and petition. Reported below: — C. C. P. A. (Pat.) —, 441 F. 2d 682.

No. 71-708. TRAFFICANTE ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Motion to dispense with printing petition and certiorari granted. Reported below: 446 F. 2d 1158.

No. 71-827. HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 71-830. TRANS WORLD AIRLINES, INC. *v.* HUGHES TOOL CO. ET AL. C. A. 2d Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 449 F. 2d 51.

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No. 71-1017. GRAVEL *v.* UNITED STATES; and

No. 71-1026. UNITED STATES *v.* GRAVEL. C. A. 1st Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 455 F. 2d 753.

No. 71-5421. MIDGETT *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 71-5103 [*Morrissey v. Brewer*, certiorari granted, 404 U. S. 999]. Reported below: 443 F. 2d 1090.

No. 71-5685. JOHNSON ET AL. *v.* NEW YORK STATE EDUCATION DEPARTMENT ET AL. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 449 F. 2d 871.

*Certiorari Denied.* (See also Nos. 71-735, 71-822, 71-831, 71-838, 71-5558, and 71-746, *supra*.)

No. 70-5291. MORGAN ET AL. *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71-269. NATIONAL BREWING Co. *v.* CALDWELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 1044.

No. 71-403. GOUGH INDUSTRIES, INC. *v.* ROTHSCHILD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 536.

No. 71-434. LOUISIANA MATERIALS Co., INC. *v.* CRONVICH, SHERIFF, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 258 La. 1039, 249 So. 2d 123.

No. 71-521. DESERT OUTDOOR ADVERTISING, INC., ET AL. *v.* COUNTY OF RIVERSIDE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

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No. 71-655. *CROSBY ET AL. v. UNITED STATES.* C. A. 2d Cir. Certiorari denied.

No. 71-667. *GROSS ET AL. v. WALSH, TRUSTEE IN BANKRUPTCY, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 445 F. 2d 385.

No. 71-669. *UNITED STATES STEEL CORP. v. UNITED STATES;* and

No. 71-673. *UNITED STATES v. UNITED STATES STEEL CORP.* C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 520.

No. 71-670. *SUNNY HILL FARMS DAIRY CO., INC. v. BUTZ, SECRETARY OF AGRICULTURE.* C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 1124.

No. 71-671. *WESTWOOD CHEMICAL, INC. v. OWENS-CORNING FIBERGLAS CORP.* C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 911.

No. 71-676. *COLEMAN v. UNITED STATES.* C. A. 6th Cir. Certiorari denied.

No. 71-677. *WILCOX v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 1131.

No. 71-681. *O'BRIEN v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 643.

No. 71-682. *MICHIGAN v. RANES.* Sup. Ct. Mich. Certiorari denied. Reported below: 385 Mich. 234, 188 N. W. 2d 568.

No. 71-684. *CITY OF COLUMBUS ET AL. v. BOWER ET AL.* Sup. Ct. Ohio. Certiorari denied. Reported below: 27 Ohio St. 2d 7, 271 N. E. 2d 860.

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No. 71-686. BLANKENSHIP, ATTORNEY GENERAL OF OKLAHOMA, ET AL. *v.* OKLAHOMA EX REL. WILSON. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 687.

No. 71-687. SILVA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 449 F. 2d 145.

No. 71-688. LADUCA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71-689. PENNSYLVANIA ET AL. *v.* BAKER ET AL., TRUSTEES IN REORGANIZATION. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 1109.

No. 71-690. ANDERSON ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 447 F. 2d 833.

No. 71-693. REYNOLDS ET AL. *v.* TEXAS GULF SULPHUR Co. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 90.

No. 71-694. LOUISIANA STATE DEPARTMENT OF HIGHWAYS *v.* DARDAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 952.

No. 71-695. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 1341.

No. 71-696. UTICA SQUARE NATIONAL BANK OF TULSA *v.* WOODSON, TRUSTEE. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 241.

No. 71-698. EVANS *v.* DEPARTMENT OF TRANSPORTATION. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 821.

No. 71-699. PONDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 816.

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No. 71-700. *PAIEWONSKY v. PAIEWONSKY*. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 178.

No. 71-704. *SCHANBARGER v. KELLOGG ET AL.* App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 902, 315 N. Y. S. 2d 1013.

No. 71-706. *BUCKLEY ET AL. v. GIBNEY, DEPUTY DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 1305.

No. 71-707. *ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE v. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 456.

No. 71-710. *SCHARFMAN v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 1352.

No. 71-712. *BRIDGES ET AL. v. DAVIS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 970 and 445 F. 2d 1401.

No. 71-719. *BRADLEY LUMBER Co., INC. v. SHARPE ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 446 F. 2d 152.

No. 71-721. *FREEMAN v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 71-722. *AUSTIN v. BERRY BROTHERS OIL FIELD SERVICE, INC., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 887.

No. 71-727. *REGISTER ET AL. v. GEORGIA*. Ct. App. Ga. Certiorari denied. Reported below: 124 Ga. App. 136, 183 S. E. 2d 68.

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No. 71-724. *SKLAROFF v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 77.

No. 71-725. *SCHOOR v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 1312.

No. 71-731. *THOMAS, SHERIFF, ET AL. v. MORGAN*. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 1356.

No. 71-733. *ALLEN ET UX. v. STATE BOARD OF EDUCATION OF NORTH CAROLINA ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 960.

No. 71-736. *DRISCOLL v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 449 F. 2d 894.

No. 71-742. *GOULD ET UX. v. AMERICAN WATER WORKS SERVICE CO., INC., ET AL.* Super. Ct. N. J. Certiorari denied. Reported below: See 59 N. J. Super. 268, 281 A. 2d 530.

No. 71-743. *LOCTITE CORP. v. BROADVIEW CHEMICAL CORP.* C. A. 2d Cir. Certiorari denied.

No. 71-750. *WOLKOMIR ET AL. v. FEDERAL LABOR REGULATIONS COUNCIL ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 71-752. *THOMAS v. OHIO*. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 71-753. *AMERICAN EXPORT ISBRANDTSEN LINES, INC. v. SUN SHIPBUILDING & DRY DOCK CO.* C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 1267.

No. 71-761. *THOMPSON v. BOARD OF COMMISSIONERS OF OAK BROOK PARK DISTRICT OF DU PAGE COUNTY*. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 178, 268 N. E. 2d 570.

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No. 71-762. EDWARD HINES LUMBER Co. v. CENTEX-WINSTON CORP. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 585.

No. 71-764. SCOTT ET AL. v. UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 581.

No. 71-768. WILLIAMS ET UX. v. DILL ET AL. C. A. 5th Cir. Certiorari denied.

No. 71-774. BROCKSTEIN ET AL., DBA CHURCH AVENUE POULTRY v. NATIONWIDE MUTUAL INSURANCE Co. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 987.

No. 71-778. HERRIMAN ET AL. v. MIDWESTERN UNITED LIFE INSURANCE Co. C. A. 7th Cir. Certiorari denied. Reported below: 450 F. 2d 999.

No. 71-779. Dow v. CONNELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 763.

No. 71-780. JOHNSON v. DENNIS, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES. Sup. Ct. Neb. Certiorari denied. Reported below: 187 Neb. 95, 187 N. W. 2d 605.

No. 71-781. COOK INDUSTRIES, INC. v. C. ITOH & Co. (AMERICA), INC. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 106.

No. 71-782. SMITH, SUPERINTENDENT OF INSURANCE, ET AL. v. OHIO VALLEY INSURANCE Co. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 27 Ohio St. 2d 268, 272 N. E. 2d 131.

No. 71-794. JOHNSON v. INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 269 N. E. 2d 879.

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No. 71-785. MARIEMONT, INC. *v.* MASHETER, DIRECTOR OF HIGHWAYS. Sup. Ct. Ohio. Certiorari denied.

No. 71-795. SOUTHERN RAILWAY CO. *v.* CITY OF MORRISTOWN. C. A. 6th Cir. Certiorari denied. Reported below: 448 F. 2d 288.

No. 71-802. BARBARA *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 449 F. 2d 1235.

No. 71-804. WOLFF *v.* KORHOLZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 449 F. 2d 82.

No. 71-808. FLUOR WESTERN, INC. *v.* G & H OFF-SHORE TOWING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 35.

No. 71-811. MARKS *v.* DEMOCRATIC PARTY OF THE UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 71-820. GENERAL MOTORS CORP. *v.* JENKINS. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 377.

No. 71-823. JORGENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 516.

No. 71-825. ENRESCO, INC., ET AL. *v.* VALMONT INDUSTRIES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 1193.

No. 71-835. GIACALONE *v.* LUCAS, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 1238.

No. 71-837. ROPER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: — Ill. App. 2d —, 272 N. E. 2d 667.

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No. 71-841. INDIANA HARBOR BELT RAILROAD CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF INDIANA ET AL. App. Ct. Ind. Certiorari denied. Reported below: — Ind. App. —, 263 N. E. 2d 292.

No. 71-843. COUNTY OF WAYNE ET AL. *v.* JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 386 Mich. 1, 190 N. W. 2d 228.

No. 71-845. MARTIN OIL SERVICE, INC. *v.* ILLINOIS DEPARTMENT OF REVENUE. Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 260, 273 N. E. 2d 823.

No. 71-848. TEDESCO *v.* CINCINNATI GAS & ELECTRIC CO. C. A. 6th Cir. Certiorari denied. Reported below: 448 F. 2d 332.

No. 71-856. SECURITY SAVINGS & LOAN ASSN. ET AL. *v.* WESTINGHOUSE CREDIT CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 387.

No. 71-877. SMITH *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 111 N. H. 249, 279 A. 2d 913.

No. 71-887. WILBUR-ELLIS CO. *v.* THE CAPTAYANNIS "S" ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 973.

No. 71-5242. CALLOWAY ET AL. *v.* LEEKE, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 256 S. C. 167, 181 S. E. 2d 481.

No. 71-5384. CANTRELL *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 71-5409. WAINMAN *v.* CLARK, SHERIFF, ET AL. Sup. Ct. Cal. Certiorari denied.

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No. 71-5371. *BENNETT v. SOUTH CAROLINA*. Sup. Ct. S. C. Certiorari denied. Reported below: 256 S. C. 234, 182 S. E. 2d 291.

No. 71-5440. *ROGERS v. ADAMS, WARDEN, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 71-5441. *INMAN v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied.

No. 71-5466. *MITCHELL v. IDEAL COLLECTION SERVICE, INC.* App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 71-5549. *YOUNG v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 30.

No. 71-5551. *DENTON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 71-5553. *LAWTON v. TARR, NATIONAL DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 446 F. 2d 787.

No. 71-5554. *HOOD v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 380.

No. 71-5556. *NEAL v. GEORGIA ET AL.* C. A. 5th Cir. Certiorari denied.

No. 71-5557. *AUSTIN v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 71-5559. *WILLIS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 963.

No. 71-5561. *WAGGONER v. CALIFORNIA*. C. A. 9th Cir. Certiorari denied.

No. 71-5563. *MAGEE v. REAGAN, GOVERNOR OF CALIFORNIA, ET AL.* C. A. 9th Cir. Certiorari denied.

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No. 71-5566. *RIDGILL v. OTIS, ACTING WARDEN.* C. A. 2d Cir. Certiorari denied.

No. 71-5568. *BRYAN v. KURCEVICH, WARDEN.* C. A. 3d Cir. Certiorari denied.

No. 71-5569. *HAGELBERGER v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 279.

No. 71-5573. *SCOTT v. FIELD, MEN'S COLONY SUPERINTENDENT.* C. A. 9th Cir. Certiorari denied.

No. 71-5574. *WADE v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 15 Cal. App. 3d 16, 92 Cal. Rptr. 750.

No. 71-5575. *EVANS v. EVANS ET AL.* Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 394, 183 S. E. 2d 242 and 245.

No. 71-5576. *BROWN v. UNITED STATES.* C. A. 2d Cir. Certiorari denied.

No. 71-5578. *BATTLE v. MOSELEY, WARDEN, ET AL.* C. A. 10th Cir. Certiorari denied.

No. 71-5579. *DIGGS v. DUNNE ET AL.* Sup. Ct. Ill. Certiorari denied.

No. 71-5584. *OSBORN v. BRIERLEY, CORRECTIONAL SUPERINTENDENT.* C. A. 3d Cir. Certiorari denied.

No. 71-5586. *RUIZ v. BETO, CORRECTIONS DIRECTOR.* C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 811.

No. 71-5589. *SANCHEZ ET AL. v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 204.

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No. 71-5588. *TARLTON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 71-5592. *ORTIZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 164.

No. 71-5593. *RAY v. FOREMAN ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 441 F. 2d 1266.

No. 71-5594. *WHITE v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 250.

No. 71-5595. *FAULKNER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 869.

No. 71-5596. *NEAL v. AMERICAN VETERANS COMMITTEE*. C. A. 5th Cir. Certiorari denied.

No. 71-5597. *OSKINS v. COINER, WARDEN*. Sup. Ct. App. W. Va. Certiorari denied.

No. 71-5598. *ROZENFELD v. NEW YORK BOARD OF PAROLE*. C. A. 2d Cir. Certiorari denied.

No. 71-5600. *TRUDO v. UNITED STATES*; and

No. 71-5612. *TATRO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 649.

No. 71-5602. *ZIMMERMAN v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 71-5603. *HUNTER v. CITY SOLICITOR OF PHILADELPHIA ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 444 F. 2d 1395.

No. 71-5604. *COHEN v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 654.

No. 71-5606. *WILLIAMS v. ROGERS, SECRETARY OF STATE, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 513.

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No. 71-5607. *SPIVEY v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 448 F. 2d 390.

No. 71-5608. *GUILE v. CALIFORNIA.* Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71-5613. *LUMSDEN v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 154.

No. 71-5614. *COLE v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 415.

No. 71-5615. *SULLIVAN v. UNITED STATES.* C. A. 2d Cir. Certiorari denied.

No. 71-5616. *BOYD v. KANSAS.* Sup. Ct. Kan. Certiorari denied. Reported below: 206 Kan. 597, 481 P. 2d 1015.

No. 71-5617. *AGERS v. WASHINGTON.* Sup. Ct. Wash. Certiorari denied.

No. 71-5618. *FINISTER v. WASHINGTON.* Sup. Ct. Wash. Certiorari denied.

No. 71-5619. *SIMS v. McCARTHY, MEN'S COLONY SUPERINTENDENT.* C. A. 9th Cir. Certiorari denied.

No. 71-5620. *ROBINSON, AKA LOPER v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 715.

No. 71-5621. *BASKIN v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 1057.

No. 71-5622. *GAINES ET AL. v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 186.

No. 71-5623. *ANDERSON v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 1379.

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No. 71-5626. *CALABRO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 885.

No. 71-5627. *McDONALD v. WELLONS ET AL.* C. A. 6th Cir. Certiorari denied.

No. 71-5628. *JACKSON, AKA ROBBINS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 281.

No. 71-5629. *JOHNSON v. SALISBURY, CORRECTIONAL SUPERINTENDENT*. C. A. 6th Cir. Certiorari denied. Reported below: 448 F. 2d 374.

No. 71-5630. *DiROSA v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 863.

No. 71-5631. *SCOTT v. HILL ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 449 F. 2d 634.

No. 71-5632. *MEMOLI v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 160.

No. 71-5634. *WHITEHEAD v. MICHIGAN*. Sup. Ct. Mich. Certiorari denied.

No. 71-5635. *JOHNSON v. MANCUSI, CORRECTIONAL SUPERINTENDENT*. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 71-5636. *MOSCATELLO ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 450 F. 2d 985.

No. 71-5637. *UNDERWOOD v. MISSOURI*. Sup. Ct. Mo. Certiorari denied. Reported below: 470 S. W. 2d 485.

No. 71-5639. *Poss v. SMITH, WARDEN*. Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 168, 184 S. E. 2d 465.

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No. 71-5640. *FITZGERALD v. CIVIL SERVICE COMMISSION OF RADNOR TOWNSHIP.* Super. Ct. Pa. Certiorari denied.

No. 71-5641. *CARTER v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 1245.

No. 71-5642. *FOUNTAIN v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 629.

No. 71-5643. *CASELLA v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 277.

No. 71-5644. *EDWARDS v. FISHMAN.* C. A. 7th Cir. Certiorari denied.

No. 71-5646. *BELL v. UNITED STATES.* C. A. D. C. Cir. Certiorari denied.

No. 71-5649. *COLABELLA v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 1299.

No. 71-5650. *NORTHERN v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied.

No. 71-5651. *TREVINO v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 45.

No. 71-5653. *PRESSLEY v. UNITED STATES.* C. A. 5th Cir. Certiorari denied.

No. 71-5654. *WINKFIELD v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

No. 71-5655. *OVERTON v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 1381.

No. 71-5658. *SARRAMEDA v. SECRETARY OF HEALTH, EDUCATION, AND WELFARE.* C. A. 1st Cir. Certiorari denied.

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No. 71-5659. *BROOKS ET AL. v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 1263.

No. 71-5660. *FARRIES v. PARKER, WARDEN.* C. A. 3d Cir. Certiorari denied.

No. 71-5661. *KELSEY v. UNITED STATES.* C. A. 10th Cir. Certiorari denied.

No. 71-5662. *GRAY v. UNITED STATES.* C. A. 4th Cir. Certiorari denied.

No. 71-5663. *TAYLOR v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 448 F. 2d 1280.

No. 71-5664. *BUCHANAN v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. Reported below: 471 S. W. 2d 401.

No. 71-5665. *EARLES v. OHIO.* Sup. Ct. Ohio. Certiorari denied.

No. 71-5667. *AVERY, AKA KENYATTA v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 978.

No. 71-5668. *SERRANO v. HOCKER, WARDEN.* C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 1093.

No. 71-5669. *WRIGHT v. BATESON, INSURANCE COMMISSIONER.* Ct. App. Ore. Certiorari denied. Reported below: 5 Ore. App. 628, 485 P. 2d 641.

No. 71-5670. *ABARCA-ESPINOSA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 1354.

No. 71-5673. *JENNINGS v. ILLINOIS.* App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 147, 267 N. E. 2d 511.

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No. 71-5674. *LOPEZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 169.

No. 71-5676. *YOUNG v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5678. *BULLOCK v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5680. *MURPHY v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5681. *McKILLOP v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5684. *POWELEIT v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5688. *WOODARD v. UNITED STATES*; and

No. 71-5727. *COLE v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 194.

No. 71-5689. *NACHBAUR v. HERMAN*. C. A. 2d Cir. Certiorari denied.

No. 71-5691. *HUFFMAN v. MOORE, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 71-5692. *BROWN v. OHIO*. Sup. Ct. Ohio. Certiorari denied.

No. 71-5694. *HUNTER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 156.

No. 71-5695. *PICKING v. STATE FINANCE CORP. ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 450 F. 2d 881.

No. 71-5696. *TEAGUE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 71-5699. *ALKES v. U. S. BOARD OF PAROLE ET AL.* C. A. 10th Cir. Certiorari denied.

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No. 71-5698. *CARTER v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 193, 445 F. 2d 669.

No. 71-5700. *HARRIS v. UNITED STATES*; and

No. 71-5717. *Cox v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5702. *WAUGH v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5703. *SMITH ET AL. v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 312.

No. 71-5704. *ROLLINS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 71-5705. *TROY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 358.

No. 71-5706. *HEARD v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 71-5708. *LUSTMAN v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 13 Cal. App. 3d 278, 91 Cal. Rptr. 548.

No. 71-5712. *YOUNG v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied.

No. 71-5715. *BARTLETT v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 700.

No. 71-5716. *WION v. UNITED STATES ET AL.* C. A. 10th Cir. Certiorari denied.

No. 71-5718. *BECKER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 156.

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No. 71-5721. *OLLER v. CALIFORNIA*. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 71-5724. *AMATO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 71-5725. *MARRERO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 373.

No. 71-5728. *WELP v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 867.

No. 71-5732. *ENGLAND v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-5733. *COLEY v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied.

No. 70-272. *KATZ ET AL. v. McAULAY ET AL.* C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall are of the opinion that certiorari should be granted. Reported below: 438 F. 2d 1058.

No. 71-183. *AGUA CALIENTE BAND OF MISSION INDIANS ET AL. v. COUNTY OF RIVERSIDE, CALIFORNIA*. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall are of the opinion that certiorari should be granted. Reported below: 442 F. 2d 1184.

No. 71-659. *DEVILLIERS v. ATLAS CORP.* C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 799.

No. 71-661. *DAVIS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 1376.

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No. 71-680. FERGUSON, U. S. DISTRICT JUDGE *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 169.

No. 71-683. INSURANCE COMPANY OF NORTH AMERICA *v.* CONTINENTAL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 449 F. 2d 1209.

No. 71-714. FARINAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1334.

No. 71-723. MEISTER *v.* DALTON. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 52 Wis. 2d 173, 188 N. W. 2d 494.

No. 71-748. KANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 77.

No. 71-755. TARABOCCHIA *v.* ZIM ISRAEL NAVIGATION Co., LTD. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 1375.

No. 71-5548. MUNDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 1165.

No. 71-5555. UPSHAW *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 1218.

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No. 71-741. *MESSENGER v. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 4, ET AL.* C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5562. *HALL v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 114.

No. 71-5565. *HUTCHINGS v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 466 S. W. 2d 584.

No. 71-5599. *WHEELER v. WARDEN, LEAVENWORTH PENITENTIARY.* C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5633. *OBA 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 892.

No. 71-5638. *MURRAY v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 503.

No. 71-5683. *NORDLOF v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5697. *POWELL v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 449 F. 2d 706.

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No. 71-654. *LOVISI v. VIRGINIA*. Sup. Ct. Va. Motion of respondent to dispense with printing brief granted. Certiorari denied.

No. 71-705. *GALVESTON CITY CO. ET AL. v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 446 F. 2d 1030.

No. 71-713. *VIRGINIA IMPRESSION PRODUCTS CO., INC. v. SCM CORP.* C. A. 4th 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: 448 F. 2d 262.

No. 71-717. *KROZAK v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 71-751. *BOARD OF EDUCATION OF LITTLE ROCK SCHOOL DISTRICT ET AL. v. CLARK ET AL.* C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 449 F. 2d 493.

No. 71-729. *SHEPPARD v. WASHINGTON*. Ct. App. Wash. Motion to dispense with printing petition granted. Certiorari denied.

No. 71-744. *ADDONIZIO v. UNITED STATES*;

No. 71-745. *LA MORTÉ v. UNITED STATES*;

No. 71-754. *VICARO v. UNITED STATES*; and

No. 71-756. *BIANCONE v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 49.

MR. JUSTICE DOUGLAS, dissenting.

At the trial involved in these cases there was much evidence of corrupt practices by the administration of petitioner Addonizio during his tenure as mayor of Newark, New Jersey. But the question posed to the

jury below was not whether these petitioners had engaged in corrupt practices, but the narrower issue of whether they had entered into and executed a criminal agreement to extract kickbacks from public contractors through threats of physical harm or economic ruin in violation of 18 U. S. C. § 1951.<sup>1</sup> Although the petitioners were charged with 65 substantive acts of coercive extraction of kickbacks, the key issue in the trial was who, if anyone, had conspired to commit these acts. Absent a finding that such a confederation had been formed, most of the evidence which damaged the petitioners could not have been introduced at all inasmuch as this evidence was hearsay admitted provisionally under the so-called coconspirator exception. That the jury found a conspiracy to have existed, however, was under the circumstances of this trial the unsurprising and virtually inevitable result of the many disabilities imposed upon an accused by the ordeal of a multi-defendant conspiracy prosecution.<sup>2</sup>

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<sup>1</sup> Section 1951 provides:

“(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

“(b)(2) The term ‘extortion’ means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”

<sup>2</sup> The potential for abuse of multi-defendant conspiracy proceedings has been discussed in O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Brooklyn L. Rev. 263 (1940); Note, Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 922, 983 (1959); Wessel, Procedural Safeguards for the Mass Conspiracy Trial, 48 A. B. A. J. 628 (1962); Goldstein, The *Krulewitch* Warning: Guilt By Association, 54 Geo. L. J. 133 (1965).

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Mr. Justice Jackson catalogued many of these disabilities in his well-known concurrence in *Krulewitch v. United States*, 336 U. S. 440, 446 (1949), reversing a conspiracy conviction, where he concluded that the prevailing "loose practice as to [the conspiracy] offense constitutes a serious threat to fairness in our administration of justice." He criticized the tendency of courts to dispense "with even the necessity to infer any definite agreement, although that is the gist of the offense." *Id.*, at 452. As to the procedural evils of this device he found that the risk to a codefendant of guilt by association was abnormally high:

"A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other." *Id.*, at 454.

Mr. Justice Jackson also regretted the wide leeway that prosecutors enjoyed in the broad scope of evidence admissible to prove conspiracy (and consequently to prove substantive acts as well). Under conspiracy law, the declarations and acts of any confederate in furtherance of the joint project are attributable to and admissible against all of its participants. This is true even if the declarant is not available for cross-examination. Moreover, such statements are admissible "subject to connection" by the prosecutor later in the trial. At the close of the Government's case, for example, the judge may believe that the Government failed to present a jury question as to a defendant's participation in a

collective criminal plot. In such a case, the judge must ask the jury to disregard the provisionally admitted hearsay. Obviously, however, it will be difficult in a lengthy trial (such as this one filling 5,500 pages of transcript) for jurors to excise the stricken testimony from their memories. In the alternative case where the judge believes that a jury question has been presented as to a defendant's participation in a criminal enterprise, the jury is permitted to consider the provisionally admitted matter in determining whether or not a defendant was a conspirator. In other words, the jury is allowed to assume its ultimate conclusion. Mr. Justice Jackson was particularly sensitive to the abuse potential in this vicious logic:

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal v. United States*, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 167 F. 2d 54." *Id.*, at 453.

There are other disabilities. Often testimony will be receivable only against a particular codefendant, yet it may also inculpate another accused such as where (a) a codefendant "opens the door" to prejudicial evidence by placing his reputation in issue,<sup>3</sup> (b) a codefendant wants to place before the jury information which is helpful to him but is damaging to other defendants, or (c) the Government desires to offer evidence admissible against less than all of the codefendants. Cautionary instructions, of course, are routinely given where such circumstances arise but we have often recognized the inability of jurors to compartmentalize information according to defendants. *Bruton v. United States*, 391 U. S. 123 (1968). See also *Jackson v. Denno*, 378 U. S. 368, 388 (1964); *Krulewitch v. United States*, *supra*, at

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<sup>3</sup> An example of a single defendant's opening the door to prosecution rebuttal prejudicial to other defendants was presented in the famous *Apalachin* trial (*United States v. Bufalino*, 285 F. 2d 408 (CA2 1960)):

"The reputation of the Apalachin delegates and the character of the meeting had been the subject of much public comment during the two years before trial. Many reports had described the lengthy criminal records of some of the delegates, had characterized the meeting as a convention of the 'Mafia' and had given other lurid details of what had occurred. None of this evidence was considered sufficiently material to the charge to warrant its introduction at trial.

"Toward the end of the trial, one of the defendants placed his reputation squarely in issue. He called witnesses who testified to his excellent reputation for truth and veracity at the time of the trial.

"Ordinarily it would have been entirely proper to attempt to refute this testimony by cross-examining with reference to the earlier publicity; the defendant himself had elsewhere complained about how much it had hurt his reputation. However, such evidence might have had equally serious adverse effects upon the nineteen co-defendants, who had done nothing to open the door against themselves." Wessel, *Procedural Safeguards for the Mass Conspiracy Trial*, *supra*, n. 2, at 631.

453 (quoted above). This shortcoming of the jury is compounded when, as here, the jury is also asked to digest voluminous testimony.

A victim of the multi-defendant conspiracy trial has fewer options for trial strategy than the ordinary defendant tried alone. Counsel may reluctantly give up the option of pointing the accusing finger at his client's codefendants in order to obtain similar concessions from other trial counsel. Counsel must also divert his preparation in part toward generating possible responses to evidence which may be admissible only against other codefendants. As for the defendant, he may be put to the choice of hiring less experienced counsel or less actively pursuing discovery or investigation because of the higher legal expenses imposed by longer joint trials. Furthermore, although an accused normally has "the right to present his own witnesses to establish a defense," *Washington v. Texas*, 388 U. S. 14, 19 (1967), an accused in a mass conspiracy trial may not put on his codefendants without their prior waivers of their absolute rights not to testify.<sup>4</sup>

All of these oppressive features were present in various degrees in this trial. But, in particular, the most onerous burden cast upon these petitioners was their inability to cross-examine each other as to comments which Government witnesses said they had heard them utter. The Court of Appeals recognized that "[t]here

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<sup>4</sup> Even at a severed trial of only one defendant, another alleged coconspirator may, if called to testify, invoke his privilege against self-incrimination. Where the severed trial is delayed until after the acquittal or finalized conviction of the witness, however, invocation of the privilege would be improper. In any event, even if the witness refused to answer questions, the defendant would at least obtain whatever inference of innocence might result from the apparent guilt of the witness.

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was much testimony as to statements made by various co-conspirators during the course, and in furtherance of the conspiracy." 451 F. 2d 49, 71. For example, one important prosecution witness testified that he had been a contractor hired by the city administration and that one of the accused conspirators, "Tony Boy" Boiardo, had told him: "You pay me the 10% . . . I take care of the Mayor. I take care of the Council." (App. 2611a.) The lawyer for the former mayor, however, was not permitted to put Boiardo on the stand and to ask him whether Addonizio had, in fact, entered into an agreement with him to coerce kickbacks. This handicap of an accused is at war with the holdings of this Court that a defendant should be permitted to confront his accusers, especially where, as here, their declarations might have been purposely misleading or self-serving. *Pointer v. Texas*, 380 U. S. 400, 407 (1965); *Douglas v. Alabama*, 380 U. S. 415 (1965); *Brookhart v. Janis*, 384 U. S. 1 (1966); *Bruton v. United States*, *supra*; *Barber v. Page*, 390 U. S. 719 (1968); *Roberts v. Russell*, 392 U. S. 293 (1968). *Dutton v. Evans*, 400 U. S. 74 (1970), is not inconsistent with this proposition. There the Court found that the hearsay was probably reliable. "[T]he circumstances under which [the declarant] made the statement were such as to give reason to suppose that [he] did not misrepresent [his coconspirator's] involvement in the crime." *Id.*, at 89. On the other hand, involved here were declarants, as mentioned earlier, who might have been motivated to misrepresent the roles of other parties in order to induce contractors, such as Rigo (the Government's key witness), to make kickbacks. Moreover, in *Dutton* the hearsay was "of peripheral significance at most," whereas here much of the case against the petitioners, as the

Court of Appeals pointed out, was admitted under the coconspirator exception to the hearsay rule.<sup>5</sup>

In addition, the petitioners were deprived of the right to cross-examine codefendant Gordon (who is not one of the petitioners). He had testified at the prior grand jury proceeding and that testimony was introduced at trial by the Government to corroborate the story of the Government's key witness, Rigo, as to various kick-back transactions. The circumstances at trial were substantially similar to those involved in *Bruton* except that Gordon's grand jury remarks did not directly mention his codefendants. Normally, that difference would be sufficient to support the lower court's finding that *Bruton* was inapposite but for the fact that the Government's case against all of the defendants turned upon Rigo's credibility. On cross-examination of Rigo, the codefendants had relentlessly attacked his credibility. But when the Government introduced the grand jury transcript in rebuttal, the defense challenge was completely terminated because Gordon, who was also on trial, could not be called to the stand. The judge, of course, gave instructions to the jury to consider the impact of the transcript upon Rigo's credibility only when assessing Gordon's guilt, but it is doubtful that the jurors could faithfully adhere to the delicate logic that Rigo may have told the truth as to Gordon but

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<sup>5</sup> The *Dutton* plurality opinion found the coconspirator hearsay had played a minor role in the trial:

"In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19 other witnesses, the testimony of but a single one is at issue here." *Dutton v. Evans*, 400 U. S. 74, 87 (1970).

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may have lied as to his codefendants. The contrary conclusion, to borrow from Mr. Justice Jackson, would be "unmitigated fiction." *Krulewitch v. United States*, *supra*, at 453.

In light of the claims of prejudice committed in this multi-defendant conspiracy trial, I would grant certiorari to consider whether the *extensive* reliance by the prosecutor on the coconspirator exception to the hearsay rule and the admission of the Gordon transcript deprived these petitioners of constitutional rights.

No. 71-888. *WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES v. ALMENARES ET AL.* C. A. 2d Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 453 F. 2d 1075.

No. 71-5547. *McCRAY v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: See 334 F. 2d 760.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner was found guilty of five violations of the Mann Act and sentenced to a total of 10 years—some of the sentences being consecutive and some concurrent. There is no doubt that petitioner transported the same woman to various cities over a period of a year for prostitution. There were five counts, two of which charged transportation in commerce of the named woman between designated cities for the purpose of prostitution. Each was an offense under 18 U. S. C. § 2421, which provides a fine of \$5,000 or five years in prison, or both.<sup>1</sup>

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<sup>1</sup> Section 2421 provides:

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to be-

Three of the five counts charged that petitioner persuaded, induced, enticed, or coerced this same woman "to go from one place to another" in interstate commerce for the purpose of prostitution, each count charging an offense under 18 U. S. C. § 2422 which carries a fine of \$5,000 or five years in prison, or both.<sup>2</sup>

As a matter of semantics there is an offense under § 2421 whenever a person "transports" a woman for the illegal purpose and there is one under § 2422 when a

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come a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

<sup>2</sup> Section 2422 provides:

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

person "induces" a woman to move interstate for the purpose of prostitution. The two sections seem complementary. But there are two substantial questions:

*First*, can § 2422 be fragmented into a series of acts, each being described as an inducement to the same woman to move interstate to live the life of a prostitute? Or within the meaning of the Act is she "induced" only once in the series?

*Second*, where, as here, petitioner and the woman move around the country in one continuous enterprise, is there a separate offense each time they cross a state line?

In *Bell v. United States*, 349 U. S. 81, we held that where a man for purposes of prostitution took two women across a state line on the same trip and in the same vehicle, he committed only a single offense. We said:

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.*, at 83.

A man who induces a woman to go on a prostitution tour certainly violates the Act. But what kind of inducement fits the Act? Here this woman, a divorcee, merely got instruction from petitioner as to how to work a cocktail lounge and bar. The legislative history of the Act shows a purpose "to prevent panderers and procurers from compelling . . . women and girls against their will and desire to enter and continue in a life of prostitution." S. Rep. No. 886, 61st Cong., 2d Sess., 10 (1910). It was supposed to reach those "who, by means of force and restraint, compel their victims to practice prostitution." *Id.*, at 11. Examples were given of the use of "[l]iquor, trickery, deceit, fraud and the use of force" by a procurer "to place the girl under his power." *Ibid.* For maintaining a regime of prostitution, the Report said,

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"the procurer has [sic] resort to physical violence and the maintenance of a system of surveillance which makes her, to all intents and purposes, a prisoner." *Id.*, at 12. There was no such force or compulsion in the present case.

The Report makes plain that the Act "does not attempt to regulate the practice of voluntary prostitution" or to displace any laws of the States. *Id.*, at 10.

Since at best this case is a marginal one, should not the Act be strictly, not loosely, construed? Since petitioner and the woman (plus petitioner's wife) were on a year's tour, do the offenses multiply every time a state line is crossed or should the enterprise be considered as one entity? Or, where there is but one inducement, is there not, so far as § 2422 is concerned, but one offense?

These are questions on which we should have briefs and argument.

The Court has not been consistent in its approach to this Act, as a comparison of *Caminetti v. United States*, 242 U. S. 470, with *Bell v. United States, supra*, makes plain. The present case of voluntary prostitution is an appropriate vehicle for a re-examination of the judicial decisions in this area.

No. 71-5591. *LEIGHTON v. NEIL, WARDEN*. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL are of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1183.

No. 71-5675. *MOONEY v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 71-5687. *WRIGHT v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 146 U. S. App. D. C. 126, 449 F. 2d 1355.

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*Rehearing Denied*

No. 70-90. SCHILB ET AL. *v.* KUEBEL, 404 U. S. 357;

No. 70-315. RESOLUTE INSURANCE CO. ET AL. *v.* SEVENTH JUDICIAL DISTRICT COURT OF OKLAHOMA COUNTY ET AL., 404 U. S. 997;

No. 71-254. WESTMORELAND *v.* MISSISSIPPI, 404 U. S. 1038;

No. 71-463. KADANS *v.* COLLINS, CHIEF JUSTICE, SUPREME COURT OF NEVADA, ET AL., 404 U. S. 1007;

No. 71-518. COUCH, ADMINISTRATRIX *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO., 404 U. S. 1025;

No. 71-545. UNITED STATES STEEL CORP. *v.* BLAIR, 404 U. S. 1018;

No. 71-5171. CUNNINGHAM *v.* WINGO, WARDEN, 404 U. S. 1064;

No. 71-5326. FELAN *v.* UNITED STATES, 404 U. S. 978;

No. 71-5380. GALDEIRA ET AL. *v.* RICHARDSON ET AL., 404 U. S. 993;

No. 71-5394. SHAPPELL *v.* MARTIN-MARIETTA CORP., 404 U. S. 1002;

No. 71-5479. TODARO *v.* UNITED STATES, 404 U. S. 1040;

No. 71-5482. McCRAY *v.* UNITED STATES MARSHAL FOR THE DISTRICT OF KANSAS ET AL., 404 U. S. 1040; and

No. 71-5524. LOGAN *v.* CORRECTIONAL SUPERINTENDENT, WALLKILL PRISON, 404 U. S. 1061. Petitions for rehearing denied.

No. 70-38. FEDERAL POWER COMMISSION *v.* FLORIDA POWER & LIGHT CO., 404 U. S. 453. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 70-5025. HAINES *v.* KERNER ET AL., 404 U.S. 519. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

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No. 70-193. *Russo v. UNITED STATES*, 404 U. S. 1023. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

*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 Tenth Circuit during the period beginning March 13, 1972, and ending March 15, 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.

FEBRUARY 23, 1972

*Dismissals Under Rule 60*

No. 70-95. *BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA ET AL. v. LESTER ET AL.* Appeal from D. C. D. C. dismissed under Rule 60 of the Rules of this Court. Reported below: 319 F. Supp. 505.

No. 71-6014. *LEPISCOPO v. UNITED STATES*. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

FEBRUARY 28, 1972

*Affirmed on Appeal*

No. 71-765. *NORTHERN NATURAL GAS CO. v. WILSON ET AL.* Affirmed on appeal from D. C. Kan. Reported below: 340 F. Supp. 1126.

No. 71-5464. *KIRK v. McMEEN ET AL.* Affirmed on appeal from D. C. N. D. Iowa. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 71-5743. *TORRES ET AL. v. NEW YORK STATE DEPARTMENT OF LABOR ET AL.* Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would note probable jurisdiction and reverse. *Goldberg v. Kelly*, 397 U. S. 254 (1970). Reported below: 333 F. Supp. 341.

*Appeals Dismissed*

No. 70-56. *GILLIGAN, GOVERNOR OF OHIO, ET AL. v. SWEETENHAM ET AL.* Appeal from D. C. S. D. Ohio [probable jurisdiction noted, 401 U. S. 991] dismissed as moot. Reported below: 318 F. Supp. 1262.

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No. 71-828. DETROIT POLICE OFFICERS ASSN. ET AL. *v.* CITY OF DETROIT. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 385 Mich. 519, 190 N. W. 2d 97.

No. 71-855. WILLIS *v.* STATE BOARD OF CONTROL ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 71-880. HAYNES ET AL. *v.* LINDER ET AL. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 472 S. W. 2d 412.

#### *Miscellaneous Orders*

No. A-871. FRASER & JOHNSTON Co. *v.* LODGE 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO. C. A. 9th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

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 petitioners for leave to file supplemental brief after argument granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 70-220. CAPLIN, TRUSTEE *v.* MARINE MIDLAND GRACE TRUST Co. OF NEW YORK. C. A. 2d Cir. [Certiorari granted, 404 U. S. 982.] Motion of the Solicitor General for leave to participate in oral argument on behalf of the Securities and Exchange Commission granted and a total of 15 minutes allotted for that purpose. Counsel for respondent allotted 15 additional minutes for oral argument.

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No. 40, Orig. *PENNSYLVANIA v. NEW YORK ET AL.* Motion of American Express Co. for leave to file a brief as *amicus curiae* denied. [For earlier orders herein, see, *e. g.*, 401 U. S. 931.]

No. 70-250. *CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE, ET AL. v. REMILLARD ET AL.* Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 404 U. S. 1013.] Motion of appellee Remillard for appointment of counsel granted. It is ordered that Carmen L. Massey, of Richmond, California, be, and she is hereby, appointed to serve as counsel for appellee Remillard in this case.

No. 70-5015. *ARGERSINGER v. HAMLIN, SHERIFF.* Sup. Ct. Fla. [Certiorari granted, 401 U. S. 908.] Motion for leave to cite supplemental authority granted.

No. 70-5061. *KIRBY v. ILLINOIS.* App. Ct. Ill., 1st Dist. [Certiorari granted, 402 U. S. 995.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* granted and a total of 15 minutes allotted for that purpose. Counsel for petitioner allotted 15 additional minutes for oral argument.

No. 70-5276. *MUREL ET AL. v. BALTIMORE CITY CRIMINAL COURT ET AL.* C. A. 4th Cir. [Certiorari granted, 404 U. S. 999.] Motion to dispense with printing *amicus curiae* brief of Prison Research Council of the University of Pennsylvania Law School granted.

No. 71-5097. *HUFFMAN v. BOERSEN.* Sup. Ct. Neb. [Certiorari granted, 404 U. S. 990.] Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 71-5103. *MORRISSEY ET AL. v. BREWER, WARDEN, ET AL.* C. A. 8th Cir. [Certiorari granted, 404 U. S. 999.] Motion to dispense with printing *amicus curiae* brief of James H. Russell granted.

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No. A-797 (71-994). EPSTEIN *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN are of the opinion that the stay should be granted. Reported below: 37 App. Div. 2d 333, 325 N. Y. S. 2d 657.

No. 71-5470. BEASLEY *v.* UNITED STATES;

No. 71-5707. SMITH *v.* MACGRUDER;

No. 71-5710. HORTON *v.* NORTH CAROLINA; and

No. 71-5711. ENLOW *v.* LASH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71-5701. LAUCHLI *v.* POOS, U. S. DISTRICT JUDGE;

No. 71-5713. MOORE *v.* WHIPPLE, U. S. DISTRICT JUDGE; and

No. 71-5751. MCCRAY *v.* ARRAJ, U. S. DISTRICT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 71-798. SILK *v.* KLEPPE, ADMINISTRATOR OF SMALL BUSINESS ADMINISTRATION. Motion to dispense with printing petition granted. Motion for leave to file petition for writ of mandamus denied.

#### *Probable Jurisdiction Noted*

No. 71-873. UNITED STATES *v.* FALSTAFF BREWING CORP. ET AL. Appeal from D. C. R. I. Probable jurisdiction noted and case set for oral argument with No. 71-703 [*United States v. First National Bancorporation, Inc.*, probable jurisdiction noted, *ante*, p. 915]. Reported below: 332 F. Supp. 970.

No. 71-879. HEUBLEIN, INC. *v.* SOUTH CAROLINA TAX COMMISSION. Appeal from Sup. Ct. S. C. Probable jurisdiction noted. Reported below: 257 S. C. 17, 183 S. E. 2d 710.

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*Certiorari Granted*

No. 71-857. EVCO, DBA EVCO INSTRUCTIONAL DESIGNS *v.* JONES, COMMISSIONER OF BUREAU OF REVENUE, ET AL. Ct. App. N. M. Certiorari granted. Reported below: 83 N. M. 110, 488 P. 2d 1214.

No. 71-858. RICCI *v.* CHICAGO MERCANTILE EX-  
CHANGE ET AL. C. A. 7th Cir. Certiorari granted. Re-  
ported below: 447 F. 2d 713.

No. 71-895. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL VAN LINES. C. A. 9th Cir. Certiorari granted. Reported below: 448 F. 2d 905.

No. 71-732. SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT *v.* BUSTAMONTE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 448 F. 2d 699.

No. 71-863. COLUMBIA BROADCASTING SYSTEM, INC.  
*v.* DEMOCRATIC NATIONAL COMMITTEE;

No. 71-864. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE ET AL.;

No. 71-865. POST-NEWSWEEK STATIONS, CAPITAL AREA, INC. *v.* BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE; and

No. 71-866. AMERICAN BROADCASTING COS., INC. *v.* DEMOCRATIC NATIONAL COMMITTEE. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. Mandate of United States Court of Appeals for the District of Columbia Circuit issued on October 29, 1971, in these cases is hereby recalled and stayed pending the sending down of judgment of this Court. MR. JUSTICE DOUGLAS is of the opinion that stay should be denied. Reported below: 146 U. S. App. D. C. 181, 450 F. 2d 642.

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No. 71-900. UNION OIL CO. OF CALIFORNIA *v.* THE SAN JACINTO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 451 F. 2d 1369.

No. 71-586. NEIL, WARDEN *v.* BIGGERS. C. A. 6th Cir. Motion to use record in No. 237, October Term, 1967 [*Biggers v. Tennessee*, 390 U. S. 404] and motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions and petition. Reported below: 448 F. 2d 91.

*Certiorari Denied.* (See also No. 71-880, *supra*.)

No. 70-5405. CAPELLO *v.* GATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 71-730. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 1285.

No. 71-740. ALLEN, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 497.

No. 71-763. BRADSHAW ET AL. *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71-769. MORNING TELEGRAPH, A DIVISION OF TRIANGLE PUBLICATIONS, INC. *v.* POWERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 97.

No. 71-777. CLEVELAND ET AL. *v.* ILLINOIS BELL TELEPHONE CO. ET AL.; and

No. 71-807. AGRON *v.* ILLINOIS BELL TELEPHONE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 449 F. 2d 906.

No. 71-800. COHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 1224.

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No. 71-788. *ARMOUR & Co. v. LOCAL UNION No. 186, UNITED PACKINGHOUSE, FOOD & ALLIED WORKERS, AFL-CIO.* C. A. 6th Cir. Certiorari denied. Reported below: 446 F. 2d 610.

No. 71-789. *JACOBS v. UNITED STATES*; and

No. 71-796. *CASTENBAUM v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 530.

No. 71-810. *CHICKEN DELIGHT, INC., ET AL. v. SIEGEL ET AL.*; and

No. 71-824. *SIEGEL ET AL. v. CHICKEN DELIGHT, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 43.

No. 71-815. *DIORIO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 21.

No. 71-859. *BRADFORD ET UX. v. THOMPSON ET AL.* Sup. Ct. Tex. Certiorari denied. Reported below: 470 S. W. 2d 633.

No. 71-872. *JOHNSON ET AL. v. BOARD OF APPEALS AND REVIEW*. Ct. App. D. C. Certiorari denied. Reported below: 282 A. 2d 566.

No. 71-885. *COUNTY OF MIDDLESEX v. GEVYN CONSTRUCTION CORP.* C. A. 1st Cir. Certiorari denied. Reported below: 450 F. 2d 53.

No. 71-894. *UNITED STATES STEEL CORP. v. LAIRD ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 216.

No. 71-904. *GREAT FIDELITY INVESTMENT CO. ET AL. v. MARTIN ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 959.

No. 71-5094. *BEATY ET AL. v. NELSON, WARDEN*. C. A. 9th Cir. Certiorari denied.

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No. 71-5418. *SPILLER v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71-5448. *HAYNES v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 468 S. W. 2d 375.

No. 71-5462. *WHITMORE v. NEW YORK*. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 826, 270 N. E. 2d 893.

No. 71-5490. *PETWAY v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied.

No. 71-5511. *FARMER v. KROPP, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 5.

No. 71-5513. *ROGERS v. NEW YORK*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71-5734. *HOAK ET AL. v. PENNSYLVANIA*. Sup. Ct. Pa. Certiorari denied.

No. 71-5736. *WILLIS v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied.

No. 71-5738. *ACARINO v. MISHLER, CHIEF JUDGE, U. S. DISTRICT COURT*. C. A. 2d Cir. Certiorari denied.

No. 71-5739. *BARROW v. BOUNDS, CORRECTIONS DIRECTOR*. C. A. 4th Cir. Certiorari denied.

No. 71-5741. *SINCLAIR v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 71-5746. *GRINDSTAFF v. WARDEN, LEAVENWORTH PENITENTIARY*. C. A. 10th Cir. Certiorari denied.

No. 71-5747. *ROSENBERG v. MANCUSI, CORRECTIONAL SUPERINTENDENT*. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 613.

No. 71-5748. *WIMBERLEY v. LAIRD, SECRETARY OF DEFENSE, ET AL.* C. A. 7th Cir. Certiorari denied.

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No. 71-5749. *SASKO v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 71-5750. *BAYS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 977.

No. 71-5752. *LEWIS v. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*. C. A. D. C. Cir. Certiorari denied.

No. 71-5754. *BOYD v. BETO, CORRECTIONS DIRECTOR*. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 148.

No. 71-5756. *HALL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 1206.

No. 71-5757. *FERGUSON v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 71-5758. *LANGLEY ET AL. v. TURNER, WARDEN*. C. A. 10th Cir. Certiorari denied.

No. 71-5759. *HIDALGO v. PURCELL ET AL.* Ct. App. Ore. Certiorari denied. Reported below: 5 Ore. App. 513, 488 P. 2d 858.

No. 71-5760. *YANICH v. MUMMERT, SHERIFF*. C. A. 9th Cir. Certiorari denied.

No. 71-5763. *OVERTON v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 71-5764. *NOEL v. UNITED STATES*; and

No. 71-5774. *JONES ET AL. v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 1057.

No. 71-5765. *CHICQUELO v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 146 U. S. App. D. C. 381, 452 F. 2d 1310.

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No. 71-486. MONGER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied, it appearing that judgment of the Supreme Court of Florida rests upon an adequate state ground. Reported below: 249 So. 2d 433.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

Petitioner was employed in a newsstand which sold "girly" magazines. He was charged with the sale of two allegedly obscene magazines—Body Shop and The Erotic Cinema—in violation of Florida's obscenity statute<sup>1</sup> and, on November 3, 1970, the jury returned verdicts of guilty on both counts. On January 12, 1971, the trial court orally pronounced its judgment of guilty and imposed a sentence of either a \$1,000 fine or six months' imprisonment on each count, plus costs. That same day, petitioner filed his notice of appeal and a motion for supersedeas. On January 18, the trial court entered its written order *nunc pro tunc* January 12. This order recited that petitioner's notice of appeal was filed after the entry of judgment. Because he was challenging the constitutionality of a state statute, petitioner's appeal was transferred by the District Court of Appeal of Florida, First District, to the Florida Supreme Court.

Respondent then made a motion to dismiss the appeal because "the notice of appeal . . . was filed prior to entry of either judgment or sentence." Respondent's argument was apparently founded upon the fact that the notice of appeal was filed after the oral entry of judgment but before the written *nunc pro tunc* order. In a

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<sup>1</sup> Fla. Stat. Ann. § 847.011. This statute was held unconstitutional by a three-judge district court, *Meyer v. Austin*, 319 F. Supp. 457, and an appeal from that judgment is presently pending before this Court, No. 70-35, *Austin v. Meyer*.

4-3 decision, the Florida Supreme Court dismissed the appeal. Justice Ervin dissented, saying:

"I think it altogether *too technical* to refuse to give credence to notices of appeals filed ante to judgments or sentences being reduced to writing and placed in a minute or judgment book after they have been pronounced in open court and reflected in the minutes. A person convicted should not be delayed in taking an appeal or commencing service of sentence. A notice of appeal is not necessarily invalid because it antedates a written judgment. It picks up when the judgment is entered unless the state can show some prejudice by early filing of the notice, which it can't in this case."

Petitioner now contends that it is a denial of due process to dismiss a criminal defendant's only appeal for failing to meet a procedural technicality where the failure does not prejudice the State.<sup>2</sup> Alternatively, petitioner argues that the basis of the dismissal by the Florida Supreme Court was not an adequate and independent state ground which would bar this Court's review of his First Amendment claims. Respondent answers that the State's rules of appellate procedure are necessary "to avoid chaotic and haphazard appellate proceedings" and thus comport with the requirements of procedural due process. In any event, argues respondent, the judgment below rests upon an adequate state ground and thus is not within our certiorari jurisdiction. 28 U. S. C. § 1257 (3).

The Federal Constitution contains no requirement that a State provide appellate courts or even that there be a right to appellate review. *Griffin v. Illinois*, 351 U. S.

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<sup>2</sup> Petitioner argues that the notice of appeal was filed January 12 in order to prevent the trial court from increasing the sentence it had imposed orally.

12, 18; *McKane v. Durston*, 153 U. S. 684, 687-688. This is not to say, however, that once appellate review has been provided a State may deny it arbitrarily or capriciously without violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Douglas v. California*, 372 U. S. 353; *Burns v. Ohio*, 360 U. S. 252; *Griffin v. Illinois*, *supra*. A substantial constitutional question is presented, therefore, when federal rights secured by the First Amendment are rejected on the basis of procedural technicalities such as the one involved here. See *Daniels v. Allen*, 344 U. S. 443, 557-558 (Frankfurter, J., dissenting); *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 682; *Rogers v. Alabama*, 192 U. S. 226, 230-231; *Hill, The Inadequate State Ground*, 65 Col. L. Rev. 941, 959-962 (1965).

In my view, the basis of the dismissal in the Supreme Court of Florida is not an adequate and independent state ground sufficient to bar this Court's review of petitioner's First Amendment claims. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way." *Davis v. Wechsler*, 263 U. S. 22, 24-25. Thus, the rule that this Court will not review decisions founded upon state grounds is subject to exception so that federal claims may properly be vindicated.

In *Rogers v. Alabama*, *supra*, for example, the state court had stricken from the record a motion on the ground that it was "prolix," but we nonetheless reached the federal question raised in that motion. We have similarly reached federal questions which had been avoided by state courts on the ground that the improper remedy had been used, *NAACP v. Alabama*, 357 U. S.

449; that the argument advanced had been too indefinite or was improperly presented for consideration by the state court, *Barr v. City of Columbia*, 378 U. S. 146; *NAACP v. Alabama*, 377 U. S. 288, 293-302; *Staub v. City of Baxley*, 355 U. S. 313, 318-320; *Lovell v. Griffin*, 303 U. S. 444, 449-450; that the state appellate court lacked jurisdiction because the appellant had failed to give opposing counsel the requisite opportunity to examine and correct the transcript, *Sullivan v. Little Hunting Park*, 396 U. S. 229; that a criminal defendant had not made timely objection to the admission of evidence, *Henry v. Mississippi*, 379 U. S. 443; or that the required certification of the state appeal had not been obtained, *Parrot v. Tallahassee*, 381 U. S. 129. See also R. Stern & E. Gressman, *Supreme Court Practice* 131-142 (4th ed. 1969); Hill, *supra*; Note, 74 *Harv. L. Rev.* 1375 (1961); Note, 62 *Col. L. Rev.* 822 (1962). In *Henry v. Mississippi*, *supra*, at 446-447, we summarized the effect of procedural irregularities in state proceedings upon the scope of this Court's review:

"It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, but also in cases involving state procedural grounds. But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* [20 Wall. 590] of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of

state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions.

"These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." (Citations omitted.)

We then concluded "that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." *Id.*, at 447-448.

I assume that Florida has a legitimate interest in foreclosing interlocutory appeals in order to avoid piece-meal litigation of criminal cases. That assumption, however, does not dispose of the present case because *Henry* requires that "every case" be considered on its own facts. Here, I can fathom no state interest which would be served by rejecting a notice of appeal filed after an oral pronouncement of judgment but before a written order. This is not a case where the orderly progress of the trial was disrupted by a dilatory interlocutory appeal or where an appeal was sought before some vital aspect of the trial was completed. Nor is this a case where the record on appeal was missing some formal document or pleading. Indeed, tellingly absent from the order of the Supreme Court of Florida

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and the brief of the respondent is the assertion of any state interest which would have been served had the trial court's January 12 order been written instead of oral or had the petitioner waited until January 18 to file his formal notice of appeal. Under such circumstances, *Henry v. Mississippi* teaches that we are free to consider petitioner's federal claims.

I would grant the petition for a writ of certiorari and reverse and remand on *Redrup v. New York*, 386 U. S. 767.

No. 71-554. *LIEPMAN v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-629. *VALDEZ ET AL. v. BLACK ET AL.* C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 1071.

No. 71-772. *MENNA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 982.

No. 71-791. *ROMAN v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 579.

No. 71-870. *FEINLOWITZ v. NEW YORK*. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 29 N. Y. 2d 176, 272 N. E. 2d 561.

No. 71-668. *RIVERA v. UNITED STATES*; and

No. 71-832. *MARQUEZ v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. Reported below: 449 F. 2d 89.

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No. 71-5365. *FOSTER v. MANCUSI, CORRECTIONAL SUPERINTENDENT.* C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5505. *BIVENS v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 1064.

No. 71-5745. *MACLEAN v. LAIRD, SECRETARY OF DEFENSE, ET AL.* C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-672. *UNITED STATES v. TWO HUNDRED AND ONE 50-POUND BAGS OF FURAZOLIDONE ET AL.* C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted.

No. 71-709. *SUMIDA ET AL. v. YUMEN ET AL.* C. A. 9th Cir. Motions to dispense with printing petition and brief in opposition granted. Certiorari denied. Reported below: 444 F. 2d 1281.

No. 71-720. *CERONE ET AL. v. UNITED STATES;*

No. 71-759. *ANGELINI v. UNITED STATES;* and

No. 71-760. *CORTINA v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted for reasons stated in his dissent in *Addonizio v. United States, ante*, p. 936. Reported below: 452 F. 2d 274.

No. 71-884. *CHANDLER, U. S. DISTRICT JUDGE v. O'BRYAN.* C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 445 F. 2d 1045.

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No. 71-737. *MICHIGAN v. TRUDEAU*. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 385 Mich. 276, 187 N. W. 2d 890.

No. 71-790. *PERKINS v. LAIRD*, SECRETARY OF DEFENSE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 71-792. *GRUBBS ET AL. v. UNITED STATES*. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 451 F. 2d 275.

No. 71-799. *UNIVERSITY HILL FOUNDATION v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 701.

No. 71-814. *CORTRIGHT ET AL. v. FROEHLKE*, SECRETARY OF THE ARMY, ET AL. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 245.

No. 71-881. *ILLINOIS v. HUDSON*. Sup. Ct. Ill. Certiorari denied, it appearing that judgment of the Supreme Court of Illinois rests upon an adequate state ground. Reported below: 50 Ill. 2d 1, 276 N. E. 2d 345.

No. 71-5686. *LAUCHLI v. UNITED STATES*. C. A. 7th Cir. Certiorari denied.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner brought this civil rights lawsuit pursuant to 42 U. S. C. § 1985 to recover damages from agents of the Alcohol, Tobacco, and Firearms Division of the Treasury Department. He alleged that they had conducted un-

lawful searches of his property beyond the scope of their warrants. Both lower courts denied the petitioner, a pauper, permission to proceed *in forma pauperis*. The terse orders simply stated that the unlawful search issue was frivolous.<sup>1</sup> Yet there is no doubt that a civil rights damages action is appropriate where federal agents ransack one's premises without authority. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971). The Solicitor General, however, contends that the order of the Court of Appeals was nonetheless correct because the agents' searches had already been validated in the previous and finalized criminal proceeding.<sup>2</sup>

This action, brought to vindicate deprivations of Fourth Amendment privileges, is akin to that of the remedy of federal habeas corpus. The latter relief is not barred merely because the grounds relied on have been rejected on direct review of the conviction.<sup>3</sup> Inasmuch as both 42

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<sup>1</sup> With respect to the frivolity standard under 28 U. S. C. § 1915, I have previously stated my view that the principle of equal protection of the laws prohibits a court from denying a pauper access to judicial machinery where a similarly situated but wealthier litigant could have obtained a ruling on the merits of his claim simply by paying docketing fees. Here the petitioner was unable to pay the docketing fee required by the Court of Appeals and was unable to pay the service fee (but was able to pay the \$15 docketing fee) required by the District Court. *Cruz v. Hauck*, 404 U. S. 59 (1971).

<sup>2</sup> The Solicitor General may not be entirely correct in his implied assertion that all of the issues tendered in the instant complaint had been litigated in the criminal proceeding. Only searches conducted on April 17, 1969, were before the Court of Appeals. 444 F. 2d 1037, 1041 (CA7 1971). In addition to those seizures, petitioner's civil rights complaint attacked searches conducted on other dates which were not litigated in the previous prosecution inasmuch as the seized items were not sought to be introduced.

<sup>3</sup> Even where a federal prisoner continues to raise the same issue by filing repetitive petitions pursuant to 28 U. S. C. § 2255, the reviewing judge may not perfunctorily deny the later ones solely on the doctrine of *res judicata*. "[I]t is open to the applicant to show

U. S. C. § 1985 and federal habeas corpus are designed to make whole those who have been injured, either through loss of liberty or property, by unconstitutional conduct, it is unclear why collateral estoppel should apply against a prisoner in a civil rights action but not in his habeas action on the same issue. If Lauchli is subsequently freed on habeas on the very claim tendered here, will his civil rights action still be barred?

The Solicitor General says that the validity of petitioner's arrest and the searches of his premises, now challenged in this civil action, was "fully litigated and upheld in the criminal proceedings." That is partially true but not completely so. In the criminal case the motion to suppress the evidence was heard only by the court and it ruled on the question whether there was "probable cause" for the searches. But the issues tendered in this civil rights case will be for a jury to resolve. Is Lauchli barred from a jury trial on his civil rights suit merely because in the prior criminal case a judge ruled there was "probable cause" for the search?

These are important questions upon which we should have briefs and arguments.

The issue assumes added importance in light of the Government's current position that collateral estoppel does not bar it from re-prosecuting a defendant in a forfeiture lawsuit for the same alleged course of conduct for which he had previously been acquitted. In No. 71-672, *United States v. Two Hundred and One 50-pound Bags of Furazolidone*, the Solicitor General has petitioned this Court to reverse a Court of Appeals' determination that a prior acquittal of a defendant charged with smuggling animal feed in violation of 18 U. S. C. § 545 is a bar to a subsequent *in rem* forfeiture action

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that the ends of justice would be served by permitting the redetermination of the ground." *Sanders v. United States*, 373 U. S. 1, 16 (1963).

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brought by the Government against the feed on grounds that it was imported in violation of the same section.

The forfeiture case is not distinguishable from this case on the theory that the forfeiture action is "civil" and requires a lesser standard of proof. We have long held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." *Boyd v. United States*, 116 U. S. 616, 634 (1886). In *United States v. U. S. Coin & Currency*, 401 U. S. 715, 718 (1971), we found "no difference between a man who 'forfeits' \$8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of \$8,674 as a result of the same course of conduct."

May the Government have its cake and eat it too? May it (a) maintain that *res judicata* does not defeat forfeiture actions which are brought subsequent to acquittals and which are based on the same course of conduct, yet (b) plead collateral estoppel to a prisoner's attempts to recover damages for allegedly unconstitutional searches previously sustained on direct review of his conviction?<sup>4</sup>

I would grant the petition for certiorari or at the very least hold it for our disposition of No. 71-672.

No. 71-5762. SHARROW *v.* BROWN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 447 F. 2d 94.

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<sup>4</sup> This proposition, of course, does not foreclose the possibility that the Court could hold against the Government in both situations. By analogizing the subsequent civil rights lawsuit to the habeas action, collateral estoppel might be found inapplicable. By requiring that the Government join all "criminal" charges flowing from a single course of conduct in a single proceeding the Government's subsequent forfeiture action could be barred. *Green v. United States*, 355 U. S. 184 (1957); see my dissenting opinion in *Hoag v. New Jersey*, 356 U. S. 464, 477 (1958).

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No. 71-5761. *Joyce v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 147 U. S. App. D. C. 128, 454 F. 2d 971.

*Rehearing Denied*

No. 71-499. *MASCIA v. UNITED STATES*, 404 U. S. 1025;

No. 71-527. *UNITED STATES v. STANDARD OIL Co. OF CALIFORNIA*, 404 U. S. 558;

No. 71-536. *WILKINS, ADMINISTRATRIX v. AMERICAN EXPORT ISBRANDTSEN LINES, INC.*, 404 U. S. 1018;

No. 71-591. *RAWLS v. CONDÉ NAST PUBLICATIONS, INC.*, 404 U. S. 1038; and

No. 71-5546. *DUNLEAVAY v. ROCKEFELLER CENTER, INC., ET AL.*, 404 U. S. 1062. Petitions for rehearing denied.

No. 70-79. *RELIANCE ELECTRIC Co. v. EMERSON ELECTRIC Co.*, 404 U. S. 418. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 70-290. *GAS LIGHT Co. OF COLUMBUS v. GEORGIA POWER Co. ET AL.*, 404 U. S. 1062; and

No. 70-5049. *BURNS v. SWENSON, WARDEN, ET AL.*, 404 U. S. 1062. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 71-5444. *CARLOUGH v. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE*, 404 U. S. 1026. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

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No. 71-5277. *CARTER v. COURT OF CRIMINAL APPEALS OF TEXAS*, 404 U. S. 1012. Motion for leave to file petition for rehearing denied.

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*Miscellaneous Order*

No. 71-1080. *UNITED MINE WORKERS OF AMERICA v. BRYANT, U. S. DISTRICT JUDGE*. Motion for leave to file petition for writ of mandamus denied.

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*Order Appointing Clerk*

It is ordered that Michael Rodak, Jr., be appointed Clerk of this Court to succeed E. Robert Seaver effective at the commencement of business March 4, 1972, and that he take the oath of office and give bond as required by statute and the order of this Court entered November 22, 1948.

*Affirmed on Appeal*

No. 71-929. *FORBUSH ET AL. v. WALLACE, GOVERNOR OF ALABAMA, ET AL.* Affirmed on appeal from D. C. M. D. Ala. Reported below: 341 F. Supp. 217.

No. 71-5806. *CHARLESTON ET AL. v. WOHLGEMUTH ET AL.* Affirmed on appeal from D. C. E. D. Pa. Mr. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 332 F. Supp. 1175.

*Appeals Dismissed*

No. 71-805. *PHILADA HOME FUND, INC. v. BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES.* 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.

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No. 71-624. THOMPSON *v.* THOMPSON. Appeal from Super. Ct. Pa. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 217 Pa. Super. 874, 272 A. 2d 189.

No. 71-5773. FAIR *v.* WIGGINS. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71-932. WOODS ET AL. *v.* SOCIETY FOR THE PROPAGATION OF THE FAITH OF THE ARCHDIOCESE OF NEW ORLEANS, INC., ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 259 La. 897, 253 So. 2d 221.

*Vacated and Remanded on Appeal*

No. 70-291. OSMOND ET AL. *v.* SPENCE ET AL. Appeal from D. C. Del. Motion to dispense with printing jurisdictional statement granted. Judgment vacated and case remanded for further consideration in light of *Swarb v. Lennox*, *ante*, p. 191, and *D. H. Overmyer Co., Inc., of Ohio v. Frick Co.*, *ante*, p. 174. Order of June 21, 1971, entered by MR. JUSTICE BRENNAN, as modified by his order of August 20, 1971, shall continue in effect unless and until superseded by order of District Court. Reported below: 327 F. Supp. 1349.

No. 71-5262. CARPENTER ET AL. *v.* STERRETT, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE OF INDIANA, ET AL. Appeal from D. C. N. D. Ind. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Townsend v. Swank* and *Alexander v. Swank*, 404 U. S. 282.

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*Other Summary Disposition*

No. 71-5421. *MIDGETT v. SLAYTON, PENITENTIARY SUPERINTENDENT.* Order of this Court heretofore entered on February 22, 1972 [certiorari granted, *ante*, p. 916], in this case is hereby revoked. Certiorari dismissed. Reported below: 443 F. 2d 1090.

*Miscellaneous Orders*

No. 71-41. *INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO v. FLAIR BUILDERS, INC.* [Certiorari granted, 404 U. S. 982.] Request for additional time for filing brief for respondent granted and 30 additional days allotted for that purpose. Type-written briefs may be filed in lieu of printed briefs. J. Robert Murphy, Esquire, of Aurora, Illinois, invited to file a brief and argue in this case as *amicus curiae* in support of judgment below.

No. 71-709. *SUMIDA ET AL. v. YUMEN ET AL.*, *ante*, p. 964. Motion to disbar denied.

No. 71-1017. *GRAVEL v. UNITED STATES*; and

No. 71-1026. *UNITED STATES v. GRAVEL*. [Certiorari granted, *ante*, p. 916.] Motion to expedite granted so that the consolidated cases may be briefed and argued during the present Term of Court. Motion of Unitarian Universalist Assn. for leave to participate in oral argument as *amicus curiae* in No. 71-1017 denied.

No. 71-665. *VASQUEZ ET AL. v. WALSH, WARDEN*. Motion for leave to file petition for writ of habeas corpus denied.

No. 71-812. *LEMELSON v. PETTINE, CHIEF JUDGE, U. S. DISTRICT COURT*. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 71-5812. *MAGEE v. NELSON, WARDEN, ET AL.* Motion for leave to file petition for writ of prohibition denied.

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No. 71-5791. *CLEAVES v. PENNSYLVANIA ET AL.*; and  
No. 71-5792. *KNIGHT v. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*. Motions for leave to file petitions for writs of mandamus denied.

*Certiorari Granted*

No. 71-1016. *FEDERAL POWER COMMISSION v. LOUISIANA POWER & LIGHT CO. ET AL.*; and

No. 71-1040. *UNITED GAS PIPE LINE CO. ET AL. v. LOUISIANA POWER & LIGHT CO. ET AL.* C. A. 5th Cir. Petitions for certiorari to review judgment of United States Court of Appeals for the Fifth Circuit in *Federal Power Commission v. Louisiana Power & Light Co.* (CA No. 71-2550) granted and cases consolidated. Petitions for certiorari before judgment to review opinion and order of Federal Power Commission (FPC Opinion No. 606, *United Gas Pipe Line Co.*) denied. Motion to expedite granted so that the consolidated cases may be briefed and argued during present Term of Court. Motions of Humble Oil & Refining Co. and State of Louisiana et al. for leave to file briefs as *amici curiae* granted. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions and motions. Reported below: 456 F. 2d 326.

No. 71-839. *ERLENBAUGH ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari granted limited to Question 1, presented by the petition, which reads as follows:

“1. Whether the Court of Appeals erred in not following the opinion of the Court of Appeals for the Fourth Circuit in a 1967 case entitled U. S. vs Arnold, 380 Federal 2nd, 366, thus creating a conflict between the circuits.”

MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 452 F. 2d 967.

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No. 71-909. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* MINK ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: — U. S. App. D. C. —, 464 F. 2d 742.

*Certiorari Denied.* (See also Nos. 71-624, 71-805, 71-5773, 71-1016, and 71-1040, *supra*.)

No. 71-702. TOCCO *v.* UNITED STATES;

No. 71-5916. RICHMOND *v.* UNITED STATES;

No. 71-5924. SMITH *v.* UNITED STATES; and

No. 71-5925. LONG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 288.

No. 71-783. MARTELLA *v.* MARINE COOKS & STEWARDS UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 729.

No. 71-787. MONSANTO Co. *v.* DAWSON CHEMICAL Co. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 1035.

No. 71-818. PACE Co., DIVISION OF AMBAC INDUSTRIES, INC. *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 890.

No. 71-821. DELTA DEVELOPMENT Co., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 989.

No. 71-826. 967.905 ACRES OF LAND IN COOK COUNTY ET AL., MINNESOTA, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 447 F. 2d 764.

No. 71-842. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 21.

No. 71-846. SIRAGUSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 592.

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No. 71-860. *TROPIANO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 71-875. *IVIMEY v. NEW YORK*. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 71-878. *THOMAS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 71-882. *HUNTER v. NORTH CAROLINA*. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 498, 183 S. E. 2d 665.

No. 71-903. *JONES v. BOARD OF EDUCATION OF DAVIESS COUNTY*. Ct. App. Ky. Certiorari denied. Reported below: 470 S. W. 2d 829.

No. 71-911. *PRESSMAN v. NELLIS*. Ct. App. D. C. Certiorari denied. Reported below: 282 A. 2d 539.

No. 71-917. *BARBIZON ELECTRIC CO., INC. v. CITY OF NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 36 App. Div. 2d 923, 321 N. Y. S. 2d 322.

No. 71-922. *COHN v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 881.

No. 71-927. *TROPIANO v. MOSELEY, WARDEN*. C. A. 2d Cir. Certiorari denied.

No. 71-5753. *ALTIMUS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 736.

No. 71-5766. *BETTKER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 506.

No. 71-5767. *McHENRY v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 194.

No. 71-5768. *CLAYTON v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 450 F. 2d 16.

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No. 71-5770. *MASELLI v. MANCUSI, CORRECTIONAL SUPERINTENDENT.* C. A. 2d Cir. Certiorari denied.

No. 71-5772. *DAVIS v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 781.

No. 71-5775. *WHITE v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 493.

No. 71-5776. *HOLMES v. MARYLAND.* C. A. 4th Cir. Certiorari denied.

No. 71-5777. *GREEN v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 987.

No. 71-5778. *LAWES v. YEAGER, PRINCIPAL KEEPER.* C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 74.

No. 71-5779. *EISEN v. SILVER.* C. A. 2d Cir. Certiorari denied.

No. 71-5781. *JACKSON v. PICARD, CORRECTIONAL SUPERINTENDENT, ET AL.* C. A. 1st Cir. Certiorari denied.

No. 71-5782. *YOUNG v. ALABAMA.* C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 854.

No. 71-5783. *PATTERSON v. TULSA LOCAL No. 513, MOTION PICTURE OPERATORS OF THE UNITED STATES & CANADA.* C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 205.

No. 71-5784. *ROY v. CALIFORNIA.* Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 18 Cal. App. 3d 537, 95 Cal. Rptr. 884.

No. 71-5785. *GREEN v. SLAYTON, PENITENTIARY SUPERINTENDENT.* C. A. 4th Cir. Certiorari denied.

No. 71-5786. *CAGLE v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 644.

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No. 71-5793. *MAGEE v. YEAGER, PRINCIPAL KEEPER.*  
C. A. 3d Cir. Certiorari denied.

No. 71-5796. *MILLER v. UNITED STATES.* C. A. D. C.  
Cir. Certiorari denied.

No. 71-5797. *McBRIDE v. UNITED STATES.* C. A.  
10th Cir. Certiorari denied. Reported below: 446 F.  
2d 229.

No. 71-5798. *MCLEAN, AKA McCLEAN v. UNITED  
STATES.* C. A. 4th Cir. Certiorari denied. Reported  
below: 448 F. 2d 1399.

No. 71-5800. *CREASMAN v. FIRST FEDERAL SAVINGS  
& LOAN ASSOCIATION OF HENDERSONVILLE ET AL.* Sup.  
Ct. N. C. Certiorari denied. Reported below: 279  
N. C. 361, 183 S. E. 2d 115.

No. 71-5802. *McGAHEY v. UNITED STATES.* C. A.  
9th Cir. Certiorari denied. Reported below: 449 F.  
2d 738.

No. 71-5804. *LOGAN v. LYON ET AL.* C. A. 2d Cir.  
Certiorari denied.

No. 71-5805. *KLABIN v. NEW YORK.* App. Div.,  
Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71-5807. *JOHNSON v. BRIERLEY, PENITENTIARY  
SUPERINTENDENT.* C. A. 3d Cir. Certiorari denied.  
Reported below: 444 F. 2d 1177.

No. 71-5808. *HALEY v. UNITED STATES.* C. A. 8th  
Cir. Certiorari denied. Reported below: 444 F. 2d 61.

No. 71-5810. *JOHNSON v. UNITED STATES.* C. A. 4th  
Cir. Certiorari denied.

No. 71-5811. *COOKE v. UNITED STATES.* C. A. 4th  
Cir. Certiorari denied.

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No. 71-5809. HALEY *v.* UNITED STATES; and

No. 71-5851. LILEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 452 F. 2d 391.

No. 71-5813. SULLIVAN *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71-5814. SEEWALD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 1159.

No. 71-5939. BROWN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 101.

No. 71-246. OSWALD, CORRECTION COMMISSIONER, ET AL. *v.* SOSTRE. C. A. 2d Cir. Motion to dispense with printing *amicus curiae* brief of National Law Office of National Legal Aid & Defender Assn. and motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 442 F. 2d 178.

No. 71-548. HAMILTON *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-593. BERG *v.* SCHMIDT, JUDGE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-910. SIMS ET AL. *v.* PARKE DAVIS & CO. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 1259.

No. 71-930. BENSON ET AL. *v.* RICH ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1371.

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No. 71-5771. *MUNCASTER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 1367.

No. 71-5799. *ROBINSON v. DAVIS ET AL.* C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 753.

No. 71-809. *SOBEL v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1370.

No. 71-833. *DaCOSTA v. LAIRD, SECRETARY OF DEFENSE, ET AL.* C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1368.

MR. JUSTICE DOUGLAS, dissenting.

Once again, this Court is confronted with a challenge to the constitutionality of the presidential war which has raged in Southeast Asia for nearly a decade.<sup>1</sup> Once again, it denies certiorari. Once again, I dissent.

I have expressed at length my view that the constitutional questions raised by conscription for a presidential war are both substantial and justiciable. See, e. g., *Massachusetts v. Laird*, 400 U. S. 886 (DOUGLAS, J., dis-

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<sup>1</sup> Petitioner DaCosta is a Portuguese citizen permanently resident in the United States. He was conscripted into the United States Army in December 1970, and commenced this action in July 1971, to enjoin enforcement of military orders deploying him to Vietnam. He alleges that participation by the United States in the Vietnamese conflict has not been authorized by Congress conformably with the Constitution, and that absent such authorization, Congress has no power to conscript for military service in armed conflict overseas.

DOUGLAS, J., dissenting

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senting) (*Mass. I*); *Hart v. United States*, 391 U. S. 956 (DOUGLAS, J., dissenting); *Holmes v. United States*, 391 U. S. 936 (DOUGLAS, J., dissenting); *Mora v. McNamara*, 389 U. S. 934, 935 (DOUGLAS, J., dissenting); *Mitchell v. United States*, 386 U. S. 972 (DOUGLAS, J., dissenting).

The circuits are in conflict as to the justiciability of these questions. Compare *Massachusetts v. Laird*, 451 F. 2d 26 (CA1 1971) (*Mass. II*), and *Orlando v. Laird*, 443 F. 2d 1039 (CA2 1971), with *Velvel v. Nixon*, 415 F. 2d 236 (CA10 1969), and *Luftig v. McNamara*, 126 U. S. App. D. C. 4, 373 F. 2d 664 (1967).

This Court, of course, should give deference to the coordinate branches of the Government. But we did not defer in the *Prize Cases*, 2 Black 635, when the issue was presidential power as Commander in Chief to order a blockade. We did not defer in the *Steel Seizure Case*,<sup>2</sup> when the issue was presidential power, in time of armed international conflict, to order the seizure of domestic steel mills. Nor should we defer here, when the issue is presidential power to seize, not steel, but people. See *Mass. I, supra*, at 891-900.

The Constitution gives Congress the power "To declare War," Art. I, § 8; and it is argued that the Constitution gives to Congress the *exclusive* power to determine when it has declared war. But if there is such a "textually demonstrable constitutional commitment," *Baker v. Carr*, 369 U. S. 186, 217, it is for this Court to determine its scope. *Powell v. McCormack*, 395 U. S. 486, 521. See *Mass. I, supra*, at 892.

While we debate whether to decide the constitutionality of this war, our countrymen are daily compelled to undergo the physical and psychological tortures of armed

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<sup>2</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579.

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combat on foreign soil. Families and careers are disrupted; young men maimed and disfigured; lives lost. The issues are large; they are precisely framed; we should decide them.

No. 71-883. *PEARL v. LAIRD*, SECRETARY OF DEFENSE, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 71-920. *IN RE O'CONNOR*. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 71-953. *JOHNSON v. REED ET VIR*. Sup. Ct. Tex. Motion to dispense with printing petition granted. Certiorari denied. Reported below: See 464 S. W. 2d 689.

*Rehearing Denied*

No. 1469, October Term, 1970. *HOMART DEVELOPMENT CO. v. DIAMOND ET AL.*, 402 U. S. 988. Joint motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN are of the opinion that the motion should be granted.

No. 71-437. *AMATO ET AL. v. WISCONSIN*, 404 U. S. 1063;

No. 71-5504. *FEURTADO v. FLORIDA*, 404 U. S. 1047; and

No. 71-5536. *WICKLINE v. BROOKS ET AL.*, 404 U. S. 1061. Petitions for rehearing denied.

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*Dismissal Under Rule 60*

No. 71-747. *GRAUSAM v. MURPHEY*, STATE HOSPITAL DIRECTOR, ET AL. C. A. 3d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 448 F. 2d 197.

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*Miscellaneous Order*

No. A-937 (71-1170). WHDH, INC. v. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT; and

No. A-937 (71-1171). WHDH, INC. v. FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Application for stay pending action on petition for writ of certiorari [No. 71-1171] and motion for leave to file petition for writ of mandamus [No. 71-1170] presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

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*Affirmed on Appeal*

No. 71-936. MANARD ET AL. v. MILLER, ATTORNEY GENERAL OF VIRGINIA, ET AL. Affirmed on appeal from D. C. E. D. Va. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

*Appeals Dismissed*

No. 71-675. KAPPOS v. IOWA. Appeal from Sup. Ct. Iowa 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. Reported below: 189 N. W. 2d 563.

No. 71-5399. PERRYMAN v. WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: See 4 Wash. App. 356, 481 P. 2d 462.

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No. 71-5590. *SALISBURY v. OREGON*. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 5 Ore. App. 463, 484 P. 2d 1129.

*Certiorari Granted—Vacated and Remanded.* (See No. 71-5552, *ante*, p. 319.)

#### *Other Summary Disposition*

No. 71-431. *IMMIGRATION AND NATURALIZATION SERVICE v. VITALE*. C. A. 9th Cir. [Certiorari granted, 404 U. S. 983.] Judgment vacated and case remanded with directions to dismiss petition to review order of deportation. Reported below: 443 F. 2d 343.

#### *Miscellaneous Orders*

No. A-880. *SHELTON v. BRUNSON ET AL.* D. C. N. D. Tex. Application for stay of deployment presented to Mr. Justice Douglas, and by him referred to the Court, denied. Mr. Justice Douglas would continue stay pending timely filing and disposition of a petition for writ of certiorari in this Court.

No. A-905. *DAVIS ET AL. v. CINEMA CLASSICS, LTD., INC., ET AL.*; and

No. A-913. *BUSCH ET AL. v. CINEMA CLASSICS, LTD., INC., ET AL.* D. C. C. D. Cal. Applications for stay of preliminary injunction presented to Mr. Justice Powell, and by him referred to the Court, denied.

No. A-962. *CALIFORNIA v. ANDERSON*. Sup. Ct. Cal. Application of State of California for stay of judgment of Supreme Court of California (Crim. 13617) denied. Reported below: 6 Cal. 3d 628, 493 P. 2d 880.

No. 50, Orig. *VERMONT v. NEW YORK ET AL.* Motion of Monroe County Conservation Council for leave to intervene as a party plaintiff denied.

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No. A-926. *DOE (SCHWARTZ, REAL PARTY IN INTEREST) v. UNITED STATES.* C. A. 2d Cir. Application for stay of execution of sentence for civil contempt presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted pending further order of this Court.

No. 54, Orig. *UNITED STATES v. FLORIDA ET AL.* Motion for leave to file bill of complaint granted and defendants allotted 60 days to answer.

No. 70-283. *ADAMS, WARDEN v. WILLIAMS.* C. A. 2d Cir. [Certiorari granted, 404 U. S. 1014.] Motion of District Attorney of New York County for leave to participate in oral argument as *amicus curiae* denied.

No. 71-110. *GELBARD ET AL. v. UNITED STATES.* C. A. 9th Cir. [Certiorari granted, 404 U. S. 990.] Motion of petitioner Gelbard for assignment of a separate docket number and/or additional time for oral argument denied.

No. 71-263. *UNITED STATES v. EGAN ET AL.* C. A. 3d Cir. [Certiorari granted, 404 U. S. 990.] Motion of Ramsey Clark and Leonard B. Boudin to permit Jack J. Levine to argue orally *pro hac vice* on behalf of respondent Egan granted.

No. 71-315. *DEEPSOUTH PACKING Co., INC. v. LAITRAM CORP.* C. A. 5th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of Edward S. Irons et al., for leave to file a brief as *amici curiae* granted.

No. 71-708. *TRAFFICANTE ET AL. v. METROPOLITAN LIFE INSURANCE Co. ET AL.* C. A. 9th Cir. [Certiorari granted, *ante*, p. 915.] Motion of petitioners to dispense with printing briefs and appendix granted.

No. 71-858. *RICCI v. CHICAGO MERCANTILE EX-CHANGE ET AL.* C. A. 7th Cir. [Certiorari granted, *ante*, p. 953.] Motion for reconsideration of petition for certiorari denied.

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No. 71-288. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL. C. A. D. C. Cir. [Certiorari granted, 404 U. S. 955.] Motion of Sam J. Ervin, Jr., for additional time to participate in oral argument as *amicus curiae* denied. Permission for two counsel to argue on behalf of respondents granted.

No. 71-1024. SIXTY-SEVENTH MINNESOTA STATE SENATE *v.* BEENS ET AL.; and

No. 71-1145. SIXTY-SEVENTH MINNESOTA STATE SENATE *v.* BEENS ET AL. Appeals from D. C. Minn. Motion to expedite denied. Cases consolidated. Reported below: 336 F. Supp. 715.

No. 71-1128. KELEMEN ET AL. *v.* SERBIAN ORTHODOX CHURCH CONGREGATION OF ST. DEMETRIUS OF AKRON. Sup. Ct. Ohio. Motion for consolidation with Nos. 71-563 [*Rohrbaugh v. Presbytery of Seattle, Inc.*] and 71-867 [*Simich v. Milisavljevic*] denied.

No. 71-5255. BARKER *v.* WINGO, WARDEN. C. A. 6th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Motion of M. Curran Clem to permit Robert W. Willmott, Jr., for leave to argue orally *pro hac vice* on behalf of respondent granted.

No. 71-5833. ALEXANDER *v.* MINNESOTA. Motion for leave to file petition for writ of certiorari denied.

No. 71-5819. BOYD *v.* GAFFNEY, WARDEN; and

No. 71-5847. HITCHCOCK *v.* EYMAN, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71-949. GARRISON ET AL. *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus and/or other relief denied.

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No. 71-1013. *TEITELBAUM v. STONE, SECRETARY OF STATE OF FLORIDA;*

No. 71-5816. *PAIGE v. CHAMBERS, CHIEF JUDGE, U. S. COURT OF APPEALS;*

No. 71-5893. *DEBORDE v. HAMILTON, CHIEF JUSTICE, SUPREME COURT OF WASHINGTON, ET AL.;* and

No. 71-5897. *PUTNAM v. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.* Motions for leave to file petitions for writs of mandamus denied.

No. 71-968. *MEDANSKY v. WILL, U. S. DISTRICT JUDGE.* 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. 71-5837. *FEATHERINGHAM v. ASHLAND COUNTY COURT OF COMMON PLEAS ET AL.* Motion for leave to file petition for writ of mandamus and/or prohibition denied.

#### *Probable Jurisdiction Noted*

No. 71-718. *McGINNIS, COMMISSIONER OF CORRECTION ET AL. v. ROYSTER ET AL.* Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 332 F. Supp. 973.

No. 71-862. *UNITED AIR LINES, INC. v. MAHIN, DIRECTOR OF DEPARTMENT OF REVENUE, ET AL.* Appeal from Sup. Ct. Ill. Probable jurisdiction noted. Reported below: 49 Ill. 2d 45, 273 N. E. 2d 585.

#### *Certiorari Granted*

No. 71-366. *TIDEWATER OIL Co. v. UNITED STATES ET AL.* C. A. 9th Cir. Motion for leave to file petition for rehearing granted. Order of this Court denying petition for writ of certiorari on November 9, 1971 [404 U. S. 941], vacated. Certiorari granted.

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No. 71-692. ILLINOIS *v.* SOMERVILLE. C. A. 7th Cir. Certiorari granted. Reported below: 447 F. 2d 733.

No. 71-711. NATIONAL LABOR RELATIONS BOARD *v.* GRANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL-CIO. C. A. 1st Cir. Certiorari granted. Reported below: 446 F. 2d 369.

No. 71-829. MOURNING *v.* FAMILY PUBLICATIONS SERVICE, INC. C. A. 5th Cir. Motion of National Conference of Commissioners on Uniform State Laws for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 449 F. 2d 235.

No. 71-964. PENNSYLVANIA *v.* WARE. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 446 Pa. 52, 284 A. 2d 700.

No. 71-5908. CHAMBERS *v.* MISSISSIPPI. Sup. Ct. Miss. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 252 So. 2d 217.

*Certiorari Denied.* (See also Nos. 71-675, 71-5399, and 71-5590, *supra*.)

No. 71-641. ESCOBAR *v.* CALIFORNIA. Super. Ct. Cal., County of Orange. Certiorari denied.

No. 71-662. ROHM ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 71-734. RIVERA *v.* UNITED STATES; and

No. 71-5946. CARABALLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71-776. HARVILLE ROSE SERVICE *v.* KELLOGG Co. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 1346.

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No. 71-852. *C. D. CONSTRUCTION CORP. v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 470.

No. 71-853. *GREENBERG v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 1223.

No. 71-854. *DEUTSCH Co., METAL COMPONENTS DIVISION v. NATIONAL LABOR RELATIONS BOARD.* C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 902.

No. 71-867. *SIMICH ET AL. v. MILISAVLJEVIC ET AL.* Sup. Ct. Ohio. Certiorari denied.

No. 71-869. *DEUTSCH Co., ELECTRONIC COMPONENTS DIVISION v. NATIONAL LABOR RELATIONS BOARD.* C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 901.

No. 71-876. *NEMETZ v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 924.

No. 71-886. *STRACHAN SHIPPING Co. ET AL. v. CITY OF GALVESTON;* and

No. 71-890. *RORIE v. CITY OF GALVESTON.* Sup. Ct. Tex. Certiorari denied.

No. 71-892. *ZAMBRANO v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 416.

No. 71-893. *LANE v. IMMIGRATION AND NATURALIZATION SERVICE.* C. A. 9th Cir. Certiorari denied.

No. 71-896. *LOZOFF v. UNITED STATES.* C. A. 1st Cir. Certiorari denied.

No. 71-897. *NEW YORK DISTRICT COUNCIL No. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO v. NATIONAL LABOR RELATIONS BOARD.* C. A. 2d Cir. Certiorari denied.

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No. 71-899. *GARCIA-GUILLEM v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 1189.

No. 71-902. *MUNICIPAL LIGHT BOARD OF READING, MASSACHUSETTS, ET AL. v. FEDERAL POWER COMMISSION ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 146 U. S. App. D. C. 294, 450 F. 2d 1341.

No. 71-905. *MORSE ET UX. v. UNITED STATES.* Ct. Cl. Certiorari denied. Reported below: 195 Ct. Cl. 1, 443 F. 2d 1185.

No. 71-906. *MOUNTAIN FUEL SUPPLY Co. v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Reported below: 449 F. 2d 816.

No. 71-908. *STRAUSS v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 375.

No. 71-915. *UNITED STATES ET AL. v. PARKER ET AL.;* and

No. 71-973. *KAIBAB INDUSTRIES ET AL. v. PARKER ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 793.

No. 71-916. *KAUFMAN v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 452 F. 2d 1202.

No. 71-926. *STUHL v. 527 MADISON AVENUE Co.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 36 App. Div. 2d 502, 321 N. Y. S. 2d 811.

No. 71-933. *OHRYNOWICZ v. UNITED STATES.* C. A. 7th Cir. Certiorari denied.

No. 71-945. *LEMELSON v. TOPPER CORP. ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 845.

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No. 71-934. *DUBELKO v. DUBELKO*. Sup. Ct. Ohio. Certiorari denied.

No. 71-948. *GIPE, GUARDIAN v. DEMPSEY ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 1309.

No. 71-955. *CRIM, AKA MILLER v. INDIANA*. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 272 N. E. 2d 85.

No. 71-958. *AKTIEBOLAGET FLYMO ET AL. v. CODY ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 146 U. S. App. D. C. 345, 452 F. 2d 1274.

No. 71-961. *ROBERTS ET AL. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 4th Cir. Certiorari denied.

No. 71-967. *WAHL ET AL. v. CARRIER MANUFACTURING CO., INC.* C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 96.

No. 71-985. *MAURICE A. GARBELL, INC., ET AL. v. HAUK, U. S. DISTRICT JUDGE (BOEING CO. ET AL., REAL PARTIES IN INTEREST)*. C. A. 9th Cir. Certiorari denied.

No. 71-987. *MOODY v. MOODY*. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 465 S. W. 2d 836.

No. 71-989. *BROWN v. MICHIGAN DEPARTMENT OF MILITARY AFFAIRS*. Sup. Ct. Mich. Certiorari denied. Reported below: 386 Mich. 194, 191 N. W. 2d 347.

No. 71-1053. *JAMIESON v. AMERICAN NATIONAL SAFE DEPOSIT CO. ET AL.* App. Ct. Ill., 1st Jud. Dist. Certiorari denied. Reported below: 133 Ill. App. 2d 647, 273 N. E. 2d 741.

No. 71-5442. *HAYS v. KENTUCKY*. Ct. App. Ky. Certiorari denied. Reported below: 467 S. W. 2d 354.

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No. 71-5535. *MITCHELL v. CALIFORNIA*. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 275 Cal. App. 2d 351, 79 Cal. Rptr. 764.

No. 71-5540. *REED v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied.

No. 71-5544. *ALLEN v. CARDWELL, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 71-5545. *COLLINS v. MICHIGAN*. Sup. Ct. Mich. Certiorari denied.

No. 71-5570. *DiMAGGIO v. PRUDENTIAL SAVINGS & LOAN ASSN.* Sup. Ct. Wis. Certiorari denied.

No. 71-5583. *SMITH v. FLORIDA*. Sup. Ct. Fla. Certiorari denied.

No. 71-5605. *COSCO v. MEACHAM, WARDEN*. Sup. Ct. Wyo. Certiorari denied.

No. 71-5815. *DUNNINGS v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 71-5817. *BURNS v. COLUMBIA PICTURES INTERNATIONAL CORP. ET AL.* C. A. 9th Cir. Certiorari denied.

No. 71-5822. *BASKIN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 729.

No. 71-5823. *GREEN v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied.

No. 71-5824. *BURTON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 1089.

No. 71-5825. *JOYNER v. SLAYTON, PENITENTIARY SUPERINTENDENT*. C. A. 4th Cir. Certiorari denied.

No. 71-5826. *JOHNSON v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. Reported below: 252 So. 2d 221.

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No. 71-5827. *BRYANT v. UNITED STATES*;  
No. 71-5996. *FEGETT v. UNITED STATES*; and  
No. 71-6050. *BURKHALTER v. UNITED STATES*. C. A.  
8th Cir. Certiorari denied. Reported below: 451 F. 2d  
394.

No. 71-5831. *LEMON v. MANCUSI, CORRECTIONAL SU-  
PERINTENDENT, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 71-5832. *WOODFORD v. UNITED STATES*. C. A. 6th  
Cir. Certiorari denied.

No. 71-5834. *FACKELMAN v. UNITED STATES*. C. A.  
4th Cir. Certiorari denied.

No. 71-5835. *FREEMAN v. NEW JERSEY*. C. A. 3d Cir.  
Certiorari denied.

No. 71-5836. *CASTALDI v. UNITED STATES*; and  
No. 71-5988. *McBRIDE ET AL. v. UNITED STATES*.  
C. A. 7th Cir. Certiorari denied. Reported below: 453  
F. 2d 506.

No. 71-5838. *HINTON v. RODRIGUEZ, WARDEN*. C. A.  
10th Cir. Certiorari denied.

No. 71-5839. *FREEDMAN v. AMERICAN EXPORT IS-  
BRANDTSEN LINES, INC.* C. A. 3d Cir. Certiorari de-  
nied. Reported below: 451 F. 2d 157.

No. 71-5841. *McDANIEL v. UNITED STATES*. C. A.  
8th Cir. Certiorari denied. Reported below: 449 F. 2d  
832.

No. 71-5842. *BOYD v. UNITED STATES*. C. A. 5th Cir.  
Certiorari denied. Reported below: 448 F. 2d 477.

No. 71-5843. *LOCKETT v. OHIO*. Sup. Ct. Ohio.  
Certiorari denied.

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No. 71-5844. *GREEN v. LAIRD, SECRETARY OF DEFENSE, ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 71-5846. *BRUNGES v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 947.

No. 71-5848. *LOTT v. OKLAHOMA.* C. A. 10th Cir. Certiorari denied.

No. 71-5849. *GIBBS v. YEAGER, PRINCIPAL KEEPER.* C. A. 3d Cir. Certiorari denied.

No. 71-5850. *GRAHAM v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. (AEROJET-GENERAL CORP. ET AL., REAL PARTIES IN INTEREST).* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-5853. *TIMMONS v. PENNSYLVANIA ET AL.* C. A. 3d Cir. Certiorari denied.

No. 71-5856. *CACAVAS v. GENERAL MOTORS CORP. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 444 F. 2d 506.

No. 71-5857. *CHRISTIAN v. NEW YORK.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 37 App. Div. 2d 765, 324 N. Y. S. 2d 753.

No. 71-5859. *WYATT v. OHIO.* Sup. Ct. Ohio. Certiorari denied.

No. 71-5862. *HUBER ET AL. v. STATE BOARD OF BAR EXAMINERS OF GEORGIA ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 886.

No. 71-5863. *GOODMAN ET AL. v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 944.

No. 71-5864. *WATSON ET AL. v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 290.

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No. 71-5865. *YOUNG v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 71-5867. *LEWIS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 788.

No. 71-5868. *HALPRIN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 322.

No. 71-5869. *DANIEL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 298.

No. 71-5870. *MACCOLLUM v. ROLLINS ET AL.* C. A. 10th Cir. Certiorari denied.

No. 71-5871. *WING v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 806.

No. 71-5873. *LOVE ET AL. v. VIRGINIA ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 50.

No. 71-5878. *KENT v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 751.

No. 71-5879. *LUCKETT v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied.

No. 71-5880. *FERENC v. JOHNSON, PENITENTIARY SUPERINTENDENT*. C. A. 3d Cir. Certiorari denied.

No. 71-5882. *BRONSON v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 449 F. 2d 302.

No. 71-5883. *BIBLE v. ARIZONA ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 111.

No. 71-5885. *IANNARELLI v. MORTON, SECRETARY OF THE INTERIOR, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 71-5889. *DENMAN ET AL. v. SCANNELL ET AL.* C. A. 1st Cir. Certiorari denied.

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No. 71-5884. *BOULWARE v. NEW YORK*. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 135, 272 N. E. 2d 538.

No. 71-5891. *LINDSEY v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 701.

No. 71-5892. *LEDERMAN v. NEW YORK CITY TRANSIT AUTHORITY ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71-5894. *BARTLETT, GUARDIAN v. HOLLOPETER*. Sup. Ct. Ohio. Certiorari denied.

No. 71-5895. *KELLEY v. SPRINKLE*. C. A. 8th Cir. Certiorari denied.

No. 71-5898. *OAKS v. WAINWRIGHT, CORRECTIONS DIRECTOR*. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 1062.

No. 71-5900. *NOVICK v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 1111.

No. 71-5901. *WILLIAMS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 343.

No. 71-5902. *OLIVER v. DUGGAN, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 71-5903. *FOREMAN v. NEW JERSEY*. Super. Ct. N. J. Certiorari denied.

No. 71-5904. *WELLS v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 281 A. 2d 226.

No. 71-5907. *HOYT v. UNITED STATES*; and

No. 71-5952. *BOWMAN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 570.

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No. 71-5909. *SWANSON v. ARKANSAS*. Sup. Ct. Ark. Certiorari denied. Reported below: 251 Ark. 147, 471 S. W. 2d 351.

No. 71-415. *COLORADO RIVER WATER CONSERVATION DISTRICT v. ROCKY MOUNTAIN POWER CO. ET AL.* Sup. Ct. Colo. Certiorari denied. Mr. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Mr. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 174 Colo. 309, 486 P. 2d 438.

No. 71-563. *ROHRBAUGH ET AL. v. PRESBYTERY OF SEATTLE, INC., ET AL.* Sup. Ct. Wash. Motion of Mary Elizabeth Blue Hull Memorial Presbyterian Church, a Georgia Nonprofit Corp., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 79 Wash. 2d 367, 485 P. 2d 615.

No. 71-609. *TERMINAL FREIGHT HANDLING CO. ET AL. v. SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD;*

No. 71-924. *SEARS, ROEBUCK & CO. ET AL. v. SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD;* and

No. 71-925. *TERMINAL FREIGHT COOPERATIVE ASSN. ET AL. v. SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL.* C. A. 8th Cir. Motions of Sears, Roebuck & Co. for leave to intervene in Nos. 71-609 and 71-925 denied. Certiorari denied. Mr. JUSTICE POWELL took no part in the consideration or decision of these motions and petitions. Reported below: No. 71-609, 444 F. 2d 699; No. 71-924, 450 F. 2d 353.

No. 71-874. *FELTMAN v. UNITED STATES.* C. A. 10th Cir. Certiorari denied. Mr. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 153.

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No. 71-868. *CARTRADE, INC. v. FORD DEALERS ADVERTISING ASSOCIATION OF SOUTHERN CALIFORNIA ET AL.* C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 289.

No. 71-5519. *HINNINGTON v. DEPARTMENT OF CORRECTIONS OF CALIFORNIA ET AL.* C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 856.

No. 71-5528. *BROWN v. TENNESSEE.* Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: — Tenn. App. —, 470 S. W. 2d 39.

No. 71-5609. *GOODART v. CALIFORNIA.* Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5624. *ALCALA v. WYOMING.* Sup. Ct. Wyo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 487 P. 2d 448.

No. 71-5818. *MARCIANO v. IMMIGRATION AND NATURALIZATION SERVICE.* C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 1022.

No. 71-5820. *DAUGHDRILL, ADMINISTRATRIX v. DIAMOND M. DRILLING Co.* C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 781.

No. 71-5829. *HOWARD v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

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No. 71-5821. *MALATESTA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 1365.

No. 71-5877. *SMART v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 931.

No. 71-5905. *CRUZ v. BETO, CORRECTIONS DIRECTOR.* C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-871. *PORDUM v. UNITED STATES;* and

No. 71-5890. *LUDERA v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. Reported below: 451 F. 2d 1015.

No. 71-907. *UNITED STATES v. THOMPSON.* C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 147 U. S. App. D. C. 1, 452 F. 2d 1333.

No. 71-960. *MULLINS v. OHIO.* Sup. Ct. Ohio. Motion to dispense with printing petition granted. Certiorari denied.

No. 71-965. *LOVISI ET VIR v. VIRGINIA.* Sup. Ct. Va. Motion of respondent for leave to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5874. *WHITE v. UNITED STATES.* C. A. 5th Cir. Motion for leave to file supplemental petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 696.

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No. 71-5828. *CROW v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 451 F. 2d 323.

No. 71-5888. *BAXTER v. DAVIS ET AL.* C. A. 1st Cir. Motion for leave to amend petition granted. Certiorari denied. Reported below: 450 F. 2d 459.

*Rehearing Granted.* (See No. 71-366, *supra*.)

*Rehearing Denied*

No. 1588, October Term, 1970. *SEARS, ROEBUCK & CO. ET AL. v. SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL.*, 403 U. S. 905, 404 U. S. 960. Motion for leave to file second petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71-612. *VON POPPENHEIM v. PORTLAND BOXING & WRESTLING COMM'N ET AL.*, 404 U. S. 1039. Petition for rehearing denied.

No. 71-5171. *CUNNINGHAM v. WINGO, WARDEN*, 404 U. S. 1064, and *ante*, p. 948. Motion for leave to file second petition for rehearing denied.

No. 71-5534. *OLIVER v. HARRISON COUNTY CLERK ET AL.*, 404 U. S. 1061. Motion for leave to file 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 Customs and Patent Appeals during the period beginning May 1, 1972, and ending May 5, 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.

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*Miscellaneous Order*

No. A-980. *OPATZ v. CITY OF ST. CLOUD ET AL.* Sup. Ct. Minn. Application for temporary injunction pending appeal, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. Reported below: 293 Minn. 379, 196 N. W. 2d 298.

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*Affirmed on Appeal*

No. 71-891. *CAPITAL BROADCASTING CO. ET AL. v. ACTING ATTORNEY GENERAL ET AL.* Appeal from D. C. D. C. Motion of John F. Banzhaf III et al. for leave to file a brief as *amici curiae* and to dispense with printing granted. Judgment affirmed. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion or appeal. Reported below: 333 F. Supp. 582.

No. 71-919. *NATIONAL ASSOCIATION OF BROADCASTERS ET AL. v. ACTING ATTORNEY GENERAL ET AL.* Affirmed on appeal from D. C. D. C. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted. Reported below: 333 F. Supp. 582.

No. 71-1030. *KIERNAN ET AL. v. LINDSAY, MAYOR OF NEW YORK, ET AL.* Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 334 F. Supp. 588.

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*Appeals Dismissed*

No. 71-600. STATE BOARD OF ELECTION COMMISSIONERS ET AL. v. EVERETT ET AL. Appeal from D. C. S. D. Miss. dismissed for failure to docket case within time prescribed by Rule 13 (1). Reported below: 327 F. Supp. 640.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's dismissal of this appeal for failure to docket within the prescribed time. I do so despite the fact that the Court apparently has not consistently enforced the provisions of its Rule 13 (1) and, on occasion, has permitted appeals despite untimely docketing. See, for example, another Mississippi voting rights case, *Whitley v. Williams*, one of the cases decided with *Allen v. State Board of Elections*, 393 U. S. 544 (1969). Compare *Johnson v. Florida*, 391 U. S. 596, 598n (1968), and *United Public Workers v. Mitchell*, 330 U. S. 75, 84-86 (1947), with *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U. S. 32 (1966); *Landry v. Boyle*, 393 U. S. 220 (1968); *Shapiro v. Doe*, 396 U. S. 488 (1970); *Stein v. Lukens*, 396 U. S. 555 (1970); and *United States v. Cotton*, 397 U. S. 45 (1970).

Because I do not wish this disposition of the case to provide a basis for any inference that I, as one member of this Court, am in agreement with the reasoning set forth in the *per curiam* opinion of the three-judge District Court, 327 F. Supp. 640 (SD Miss. 1971), I append this comment.

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 84 Stat. 315, 42 U. S. C. § 1973c, first provides that a State, upon proposing an alteration of voting qualifications and procedures of the kind specified, may institute an action for an approving declaratory

judgment in the United States District Court for the District of Columbia. It then goes on as follows:

*"Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . ."*

In the present case, the changes in Mississippi's election laws effected by the legislature in 1970 were submitted to the Attorney General of the United States on July 23, 1970. In September the Mississippi Attorney General received a letter from the Assistant Attorney General of the Civil Rights Division of the Department of Justice reading in part as follows:

"The problem posed by these enactments is extremely complex. . . .

". . . [W]e have been unable to reach the conclusion that the projected effect would be to deprive Negro voters of rights under the Voting Rights Act.

"Under these circumstances, the Attorney General is not prepared at this time—60 days after receipt of these statutes—to make any determination of the validity or invalidity of Acts 362 and 363 under the Voting Rights Act. . . . Should our subsequent investigation persuade us that the acts in fact vio-

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late the 15th Amendment, the Voting Rights Act or other applicable federal legislation, we will take appropriate legal steps to raise the issues in court, or, if litigation is initiated by others to participate therein in an appropriate manner.

"I want to make clear that no inference of approval or disapproval is to be drawn from the failure of the Attorney General to object within the statutory period. The fact is that we have been unable to reach a decision within the allotted time on the basis of available evidence. . . ."

The three-judge District Court granted its injunctive relief on the ground that the pre-clearance requirements of § 5 had not been satisfied. It did not reach the substantive allegations of racial discrimination set forth in the appellees' complaint. Specifically, the District Court said, "Since Mississippi's new laws have not been subjected to the required federal scrutiny, they are still in a state of suspended animation." The court held that until the statutorily suggested favorable declaratory judgment was obtained in the District of Columbia, or the Mississippi laws were *resubmitted* to the Attorney General and he had specifically approved, "the acts involved in this case may not be given any effect." 327 F. Supp., at 644.

I am unable so to read § 5 of the Voting Rights Act of 1965, and I cannot subscribe to the District Court's reasoning. Section 5, it seems to me, plainly and clearly provides that if the proposal has been properly submitted to the Attorney General, as it was, "and the Attorney General has not interposed an objection within sixty days after such submission," as he did not, the proposed statutory changes "may be enforced" without the court's proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney

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General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable, subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in *Perkins v. Matthews*, 400 U. S. 379, 385 (1971), that supports a contrary conclusion. In my view the District Court's holding, when it equated nonaction by the Attorney General with the interposition by him of an objection, is without foundation in the statute.

With the promulgation on September 10, 1971, of "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965," 36 Fed. Reg. 18186-18190, 28 CFR §§ 51.1-51.29, and the specific procedure authorized for the Attorney General by § 51.19, the problem should not arise in the future.

MR. JUSTICE DOUGLAS, dissenting.

I would not dismiss this appeal for nonjurisdictional tardiness in docketing. There is no doubt that we have statutory jurisdiction to hear this case under 42 U. S. C. § 1973c. And, no doubt we may waive our self-imposed Rule 13 (1) inasmuch as "the requirement of docketing within sixty days [is not a] limitation on our power to hear [an] appeal." *United Public Workers v. Mitchell*, 330 U. S. 75, 86. But, as MR. JUSTICE BLACKMUN observes, *ante*, at 1001, this Court has failed to develop even the shadow of a consistent practice concerning the effect to be given an appellant's failure to docket within the prescribed time. In some cases the defect has been fatal<sup>1</sup>

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<sup>1</sup> *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U. S. 32; *Landry v. Boyle*, 393 U. S. 220; *Shapiro v. Doe*, 396 U. S. 488; *Stein v. Luken*, 396 U. S. 555; *United States v. Cotton*, 397 U. S. 45; *Cheley v. Parham*, 404 U. S. 878.

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while in others it has been forgiven.<sup>2</sup> This appeal was docketed 66 days late. Yet in *Johnson v. Florida*, 391 U. S. 596, 598, we entertained without explanation an appeal which was 56 days tardy. And, Mississippi's own experience with the vagaries of our dispensation of waivers has not been an illuminating one. In *Whitley v. Williams*, decided with *Allen v. State Board of Elections*, 393 U. S. 544, another challenge to that State's voting laws, the State was the appellee and the challenger's appeal was docketed 60 days out of time. Nonetheless, the infraction was passed over, the case was heard, and the District Court was reversed.

I cannot acquiesce in an arbitrary practice which permits the Court to sweep unpleasant cases under the rug.<sup>3</sup> Unless we are willing to prescribe criteria for guiding our granting of waivers of the docketing requirement, such as we have done in Rule 19 for exercising our certiorari discretion, then we should either enforce Rule 13 (1) for all or for none.

No. 71-1003. HORSE CREEK ROYALTY CORP. ET AL. v. SOUTHLAND ROYALTY CO. ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of properly presented federal question. Reported below: 489 P. 2d 214.

No. 71-5915. STRICKLAND ET AL. v. BOARD OF EDUCATION, SAN FRANCISCO UNIFIED SCHOOL DISTRICT, ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 20 Cal. App. 3d 83, 97 Cal. Rptr. 422.

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<sup>2</sup> *United Public Workers v. Mitchell*, 330 U. S. 75, 86; *Johnson v. Florida*, 391 U. S. 596, 598; *Whitley v. Williams*, decided with *Allen v. State Board of Elections*, 393 U. S. 544; see also *Durham v. United States*, 401 U. S. 481 (Rule 22 (2) waiver).

<sup>3</sup> This is not a frivolous appeal. Whatever the infirmities of the Mississippi voting statute, there is a strong argument, as MR. JUSTICE BLACKMUN indicates, that the District Court may have erred in using § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c, to enjoin its effectiveness.

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No. 71-5948. *PRESLER v. STATE DIVISION OF HUMAN RIGHTS 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.

*Other Summary Disposition*

No. 70-251. *JOSEPH v. UNITED STATES.* C. A. 3d Cir. [Certiorari granted, 404 U. S. 820.] After this Court granted the writ of certiorari in this case, the Solicitor General, in his Memorandum for the United States on the merits, took a position different from that previously asserted by the United States in the United States Court of Appeals for the Third Circuit and in his opposition to the petition for writ of certiorari. We therefore vacate the judgment and remand the case for consideration in light of the position now asserted by the Solicitor General. Reported below: 438 F. 2d 1233.

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

While I think the judgment should be vacated and the case remanded, I would not do so on the Solicitor General's confession of error, but rather for the reason that meaningful administrative and judicial review of Selective Service classification decisions is impossible where the Service does not state reasons for its actions.

Joseph, then classified I-A, applied for a conscientious objector exemption in April 1967. He stated in his conscientious objector form (SSS Form 150) that he believed in a Supreme Being, that he was a member of the Nation of Islam (Black Muslims), and that he had joined Muhammed's Mosque No. 12, in Philadelphia, in April 1965, at the age of 17. He represented the views of the Black Muslims regarding participation in war as follows:

"We believe that we who declared ourselves to be Rightous [sic] Muslims Should not Participate in

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wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for."

Joseph's board met on June 8, 1967. Based on the information in the SSS Form 150 and in the rest of Joseph's file, but without the benefit of a meeting with Joseph, the board voted unanimously to retain him in Class I-A, and sent him a notice of classification (SSS Form 110) to this effect. No reasons were given for the classification decision.

The Solicitor General argues from the premise that when the board acted, it effectively "reopened" Joseph's classification. According to the Solicitor General, the applicable regulations then in force prohibited a board from reopening a classification without first determining that a *prima facie* case had been made out. See 32 CFR §§ 1625.2, 1625.4. "[N]ot prepared to assume" that the board violated the reopening regulations, the Solicitor General reasons that the fact of reopening must therefore mean that the board had concluded (albeit erroneously) that Joseph had made out a *prima facie* case, and denied the claim because it questioned his sincerity.

The first difficulty with this argument is that a local board may well have the power to reopen a classification on a lesser showing than a *prima facie* case. See, e. g., *United States v. Stephens*, 445 F. 2d 192, 196 (CA3 1971). Second, the Solicitor General's argument rests on the intent of the board. If the board did not think that it was reopening, there would have been no reason for it to worry about the *prima facie* case requirements allegedly contained in the reopening regulations. And the Solicitor General concedes that "some confusion" as to whether the June 8 action was a "reopening" developed at trial. Memorandum for the United States 18-19.

Assuming, however, that there was a reopening, the Solicitor General's argument still fails, for the board's subsequent handling of Joseph's claim rebuts any "presumption of regularity" that might otherwise be appropriate. Joseph's letter requesting an appeal from the June 8, 1967, decision was received by the board July 6, 1967. The request was thus timely under 32 CFR § 1626.2 (c)(1). No action was taken, however, until August 1, 1967, when Joseph was notified that his "statutory rights have expired," but that he was requested to appear August 10, 1967, for an interview. Joseph appeared as requested, and on August 14, 1967, the board forwarded his file to the appeal board. There is no indication in Joseph's file that the board took any action as a result of the August 10 "interview."

The above course of action embodied several violations of the Selective Service regulations. First, Joseph's statutory rights had not expired on August 1, 1967. His appeal was timely, and was required to be processed in accordance with 32 CFR § 1626.14, which stipulates that "in no event shall [a registrant's] file be forwarded [to the appeal board] later than five days after the period for taking an appeal has elapsed." The board violated this regulation by keeping Joseph's file past July 13, 1967.

Had Joseph requested a personal appearance in the letter written by him and received by the board on July 6, 1967, the board would have been authorized to retain his file. But he did not. The interview which the board granted him was a mere courtesy. As such, it was unauthorized by statute, *United States v. Hayden*, 445 F. 2d 1365, 1374 (CA9 1971), and could not operate to relieve the board of its statutory obligation to forward Joseph's file pursuant to the mandate of 32 CFR § 1626.14.

It can also be argued, from the fact that Joseph was

given an interview after the board received his letter on July 6, 1967, that the letter was deemed a request to reopen, as well as an appeal. There was testimony at Joseph's trial that the board's failure to indicate any action following the interview meant that it had refused to reopen Joseph's classification. (Testimony of Mr. Plaskow, App. 14.) But where a board refuses a registrant's written request to reopen his classification, it must so advise him, by letter, and it must place a copy of the letter in his file. 32 CFR § 1625.4. Joseph's board did not do so.

Whatever force the "presumption of regularity" might have in the ordinary case, it is a weak reed on which to rest under these circumstances. But the "presumption" is the linchpin of the Solicitor General's analysis; without it, a number of alternate hypotheses become as plausible as if not more plausible than that offered by the Solicitor General.

For example, it was the Government's consistent position, until the Solicitor General's confession in *Clay v. United States*, 403 U. S. 698, that conscientious objector claims based on Black Muslim teachings did not satisfy the statutory requirement that they be based on "religious training and belief." The Justice Department letter quoted in *Clay, supra*, is representative of the Government's views at the time that Joseph's claim was under consideration:

"It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad. . . . It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on

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grounds which primarily are political and racial." 403 U. S., at 702.

If one is to decide this case by speculation and assumption, a likely analysis is that Joseph's local board knew of, and followed, the Justice Department's articulated policy with respect to Black Muslim conscientious objector claims. Joseph stated in his SSS Form 150, "I receive my training from the honorable Elijah Muhammad Last Messenger of Allah Leader and Teacher of the Nation of Islam here in The Wilderous [sic] of North America." Given the Government's oft-articulated views as to the insufficiency of such teachings to support a conscientious objector claim, Joseph's local board may well have denied his exemption for failure to demonstrate it was based on "religious training and belief." The Solicitor General concedes that such a ground would have been clear error. Memorandum for the United States 14 n. 13. See *Clay, supra*, at 703.

There is also the possibility that Joseph's board thought him to be a selective objector, because his statement of belief left open the possibility that he might fight if "America agrees to give us the necessary territory wherein we may have something to fight for." The Solicitor General strenuously insists that this is indeed the correct analysis of Joseph's claim.<sup>1</sup>

Finally, there is the difficulty inherent in accepting the Solicitor General's assumption that Joseph's claim was not denied for failure to meet any of the statutory criteria, but for insincerity. It is well settled that mere disbelief in the sincerity of a registrant, based on no objective evidence of insincerity, will not suffice to deny a con-

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<sup>1</sup> Joseph argues persuasively, however, that this statement is nothing more than the Muslim equivalent of a Jehovah's Witness' declaration that he will fight in defense of "Kingdom Interests." *Sicurella v. United States*, 348 U. S. 385. See Brief for Petitioner 23-25.

scientious objector claim once a *prima facie* case is made out. *Dickinson v. United States*, 346 U. S. 389; *United States v. Hayden, supra*, at 1373. The "evidence of insincerity" pointed to by the Solicitor General is ambiguous at best. He notes that Joseph joined the Muslims a year before he first registered for the draft, and two years before filing for his conscientious objector exemption, but that he made no claim to conscientious objector status in his Classification Questionnaire, and no subsequent claim of late crystallization. By themselves, these facts seem insufficient. Joseph was a 17-year-old high school dropout when he became a Muslim. His lack of sophistication and minimal writing skills are apparent from his communications with the board. If we are to assume with the Solicitor General that Joseph's board found he made out a *prima facie* case, I should think it also follows that the board, having gone thus far, would make further inquiries into Joseph's sincerity rather than rely on such an ambiguous and inartful record.<sup>2</sup>

These speculations should not be taken to mean that I think the Solicitor General's analysis should be rejected. It is perhaps no less probable than the alternatives that I have suggested. The point is that it is no *more* probable.

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<sup>2</sup> Other alleged indicia of insincerity need little comment. Many smokers would take issue with the Solicitor General's attempt to demean Joseph's statement that his ability to give up smoking was a demonstration of his faith. And, the statement by an unknown Army official that a psychological interview of petitioner revealed him to have "a mature attitude and interest in the Armed Forces" is simply meaningless without more information as to the nature of the interview in question and the particular responses on which the Army's conclusory remark was based. Moreover, the interview took place over five months before petitioner first filed his conscientious objector claim, and thus certainly cannot be taken as representing his views at the time his conscientious objector claim was denied.

Joseph's local and appeal boards might have denied his claim because he was thought to be insincere, because his Black Muslim beliefs were not thought to be religious, because he was thought to be a selective objector, or perhaps for some other reason not apparent from the record. Viewing this bare record from our perspective, there is simply no way to decide why it was that Joseph's claim was denied.<sup>3</sup>

The conviction must be reversed, therefore, not because Joseph made out a *prima facie* case and is thereby entitled to reasons, but because without a statement of reasons, it is impossible even to tell if Joseph's *prima facie* showing was a relevant factor in the administrative process.<sup>4</sup> I would require the Selective Service to pro-

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<sup>3</sup> The "*de novo*" review undertaken by the appeal board suffers from this same deficiency. We do not know why the appeal board affirmed the lower board's action, for it, too, gave no reasons. And, the appeal board is just as much in the dark as we are with respect to the basis for the lower board's action. "The Appeal Boards are no more entitled to speculate as to the basis for Local Board action than are reviewing courts." *United States v. Speicher*, 439 F. 2d 104, 108 (CA3 1971). The appeal board, of course, should also be required to give reasons, for the proposition "[t]hat judicial review of two administrative agency actions unsupported by reasons is somehow less futile than judicial review of one such action," *id.*, at 107, is clearly untenable.

<sup>4</sup> This analysis is unchanged by the fact that the Administrative Procedure Act is not directly applicable to agency action under the Military Selective Service Act of 1967. See 50 U. S. C. App. § 463 (b). It remains a "simple but fundamental rule of administrative law . . . [that if] the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action." *SEC v. Chenery Corp.*, 332 U. S. 194, 196-197.

Thus, in analyzing an NLRB decision dealing with the process of certifying labor representatives, a process expressly exempt from the formal procedural requirements of the Administrative Procedure Act, see 5 U. S. C. § 554 (a)(6), the Court squarely held that

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vide a concise statement of reasons whenever a requested classification is denied, and whatever the administrative level at which the denial takes place.

*Certiorari Granted—Vacated and Remanded*

No. 71-5840. *LENHARD v. UNITED STATES*. C. A. 2d Cir. In his memorandum for the United States in response to petition for writ of certiorari in this case, filed February 1, 1972, the Solicitor General asserted a position different from that previously asserted by the United States in the United States Court of Appeals for the Second Circuit. We therefore grant the petition, vacate the judgment, and remand case to that court for consideration in light of the position now asserted by the Solicitor General.

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the Board's determination could not stand unless supported by a statement of reasons:

"When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 197. See *Burlington Truck Lines v. United States*, 371 U. S. 156, 167-169; *Interstate Commerce Comm'n v. J-T Transport Co.*, 368 U. S. 81, 93. Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . .' *Burlington Truck Lines v. United States*, *supra*, at 168; see *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U. S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' *Securities & Exchange Comm'n v. Chenery Corp.*, *supra*, at 196." *NLRB v. Metropolitan Ins. Co.*, 380 U. S. 438, 443-444 (footnote omitted).

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No. 70-5056. *ST. CLAIR v. SELECTIVE SERVICE LOCAL BOARD NO. 35, BROOKLYN, NEW YORK, ET AL.* C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Fein v. Selective Service System*, *ante*, p. 365. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

No. 71-316. *BLATT v. LOCAL BOARD NO. 116, FREDERICKSBURG CITY SELECTIVE SERVICE SYSTEM, ET AL.* C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fein v. Selective Service System*, *ante*, p. 365. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case. Reported below: 443 F. 2d 304.

No. 71-448. *MORGAN v. MELCHAR ET AL.* C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fein v. Selective Service System*, *ante*, p. 365. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case. Reported below: 442 F. 2d 1082.

#### *Miscellaneous Orders*

No. A-986. *WASHINGTON STATE LABOR COUNCIL, AFL-CIO v. JERTBERG ET AL.* D. C. W. D. Wash. Application for temporary stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 40, Orig. *PENNSYLVANIA v. NEW YORK ET AL.* Motion of State of Pennsylvania for additional time for oral argument granted and a total of 45 minutes allotted to each side for oral argument, the time to be allocated by the parties. [For earlier orders herein, see, e. g., 404 U. S. 988.]

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No. 45, Orig. WASHINGTON ET AL. *v.* GENERAL MOTORS CORP. ET AL. Motion of plaintiffs for leave to file supplemental brief after argument granted. [For earlier orders herein, see, *e. g.*, 402 U. S. 940.]

No. 71-492. LLOYD CORP., LTD. *v.* TANNER ET AL. C. A. 9th Cir. [Certiorari granted, 404 U. S. 1037.] Motions of Homart Development Co. and American Retail Federation for leave to file briefs as *amici curiae* granted. Motion of Homart Development Co. for leave to participate in oral argument as *amicus curiae* denied.

No. 71-506. UNITED STATES ET AL. *v.* MIDWEST VIDEO CORP. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of State of Illinois for leave to participate in oral argument as *amicus curiae* denied.

No. 71-1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and

No. 71-1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 973.] Motions of Brooklyn Union Gas Co., Public Service Commission of State of New York, Columbia Gas Transmission Corp., and Pipeline Intervenors for leave to file briefs as *amici curiae* granted.

No. 71-5933. TANNER *v.* TWOMEY, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 71-5571. RODRIQUEZ *v.* CADY, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 71-5936. GAGLIE *v.* UNITED STATES DISTRICT COURT FOR CENTRAL DISTRICT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus denied.

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*Certiorari Granted*

No. 71-1021. EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. *v.* DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 452 F. 2d 820.

*Certiorari Denied. (See also No. 71-5948, *supra*.)*

No. 71-640. SAN DIEGO UNIFIED SCHOOL DISTRICT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 19 Cal. App. 3d 252, 96 Cal. Rptr. 658.

No. 71-803. MASON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 3d 759, 488 P. 2d 630.

No. 71-901. GROOB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 1210.

No. 71-912. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1103 and 450 F. 2d 795.

No. 71-921. FISCHETTI ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 34.

No. 71-935. CHASON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 301.

No. 71-937. HOLMES *v.* UNITED STATES; and

No. 71-5961. MATTHEWS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 249.

No. 71-952. KOVTUN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 1268.

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No. 71-990. SPERRY RAND CORP. *v.* A-T-O, INC., FORMERLY AUTOMATIC SPRINKLER CORP. OF AMERICA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 1387.

No. 71-1009. LINDAUER *v.* OKLAHOMA CITY URBAN RENEWAL AUTHORITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 452 F. 2d 117.

No. 71-1015. SCHROEDER ET UX. *v.* BUSENHART ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 133 Ill. App. 2d 180, 272 N. E. 2d 750.

No. 71-1020. PHILADELPHIA CHEWING GUM CORP. *v.* SOMPORTEX LTD. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 453 F. 2d 435.

No. 71-1061. ARNESON PRODUCTS, INC., ET AL. *v.* BLUMENFELD. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71-5906. ANSTEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 314.

No. 71-5911. OVERTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71-5913. ROBINSON, AKA BEASLEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 495, 183 S. E. 2d 650.

No. 71-5917. CRONAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 1303.

No. 71-5919. MENDOZA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 571, 270 N. E. 2d 540.

No. 71-5922. JOHNSON *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied.

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No. 71-5921. *MAHAFFEY v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 471 S. W. 2d 801.

No. 71-5926. *JONES v. CROUSE, WARDEN*. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 1395.

No. 71-5927. *JOHNSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 1321.

No. 71-5928. *DRAKEFORD v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-5929. *WATTS v. NEW JERSEY*. C. A. 3d Cir. Certiorari denied.

No. 71-5931. *SCHOORE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 348.

No. 71-5935. *LEWIS v. KENTUCKY*. Ct. App. Ky. Certiorari denied. Reported below: 472 S. W. 2d 65.

No. 71-5940. *SCHROEDER v. BUCHKOE, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 71-5942. *ARRIAGADA v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 487.

No. 71-5943. *BRAYTON ET AL. v. HOLLOPETER ET AL.* Sup. Ct. Ohio. Certiorari denied.

No. 71-5944. *KYLE v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 1195.

No. 71-5945. *DOWELL v. JOHNSON, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 71-5950. *DOLLAR v. CALIFORNIA*. C. A. 9th Cir. Certiorari denied.

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No. 71-5951. *TATRO v. UNITED STATES*. C. A. 2d Cir.  
Certiorari denied. Reported below: 452 F. 2d 1207.

No. 71-5953. *KENNEDY v. UNITED STATES*. C. A. 5th Cir.  
Certiorari denied.

No. 71-5954. *CASTRO v. YEAGER, PRINCIPAL KEEPER*.  
C. A. 3d Cir. Certiorari denied.

No. 71-5955. *GAFFORD v. WARDEN, LEAVENWORTH  
PENITENTIARY, ET AL.* C. A. 10th Cir. Certiorari denied.

No. 71-5958. *HOLMES v. UNITED STATES*. C. A. 6th Cir.  
Certiorari denied.

No. 71-5959. *CALHOUN v. UNITED STATES*. C. A. 7th Cir.  
Certiorari denied. Reported below: 454 F. 2d 702.

No. 71-5963. *TYLER v. PARKS ET AL.* C. A. 8th Cir.  
Certiorari denied.

No. 71-6252. *RAY v. UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA*. C. A. 3d Cir.  
Certiorari denied.

No. 71-558. *HEYD, SHERIFF v. BASTIDA*. C. A. 5th Cir.  
Motion of respondent for leave to proceed *in forma pauperis* granted.  
Certiorari denied. Reported below: 444 F. 2d 396.

No. 71-605. *HENRY ET AL. v. CLAIBORNE HARDWARE  
CO. ET AL.* C. A. 5th Cir. Certiorari denied. MR. JUSTICE  
DOUGLAS is of the opinion that certiorari should be  
granted. MR. JUSTICE MARSHALL took no part in the  
consideration or decision of this petition. Reported  
below: 444 F. 2d 1300.

No. 71-806. *WEHINGER v. CALIFORNIA*. Ct. App.  
Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE  
DOUGLAS is of the opinion that certiorari should be  
granted.

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No. 71-615. *CHAPMAN v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist. It appearing the state court decision is not final, certiorari denied. Reported below: 17 Cal. App. 3d 865, 95 Cal. Rptr. 242.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner operates a bookstore in Fremont, California. On two occasions, a police officer visited the store and purchased four magazines and one paperback novel. While in the store the second time, the officer also "looked at parts" of 12 additional magazines and 14 other paperback books which were on petitioner's shelves. Based upon a reading of the four magazines, portions of the book, and the officer's conclusory affidavit, a magistrate issued an *ex parte* search warrant authorizing the seizure of the publications the officer had earlier purchased or perused. The warrant was executed and 78 copies of 35 different titles were seized. Among the items seized were 19 copies of nine magazines not specified in the warrant and apparently not previously evaluated by a magistrate.

Petitioner was charged with the sale or distribution of obscene matter in violation of Cal. Penal Code § 311.2. Petitioner made a motion under §§ 1538.5, 1539, and 1540 of the Cal. Penal Code to suppress the evidence and to return the property seized. The municipal court ordered the return of the books which had not been specified in the warrant and of one book which it found not to be obscene.<sup>1</sup> It denied petitioner's motion in all other re-

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<sup>1</sup> It does not appear that the respondent appealed from that portion of the municipal court's order suppressing the books which had not been specified in the warrant or which had been found not to be obscene. The Court of Appeal nonetheless upheld the admissibility of those books which had not been specified in the warrant and vacated the municipal court's order to the contrary.

spects. On appeal, the Appellate Department of the Superior Court ordered the suppression of those items which had been seized without a prior adversary hearing on their obscenity *vel non* but affirmed the municipal court with regard to the materials which had been purchased. The State then appealed and the Court of Appeal reversed in part the judgment of the Appellate Department and vacated in part the judgment of the municipal court, thereby allowing the admission into evidence of all the items except the one which had been determined not to be obscene. 17 Cal. App. 3d 865, 95 Cal. Rptr. 242. The Supreme Court of California denied a hearing and petitioner now seeks a writ of certiorari.

Our jurisdiction to review decisions of state courts is limited to “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . .” 28 U. S. C. § 1257. The finality requirement, which has been with us since the Judiciary Act of 1789, § 25, 1 Stat. 85, is “[d]esigned to avoid the evils of piecemeal review,” *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62, 67, and is founded upon “considerations generally applicable to good judicial administration.” *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 124. Our decisions make clear, however, that “this provision of the statute [has long been given a] practical rather than a technical construction.” *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541, 546. Thus, where denial of review would effectively foreclose our later consideration of a federal claim, *California v. Stewart*, 383 U. S. 903, 384 U. S. 436, 498 n. 71; *Hill v. Chicago & Evanston R. Co.*, 140 U. S. 52, 54; where postponement of review would seriously erode a federal policy, *Construction Laborers v. Curry*, 371 U. S. 542, 550; *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1, 3; or where determination of preliminary questions might

avoid subsequent litigation, *Mercantile National Bank v. Langdeau*, 371 U. S. 555, 558, we have determined that the requirement of finality had been satisfied. Similarly, where the subsequent proceedings in state court would deny the federal right for the vindication of which review was sought, we have concluded that the case was final. See, *e. g.*, *Klopfer v. North Carolina*, 386 U. S. 213 (speedy trial); *Harris v. Washington*, 404 U. S. 55 (double jeopardy); *Colombo v. New York*, *ante*, p. 9 (double jeopardy). And, as MR. JUSTICE WHITE indicated for the Court in *Mercantile National Bank v. Langdeau*, *supra*, at 558, we have found the policies underlying § 1257 satisfied where the matter to be reviewed was entirely "separate and independent" from those to be raised in the subsequent state proceedings.<sup>2</sup>

In *Mills v. Alabama*, 384 U. S. 214, a case strikingly similar to the present one, we determined that the finality requirement had been met. There, the trial court had sustained a demurrer to the complaint, but the Supreme Court of Alabama reversed and remanded for trial. Mr. Justice Black, speaking for eight members of the Court, concluded that we had jurisdiction under § 1257:

"The State has moved to dismiss this appeal on the ground that the Alabama Supreme Court's judgment is not a 'final judgment' and therefore not appealable under § 1257. The State argues that

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<sup>2</sup> "This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." 371 U. S., at 558.

since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered 'final.' This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. The language of § 1257 as we construed it in *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 381-383, does not require a result leading to such consequences. See also *Construction Laborers v. Curry*, 371 U. S. 542, 548-551; *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 72-74. Following those cases we hold that we have jurisdiction." 384 U. S., at 217-218. (Footnotes omitted.)

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In a concurring opinion joined by MR. JUSTICE BRENNAN, I said:

"We deal here with the rights of free speech and press in a basic form: the right to express views on matters before the electorate. In light of appellant's concession that he has no other defense to offer should the case go to trial, and considering the importance of the First Amendment rights at stake in this litigation, it would require regard for some remote, theoretical interests of federalism to conclude that this Court lacks jurisdiction because of the unlikely possibility that a jury *might* disregard a trial judge's instructions and acquit.

"Indeed, even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution." 384 U. S., at 221. (Citations omitted.)

The issues petitioner tenders are important ones. They go to the constitutionality of mass seizures of materials presumptively protected by the First Amendment, *Quantity of Books v. Kansas*, 378 U. S. 205; *Marcus v. Search Warrant*, 367 U. S. 717; the need for a prior adversary hearing before protected materials are condemned as obscene, *Lee Art Theatre, Inc. v. Virginia*, 392 U. S. 636; *Quantity of Books v. Kansas*, *supra*; the procedural burdens which must be overcome to secure the return of protected materials, *United States v. Thirty-seven Photographs*, 402 U. S. 363; cf. *Freedman*

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*v. Maryland*, 380 U. S. 51; the sufficiency of the officer's affidavit, the seizure of materials not specified in the warrant, *Stanley v. Georgia*, 394 U. S. 557, 569 (STEWART, J., concurring); *Marron v. United States*, 275 U. S. 192; and, of course, the obscenity *vel non* of the publications.

No significant question of fact or law remains for trial. It seems beyond argument that petitioner possessed the publications in question "for sale or distribution." Cal. Penal Code § 311.2. Petitioner's only viable defenses appear to be whether the publications were constitutionally protected and whether their seizure in some way was procedurally defective. These issues were passed upon by the courts below and are now before us for decision.

The purpose of furthering economy in judicial administration would plainly be served by deciding these questions now rather than by sending petitioner through the formalities of a trial and months—if not years—of repetitious appellate review before allowing him to present to this Court again the very issues that are here now.<sup>3</sup> California has sought to conserve its judicial resources by providing pretrial appellate review of suppression hearings. Where the admissibility of evidence is the only real issue, this policy generally results either in the prompt dismissal of the charges without trial or in a plea bargain and guilty plea. The interests in the smooth working of our federal system and our accommodation of California's interests in pretrial adjudication of dispositive questions of law dictate that we not postpone our consideration of the federal questions now presented.

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<sup>3</sup> Even if the California courts refuse to reconsider their earlier rulings, petitioner will be free to present the same claims now raised in the present petition for a writ of certiorari. R. Stern & E. Gressman, *Supreme Court Practice* 102 (4th ed. 1969).

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This is not a case involving only a pretrial motion to suppress. Rather, the motion now before us embraces all of the evidence the prosecution will introduce at trial and common to all of these items is the issue of their obscenity *vel non*. *Mills v. Alabama*, *supra*, teaches that where First Amendment rights are involved, compliance with procedural formalities before allowing their vindication in this Court is not necessary unless those procedures are meaningful.

I would follow *Mills* and grant the petition for a writ of certiorari and put the case down for argument.

No. 71-816. *DUN & BRADSTREET, INC. v. KANSAS ELECTRIC SUPPLY CO., INC.* C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 647.

No. 71-938. *WINNEBAGO TRIBE OF NEBRASKA v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 667.

No. 71-1008. *HAWKINS v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5912. *WILLIAMSON ET AL. v. UNITED STATES.* C. A. 5th Cir. Certiorari denied.\* MR. JUSTICE BRENNAN would grant the petition and set case for argument. Reported below: 450 F. 2d 585.

MR. JUSTICE DOUGLAS, dissenting.

Petitioners were suspected of maintaining an illicit whiskey still in violation of federal tax statutes. To secure evidence against them the Treasury Department

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\*[REPORTER'S NOTE: The following statement of MR. JUSTICE BRENNAN and dissenting opinion of MR. JUSTICE DOUGLAS were filed on April 3, 1972.]

planted in their midst an undercover agent who posed as a truck driver of their vendee. After gaining their confidence, this agent on 17 occasions in 1968, after our decision in *Katz v. United States*, 389 U. S. 347, telephoned either petitioner James Williamson or a coconspirator, one Hutcheson, for the ostensible purpose of finalizing arrangements for the delivery of their product. During their conversations, the agent was in a position to shape and guide the content and direction of their discussions and to elicit damaging admissions. All of these communications were intercepted and recorded by another federal officer who acted without a warrant and without the petitioner's knowledge but, of course, with the full cooperation of the Treasury plant. After the officers obtained satisfactory evidence against the pair, they were arrested, indicted, and convicted after a trial, at which all of the recordings were played, over objection, for the jury.

As I have discussed before, electronic eavesdropping early crept into our law as a means of combating "fifth column" activities during wartime.<sup>1</sup> Later, it was said that this weapon was essential in the battle against organized crime. Now we learn that the omnipresent electronic ear is stalking the hill country in search of moonshiners. Apparently, no suspect is too unimportant to escape its reach.

Nor is any person too important to be excluded from the Government's dossiers. Information recently presented to the Senate Subcommittee on Constitutional Rights discloses that subjects of Army intelligence oper-

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<sup>1</sup> See Appendix I to my dissent in *United States v. White*, 401 U. S. 745, 766-767. I have expressed in more detail than here my opposition to various forms of electronic spying in *Katz v. United States*, 389 U. S. 347; *Berger v. New York*, 388 U. S. 41; *Osborn v. United States*, 385 U. S. 323; *Pugach v. Dollinger*, 365 U. S. 458; *Silverman v. United States*, 365 U. S. 505; *On Lee v. United States*, 343 U. S. 747.

ations have included Senators Fred Harris, Harold Hughes, Edward Kennedy, George McGovern, and Edmund Muskie.<sup>2</sup> The list also included five United States Representatives<sup>3</sup> and four Governors.<sup>4</sup> Indeed, the electronic ear was said to have turned on a Justice of this Court.<sup>5</sup> The Subcommittee found that the catalogue of organizations that had been subjected to surveillance embraced the NAACP, the ACLU, Operation Breadbasket, the Urban League, and the States' Rights Party.<sup>6</sup> Its hearings also revealed that Army spies had infiltrated Resurrection City,<sup>7</sup> the Poor People's Campaign,<sup>8</sup> both nominating conventions in 1968,<sup>9</sup> black studies programs,<sup>10</sup> and anti-war groups.<sup>11</sup>

Senator Ervin, who chaired these hearings, warns this Court in an *amicus* brief in another case, that "it is not an exaggeration to talk in terms of hundreds of thousands of individuals, organizations, events, and dossiers."<sup>12</sup>

After related hearings concerning federal wiretapping, Senator Edward Kennedy only months ago warned his

<sup>2</sup> N. Y. Times, Feb. 29, 1972, p. 1, col. 3.

<sup>3</sup> *Id.*, at cols. 3-4. The list named Representatives Philip Crane, John Rarick, and Don Edwards, and former Representatives Adam Clayton Powell and Allard Lowenstein.

<sup>4</sup> *Id.*, at col. 4. The list named Governors Sargent of Massachusetts and Curtis of Maine; former Governors Hoff of Vermont and Kerner of Illinois; and Lieutenant Governor Hayes of Vermont.

<sup>5</sup> *Id.*, at col. 4.

<sup>6</sup> Amicus Curiae Brief submitted by Senator Sam Ervin, Jr., Chairman of the Subcommittee on Constitutional Rights, in *Laird v. Tatum*, No. 71-288, O. T. 1971, p. 10.

<sup>7</sup> Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., pt. 1, pp. 197-198 (1971).

<sup>8</sup> *Id.*, at 197.

<sup>9</sup> *Id.*, at 198-200.

<sup>10</sup> *Id.*, at 201, 296.

<sup>11</sup> *Ibid.*

<sup>12</sup> Amicus Brief, *supra*, n. 6, at 8.

colleagues of "the frightening possibility that the conversations of untold thousands of citizens of this country are being monitored on secret devices which no judge has authorized and which may remain in operation for months and perhaps years at a time."<sup>13</sup>

Although the problem is an enormous and recurring one, our decisions have not articulated a coherent response. Ironically, if petitioner James Williamson had confided in a genuine confederate rather than in a spy, there would be no doubt that the warrantless seizure of his telephonic communications would have offended *Katz v. United States, supra*. It was said, however, by a plurality in *United States v. White*, 401 U. S. 745, that speakers simply must assume the risk that their confidants may tattle, and, therefore, they should assume the further risk that every word they utter will be instantaneously fed into a recorder. Yet there is a significant "qualitative difference" between electronic surveillance and conventional police stratagems such as eavesdropping and disguise. *Lopez v. United States*, 373 U. S. 427, 465 (dissenting opinion). That chasm cannot be bridged simply by invoking the conclusory proposition that one must assume the risk of being subjected to electronic surveillance. Under that reasoning we might also have held that Katz should have assumed the risk that his telephone booth was bugged. Obviously, citizens must bear only those threats to privacy which we decide to impose.

The ruse employed by the Government in this case has still a further offensive characteristic. Here the agents had the opportunity not only to destroy a petitioner's privacy but to interrogate him in a clandestine fashion without the warnings required by *Miranda v. Arizona*, 384 U. S. 436, without the assistance of counsel, and

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<sup>13</sup> Letter to members of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, from Senator Edward Kennedy, Dec. 17, 1971, pp. 2-3.

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without knowledge that every word he spoke would be replayed to a court. Yet under the plurality reasoning in *White* such deception is permitted. Thus, both *Katz* and *Miranda* can be circumvented through the simple expedient of injecting a secret agent into a suspect situation.

I would grant this petition.

No. 71-5934. *CARROLL v. BETO, CORRECTIONS DIRECTOR.* C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 648.

No. 71-5956. *BOGACKI v. BOARD OF SUPERVISORS OF RIVERSIDE COUNTY ET AL.* Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 5 Cal. 3d 771, 489 P. 2d 537.

No. 71-5957. *CARRASCO-FAVELA v. IMMIGRATION AND NATURALIZATION SERVICE.* C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 865.

No. 71-931. *VOLPE, SECRETARY OF TRANSPORTATION, ET AL. v. D. C. FEDERATION OF CIVIC ASSNS. ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 148 U. S. App. D. C. 207, 459 F. 2d 1231.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the denial of certiorari in this case, but solely out of considerations of timing. Questions of great importance to the Washington, D. C., area are presented by the petition, not the least of which is whether the Court of Appeals has, for a second time, unjustifiably

frustrated the efforts of the Executive Branch to comply with the will of Congress as rather clearly expressed in § 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 827.\* If we were to grant the writ, however, it would be almost a year before we could render a decision in the case. It seems preferable, therefore, that we stay our hand. In these circumstances Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the project, even to the point of limiting or prohibiting judicial review of its directives in this respect.

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\*Certain of the provisions of § 23 of the Federal-Aid Highway Act of 1968 were apparently enacted in response to the decision in *D. C. Federation of Civic Assns., Inc. v. Airis*, 129 U. S. App. D. C. 125, 391 F. 2d 478, in which it was held that the planning and construction of this project had to be carried out in strict compliance with the procedural requirements of Title 7 of the D. C. Code. Section 23 (a) of the Act provides that "[n]otwithstanding any other provision of law, or any court decision . . . to the contrary, the Secretary of Transportation and the government of the District of Columbia shall . . . construct" certain specified "routes on the Interstate System within the District of Columbia." (Emphasis added.) In § 23 (b), Congress singled out four particular projects, including this one, for special treatment by providing that work on those projects was to commence "[n]ot later than 30 days after the date of enactment of this section." In an earlier phase of the litigation involved in the instant petition, the Court of Appeals rejected the petitioners' contention that § 23 rendered inapplicable the pre-construction planning and public hearing requirements set out in various sections of Title 23 of the United States Code. *D. C. Federation of Civic Assns., Inc. v. Volpe*, 140 U. S. App. D. C. 162, 434 F. 2d 436. On remand following that decision, the District Court found that the petitioners had complied with all applicable provisions of Title 23 except those of § 128 relating to public hearings and those of § 109 relating to safety standards and other requirements. The Court of Appeals, in the decision that we are now being asked to review, reversed in part, holding that the petitioners had failed to comply with a number of additional pre-construction provisions of Title 23.

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No. 71-941. *FERRARA ET AL. v. UNITED STATES.* C. A. 2d Cir. Motion to defer consideration and certiorari denied. Reported below: 451 F. 2d 91.

No. 71-956. *FREEMAN, GUARDIAN, ET AL. v. FLAKE ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 258.

MR. JUSTICE DOUGLAS, dissenting.

Today the Court declines to decide whether a public school may constitutionally refuse to permit a student to attend solely because his hair style meets with the disapproval of the school authorities. The Court also denied certiorari in *Olff v. East Side Union High School District*, 404 U. S. 1042, which presented the same issue. I dissented in *Olff*, and filed an opinion. For the same reasons expressed therein, I dissent today. I add only that now eight circuits have passed on the question. On widely disparate rationales, four have upheld school hair regulations (see *Freeman v. Flake*, 448 F. 2d 258 (CA10 1971); *King v. Saddleback Junior College District*, 445 F. 2d 932 (CA9 1971); *Jackson v. Dorrier*, 424 F. 2d 213 (CA6 1970); and *Ferrell v. Dallas Independent School District*, 392 F. 2d 697 (CA5 1968)), and four have struck them down (see *Massie v. Henry*, 455 F. 2d 779 (CA4 1972); *Bishop v. Colaw*, 450 F. 2d 1069 (CA8 1971); *Richards v. Thurston*, 424 F. 2d 1281 (CA1 1970); and *Breen v. Kahl*, 419 F. 2d 1034 (CA7 1969)).

I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights.

No. 71-5923. *FAIRMAN ET AL. v. UNITED STATES.* C. A. 5th Cir. Motion for testing physical evidence and certiorari denied. Reported below: 451 F. 2d 209.

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No. 71-999. DIXON, TREASURER OF ILLINOIS, ET AL. v. CASTLE, SENIOR JUDGE, U. S. COURT OF APPEALS, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 71-5567. MILLER v. SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Motion to amend petition granted. Certiorari denied. Reported below: 448 F. 2d 186.

No. 71-5577. McGREGOR v. SCHMIDT, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN, ET AL. Sup. Ct. Wis. Certiorari and other relief denied.

*Rehearing Denied*

No. 70-161. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE v. WRIGHT ET AL., *ante*, p. 208;

No. 70-5211. WRIGHT ET AL. v. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante*, p. 208;

No. 71-183. AGUA CALIENTE BAND OF MISSION INDIANS ET AL. v. COUNTY OF RIVERSIDE, CALIFORNIA, *ante*, p. 933; and

No. 71-659. DEVILLIERS v. ATLAS CORP., *ante*, p. 933. Petitions for rehearing denied.

No. 70-28. UNITED STATES v. GENERES ET VIR, *ante*, p. 93. Petition for rehearing denied. MR. JUSTICE POWELL AND MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 70-267. NATIONAL LABOR RELATIONS BOARD v. SCRIVENER, DBA AA ELECTRIC CO., *ante*, p. 117. Motions to dispense with printing and to dispense with taxation of costs granted. Petition for rehearing denied.

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*Assignment Order*

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States District Court for the Southern District of Texas during the period beginning November 1, 1972, and ending December 31, 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.

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*Affirmed on Appeal*

No. 70-20. CANNIFFE ET AL. *v.* BURG. Affirmed on appeal from D. C. Mass. Reported below: 315 F. Supp. 380.

No. 70-80. DAVIS, GOVERNOR OF VERMONT, ET AL. *v.* KOHN ET UX. Affirmed on appeal from D. C. Vt. Reported below: 320 F. Supp. 246.

No. 71-628. CODY, ELECTIONS COMMISSIONER, ET AL. *v.* ANDREWS ET UX. Affirmed on appeal from D. C. M. D. N. C. Reported below: 327 F. Supp. 793.

No. 70-76. DONOVAN, SECRETARY OF STATE OF MINNESOTA, ET AL. *v.* KEPPEL ET AL. Affirmed on appeal from D. C. Minn. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal. Reported below: 326 F. Supp. 15.

No. 70-51. WHITCOMB, GOVERNOR OF INDIANA, ET AL. *v.* AFFELDT ET UX. Appeal from D. C. N. D. Ind. Motion of appellees for leave to dispense with printing motion to affirm granted. Judgment affirmed. Reported below: 319 F. Supp. 69.

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No. 70-59. AMOS, SECRETARY OF STATE OF ALABAMA, ET AL. *v.* HADNOTT ET AL. Appeal from D. C. M. D. Ala. Motion of appellees for leave to dispense with printing motion to affirm granted. Motion of appellants to dispense with printing jurisdictional statement granted. Judgment affirmed. Reported below: 320 F. Supp. 107.

No. 70-68. VIRGINIA STATE BOARD OF ELECTIONS *v.* BUFFORD ET AL. Appeal from D. C. E. D. Va. Motion of appellees for leave to dispense with printing motion to affirm granted. Judgment affirmed. Reported below: 319 F. Supp. 843.

No. 71-650. MINNESOTA *v.* NORTHERN STATES POWER Co. Affirmed on appeal from C. A. 8th Cir. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART dissent from affirmance. Reported below: 447 F. 2d 1143.

*Appeals Dismissed*

No. 71-674. LAKE SHORE AUTO PARTS Co. *v.* KORZEN ET AL. 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. Reported below: 49 Ill. 2d 137, 273 N. E. 2d 592.

No. 71-950. GARRETT FREIGHTLINES, INC. *v.* UNITED STATES ET AL. Appeal from D. C. Colo. dismissed. *Shenandoah Valley Broadcasting, Inc. v. ASCAP*, 375 U. S. 39 (1963). MR. JUSTICE DOUGLAS dissents from the dismissal of the case and would affirm, believing that the appeal is properly taken. Reported below: 339 F. Supp. 554.

No. 71-1039. ANDERSON ET AL. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Appeal from Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Motion of appellants for leave to dispense with printing reply brief granted. Appeal dismissed for want of substantial federal question. Reported below: 467 S. W. 2d 205.

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No. 71-1001. *BERBERIAN v. RHODE ISLAND*. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — R. I. —, 284 A. 2d 590.

*Vacated and Remanded on Appeal*

No. 70-16. *COCANOWER v. MARSTON, RECORDER FOR MARICOPA COUNTY, ET AL.* Appeal from D. C. Ariz. Judgment vacated and case remanded for further consideration in light of *Dunn v. Blumstein*, *ante*, p. 330. Reported below: 318 F. Supp. 402.

No. 70-81. *FITZPATRICK ET AL. v. BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO ET AL.* Appeal from D. C. N. D. Ill. Judgment vacated and case remanded for further consideration in light of *Dunn v. Blumstein*, *ante*, p. 330.

No. 70-5076. *LESTER ET AL. v. BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA ET AL.* Appeal from D. C. D. C. Judgment vacated and case remanded for further consideration in light of *Dunn v. Blumstein*, *ante*, p. 330. Reported below: 319 F. Supp. 505.

No. 71-5690. *FERGUSON ET AL. v. WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL.* Appeal from D. C. N. D. Miss. Judgment vacated and case remanded for further consideration in light of *Dunn v. Blumstein*, *ante*, p. 330. Reported below: 330 F. Supp. 1012.

*Certiorari Granted—Vacated and Remanded*

No. 70-5080. *WEDDLE v. DIRECTOR, PATUXENT INSTITUTION, ET AL.* C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lynch v. Household Finance Corp.*, *ante*, p. 538. Reported below: 436 F. 2d 342.

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No. 70-5395. ROBERTS ET AL. *v.* HARDER, COMMISSIONER OF WELFARE OF CONNECTICUT. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lynch v. Household Finance Corp.*, *ante*, p. 538. Reported below: 440 F. 2d 1229.

#### *Miscellaneous Orders*

No. A-974. IN RE RESIGNATION OF GERBER. Albert B. Gerber, of Philadelphia, Pennsylvania, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court.

No. 70-223. CENTRAL HARDWARE Co. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of respondent Retail Clerks Union for additional time for oral argument granted and 10 minutes allotted for that purpose. Petitioner also allotted 10 additional minutes for oral argument.

No. 70-283. ADAMS, WARDEN *v.* WILLIAMS. C. A. 2d Cir. [Certiorari granted, 404 U. S. 1014.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 71-452. HEALY ET AL. *v.* JAMES ET AL. C. A. 2d Cir. [Certiorari granted, 404 U. S. 983.] Motion of Associated Students of San Francisco State College et al. for leave to file a brief as *amici curiae* denied.

No. 71-857. EVCO, DBA EVCO INSTRUCTIONAL DESIGNS *v.* JONES, COMMISSIONER OF BUREAU OF REVENUE, ET AL. Ct. App. N. M. [Certiorari granted, *ante*, p. 953.] Motion of petitioner to dispense with printing appendix and to proceed on original record granted.

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No. 71-492. LLOYD CORP., LTD. *v.* TANNER ET AL. C. A. 9th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of American Retail Federation for leave to participate in oral argument as *amicus curiae* denied.

No. 71-1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and

No. 71-1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 973.] Motion of Mobile Gas Service Corp. et al. for leave to file a brief as *amici curiae* granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71-1017. GRAVEL *v.* UNITED STATES; and

No. 71-1026. UNITED STATES *v.* GRAVEL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion of counsel for Gravel for additional time for oral argument denied. Motion of the United States Senate for leave to permit Sam J. Ervin, Jr., to participate in oral argument as *amicus curiae* granted and a total of 30 minutes allotted for that purpose. The Solicitor General is allotted 30 additional minutes for oral argument.

No. 71-1031. TONASKET *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 79 Wash. 2d 607, 488 P. 2d 281.

No. 71-5564. STEWART ET AL. *v.* WHITE ET AL., JUDGES. Motion for leave to file petition for writ of mandamus and/or prohibition and other relief denied.

*Certiorari Granted*

No. 71-889. COUCH *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 449 F. 2d 141.

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No. 71-1022. UNITED STATES *v.* BASYE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 450 F. 2d 109.

No. 71-685. LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL.; and

No. 71-691. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS, ET AL. *v.* SHAPIRO ET AL. Sup. Ct. Ill. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 49 Ill. 2d 137, 273 N. E. 2d 592.

No. 71-651. CALIFORNIA *v.* KRIVDA ET AL. Sup. Ct. Cal. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 5 Cal. 3d 357, 486 P. 2d 1262.

No. 71-951. ALMOTA FARMERS ELEVATOR & WAREHOUSE Co. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted and case set for oral argument with No. 71-559 [*United States v. Fuller*, certiorari granted, 404 U. S. 1037]. Reported below: 450 F. 2d 125.

*Certiorari Denied.\* (See also Nos. 71-674 and 71-1001, supra.)*

No. 68-5028. TYLER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 5 Md. App. 265, 246 A. 2d 634.

No. 70-5028. SCAIFE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 70-5036. PROWSE *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 70-5068. LUCAS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

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\*[Reporter's Note: For statement of MR. JUSTICE BRENNAN and dissenting opinion of MR. JUSTICE DOUGLAS in No. 71-5912, *Williamson v. United States*, see *ante*, p. 1026.]

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No. 70-5057. *BILLINGS v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied. Reported below: 10 Md. App. 31, 267 A. 2d 808.

No. 70-5059. *BARNER v. NORTH CAROLINA*. Ct. App. N. C. Certiorari denied. Reported below: 8 N. C. App. 1, 173 S. E. 2d 605.

No. 70-5148. *OLSEN v. ELLSWORTH ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 2d 630.

No. 71-642. *PARROTT v. OHIO*. Sup. Ct. Ohio. Certiorari denied. Reported below: 27 Ohio St. 2d 205, 272 N. E. 2d 112.

No. 71-813. *FAVRO v. WASHINGTON*. Ct. App. Wash. Certiorari denied. Reported below: 5 Wash. App. 311, 487 P. 2d 261.

No. 71-817. *CARDENAS v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-836. *WOOD ET AL. v. IDAHO*. Sup. Ct. Idaho. Certiorari denied. Reported below: 94 Idaho 612, 495 P. 2d 18.

No. 71-840. *BORING v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. Reported below: 253 So. 2d 251.

No. 71-923. *CECIRE ET AL., TRUSTEES v. STEWART, SUPERINTENDENT OF INSURANCE*. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 563, 272 N. E. 2d 887.

No. 71-944. *SALETKO v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 193.

No. 71-957. *SHALLA v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL.* C. A. 6th Cir. Certiorari denied.

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No. 71-959. *THOMAS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 334.

No. 71-971. *FISONS LTD. ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 1241.

No. 71-974. *CONRAD, EXECUTRIX v. JUDSON ET AL.* Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 465 S. W. 2d 819.

No. 71-988. *VAUGHN v. HUFNAGEL, EXECUTOR, ET AL.* Ct. App. Ky. Certiorari denied. Reported below: 473 S. W. 2d 124.

No. 71-996. *SNOOK v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 329.

No. 71-1004. *GENERAL TEAMSTERS LOCAL UNION NO. 528 ET AL. v. ALLIED FOODS, INC.* Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 479, 186 S. E. 2d 527.

No. 71-1018. *MALONEY v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 1186.

No. 71-1029. *REISMAN v. NEW YORK*. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 278, 277 N. E. 2d 396.

No. 71-1033. *GREAT DANE TRAILERS, INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 4th Cir. Certiorari denied.

No. 71-1034. *EMBRY v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 472.

No. 71-1037. *SILVERTRUST, EXECUTOR, ET AL. v. REDKE*. Sup. Ct. Cal. Certiorari denied. Reported below: 6 Cal. 3d 94, 490 P. 2d 805.

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No. 71-1038. *CITY OF THOUSAND OAKS v. VAN NUYS PUBLISHING CO., INC.* Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 3d 817, 489 P. 2d 809.

No. 71-1046. *GRIFFITH v. ALABAMA.* Ct. Crim. App. Ala. Certiorari denied. Reported below: 47 Ala. App. 378, 255 So. 2d 48.

No. 71-1055. *ANDERSON v. COLORADO.* Sup. Ct. Colo. Certiorari denied. Reported below: — Colo. —, 490 P. 2d 47.

No. 71-1079. *HAY v. TRUSCOTT ET AL.* Sup. Ct. Pa. Certiorari denied.

No. 71-5035. *SAMPERI v. NEW YORK.* Ct. App. N. Y. Certiorari denied.

No. 71-5309. *JORDAN v. PROCUNIER, CORRECTIONS DIRECTOR.* Sup. Ct. Cal. Certiorari denied.

No. 71-5355. *MOSES v. EYMAN, WARDEN.* C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 306.

No. 71-5465. *CROSSWHITE v. SWENSON, WARDEN.* C. A. 8th Cir. Certiorari denied. Reported below: 444 F. 2d 648.

No. 71-5585. *MARTIN v. PATE, WARDEN.* C. A. 7th Cir. Certiorari denied.

No. 71-5587. *PLAIR v. OHIO.* Sup. Ct. Ohio. Certiorari denied.

No. 71-5755. *MONSOUR v. CADY, WARDEN, ET AL.* Sup. Ct. Wis. Certiorari denied.

No. 71-5964. *LAUCHLI v. HARRIS, WARDEN, ET AL.* C. A. 7th Cir. Certiorari denied.

No. 71-5965. *BETHEA v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 18 Cal. App. 3d 930, 96 Cal. Rptr. 229.

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No. 71-5967. *JENSON v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 1258.

No. 71-5968. *HUGGINS v. UNITED STATES*. Ct. Cl. Certiorari denied.

No. 71-5969. *BAMBERGER v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 696.

No. 71-5971. *KIMMONS v. WAINWRIGHT, CORRECTIONS DIRECTOR*. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 335.

No. 71-5973. *SMITH v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 451 F. 2d 169.

No. 71-5975. *SAVAGE v. UNITED STATES ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 449.

No. 71-5976. *NICHOLSON v. WOLFF, WARDEN*. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 777.

No. 71-5977. *ZOVLUCK v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 339.

No. 71-5978. *TINER v. MICHIGAN*. Sup. Ct. Mich. Certiorari denied.

No. 71-5979. *PACHECO v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 448 F. 2d 1398.

No. 71-5980. *WATTS v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied.

No. 71-5981. *PELOW v. MANCUSI, CORRECTIONAL SUPERINTENDENT*. C. A. 2d Cir. Certiorari denied.

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No. 71-5982. MARCELIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71-5984. WALKER *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71-5986. CARLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71-5987. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71-5993. DADURIAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 450 F. 2d 22.

No. 71-5994. FENTRESS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 133 Ill. App. 2d 38, 272 N. E. 2d 801.

No. 71-5995. BREWER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 71-5997. ARCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 1106.

No. 71-5999. MASTERS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 866.

No. 71-6000. DUNLEAVAY *v.* ROCKEFELLER CENTER, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 447 F. 2d 1402.

No. 71-6002. WOOD *v.* CIRCUIT COURT OF WARREN COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 71-6003. STRICKLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71-6004. HOOKS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 253 So. 2d 424.

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No. 71-6005. *EVANS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 71-6006. *MAGGARD v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 502.

No. 71-6007. *FENTRESS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 452 F. 2d 609.

No. 71-6008. *LAUCHLI v. Poos, U. S. DISTRICT JUDGE, ET AL.* C. A. 7th Cir. Certiorari denied.

No. 71-6009. *JOHNSON v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 344.

No. 70-22. *M. F. A. CENTRAL COOPERATIVE ET AL. v. BOOKWALTER, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.* C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 427 F. 2d 1341.

No. 71-525. *LUSBY v. VIRGINIA*. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted.

No. 71-716. *SMITHERMAN v. VIRGINIA*. Sup. Ct. Va. Motion to dispense with printing petition and motion of respondent for leave to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-766. *CARTER, DIRECTOR, MISSOURI DIVISION OF WELFARE, ET AL. v. LIKE ET AL.* C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 448 F. 2d 798.

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No. 71-978. *McCONNELL v. ANDERSON ET AL.* C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 193.

No. 71-994. *EPSTEIN v. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.* App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 37 App. Div. 2d 333, 325 N. Y. S. 2d 657.

No. 71-995. *DAVIS v. UNITED STATES.* Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 196 Ct. Cl. 517.

No. 71-1054. *SMITH, ADMINISTRATRIX v. SOUTHERN PACIFIC Co.* Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5449. *QUICK v. VIRGINIA.* Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5450. *CAMM v. PENNSYLVANIA.* Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 443 Pa. 253, 277 A. 2d 325.

No. 71-5550. *MANUEL v. SALISBURY, CORRECTIONAL SUPERINTENDENT.* C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 453.

No. 71-5970. *NIELSEN v. MICHIGAN.* Ct. App. Mich. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 34 Mich. App. 261, 191 N. W. 2d 121.

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No. 71-5560. *MILLER v. OREGON*. Sup. Ct. Ore. Certiorari denied. Reported below: See 5 Ore. App. 501, 484 P. 2d 1132.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL, dissenting.

Petitioner had a pistol on his person when he was arrested in Portland, Oregon, on January 28, 1970. Two prosecutions were brought against him based on this single act of possession. The first was a complaint filed January 29, 1970, for violation of § 14.32.040 of the Code of the City of Portland, which makes it a crime to carry a concealed weapon. The second was an indictment handed down April 20, 1970, for violation of Oregon Revised Statutes § 166.270, which makes it a felony for "any person who has been convicted of a felony against the person or property of another" to carry a concealed weapon.

On April 29, 1970, the petitioner was convicted of the ordinance violation. He thereupon entered a plea of double jeopardy to the felony indictment. The plea was sustained in the trial court and the indictment dismissed. The Court of Appeals of Oregon reversed, 5 Ore. App. 501, 484 P. 2d 1132. The Oregon Supreme Court denied review.

I would grant the petition for certiorari and reverse. In my view the Double Jeopardy Clause applicable to the States through the Fourteenth Amendment, *Benton v. Maryland*, 395 U. S. 784 (1969), requires the prosecution, except in most limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe v. Swenson*, 397 U. S. 436, 453-454 (1970) (concurring opinion). Under this "same transaction" test of "same offense" the trial court properly sustained petitioner's double jeopardy plea.

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No. 71-993. *LOVISI v. VIRGINIA*. Sup. Ct. Va. Motion of respondent to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5726. *HUNT, AKA ADAMS v. GEORGIA ET AL.* C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 445 F. 2d 1228.

No. 71-5989. *THERIAULT ET AL. v. SILBER ET AL.* C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 71-5990. *SINCLAIR v. TURNER, WARDEN*. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 447 F. 2d 1158.

#### *Rehearing Denied*

No. 71-554. *LIEPMAN v. CALIFORNIA*, *ante*, p. 963;

No. 71-657. *HAWAIIAN LAND CO., LTD. v. DIRECTOR OF TAXATION OF HAWAII*, *ante*, p. 907;

No. 71-694. *LOUISIANA STATE DEPARTMENT OF HIGHWAYS v. DARDAR ET AL.*, *ante*, p. 918;

No. 71-709. *SUMIDA ET AL. v. YUMEN ET AL.*, *ante*, p. 964;

No. 71-730. *WILLIAMS v. UNITED STATES*, *ante*, p. 954;

No. 71-742. *GOULD ET UX. v. AMERICAN WATER WORKS SERVICE CO., INC., ET AL.*, *ante*, p. 920;

No. 71-744. *ADDONIZIO v. UNITED STATES*, *ante*, p. 936; and

No. 71-765. *NORTHERN NATURAL GAS CO. v. WILSON ET AL.*, *ante*, p. 949. Petitions for rehearing denied.

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No. 71-789. *JACOBS v. UNITED STATES*, *ante*, p. 955;

No. 71-796. *CASTENBAUM v. UNITED STATES*, *ante*, p. 955;

No. 71-904. *GREAT FIDELITY INVESTMENT CO. ET AL. v. MARTIN ET AL.*, *ante*, p. 955;

No. 71-5470. *BEASLEY v. UNITED STATES*, *ante*, p. 952;

No. 71-5547. *McCRAY v. UNITED STATES*, *ante*, p. 944;

No. 71-5582. *GERARDI v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL.*, *ante*, p. 914;

No. 71-5588. *TARLTON v. UNITED STATES*, *ante*, p. 926;

No. 71-5718. *BECKER v. UNITED STATES*, *ante*, p. 932; and

No. 71-5738. *ACARINO v. MISHLER, CHIEF JUDGE, U. S. DISTRICT COURT*, *ante*, p. 956. Petitions for rehearing denied.

No. 70-6. *SWARB ET AL. v. LENNOX ET AL.*, *ante*, p. 191. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 71-884. *CHANDLER, U. S. DISTRICT JUDGE v. O'BRYAN*, *ante*, p. 964. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

#### *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 Seventh Circuit during the week of May 22, 1972, and for such additional time in advance thereof to prepare for the hearing 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.

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APRIL 7, 1972

*Dismissal Under Rule 60*

No. 71-1050. ROBERTS, AKA MATTHEWS *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 455 F. 2d 930.

APRIL 11, 1972

*Miscellaneous Order*

No. A-972 (71-982). HALL, SECRETARY OF HUMAN RELATIONS AGENCY, ET AL. *v.* VILLA ET AL. Sup. Ct. Cal. Application for stay of judgment pending action on petition for writ of certiorari presented to Mr. JUSTICE BLACKMUN, and by him referred to the Court, granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

APRIL 17, 1972

*Affirmed on Appeal*

No. 71-940. BRUSCA ET AL. *v.* STATE BOARD OF EDUCATION ET AL. Affirmed on appeal from D. C. E. D. Mo. Reported below: 332 F. Supp. 275.

*Appeals Dismissed*

No. 71-793. ANDERSON ET AL. *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 12 Md. App. 186, 278 A. 2d 439.

No. 71-5974. MORRIS *v.* GEORGIA. 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: 228 Ga. 39, 184 S. E. 2d 82.

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No. 71-6067. *DIGGS v. BENJAMIN FRANKLIN UNIVERSITY.* Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71-6082. *RENER v. BETO, CORRECTIONS DIRECTOR.* Appeal from C. A. 5th Cir. Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 447 F. 2d 20.

*Vacated and Remanded on Appeal*

No. 70-44. *ROTHSTEIN v. LUTHERAN SOCIAL SERVICES OF WISCONSIN AND UPPER MICHIGAN.* Appeal from Sup. Ct. Wis. Motion to strike appellant's supplemental brief denied. Judgment vacated and case remanded for further consideration in light of *Stanley v. Illinois*, *ante*, p. 645, and with due consideration for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time. Reported below: 47 Wis. 2d 420, 178 N. W. 2d 56.

No. 71-9. *LUNG ET AL. v. JONES ET AL.* Appeal from D. C. N. M. Judgment vacated and case remanded for further consideration in light of *Lynch v. Household Finance Corp.*, *ante*, p. 538. Reported below: 322 F. Supp. 1067.

*Certiorari Granted—Vacated or Reversed, and Remanded*

No. 70-123. *VANDERLAAN v. VANDERLAAN.* App. Ct. Ill., 1st Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stanley v. Illinois*, *ante*, p. 645. Reported below: 126 Ill. App. 2d 410, 262 N. E. 2d 717.

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No. 70-142. *GARREN ET AL. v. CITY OF WINSTON-SALEM.* C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lynch v. Household Finance Corp.*, *ante*, p. 538. Reported below: 439 F. 2d 140.

No. 70-249. *TUCKER v. MAHER ET AL.* C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lynch v. Household Finance Corp.*, *ante*, p. 538. Reported below: 441 F. 2d 740.

No. 71-5580. *GONZALES v. BETO, CORRECTIONS DIRECTOR.* C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment reversed and case remanded. *Turner v. Louisiana*, 379 U. S. 466. Reported below: 445 F. 2d 1202.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in the judgment.

A gas station attendant was shot to death during the course of a holdup in Dawson County, Texas, on a February night in 1956. Five years later the petitioner was arrested, tried, and convicted of the crime. The prosecution's case against the petitioner rested almost totally upon the testimony of the county sheriff. The sheriff testified to the authenticity of a written confession that he said had been dictated and signed with an "X" by the petitioner. The witness insisted on cross-examination that, although the petitioner could not read or write, and had some difficulty speaking and understanding English, he had indeed dictated the rather complex confession and had understood what he was signing. Only one other witness, who corroborated a part of the sheriff's testimony, connected the petitioner with the crime.

The county sheriff, however, played a dual role at the trial, for he was not only the key prosecution witness

against the petitioner, but the bailiff of the jury as well. In the latter capacity, he was responsible for the care and protection of the jurors. He had, therefore, substantial and continuing contact with and authority over them during the entire course of the trial. On several occasions, he conducted them in and out of the courtroom on the instructions of the judge. Once, the judge even asked him to step down from the witness stand, where he was undergoing cross-examination, in order to retire the jury.<sup>1</sup> In his role as bailiff, the sheriff walked with the jurors to a local restaurant for lunch, conversing with them on the way. At the restaurant, he ate with them in a private room, where the conversations continued. Late in the afternoon, while the jurors were deliberating in the case that turned so largely on their assessment of the sheriff's credibility, they asked the sheriff, as bailiff, to bring them soft drinks in the jury room, which he did.

The petitioner has now sought federal habeas corpus relief, claiming that the sheriff's dual role as key prosecution witness and jury bailiff and his substantial association with the jurors during the trial infringed the petitioner's right to due process of law under the doctrine of *Turner v. Louisiana*, 379 U. S. 466. In *Turner*, two deputy sheriffs served identical dual roles as prosecution witnesses and jury custodians, testifying as to the circum-

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<sup>1</sup> This occurred immediately after defense counsel had emphasized his challenge to the sheriff's credibility:

"MR. BASDEN [defense counsel]: I have no further questions to ask this witness [the sheriff], and I will pass him. If this statement [the confession] is introduced in evidence, I would like to put on testimony to impeach the testimony given by this witness to assist the Court in understanding the defendant's ability to speak the English language, in regard to giving a statement to these Peace Officers, and I would like to make this request, to be allowed to call these witnesses of mine at this time to testify.

"THE COURT: Mr. Sheriff, will you retire the jury for a few minutes?"

stances of the defendant's confession while shepherding the jurors through a three-day trial. During the trial, the jury was sequestered and was in "close and continual association" with the deputies. *Id.*, at 468. "The deputies ate with them, conversed with them, and did errands for them." *Ibid.* This Court held that the prejudice inherent in that situation violated the defendant's due process right to a fair trial before an impartial jury.

After the evidentiary hearing in the present case, the District Court denied the petitioner's habeas corpus application. A divided Court of Appeals affirmed the denial. 445 F. 2d 1202. Both courts held that the particular facts of the petitioner's case distinguished it from *Turner*, since the association of the key prosecution witness with the jurors as their custodian during the petitioner's one-day trial was somewhat less extensive and somewhat less intense than the association of the deputy sheriffs with the sequestered jury during the three-day trial in *Turner*.<sup>2</sup>

*Turner*, of course, did not set down a rigid, *per se* rule automatically requiring the reversal of any conviction whenever any Government witness comes into any contact with the jury. The Court's opinion specifically indicated that association with the jury by a witness whose testimony was "confined to some uncontested or merely formal aspect of the case for the prosecution" would hardly present a constitutional problem. *Id.*, at 473. And it indicated that a mere "brief encounter," by chance, with the jury would not generally contravene

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<sup>2</sup> Neither the District Court nor the Court of Appeals questioned that the county sheriff whose credibility was at issue had been a key witness for the prosecution. Indeed, the District Court's unreported opinion specifically found, as summarized by the Court of Appeals, that "[t]he sheriff was an essential witness for the prosecution in that his testimony, although disputed, established the voluntary character of the confession upon which Gonzales was convicted." 445 F. 2d, at 1205.

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due process principles. *Ibid.* For, as pointed out in dissent today, certain chance contacts between witnesses and jury members, while passing in the hall or crowded together in an elevator, are often inevitable.

But the Court in *Turner* was not dealing with just any prosecution witness coming into any contact with the jury. Rather, it was dealing with crucial witnesses against the defendant who associated with the jurors as their official guardians throughout the trial. *Turner* established the simple principle that association of that particular sort cannot be permitted if criminal defendants are to be afforded due process of law.

At the heart of our holding in *Turner* lay a recognition of the great prejudice inherent in the dual role of jury bailiff and key prosecution witness:

"It would have undermined the basic guarantees of trial by jury to permit this kind of an association between the jurors and two key prosecution witnesses who were *not* deputy sheriffs. But the role that Simmons and Rispone played as deputies made the association even more prejudicial. For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial." *Id.*, at 474.<sup>3</sup>

Our adversary system of criminal justice demands that the respective roles of prosecution and defense and the neutral role of the court be kept separate and distinct in a criminal trial. When a key witness against a defendant doubles as the officer of the court specifically charged with the care and protection of the jurors, associating with them on both a personal and an official basis while

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<sup>3</sup> In a later case drawing upon the doctrine of *Turner*, the Court emphasized that "the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury . . . ." *Parker v. Gladden*, 385 U. S. 363, 365.

simultaneously testifying for the prosecution, the adversary system of justice is perverted.

Naturally, the extent and intensity of a bailiff's association with a jury will vary from case to case. But, in the petitioner's case, I cannot say that it was by any means *de minimis*. Although the trial lasted only one day and the jury was not sequestered with the county sheriff, the association between the jurors and the witness-bailiff was an extended one, and the duality of the witness-bailiff's roles was inevitably driven home to the jury. And, although the witness-bailiff may not have spoken to the jurors about the case itself outside the courtroom, *Turner* makes clear that even if he "never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this association throughout the trial between the jurors and [this] key witness for the prosecution." 379 U. S., at 473. It is enough to bring the petitioner's case within the four corners of *Turner* that the key witness for the prosecution also served as the guardian of the jury, associating extensively with the jurors during the trial.<sup>4</sup>

MR. JUSTICE REHNQUIST, whom MR. JUSTICE WHITE joins, dissenting.

In order to reverse summarily the state court conviction of a confessed murderer, the majority in this case chooses to convert a salutary principle into a rigid rule

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<sup>4</sup> The petitioner's trial was held before our decision in *Turner*, but *Turner*, of course, stated no new constitutional doctrine. Its principle "went to the fairness of the trial—the very integrity of the fact-finding process." *Linkletter v. Walker*, 381 U. S. 618, 639. It overruled no line of decisions on which the State might have justifiably relied. To the contrary, it simply applied established case law holding that due process of law requires an impartial jury. *Turner v. Louisiana*, 379 U. S. 466, 471-472.

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unjustified by considerations of constitutional policy or fairness. I must respectfully dissent.

Petitioner Rudy Gonzales was convicted of murder after a trial by jury in the District Court of Dawson County, Texas. The case was not a complicated one. The State's evidence consisted primarily of petitioner's signed and witnessed confession, admitting his complicity in an armed robbery and murder of the proprietor of a local service station. The evidence showed that the police had warned petitioner of his rights before he made this confession, and there is no suggestion that the statement was in any way coerced.

In cross-examining the sheriff who obtained the confession, petitioner's counsel questioned whether petitioner's command of the English language had been sufficient for him to understand what occurred at the time of the confession. The sheriff responded that while petitioner had not spoken perfect English, he had been able to comprehend and answer sensibly all the sheriff's questions. The defense presented no evidence to the jury, which found petitioner guilty within 10 minutes after the close of the case.

Petitioner's sole claim to habeas relief is that he was deprived of due process of law because the sheriff of Dawson County at that time also served as bailiff of the jury. In order to sustain this claim, petitioner seeks to have this Court extend the doctrine of *Turner v. Louisiana*, 379 U. S. 466 (1965).

In *Turner*, two deputy sheriffs who testified as to the circumstances of the defendant's confession served as jury bailiffs throughout the three-day trial. During this period the jury was sequestered and was in "close and continual association" with the deputies. *Id.*, at 468. "The deputies ate with them, conversed with them, and did errands for them." *Ibid.* Defendant's counsel repeatedly argued against this practice at trial, but the

trial judge refused to halt the deputy sheriffs' association with the jury. Under such circumstances, this Court found a denial of due process and reversed the convictions.

*Turner* did not, however, establish a rigid, *per se* rule automatically requiring the reversal of any conviction whenever a Government witness comes into contact with the jury. Indeed, certain chance contacts between witnesses and jury members—while passing in the hall or crowded together in an elevator—may be inevitable. Although such contacts may be undesirable, as Judge Learned Hand stated, "when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." *United States v. Compagna*, 146 F. 2d 524, 528 (CA2 1944), cert. denied, 324 U. S. 867 (1945).

The Court in *Turner* recognized that there is a continuum of potential prejudice resulting from different types of contacts. It emphasized that the case before it dealt "not with a brief encounter, but with a continuous and intimate association throughout a three-day trial." 379 U. S., at 473. The Court granted relief only after analyzing the specific factors that might have resulted in prejudice to the defendant.

In the instant case it is undisputed that the sheriff never discussed the case with any member of the jury. As bailiff he escorted the jury to the jury room on several occasions. After the jury had found petitioner guilty and while it was considering the penalty, the sheriff responded to the jury's request for some soft drinks. This contact with the jury consisted solely of the sheriff walking into the room, placing the bottles on the table, and immediately leaving the room. There was no conversation beyond an exchange of formal pleasantries. Finally, and perhaps most significantly, the sheriff accompanied the jury to lunch.

As *Turner* noted, under certain circumstances a series of such informal contacts between witness and jury can be prejudicial. A jury member is more likely to question the credibility of an unknown Government witness than that of a person whom he has come to know and like after extended association. But in the present case the sheriff's contacts with the jury were far less prejudicial than in *Turner*. First, viewed quantitatively, the amount of contact involved here appears closer to a "brief encounter" than to the "continuous and intimate association" emphasized there, where the jury was sequestered with those witnesses for three days. Secondly, it is important to note that this is not a case where jurors became personally acquainted with the sheriff because of his role as bailiff. Indeed, prior to the trial which took place in Lamesa, Texas, a town of only about 13,000 people, the sheriff knew personally every single member of the jury. I find it impossible to conclude on this record that the sheriff's casual lunchtime conversation with people he already knew deprived petitioner of his constitutional rights.

By applying the *Turner* principle to the facts of this case, the Court converts *Turner's* pragmatic approach into an almost insurmountable *per se* rule. Yet, this case decisively demonstrates the error of following such a quasi-legislative approach. After the decision in *Turner*, the Texas Legislature passed a statute forbidding a Government witness to serve as bailiff. Tex. Code Crim. Proc. Art. 36.24. This statute had prospective application only, and thus did not affect Gonzales' trial, which had taken place in 1961. In this manner the legislature was able to prevent a problem from arising in the future, without adopting a blunderbuss approach which would upset final convictions whose reliability and fairness could not reasonably be questioned. The legislators left to the courts the job of reviewing

past cases, using the more practical, flexible *Turner* approach.

Applying this case-by-case approach, it is hard to discern any unfairness in Gonzales' trial. Indeed, unlike *Turner*, Gonzales' counsel never raised any objection at trial to the sheriff's activities, although they were completely open and obvious. While this failure to object might not preclude petitioner's raising the issue now, it does seem to indicate a recognition at the time by all concerned that there was not in fact any dangerous objectionable impropriety taking place.

Today's ruling bids fair to swell the ever-mounting volume of constitutional litigation with which the courts of this country must deal. *Turner*'s reliance on *Irvin v. Dowd*, 366 U. S. 717 (1961), leaves open the inference that the gist of the claim of constitutional deprivation depends, not on the fact that the particular State's witness was a custodian of the jury, but on the fact that the State presumably failed to insulate the jury from all contact with the State's witnesses during the trial. Thus all of the unintended but virtually inevitable contacts between the State's witnesses, prosecuting attorneys, and the jurors during trial recesses could become potential constitutional infirmities in a conviction. Today's decision may well convert into Fifth or Fourteenth Amendment claims many matters that have in the past been dealt with quite satisfactorily by the trial judge determining on a motion for mistrial whether or not there was prejudice. Cases dealing with the issue in the past do not suggest that juror-witness contacts automatically raise issues of constitutional dimension. See, e. g., *Jordan v. United States*, 133 U. S. App. D. C. 102, 408 F. 2d 1305 (1969); *State v. Miles*, 364 S. W. 2d 532 (Mo. 1963). See generally Annot., 9 A. L. R. 3d 1275 (1966).

After revealing the activities of the deputy sheriffs in *Turner*, 379 U. S., at 473, the Court stated that "it

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would be blinking reality" to ignore the inherent prejudice there. In my view, it is "blinking reality" to hold that petitioner here was denied a substantial constitutional right at the trial of his case. The Court having determined that this matter should be treated summarily and without argument, I would affirm.

#### *Miscellaneous Orders*

No. 776, October Term, 1968. UTAH PUBLIC SERVICE COMMISSION *v.* EL PASO NATURAL GAS CO. ET AL., 395 U. S. 464. Motion for modification of mandate (judgment) and other relief denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 70-223. CENTRAL HARDWARE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of American Retail Federation for leave to participate in oral argument as *amicus curiae* denied.

No. 70-250. CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* REMILLARD ET AL. [Probable jurisdiction noted, 404 U. S. 1013.] Motion of National Welfare Rights Organization et al. for leave to file a brief as *amici curiae* denied.

No. 71-485. GOTTSCHALK, ACTING COMMISSIONER OF PATENTS *v.* BENSON ET AL. C. C. P. A. [Certiorari granted, *ante*, p. 915.] Motion of petitioner to dispense with printing appendix and to proceed on original record granted. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71-506. UNITED STATES ET AL. *v.* MIDWEST VIDEO CORP. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

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No. 71-732. SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT *v.* BUSTAMONTE. C. A. 9th Cir. [Certiorari granted, *ante*, p. 953.] Motion of respondent for appointment of counsel granted. It is ordered that Stuart P. Tobisman, Esquire, of Los Angeles, California, be, and he is hereby, appointed to serve as counsel for respondent *pro hac vice* in this case.

No. 71-829. MOURNING *v.* FAMILY PUBLICATIONS SERVICE, INC. C. A. 5th Cir. [Certiorari granted, *ante*, p. 987.] Motion of petitioner for leave to proceed further herein *in forma pauperis* granted.

No. 71-1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and

No. 71-1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 973.] Motions of Atlanta Gas Light Co. et al., Monsanto Co. et al., and Humble Oil & Refining Co. for leave to file briefs as *amici curiae* granted. Motions of State of Louisiana, Humble Oil & Refining Co., and Mobile Gas Service Corp. et al. for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 71-1017. GRAVEL *v.* UNITED STATES; and

No. 71-1026. UNITED STATES *v.* GRAVEL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion requesting permission to divide time for oral argument on behalf of *amicus curiae* granted.

No. A-962 (71-1248). CALIFORNIA *v.* ANDERSON. Sup. Ct. Cal. Renewed application for stay denied.

No. 71-5671. GIDMARK *v.* BENSON, PRISON CAMP ADMINISTRATOR. 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.

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No. 71-6019. *BLACKBURN v. HENDERSON, WARDEN*; and

No. 71-6077. *NIDIVER v. FIELD, MEN'S COLONY SUPERINTENDENT*. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71-983. *ALBRECHT v. MATTHES, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.*;

No. 71-6040. *ROJAS v. CHAMBERS, CHIEF JUDGE, U. S. COURT OF APPEALS*;

No. 71-6055. *McCRAY v. MARYLAND*;

No. 71-6088. *GIBSON v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA ET AL.*;

No. 71-6096. *GAY v. DOWNING ET AL.*; and

No. 71-6110. *PICKING v. KAUFMAN, U. S. DISTRICT JUDGE*. Motions for leave to file petitions for writs of mandamus denied.

No. 71-6098. *ARNOLD v. UNITED STATES*. Motion for leave to file petition for writ of prohibition denied.

*Probable Jurisdiction Noted or Postponed*

No. 71-1082. *ASKEW, GOVERNOR OF FLORIDA, ET AL. v. AMERICAN WATERWAYS OPERATORS, INC., ET AL.* Appeal from D. C. M. D. Fla. Probable jurisdiction noted. Reported below: 335 F. Supp. 1241.

No. 71-364. *MAHAN, SECRETARY OF BOARD OF ELECTIONS, ET AL. v. HOWELL ET AL.*;

No. 71-373. *CITY OF VIRGINIA BEACH v. HOWELL ET AL.*; and

No. 71-553. *THORNTON ET AL. v. PRICHARD ET AL.* Appeals from D. C. E. D. Va. Probable jurisdiction noted. Cases consolidated and a total of two hours allotted for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of these cases. Reported below: 330 F. Supp. 1138.

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No. 71-6078. *LINDA R. S. v. RICHARD D. ET AL.* Appeal from D. C. N. D. Tex. Motion of appellants for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 335 F. Supp. 804.

*Certiorari Granted*

No. 71-1011. *BRONSTON v. UNITED STATES.* C. A. 2d Cir. Certiorari granted. Reported below: 453 F. 2d 555.

No. 71-1059. *KERN COUNTY LAND CO. v. OCCIDENTAL PETROLEUM CORP.* C. A. 2d Cir. Certiorari granted. Reported below: 450 F. 2d 157.

*Certiorari Denied.* (See also Nos. 71-5974, 71-6067, and 71-6082, *supra*.)

No. 70-284. *PENNSYLVANIA v. SILVERMAN.* Sup. Ct. Pa. Certiorari denied. Reported below: 442 Pa. 211, 275 A. 2d 308.

No. 71-851. *WRENN v. NORTH CAROLINA.* Ct. App. N. C. Certiorari denied. Reported below: 12 N. C. App. 146, 182 S. E. 2d 600.

No. 71-861. *LEFF ET AL. v. HOUSING AUTHORITY OF THE CITY OF EAST ORANGE ET AL.* Super. Ct. N. J. Certiorari denied.

No. 71-914. *BRAVER ET AL. v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 799.

No. 71-918. *LOVE ET AL. v. DADE COUNTY SCHOOL BOARD ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 150.

No. 71-947. *VUCI ET AL. v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 940.

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No. 71-963. BBF LIQUIDATING, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 938.

No. 71-969. CENTURY ARMS, INC. *v.* CONNALLY, SECRETARY OF THE TREASURY. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 1306.

No. 71-972. COCHRAN *v.* COSTILL ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 71-998. PENOSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 217.

No. 71-1006. VIRGINIA NATIONAL BANK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 450 F. 2d 1155.

No. 71-1007. REGENCY REALTY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied.

No. 71-1025. HENRY COUNTY BEVERAGE Co., INC. *v.* SECRETARY OF THE TREASURY. C. A. 7th Cir. Certiorari denied: Reported below: 454 F. 2d 413.

No. 71-1032. A. W. THOMPSON, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 1333.

No. 71-1036. LECCI *v.* LEONARD ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71-1062. PROCTER & GAMBLE Co. *v.* PUREX CORP., LTD. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 288.

No. 71-1073. TRAP ROCK INDUSTRIES, INC. *v.* KOHL, COMMISSIONER OF TRANSPORTATION, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 59 N. J. 471, 284 A. 2d 161.

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No. 71-1067. *RILEY ET AL. v. DISTRICT OF COLUMBIA.* Ct. App. D. C. Certiorari denied. Reported below: 283 A. 2d 819.

No. 71-1071. *SAIKEN v. ILLINOIS.* Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 504, 275 N. E. 2d 381.

No. 71-1074. *BIXLER v. ILLINOIS.* Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 328, 275 N. E. 2d 392.

No. 71-1075. *FERSHTMAN ET AL. v. SCHECTMAN ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 1357.

No. 71-1076. *EMERY AIR FREIGHT CORP. v. LOCAL UNION 295, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 586.

No. 71-1081. *KEARNEY & TRECKER CORP. v. GIDDINGS & LEWIS, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 579.

No. 71-1089. *CALIFORNIA SHIPPING Co., INC., ET AL. v. PACIFIC FAR EAST LINE, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 380.

No. 71-1096. *MILES v. CITY-PARISH GOVERNMENT OF EAST BATON ROUGE PARISH ET AL.* Sup. Ct. La. Certiorari denied. Reported below: 260 La. 108, 255 So. 2d 93.

No. 71-1108. *NEWSOME ET AL. v. MASON & HANGER-SILAS MASON Co., INC., ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 425.

No. 71-5364. *ARMSTEAD ET AL. v. VIRGINIA.* Sup. Ct. Va. Certiorari denied.

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No. 71-1118. *FORD MOTOR Co. v. W. F. HOLT & SONS, INC., ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 116.

No. 71-1203. *BANCO POPULAR DE PUERTO RICO v. LAS COLINAS, INC., ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 453 F. 2d 911.

No. 71-5516. *WEDDEL v. CRAVEN, WARDEN, ET AL.* Sup. Ct. Cal. Certiorari denied.

No. 71-5517. *WEDDEL v. CALIFORNIA.* Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71-5645. *ANDRADE v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. Reported below: 470 S. W. 2d 194.

No. 71-5652. *GLOVER v. FLORIDA.* Ct. of Record of Escambia County. Certiorari denied.

No. 71-5682. *O'DELL v. OHIO STATE MEDICAL BOARD.* Ct. App. Ohio, Clermont County. Certiorari denied. Reported below: See 22 Ohio Misc. 138, 259 N. E. 2d 167.

No. 71-5693. *REID v. VIRGINIA.* C. A. 4th Cir. Certiorari denied.

No. 71-5719. *STANDIFER v. JARVIS ET AL.* C. A. 10th Cir. Certiorari denied.

No. 71-5730. *MEREDITH v. EYMAN, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 71-5742. *SIMS ET AL. v. MICHIGAN.* Sup. Ct. Mich. Certiorari denied. Reported below: 385 Mich. 621, 189 N. W. 2d 41.

No. 71-5787. *JACKSON v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied. Reported below: 470 S. W. 2d 201.

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No. 71-5731. *STUARD v. EYMAN, WARDEN*. C. A. 9th Cir. Certiorari denied.

No. 71-6010. *JACKSON v. HENDERSON, CORRECTIONAL SUPERINTENDENT*. C. A. 2d Cir. Certiorari denied.

No. 71-6012. *JACKSON v. WAINWRIGHT, CORRECTIONS DIRECTOR*. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 289.

No. 71-6013. *EVANS v. MARYLAND*. Ct. Sp. App. Md. Certiorari denied.

No. 71-6015. *GOZNELLI v. BRANTLEY, WARDEN*. Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 383, 275 N. E. 2d 396.

No. 71-6016. *GUILE v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-6018. *CLOSE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 450 F. 2d 152.

No. 71-6020. *SUNDLUN v. SUNDLUN*. Sup. Ct. R. I. Certiorari denied. Reported below: 108 R. I. 603, 277 A. 2d 918.

No. 71-6021. *BOLTON v. KROPP, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 71-6022. *JACKSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 71-6024. *WARNER v. NEBRASKA*. Sup. Ct. Neb. Certiorari denied. Reported below: 187 Neb. 335, 190 N. W. 2d 786.

No. 71-6025. *HOOD v. BURNETT ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 941.

No. 71-6026. *JACKSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

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No. 71-6027. *BROWN v. ROSS*, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71-6028. *ROSS v. HOWARD*, WARDEN. Sup. Ct. R. I. Certiorari denied.

No. 71-6031. *STRATTON v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 36.

No. 71-6032. *PATTON v. INDIANA*. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 275 N. E. 2d 794.

No. 71-6033. *STEPHENSON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 768.

No. 71-6036. *JOHNSON v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 760.

No. 71-6038. *WALTENBERG v. SUPREME COURT OF RICHMOND COUNTY ET AL.* C. A. 2d Cir. Certiorari denied.

No. 71-6039. *PICKETT v. HENDERSON*, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71-6041. *TATE v. GRACE ET AL.* C. A. 6th Cir. Certiorari denied.

No. 71-6044. *WILSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 356.

No. 71-6045. *RODGERS v. GAFFNEY*, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71-6046. *LUCAS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 141.

No. 71-6047. *MAHLER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 452 F. 2d 547.

No. 71-6048. *MEDINA v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 1090.

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No. 71-6049. *MATTISON v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-6052. *GEORGE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 269.

No. 71-6053. *MAGEE v. NELSON, WARDEN*. C. A. 9th Cir. Certiorari denied.

No. 71-6054. *EVINS v. SLAYTON, PENITENTIARY SUPERINTENDENT*. C. A. 4th Cir. Certiorari denied.

No. 71-6057. *DOUGHERTY v. UNITED STATES*. C. A. 7th Cir. Certiorari denied.

No. 71-6058. *AUGELLO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 1167.

No. 71-6061. *HUME v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 339.

No. 71-6062. *CAPPS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 71-6063. *FULLY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 452 F. 2d 1012.

No. 71-6064. *PARSONS v. ADAMS, WARDEN*. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 257.

No. 71-6065. *BYLAND v. CRAVEN, WARDEN*. Sup. Ct. Cal. Certiorari denied.

No. 71-6066. *SULLIVAN v. SULLIVAN*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-6069. *SMILEY v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-6072. *PARKER v. LEWIS, U. S. DISTRICT JUDGE*. C. A. 4th Cir. Certiorari denied.

No. 71-6075. *WATT v. PAGE, WARDEN*. C. A. 10th Cir. Certiorari denied. Reported below: 452 F. 2d 1174.

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No. 71-6073. *LATHAN v. DEEGAN*, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 181.

No. 71-6076. *THOMPSON v. STROM ET AL.* C. A. 8th Cir. Certiorari denied.

No. 71-6079. *BURROUGHS v. UNITED STATES.* C. A. 5th Cir. Certiorari denied.

No. 71-6080. *LUCAS v. BROUGHTON.* C. A. 2d Cir. Certiorari denied.

No. 71-6083. *WILKERSON v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 657.

No. 71-6084. *ARCHIE v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 897.

No. 71-6086. *LONG v. KLEINDIENST, ACTING ATTORNEY GENERAL, ET AL.* C. A. D. C. Cir. Certiorari denied.

No. 71-6087. *CHAMBERS ET AL. v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 359.

No. 71-6089. *WHITE v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 451 F. 2d 559.

No. 71-6090. *SPEAKS v. UNITED STATES.* C. A. 1st Cir. Certiorari denied. Reported below: 453 F. 2d 966.

No. 71-6091. *JEFFRIES v. UNITED STATES.* C. A. 2d Cir. Certiorari denied.

No. 71-6092. *HAGLER ET AL. v. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE.* C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 45.

No. 71-6093. *DEAN v. MOORE ET AL.* C. A. 2d Cir. Certiorari denied.

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No. 71-6094. WEBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 760.

No. 71-6095. WHITE, AKA LITTLEJOHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 264.

No. 71-6099. MARNIN *v.* URBANIAK ET AL. C. A. 3d Cir. Certiorari denied.

No. 71-6101. ADAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 1357.

No. 71-6102. SMOTHERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 995.

No. 71-6103. PLEASANT *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 749.

No. 71-6105. BREAUX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 948.

No. 71-6107. MARRATTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71-6108. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 1112.

No. 71-6111. BOSWELL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71-6113. JOHNSON *v.* DEPARTMENT OF WATER & POWER OF THE CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 294.

No. 71-6114. DENNIS *v.* McCACKEN ET AL. Sup. Ct. Fla. Certiorari denied.

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No. 71-6115. *FREEMAN v. FIRST DISTRICT COURT OF APPEALS ET AL.* Sup. Ct. Ohio. Certiorari denied.

No. 71-758. *GREEN v. MISSOURI.* Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 470 S. W. 2d 565.

No. 71-797. *PUGLIA v. COTTER ET AL.* C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 1362.

No. 71-962. *KELLEY ET AL. v. TEXAS STATE BOARD OF MEDICAL EXAMINERS.* Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 467 S. W. 2d 539.

No. 71-1035. *LECCI v. CAHN, DISTRICT ATTORNEY OF NASSAU COUNTY, ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 37 App. Div. 2d 779, 325 N. Y. S. 2d 400.

No. 71-1041. *TAXAY v. SHAFFER, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.* C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-1090. *CABBLER v. VIRGINIA.* Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 212 Va. 520, 184 S. E. 2d 781.

No. 71-1099. *PHOENIX NEWSPAPERS, INC., ET AL. v. PEAGLER ET AL.* Super. Ct. Ariz., County of Maricopa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

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No. 71-1019. TEXTILE WORKERS UNION OF AMERICA, AFL-CIO *v.* MOORE OF BEDFORD, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 406.

No. 71-5367. AMPHY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 259 La. 161, 249 So. 2d 560.

No. 71-5657. WILLIAMS *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-5714. SCHERER *v.* HOCKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1176.

No. 71-6011. BREEDLOVE ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 470 S. W. 2d 880.

No. 71-6023. CAMARA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 1122.

No. 71-6029. SILVERSTEIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-979. CITY OF CHICAGO ET AL. *v.* FEDERAL POWER COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 147 U. S. App. D. C. 312, 458 F. 2d 731.

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No. 71-6030. *TEAGUE v. WRIGHT*. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-976. *TYRONE v. UNITED STATES*. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 451 F. 2d 16.

No. 71-1002. *LAMM v. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.* C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 449 F. 2d 1202.

No. 71-1042. *EXER-GENIE, INC., ET AL. v. McDONALD ET AL.* C. A. 9th Cir. Motion of respondents for leave to dispense with printing brief granted. Certiorari denied. Reported below: 453 F. 2d 132.

No. 71-1052. *McKINNEY, DBA PARIS BOOKSTALL, ET AL. v. ALABAMA*. Sup. Ct. Ala. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART are of the opinion that certiorari should be granted and judgment reversed. *Redrup v. New York*, 386 U. S. 767 (1967). Reported below: 287 Ala. 648, 254 So. 2d 714.

No. 71-1072. *HEYMAN, TRUSTEE IN BANKRUPTCY v. MAHIN, DIRECTOR OF REVENUE OF ILLINOIS, ET AL.* Sup. Ct. Ill. Motion of S. Bloom, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 49 Ill. 2d 284, 275 N. E. 2d 421.

No. 71-1077. *ELLIS, TRUSTEE v. POWERS ET AL.* Sup. Ct. Hawaii. Motion to proceed on typewritten papers granted. Certiorari denied.

No. 71-6104. *PATTERSON v. LASH, WARDEN*. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 452 F. 2d 150.

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*Rehearing Denied*

No. 71-854. DEUTSCH Co., METAL COMPONENTS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 988;

No. 71-869. DEUTSCH Co., ELECTRONIC COMPONENTS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 988;

No. 71-1013. TEITELBAUM *v.* STONE, SECRETARY OF STATE OF FLORIDA, *ante*, p. 986;

No. 71-1030. KIERNAN ET AL. *v.* LINDSAY, MAYOR OF NEW YORK, ET AL., *ante*, p. 1000;

No. 71-1053. JAMIESON *v.* AMERICAN NATIONAL SAFE DEPOSIT Co. ET AL., *ante*, p. 990;

No. 71-5599. WHEELER *v.* WARDEN, LEAVENWORTH PENITENTIARY, *ante*, p. 935;

No. 71-5711. ENLOW *v.* LASH, WARDEN, *ante*, p. 952;

No. 71-5750. BAYS *v.* UNITED STATES, *ante*, p. 957; and

No. 71-5802. McGAHEY *v.* UNITED STATES, *ante*, p. 977. Petitions for rehearing denied.

No. 70-5223. LIPSCOMB *v.* UNITED STATES, 404 U. S. 840;

No. 71-5579. DIGGS *v.* DUNNE ET AL., *ante*, p. 925; and

No. 71-5749. SASKO *v.* UNITED STATES, *ante*, p. 957. Motions for leave to file petitions for rehearing denied.

No. 71-654. LOVISI *v.* VIRGINIA, *ante*, p. 936. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 71-5762. SHARROW *v.* BROWN, *ante*, p. 968. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

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REPORTER'S NOTE

The next page is purposely numbered 1201. The numbers between 1076 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.

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