

ORDERS FROM JUNE 12 THROUGH
JUNE 21, 1972

JUNE 12, 1972

Affirmed on Appeal

No. 71-1396. DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* PREISLER ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 341 F. Supp. 1158.

Reversed on Appeal

No. 71-5443. HARVEY *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. Motion for leave to proceed *in forma pauperis* granted. Judgment reversed. *Brooks v. Tennessee*, 406 U. S. 605. Reported below: 225 Tenn. 316, 468 S. W. 2d 731.

Certiorari Granted—Reversed and Remanded. (See No. 71-1180, *ante*, p. 197, and No. 71-6425, *ante*, p. 203.)

Certiorari Granted—Vacated and Remanded. (See also No. 71-784, *ante*, p. 191.)

No. 70-5024. FARRELL *v.* STOVALL ET AL. Sup. Ct. Wis. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Humphrey v. Cady*, 405 U. S. 504, and *Jackson v. Indiana*, 406 U. S. 715.

Miscellaneous Orders

No. A-1270 (71-1345). CRISMON *v.* UNITED STATES. C. A. 8th Cir. Petitioner's second application for bail pending decision on his petition for writ of certiorari, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

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No. A-1208 (No. 70-105). *HANRAHAN v. DOE ET AL.*; and

No. A-1208 (No. 70-106). *HEFFERNAN, GUARDIAN v. DOE ET AL.* Appeals from D. C. N. D. Ill. Application of appellees for vacation of stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would vacate the stay.

No. 71-703. *UNITED STATES v. FIRST NATIONAL BANK CORPORATION, INC.* Appeal from D. C. Colo. [Probable jurisdiction noted, 405 U. S. 915.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Counsel for appellees also allotted 15 additional minutes for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of the motion.

No. A-1248 (71-1476). *GAFFNEY v. CUMMINGS ET AL.* Appeal from D. C. Conn. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted. MR. JUSTICE STEWART would deny the application. Reported below: 341 F. Supp. 139.

MR. JUSTICE DOUGLAS, dissenting.

Appellant seeks to stay the judgment of a three-judge Federal District Court, which held unconstitutional Connecticut's plan for apportioning its state legislature. 341 F. Supp. 139. The plan was adopted in September 1971, and was only in the preliminary stages of implementation when it was struck down as violative of the Equal Protection Clause on March 30, 1972. An appeal from that decision has been docketed in this Court. *Gaffney v. Cummings*, No. 71-1476.

We denied a motion for expedited consideration of that appeal on May 22, 1972. 406 U. S. 942. Appellant promptly moved the lower court for a stay of its

March 30 decision, and when that stay was denied on May 26, 1972, appellant came here.

Earlier this Term, in another reapportionment case, MR. JUSTICE POWELL, in an in-chambers opinion, articulated the considerations involved in our review of applications for a stay of lower court judgments:

“A lower court judgment, entered by a tribunal that was closer to the facts . . . , is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm.” *Graves v. Barnes*, 404 U. S. 1201, 1203.

“Irreparable harm,” of course, inheres in any challenge to legislative apportionment. If the court below erred, the fall election will be held under an improper order, one which will doubtless affect the composition of the next state legislature. But this type of “irreparable injury” affects both sides equally, for if the court below was correct, staying its order will cause irreparable harm of precisely the same dimension.

There is “irreparable injury” in a different sense if the court’s order striking down a state apportionment is handed down so near the upcoming election that it is administratively impractical to implement an orderly election. Here, there is no serious claim that irreparable injury, in this sense, would result if a stay is not granted. The court below found as fact that there is ample time before the fall election to implement the plan submitted by the Special Master on May 26, 1972, or any proposed substitute which the State or appellant might submit within a reasonable time.¹ In-

¹ The legislature has recently acted to remove whatever procedural roadblocks there might be to implementation of the Master’s plan

deed, appellant concedes that the question of which plan can be most easily implemented is a "non-issue."²

Thus, the issue determinative of the stay application is the probable correctness of the decision below, and, in my view, appellant has not met his burden "of showing that the decision below was erroneous."

In *Reynolds v. Sims*, 377 U. S. 533, 577, we said "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Moreover, a State may not be heard to argue that a population variance is justified because it is *de minimis*. "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. . . . Unless population variances among . . . districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick v. Preisler*, 394 U. S. 526, 530-531.³

A comparison of the population variances in this case with those disapproved in *Kirkpatrick, supra*, is striking. In *Kirkpatrick*, the average variation from the ideal district was only 1.6%. Here, assembly districts in the state plan exhibited an average variation of 1.9%. In *Kirkpatrick*, the ratio of the largest to the smallest district was only 1.06 to 1. Here, the ratio of the largest to the smallest assembly district is 1.082

or any other which the court below might adopt. Public Act 220, May 16, 1972. The District Court indicated that the legislature will shortly submit a plan of its own for the court's consideration. 341 F. Supp. 139, 150.

² Appellant's Reply Memorandum 4. See also Appellant's Motion for Stay of Judgment 8.

³ It is irrelevant to this comparison that *Kirkpatrick*, 394 U. S. 526, involved congressional rather than state legislative redistricting. In either case, the burden is on the State to demonstrate a valid justification for any population variance, no matter how small.

to 1. In *Kirkpatrick*, 70% of the districts were within plus or minus 1.88% of the ideal population figure. Here, only 51.65% of the assembly districts are within 2.0% of the ideal. In *Kirkpatrick*, the total variance⁴ was 5.97%. Here, the total variance of the assembly redistricting is 7.83%.

It is true, of course, that "the extent to which equality may practicably be achieved may differ from State to State . . .," *Kirkpatrick, supra*, at 530. Thus, a State may be able to justify certain variations. Here, however, only two justifications are offered, and neither appears to have particular merit.

It is primarily argued that the variations are justified by a legitimate state interest in achieving "a partisan balancing of strength in each house." The District Court explained the concept as follows:

"The partisan balancing of strength in each house, termed by intervening defendant [appellant in this Court] a 'fair political balance' and by plaintiffs [appellees herein] 'political gerrymandering' was obtained by so adjusting the census areas utilized as building blocks into the structuring of Senate and House districts that, on the basis of the vote for all the Senate candidates of each party in the elections of 1966, 1968 and 1970, whichever party carried the state should carry a majority of Senate seats proportional to the statewide party majority, and likewise in the House, based on the party vote for all the House candidates of each party in the same three elections.

"In one or more House and one or more Senate districts some accommodation was also made in

⁴ The "total variance" in an apportionment plan is derived by adding together the percentage variation from the ideal of the two districts which are respectively the most overpopulated and underpopulated.

the interest of retaining in office a particular incumbent." 341 F. Supp. 139, 147.

This Court has never decided whether political gerrymandering or "fair political balance" is *per se* unconstitutional, irrespective of population variances. See, *e. g.*, *Wells v. Rockefeller*, 394 U. S. 542, 544. But we have said, in no uncertain terms, that gerrymandering is not a justification where population variances do result. In *Kirkpatrick*, for example, we even rejected the State's attempt to justify the population variances there present on the ground that the variations were necessary to avoid gerrymandering.

"[A]n argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." 394 U. S., at 534.

Thus, whether or not Connecticut may gerrymander its legislature if population equality is preserved, it may not do so when population disparities result.

An additional consideration urged to justify the discrepancies is the State's interest in preserving town lines. But any weight this factor would ordinarily have is rendered insignificant by the fact that the State's own plan cuts across 47 towns to create assembly districts, and 23 towns to create senate districts. See *Whitcomb v. Chavis*, 403 U. S. 124, 162 n. 42.

Appellant has one final argument. Attempting to litigate the merits of the Special Master's plan, he argues that implementation of that plan would exceed the equity power of the federal court under our recent decision in *Sixty-seventh Minnesota State Senate v. Beens*, 406 U. S. 187. But the merits of the Special Master's plan are not before this Court. Indeed, in

denying the stay below, the District Court obligated itself to "set down for hearing with all reasonable dispatch the plan submitted by the Special Master and any other plans submitted." Whatever appellant's objections to the Master's plan might be, he should first air them in the District Court which stands ready to hear them.

Additionally, even were the Special Master's plan at issue, appellant's objections would not be well taken. This is not a case in which the size of a state house is "slashed" in half, as in *Minnesota State Senate, supra*. Here, the District Court merely reduced the size of Connecticut's house from 151 members to 144, in order that the number of house districts be an even multiple of the 36 senate districts.⁵ A house of such size is expressly contemplated by the Connecticut Constitution.⁶ The District Court's action is simply a "minor variation," allowing senate and house districts to be drawn with congruent boundaries, that is well within the remedial powers of an equity court.⁷

I dissent from the Court's order granting this stay.

⁵ Minor variations for this purpose were approved in the *Minnesota State Senate* case. 406 U. S. 187, and cases cited *id.*, at 198 n. 10.

⁶ Article III, § 4, of the Connecticut Constitution provides that "The house of representatives shall consist of not less than one hundred twenty-five and not more than two hundred twenty-five members"

⁷ Appellant also objects to the extent to which the Master's plan dishonors town boundaries. It is undisputed, however, that town boundaries cannot be preserved intact in all cases under any constitutional plan. The Master's plan, drawn with the preservation of as many town lines as possible as an express consideration (though a subordinate one to the goal of population equality), cuts across only 60 towns in creating assembly districts, and 30 towns in creating senate districts. These figures compare favorably with those in the State's plan, *supra*, at 906.

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No. 71-6129. *McDONNELL v. WOLFF, WARDEN, ET AL.*; and

No. 71-6479. *WILLIAMS v. CALIFORNIA*. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71-6362. *DAYE ET AL. v. LARKINS, JUDGE, ET AL.*; and

No. 71-6480. *TILLI v. DAVIS ET AL.* Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 71-1031. *TONASKET v. WASHINGTON ET AL.* Appeal from Sup. Ct. Wash. Probable jurisdiction noted. Reported below: 79 Wash. 2d 607, 488 P. 2d 281.

No. 71-1069. *ASSOCIATED ENTERPRISES, INC., ET AL. v. TOLTEC WATERSHED IMPROVEMENT DISTRICT*. Appeal from Sup. Ct. Wyo. Probable jurisdiction noted. Reported below: 490 P. 2d 1069.

No. 70-279. *UNITED STATES ET AL. v. FLORIDA EAST COAST RAILWAY Co. ET AL.* Appeal from D. C. M. D. Fla. Probable jurisdiction noted. MR. JUSTICE POWELL took no part in the consideration or decision of this matter. Reported below: 322 F. Supp. 725.

No. 71-1222. *SUGARMAN, ADMINISTRATOR, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, ET AL. v. DOUGALL ET AL.* Appeal from D. C. S. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 339 F. Supp. 906.

Certiorari Granted

No. 71-1304. *BRADLEY ET AL. v. UNITED STATES*. C. A. 1st Cir. Certiorari granted. Reported below: 455 F. 2d 1181.

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No. 71-1255. UNITED STATES *v.* ASH. C. A. D. C. Cir. Certiorari granted. Application of respondent for release on bail, presented to THE CHIEF JUSTICE and by him referred to the Court, denied without prejudice to renewed application to the District Court. See 18 U. S. C. § 3148. Reported below: 149 U. S. App. D. C. 1, 461 F. 2d 92.

No. 71-6060. TACON *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 107 Ariz. 353, 488 P. 2d 973.

No. 71-6516. BRADEN *v.* 30TH JUDICIAL CIRCUIT COURT OF KENTUCKY. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 454 F. 2d 145.

Certiorari Denied

No. 70-352. LAWRENCE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 3d 273, 481 P. 2d 212.

No. 70-5101. PATLER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 211 Va. 448, 177 S. E. 2d 618.

No. 70-5109. TOWNES *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 461 S. W. 2d 761.

No. 71-970. AGNELLINO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 59 N. J. 434, 283 A. 2d 533.

No. 71-1212. GEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 849.

No. 71-1218. HOLMES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 249.

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- No. 71-1115. *FARRELL ET AL. v. MASSACHUSETTS*;
No. 71-1251. *LOCAL FINANCE CORP. v. MASSACHUSETTS*;
No. 71-1253. *WOODCOCK v. MASSACHUSETTS*;
No. 71-1254. *LIBERTY LOAN CORP. v. MASSACHUSETTS*; and
No. 71-6428. *HANLEY v. MASSACHUSETTS*. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 275 N. E. 2d 33.
- No. 71-1228. *WALKER ET AL. v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1205.
- No. 71-1230. *PEPSI-COLA BOTTLING CO. OF MIAMI, INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 824.
- No. 71-1252. *KAMBER v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 918.
- No. 71-1257. *MOORE ET AL. v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 569.
- No. 71-1259. *CENTRAL MACHINE & TOOL Co., INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 10th Cir. Certiorari denied.
- No. 71-1268. *BROWN ET AL. v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 293.
- No. 71-1270. *McKEE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 456 F. 2d 1049.
- No. 71-1272. *DEFONT ET AL. v. UNITED STATES ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 453 F. 2d 1239.

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No. 71-1273. *FRIED v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 71-1274. *WAINWRIGHT v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 984.

No. 71-1275. *COBB v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 405.

No. 71-1277. *GRIMES ET AL. v. UNITED STATES*; and No. 71-1296. *GUINN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 29.

No. 71-1292. *ALEXANDER v. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE*. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 1185.

No. 71-1308. *PRITCHARD, AKA O'ROARKE v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 1036.

No. 71-1335. *ANSELMO ET AL. v. LOUISIANA*. Sup. Ct. La. Certiorari denied. Reported below: 260 La. 306, 256 So. 2d 98.

No. 71-1348. *SOBEL, DBA SCRIPT SHOP EAST v. CITY OF LACY-LAKEVIEW, TEXAS, ET AL.* C. A. 5th Cir. Certiorari denied.

No. 71-1350. *CHAMBERS ET AL. v. NATIONWIDE MUTUAL INSURANCE Co.* Sup. Ct. Va. Certiorari denied.

No. 71-1354. *WESTINGHOUSE ELECTRIC CORP. v. TITANIUM METALS CORPORATION OF AMERICA*. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 515.

No. 71-1395. *CAROLLO v. S. S. KRESGE Co., DBA K-MART*. C. A. 4th Cir. Certiorari denied. Reported below: 456 F. 2d 306.

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No. 71-1374. *GELLIS v. CITY OF SAVANNAH, GEORGIA, ET AL.* C. A. 5th Cir. Certiorari denied.

No. 71-1414. *BEAUDRY v. WISCONSIN.* Sup. Ct. Wis. Certiorari denied. Reported below: 53 Wis. 148, 191 N. W. 2d 842.

No. 71-1448. *ENSO-GUTZEIT O/Y ET AL. v. SIDEREWICZ.* C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 1094.

No. 71-5370. *HALL v. FLORIDA.* Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 249 So. 2d 59.

No. 71-6035. *FUSARO v. CALIFORNIA.* Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 18 Cal. App. 3d 877, 96 Cal. Rptr. 368.

No. 71-6071. *PAYNE v. CRAVEN, WARDEN.* Sup. Ct. Cal. Certiorari denied.

No. 71-6251. *CANNITO ET AL. v. WOLFF, WARDEN.* C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 542.

No. 71-6258. *FARESE v. UNITED STATES.* C. A. D. C. Cir. Certiorari denied.

No. 71-6285. *AVENDANO v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 975.

No. 71-6291. *CHILDS v. CARDWELL, WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 541.

No. 71-6336. *ROBINSON v. UNITED STATES.* C. A. 5th Cir. Certiorari denied.

No. 71-6426. *DEBRUHL v. UNITED STATES.* C. A. 4th Cir. Certiorari denied.

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No. 71-6427. *YOUNG v. REED, CHAIRMAN, BOARD OF PAROLE, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 71-6443. *CLARK v. JOHNSON ET AL.* C. A. 10th Cir. Certiorari denied.

No. 71-6446. *REED v. UNITED STATES.* C. A. 2d Cir. Certiorari denied.

No. 71-6458. *GRENE v. CHOATE, U. S. DISTRICT JUDGE.* C. A. 5th Cir. Certiorari denied.

No. 71-6462. *SMITH v. RODGERS, JAIL SUPERINTENDENT.* C. A. D. C. Cir. Certiorari denied.

No. 71-6475. *WILLIAMS v. CLARK, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied.

No. 71-6477. *MASHEIOFF v. AMERICAN EXPORT LINES, INC., ET AL.* C. A. 2d Cir. Certiorari denied.

No. 71-6478. *CULBERSON v. WAINWRIGHT, CORRECTIONS DIRECTOR.* C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1219.

No. 71-6482. *HARRIS v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-6483. *LOGAN v. SLAYTON, PENITENTIARY SUPERINTENDENT.* C. A. 4th Cir. Certiorari denied.

No. 71-6484. *GANCI v. HENDERSON, PRISON SUPERINTENDENT.* C. A. 2d Cir. Certiorari denied.

No. 71-6488. *JOHNSON v. COLORADO.* Ct. App. Colo. Certiorari denied. Reported below: 490 P. 2d 704.

No. 71-6493. *McGURRIN v. SHOVLIN, HOSPITAL SUPERINTENDENT.* C. A. 3d Cir. Certiorari denied. Reported below: 455 F. 2d 1278.

No. 71-6498. *DIGGS v. EARLY.* Super. Ct. D. C. Certiorari denied.

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No. 71-6499. *RUIZ-JUAREZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1015.

No. 71-6515. *PACE v. WELSH*. C. A. 1st Cir. Certiorari denied.

No. 70-5013. *JOHNSON v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 45 Ill. 2d 283, 259 N. E. 2d 57.

No. 71-1122. *BENEFICIAL FINANCE CO. ET AL. v. MASSACHUSETTS*; and

No. 71-1241. *HOUSEHOLD FINANCE CORP. ET AL. v. MASSACHUSETTS*. Sup. Jud. Ct. Mass. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: — Mass. —, 275 N. E. 2d 33.

No. 71-1215. *TIGERMAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 456 F. 2d 54.

No. 71-1224. *McGEE v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 460 F. 2d 1287.

No. 71-1258. *DEMANGONE v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 456 F. 2d 807.

No. 71-1271. *SCHNEIDER v. LAIRD, SECRETARY OF DEFENSE, ET AL.* C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 345.

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No. 71-1334. *TWENTIETH CENTURY-FOX FILM CORP. v. DESNY*. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-1341. *BEHR ET AL. v. CALIFORNIA*. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-1346. *UNITED MINE WORKERS OF AMERICA v. RIVERTON COAL 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 1035.

No. 71-1362. *JOHNSON v. COMMITTEE ON EXAMINATIONS & ADMISSIONS OF THE SUPREME COURT OF ARIZONA*. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-1384. *NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE v. BAKER ET AL., TRUSTEES*. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 811.

No. 71-6158. *FOGGY v. ARIZONA ET AL.* Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 107 Ariz. 307, 486 P. 2d 789.

No. 71-6502. *YOUNG v. MARYLAND*. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 679.

No. 71-1266. *GETTELMAN v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 7th Cir. Motion to dispense with printing petition granted. Certiorari denied.

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No. 71-6514. RAYSOR ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 257 S. C. 265, 185 S. E. 2d 529.

No. 71-1078. MOITY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 71-1365. RANGER INSURANCE CO. *v.* CULBERSON, EXECUTRIX, ET AL. C. A. 5th Cir. Motion of respondent Culberson for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 454 F. 2d 857.

No. 71-1412. EYMAN, WARDEN *v.* HART. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 458 F. 2d 334.

No. 71-1462. SOLO CUP CO. *v.* ILLINOIS TOOL WORKS, INC. C. A. 7th Cir. Motion of Sweetheart Plastics, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 461 F. 2d 265.

Rehearing Denied

No. 70-78. AFFILIATED UTE CITIZENS OF UTAH ET AL. *v.* UNITED STATES ET AL., 406 U. S. 128. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 71-962. KELLEY ET AL. *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS, 405 U. S. 1073. Petition for rehearing denied.

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Dismissal Under Rule 60

No. 71-1372. BENNETT ET AL. *v.* GRAVELLE ET AL. C. A. 4th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 451 F. 2d 1011.

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Appeals Dismissed

No. 71-1085. CALIFORNIA *v.* KAPLAN. Appeal from Sup. Ct. Cal. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed, it appearing that the judgment below rests upon an adequate state ground. Reported below: 6 Cal. 3d 150, 491 P. 2d 1.

No. 71-1400. UNITED AIR LINES, INC. *v.* PORTERFIELD, TAX COMMISSIONER OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 28 Ohio St. 2d 97, 276 N. E. 2d 629.

No. 71-1477. DICKENS ET UX. *v.* ERNESTO ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 30 N. Y. 2d 61, 281 N. E. 2d 153.

No. 71-5400. HICKMAN *v.* VIRGINIA. Appeal from Sup. Ct. Va. 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.

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Vacated and Remanded on Appeal

No. 71-5723. MCALLISTER *v.* VIRGINIA. Appeal from Sup. Ct. Va. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Argersinger v. Hamlin, Sheriff, ante*, p. 25. MR. JUSTICE DOUGLAS would reverse judgment of lower court.

Affirmed on Appeal

No. 71-1435. STATE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA ET AL. *v.* ZARATE ET AL. Appeal from D. C. S. D. Fla. Motion of appellees Herman and Pola Sheydwasser for leave to proceed *in forma pauperis* granted. Judgment affirmed. MR. JUSTICE WHITE is of the opinion that probable jurisdiction should be noted.

Certiorari Granted—Vacated and Remanded

No. 70-5052. KAMMERER *v.* WASHINGTON ET AL. Sup. Ct. Wash. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Argersinger v. Hamlin, Sheriff, ante*, p. 25.

No. 70-5053. FOX *v.* CITY OF BELLEVUE ET AL. Sup. Ct. Wash. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Argersinger v. Hamlin, Sheriff, ante*, p. 25.

No. 71-5722. WRIGHT *v.* TOWN OF WOOD. Sup. Ct. S. D. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Argersinger v. Hamlin, Sheriff, ante*, p. 25. MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgment of the lower court. Reported below: 85 S. D. 669, 189 N. W. 2d 447.

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No. 71-6445. *JONES v. UNITED STATES*. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. On representation of the Solicitor General set forth in his Memorandum for the United States, filed May 25, 1972, judgment is vacated and case remanded for reconsideration in light of position presently asserted by the Government. Reported below: 456 F. 2d 627.

Certiorari Granted—Reversed and Remanded. (See No. 71-1309, *ante*, p. 366.)

Miscellaneous Orders

No. 71-1592. *AUERBACH ET AL. v. MANDEL, GOVERNOR OF MARYLAND, ET AL.* Appeal from D. C. Md. Motion to expedite denied.

No. 71-6534. *FERRE v. BRANTLEY, WARDEN*; and

No. 71-6541. *MCCRAY v. MARYLAND*. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71-6573. *GERARDI v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL.* Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 71-1369. *OSWALD, CORRECTION COMMISSIONER, ET AL. v. RODRIGUEZ ET AL.* C. A. 2d Cir. Certiorari granted. Reported below: 456 F. 2d 79.

No. 71-1398. *WARNER, SECRETARY OF THE NAVY v. FLEMINGS*. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for argument with No. 71-6314 [*Gosa v. Mayden, Warden*], *infra*. Reported below: 458 F. 2d 544.

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No. 71-6314. *GOSA v. MAYDEN, WARDEN*. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for argument with No. 71-1398 [*Warner, Secretary of the Navy v. Flemings*], *supra*. Reported below: 450 F. 2d 753.

Certiorari Denied. (See also No. 71-5400, *supra*.)

No. 71-1206. *DEPUGH v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 452 F. 2d 915.

No. 71-1260. *SCHOOL TOWN OF SPEEDWAY ET AL. v. DILLIN, U. S. DISTRICT JUDGE, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: See 332 F. Supp. 655.

No. 71-1290. *BINDER v. UNITED STATES*;

No. 71-1307. *SAMUELS v. UNITED STATES*; and

No. 71-6519. *BLAUNER v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 805.

No. 71-1295. *WENGER v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 308.

No. 71-1299. *KARNEGES ET AL. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 71-1366. *MARINO ET AL. v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 38 App. Div. 2d 688 and 689, 326 N. Y. S. 2d 551 and 552.

No. 71-1367. *ROCKWELL-STANDARD CORP. v. SCAIFE Co.* Sup. Ct. Pa. Certiorari denied. Reported below: 446 Pa. 280, 285 A. 2d 451.

No. 71-1379. *WATTS v. TEAGLE ET AL.* Ct. App. Ga. Certiorari denied. Reported below: 124 Ga. App. 726, 185 S. E. 2d 803.

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No. 71-1375. CITY OF HICKORY HILLS *v.* VILLAGE OF BRIDGEVIEW ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 1 Ill. App. 3d 931, 274 N. E. 2d 925.

No. 71-1385. SPAGAT ET AL. *v.* MAHIN, DIRECTOR OF REVENUE OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 183, 277 N. E. 2d 834.

No. 71-1388. GRIVETTI ET AL. *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS; and

No. 71-1389. PARTEE ET AL. *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 156, 277 N. E. 2d 881.

No. 71-1415. ROSS *v.* TAIT. Sup. Ct. Mich. Certiorari denied.

No. 71-1420. TEPERICH *v.* NORTH JUDSON-SAN PIERRE HIGH SCHOOL BUILDING CORP. ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 275 N. E. 2d 814.

No. 71-1466. GORSALITZ *v.* OLIN MATHIESON CHEMICAL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 180.

No. 71-5611. WALSH ET AL. *v.* PICARD, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 446 F. 2d 1209.

No. 71-6074. RAY *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 71-6167. HATTON *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 378, 185 S. E. 2d 388.

No. 71-6190. TROXELL *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

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No. 71-6169. *HAWKINS v. VIRGINIA*. Sup. Ct. Va. Certiorari denied. Reported below: 212 Va. 632, 186 S. E. 2d 38.

No. 71-6281. *BEISHIR ET AL. v. SWENSON, WARDEN, ET AL.* C. A. 8th Cir. Certiorari denied.

No. 71-6284. *ANDREWS v. NORTH CAROLINA*. Ct. App. N. C. Certiorari denied. Reported below: 12 N. C. 421, 184 S. E. 2d 69.

No. 71-6394. *TALBOTT v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 454 F. 2d 1111.

No. 71-6454. *REVEL ET AL. v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 71-6465. *DELUZIO v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 454 F. 2d 711.

No. 71-6474. *ERWING v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 71-6494. *ALKES v. UNITED STATES BOARD OF PAROLE ET AL.* C. A. 10th Cir. Certiorari denied.

No. 71-6526. *UPSHER v. OHIO*. Sup. Ct. Ohio. Certiorari denied.

No. 71-6530. *LOVISI v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 71-6531. *SIRES v. PINNOCK*. Sup. Ct. Wash. Certiorari denied.

No. 71-6533. *PLOTT v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied.

No. 71-6542. *LEMON v. YEAGER, PRINCIPAL KEEPER*. C. A. 3d Cir. Certiorari denied.

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No. 71-6545. *SWEENEY v. NEW YORK*. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 71-6548. *SPINELLI v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 71-6559. *McREYNOLDS v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 71-6560. *MAYBERRY v. YEAGER, PRINCIPAL KEEPER*. C. A. 3d Cir. Certiorari denied.

No. 71-6561. *LAIETTA v. NEW YORK*. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 68, 281 N. E. 2d 157.

No. 71-6562. *LaFAY v. FRITZ, CORRECTIONAL SUPERINTENDENT*. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 297.

No. 71-6563. *HACKER v. GAFFNEY, WARDEN*. C. A. 10th Cir. Certiorari denied.

No. 71-6577. *DOCKERY v. CALIFORNIA*. C. A. 9th Cir. Certiorari denied.

No. 71-6578. *PILLIS ET AL. v. GOVERNOR OF VIRGINIA ET AL.* C. A. 4th Cir. Certiorari denied.

No. 71-6581. *LOPEZ v. WISCONSIN*. Sup. Ct. Wis. Certiorari denied. Reported below: 53 Wis. 2d 662, 193 N. W. 2d 874.

No. 71-6590. *MOORE v. POWELL, CORRECTIONAL SUPERINTENDENT*. C. A. 3d Cir. Certiorari denied.

No. 71-6591. *CARUSO v. NEW YORK ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71-6597. *JUNIOR v. ALABAMA*. Ct. Crim. App. Ala. Certiorari denied. Reported below: 47 Ala. App. 518, 257 So. 2d 844.

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No. 71-6593. *BUTLER v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71-6595. *STOKES v. KENTUCKY*. Ct. App. Ky. Certiorari denied.

No. 71-6599. *SPILLERS v. NORTHERN ASSURANCE COMPANY OF AMERICA ET AL.* Sup. Ct. La. Certiorari denied. Reported below: 260 La. 288, 255 So. 2d 772.

No. 71-6600. *IN RE WAYLAND*. Sup. Ct. Okla. Certiorari denied.

No. 71-6602. *STELL v. BENJAMIN*. C. A. D. C. Cir. Certiorari denied.

No. 71-6605. *LIVINGSTON v. MOBIL OIL CORP.* Ct. App. N. Y. Certiorari denied.

No. 71-6608. *ABRAHAM v. OHIO*. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 70-50. *CONSOLIDATED CITY OF JACKSONVILLE ET AL. v. WOOLEY*. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 433 F. 2d 980.

No. 71-898. *NORTHERN CALIFORNIA COLLECTION SERVICE, INC., OF SACRAMENTO v. RANDONE ET AL.* Sup. Ct. Cal. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 5 Cal. 3d 536, 488 P. 2d 13.

No. 70-5304. *BELL v. KENTUCKY*. Cir. Ct. Ky., Fayette County. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-1262. *HERSCOVITZ v. BOARD OF COMMISSIONERS OF THE UTAH STATE BAR*. Sup. Ct. Utah. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

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No. 71-143. *STEVENS ET AL. v. WATSON*. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 16 Cal. App. 3d 629, 94 Cal. Rptr. 190.

No. 71-1337. *JOHNSON ET AL. v. VIRGINIA*. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 212 Va. 579, 186 S. E. 2d 53.

No. 71-1352. *MULVANEY ET AL. v. NEW JERSEY*. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 60 N. J. 139, 286 A. 2d 512.

No. 71-1370. *HACKETT ET AL. v. GENERAL HOST CORP. ET AL.* C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 618.

No. 71-1406. *HOWARD ET AL. v. ADAMS COUNTY BOARD OF SUPERVISORS ET AL.* C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 455.

No. 71-1424. *FITZGERALD v. SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (SOUTHERN PACIFIC Co., REAL PARTY IN INTEREST)*. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-1460. *HAMILTON, ADMINISTRATRIX v. CHESAPEAKE & OHIO RAILWAY Co.* C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-6455. *HARRIS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

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No. 71-6100. *BRIDGES v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 471 S. W. 2d 838.

No. 71-6112. *MILLER v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 731.

No. 71-6538. *HUCKABAY v. WOODMANSEE, JUDGE, ET AL.* C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 1389.

No. 71-6553. *SPAIN v. MONTANYE, CORRECTIONAL SUPERINTENDENT*. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71-6616. *DIXON v. UNITED STATES*. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 287 A. 2d 89.

No. 71-1219. *SCENIC HUDSON PRESERVATION CONFERENCE ET AL. v. FEDERAL POWER COMMISSION ET AL.*;

No. 71-1220. *CITY OF NEW YORK v. FEDERAL POWER COMMISSION ET AL.*; and

No. 71-1221. *SIERRA CLUB ET AL. v. FEDERAL POWER COMMISSION ET AL.* C. A. 2d Cir. Motion to dispense with printing the Federal Power Commission opinion in No. 71-1219 to conform with Rule 39 of the Rules of this Court granted. Certiorari denied. Reported below: 453 F. 2d 463.

MR. JUSTICE DOUGLAS, dissenting.

These petitions should be granted to consider whether the Federal Power Commission complied with its obligations under §§ 101 and 102 of the National Environ-

mental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. §§ 4331 and 4332, in granting a license to Consolidated Edison Company of New York, Inc., for the construction of a pumped storage power project on Storm King Mountain on the Hudson River.

Under § 101 of the Act federal agencies are instructed to take environmental consequences into account in their decisionmaking.¹ That mandate was aimed partly at eliminating the excuse which had often been offered by bureaucrats that their statutory authority did not authorize consideration of such factors in their policy decisions. See *Udall v. FPC*, 387 U. S. 428.² More impor-

¹ Section 101 of the National Environmental Policy Act, 83 Stat. 852, 42 U. S. C. § 4331, provides in pertinent part:

“(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

“(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

“(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

“(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

“(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.”

² In that case we held that the grant of authority to this Commission to alienate federal water resources does not turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. We said: “The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the ‘public interest,’ including . . . the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.” 387 U. S., at 450.

The Commission’s attitude in that case reappeared in the present

tantly, § 101 was meant as an affirmative duty "to consider environmental issues just as they consider other matters within their mandates." *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 146 U. S. App. D. C. 33, 36, 449 F. 2d 1109, 1112.

Section 102³ requires that administrators incorporate

case: "Implicit in the reasoning of the Commission and the Examiner is the assumption that this project must be built and that it must be built now." 387 U. S., at 448.

³ Section 102 of the National Environmental Policy Act, 42 U. S. C. § 4332, provides in pertinent part:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by

certain procedures into their operating routines in order (1) to increase the likelihood that environmental consequences of agency action will not be unforeseen and (2) to insure that if a project is approved, an environmentally acceptable alternative will be chosen. Section 102 (2)(C) requires a detailed statement in connection with actions significantly affecting the quality of the human environment, specifying the environmental impact of the proposed action and alternatives. Section 102 (2) (D) places bureaus under an affirmative duty to study and develop alternatives where there are unresolved conflicts concerning the alternative uses of available resources.

This case poses issues under both sections. In 1964 the Consolidated Edison Company of New York (Con Ed) proposed to the Commission that it be allowed to construct a reservoir atop Storm King Mountain along with a hydroelectric generating plant to be driven by water falling from the reservoir. During the daytime hours when energy demand is high the plant would be operational, but during the evening hours when part of Con Ed's existing facilities are normally idle, power from one of its existing plants would be used to pump water from the Hudson River to the reservoir. In 1965 the Commission approved the project but the Court of Appeals for the Second Circuit in a suit brought by conservationists and local residents set aside the order and remanded for more detailed consideration of various environmental aspects of the project. *Scenic Hudson Preservation Conference v. FPC*, 354 F. 2d 608 (CA2).

section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

“(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”

After more hearings had been completed but before the Commission acted, the National Environmental Policy Act of 1969 became effective. Although it has been conceded that the Act's requirements were applicable in these proceedings, no further hearings were held; and no environmental impact statement was drafted. The Commission approved the project and attempted to satisfy its procedural duties under § 102 by specifying certain environmental impact forecasts in its final opinion.

The Court of Appeals affirmed, over the dissent of Judge Oakes, who thought that the Commission had not discharged its obligations under NEPA. 453 F. 2d 463. The majority held that under § 101 the ultimate balance of energy and environmental values was the responsibility of the Commission, and courts could upset only decisions not supported by "substantial evidence." It also held, with respect to the procedural requirements of § 102, that the Commission's hearings and consultation with other agencies satisfied the command that a "systematic, interdisciplinary approach" be utilized.⁴ It also found that the Commission's final opinion which contained its environmental findings would, under the circumstances, suffice as an environmental impact statement. A petition for rehearing *en banc* was denied by an equally divided court, with Judge Timbers dissenting in a short opinion which expressed doubt as to the validity of the majority's reliance on the "substantial evidence" test, *id.*, at 494.

I believe the Court of Appeals gave the Act too restrictive a meaning. As to the Commission's duty to take environmental impact into account, Judge Oakes, in his dissenting opinion, made a strong case for the view that the Commission (a) misjudged the risk that project construction might work irreparable injury to one of

⁴ NEPA, § 102 (2) (A).

three vital water supply systems serving New York City; (b) underestimated the extent of additional air pollution which would be generated by nighttime burning of fossil fuels in New York City in order to generate the power needed to pump the river water to the reservoir; and (c) generally undervalued environmental considerations while overvaluing engineering and economic considerations. Although value judgments are inevitable and even though the Commission's balancing of environmental costs with other factors may be entitled to some deference, I share Judge Timbers' doubts that under § 101 the balance struck by an agency unskilled in environmental matters should be reviewed only through the lens of the "substantial evidence" test. Cf. *Citizens To Preserve Overton Park v. Volpe*, 401 U. S. 402, 413 ("If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems"). But see *Calvert Cliffs'*, *supra*, at 39, 449 F. 2d, at 1115.

I also am not satisfied that the procedural obligations under § 102 were honored. First, the Commission did not draft the impact statement required by § 102 (2)(C). Thus, when the Commissioners deliberated the fate of Storm King Mountain, they did not have before them a coherent study addressed to the environmental consequences of the project and alternatives to it. Another panel of the Second Circuit has recently ruled that the impact statement must be written *before* action is taken. *Greene County Planning Board v. FPC*, 455 F. 2d 412 (CA2). Administrators cannot attempt to comply with the Act by calling their final opinion their impact statement. True, here the hearings had been completed after the Act became effective. Yet the Commission could have deferred decision until its own § 102 statement was prepared.

Second, the Commission's final opinion suggests that its consideration of environmental issues is required only when private citizens bring such problems to the agency's attention. For example, in many passages of its opinion the Commission states that particular objections to the project had been rejected for lack of evidence in the administrative record.⁵ This approach—symptomatic of the phenomenon of bureaucratic “industry-mindedness”—wrongly assumed that a presumption of validity supported the Con Ed proposal and that environmental groups had a burden of proof to overcome.

Similarly, the Commission limited its inquiry primarily to those program alternatives which had been submitted by the conservationists opposing the Con Ed project. The agency did not generate its own alternatives, although Congress charged each federal agency to represent not only the public interest in general but also under NEPA to pay particular attention to the environmental ramifications of its actions. Whether or not conservationists appear to register dissent, the Commission is told in § 102 (2)(D) to “study, develop, and

⁵ For example, see Judge Oakes' dissent below, 453 F. 2d 463, 482. Scenic Hudson's Petition A47. See also the opinion of the Federal Power Commission, No. 584, *Consolidated Edison Company of New York, Inc., Project 2338*, 44 F. C. C. 350: “There has been no showing that a combination nuclear-gas turbine alternative offers any advantages or indeed is even reasonably equivalent to Cornwall.” *Id.*, at 377. “None of the interveners presented any evidence on alternative hydroelectric sites.” *Id.*, at 379. “The record is uncontradicted, and we find, that there is no feasible hydroelectric alternative to Cornwall.” *Ibid.* “No party to this proceeding has suggested any other plan or project for improving or developing the waterway” *Id.*, at 388. And see *id.*, at 409 n. 25, stating in part that “[t]here is no evidence concerning the condition of the Aqueduct's lining. Its structural integrity is unknown to the City or any of its witnesses.”

describe appropriate alternatives to recommended courses of action" The agency is directed to apply its own expertise and imagination in exploring less drastic alternatives. And, one alternative, which went completely overlooked by the Commission, as Judge Oakes noted below, is not to build any project at all. Whether that option is realistic we do not know. Informing the public and Congress on that score is the function of the impact statement. In short, the Act requires that bureaucrats not only listen to protests, but also avoid projects that have imprudent environmental impacts. There is no burden of proof for the objector to overcome.

Finally, the Commission's opinion is too imprecise to provide any helpful insight for Congress, the Council on Environmental Quality, or the public into what value judgments it made. We know that the Commission rejected alternatives with less deleterious environmental consequences on the ground that they were "more" costly and "less" reliable. But we have no reasonably precise notion of how much reliability and money were gained at the expense of the destruction of Storm King Mountain. Whether or not courts may review the Commission's ultimate balance of these competing considerations, the fact remains that Congress and the public are entitled to know those judgments. One function of the § 102 statement is certainly to make explicit the priorities of the agencies. That purpose is not served where all that is basically told is that the preferred alternative is cheaper and more reliable, though involving adverse implications for the surrounding ecology.

If this kind of impact statement is tolerated, then the mandate of NEPA becomes only a ritual and like the peppercorn a mere symbol that has no vital meaning. The decision below is, in other words, the beginning of the demise of the mandate of NEPA.

I would grant these petitions.

June 19, 21, 1972

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No. 71-1280. *B. FORMAN CO., INC., ET AL. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL are of the opinion that certiorari should be granted. Reported below: 453 F. 2d 1144.

No. 71-1392. *COUNTY BOARD OF EDUCATION OF FAYETTE COUNTY, TENNESSEE v. WALKER ET AL.* C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 455 F. 2d 199.

No. 71-1457. *MONSANTO CO. v. ROHM & HAAS CO.* C. A. 3d Cir. Motion of American Patent Law Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 456 F. 2d 592.

Rehearing Denied

No. 71-1196. *COREY ET AL. v. STATE SAVINGS & LOAN ASSN. ET AL.*, 406 U. S. 920; and

No. 71-5172. *DUKES v. WARDEN*, 406 U. S. 250. Petitions for rehearing denied.

No. 71-5845. *COLEMAN v. CRAMER*, 406 U. S. 910. Motion for leave to file petition for rehearing denied.

JUNE 21, 1972

Dismissal Under Rule 60

No. 71-5217. *JERNIGAN v. ECONOMY EXTERMINATING CO., INC., ET AL.* Appeal from D. C. N. D. Ga. dismissed under Rule 60 of the Rules of this Court. Reported below: 327 F. Supp. 24.