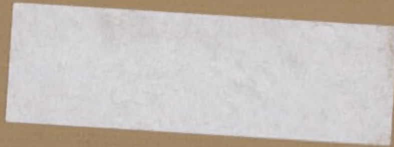

PROPERTY OF THE
UNITED STATES
GOVERNMENT

UNITED STATES REPORTS

VOLUME 425

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1975

Opinions of March 24 (concluded) Through (in part) June 1, 1976

Orders of March 29 Through May 27, 1976

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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Errata

417 U. S. lxiii, last line; 520 n. 15, line 7; 527, line 9; and 527 n. 5, line 5: "[1970] 3 U. S. T. 2517" should be "[1970] 21 U. S. T. (pt. 3) 2517".

424 U. S. title page: "January 30 Through March 24, 1976" should be "January 30 Through (in part) March 24, 1976".

424 U. S. 115 n. 157, line 7: "244" should be "241".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

EDWARD H. LEVI, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
ALFRED WONG, Acting Marshal.
EDWARD G. HUDON, Librarian.*
BETTY J. CLOWERS, Acting Librarian.†

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*Mr. Hudon retired as Librarian effective April 30, 1976.

†Mrs. Clowers was appointed Acting Librarian effective May 4, 1976.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1975

ABBOTT LABORATORIES ET AL. *v.* PORTLAND RETAIL DRUGGISTS ASSN., INC.

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

No. 74-1274. Argued December 16, 1975—Decided March 24, 1976

Respondent, as assignee of more than 60 commercial pharmacies, brought this antitrust action against petitioner manufacturers, charging that by selling drugs to certain hospitals, each of which has a pharmacy, at prices lower than those charged to respondent's assignors, petitioners violated the Robinson-Patman Act, which makes it unlawful for one engaged in commerce to discriminate in price between different purchasers of like commodities where "the effect . . . may be substantially to lessen competition." 15 U. S. C. § 13 (a). Petitioners claimed that the challenged sales were exempt under the Nonprofit Institutions Act, which, *inter alia,* excludes from the application of the Robinson-Patman Act nonprofit hospitals' "purchases of their supplies for their own use." § 13c. The District Court ruled on the basis of the evidence adduced that the hospitals involved were nonprofit and that their drug purchases were "for their own use" within the meaning of § 13c, and granted summary judgment in favor of petitioners. The Court of Appeals vacated and remanded. While agreeing that the designated hospitals were nonprofit, that court concluded that a hospital's drugs are purchased for its "own use" only where the hospital can be said to be the consumer, *i. e.,*

where dispensations are to inpatients and emergency facility patients. *Held:*

1. Section 13c does not exempt all of a nonprofit hospital's drug purchases from the Robinson-Patman Act but the exempting language must be construed as applying to what reasonably may be regarded as use *by the hospital* in the sense that such use is part of and promotes the hospital's intended institutional operation in the care of its patients. Pp. 8–14.

2. Applying the foregoing rule, drug purchases by a nonprofit hospital are exempt as being for the hospital's "own use" if the drugs are dispensed:

(a) To the inpatient for use in his treatment at the hospital; to the patient admitted to the hospital's emergency facility for use in his treatment there; or to the outpatient for personal use on the hospital premises. Such dispensations are part of the hospital's basic function. P. 14.

(b) To the inpatient, or to the emergency facility patient, upon his discharge, and to the outpatient, all for off-premises personal use, provided these take-home dispensations are for a limited and reasonable time, as a continuation of, or supplement to, hospital treatment. Pp. 14–15.

(c) To the hospital employee or student for personal use, or for the use of his dependent. Each is a member of the hospital family and dispensation to him furthers the hospital's functions. P. 16.

(d) To the physician staff member for his personal use or the use of his dependent. Here the considerations are similar to those in (c), *supra.* Pp. 16–17.

3. Purchases for the following types of dispensation are not exempt since they are not for the hospital's "own use":

(a) To the former patient, by way of a renewal of a prescription given when he was an inpatient, an emergency facility patient, or an outpatient. The purpose of the exemption has been exceeded where the connection with the hospital has reached the refill stage. Pp. 15–16.

(b) To nondependents of those covered in ¶¶ 2 (c) and (d), *supra.* These relationships are too attenuated for the statutory benefit. Pp. 16, 17.

(c) To the walk-in customer, who has no present connection with the hospital or its pharmacy (except in the occasional emergency situation, which can be viewed as *de minimis*). Pp. 17–18.

4. Under these standards the hospital can either put all the drugs it purchases to its "own use" exclusively, or can keep separate records for the drugs put to its "own use" and for those otherwise dispensed, making accounting submissions to the supplier for price adjustments. The supplier is protected from antitrust liability if he reasonably and noncollusively relies upon the hospital's certification as to its dispensation of drugs purchased from the supplier. Pp. 19–21.

510 F. 2d 486, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 21. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 23. STEVENS, J., took no part in the consideration or decision of the case.

James H. Clarke argued the cause for petitioners. With him on the briefs were *William B. Crow, Garry P. McMurry, R. R. Bullivant, Walter J. Cosgrave, Jack L. Kennedy, Thomas M. Triplett, Robert R. Carney,* and *Barnes H. Ellis.*

Roger Tilbury argued the cause for respondent. With him on the briefs was *Henry Kane.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Robinson-Patman Price Discrimination Act (Robinson-Patman), adopted in 1936, 49 Stat. 1526, amending § 2 of the Clayton Act, 38 Stat. 730, in general makes it unlawful for one engaged in commerce to dis-

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**Richard J. Wertheimer* and *Cary H. Sherman* filed a brief for the American Hospital Assn. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *H. R. Burnham* and *James Allen Main* for the Alabama Pharmaceutical Assn. et al.; and by *Arthur B. Hanson, W. Frank Stickle, Jr.,* and *Sidney Waller* for the American Pharmaceutical Assn. et al.

criminate in price between different purchasers of like commodities where, among other things, "the effect of such discrimination may be substantially to lessen competition." 15 U. S. C. § 13 (a). The Nonprofit Institutions Act, adopted only two years later, in 1938, c. 283, 52 Stat. 446, exempts from the application of Robinson-Patman "purchases of their supplies for their own use by schools . . . hospitals, and charitable institutions not operated for profit." 15 U. S. C. § 13c.[1]

This case concerns nonprofit hospitals' purchases of products at favored prices from pharmaceutical companies. The issue is the proper construction of the phrase "purchases of their supplies for their own use," as it appears in the Nonprofit Institutions Act, and the consequent extent the hospitals' purchases are exempt from the proscription of Robinson-Patman.

I

Petitioners are 12 manufacturers of pharmaceutical products. Respondent, an Oregon nonprofit corporation and assignee of more than 60 commercial pharmacies doing business in the metropolitan Portland, Ore., area, instituted this action against petitioners in the United States District Court for the District of Oregon for violations of the federal antitrust laws. Treble damages and injunctive relief were sought.

The amended complaint asserted five causes of action. Only one of the five (the second) is presently before us.[2]

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[1] "Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

[2] Causes of action based on discrimination in sales to city, county, and state governments, and to the Federal Government (the third and fourth causes of action asserted in the amended complaint, Record 61–62) were dismissed for failure to state a claim. App. 292. A cause of action based on discrimination in sales to proprietary

In this claim the respondent alleged that in selling pharmaceutical products petitioners discriminated between nonprofit hospitals, on the one hand, and commercial pharmacies (regular drugstores), including respondent's assignors, on the other. As an affirmative defense, petitioners pleaded that their sales of pharmaceutical products to nonprofit hospitals were exempt from Robinson-Patman under the Nonprofit Institutions Act.

The parties engaged in discovery as to the nonprofit status and drug-dispensing practices of 14 designated metropolitan Portland area institutions that operate as nonprofit hospitals. Affidavits were obtained and filed. Petitioners, as defendants, pursuant to Fed. Rule Civ. Proc. 56 (b), then moved for summary judgment on the amended complaint's second cause of action. App. 68.

The District Court, by an opinion delivered orally, ruled that all the designated institutions were nonprofit hospitals, and that their purchases of pharmaceutical products from petitioners were purchases of supplies "for their own use," within the language of 15 U. S. C. § 13c, and thus were exempt from the restrictions of Robinson-Patman. The court concluded, accordingly, that there was no issue as to any material fact with respect to the hospitals' nonprofit status or their use of the pharmaceutical products they purchased, and granted summary judgment in favor of the petitioners on the respondent's second cause of action. App. 278–288, 290–292.

The District Court, *id.*, at 292, certified its judgment under 28 U. S. C. § 1292 (b), and the United States Court of Appeals for the Ninth Circuit permitted the interlocutory appeal to be taken. The Court of Appeals, while

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hospitals and commercial entities, and one that the alleged discriminations were the product of a conspiracy (the amended complaint's first and fifth causes of action, Record 52–61, 62–63), remain pending.

rejecting respondent's contentions that the designated hospitals did not qualify for exemption under § 13c,[3] nevertheless vacated the District Court's judgment and remanded the case for further proceedings. 510 F. 2d 486 (1974).

Because of the importance of the issue in the context of the modern nonprofit hospital, with its expanding service to the community, as compared with hospital operations of some years ago, and because of the obvious need for a definitive construction of language in the Nonprofit Institutions Act,[4] we granted certiorari. 422 U. S. 1040 (1975).

II

The pertinent facts are not really in dispute. The petitioners, admittedly, sell their pharmaceutical products to the designated Portland hospitals at prices less than those that govern petitioners' sales of like products to the respondent's assignors who are commercial pharmacists in Portland. The respective hospitals in turn dispense the pharmaceutical products they have so purchased from the petitioners. The application of Robinson-Patman to this situation is conceded except to the extent the exemption provision of the Nonprofit Institutions Act applies. The controversy, thus, comes into clear focus.

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[3] The sole exception was Bess Kaiser Hospital. As to this institution, the Court of Appeals concluded that certain factors "appear to present disputed issues of fact," and that the "proper legal standard" for determining whether that hospital was " 'not operated for profit' " could not be developed "on the limited record" before the court. The issue, therefore, was to be resolved on remand. 510 F. 2d 486, 488 (1974). No review of this aspect of the Court of Appeals' judgment has been sought, and that detail is not before us. Neither are we confronted here with an issue as to the nonprofit status, within § 13c, of the other 13 hospitals.

[4] See the same Court of Appeals' decision in *Logan Lanes, Inc.* v. *Brunswick Corp.*, 378 F. 2d 212, cert. denied, 389 U. S. 898 (1967).

Each of the designated hospitals has a pharmacy. It is a separate department of the hospital. Its operation produces revenue in excess of costs. The net accrues to the hospital's benefit, is utilized for the institution's general purposes, and thus supports other activities of the hospital.

The District Court, App. 283–285, and the Court of Appeals, 510 F. 2d, at 489, each perceived various categories of dispensations by the hospital pharmacies of the pharmaceutical products purchased from petitioners. But the District Court, in sustaining petitioners' motion for summary judgment, observed that "the vast majority" of the products purchased (85% to 95%), namely, those for the bed patient and for the patient receiving treatment in the hospitals' emergency facilities, were "clearly" for the hospitals' use, within the meaning of the Nonprofit Institutions Act, App. 283; that "out-patient treatment," whether "initial or repeated," was not outside that Act merely because there has been a "change in the distribution of health care" whereby the percentage of outpatient treatment increased since the statute was passed in 1938, *id.*, at 284; that "take-home drugs" were within the "clear meaning" of the statute, *ibid.;* that drugs furnished to employees, staff physicians, and other members of the staff, while presenting "some mild degree of question," nevertheless were "for the use of the hospital," *id.*, at 285; and that the situation with respect to walk-in patients was insufficient in amount to "justify withdrawing" the statute's exemption, *ibid.*

The Court of Appeals agreed that the inpatient and emergency facility situations "cover by far the greater part of hospital distribution," and that "such dispensing of drugs in the course of treatment in the hospital is the hospitals' [*sic*] own use." 510 F. 2d, at 489. The court recited petitioners' asserted justifications for the other types of sales "as proper hospital functions": the need

of the departing inpatient for take-home drugs; the continuation at home of the patient's treatment begun earlier in the hospital; the sales to employees as being pursuant to collective-bargaining agreements; the sales to students as being aspects of the hospital's educational programs; the sales to physicians as being perquisites of hospital staff membership; the limitation of walk-in sales to instances where, at the time, the needed drugs could not be obtained elsewhere; the hospital's position "as a center for the provision of a full range of health services"; and "a decent regard for the needs of the community." *Ibid.*

But, conceding that "distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function," the Court of Appeals concluded that this was not necessarily "the hospitals' 'own use.'" Instead, said the court, hospital use under § 13c was limited to cases where the hospital can be said to be the consumer, that is, to those cases where the dispensations of drugs were to inpatients and emergency facility patients. The concept could not apply "to cases of resale by the hospital to a private consumer." Accordingly, as to such sales, the hospital may not acquire the pharmaceutical products "at an acquisition price that discriminates against local retail druggists." *Ibid.*

III

We, too, find it convenient to view the hospitals' sales and dispensations of the pharmaceutical products purchased from petitioners as falling into several categories.[5] We divide them as follows:

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[5] The record does not show that each of the designated hospitals made dispensations in each category. It does indicate that dispensations in each category were made by the hospitals considered as a group. Some hospitals refused to make certain types of dispensations. It would serve no useful purpose for us to describe

1. To the inpatient for use in his treatment at the hospital. For present purposes, we define an inpatient as one admitted to the hospital for at least overnight bed occupancy.[6]

2. To the patient admitted to the hospital's emergency facility for use in the patient's treatment there. A patient in this category may or may not become an inpatient, as defined in the preceding paragraph.

3. To the outpatient for personal use on the hospital premises. For present purposes, we define an outpatient as one (other than an inpatient or a patient admitted to the emergency facility) who receives treatment or consultation on the premises.

4. To the inpatient, or to the emergency facility patient, upon his discharge and for his personal use away from the premises.

5. To the outpatient for personal use away from the premises.

6. To the former patient, by way of a renewal of a prescription given when he was an inpatient, an emergency facility patient, or an outpatient.

7. To the hospital's employee or student for personal use or for the use of his dependent.[7]

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the extent to which each individual hospital made dispensations in the several categories.

[6] A patient admitted for overnight bed occupancy, in the estimation of the several affiants whose affidavits appear in the record, clearly is an "inpatient." Some would carry the description further to include a patient admitted only for day surgery, or one who remains 12 hours or more, irrespective of overnight bed occupancy. In view of our disposition of the case, these distinctions are of no consequence here.

[7] The record seemingly contains no reference to a dispensation to a special duty nurse, chaplain, or similar nonemployee professional, on duty at the hospital. We place any dispensation of this type in the same category as one to the hospital's employee or student.

8. To the physician who is a member of the hospital's staff, but who is not its employee, for personal use or for the use of his dependent.

9. To the physician, who is a member of the hospital's staff, for dispensation in the course of the physician's private practice away from the hospital.

10. To the walk-in customer who is not a patient of the hospital.[8]

This division into categories reveals, of course, that we are concerned with linedrawing. The demarcation is somewhat simplified, on this record, by a concession on the part of the respondent. The respondent agrees with the Court of Appeals that the dispensing of drugs " 'in the course of treatment in the hospital is the hospitals' [*sic*] own use,' " regardless of whether the patient is technically described as an outpatient or as an inpatient. It does not matter, the respondent says, "whether the patient is occupying a bed or not"; thus, a "day surgery patient receiving medication while being treated in the hospital would be covered [that is, the sale to him would be exempt] whether in bed or not, as would one receiving a shot or pill while standing upright or otherwise in the outpatient clinic." Brief for Respondent 11. See also Tr. of Oral Arg. 29.

This concession, then, covers the above-listed categories 1, 2, and 3. We hasten to add, however, that if the respondent had made no concession as to these three categories, we would have reached the same result, for it seems to us to be very clear that a hospital's purchase of pharmaceutical products that are dispensed to and consumed by a patient on the hospital premises, whether that patient is bedded, or is seen in the emergency

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[8] This division into 10 categories may not be exhaustive. It appears to cover, however, the several types of dispensations indicated by the record.

facility, or is only an outpatient, is a purchase of supplies for the hospital's "own use," within § 13c. In our view, as the respondent's concession indicates, this is so clear that it needs no further explication.

Before we turn to the remaining categories, we should state that we recognize, as the parties do, that the concept of the nonprofit hospital and its appropriate and necessary activity has vastly changed and developed since the enactment of the Nonprofit Institutions Act in 1938. The intervening decades have seen the hospital assume a larger community character. Some hospitals, indeed, truly have become centers for the "delivery" of health care. The nonprofit hospital no longer is a receiving facility only for the bedridden, the surgical patient, and the critical emergency. It has become a place where the community is readily inclined to turn, and—because of increasing costs, physician specialization, shortage of general practitioners, and other factors—is often compelled to turn, whenever a medical problem of import presents itself. The emergency room has become a facility for all who need it and it no longer is restricted to cases previously authorized by members of the staff. And patients that not long ago required bed care are often now treated on an ambulatory and outpatient basis. See *Eastern Kentucky Welfare Rights Organization* v. *Simon,* 165 U. S. App. D. C. 239, 249, 506 F. 2d 1278, 1288 (1974), cert. granted, 421 U. S. 975 (1975); Brodie & Graber, Institutional Pharmacy Practice in the 1970's, 28 Am. J. Hosp. Pharm. 240, 241 (1971).

IV

It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States* v. *McKesson*

& Robbins, 351 U. S. 305, 316 (1956); *FMC* v. *Seatrain Lines, Inc.,* 411 U. S. 726, 733 (1973); *Perkins* v. *Standard Oil Co.,* 395 U. S. 642, 646–647 (1969). The Court has recognized, also, that Robinson-Patman "was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC* v. *Broch & Co.,* 363 U. S. 166, 168 (1960); *FTC* v. *Fred Meyer, Inc.,* 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin* v. *Knight,* 389 U. S. 332, 336 (1967); *Peyton* v. *Rowe,* 391 U. S. 54, 65 (1968). Implied antitrust immunity is not favored. *United States* v. *National Assn. Securities Dealers,* 422 U. S. 694, 719 (1975). "[O]ur cases have repeatedly established that there is a heavy presumption against implicit [antitrust] exemptions." *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 787 (1975); *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 350–351 (1963). And the focus of Robinson-Patman is on competition "at the same functional level." *FTC* v. *Sun Oil Co.,* 371 U. S. 505, 520 (1963).

But the legislative history of the Nonprofit Institutions Act indicates clearly that that Act was concerned with the suspicion that Robinson-Patman, at the time just recently enacted, actually might operate to outlaw price favors that sellers would wish to grant to eleemosynary institutions. S. Rep. No. 1769, 75th Cong., 3d Sess., 1 (1938); H. R. Rep. No. 2161, 75th Cong., 3d Sess., 1 (1938). The parties here seek to utilize this legislative history in opposite ways. The respondent asserts that the statutory assurance of exemption "was never intended to countenance a mass invasion of the retail drug sale market by hospitals," Brief for Respondent 34, and that what Congress had in mind was "the role traditionally occupied by hospitals," *id.,* at 35. The petitioners assert

that the 1938 statute "was written to assist a wide range of nonprofit institutions to operate at the lowest possible cost in the public interest," Brief for Petitioners 17, and that the focus was on the character of the institution, not on the particular features of its program, and not only on those institutions that operated at a loss, *id.*, at 17–18.

We are not fully persuaded by either view. The modern American hospital developed from an institution originally intended for the sick poor. See *Eastern Kentucky Welfare Rights Organization* v. *Simon,* 165 U. S. App. D. C., at 249, 506 F. 2d, at 1288; E. Fisch, D. Freed, & E. Schachter, Charities and Charitable Foundations § 322 (1974); Bromberg, The Charitable Hospital, 20 Cath. U. L. Rev. 237, 238–240 (1970). Language in the bill which became the 1938 Act, that would have exempted only sales to nonprofit institutions "supported in whole or in part by public subscriptions," was deleted, 83 Cong. Rec. 6065 (1938), and the Act's exemption provision was not so restricted and confined. We thus do not relate the exemption to what might be described as the nonprofit hospital's original or "traditional" status. On the other hand, there is nothing in the Act that indicates that its exemption provision is to be applied and expanded automatically to whatever new venture the nonprofit hospital finds attractive in these changing days. The Congress surely did not intend to give the hospital a blank check. Had it so intended, it would not have qualified purchases by nonprofit institutions in the way it did in § 13c. See H. R. Rep. No. 1983, 90th Cong., 2d Sess., 78–79 (1968). We are concerned, after all, with an exemption from an antitrust statute, and the accepted general principles, hereinabove set forth, do have application even in the nonprofit hospital context.

We therefore conclude that the exemption provision of the Nonprofit Institutions Act is a limited one; that just because it is a nonprofit hospital that is purchasing pharmaceutical products does not mean that all its purchases are exempt from Robinson-Patman; that the test is the obvious one inherent in the language of the statute, namely, "purchases of their supplies for their own use"; and that "their own use" is what reasonably may be regarded as use *by the hospital* in the sense that such use is a part of and promotes the hospital's intended institutional operation in the care of persons who are its patients. This implies the limitation and it turns the measure naturally from the purchase to the use, as § 13c requires. In this focus we consider the several categories listed above.

V

1, 2, and 3. As to these three categories, we reiterate our conclusions already enunciated in the light of the concession by the respondent. Dispensation to the bed-occupying inpatient and to the patient at the hospital's emergency facility, in either case for use on the hospital premises, is a part of the institution's basic function, and is dispensation for the hospital's "own use." That it is the patient rather than the hospital that consumes is not determinative, and, indeed, the respondent here does not contend otherwise. A like result follows with respect to dispensation to the hospital's outpatient when that patient uses the pharmaceutical product on the hospital's premises.

4 and 5. The take-home prescription, usually a continuance of, or supplement to, what has been prescriptively administered at the hospital while the recipient was an inpatient, emergency facility patient, or outpatient, takes us, to be sure, one small step beyond and outside the hospital's door. The patient is released from

care to continue his treatment and recuperation under something less than the hospital's emergency or routine intensive, regular, or, even, more casual care (if it offers that type), and less than its consultative service at its outpatient facility. The release from the hospital environment into the home is the next step in the chain of treatment on the patient's way to his resumption of normal activity completely free of treatment. The medical supervision and the hospital's participation in it to this point, at least, although approaching an end, are continuous and real, and are distinct parts of the transition from hospital care to home care. We therefore conclude that the genuine take-home prescription, intended, for a limited and reasonable time, as a continuation of, or supplement to, the treatment that was administered at the hospital to the patient who needed, and now continues to need, that treatment, is for the hospital's "own use." We therefore disagree with the Court of Appeals as to categories 4 and 5. We feel that a contrary ruling on our part would unduly and undeservedly emphasize the doorsill of the hospital, and that to draw a line at that threshold would be arbitrary and not consistent with congressional intent. In these instances, the hospital's "own use" of the pharmaceutical products extends realistically and not inappropriately somewhat beyond that threshold.

6. We conclude, however, that the refill for the hospital's former patient is on the other side of the line that divides that which is in the hospital's "own use" from that which is not. Inevitably, in accord with the test above set forth, there comes a point where the dispensation of pharmaceutical products is not for the institution's "own use." That point, we feel, is positioned short of the refill. Continuation of a drug's use for some time after initial prescription at the hospital may well be indicated for the particular patient, but, except for the lim-

ited take-home prescription referred to above, it is not the hospital's "own use," and it certainly is not for its "own use" forever just because it originated under hospital auspices. We conclude that the statute's limitation has been exceeded when the connection with the hospital has become as attenuated as it is at the refill stage.

7. Dispensation to the hospital's employee or to its student for the purchaser's personal use or for the use of his dependent poses a somewhat different problem. A hospital is an organization populated by persons rendering essential services of various kinds. The hospital's employees enable it to function. The hospital pharmacy is but a part of the whole; the employee and his services are other parts. And to the extent the institution has students on the medical and hospital scene—interns, persons in the hospital's nursing, practical nursing, and nurse's aide programs, those in paramedical, chaplaincy, and administrative fields, and the like—the connection with the hospital's purposes and its activities is obvious and institutionally intimate. We conclude, therefore, that dispensation by the pharmacy to the hospital's employee or student, each of whom, literally, is a member of the hospital family, for his own use or for the use of his dependent, enhances the hospital function and qualifies as being in the hospital's "own use," within the meaning of § 13c.[9] But we draw the line between dispensation for the employee's or the student's personal use, or for the use of his dependent, on the one hand, and that for the use of another, even a nondependent family member, on the other.

8 and 9. What we have said in the preceding paragraph applies with equal force to dispensation to a

[9] The fact that, with respect to employees, the availability of the hospital pharmacy might be the compelled subject of a collective-bargaining agreement, in our view, cannot be controlling.

physician member of the staff for his personal use or for the personal use of his dependent. The physician staff member, though not an employee in the technical sense of being full time in the hospital's service and on its payroll, nevertheless is vital to its existence. It is he who supplies the patient and who engages, perhaps directly and at least to some extent through the staff organization, in the formulation of the hospital's professional and operative policies. His activity at the hospital is in the hospital's use—its very purpose for existence—and dispensation to the physician and his dependent, we think, is for the hospital's "own use," within § 13c.

We again draw the line, however, when the physician's acquisition from the hospital pharmacy is not for his personal use or that of his dependent, or is not for the hospital. To the extent that the physician utilizes his proximity to the hospital pharmacy, and it permits him so to do, for other persons or other uses—even, as this record occasionally intimates, for dispensation in that portion of his private practice unconnected with the hospital—the requirement of the hospital's "own use" is not fulfilled. Here again the relationship is too attenuated for the statutory benefit, and we hold that § 13c definitely is not satisfied.

10. The walk-in prescription buyer for the most part affords little difficulty for us in the context of § 13c. Even though one acknowledges the full weight of the argument that the modern hospital is a different institution from what it was when the Nonprofit Institutions Act was adopted in 1938, and that increasingly it has become a focus of health care in the community, the extension of § 13c to the walk-in customer, who has no present connection with the hospital and its pharmacy other than as a place to have his prescription filled, would

make the commercially advantaged hospital pharmacy just another community drug store open to all comers for prescription services and devastatingly positioned with respect to competing commercial pharmacies. This would extend the hospital's "own use" concept beyond that contemplated by Congress in § 13c.

We therefore hold that the walk-in buyer generally is not within the statute's exemption. We recognize, however, that there may be an occasion when the hospital pharmacy is the only one available in the community to meet a particular emergency situation. The respondent seeks to counter this possibility with a telephone book yellow-page reference to the providing of 24-hour service, and of some emergency or delivery service, by certain metropolitan Portland retail pharmacies. Brief for Respondent 56. That may be. We are content, however, to conclude that the occasional emergency is *de minimis,* in any event, and that its presence solitarily would not trigger litigation of the present kind. So long as the hospital pharmacy holds the emergency situation within bounds, and entertains it only as a humanitarian gesture, we shall not condemn the hospital and its suppliers to a Robinson-Patman violation because of the presence of the occasional walk-in dispensation of that type.[10]

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[10] We referred above, in n. 4, to *Logan Lanes, Inc.* v. *Brunswick Corp.* The parties, in their respective ways, seek to make as much as possible of that decision. *Logan Lanes* was a treble-damages suit centering in the sale by Brunswick, to a Utah State Board, of bowling lanes and related equipment at prices lower than Brunswick charged Logan for similar equipment. The items purchased by the board were installed in a state university's student union building, and, while they were "primarily for the use of students, faculty and staff of the University," were also used by members of the public. 378 F. 2d, at 214. The public use during the 20 months following installation, according to affidavits presented by Brunswick, amounted to 2,934 lines bowled out of a total of 128,349. The trial court

VI

The petitioners suggest that a decision holding some dispensations by the nonprofit hospital not to be exempt establishes an objectionable and unworkable standard for hospitals and their suppliers because it "requires a segregation of drugs or accounting of their use

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granted Brunswick's motion for summary judgment. One ground for this ruling was that the purchase was exempt under § 13c. The Ninth Circuit affirmed. It refused to restrict the statute's use of the term "supplies" to consumables and noncapital items and, instead, held that the term embraced anything required to meet the qualified institution's needs. It concluded that the exact amount of public use was immaterial and that, even assuming "the public made substantial use of the University bowling facilities," 378 F. 2d, at 217, the purchases in question were made by the nonprofit university for its own use. The situation presented by *Students Book Co.* v. *Washington Law Book Co.*, 98 U. S. App. D. C. 49, 232 F. 2d 49 (1955), cert. denied, 350 U. S. 988 (1956), also cited by the parties here, was distinguished.

The latter case concerned sales of lawbooks to self-sustaining campus bookstores for resale at a profit. The Court of Appeals held, 98 U. S. App. D. C., at 50–51, n. 5, 232 F. 2d, at 50–51, n. 5, that these were not sales to universities "for their own use," within the meaning of § 13c. The defendant, however, prevailed on another ground.

We agree with the court in the *Students Book Co.* case that the purchases challenged there were not purchases by a nonprofit institution of the type to which § 13c relates. Those in *Logan Lanes,* in contrast, were. The Ninth Circuit apparently would distinguish *Logan Lanes* from the present case on the ground that "[p]lant equipment acquired for a university's own use cannot be segregated from that acquired for use by others, since the same equipment serves both uses." 510 F. 2d, at 490. It went on to say that the situation "of supplies acquired for consumption . . . is otherwise." *Ibid.* The court regarded the present case as factually similar to *Students Book Co.* As we have just stated, however, we are in accord with the District of Columbia Circuit's characterization of the bookstore purchases as not being transactions with the universities at all, but with the campus bookstores for resale at the latter's profit.

that can be achieved only through the institution of clumsy and expensive dual supply or tracing systems to regulate and account for the use of drugs." Brief for Petitioners 28. They suggest the undesirability of a supplier's "controlling the disposition of merchandise in the hands of a purchaser," citing *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, 379 (1967), and they speak of the supplier's "retroactive exposure to claims." Brief for Petitioners 29.

Petitioners' concern is understandable, but we feel that it is overstated. Looking at the problem from the point of view of the purchasing hospital, two alternatives, and perhaps more,[11] are presented. The first, and easier, is for the hospital pharmacy *not* to dispense in any way hereinabove held to be outside the exemption of § 13c. The second is for the pharmacy to do exactly what the petitioners deplore, namely to establish a recordkeeping procedure that segregates the nonexempt use from the exempt use. This would be supplemented by the hospital's submission to its supplier of an appropriate accounting followed by the price adjustment that is indicated. This, to be sure, is cumbersome, but it obviously is the price the Congress has exacted for the benefits bestowed by the controlling legislation, and it should be no more cumbersome than the accounting demands that are made on commercial enterprises of all kinds in our complex society of today.

The supplier, on the other hand, properly may expect to be protected from antitrust liability for reasonable and noncollusive reliance upon its hospital customer's certification as to its dispensation of the products it purchases

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[11] Our reference to two alternatives is not meant to be exclusive. Imaginative suppliers and purchasers may well come up with other and better means to alleviate whatever routine recordkeeping details and burdens may exist.

from the supplier. But it is not unreasonable to expect the supplier to assume the burden of obtaining the certification when it seeks to enjoy, with the institutional purchaser, the benefits provided by § 13c. It clearly does this with respect to responsibility for identification of its purchaser under that statute's standard, and little additional burden is imposed if it is required to take the small second step of routinely obtaining a representation from its hospital customer as to the use of the products purchased.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion. Costs are allowed to petitioners to the extent of 50%.

It is so ordered.

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

MR. JUSTICE MARSHALL, concurring.

While I join the Court's opinion, I wish to add a word about the applicability of the exemption provided by the Nonprofit Institutions Act. To my mind, the key to the Act is that it exempts from the Robinson-Patman Act not only an itemized list of institutions, but also all "charitable institutions not operated for profit." 15 U. S. C. § 13c. This suggests to me that the named institutions—schools, colleges, universities, public libraries, churches, and hospitals—were not intended to be limited to their traditional activities in qualifying for the exemption, but may expand those activities and still qualify so long as any new activities for which exempted supplies are purchased are charitable and not operated for profit.

I agree with the Court that the exemption is not "to be applied and expanded automatically to whatever new

venture the nonprofit hospital finds attractive in these changing days." *Ante,* at 13. But I believe the exemption *is* applicable to any new venture the hospital finds attractive and that is both charitable and not operated for profit. There is no suggestion—nor could one be made—that the activities the Court today finds outside the exemption fall within this category,* so there is no need to address this problem here. But I write to emphasize that I do not read the Court's opinion as foreclosing hospitals—or other exempted institutions—from expanding their charitable activities in highly untraditional ways and still qualifying for the exemption.

Likewise, I agree with the Court that the proper inquiry in this case is whether each kind of drug sale by the hospital "is a part of and promotes the hospital's intended institutional operation in the care of persons who are its patients." *Ante,* at 14. However, when a nonprofit institution makes sales for profit, as here, analysis is furthered, I suggest, by recognition of the purpose of the "own use" limitation.

Since all charitable institutions are covered by the Act, the purpose quite obviously is not to freeze a particular charitable institution into a particular kind of charity. Rather, as I understand it, the purpose of the limitation is generally to preclude the institution from taking advantage of its antitrust exemption by buying low-cost supplies solely for the purpose of reselling them at a profit. That is, Congress was primarily interested in directly aiding nonprofit institutions by lowering their operating expenses, but not interested in indirectly aiding

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*This case would be much more difficult for me if the hospitals involved did not all make profits on the sale of drugs to outsiders. *Ante,* at 7. If they did not, we would have to determine in each case whether such sales, even if not within the hospital's institutional function, nonetheless constituted a "charitable" venture of their own.

such institutions by providing them with the means of raising additional money—particularly when such resales of supplies would put the institution in competition with retail businesses not eligible for the exemption. While I do not believe Congress meant to preclude profit-making sales in the course of the institution's charitable activities—and so I agree that the Court's inquiry is the correct one—I suggest that the nexus between particular sales and those activities should be particularly closely scrutinized when a profit is made to assure that the sales are not made primarily for moneymaking purposes. Thus, sales only arguably within the scope of the institution's charitable activities might be exempted when made on a nonprofit basis and not exempted when made for profit. After analysis with this balancing factor in mind, I agree with the lines drawn by the Court and concur in its opinion.

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

It is common ground in this case that the dispensation of pharmaceutical products for consumption by a hospital's patients upon the hospital's premises constitutes the hospital's "own use" of the products within the meaning of 15 U. S. C. § 13c. The controversy concerns the various other "uses" of these products catalogued in the Court's opinion. *Ante,* at 8–10. As to those uses the Court of Appeals expressed its views as follows:

> "We may concede that in these respects distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function. It is not, however, the hospitals' 'own use.' . . . The purpose for which these supplies are purchased—the use to which they are to be put—is their consumption. Section 13c

can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer.

"The hospitals here are (quite properly) accommodating patients, staff and strangers with means whereby they can conveniently purchase for *their* use. The question is not whether the hospitals can continue to provide this useful community service. The question is whether in providing it they may acquire the drugs for such resale at an acquisition price that discriminates against local retail druggists. We hold that they may not." 510 F. 2d 486, 489.

I agree with the Court of Appeals and would affirm its judgment.

Syllabus

MIDDENDORF, SECRETARY OF THE NAVY, ET AL. v. HENRY ET AL.

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

No. 74–175. Argued January 22, 1975—Reargued November 5, 1975—Decided March 24, 1976*

The Uniform Code of Military Justice (UCMJ) provides four methods of disposing of cases involving servicemen's offenses: general, special, and summary courts-martial, and disciplinary punishment pursuant to Art. 15 of the UCMJ. General courts-martial and special courts-martial, which may impose substantial penalties, resemble judicial proceedings, nearly always presided over by lawyer judges, with lawyer counsel for both sides. Article 15 punishment, conducted personally by the accused's commanding officer, is an administrative method of dealing with most minor offenses. A summary court-martial, lying in between the informal Art. 15 procedure and the judicial procedures of general and special courts-martial, is designed "to exercise justice promptly for relatively minor offenses" in an informal proceeding conducted by a single commissioned officer, acting as judge, factfinder, prosecutor, and defense counsel (with jurisdiction only over noncommissioned officers and other enlisted personnel), who can impose as maximum sentences: 30 days' confinement at hard labor or 45 days' hard labor without confinement; two months' restriction to specified limits; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month. If the accused does not consent to trial by summary court-martial, the case will either be referred to a special or general court-martial, or be dismissed. Various enlisted members of the Marine Corps (hereinafter plaintiffs) charged for the most part with "unauthorized absences" brought this class action in District Court challenging the authority of the military to try them at summary courts-martial without providing them with counsel. All the plaintiffs had con-

*Together with No. 74–5176, *Henry et al.* v. *Middendorf, Secretary of the Navy, et al.*, also on certiorari to the same court.

sented in writing to be tried by summary court-martial, without counsel, after having been advised that they could be tried by special court-martial with counsel provided and having been apprised of the maximum sentences imposable under the two procedures. The District Court entered a judgment for the plaintiffs. The Court of Appeals vacated the judgment and remanded the case for reconsideration in the light of its opinion in *Daigle* v. *Warner,* 490 F. 2d 358, wherein it had held that there is no right to counsel under the Sixth Amendment in summary courts-martial and no absolute Fifth Amendment due process right in every case in which a military defendant might be imprisoned, but that, in line with *Gagnon* v. *Scarpelli,* 411 U. S. 778, counsel is required where the accused makes a request based on a timely and colorable claim (1) that he has a defense and (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present his defense. *Held:*

1. There is no Sixth Amendment right to counsel in a summary court-martial, since that proceeding is not a "criminal prosecution" as that term is used in the Amendment. Pp. 33–42.

(a) Even in a civilian context the fact that a proceeding will result in the loss of liberty does not *ipso facto* mean that the proceeding is a "criminal prosecution" for Sixth Amendment purposes, *Gagnon* v. *Scarpelli, supra,* at 788–789; *In re Gault,* 387 U. S. 1, 30; and when it is taken into account that a summary court-martial occurs in the military rather than a civilian community the considerations supporting the conclusion that it is not a "criminal prosecution" are at least as strong as the factors that were held dispositive in those cases. The charges against most of the plaintiffs here have no common-law counterpart and carry little popular opprobrium; nor are the penalties comparable to civilian sanctions. Pp. 34–40.

(b) A summary court-martial, unlike a criminal trial, is not an adversary proceeding. Pp. 40–42.

2. Nor does the Due Process Clause of the Fifth Amendment require that counsel be provided the accused in a summary court-martial proceeding. Pp. 42–48.

(a) Though the loss of liberty which may result from a summary court-martial implicates due process, the question whether that embodies a right to counsel depends upon an analysis of the interests of the accused and those of the regime to which he is subject, and in making that analysis deference must be

given to Congress' determination under Art. I, § 8, of the Constitution, that counsel should not be provided in that type of proceeding. P. 43.

(b) Supporting Congress' decision is the fact that the presence of counsel would convert a brief, informal hearing, which may be readily convened and concluded, into an attenuated proceeding, pre-empting the time of military personnel and thus consuming military resources to an unwarranted degree. See *U. S. ex rel. Toth* v. *Quarles,* 350 U. S. 11, 17. Pp. 45–46.

(c) The accused who feels that counsel is essential in the situation envisaged by the Court of Appeals in reliance on *Daigle* v. *Warner, supra,* may elect trial, with counsel provided, in a special court-martial proceeding, and though he would thus expose himself to the possibility of greater penalties, a decision involving that kind of choice, which often occurs in civilian criminal cases, is not constitutionally decisive. Pp. 46–48.

493 F. 2d 1231, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 49. STEWART, J., filed a dissenting statement, *post*, p. 49. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 51. STEVENS, J., took no part in the consideration or decision of the cases.

Harvey M. Stone argued the cause *pro hac vice* for petitioners in No. 74–175 and respondents in No. 74–5176 on the reargument. *Deputy Solicitor General Frey* argued the cause for those parties on the original argument. With *Mr. Stone* on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Harriet S. Shapiro, Sidney M. Glazer, Merlin H. Staring, H. B. Robertson, Jr.,* and *Max G. Halliday.*

Nathan R. Zahm reargued the cause for petitioners in No. 74–5176 and respondents in No. 74–175. With him on the briefs were *A. L. Wirin, Fred Okrand, David F. Addlestone,* and *Thomas M. Geisler, Jr.*

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MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In February 1973 plaintiffs[1]—then enlisted members of the United States Marine Corps—brought this class action in the United States District Court for the Central District of California challenging the authority of the military to try them at summary courts-martial without providing them with counsel. Five plaintiffs[2] had been charged with "unauthorized absences"[3] in violation of Art. 86, UCMJ, 10 U. S. C. § 886, convicted at summary courts-martial, and sentenced, *inter alia,* to periods of confinement ranging from 20 to 30 days at hard labor. The other three plaintiffs, two of whom were charged, *inter alia,* with unauthorized absence and one with assault, Art. 128, UCMJ, 10 U. S. C. § 928, had been ordered to stand trial at summary courts-martial which had not been convened. Those who were convicted had not been provided counsel—those who were awaiting trial had been informed that counsel would not be provided. All convicted plaintiffs were informed prior to trial that they would not be afforded counsel and that they could refuse trial by summary court-martial if they so desired. In the event of such refusal their cases would be referred to special courts-martial at which counsel would be provided. All plaintiffs consented in writing to proceed to trial by summary court-martial, without

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[1] Both parties have petitioned from the judgment of the court below. For simplicity we refer to the servicemen as "plaintiffs" and the federal parties as "defendants."

[2] Including two who were not among the original six plaintiffs but later intervened.

[3] One of these plaintiffs was also charged with several other offenses, including assault on a superior noncommissioned officer, Art. 91, Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 891.

counsel.[4] Plaintiffs' court-martial records were reviewed and approved [5] by the Staff Judge Advocate pursuant to Art. 65 (c), UCMJ, 10 U. S. C. § 865 (c). Plaintiffs did not file a petition for review with the Judge Advocate General of the Navy pursuant to Art. 69, UCMJ, 10 U. S. C. § 869.[6]

In the District Court, plaintiffs brought a class action seeking habeas corpus (release from confinement), an

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[4] Plaintiffs were so informed and consented pursuant to the terms of (Navy) Staff Judge Advocate Memorandum 10–72 which was in force at El Toro Marine Corps Air Station where all plaintiffs were stationed. Record 18.

For example, as to plaintiff Henry, the following entry appears in the record of his court-martial:

"The accused was advised that, if tried by Summary Court-Martial, he would not be represented by appointed military counsel; that instead, that Summary Court-Martial Officer would thoroughly and impartially inquire into both sides of the matter, and would assure that the interests of both the Government and the accused are safeguarded; that, if his case were that referred to a Special Courts-Martial [*sic*], he would be provided counsel. In addition, the accused, after being informed of the maximum punishment imposable in his case both by a Summary Courts-Martial [*sic*] and Special Courts-Martial [*sic*], he would be foregoing his statutory rights to counsel at a Special Courts-Martials [*sic*]." *Id.*, at 114.

[5] At least one plaintiff, McLean, was found not guilty as to certain charges at the summary court-martial. Upon review at the supervisory authority level, guilty findings on certain other charges upon which he had been convicted were reversed.

[6] These plaintiffs arguably failed to exhaust their military remedies. However, the defendants urge that exhaustion not be required here because the practice of the Judge Advocate General has been to defer consideration of any petitions on the right-to-counsel issue pending the completion of litigation on this issue in the federal courts.

Since the exhaustion requirement is designed to protect the military from undue interference by the federal courts, *Schlesinger* v. *Councilman,* 420 U. S. 738, 758 (1975), the military can waive that requirement where it feels that review in the federal courts is necessary. See *Sosna* v. *Iowa,* 419 U. S. 393, 396–397, n. 3 (1975).

injunction against future confinement resulting from uncounseled summary court-martial convictions, and an order vacating the convictions of those previously convicted.

The District Court allowed the suit to proceed as a class action, expunged all of plaintiffs' convictions, released all plaintiffs and all other members of their class [7] from confinement, and issued a worldwide injunction against summary courts-martial without counsel. Because of our disposition of this case on the merits, we have no occasion to reach the question of whether Fed. Rule Civ. Proc. 23, providing for class actions, is applicable to petitions for habeas corpus, see *Harris* v. *Nelson*, 394 U. S. 286 (1969), or whether the District Court properly determined that its remedial order was entitled to be enforced outside of the territorial limits of the district in which the court sat.

The Court of Appeals vacated the judgment of the District Court, and remanded the case for reconsideration in light of the Court of Appeals' opinion in *Daigle* v. *Warner*, 490 F. 2d 358 (CA9 1973). *Daigle* had held that there was no Sixth Amendment right to counsel in summary courts-martial, and likewise held that there was no absolute Fifth Amendment due process right to counsel in every case in which a military defendant might be imprisoned. However, citing *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), it did hold that counsel was required where the "accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to

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[7] The class included all members of the Navy and Marine Corps who "were or are now or will be required after (the date of the order) to stand trial by summary courts-martial" and who had not been afforded counsel. 357 F. Supp. 495, 499 (1973).

present the defense or mitigating circumstances." *Daigle* made an exception from this general rule for cases in which counsel "is not reasonably available," in which instance it would not be required. 490 F. 2d, at 365. We granted certiorari. 419 U. S. 895 (1974).

I

The UCMJ provides four methods for disposing of cases involving offenses committed by servicemen: the general, special, and summary courts-martial, and disciplinary punishment administered by the commanding officer pursuant to Art. 15, UCMJ, 10 U. S. C. § 815. General and special courts-martial resemble judicial proceedings, nearly always presided over by lawyer judges with lawyer counsel for both the prosecution and the defense.[8] General courts-martial are authorized to award any lawful sentence, including death. Art. 18, UCMJ, 10 U. S. C. § 818. Special courts-martial may award a bad-conduct discharge, up to six months' confinement at hard labor, forfeiture of two-thirds pay per month for six months, and in the case of an enlisted member, reduction to the lowest pay grade, Art. 19, UCMJ, 10 U. S. C. § 819. Article 15 punishment, conducted personally by the accused's commanding officer, is an admin-

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[8] These features are mandatory for general courts-martial. Special courts-martial may be, but seldom are, convened without a military judge; in such cases, the senior member of the court presides. Appointed defense counsel at a special court-martial is required to be an attorney, unless an attorney cannot be obtained because of physical conditions or military exigencies. In addition to the appointed counsel at a general or special court-martial, the accused may retain civilian counsel at his own expense, or he may be represented by a military lawyer of his own selection, if such lawyer is "reasonably available." Arts. 16, 25, 27 (b), 27 (c), 38 (b), UCMJ, 10 U. S. C. §§ 816, 825, 827 (b), 827 (c), 838 (b).

istrative method of dealing with the most minor offenses. *Parker* v. *Levy*, 417 U. S. 733, 750 (1974).[9]

The summary court-martial occupies a position between informal nonjudicial disposition under Art. 15 and the courtroom-type procedure of the general and special courts-martial. Its purpose, "is to exercise justice promptly for relatively minor offenses under a simple form of procedure." Manual for Courts-Martial ¶ 79*a* (1969) (MCM). It is an informal proceeding conducted by a single commissioned officer with jurisdiction only over noncommissioned officers and other enlisted personnel. Art. 20, UCMJ, 10 U. S. C. § 820. The presiding officer acts as judge, factfinder, prosecutor, and defense counsel. The presiding officer must inform the accused of the charges and the name of the accuser and call all witnesses whom he or the accused desires to call.[10] MCM ¶ 79*d* (1). The accused must consent to trial

[9] The maximum punishments which may be imposed under Art. 15 are: 30 days' correctional custody; 60 days' restriction to specified limits; 45 days' extra duties; forfeiture of one-half of one month's pay per month for two months; detention of one-half of one month's pay per month for three months; reduction in grade. Enlisted members attached to or embarked on a vessel may be sentenced to three days' confinement on bread and water or diminished rations. Correctional custody is not necessarily the same as confinement. It is intended to be served in a way which allows normal performance of duty, together with intensive counseling. Persons serving correctional custody, however, may be confined. Art. 15 (b). See Department of the Navy, SECNAV Inst. 1640.9, Corrections Manual, c. 7, June 1972; Department of the Army, Pamphlet No. 27-4, Correctional Custody, 1 June 1972; Department of the Air Force, Reg. 125-35, Correctional Custody, 7 Oct. 1970.

[10] Additionally, the officer must inform the accused of his right to remain silent and allow him to cross-examine witnesses or have the summary court officer cross-examine them for him. The accused may testify and present evidence in his own behalf. If the

by summary court-martial; if he does not do so, trial may be ordered by special or general court-martial.

The maximum sentence elements which may be imposed by summary courts-martial are: one month's confinement at hard labor; 45 days' hard labor without confinement; two months' restriction to specified limits; reduction to the lowest enlisted pay grade; and forfeiture of two-thirds pay for one month. Art. 20, UCMJ, 10 U. S. C. § 820.[11]

II

The question of whether an accused in a court-martial has a constitutional right to counsel has been much debated[12] and never squarely resolved. See *Reid* v. *Covert,* 354 U. S. 1, 37 (1957). Dicta in *Ex parte Milligan,* 4 Wall. 2, 123 (1866), said that "the framers of the Constitution, doubtless, meant to limit the right of trial by

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accused is found guilty he may make a statement, sworn or unsworn, in extenuation or mitigation. MCM ¶ 79*d*.

The record of the trial is then reviewed by the convening officer, Art. 60, UCMJ, 10 U. S. C. § 860, and thereafter by a judge advocate. Art. 65 (c), UCMJ, 10 U. S. C. § 865 (c).

[11] Not all these sentence elements may be imposed in one sentence, and enlisted persons above the fourth enlisted pay grade may not be sentenced to confinement or hard labor by summary courts-martial, or reduced except to the next inferior grade. MCM ¶¶ 16*b* and 127*c*.

[12] Compare, Wiener, Courts-Martial and the Bill of Rights: The Original Practice, 72 Harv. L. Rev. 1 (1958), which finds that there is no historic precedent for application of the right to counsel to courts-martial, with Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957), which concludes that the original intent of the Framers was to apply the Sixth Amendment right to counsel to the military. Compare *Daigle* v. *Warner,* 490 F. 2d 358 (CA9 1973), with *Betonie* v. *Sizemore,* 496 F. 2d 1001 (CA5 1974).

jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." In *Ex parte Quirin,* 317 U. S. 1, 40 (1942), it was said that " 'cases arising in the land or naval forces' . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth."

We find it unnecessary in this case to finally resolve the broader aspects of this question, since we conclude that even were the Sixth Amendment to be held applicable to court-martial proceedings, the summary court-martial provided for in these cases was not a "criminal prosecution" within the meaning of that Amendment.[13]

This conclusion, of course, does not answer the ultimate question of whether the plaintiffs are entitled to counsel at a summary court-martial proceeding, but it does shift the frame of reference from the Sixth Amendment's guarantee of counsel "[i]n all criminal prosecutions" to the Fifth Amendment's prohibition against the deprivation of "life, liberty, or property, without due process of law."

Argersinger v. *Hamlin,* 407 U. S. 25 (1972), held that the Sixth Amendment's provision for the assistance of counsel extended to misdemeanor prosecutions in civilian courts if conviction would result in imprisonment. A

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[13] Since under our Brother MARSHALL's analysis the Sixth Amendment applies to the military, it would appear that not only the right to counsel but the right to jury trial, which is likewise guaranteed by that Amendment, would come with it. While under *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), such a right would presumably not obtain in cases of summary courts-martial because of the short periods of confinement which they may impose, it would surely apply to special and general courts-martial, which are empowered to impose sentences far in excess of those held in *Duncan* to be the maximum which could be imposed without a jury. Whatever may be the merits of "selective incorporation" under the Fourteenth Amendment, the Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel.

summary court-martial may impose 30 days' confinement at hard labor, which is doubtless the military equivalent of imprisonment. Yet the fact that the outcome of a proceeding may result in loss of liberty does not by itself, even in civilian life, mean that the Sixth Amendment's guarantee of counsel is applicable. In *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), the respondent faced the prospect of being sent to prison as a result of the revocation of his probation, but we held that the revocation proceeding was nonetheless not a "criminal proceeding." We took pains in that case to observe:

> "[T]here are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences.
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> "In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole." *Id.,* at 788–789.

In re Gault, 387 U. S. 1 (1967), involved a proceeding in which a juvenile was threatened with confinement. The Court, although holding counsel was required, went on to say:

> " 'We do not mean . . . to indicate that the hearing

to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'" *Id.*, at 30.

The Court's distinction between various civilian proceedings, and its conclusion that, notwithstanding the potential loss of liberty, neither juvenile hearings nor probation revocation hearings are "criminal proceedings," are equally relevant in assessing the role of the summary court-martial in the military.

The summary court-martial is, as noted above, one of four types of proceedings by which the military imposes discipline or punishment. If we were to remove the holding of *Argersinger* from its civilian context and apply it to require counsel before a summary court-martial proceeding simply because loss of liberty may result from such a proceeding, it would seem all but inescapable that counsel would likewise be required for the lowest level of military proceeding for dealing with the most minor offenses. For even the so-called Art. 15 "nonjudicial punishment," which may be imposed administratively by the commanding officer, may result in the imposition upon an enlisted man of "correctional custody" with hard labor for not more than 30 consecutive days.[14] 10 U. S. C. § 815 (b).[15] But we think that

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[14] Chief Judge Darden, dissenting in *United States* v. *Alderman*, 22 U. S. C. M. A. 298, 46 C. M. R. 298 (1973), made a similar observation:

"While it may be argued that counsel should be required for summary courts-martial since they constitute criminal convictions and not for Article 15 proceedings as they are nonjudicial and corrective in nature, the effect of confinement under the former and correctional custody under the latter is difficult to distinguish. See In re Gault, 387 U. S. 1 (1967). Consequently, I would have difficulty in sus-

[*Footnote 15 is on p. 37*]

the analysis made in cases such as *Gagnon* and *Gault,* as well as considerations peculiar to the military, counsel against such a mechanical application of *Argersinger.*

Admittedly *Gagnon* is distinguishable in that there the defendant had been earlier sentenced at the close of an orthodox criminal prosecution. But *Gault* is not so distinguishable: there the juvenile faced possible initial confinement as a result of the proceeding in question, but the Court nevertheless based its conclusion that counsel was required on the Due Process Clause of the Fourteenth Amendment, rather than on any determination that the hearing was a "criminal prosecution" within the meaning of the Sixth Amendment.

It seems to us indisputably clear, therefore, that even in a civilian context the fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a "criminal prosecution" for purposes of the Sixth Amendment. Nor does the fact that confinement will be imposed in the first instance as a result of that proceeding make it a "criminal prosecution." When we consider in addition the fact that a summary court-martial occurs in the military community, rather than the civilian community, we believe that the considerations supporting the conclusion that it is not a "criminal prosecution" are at least as strong as those which were held dispositive in *Gagnon* and *Gault.*

The dissent points out, *post,* at 56–57, n. 6, that in

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taining the position that while counsel must be provided before summary courts-martial, they may be dispensed with in Article 15 proceedings that may result in correctional custody." *Id.,* at 308 n. 1, 46 C. M. R., at 308 n. 1.

[15] This section provides that a commanding officer (of the grade of major or lieutenant commander or above) may impose, *inter alia,* not more than 30 consecutive days of "correctional custody," § 815 (b)(2)(H)(ii), during duty or non-duty hours and may include "hard labor." § 815 (b).

Gault the Court gave weight to the rehabilitative purpose of the juvenile proceedings there involved, and that no such factor is present in summary courts-martial. Undoubtedly both *Gault* and *Gagnon* are factually distinguishable from the summary court-martial proceeding here. But together they surely stand for the proposition that even in the civilian community a proceeding which may result in deprivation of liberty is nonetheless not a "criminal proceeding" within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial. The summary court-martial proceeding here is likewise different from a traditional trial in many respects, the most important of which is that it occurs within the military community. This latter factor, under a long line of decisions of this Court, is every bit as significant, and every bit as entitled to be given controlling weight, as the fact in *Gagnon* that the defendant had been previously sentenced, or the fact in *Gault* that the proceeding had a rehabilitative purpose.

We have only recently noted the difference between the diverse civilian community and the much more tightly regimented military community in *Parker* v. *Levy,* 417 U. S. 733, 749 (1974). We said there that the UCMJ "cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community." *Ibid.* Much of the conduct proscribed by the military is not "criminal" conduct in the civilian sense of the word. *Id.,* at 749–751.

Here, for example, most of the plaintiffs were charged solely with "unauthorized absence," an offense which has no common-law counterpart and which carries little popular opprobrium. Conviction of such an offense would likely have no consequences for the accused beyond the immediate punishment meted out by the military, unlike conviction for such civilian misdemeanors as vagrancy or larceny which could carry a stamp of "bad character" with conviction.[16]

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[16] Our Brother MARSHALL argues, *post,* at 57–58, and nn. 8 and 9, that the military considers a summary court-martial conviction as "criminal." But Admiral Hearn, the Navy Judge Advocate General, did not describe the convictions as "criminal"; he did state that a commanding officer's decision to utilize a summary court-martial, as opposed to an Art. 15 administrative punishment, might turn on his judgment that it was "in the best interests of the service to begin to put on record [the] infractions" of a serviceman who had accumulated several Art. 15 punishments for the same type of offense. Joint Hearings on Military Justice before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a Special Subcommittee of the Senate Committee on Armed Services, 89th Cong., 2d Sess., 34 (1966) (1966 Hearings). The Army Assistant Judge Advocate General then pointed out that one advantage a summary court-martial held for the accused, over an Art. 15 proceeding, was that the latter was adjudged by the company commander, the "nominal accuser," whereas "the summary court knows nothing about the case at all." *Ibid.*

The dissent also refers us to the Army's acknowledgment of "collateral consequences" flowing from a summary court-martial conviction. *Post,* at 58–59. But that which is quoted in the text is a portion of the Army's written response in 1962 to the following question: "What are the effects on a serviceman's career of conviction by summary or special court-martial?" The disjunctive in the question makes it impossible to tell whether the portion quoted is addressed to special or summary court-martial, or both.

Finally, whatever conclusions may have been drawn by the author of the article in 39 Va. L. Rev. 319 cited by the dissent, *post,* at 59 n. 11, as to the "impact of a summary court-martial conviction," are of little aid to present considerations. The article was written at

By the same token, the penalties which may be meted out in summary courts-martial are limited to one month's confinement at hard labor, 45 days' hard labor without confinement, or two months' restriction to specified limits.[17] Sanctions which may be imposed affecting a property interest are limited to reduction in grade with attendant loss of pay, or forfeiture or detention of a portion of one month's pay.

Finally, a summary court-martial is procedurally quite different from a criminal trial. In the first place, it is not an adversary proceeding. Yet the adversary nature of civilian criminal proceedings is one of the touchstones of the Sixth Amendment's right to counsel[18] which we

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the inception of the UCMJ, then in operation for a year, and discusses sentencing in terms of the interaction between the Code and the corresponding 1951 Manual for Courts-Martial. Both, of course, have undergone substantial revision in the intervening 23 years. It should not be lightly assumed that the author's conclusions drawn at that time are valid with respect to the present UCMJ and MCM, or the manner in which they are currently implemented by the various services.

[17] Our Brother MARSHALL notes, *post*, at 57, that technically even the most serious noncapital UCMJ offenses may be tried before a summary court-martial. But that is of little practical effect upon the serviceman accused, given the ceilings on punishments imposed by Art. 20. It would seem inconceivable that a serious charge such as striking a commissioned officer, Art. 90 (1), UCMJ, 10 U. S. C. § 890 (1)—for which a general court-martial could impose a 10-year sentence—would ever be prosecuted before a court which could impose maximum confinement at hard labor for only one month. But if that occurred, an accused so charged before a summary court-martial would no doubt be delighted at his good fortune. The fact is, as the dissent notes, *post*, at 57–58, n. 8, that only 14% of the summary courts-martial conducted by the Navy are for "nonmilitary" offenses. We do not regard this figure as "substantial" in the sense that the dissent apparently does.

[18] As we held in *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938):

"The Sixth Amendment . . . embodies a realistic recognition of the obvious truth that the average defendant does not have the

extended to petty offenses in *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).

Argersinger relied on *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), where we held:

> "[I]n our adversary system of criminal justice, any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. . . ." *Id.,* at 344.

The function of the presiding officer is quite different from that of any participant in a civilian trial. He is guided by the admonition in ¶ 79*a* of the MCM: "The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded." The presiding officer is more specifically enjoined to attend to the interests of the accused by these provisions of the same paragraph:

> "The accused will be extended the right to cross-examine these witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain the attendance of witnesses, administer the oath and examine them, and obtain such other evi-

professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."

dence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent and will give the accused full opportunity to exercise his election." MCM ¶ 79*d* (3).

We believe there are significant parallels between the Court's description of probation and parole revocation proceedings in *Gagnon* and the summary court-martial, which parallels tend to distinguish both of these proceedings from the civilian misdemeanor prosecution upon which *Argersinger* focused. When we consider in addition that the court-martial proceeding takes place not in civilian society, as does the parole revocation proceeding, but in the military community with all of its distinctive qualities, we conclude that a summary court-martial is not a "criminal prosecution" for purposes of the Sixth Amendment.[19]

III

The Court of Appeals likewise concluded that there was no Sixth Amendment right to counsel in summary court-martial proceedings such as this, but applying the due process standards of the Fifth Amendment adopted a standard from *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), which would have made the right to counsel depend upon the nature of the serviceman's defense. We

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[19] No one of the factors discussed above—the nature of the proceedings, of the offenses, and of the punishments—is necessarily dispositive. Rather, all three combine with the distinctive nature of military life and discipline to lead to our conclusion. The dissent, by discussing these factors independently and attempting to demonstrate that each factor cannot stand by its own force does not come to grips with this analysis.

are unable to agree that the Court of Appeals properly applied *Gagnon* in this military context.

We recognize that plaintiffs, who have either been convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty or property, and consequently are entitled to the due process of law guaranteed by the Fifth Amendment.

However, whether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject. *Wolff* v. *McDonnell*, 418 U. S. 539, 556 (1974).

In making such an analysis we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U. S. Const., Art. I, § 8, that counsel should not be provided in summary courts-martial. As we held in *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953):

> "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress." (Footnote omitted.)

The United States Court of Military Appeals has held that *Argersinger* is applicable to the military and requires counsel at summary courts-martial. *United States* v. *Alderman*, 22 U. S. C. M. A. 298, 46 C. M. R. 298 (1973). Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference. But the 2-to-1 decision, in which the majority itself was sharply divided in theory, does not reject the claim of military necessity. Judge Quinn was of the opinion that *Argersinger*'s expansion of the Sixth Amendment right to counsel was

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binding on military tribunals equally with civilian courts.[20] *Alderman, supra,* at 300, 46 C. M. R., at 300. Judge Duncan, concurring in part, disagreed, reasoning that decisions such as *Argersinger* were not binding precedent if "there is demonstrated a military necessity demanding nonapplicability." *Id.,* at 303, 46 C. M. R., at 303. He found no convincing evidence of military necessity which would preclude application of *Argersinger.* Chief Judge Darden, dissenting, disagreed with Judge Quinn, and pointed to that court's decisions recognizing "the need for balancing the application of the constitutional protection against military needs." *Id.,* at 307, 46 C. M. R., at 307. Taking issue as well with Judge Duncan, he stated his belief that the Court of Military Appeals "possesses no special competence to evaluate the effect of a particular procedure on morale and discipline and to require its implementation over and above the balance struck by Congress." *Id.,* at 308, 46 C. M. R., at 308.

Given that only one member of the Court of Military Appeals took issue with the claim of military necessity, and taking the latter of Chief Judge Darden's statements as applying with at least equal force to the Members of this Court, we are left with Congress' previous determination that counsel is not required. We thus need only decide whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress.[21]

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[20] Judge Quinn's broad view of the applicability of the Bill of Rights to members of the military is well established. Concurring in *United States* v. *Culp,* 14 U. S. C. M. A. 199, 216–217, 33 C. M. R. 411, 428–429 (1963), he stated that its protections run to the Armed Forces " 'unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' " See also *United States* v. *Jacoby,* 11 U. S. C. M. A. 428, 530–431, 29 C. M. R. 244, 246–247 (1960).

[21] Prior to the enactment of the UCMJ into positive law in

We first consider the effect of providing counsel at summary courts-martial. As we observed in *Gagnon* v. *Scarpelli, supra,* at 787:

> "The introduction of counsel into a . . . proceeding will alter significantly the nature of the proceeding. If counsel is provided for the [accused], the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views."

In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of

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1956 it was suggested that summary courts-martial be abolished. Congress rejected this suggestion and instead provided that no person could be tried by summary court-martial if he objected thereto (unless he had previously refused Art. 15 punishment). 70A Stat. 43. Prior to the 1968 amendments to the Code the elimination of summary courts-martial was again proposed and rejected. *E. g.,* Subcommittee on Constitutional Rights of Senate Committee on the Judiciary, 88th Cong., 1st Sess., Summary—Report of Hearings on Constitutional Rights of Military Personnel, 34–36 (1963). Instead, the Art. 15 exception to the right to refuse was eliminated as a compromise between those favoring retention of summary courts-martial and those who would abolish them. S. Rep. No. 1601, 90th Cong., 2d Sess., 6 (1968). It is thus apparent that Congress has considered the matter in some depth.

the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.[22]

As we observed in *U. S. ex rel. Toth* v. *Quarles,* 350 U. S. 11, 17 (1955):

> "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. . . . [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."

However, the Court of Appeals did not find counsel necessary in all proceedings but only, pursuant to *Daigle* v. *Warner,* where the accused makes

> "a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances." 490 F. 2d, at 365.

But if the accused has such a claim, if he feels that in order to properly air his views and vindicate his rights,

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[22] The one-month period of confinement which may be imposed by a summary court-martial stands in marked contrast with the period of confinement for a minimum of three years which could have been imposed in a juvenile proceeding in *In re Gault,* 387 U. S. 1, 37 n. 60 (1967).

a formal, counseled proceeding is necessary he may simply refuse trial by summary court-martial and proceed to trial by special or general court-martial at which he may have counsel.[23] Thus, he stands in a considerably more favorable position than the probationer in *Gagnon* who, though subject to the possibility of longer periods of incarceration, had no such absolute right to counsel.[24]

It is true that by exercising this option the accused subjects himself to greater possible penalties imposed in the special court-martial proceeding. However, we do not find that possible detriment to be constitutionally decisive. We have frequently approved the much more difficult decision, daily faced by civilian criminal defendants, to plead guilty to a lesser included offense. *E. g., Brady* v. *United States,* 397 U. S. 742, 749–750 (1970). In such a case the defendant gives up not only his right to counsel but his right to any trial at all. Furthermore,

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[23] Article 20 UCMJ, 10 U. S. C. § 820, provides in pertinent part that "[n]o person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. . . ."

Article 38 (b) UCMJ, 10 U. S. C. § 838 (b), provides:

"The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under section 827 of this title."

[24] The dissent criticizes our failure to discuss *Gault, supra,* as to this point. *Gault* is inapposite. Contrary to the assertion of the dissent, *post,* at 69 n. 22, Gault, had he been tried in the adult courts, would have been subject to a maximum sentence of two *months* rather than the six years he actually received. 387 U. S., at 29. We cannot speculate what the result in *Gault* would have been if there had been a waiver available and if the adult sentence had been greater rather than less than the juvenile.

if he elects to exercise his right to trial he stands to be convicted of a more serious offense which will likely bear increased penalties.[25]

Such choices are a necessary part of the criminal justice system:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann* v. *Richardson,* 397 U. S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha* v. *California,* 402 U. S. 183, 213 (1971).

We therefore agree with the defendants that neither the Sixth nor the Fifth Amendment to the United States Constitution empowers us to overturn the congressional determination that counsel is not required in summary courts-martial. The judgment of the Court of Appeals is therefore

Reversed.

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

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[25] It by no means follows, as the dissent suggests, *post,* at 71-72, that the same result would obtain with such a two-tier system in the civilian context, where *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), and *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), have held the Sixth Amendment's right to counsel applicable. In such a context, the reasoning of *United States* v. *Jackson,* 390 U. S. 570 (1968), that one cannot be penalized for exercising a constitutional right would come into play. Here, however, we have held that there is no constitutional right to counsel at summary court-martial, so the issue of being penalized for the exercise of such a right is not presented.

MR. JUSTICE STEWART dissents, believing that the Due Process Clause of the Fifth Amendment requires that a defendant be accorded the assistance of counsel in a summary court-martial proceeding.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring.

As I agree with the substance and holding of the Court's opinion, I join it. I write separately to emphasize the factor which, in my view, distinguishes this case from *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972). One sentence expresses the fundamental basis for the distinction:

> "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker* v. *Levy,* 417 U. S. 733, 743 (1974).

In *Parker,* the Court went on to say that we also have recognized that "the military has, again by necessity, developed laws and traditions of its own during its long history." *Ibid.* Only last Term in *Schlesinger* v. *Councilman,* 420 U. S. 738, 757 (1975), we said:

> "The laws and traditions governing [military] discipline have a long history; . . . they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress."

The Constitution expressly authorized the Congress to "make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8. Court-martial proceedings, as a primary means for the regulation and discipline of the Armed Forces, were well known to the Founding Fathers. The procedures in such courts were

never deemed analogous to, or required to conform with, procedures in civilian courts. One must ignore history, tradition, and practice for two centuries to read into the Constitution, at this late date, a requirement for counsel in the discipline of minor violations of military law.[1]

I recognize, of course, that one's constitutional rights are not surrendered upon entering the Armed Services. But the rights are applied, as this Court often has held, in light of the "unique military exigencies" that necessarily govern many aspects of military service. See *Parker* v. *Levy, supra,* at 758. In recognition of this, since the founding of the Republic Congress has enacted special legislation applicable only to the Armed Services,[2] including the current provisions in the Uniform Code of

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[1] As noted in the Court's opinion, the relatively petty offenses that customarily come before summary courts-martial most often involve military offenses unknown in civilian society. In this case, for example, most of the plaintiffs were charged only with "unauthorized absence." To be sure, such courts also try some offenses that would be violations of civilian criminal law. But these are typically petty offenses and are committed by defendants subject to military discipline. The Court has no occasion in this case to address whether the Constitution requires the providing of counsel in special and general court-martial proceedings where serious, civil felonies are often charged. Indeed, all of the Armed Services now are required by statute to provide counsel in such cases. Art. 27, UCMJ, 10 U. S. C. § 827.

[2] In *Schlesinger* v. *Councilman,* referring to the Uniform Code, the Court said:

"Congress attempted to balance these military necessities [governing discipline] against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted. As a result, Congress created an integrated system of military courts and review procedures . . . ." 420 U. S. 738, 757-758 (1975).

Military Justice for summary courts-martial. Art. 16 (3), UCMJ, 10 U. S. C. § 816 (3).

I find no basis for holding now that the Constitution compels the equating, for purposes of requiring that counsel be provided, of military summary courts with civilian criminal courts.

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

We only recently held that, absent a waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger* v. *Hamlin,* 407 U. S. 25, 37 (1972). Today the Court refuses to apply *Argersinger*'s holding to defendants in summary court-martial proceedings. Assuming for purposes of its opinion that the Sixth Amendment applies to courts-martial in general, the Court holds that, because of their special characteristics, summary courts-martial in particular are simply not "criminal prosecutions" within the meaning of the Sixth Amendment, and that the right to counsel is therefore inapplicable to them. I dissent.

I

Preliminarily, summary courts-martial aside, it is clear to me that a citizen does not surrender all right to appointed counsel when he enters the military. It is inconceivable, for example, that this Court could conclude that a defendant in a general court-martial proceeding, where sentences as severe as life imprisonment may be imposed, is not entitled to the same protection our Constitution affords a civilian defendant facing even a day's imprisonment. See *Argersinger* v. *Hamlin, supra.* Surely those sworn to risk their lives to defend the Constitution should derive some benefit from the right to counsel, a

right that has become even more firmly entrenched in our jurisprudence over the past several generations. See *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Powell* v. *Alabama,* 287 U. S. 45 (1932).

The only question that might arise is whether the general guarantee of counsel to court-martial defendants is to be placed under the Fifth Amendment or under the Sixth Amendment. It is my conviction that it is a Sixth Amendment guarantee. That Amendment provides an explicit guarantee of counsel "in all criminal prosecutions." Since, as we recently observed, courts-martial are "convened to adjudicate charges of criminal violations of military law," *Parisi* v. *Davidson,* 405 U. S. 34, 42 (1972), it would seem that courts-martial are criminal prosecutions and that the Sixth Amendment therefore applies on its face.

There is legitimate dispute among scholars, it is true, about whether the Framers expressly intended the Sixth Amendment right to counsel to apply to the military. See *ante,* at 33–34, and n. 12.[1] While the historical evidence is somewhat ambiguous, my reading of the sources suggests that the Sixth Amendment right to counsel was intended by the Framers to apply to courts-martial.

[1] Those who argue that the Framers did intend the Sixth Amendment right to counsel to apply point both to congressional proceedings which seem to assume the right's applicability, see Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293, 303–315 (1957), and materials cited therein, and to the fact that it was traditional in the late 18th century to allow an accused serviceman legal assistance. *Id.,* at 318. Those who take the opposite position point, *inter alia,* to contemporary treatises, see Wiener, Courts-Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1, 23–26 (1958), and materials cited therein, to the lack of mention of any right to counsel in the first military codes under the Constitution, *id.,* at 22–23, and to the fact that any counsel who did appear in military proceedings was allowed only a limited role. *Id.,* at 27–32.

But even if the historical evidence plainly showed to the contrary—and its certainly does not—that would not be determinative of the contemporary scope of the Sixth Amendment. As Mr. Chief Justice Hughes observed:

> "If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 442–443 (1934).

Application of the Sixth Amendment right to counsel to the military follows logically and naturally from the modern right-to-counsel decisions, in which the right has been held fully applicable in every case in which a defendant faced conviction of a criminal offense and potential incarceration.[2] See, *e. g., Argersinger* v. *Hamlin,*

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[2] In any given case, whether there is a Sixth Amendment right to trial by jury is, of course, not at all determinative of whether there is a Sixth Amendment right to counsel. Indeed, in *Argersinger* itself we stated that "[w]e reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." 407 U. S. 25, 30–31 (1972). Compare *id.,* at 37, with *Duncan* v. *Louisiana,* 391 U. S. 145, 159 (1968).

This Court has indicated that the Fifth Amendment's express exemption of the military from the requirement of indictment by grand jury also exempts the military "inferentially, from the [Sixth Amendment] right to trial by jury." *O'Callahan* v. *Parker,* 395 U. S. 258, 261 (1969). But there is no reason to assume that the same inferences from the Fifth Amendment exemption should be drawn with regard to the Sixth Amendment right to counsel. Not even the federal parties suggest that the settling of the jury-trial issue with regard to the military has *ipso facto* settled all other Sixth Amendment issues as well.

supra; Gideon v. *Wainwright, supra.* The due process right to counsel, usually applied on a case-by-case basis, extends a qualified right to counsel to persons not involved in criminal proceedings, see *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), but has not been viewed as a replacement for the Sixth Amendment right to counsel in situations in which a defendant stands to be convicted of a criminal offense.

In short, it is my belief that the Sixth Amendment demands that court-martial defendants ordinarily be accorded counsel.[3] Only if the *special* characteristics of summary courts-martial in particular deprive them of the status of "criminal prosecutions" is the Sixth Amendment inapplicable in the cases before us today. It is, of course, this proposition to which the major part of the Court's opinion is addressed and to which I now turn.

II

The Court's conclusion that summary courts-martial are not "criminal prosecutions" is, on its face, a surprising one. No less than in the case of other courts-martial, summary courts-martial are directed at adjudicating "charges of criminal violations of military law," and conviction at a summary court-martial can lead to confinement for one month. Nevertheless, the Court finds its conclusion mandated by a combination of

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[3] Even if a pure due process analysis were to be used, however, counsel, to my mind, would still be required for courts-martial. Many of the factors analyzed below in a Sixth Amendment context, see Part II, *infra,* are fully relevant to a due process analysis. See *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973); *Morrissey* v. *Brewer,* 408 U. S. 471 (1972). And, while *Gagnon* adopts a case-by-case approach to the right to counsel in probation revocation proceedings, the fact that in courts-martial we are dealing with a trial which can result in a criminal conviction mandates that counsel be made available in every case. See *Gagnon, supra,* at 789 n. 12.

four factors:[4] the limitations on the punishment that can be meted out by a summary court-martial, the nature of the offenses for which a defendant can be tried, the nature of the summary court-martial proceeding itself, and "the distinctive nature of military life and discipline." *Ante,* at 42 n. 19. I am totally unpersuaded that these considerations—or any others—

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[4] The Court looks to our analysis in *Gagnon* v. *Scarpelli, supra,* as support in the distinctions it draws between "criminal prosecutions" under the Sixth Amendment and summary courts-martial. I find that reliance questionable, to say the least.

The Court intimates, *ante,* at 35, that our holding in *Gagnon* that a probation revocation hearing is not part of a criminal prosecution was based on factors relating to the manner in which such hearings are conducted—factors such as the absence of a prosecutor and the informality of the proceedings. This, however, is an inaccurate reflection of what we said in *Gagnon. Gagnon's* conclusion, stated early in the opinion, 411 U. S., at 782, that a probation revocation hearing is "not a stage of a criminal prosecution" was not at all dependent on the manner in which such proceedings are conducted. Rather, it was held to follow from the conclusion in *Morrissey* v. *Brewer, supra,* that revocation of parole was not part of a criminal prosecution, with the following analysis in *Morrissey* held to be determinative:

"'Parole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.' [408 U. S.], at 480." 411 U. S., at 781.

The manner in which the hearing was conducted was simply not a factor in our conclusion that such a hearing is not part of a "criminal prosecution." Only *after* we reached this conclusion did we refer to the manner in which the hearing was conducted in considering the *secondary* question whether the right to appointed counsel was nevertheless required as a matter of due process. Thus, even assuming there are "parallels" between the manner in which probation-revocation hearings are conducted and the manner in which summary courts-martial are conducted, *ante,* at 41–42, *Gagnon* lends no support to the conclusion that summary courts-martial are not "criminal prosecutions" within the meaning of the Sixth Amendment.

whether taken singly or in combination, justify denying to summary court-martial defendants the right to the assistance of counsel, "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson* v. *Zerbst,* 304 U. S. 458, 462 (1938).

A

It is of course true, as the Court states, that a summary court-martial may not adjudge confinement in excess of one month. Manual for Courts-Martial ¶ 16*b* (1969) (MCM).[5] But *Argersinger* itself held the length of confinement to be wholly irrelevant in determining the applicability of the right to counsel. Aware that "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter," *Baldwin* v. *New York,* 399 U. S. 66, 73 (1970) (plurality opinion), we held in *Argersinger* that the fact of confinement, not its duration, is determinative of the right to counsel. Insofar as the Court today uses the 30-day ceiling on a summary court-martial defendant's sentence as support for its holding, it is not so much finding *Argersinger* "inapplicable" as rejecting the very basis of *Argersinger*'s holding.[6]

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[5] The MCM was prescribed by Executive Order of September 11, 1968, to supplement the Uniform Code of Military Justice (UCMJ).

[6] The Court attempts to evade *Argersinger*'s clear mandate by relying on our decisions in *Gagnon* v. *Scarpelli, supra,* and *In re Gault,* 387 U. S. 1 (1967). As for *Gagnon,* I have already observed, *supra,* n. 4, that it lends no support to the Court's Sixth Amendment analysis in this case. As for *Gault,* it is true that we have held that juvenile delinquency proceedings, even though they might result in confinement, are not "criminal prosecutions" under the Sixth Amendment. *McKeiver* v. *Pennsylvania,* 403 U. S. 528 (1971); see *id.,* at 553 (opinion of BRENNAN, J.). However, that conclusion was undoubtedly based on the predominantly rehabilitative purpose of the juvenile justice system, a factor which, as shown

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In further support of its holding, the Court observes that "[m]uch of the conduct proscribed by the military is not 'criminal' conduct in the civilian sense of the word," *ante,* at 38, and intimates that conviction for many offenses normally tried at summary court-martial would have no consequences "beyond the immediate punishment meted out by the military." *Ante,* at 39. The Court's observations are both misleading and irrelevant.

While the summary court-martial is generally designed to deal with relatively minor offenses, see MCM ¶ 79, as a statutory matter the summary proceeding can be used to try *any* noncapital offense triable by general or special court-martial. Art. 20, UCMJ, 10 U. S. C. § 820.[7] See *United States* v. *Moore,* 5 U. S. C. M. A. 687, 697, 18 C. M. R. 311, 321 (1955). And while the offense for which most of the plaintiffs here were tried—unauthorized absence—has no common-law counterpart, a substantial proportion of the offenses actually tried by summary court-martial are offenses, such as larceny and assault, that would also constitute criminal offenses if committed by a civilian.[8] Indeed, one of the service-

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infra, at 61, is manifestly not present in the summary court-martial context. And, while *Gault* did not apply the Sixth Amendment, it did, of course, hold a due process right to counsel applicable to *all* juvenile delinquency proceedings which pose a threat of confinement.

[7] Of course the punishment ceilings imposed by 10 U. S. C. § 820 on summary courts-martial are applicable no matter what offense is being tried. But the "popular opprobrium" resulting from conviction of a serious crime—a factor in which the Court places considerable stock, *ante,* at 39—is likely to be severe whatever the magnitude of the punishment; that "popular opprobrium" could, of course, have significant "practical effect," *ante,* at 40 n. 17, on a serviceman's future.

[8] See 10 U. S. C. §§ 921, 928. Figures supplied by the federal parties indicate that in 1973, 14% of the summary courts-martial

men in these cases was charged with assault. It is therefore misleading to suggest, as the Court does, that there is a fundamental difference between the type of conduct chargeable at summary court-martial and the type of conduct deemed criminal in the civilian sector.

The Court's further implication that a summary court-martial conviction has no consequences beyond "the immediate punishment" *ante*, at 39, is also inaccurate. One of the central distinctions between Art. 15 nonjudicial punishment and a summary court-martial conviction is that the latter is regarded as a criminal conviction.[9] And that criminal conviction has collateral consequences both in military and civilian life. As the Army itself has readily acknowledged:

> "Conviction by [any] court-martial creates a criminal record which will color consideration of any subsequent misconduct by the soldier. A noncommissioned officer may survive one summary court-martial without reduction being effected, but it is unlikely that, with one conviction on his record, he will survive a second trial and retain his status. A conviction of an officer by any court-martial could

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conducted by the Navy were for "nonmilitary offenses." Brief for Federal Parties 33; see also Fidell, The Summary Court-Martial: A Proposal, 8 Harv. J. Legis. 571, 599 n. 121 (1971). See also Joint Hearings on Military Justice before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a Special Subcommittee of the Senate Committee on Armed Services, 89th Cong., 2d Sess., 1056 (1966) (hereinafter cited as 1966 Hearings).

[9] In Senate testimony, the Judge Advocate General of the Navy observed that a serviceman convicted by a summary court-martial as opposed to one punished under Art. 15, "begins to acquire a record of convictions." 1966 Hearings 33. See also Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Summary—Report of Hearings on the Constitutional Rights of Military Personnel, 88th Cong., 1st Sess., 35 (1963).

have a devastating aftereffect upon his career. It could be described in some cases as a sentence to a passover on a promotion list and may serve as a basis for initiation of administrative elimination action.

"For any man, the fact of a criminal conviction on his record is a handicap in civilian life. It may interfere with his job opportunities; it may be counted against him if he has difficulty with a civilian law enforcement agency; and in general he tends to be a marked man." [10]

The MCM itself belies any claim that no significant consequences beyond immediate punishment attach to a summary court-martial conviction. Paragraph 127*c* of the MCM establishes a comprehensive scheme by which an offender is made subject to increased punishment if he has a record of previous convictions—even if all of those previous convictions were by summary court-martial.

It is therefore wholly unrealistic to suggest that the impact of a summary court-martial conviction lies exclusively in the immediate punishment that is meted out.[11] Summary court-martial convictions carry with them a potential of stigma, injury to career, and increased punishment for future offenses in the same way as do convictions after civilian criminal trials and convictions after general and special courts-martial.

Quite apart from their flimsy factual basis, the Court's observations as to both the nature of the offenses tried at summary court-martial and the lack of collateral conse-

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[10] Hearings on Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 2d Sess., 838 (1962).

[11] See also Fidell, *supra*, n. 8, at 594–596; Feld, The Court Martial Sentence: Fair or Foul, 39 Va. L. Rev. 319, 322 (1953).

quences of convictions have already been determined by *Argersinger* to be irrelevant to the applicability of the Sixth Amendment's right to counsel. *Argersinger* teaches that the right to counsel is triggered by the potential of confinement, regardless of how trivial or petty the offense may seem. See 407 U. S., at 37. Logic itself would therefore preclude the suggestion that the right to counsel, activated by the potential of confinement, is deactivated by the absence of collateral consequences of conviction.

C

The nature of the summary court-martial proceeding—the proceeding's nonadversary nature and, relatedly, the protective functions of its presiding officer—is a third factor which, according to the Court, helps to make unnecessary the provision of counsel to the accused. Again, the Court's reliance is without substantial foundation.

The Court characterizes summary courts-martial as "nonadversary," but offers little explanation as to how that characterization advances the contention that the right to counsel is inapplicable. If the Court's argument is simply that furnishing counsel will transform the proceeding into an adversary proceeding, it is no argument at all, but simply an observation. The argument must be either that there is something peculiar about the goal of the summary court-martial proceeding that makes the right to counsel inapplicable, or that there are elements in the conduct of the proceeding itself that render counsel unnecessary.

To the extent that the Court's characterization of summary courts-martial as "nonadversary" is meant to convey something about the goal or purpose of the proceeding, it is totally unpersuasive. In this sense the summary court-martial proceeding is far less "nonadversary" than the juvenile delinquency proceedings to which we

held the right to counsel applicable in *In re Gault,* 387 U. S. 1 (1967). The Court in *Gault* did not dispute that the proper purpose of the juvenile justice system is rehabilitative rather than punitive, that all parties to a juvenile delinquency proceeding might be striving for an adjudication and disposition that is in "the best interests of the child," and that the traditional notion of the "kindly juvenile judge" is a highly appropriate one. See *id.,* at 27. Yet the Court in *Gault* confronted the reality that, however beneficial the goal of delinquency proceedings, they have as their potential result the confinement of an individual in an institution. *Ibid.* This factor mandated that accused juvenile offenders be entitled to the representation of counsel.[12]

As distinguished from the situation in *Gault,* summary courts-martial have no special rehabilitative purpose; rather, their central immediate purpose is to discipline those who have violated the UCMJ.[13] If the goals of juvenile delinquency proceedings are an insufficient justification for the denial of counsel, it follows *a fortiori* that the goals of the summary court-martial are similarly insufficient.

The second possible meaning conveyed by characterizing the summary court-martial as "nonadversary"—the

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[12] The Court intimates that our decision in *Gault* might have been different had Gerald Gault been faced with a period of confinement significantly less than three years in duration. *Ante,* at 46 n. 22. However, our opinion contained no hint of any such limitation and held the right to counsel applicable *whenever* a juvenile is faced with proceedings "which may result in commitment to an institution in which the juvenile's freedom is curtailed." 387 U. S., at 41.

[13] In general, "a military trial is marked by the age-old manifest destiny of retributive justice. . . . '[M]ilitary law has always been and continues to be primarily an instrument of discipline, not justice.' Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969)." *O'Callahan* v. *Parker,* 395 U. S. 258, 266 (1969).

presence of elements in the conduct of the proceeding itself which render independent counsel unnecessary—is reflected in the Court's observation that the "function of the presiding officer is quite different from that of any participant in a civilian trial." *Ante*, at 41. It is the responsibility of the presiding officer to act as judge, jury, prosecutor, and defense counsel combined. The Court intimates that the presiding officer's duty to advise the accused of his rights and his ability to help the accused assemble facts, examine witnesses, and cross-examine his accusers make defense counsel unnecessary, particularly in light of the absence of a formal prosecutor in the proceeding. I find this argument unpersuasive. In *Powell* v. *Alabama*, 287 U. S. 45 (1932), we rejected the notion that a judge could "effectively discharge the obligations of counsel for the accused," largely because a judge "cannot . . . participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Id.*, at 61.

It is true that in *Powell* the unrepresented defendant was opposed by a traditional prosecutor. But in *Gault*, *supra*, there was no prosecutor; the only participants in the delinquency proceedings were the juvenile, his mother, the probation officers, and the judge. All participants were presumably interested in the welfare of the juvenile. Yet we held that no matter how protective the judge or the other participants might have been, the juvenile was entitled to independent counsel.

The irreconcilable conflict among the roles of the summary court-martial presiding officer inevitably prevents him from functioning effectively as a substitute for defense counsel. For instance, a defendant has a right to remain silent and not testify at his court-martial. See Art. 31, UCMJ, 10 U. S. C. § 831; MCM ¶ 53*h*. An in-

telligent decision whether to exercise that right requires consultation as to whether testifying would hurt or help his case and inevitably involves the sharing of confidences with counsel. Full consultation cannot possibly take place when "defense counsel" is also playing the role of judge and prosecutor. The defense counsel who also serves as prosecutor and judge is effectively unavailable for many of the "necessary conferences between counsel and accused," *Powell* v. *Alabama, supra,* at 61, as well as for the making and implementation of critical tactical and strategic trial decisions. As helpful as the presiding officer might be to the defendant, his inconsistent roles bar him from being an adequate substitute for independent defense counsel.

In sum, there is nothing about the assertedly "nonadversary" nature of the summary court-martial—either in terms of its goals or alternative safeguards—that renders unnecessary the assistance of counsel.

D

Finally, the Court draws on notions of military necessity to justify its conclusion that the right to counsel is inapplicable to summary court-martial proceedings. Concerns for discipline and obedience will on occasion, it is true, justify imposing restrictions on the military that would be unconstitutional in a civilian context. See *Parker* v. *Levy,* 417 U. S. 733, 758 (1974). But denials of traditional rights to any group should not be approved without examination, especially when the group comprises members of the military, who are engaged in an endeavor of national service, frequently fraught with both danger and sacrifice. After such examination, I am persuaded that the denial of the right to counsel at summary courts-martial cannot be justified by military necessity.

The substance of the asserted justification here is that discipline, efficiency, and morale demand the utilization of an expeditious disciplinary procedure for relatively minor offenses. It would seem, however, that Art. 15 nonjudicial punishment—which can be speedily imposed by a commander, but which does not carry with it the stigma of a criminal conviction—provides just such a procedure.[14] Indeed, the 1962 amendments to Art. 15, 10 U. S. C. § 815, greatly expanded the availability of nonjudicial punishment and resulted in a sharp decrease in the utilization of the summary court-martial.[15] There is, therefore, no pressing need to have a streamlined summary court-martial proceeding in order to supply an expeditious disciplinary procedure. Moreover, it is by no means clear that guaranteeing counsel to summary court-martial defendants would result in significantly longer time periods from preferral of charges to punishment than *fairly* conducted proceedings in the absence of counsel; [16] any timesaving that is now

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[14] Differences have been advanced to distinguish the punishment that can be imposed under Art. 15 from the "confinement" that can result from a summary court-martial. See *United States* v. *Shamel,* 22 U. S. C. M. A. 361, 47 C. M. R. 116 (1973) (Quinn, J.).

[15] Between 1962 and 1969, the number of summary courts-martial per year in the Armed Services dropped from 85,166 to 28,281, and their percentage of the total military caseload dropped from 64% to 26%. Fidell, *supra,* n. 8, at 573. "The chief explanation for this phenomenon lies in the expansion of nonjudicial punishment powers accomplished in 1963." *Id.,* at 572.

[16] While, according to the federal parties to these cases, the average time period between preferral of charges and final review in summary courts-martial has increased by 13 days since the United States Court of Military Appeals applied *Argersinger* to the military in *United States* v. *Alderman,* 22 U. S. C. M. A. 298, 46 C. M. R. 298 (1973), Supp. Mem. for Federal Parties 3–4, the parties themselves concede that "it is not possible to ascribe the changed experience . . . exclusively to the injection of counsel into summary court proceedings." *Ibid.* Nothing is offered by the federal parties

enjoyed might well result from the presiding officer's being something less than an adequate substitute for independent defense counsel.

It is especially difficult to accept the federal parties' claim of "military necessity" in view of the fact that well *before* our decision in *Argersinger,* each of the services allowed summary court-martial defendants to retain counsel at their own expense.[17] Given this fact, the fed-

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to indicate that the average time of the summary court-martial proceeding itself has been lengthened as a result of providing counsel to defendants.

[17] See 1966 Hearings 34 (testimony of Brig. Gen. Kenneth J. Hodson, Asst. Judge Adv. Gen. for Military Justice, Department of the Army); 38 (testimony of Maj. Gen. R. W. Manss, Judge Adv. Gen. of the Air Force); 39 (testimony of Rear Adm. Wilfred A. Hearn, Judge Adv. Gen. of the Navy); 626 (letter of June 7, 1965, to the Chairman of the Senate Committee on Armed Services from the Acting General Counsel of the Department of the Treasury).

Indeed, while acknowledging that "[t]here is no provision either in law or regulation for the appointment of counsel before a summary court-martial," the Department of the Treasury indicated, six years *before Argersinger* was decided, that "it is Treasury Department policy [in the Coast Guard] that military counsel for a summary court-martial will be supplied upon request if reasonably available." *Id.,* at 627.

Moreover, the following question-and-answer exchange took place in 1966 by letter between the Senate Subcommittee on Constitutional Rights and the Navy Judge Advocate General Corps:

"Question: Are defendants permitted by official Defense Department or service policy or regulation to have counsel assist them in summary courts?

"Answer: . . . [A]lthough the right to individual representation is not extended to an accused before a summary court-martial by policy or regulation, the general practice in the naval service is to accord such representation on the request of the accused.

. . . . .

"Question: . . . If a man requests the appointment of counsel, legal or otherwise, is it the practice to grant such requests?

"Answer: Yes, dependent upon the reasonable availability of the requested counsel." *Id.,* at 939.

eral parties' argument is reduced to a contention that only those defendants who cannot afford to retain counsel must, as a matter of "military necessity," be denied counsel at summary court-martial proceedings. Sustaining that contention means a defeat for those very principles of equality and justice that the military is sworn to defend; the most fundamental notions of fairness are subverted when the rights of the poor alone are sacrificed to the cause of "military necessity."

It is also significant that the United States Court of Military Appeals (USCMA), a body with recognized expertise in dealing with military problems,[18] has applied *Argersinger* to summary courts-martial without giving any hint that military necessity posed a problem. *United States* v. *Alderman,* 22 U. S. C. M. A. 298, 46 C. M. R. 298 (1973).[19] Indeed, Judge Duncan of that court explicitly noted that "the record contains no evidence which convinces me that application of the *Argersinger* rule should not be followed in our system because of military necessity." *Id.,* at 303, 46 C. M. R., at 303 (concurring in part and dissenting in part).[20] And even before *Alderman* was decided, both the Air Force and the

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[18] See *Schlesinger* v. *Councilman,* 420 U. S. 738, 758 (1975); *Noyd* v. *Bond,* 395 U. S. 683, 694 (1969).

[19] The decisions of the USCMA are final. 10 U. S. C. § 876. It is indeed ironic that the federal parties—statutorily barred from appealing *Alderman*—have now secured its rejection through this lawsuit, originally brought in federal court by servicemen seeking the very protections later accorded them by *Alderman.*

[20] See also *Daigle* v. *Warner,* 490 F. 2d 358 (1974), cert. pending, No. 73–6642, in which the Court of Appeals for the Ninth Circuit noted that "[w]hile the Navy argues with some vigor that naval discipline will suffer severely if appointed counsel are required [in summary courts-martial], there is scant support for this in the record." *Id.,* at 366.

The Court, relying on previously stated views of Judge Quinn, one of the members of the *Alderman* majority, and on Judge Quinn's

Army applied *Argersinger* to summary courts-martial [21] rather than advancing the theoretically available "military necessity" argument. See *United States* v. *Priest,* 21 U. S. C. M. A. 564, 45 C. M. R. 338 (1972). That they did so leads me to doubt whether even the military was then of the opinion that military necessity dictated the denial of counsel.

Virtually ignoring all the factors that cast doubt on the military-necessity justification, the Court defers to an asserted congressional judgment that "counsel should not be provided in summary courts-martial." *Ante,* at 43. While Congress' evaluation of military necessity is clearly entitled to deference, it would be a departure from our position in the past to suggest that the Court need not come to its own conclusion as to the validity of any argument based on military necessity. See, *e. g., United States* v. *Robel,* 389 U. S. 258, 264 (1967); *Parker* v. *Levy,* 417 U. S. 733 (1974); cf. *New York Times Co.* v. *United States,* 403 U. S. 713 (1971). But regardless of what weight is properly accorded a clear congressional determination of military necessity, there has been no such determination in this case.

The only congressional action referred to by the Court is Congress' refusal in 1956 and 1968 to abolish summary

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failure in his *Alderman* opinion to explicitly mention the military-necessity argument, declines to view *Alderman* as a rejection of that argument. I disagree. In *United States* v. *Priest,* 21 U. S. C. M. A. 564, 45 C. M. R. 338 (1972)—decided only 10 months before *Alderman*—the USCMA had recognized, albeit in another context, that military necessity may affect the application of traditional constitutional rights to members of the military, and the parties in *Alderman* briefed the military-necessity argument in great detail. Judge Quinn concurred in the *Priest* opinion. These factors, plus Judge Duncan's explicit reference to the argument, lead me to read *Alderman* as a rejection of the military-necessity argument.

[21] *United States* v. *Alderman, supra,* at 303, 46 C. M. R., at 303 (Duncan, J., concurring in part and dissenting in part).

courts-martial altogether and its concurrent extending of the serviceman's opportunity to reject trial by summary court-martial. The Court refers to that action as evidence that Congress has considered "in some depth" the matter whether counsel is required in summary courts-martial. *Ante,* at 45 n. 21. But there is no evidence offered of any detailed congressional consideration of the specific question of the feasibility of providing counsel at summary courts-martial. And, more importantly, there is no indication that Congress made a judgment that military necessity requires the denial of the constitutional right to counsel to summary court-martial defendants.

If Congress' lack of discussion of military necessity is not enough to throw substantial doubt on the Court's inferences, the timing of the congressional action cited by the Court should certainly do so. All that action occurred substantially before our decision in *Argersinger.* Thus, even if we assume that Congress' decision to retain the summary court-martial represents a considered conclusion that "counsel should not be provided," that judgment was made at a time when even civilian defendants subject to prison terms of less than six months had no recognized constitutional right to counsel. There would, therefore, have been little reason for Congress in 1956 or 1968 to undertake the detailed consideration necessary to make a finding of "military necessity" before concluding that counsel need not be provided to summary court-martial defendants.

In sum, there is simply no indication that Congress ever made a clear determination that "military necessity" precludes applying the Sixth Amendment's right to counsel to summary court-martial proceedings. Indeed, the Court characterizes the congressional determination in the vaguest of terms, and never expressly

claims that Congress made a determination of military necessity. Thus, I can only read the Court's opinion as a grant of almost total deference to any Act of Congress dealing with the military.

III

The Court rejects even the limited holding of the Court of Appeals that the provision of counsel in summary court-martial proceedings should be evaluated as a matter of due process on the basis of the accused's defense in any particular case. The Court explains that summary court-martial defendants can have counsel appointed by refusing trial by summary court-martial and then proceeding to trial by special court-martial—the acknowledged consequence of which is exposure to greater possible penalties. Given my conviction that a summary court-martial is a criminal prosecution under the Sixth Amendment, it is unnecessary for me to deal in detail with this due process question.[22] In the event, however, that the special court-martial option may be offered as additional support for the Court's treatment of the Sixth Amendment issue, I shall briefly assess its significance.

The Court analogizes the decision whether to expose oneself to special court-martial with counsel or to proceed by summary court-martial without counsel to the

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[22] It does seem to me, however, that the serviceman's "option" of subjecting himself to the possibility of a special court-martial lends little support to the Court's due process analysis. We held in *In re Gault*, 387 U. S. 1 (1967)—a decision left unmentioned in the Court's treatment of the Fifth Amendment question—that, as a matter of due process accused offenders have an absolute right to counsel at juvenile delinquency proceedings. Surely that holding would be no different in the case of a juvenile given the opportunity "voluntarily" to subject himself to adult criminal proceedings, in which he would have counsel, but at which he would be subject to harsher punishment.

decision faced by a civilian defendant whether to proceed to trial or plead guilty to a lesser included offense. According to the Court, the right given up by such a civilian defendant is "not only his right to counsel but his right to any trial at all." *Ante,* at 47. The analogy is a flawed one. The civilian defendant who pleads guilty *necessarily* gives up whatever rights he might thereafter have been accorded to enable him to protect a claim of innocence; the conditions on his pleading guilty are logically mandated ones. By contrast, the condition on the military defendant's opting to be tried by summary court-martial—*i. e.,* the denial of counsel—is an imposed one, and must therefore be viewed with suspicion.

Indeed, the force of the Court's analogy is entirely dissipated by the fact that a civilian defendant who pleads guilty forfeits only so much of his right to counsel as is a necessary consequence of his plea. He is fully entitled to counsel in the process leading up to the plea—including negotiations with the Government as to the possibility of a plea and the actual decision to plead. The defendant is also entitled to counsel in any sentencing proceeding that might follow the making of his plea. I have no doubt that a scheme in which the acceptance of guilty pleas was conditioned on a full abandonment of the right to counsel would be unconstitutional.

By contrast, the Court today approves the denial of counsel to the summary court-martial defendant at all stages and for all purposes—including, at least as regards sailors and marines,[23] the very decision whether to reject

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[23] Neither the UCMJ nor the MCM contains any indication that a serviceman must be provided with counsel to assist him in making his determination as to whether to consent or object to trial by summary court-martial. While internal Army guidelines do appear to allow consultation with counsel in making this determination, see Military Justice Handbook, Guide for Summary Court-Martial Trial

trial by summary court-martial. And if the accused opts for the summary court-martial—the Court's parallel to the accepted guilty plea—he has no right to counsel either at the adjudicative or sentencing phase of the proceeding.[24]

Conditioning the provision of counsel on a defendant's subjecting himself to the risk of additional punishment suffers from the same defect as the scheme disapproved by the Court in *United States* v. *Jackson*, 390 U. S. 570 (1968), in which the right to a trial by jury was conditioned on a defendant's subjecting himself to the possibility of capital punishment. If the Court's analysis is correct as applied to the Sixth Amendment, then *Argersinger*'s guarantee of counsel for the trial of any offense carrying with it the potential of imprisonment could be reduced to a nullity; a State could constitutionally establish two levels of imprisonment for the same offense—a lower tier for defendants who are willing to proceed to trial without counsel, and a higher one for those who insist on having the assistance of counsel.[25] It

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Procedure 3-3 to 3-5, Department of the Army Pamphlet No. 27-7 (1973), Navy guidelines contain no such provision.

[24] Assuming the "option scheme" presents the serviceman with any sort of realistic choice, its availability also substantially undercuts the federal parties' military-necessity argument. See *supra*, at 63-69. The federal parties argue that as a matter of "military necessity" minor offenses must be disposed of at summary court-martial proceedings without giving defendants the benefit of counsel. Yet, under the option scheme *any* serviceman can be assured of counsel simply by rejecting trial by summary court-martial. Thus the scheme itself could render unattainable a goal which is claimed to be a matter of military necessity.

[25] While we sustained the Kentucky two-tier system against due process and double jeopardy attacks in *Colten* v. *Kentucky*, 407 U. S. 104 (1972), we were careful to note that under that system a defendant "cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel." *Id.*, at 119.

is inconceivable to me that the Sixth Amendment would tolerate such a result.

IV

The right to counsel has been termed "the most pervasive" [26] of all the rights accorded an accused. As a result of the Court's action today, of all accused persons protected by the United States Constitution—federal defendants and state defendants, juveniles and adults, civilians and soldiers—only those enlisted men [27] tried by summary court-martial can be imprisoned without having been accorded the right to counsel. I would have expected that such a result would have been based on justifications far more substantial than those relied on by the Court. I respectfully dissent.

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[26] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

[27] Officers are not subject to summary courts-martial. 10 U. S. C. § 820.

CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* SUGAR ET AL.

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

No. 74-858. Argued January 20, 1976—Decided March 24, 1976*

Where it is unclear whether the New York State courts will construe a New York prejudgment attachment statute so as to remove any federal constitutional problems, it is improper for a three-judge District Court to address the question of the statute's constitutionality or to interfere with its enforcement. The judgment declaring the statute unconstitutional and enjoining its enforcement is therefore vacated and the cases are remanded to the District Court with directions to abstain from a decision of the federal constitutional issues until the parties have had an opportunity to obtain a construction of the New York law from the New York state courts.

383 F. Supp. 643, vacated and remanded.

A. Seth Greenwald, Assistant Attorney General of New York, argued the cause for appellants in No. 74-858. With him on the briefs were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General. *Philip H. Busner* argued the cause for appellants in No. 74-859. With him on the brief was *Fred I. Sonnenfeld.*

John G. Ledes argued the cause and filed a brief for appellees.†

PER CURIAM.

This is an appeal from the judgment of a three-judge federal court declaring unconstitutional and enjoining

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*Together with No. 74-859, *Curtis Circulation Co. et al.* v. *Sugar et al.,* also on appeal from the same court.

†*John E. Kirklin* and *Kalman Finkel* filed a brief for the Legal Aid Society of New York City as *amicus curiae* urging affirmance.

the enforcement of certain statutes of the State of New York which provide for prejudgment attachment of a defendant's assets. On April 13, 1973, appellant Curtis Circulation Co. (Curtis) filed a suit against appellees Sugar and Wrestling Revue, Inc. (Wrestling), and Champion Sports Publications, Inc. (Champion), in a New York state court. The complaint alleged that Curtis had advanced over $100,000—of which $28,588.08 remained unpaid—to Champion under a contract with Champion pursuant to which Champion had agreed to permit Curtis to market certain identified sports magazines. It further alleged that Sugar, who owned and operated Champion, had caused title to the magazines to be transferred to Wrestling, another company owned and operated by Sugar, and had caused Wrestling to transfer the magazines to National Sports Publishing Corp. (National), a corporation not controlled by Sugar, for sale to the public. The consequence was that Champion had been stripped of its assets and that the magazines—out of the sales of which Curtis was to recoup its advance to Champion—had been sold instead by National. The complaint, containing several counts alleging fraud on the part of each defendant, sought a judgment for the $28,588.08 of Curtis' advances which remained unrepaid.

At the same time, Curtis sought to attach the debt owed by National to Wrestling for the magazines which National had sold and for which it had not yet paid Wrestling. New York Civil Practice Laws and Rules (CPLR) § 6201 (Supp. 1975–1976)[1] provides for attach-

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[1] "An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

. . . . .

"4. the defendant, with intent to defraud his creditors, has

ment on various grounds. The order of attachment may be granted in favor of a plaintiff by a judge, upon *ex parte* motion at any time before judgment, § 6211; and must be supported "by affidavit and such other written evidence as may be submitted, [showing] that there is a cause of action and the one or more grounds for attachment . . . that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff." § 6212 (a). In addition, the plaintiff will be ordered by the judge to give an undertaking in an amount fixed by the court out of which the defendant will be paid legal costs and damages resulting from the attachment if the defendant prevails in the underlying lawsuit. § 6212 (b).

Pursuant to these procedures, Curtis filed a detailed affidavit alleging that it had a cause of action against appellees and Champion for fraud justifying a recovery of $28,588.08, and seeking an order of attachment under CPLR §§ 6201 (4), (5), and (8) (Supp. 1975–1976).

On April 13, 1973, New York Supreme Court Justice Fine granted the motion conditioned on Curtis' providing a $10,000 undertaking, $8,570 of which was for the purpose of holding the defendants harmless should they prevail in the underlying suit. The undertaking was provided by Curtis and the order of attachment issued. The sheriff then levied on the debt owed by National to Wrestling, and money in the total amount of $24,324.17

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assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

"5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

. . . . .

"8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

was paid to the sheriff by National in April and May 1973, and in April, June, and July 1974.

Under CPLR, a defendant may discharge an attachment by giving an undertaking in an amount equal to the value of the property attached, § 6222, or by successfully moving to vacate the attachment under § 6223. That section provides:

> "Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action."

Appellees neither gave an undertaking nor moved to vacate the attachment under § 6223. Instead they waited nine months until January 1974, and filed the instant action under 42 U. S. C. § 1983 in the United States District Court for the Southern District of New York naming as defendants the sheriff, Judge Fine, the Attorney General, the Governor of New York, and the plaintiffs in the state action. Alleging that the temporary loss, pending decision on the merits of the underlying complaint, of the money owed them by National was injuring them irreparably, they sought a declaration that the attachment provisions of CPLR were unconstitutional, an order enjoining their further enforcement, and an order directing that the attachment of National's debt to Wrestling be vacated. Appellees

asked that a three-judge court be convened under 28 U. S. C. §§ 2281 and 2284.

On June 17, 1974, the single-judge court rejected appellants' claim that it should abstain from deciding the constitutional issue, and a three-judge court was convened. On November 6, 1974, the three-judge court granted the requested relief "until and unless a meaningful opportunity to vacate an attachment is provided under CPLR [§] 6223 or by the [c]ourts of the State of New York." The judgment was stayed, however, pending appeal to this Court.

As we understand it, the District Court found the New York prejudgment attachment provisions unconstitutional because it concluded that the opportunity to vacate the attachment provided by CPLR § 6223 was inadequate, under this Court's cases, to justify the property deprivation involved. In its view, the hearing available on a motion to vacate the attachment was inadequate principally because the hearing would only be concerned with the question whether the "attachment is unnecessary to the security of the plaintiff," § 6223, and would not require the plaintiff to litigate the question of the likelihood that it would ultimately prevail on the merits.[2]

It may be that the three-judge District Court below was correct in its "forecast," see *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, 499 (1941), that even in light of recent cases in this Court, see, *e. g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601 (1975); *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), the New York courts will construe CPLR § 6223 to preclude an adequate prelim-

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[2] The court also concluded that the burden of proof at the hearing would be on the defendant, and noted that the plaintiff, unlike the plaintiff in *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974), had no special property interest in the property attached.

inary inquiry into the merits of a plaintiff's underlying claim. Cf. *Boehning* v. *Indiana Employees Assn.*, 423 U. S. 6, 7–8, n. (1975). On the other hand, as the order of the three-judge court itself recognized, the New York courts could conclude otherwise. The New York Court of Appeals has already held that an attachment may be vacated if it "clearly" appears "that the plaintiffs must ultimately fail" on the merits. *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 377, 138 N. E. 24, 26 (1923). See also *Maitrejean* v. *Levon Properties*, 45 App. Div. 2d 1020, 358 N. Y. S. 2d 203 (1974); *Richman* v. *Richman*, 41 App. Div. 2d 993, 344 N. Y. S. 2d 52 (1973); *Martin Enterprises, Inc.* v. *M. S. Kaplan Co.*, 45 App. Div. 2d 883, 358 N. Y. S. 2d 160 (1974). The precise nature of any inquiry into the merits which will be made by the New York courts under this rubric is unclear, but an inquiry consistent with the constitutional standard is by no means automatically precluded. Indeed, two New York trial courts have expressly held, subsequent to the decision below, that where fact issues are raised, on a motion to vacate an attachment, with respect to the merits of the underlying claim, a preliminary hearing will be held on those issues. *Regnell* v. *Page*, 82 Misc. 2d 506, 369 N. Y. S. 2d 936 (1975); *New York Auction Co.* v. *Belt*, 81 Misc. 2d 1032, 368 N. Y. S. 2d 98 (1975).

Under these circumstances, it would be unwise for this Court to address the constitutionality of the New York attachment statutes, for decision on that issue may be rendered unnecessary by a decision of the New York courts as a matter of state law. *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639, 640 (1959); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970); *Harman* v. *Forssenius*, 380 U. S. 528 (1965); *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41 (1970); *Railroad Comm'n* v. *Pullman Co.*,

supra. The court below has declared unconstitutional the statute of a State the continued utilization of which is undoubtedly of importance to that State. If the State construes its statute so as to remove any constitutional problems, friction with the State will have been avoided. *Railroad Comm'n* v. *Pullman Co.*, *supra,* at 500–501. Finally, injunctive relief against the state officials who were defendants below appears particularly inappropriate in light of the fact that these officials contended below and continue to contend here that New York law does provide an opportunity for a preliminary hearing on the merits of a plaintiff's underlying claim.

Accordingly, we vacate the judgment below and remand these cases to the three-judge court and direct it to abstain from a decision of the federal constitutional issues until the parties have had an opportunity to obtain a construction of New York law from the New York state courts.

So ordered.

GEDERS *v.* UNITED STATES

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

No. 74-5968. Argued December 1, 1975—Decided March 30, 1976

The trial court's order preventing petitioner, the defendant in a federal criminal prosecution, from consulting his counsel "about anything" during a 17-hour overnight recess in the trial between his direct- and cross-examination *held* to deprive petitioner of his right to the assistance of counsel guaranteed by the Sixth Amendment. Pp. 86-91.

(a) A federal trial judge has broad power to sequester nonparty witnesses before, during, and after their testimony to restrain them from "tailoring" their testimony, to aid in detecting less-than-candid testimony, and (in the case of a recess called before testimony is completed) to prevent improper attempts to influence the testimony in light of the testimony already given. But a sequestration order applied to a criminal defendant affects the defendant quite differently from a nonparty witness, who presumably has no stake in the trial's outcome and little, other than his own testimony, to discuss with trial counsel. The defendant has the right to be present for all testimony and may discuss his testimony with his attorney up to the time he takes the witness stand, so sequestration accomplishes less when applied to a defendant during a recess. A defendant is ordinarily ill-equipped to comprehend the trial process without a lawyer's guidance; he often must consult with counsel during the trial, and during overnight recesses often discusses the events of the day's trial and their significance. Pp. 87-89.

(b) The problem of possible improper influence on testimony or "coaching" can be dealt with in other ways, such as by a prosecutor's skillful cross-examination to discover whether "coaching" occurred during a recess, or by the trial judge's directing that the examination of witnesses continue without interruption until completed, or otherwise arranging the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption. Pp. 89-91.

(c) To the extent that conflict remains between the defendant's right to consult with his attorney during an overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel. P. 91.

502 F. 2d 1, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 92.

Seymour L. Honig argued the cause and filed a brief for petitioner.

Sidney M. Glazer argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh, John P. Rupp, Victor Stone,* and *Lauren S. Kahn.*

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

We granted certiorari to consider whether a trial court's order directing petitioner, the defendant in a federal prosecution, not to consult his attorney during a regular overnight recess, called while petitioner was on the stand as a witness and shortly before cross-examination was to begin, deprived him of the assistance of counsel in violation of the Sixth Amendment.

A grand jury in the Middle District of Florida returned indictments charging petitioner and several codefendants with conspiracy to import and illegal importation of a controlled substance into the United States, in violation of 18 U. S. C. § 371 and 21 U. S. C. § 952 (a), and with possession of marihuana,

in violation of 21 U. S. C. § 841 (a). The charges grew out of plans for several of the defendants to fly about 1,000 pounds of marihuana from Colombia into the United States, plans that might have succeeded but for the fact that the pilot of the charter plane informed the United States Customs Service of the arrangements.

The trial of petitioner and one codefendant commenced on Tuesday, October 9, 1973. Petitioner testified in his own defense on Tuesday, October 16, and Wednesday, October 17. Petitioner's counsel concluded direct examination at 4:55 p. m. Tuesday. When the court recessed for the night, and after the jury departed, the prosecutor asked the judge to instruct petitioner not to discuss the case overnight with anyone. Throughout the trial, the judge had given the same instruction to every witness whose testimony was interrupted by a recess.

Petitioner's attorney objected, explaining that he believed he had a right to confer with his client about matters other than the imminent cross-examination, and that he wished to discuss problems relating to the trial with his client. The judge indicated his confidence that counsel would properly confine the discussion, but expressed some doubt that petitioner would be able to do so, saying: "I think he would understand it if I told him just not to talk to you; and I just think it is better that he not talk to you about anything." The judge suggested that counsel could have an opportunity immediately after the recess to discuss with his client matters other than the cross-examination, such as what witnesses were to be called the next day, and he indicated that he would grant a recess the next day so that counsel could consult with petitioner after petitioner's testimony ended. Counsel persisted in his

objection, although he appropriately indicated that he would—as in fact he did—comply with the court's order.[1]

When court convened the next morning, petitioner's

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[1] The discussion among the judge, petitioner's attorney (Mr. Rinehart), and the prosecutor (Mr. Blasingame), summarized in the text, was:

"MR. BLASINGAME: Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorneys—or anyone—about this case at all?

"MR. RINEHART: If he were instructed not to talk to his attorney, I feel that it would be improper. I think I always have the right to talk to my client.

"MR. BLASINGAME: I don't think so.

"THE COURT: Well I don't know whether you requested that I so instruct another witness when there was a recess, to that effect; but you do—let's make this clear—you always have the right to talk to your client—but except for the accident—and 'accident' means something over which you have no control—the cross-examination would have been right now and you would not have had an opportunity to talk to him.

"Now, because of the fact that it is 5:00 o'clock and we are recessing until tomorrow, you would have that opportunity.

"If you had requested the opportunity and this had been 2:00 o'clock—and if you had said 'If the Court please, I would like to have a recess'—and then, outside the presence of the Jury, had said, 'because I want to talk to my client'; what would I have said?

"MR. RINEHART: You probably would not have granted the recess, Your Honor.

"THE COURT: Should I have?

"MR. RINEHART: Not if there was something else to do, Your Honor.

"THE COURT: Well would you have had a right to just talk to your client while he is subject to cross-examination?

"MR. RINEHART: Well I would not—

"THE COURT: Would you have?

"MR. RINEHART: I would not instruct my client anyway.

"THE COURT: Well would you have talked to him? Would

attorney asked and received permission to reopen his direct examination of petitioner. The cross-examination which followed was finished in the morning; the judge

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you have had a right to confer with him? That is what I want to know.

"MR. RINEHART: If there were matters that I felt I had not brought out on Direct and that I should have covered—

"THE COURT: Before he is cross-examined?

"MR. RINEHART: Even before he is cross-examined. Sometimes we remember things we did not—

"THE COURT: Yes, sir. That is the reason you are entitled to Re-direct.

"MR. RINEHART: Right.

"THE COURT: Now I would appreciate it if you would answer my question. We have had a little trouble about being responsive.

"MR. RINEHART: All right.

"THE COURT: My question is: While a witness is subject to cross-examination, even though he is a defendant, does his attorney have the right to confer with him before he is cross-examined?

"You have been practicing law for a long time.

"MR. RINEHART: I feel that I do have the right to confer with him but not to coach him as to what he may say on cross-examination or how to answer questions.

"THE COURT: Then what else would you need to talk to him about?

"MR. RINEHART: I don't know. Such as whom should I call as the next witness.

"THE COURT: All right.

"MR. RINEHART: There are numerous strategic things that an attorney must confer with his client about.

"THE COURT: Well I don't have any questions, Mr. Rinehart, about what you—I think you are a disciplined man. I think you are trained in the law. And I think if you should tell me, for instance, that you would not discuss this direct testimony with your client I would accept that statement without any qualification.

"MR. RINEHART: Your Honor, I can assure you of that.

"THE COURT: I understand that. But your client, as far as I know, has not had any legal training; and I don't know anything about him other than what I have heard here today. And I don't

then called the luncheon recess. Petitioner—whose testimony on redirect examination was yet to come—was permitted to confer with his attorney during the noon recess. The trial concluded the following day, and petitioner was convicted on all three counts; he was sentenced to concurrent three-year prison terms.

The Court of Appeals affirmed petitioner's convic-

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know that he is subject to that same instruction—that he would understand it.

"I think he would understand it if I told him just not to talk to you; *and I just think it is better that he not talk to you about anything.*

"I think you might ask him right now—right here while we are here—what witnesses he thinks you ought to call in the morning.

"Let's put it this way. You ask him right now if he thinks there are any witnesses you ought to call during the evening. If anything comes up after he has been cross-examined, and after you have had an opportunity for re-direct, we would have a recess and you would have all the time you need to talk to him about strategies or anything else. We will take the rest of this month, if necessary, to give you an opportunity and him an opportunity for a fair trial. But we are not going to let strategy take the place of this situation.

"And I have held that I find that I don't think you would do anything wrong; but I think it would be better, under the circumstances of this case. And that is my ruling.

"MR. RINEHART: If that is your ruling, Your Honor, we will obey it.

"THE COURT: All right. Now you just move to the side, please.

"Now, Mr. Geders, will you stand up. I direct you not to discuss your testimony in this case with anyone until you are back here tomorrow morning at 9:30 for the purpose of being cross-examined.

"Do you understand that?

"MR. GEDERS: I understand.

"THE COURT: All right, thank you. All right, the Court will be in recess." (Emphasis added.)

The ambiguity of this colloquy appears to be resolved by the direction that petitioner "not talk to you [counsel] about anything."

tion. *United States* v. *Fink,* 502 F. 2d 1 (CA5 1974). On the point here at issue, the court held that petitioner's failure to claim any prejudice resulting from his inability to consult with counsel during one evening of the trial was fatal to his appeal. In so holding, the court relied on *United States* v. *Leighton,* 386 F. 2d 822 (CA2 1967), cert. denied, 390 U. S. 1025 (1968), dealing with a similar order applied to a noon recess, and rejected the Third Circuit's position that prejudice need not be shown, *United States* v. *Venuto,* 182 F. 2d 519 (1950), in a case involving an overnight recess. The Court of Appeals also disposed of several other claims of error. We granted certiorari limited to petitioner's claim that the order forbidding consultation with his attorney overnight denied him the assistance of counsel in violation of the Sixth Amendment. 421 U. S. 929.

Our cases have consistently recognized the important role the trial judge plays in the federal system of criminal justice. "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia* v. *United States,* 289 U. S. 466, 469 (1933). A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion. *Goldsby* v. *United States,* 160 U. S. 70, 74 (1895); *United States* v. *Martinez-Villanueva,* 463 F. 2d 1336 (CA9 1972); *Nelson* v. *United States,* 415 F. 2d 483, 487 (CA5 1969), cert. denied, 396 U. S. 1060 (1970). Within limits, the judge may control the scope of rebuttal testimony, *United States* v. *Chrzanowski,* 502 F. 2d 573, 575–576 (CA3 1974); *United*

States v. *Perez,* 491 F. 2d 167, 173 (CA9), cert. denied *sub nom. Lombera* v. *United States,* 419 U. S. 858 (1974); may refuse to allow cumulative, repetitive, or irrelevant testimony, *Hamling* v. *United States,* 418 U. S. 87, 127 (1974); *County of Macon* v. *Shores,* 97 U. S. 272 (1877); and may control the scope of examination of witnesses, *United States* v. *Nobles,* 422 U. S. 225, 231 (1975); *Glasser* v. *United States,* 315 U. S. 60, 83 (1942). If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.

The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony. *Holder* v. *United States,* 150 U. S. 91, 92 (1893); *United States* v. *Robinson,* 502 F. 2d 894 (CA7 1974); *United States* v. *Eastwood,* 489 F. 2d 818, 821 (CA5 1974). Wigmore notes that centuries ago, the practice of sequestration of witnesses "already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law." 6 J. Wigmore, Evidence § 1837, p. 348 (3d ed., 1940). The aim of imposing "the rule on witnesses," as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid. See Wigmore, *supra,* § 1838; F. Wharton, Criminal Evidence § 405 (C. Torcia ed., 1972). Sequestering a witness over a recess called before testimony is completed serves a third purpose as well—preventing improper attempts to influence the testimony in light of the testimony already given.

The trial judge here sequestered all witnesses for both prosecution and defense and before each recess instructed

the testifying witness not to discuss his testimony with anyone. Applied to nonparty witnesses who were present to give evidence, the orders were within sound judicial discretion and are not challenged here.

But the petitioner was not simply a witness; he was also the defendant. A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, "the rule" accomplishes less when it is applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand.

The recess at issue was only one of many called during a trial that continued over 10 calendar days. But it was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to

be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama,* 287 U. S. 45, 68–69 (1932).

See also *Argersinger* v. *Hamlin,* 407 U. S. 25, 31–36 (1972); *Gideon* v. *Wainwright,* 372 U. S. 335, 343–345 (1963). Other courts have concluded that an order preventing a defendant from consulting his attorney during an overnight recess infringes upon this substantial right. See *United States* v. *Venuto,* 182 F. 2d 519 (CA3 1950); *People* v. *Noble,* 42 Ill. 2d 425, 248 N. E. 2d 96 (1969); *Commonwealth* v. *Werner,* 206 Pa. Super. 498, 214 A. 2d 276 (1965). But see *People* v. *Prevost,* 219 Mich. 233, 189 N. W. 92 (1922).[2]

There are other ways to deal with the problem of possible improper influence on testimony or "coaching" of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could de-

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[2] *United States* v. *Leighton,* 386 F. 2d 822 (CA2 1967), on which the Court of Appeals relied, involved an embargo order preventing a defendant from consulting his attorney during a brief routine recess during the trial day, a matter we emphasize is not before us in this case. See *United States* v. *Schrimsher,* 493 F. 2d 848 (CA5 1974); *United States* v. *Crutcher,* 405 F. 2d 239 (CA2 1968), cert. denied, 394 U. S. 908 (1969); see also *Krull* v. *United States,* 240 F. 2d 122 (CA5), cert. denied, 353 U. S. 915 (1957). Cf. *Pendergraft* v. *State,* 191 So. 2d 830 (Miss. 1966).

velop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination. In addition the trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses,[3] may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption. That this would not be feasible in some cases due to the length

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[3] An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it. Ethical Consideration 7-26 of the American Bar Association Code of Professional Responsibility (1975) states:

"The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured."

Disciplinary Rule 7-102 of the Code provides in relevant part:

"(A) In his representation of a client, a lawyer shall not:

. . . . .

"(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

"(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

"(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule."

Any violation of these strictures would constitute a most serious breach of the attorney's duty to the court, to be treated accordingly.

We note that the judge expressed full confidence that petitioner's trial attorney would respect the difference between assistance and improper influence.

of direct- and cross-examination does not alter the availability, in most cases, of a solution that does not cut off communication for so long a period as presented by this record. Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself.

There are a variety of ways to further the purpose served by sequestration without placing a sustained barrier to communication between a defendant and his lawyer. To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel. *Brooks* v. *Tennessee,* 406 U. S. 605 (1972).

The challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel. We need not reach, and we do not deal with, limitations imposed in other circumstances. We hold that an order preventing petitioner from consulting his counsel "about anything" during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals, with directions that it be remanded to the

District Court for proceedings consistent with this opinion.

Reversed and remanded.

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

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

I join in most of the Court's opinion, and I agree with its conclusion that an order preventing a defendant from consulting with his attorney during an overnight recess violates the defendant's Sixth Amendment right to counsel.

The Court notes that this case does not involve an order barring communication between defendant and counsel during a "brief routine recess during the trial day." [1] *Ante,* at 89 n. 2. That is, of course, true. I would add, however, that I do not understand the Court's observation as suggesting that as a general rule no constitutional infirmity would inhere in an order barring communication between a defendant and his attorney during a "brief routine recess." In my view, the general principles adopted by the Court today are fully applicable to the analysis of *any* order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial.

Thus, as the Court holds, a defendant who claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice. Such an

[1] I would assume, however, that the Court's repeated reference to the length of the overnight recess in this case—17 hours—is not intended to have any dispositive significance, and that the Court's holding is at least broad enough to cover all overnight recesses.

order is inherently suspect, and requires initial justification by the Government.

The only justification expressly considered by the Court in its opinion is the desire to avoid the risk of unethical counseling by an attorney.[2] The Court holds that the fear of unethical conduct is not a sufficient ground for an order barring overnight communication between a defendant and his attorney, and the same would hold true absent the most unusual circumstances, I take it, for an order barring consultation between a defendant and his attorney at *any* time before or during the trial.[3] If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. If any order barring communication between a defendant and his attorney is to survive constitutional inquiry, it must be for some reason other than a fear of unethical conduct.

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[2] For the distinction between ethical and unethical counseling, see *ante*, at 90 n. 3.

[3] The Court suggests, however, that "doubts that defense counsel will observe the ethical limits on guiding witnesses" would justify such actions as postponing the luncheon recess or extending the normal adjournment hour in order to complete the defendant's testimony. *Ante*, at 90–91. I would assume that trial courts generally take such steps out of a desire to move the trial along in an orderly and expeditious fashion, not out of fear that defense counsel might exceed the bounds of ethical conduct if given the opportunity. And I am unwilling to endorse the notion that where the orderly and expeditious progress of the trial would not be served, the trial court should nevertheless feel free to continue the defendant's testimony without interruption because of a belief that defense counsel is likely to act unethically.

GOLDBERG *v.* UNITED STATES

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

No. 74-6293. Argued January 14, 1976—Decided March 30, 1976

During the course of petitioner's criminal trial, the chief prosecution witness (Newman) indicated on cross-examination that on certain dates he was interviewed by Government lawyers who took notes relating to Newman's forthcoming trial testimony, and that Newman verified the accuracy of the notes. Petitioner thereupon moved for production of the notes pursuant to the Jencks Act, 18 U. S. C. § 3500, which provides that in a federal criminal prosecution after a witness called by the Government has testified on direct examination, the court on the defendant's motion shall order the Government to produce any "statement" in its possession that relates to the subject matter of the witness' testimony. In relevant part a "statement" is defined as "a written statement made by said witness and signed or otherwise adopted or approved by him." § 3500 (e)(1). The trial judge denied petitioner's motion on the ground that the material was "the work product of counsel" and declined to inspect the material *in camera*. The Court of Appeals affirmed on the ground that the notes were not statements of the witness within the meaning of § 3500 (e). *Held:*

1. Any writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been "signed or otherwise adopted or approved" by that witness is producible under the Jencks Act, and the writing is not rendered nonproducible because a Government lawyer interviewed the witness and wrote the statement. Pp. 101-108.

(a) Nothing in the language or legislative history of the Jencks Act excepts as a lawyer's "work product" a statement within the definition of a producible statement. Pp. 101-102.

(b) Nor is the Act limited to statements made to an investigative agency as distinguished from prosecutors preparing for trial. Though the Government's argument to the contrary is based on the asserted unfairness of allowing defense counsel to impeach a witness by a statement that is the product of the attorney's selections rather than his own, the writings are producible only if they meet the terms of the statutory definition;

the Act itself protects witnesses from this unfairness; and it also safeguards the primary policy of the work-product doctrine by protecting the privacy of an attorney's mental processes. Pp. 102–106.

(c) Production of statements within § 3500 (e) (1) and written by Government lawyers will not force such lawyers to testify at trial. Moreover, there is a clearly legitimate purpose for the statutory disclosure, *i. e.,* furtherance of "the fair and just administration of criminal justice," *Campbell* v. *United States,* 365 U. S. 85, 92 (*Campbell I*); lawyers will not become witnesses, since statements are producible only where they can fairly be said to be the witness' own; and defense counsel will have no right to call Government lawyers to authenticate their notes. Pp. 106–107.

2. In the circumstances of this case, the Court of Appeals erred in making the initial determination that the writings in question were not producible statements. *Campbell* v. *United States,* 373 U. S. 487, 493 (*Campbell II*). Pp. 108–111.

(a) Newman's testimony was sufficient to call upon the trial judge to conduct an inquiry into the producibility of the material. Such an inquiry is now required to determine whether petitioner's Jencks Act motion should have been granted. *Campbell I, supra,* at 98–99. Pp. 108–110.

(b) It is not necessary for this Court to vacate petitioner's conviction and order a new trial, since petitioner's rights can be fully protected by a remand to the trial court for an inquiry into the producibility of the material, the supplementing of the record with findings, and the availability of appellate review should the trial court decide that a new trial is not required. Pp. 110–111.

Vacated and remanded.

Brennan, J., delivered the opinion of the Court, in which Stewart, White, Marshall, Blackmun, Rehnquist, and Stevens, JJ., joined. Stevens, J., filed a concurring opinion, in which Stewart, J., joined, *post,* p. 112. Powell, J., filed an opinion concurring in the judgment, in which Burger, C. J., joined, *post,* p. 116.

Donald C. Smaltz, by appointment of the Court, 423 U. S. 817, argued the cause and filed briefs for petitioner.

Paul L. Friedman argued the cause for the United States. With him on the brief were *Solicitor General*

Bork, Assistant Attorney General Thornburgh, Deputy Solicitor General Frey, Sidney M. Glazer, and *Marshall Tamor Golding.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents important questions of construction and administration of the Jencks Act, 18 U. S. C. § 3500.[1]

**Frank Matthew Mangan* filed a brief for the California Attorneys for Criminal Justice et al. as *amici curiae* urging reversal.

[1] The statute provides in full:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial

That statute provides that in a federal criminal prosecution, after a witness called by the United States has testified on direct examination, the court, on motion of the defendant, shall order the United States to produce any "statement," as defined in the Act, in the possession of the United States that relates to the subject matter as to which the witness has testified. The definition of "statement" in § 3500 (e) pertinent to this case is: "(1) a written statement made by said witness and signed or otherwise adopted or approved by him."

At petitioner's trial in the District Court for the District of Arizona on charges of mail fraud in violation of 18 U. S. C. § 1341, the trial judge sustained the Government's contention that certain writings of Government lawyers of conversations with the Government's key wit-

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judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

"(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

ness were "the work product of counsel," although the judge had not examined the writings. The Court of Appeals for the Ninth Circuit affirmed but on a different ground. In an unpublished memorandum opinion the Court of Appeals stated: "Apart from the question whether such notes were exempt from the Jencks Act . . . as 'work product,' they were not statements of the [witness] within the meaning of § 3500 (e)." [2] We granted certiorari limited to the Jencks Act question, 422 U. S. 1006.[3]

We hold that a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been "signed or otherwise adopted or approved" by the Government witness is producible under the Jencks Act, and is not rendered nonproducible because a Government lawyer interviews the witness and writes the "statement." We hold further that in the circumstances of this case the Court of Appeals erred in determining in the first instance that the writings in question were not "statements." We therefore vacate the judgment of the Court of Appeals and re-

[2] In the Court of Appeals' opinion the bracketed word is "defendant" rather than "witness," but this error was apparently inadvertent.

[3] The Court granted the petition "limited to Question 8 presented by the petition," 422 U. S. 1006, which reads as follows:

"Whether 18 U. S. C. § 3500, the Jencks Act, contains an 'attorney's work product exception'; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time where the witness corrected same, which notes were prepared 'only after lengthy conversations had occurred and a mutual understanding of the factual situation' had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of *Brady vs. Maryland*, [373 U. S. 83 (1963)]."

In light of our result, we need not address the *Brady* claim. See n. 15, *infra*.

mand the case to the District Court for further proceedings consistent with this opinion, following the procedure in *Campbell* v. *United States,* 365 U. S. 85 (1961) (*Campbell I*).

I

Petitioner, with Edwin S. Newman and three other codefendants, was charged in a multiple-count indictment with using the mails to defraud by means of a fraudulent scheme, which may be briefly summarized. The Financial Security Life Insurance Co., of which petitioner was president, issued single-premium annuities to various individuals; the policies purported to be fully prepaid and were used as collateral for loans. Promissory notes were accepted in lieu of the premiums, and interest on the notes was the only money paid to the company. Further, the policies were misrepresented as being free of liens or encumbrances. In fact, the policies were valueless. Petitioner concealed these facts from lenders who accepted the policies as collateral; indeed, the company refused payment of the proceeds of the policies to the lenders upon the ground of nonpayment of premiums. The three codefendants were charged with using the annuities as collateral to obtain loans. Petitioner used these "sales" of annuities to inflate the assets of the company on paper, intending eventually to sell the company.

Of the five defendants, only petitioner and Newman worked for the company. Newman agreed to plead guilty to a single count of the indictment and to testify as a Government witness. Thereupon his case was severed prior to petitioner's trial.[4] He was the key prosecution witness, revealing in great detail the operation of the fraudulent scheme and the transactions al-

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[4] The other three codefendants entered guilty pleas.

leged in the indictment. Newman signed all of the correspondence with lenders, but testified that at all times he acted pursuant to instructions from petitioner. The Government's case against petitioner consisted primarily of Newman's testimony.

Prior to the trial, which covered seven weeks starting May 22, 1973, the Government delivered to petitioner a copy of Newman's testimony before the grand jury, a memorandum of an interview with Newman conducted by a postal inspector over three years earlier, and a reporter's transcript of an interview with Newman conducted by two Government lawyers on May 11, 1973. The May 11 transcript indicated that the lawyers intended to conduct further interviews with Newman concerning other transactions. At the trial, on cross-examination on June 27, Newman disclosed that he had met with the lawyers on May 13, June 9 and 10, and part of each day from June 16 through June 27. Unlike the May 11 meeting, no reporter was present. Newman's forthcoming trial testimony was the subject of the discussion, but the notes of the interview were handwritten by the lawyers. Significantly, however, Newman testified, speaking of the May 13 interview:

> "Q. And as they took notes, did they sometimes question you about what you had just said to make sure that they got it down correctly?
>
> "A. They may have. I don't really remember that that was part of the pattern."

And again, speaking of the June 9 and June 10 interviews, Newman testified:

> "Q. As you were explaining—or discussing your testimony, did anyone take notes?
>
> "A. The two gentlemen took notes.
>
> "Q. Were they occasionally read back to you to

see whether or not they correctly understood what you were saying?

"A. Probably from time to time.

"Q. All right, sir. Did you either correct them or say, 'Yes, that's right,' or 'No, that's not right because it went this way, I believe,' words to that effect?

"A. Yes, that would happen."

Finally, he described this as the pattern followed at all remaining meetings with the lawyers.

At this point petitioner moved, pursuant to § 3500 (b), for an order directing the United States to deliver the notes to the defense. The trial judge, without waiting to hear from the Government, denied the motion on the ground that the material was "attorney's work product." Petitioner renewed the motion the following day, coupling the motion with a request that the Government be ordered to deliver the material for *in camera* inspection by the court. The motions were denied, but with leave to submit a memorandum in support of the motions. Petitioner's memorandum argued against the existence of a "work product" exception and renewed the request for an order directing delivery of the material for *in camera* inspection. Thereafter, the Government orally argued that the material in question was not producible as "the work product of counsel," and the judge again denied petitioner's motions. On appeal, the material, which totaled 237 pages and was not part of the District Court record, was lodged with the Court of Appeals.

II

We see nothing in the Jencks Act or its legislative history that excepts from production otherwise producible statements on the ground that they constitute "work

product" of Government lawyers. It is not clear from its brief that the Government argues to the contrary;[5] rather, the Government's principal contention seems to be that in any event the principles underlying the "work product" doctrine suggest a narrow construction of "statement" as not to include a lawyer's "work product" even though it fits the statutory definition of a producible statement. We reject the argument, since the plain language of the statute, fully buttressed by legislative history, allows no room for the tendered exception.

The Government maintains that the Act can be read to include only statements given to a Government investigative or law enforcement agent during an investigation, and not those given to a Government trial attorney in preparation for trial. This contention rests in part on the original language of § 3500 (a), which postponed discovery, until after a witness' direct examination, of statements of the witness made "to an agent of the Government."[6] But nothing in the Act even remotely sug-

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[5] "We believe that there is no broad attorney's work-product exception to the Jencks Act that shelters statements relating to the subject matter of the testimony of a witness merely because the statements were obtained by a government attorney rather than a government investigator. For if what is involved is truly the statement of the *witness*—that is, a statement written and signed or otherwise formally adopted or approved by him or a substantially verbatim recording of an oral statement—by definition it does not contain the mental impressions, trial strategy or personal beliefs of an attorney. Such material thus implicates only tangentially, if at all, the policies underpinning the work product doctrine." Brief for United States 27–28. But an inconsistent position is suggested, *id.*, at 19–20, 49–53, and n. 32.

[6] The phrase "to an agent of the Government" was deleted from § 3500 (a) in 1970 when the Act was amended to add grand jury statements to the statutory definition of "statement." Pub. L. 91–452, § 102, 84 Stat. 926. Petitioner recognizes that the deletion was not intended otherwise to expand the disclosure requirements of the Act.

gests that "an agent of the Government" excludes Government lawyers.[7] In any event, § 3500 (b) requires production of "any statement (as hereinafter defined) of the witness in the possession of the United States" without any limitation to statements made "to an agent of the Government." Section 3500 (e)(1) defines a producible statement as one "made by said witness and signed or otherwise adopted or approved by him" with no limitation that it be a statement made "to an agent of the Government."

The Government also suggests that Congress enacted the Jencks Act to limit the scope of this Court's decision

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[7] The Government cites a statement by Senator Javits that "this bill is intended to relate only to statements or reports of government agents, and we understand those to mean enforcement officials," 103 Cong. Rec. 15927 (1957), and argues that "[i]n common parlance a government trial attorney is not considered an 'enforcement official.'" No justification is advanced, and we can think of none, for excluding some Department of Justice employees, but not others, from the category of enforcement officials. In any event the Javits statement is a weak reed upon which to rest the argument. Senator Javits' statement had nothing whatever to do with the kind of official to whom a witness' statement is given; he was responding to an inquiry as to the officials who must respond to an order to deliver materials:

"MR. WATKINS. Suppose the information is in the files of the United States marshal for the district.

"MR. JAVITS. The normal discovery rules would apply, because this bill is intended to relate only to statements or reports of Government agents, and we understand those to mean enforcement officials." *Ibid.*

And that his use of the description "enforcement officials" was not meant as a limitation is crystal clear in his final response to the inquiry:

"MR. JAVITS. I am willing to say this to the Senator: I would be glad, for myself, to apply the provisions of this bill to all officials of the Federal Government. If the words do go that far, it is perfectly all right with me, and I know exactly what I am voting for. I think they do." *Ibid.*

in *Jencks* v. *United States,* 353 U. S. 657 (1957), and since *Jencks* involved statements to an investigative agency—the Federal Bureau of Investigation—Congress intended to require production only of statements of witnesses made to investigative agencies, not those given to prosecutors in preparation for trial.

That the Act was not intended to limit the *Jencks* decision is apparent from its legislative history. Rather than limiting, the Act "reaffirms [*Jencks*] in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial." S. Rep. No. 981, 85th Cong., 1st Sess., 3 (1957). See H. R. Rep. No. 700, 85th Cong., 1st Sess., 4 (1957); *Campbell I,* 365 U. S., at 92. Moreover, Congress was concerned, not with the *Jencks* decision itself, but with "misinterpretations and misunderstandings" in application of *Jencks* in district courts and courts of appeals. S. Rep. No. 981, *supra,* at 3–5, 7–12; H. R. Rep. No. 700, *supra,* at 2–3, 6. The concern was that misapplication of *Jencks* would permit defendants "to rove at will through Government files." S. Rep. No. 569, 85th Cong., 1st Sess., 3 (1957). See *Palermo* v. *United States,* 360 U. S. 343, 350 (1959). The House committee expressed its goal as that of preventing defendants from "rummag[ing] through confidential information containing matters of public interest, safety, welfare, and national security." H. R. Rep. No. 700, *supra,* at 4.[8]

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[8] The Government's assertion that Congress was concerned that "a government trial lawyer's notes made in preparation for trial not be routinely disclosed to the defense" is totally without support in the legislative history and the Government cites none. On the contrary, the Government expressed its agreement with the disclosure of materials within the definition of § 3500 (e), without suggesting that a Government lawyer's notes are protected. See H. R. Rep. No.

The objective of preventing "rummaging" plainly adds no support to the argument that Congress meant that distinctions should be made based upon the occupation of the Government official to whom the witness gave the statement.[9]

The Government urges as a "primary reason" for adopting its construction that it is unfair to allow defense counsel to impeach a witness by using a statement that "could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." *Palermo* v. *United States, supra,* at 350. The short answer to that argument is that writings must be produced only to the extent they are "statements" as defined; further, § 3500 (c) expressly provides a procedure for excising any matter not relevant to the witness' direct testimony.

For the same reasons, we see no merit in the Government's argument that, without an exception, disclosure of statements taken by Government lawyers may undermine the policies that gave rise to the work-product doctrine. See *United States* v. *Nobles,* 422 U. S. 225, 236–239

700, 85th Cong., 1st Sess., 7–12 (1957) (statement of Attorney General Brownell).

[9] It is also urged that notes of an attorney of an interview will differ from those taken by investigative agents. The trial attorney, it is argued, is more likely to record mental impressions and trial strategy and take notes only for the purpose of personal recollection, a "highly individualistic matter." The investigative agent, on the other hand, has assertedly greater concern with recording a witness' statement completely, because he is gathering facts, "raw data," to be used by others. Those arguments may be relevant to the determination whether given materials constitute a "statement," but the distinction in this respect cannot, in the face of the Act's broad and inclusive definition of "statement," make the obligation to produce turn on the title of the official who takes the statement. In addition, the distinction would be recognized in proper administration of the Act. See *infra,* at 106.

(1975); *Hickman* v. *Taylor,* 329 U. S. 495 (1947). Proper application of the Act will not compel disclosure of a Government lawyer's recordation of mental impressions, personal beliefs, trial strategy, legal conclusions, or anything else that "could not fairly be said to be the witness' own" statement. "If a government attorney has recorded only his own thoughts in his interview notes, the notes would seem both to come within the work product immunity and to fall without the statutory definition of a 'statement.'" *Saunders* v. *United States,* 114 U. S. App. D. C. 345, 349, 316 F. 2d 346, 350 (1963) (Reed, J.).[10] Furthermore, if a witness has for some reason "adopted or approved" a writing containing trial strategy or similar matter, such matter would be excised under § 3500 (c) as not relating to the subject matter of the witness' testimony or direct examination. Thus, the primary policy underlying the work-product doctrine—*i. e.,* protection of the privacy of an attorney's mental processes, *United States* v. *Nobles, supra,* at 238—is adequately safeguarded by the Jencks Act itself.

The Government contends that production of statements written by Government lawyers "forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witness' remarks." *Hickman* v. *Taylor, supra,* at 513. Although the risk of such testimony supported approbation of the work-product doctrine in *Hickman,* the nature of the disclosure provided by the Jencks Act differs significantly. In *Hickman* the Court concluded that there was no showing of necessity strong enough to justify the requested disclosure: there was a danger of inaccuracy and untrustworthiness, there

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[10] For the same reason, we are not persuaded that acceptance of a definition of "statement" that includes prosecutors' notes "might reveal the inner workings of the investigative process and thereby injure the national interest." *Palermo* v. *United States,* 360 U. S. 343, 350 (1959).

was "[n]o legitimate purpose," and use of the attorney's words for impeachment would have made the attorney a witness rather than an officer of the court. 329 U. S., at 512–513. First, although there is some risk that a witness' words will be distorted in notes taken by a Government lawyer, see *Palermo* v. *United States,* 360 U. S., at 352, there is no such danger where a witness has adopted or approved the lawyer's notes. Second, there is a clearly legitimate—and congressionally recognized—purpose for disclosure under the Jencks Act. The Act requires disclosure of all statements for use in impeaching witnesses and "is thus designed to further the fair and just administration of criminal justice." *Campbell I,* 365 U. S., at 92. Third, the lawyer is not called upon to be a witness, since statements are produced only where they can "fairly be said to be the witness' own." Finally, we cannot accept the Government's claims that defense counsel will have a right to call Government lawyers as witnesses to "authenticate" their notes,[11] nor do we find realistic the Government's fear that a lawyer will "feel impelled" to take the stand.[12]

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[11] There is no reason to require or permit such authentication where the district court has already determined that a writing has been adopted or approved by a Government witness.

[12] The Government suggests that there may be a need for testimony to explain the meaning of a lawyer's notes. But any explanation by the lawyer would be meaningless if the notes as written have been adopted or approved by the witness. Further, the Government asserts that a lawyer may want to testify to contradict his witness. Such a desire, we are told, is created where a witness repudiates some part of the notes that is inconsistent with the witness' trial testimony. Once the court has found that the witness adopted or approved the lawyer's writings, further testimony—either by the lawyer or the witness—as to whether the statement was made is repetitive and could be excluded by the court in its discretion. Fed. Rule Evid. 403. In addition, if the witness claims that he was being truthful in the statement and not at trial, or vice

We therefore conclude that the District Court erred in holding that the work-product doctrine bars production of writings otherwise producible under the Jencks Act.[13]

III

The Court of Appeals erred in undertaking to make the initial determination whether the materials constituted producible "statements." If that function may ever be properly undertaken by a court of appeals, the Court of Appeals should not have attempted to make the determination in this case. *Campbell* v. *United States,* 373 U. S. 487, 493 (1963) (*Campbell II*).

We have recognized that a Government objection to production may require that the trial court inspect documents or hold a hearing to gather extrinsic evidence bearing on the extent to which the documents are statements producible under § 3500.[14] *Campbell I, supra,* at

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versa, or simply admits the inconsistency, we see no compelling motivation for testimony by the Government lawyer who wrote the statement; the statement used to impeach the witness is not the lawyer's, but the witness'.

The Government also urges that the risk of forcing lawyers to testify would be eliminated by construing the Act to require written adoption or approval "comparable to a signature." We see no realistic risk for the reasons stated above. Furthermore, we have not discovered any meaningful legislative history to support such a reading.

[13] The Courts of Appeals that have considered the applicability of the "work product" doctrine to the Jencks Act have uniformly reached the same conclusion. *Saunders* v. *United States,* 114 U. S. App. D. C. 345, 349, 316 F. 2d 346, 350 (1963) (Reed, J.); *United States* v. *Aviles,* 315 F. 2d 186, 191 (CA2 1963); *United States* v. *Hilbrich,* 341 F. 2d 555, 557 (CA7), cert. denied, 381 U. S. 941 (1965); *United States* v. *Smaldone,* 484 F. 2d 311, 317 (CA10 1973), cert. denied, 415 U. S. 915 (1974).

[14] Some courts have suggested that the trial court has an "affirmative duty" to secure the necessary evidence. *E. g., Saunders* v. *United States, supra,* at 348, 316 F. 2d, at 349; *United States* v. *Chitwood,*

92–93; *Palermo* v. *United States, supra,* at 354–355; cf. *Campbell II, supra,* at 493. In *Campbell I* the Court unanimously concluded that the trial judge was obliged to conduct some inquiry into the circumstances of the witness' interview there in question. 365 U. S., at 95; *id.,* at 107–108 (Frankfurter, J., dissenting in part and concurring in result in part). The circumstances of this case compel the same conclusion. Newman's testimony raised a sufficient question under the Act to require the trial judge to conduct such an inquiry, and since we hold that the trial judge erred in exempting the material from production as attorneys' "work product," a remand for such an inquiry by the District Court is required to determine whether petitioner's motion should have been granted.[15]

The necessity for a hearing in the District Court is highlighted by developments since our grant of the petition for certiorari. The Solicitor General has discovered that 40 of the 237 pages of material are not notes of Government lawyers but handwritten statements of Newman himself.[16] Petitioner contends that the failure of the Government to turn over those 40 pages constitutes error requiring reversal of his conviction without more.[17]

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457 F. 2d 676, 678 (CA6 1972); *United States* v. *Keig,* 320 F. 2d 634, 637 (CA7 1963); *Ogden* v. *United States,* 303 F. 2d 724, 734 (CA9 1962).

[15] Pending the result of the proceedings on remand, we decline to examine the 237 pages of material. That is initially a task for the District Judge. For that reason any disposition of the *Brady* issue raised by petitioner, see n. 3, *supra,* must be deferred pending the District Court's inquiry on remand.

[16] After this discovery the Solicitor General delivered all 237 pages of material to petitioner's counsel. On oral argument he advised the Court that this disclosure was not intended as a concession that the material was producible under the Jencks Act.

[17] The Government argues that the issues pertaining to the notes written by Newman are beyond the scope of our grant of certiorari,

The Government, although conceding that these 40 pages contain "statements," argues that they nevertheless were not producible. The Government contends that Newman wrote the 40 pages after completing his direct testimony in order to aid the prosecution's cross-examination of a defense witness, and thus are not producible because not in existence at the time of petitioner's motion to produce,[18] but the Government admits that these assertions are not based on facts in the record. Any inquiry regarding them is not for this Court but for the District Court on remand. The same is true of the claim that in any event the contents of the 40 pages deal largely, if not entirely, with matter other than Newman's direct testimony.

As to the remainder of the 237 pages, there are other issues to be resolved on remand. For example, it will be necessary to determine whether the prosecutors' notes were actually read back to Newman and whether he adopted or approved them.[19] In addition, the court may

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which was limited to the question whether there is an attorney's work-product exception to the Jencks Act. See n. 3, *supra.* But petitioner was not aware at the time of filing his petition for review that 40 pages of the notes were written by Newman, and the petition obviously was intended to cover the full 237 pages of papers. In that circumstance we shall treat the questions raised by the Newman notes as subsumed in the question presented.

[18] Another matter for the District Court is the parties' dispute whether there was a proper Jencks request when Newman testified on rebuttal.

[19] Every witness interview will, of course, involve conversation between the lawyer and the witness, and the lawyer will necessarily inquire of the witness to be certain that he has correctly understood what the witness has said. Such discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer's notes within § 3500 (e)(1), which is satisfied only when the witness has "signed or otherwise adopted or approved" what the lawyer has written. This requirement clearly is not met

have to consider whether the notes were in existence at the time of petitioner's motion.[20]

We of course intimate no view whether production of any of the 237 pages of material was required in this case. That determination is to be made by the District Court. We therefore conclude that the proper disposition of this case is that of *Campbell I, supra,* at 98–99. Petitioner is entitled to a redetermination of his motion for the production of the 237 pages of material. But we do not think that this Court should vacate his conviction and order a new trial, since petitioner's rights can be fully protected by a remand to the trial court with direction to hold an inquiry consistent with this opinion. The District Court will supplement the record with findings and enter a new final judgment of conviction if the court concludes after the inquiry to reaffirm its denial of petitioner's motion. This procedure will preserve petitioner's opportunity to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the material, or part of it, to petitioner, and that the error was not harmless,[21] the District Court will

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when the lawyer does not read back, or the witness does not read, what the lawyer has written.

[20] See n. 18, *supra.* By noting some of the issues that must be dealt with on remand—we hope we have set forth the most significant—we do not intend to limit the remand proceeding. It may be that further issues, heretofore overlooked or raised by evidence adduced in the remand proceeding, will also be presented for consideration.

[21] Since courts cannot "speculate whether [Jencks material] could have been utilized effectively" at trial, *Clancy* v. *United States,* 365 U. S. 312, 316 (1961), the harmless-error doctrine must be strictly applied in Jencks Act cases. *Campbell* v. *United States,* 373 U. S. 487, 497 n. 14 (1963) (*Campbell II*); *Rosenberg* v. *United States,* 360 U. S. 367, 371 (1959); *id.,* at 376 (BRENNAN, J., dissenting). See *Kotteakos* v. *United States,* 328 U. S. 750, 765 (1946); *Gordon* v. *United States,* 344 U. S. 414, 422–423 (1953).

vacate the judgment of conviction and accord petitioner a new trial.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART joins, concurring.

The statutory definition of the term "statement" was intended by Congress to describe material that could be fairly used to impeach the testimony of a witness. A major purpose of the statute was to exclude from that definition various kinds of material which lower federal courts had been requiring the Government to produce because they had misinterpreted the narrow holding of the *Jencks* case itself.[1] That case, like the statute, applies only to material that may be used legitimately for impeachment.

The statutory definition is in two parts, encompassing originals of statements made by the witness (18 U. S. C. § 3500 (e)(1)) and verbatim or substantially verbatim copies (§ 3500 (e)(2)). Whether a particular writing is an original or a copy, it is not a statutory "statement" unless it reflects the witness' own words fully and without distortion.[2] If it is truly an impeaching statement,

[1] See H. R. Rep. No. 700, 85th Cong., 1st Sess., 2–3 (1957); *Palermo* v. *United States*, 360 U. S. 343, 345–346, and n. 3.

[2] Congress was specifically concerned about the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral interview. We emphasized this concern in a discussion of the legislative history of § 3500 (e) (2) which is unquestionably relevant to the issue before us even though we are directly concerned with § 3500 (e) (1):

"It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should

it is in a form which either party could use to prevent the witness from testifying to facts inconsistent with those stated to the interviewer.[3]

Frequently such statements are in the form of narratives or summaries actually drafted by the interviewer

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be made available to the defense for purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear from the continuous congressional emphasis on 'substantially verbatim recital,' and 'continuous, narrative statements made by the witness recorded verbatim, or nearly so . . . ,' see Appendix B, *post,* p. 358, that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions." *Palermo* v. *United States, supra,* at 352–353.

[3] Although typically at trial it is defense counsel who tries to impeach a Government witness, it is important to remember that there are many situations in which the prosecution may also have the right to confront a recalcitrant, forgetful, or perjurious witness with a prior statement in order to induce him to tell the whole truth and nothing but the truth. In deciding whether a writing is a Jencks Act statement, it is therefore important for the district court to keep in mind the reason for its production.

"It has always been, and will remain, the practice of the FBI and every other Federal law enforcement agency to take written statements of important witnesses. This is vital not only to insure the accuracy of the statement at the time it is made but to tie the witness down so that he will stand by the statement which he has read and signed." H. R. Rep. No. 700, *supra,* at 6.

and signed or otherwise unequivocally adopted or approved by the prospective witness. In such instances the document is equally a statement whether the interview was conducted by a layman or a lawyer. The question is simply whether the approval by the witness is sufficiently unambiguous to make it fair for either party at a subsequent trial to use that statement to refresh his recollection or to impeach his testimony.[4]

The writings which are made by a lawyer when he is outlining his examination of a witness are of a much different character and are intended to serve a different purpose. They may include his own impressions of the case, his proposed line of questioning, comments on his trial strategy, references to questions of admissibility, legal theory, and a host of other matters. Such comments in the prosecutor's notes may relate to the subject matter of the witness' testimony, and the witness may express approval of what the prosecutor has said about such matters. Nevertheless, it is perfectly clear that such comments by the prosecutor are not "statement[s] made by [the] witness" within the meaning of § 3500 (e)(1). In short, more than relevance to the testimony and approval by the witness is necessary to make a writing a Jencks Act statement. It must first of all be the kind of factual narrative by the witness that is usable for impeachment.

If one of the prosecutor's notes is that kind of factual comment, it is still not a statutory statement unless that specific note has been adopted or approved by the witness. For if a witness could testify, without fear of

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[4] A summary of an interview with a witness becomes that witness' own words only when adopted as such by the witness. Thus after a witness has authenticated or verified a summary it is unnecessary to determine whether it is "substantially verbatim" because by the terms of 18 U. S. C. § 3500 (e)(1) it has become the witness' own words.

contradiction, that the words used by the prosecutor were not his own, the document would not impeach his testimony and could not properly be offered for that purpose. General testimony that some of the notes taken by the prosecutor during a lengthy interrogation were read back to the witness, and that the witness sometimes assented to the prosecutor's version of what he said, would not justify a finding of approval of any particular note. Fairness to the witness demands a much stricter test of approval before he may be confronted with assertedly prior inconsistent statements.

Whether this requirement can be satisfied without the testimony of the prosecutor is a question that is not ripe for decision.[5] The possibility of the need for such testimony is a matter which the trial court may appropriately consider in determining whether any specific note is producible. For nothing in the legislative history of the Act suggests that Congress intended to authorize cross-examination of the prosecutor by defense counsel. In order to avoid the risk of unseemly testimony by trial counsel and, more importantly, in order to avoid unfairness to the witness, any determination that a portion of the prosecutor's notes is producible must be supported

[5] The problem is apt to arise when a witness has approved some but not all of what the prosecutor has said; for then it is necessary to ascertain *which* notes have been specifically approved. Normally that question would have to be answered on the basis of colloquy or testimony outside the presence of the jury. In such a hearing the notes could not be read to the witness without impairing their usefulness as impeaching evidence, see *Campbell* v. *United States,* 365 U. S. 85, 97; accordingly, there is a real danger that the lawyer's testimony may be needed if the issue is in dispute. Moreover, a finding of approval by the judge in a proceeding outside the presence of the jury would not foreclose a denial of such approval by the witness when he is on the stand. In that event, only the prosecutor's testimony or stipulation could qualify the document for use as impeaching evidence.

by a finding of unambiguous and specific approval by the witness.[6]

Since I do not understand these additional comments to be inconsistent with anything in the Court's opinion, I join that opinion.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

Petitioner, Philip Goldberg, moved that the prosecutors' notes prepared during the extensive interviews with the witness Newman be produced pursuant to the Jencks Act (Act), 18 U. S. C. § 3500. The Court remands this case with directions that the trial court determine whether the prosecutors' notes were "statements" within the meaning of the Act. This disposition is stated in the following language:

> "Newman's testimony raised a sufficient question under the Act to *require* the trial judge to conduct such an inquiry, and since we hold that the trial judge erred in exempting the material from production as attorneys' 'work product,' a remand for such an inquiry by the District Court is required to determine whether petitioner's motion should have

[6] In *Palermo* we emphasized the need for fairness to the witness: "One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness. Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." 360 U. S., at 350.

been granted." *Ante,* at 109 (emphasis added; footnote omitted).

I am in general accord with the Court's treatment of the "work product" question, but I do not agree that Newman's testimony *required* the trial judge to conduct an inquiry into producibility. Indeed, had the trial judge ruled that Newman's testimony was insufficient to justify further inquiry, rather than relying on the "work product" privilege, I would have affirmed the denial of Goldberg's motion. I write separately because my disagreement with the Court on this central point raises important questions about the proper administration of the Act. Remand is appropriate for reasons other than those voiced by the majority, however, and I concur in the Court's judgment that the case should be remanded.

I

Goldberg's motion rested solely on information elicited from Newman during cross-examination. The entire pertinent cross-examination is set out in the margin.[1]

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[1] "Q. So you met with the Government representatives on May 12, is that right?

. . . . .

"A. Yes, I met with the Government on May 12th.

"Q. And did you discuss what your testimony would be here?

"A. Yes.

"Q. Who did you discuss it with?

"A. Mr. Lebowitz, Mr. Keilp.

"Q. And did they take notes or jot down anything at all of what you were saying?

"A. Yes.

"Q. There wasn't a reporter present?

"A. No.

"Q. And as they took notes, did they sometimes question you about what you had just said to make sure that they got it down correctly?

[*Footnote 1 is continued on p. 118*]

The opinion of the Court concludes that the interchange in this limited cross-examination "raised a sufficient question under the Act to require the trial judge to conduct"

"A. They may have. I don't really remember that that was part of the pattern.

. . . . .

"Q. Did you discuss your testimony [on June 9 and 10]?

"A. With Mr. Lebowitz and Mr. Keilp?

"Q. Yes.

"A. Yes.

"Q. Was a reporter there?

"A. No.

"Q. As you were explaining—or discussing your testimony, did anyone take notes?

"A. The two gentlemen took notes.

"Q. Were they occasionally read back to you to see whether or not they correctly understood what you were saying?

"A. Probably from time to time.

"Q. All right, sir. Did you either correct them or say, 'Yes, that's right,' or 'No, that's not right because it went this way, I believe,' words to that effect?

"A. Yes, that would happen.

. . . . .

"Q. Did you meet with them on the 11th [of June]? Mondays have not been a court day thus far.

"A. Yes, I did meet with them on the 11th.

"Q. Same procedure, you talked with them, they write down what you are saying?

"A. Yes.

. . . . .

"Q. BY MR. SMALTZ: When was the next time you came back to Phoenix?

"A. Saturday the 16th.

"Q. Did you meet with the Government representative?

"A. Yes.

"Q. Same procedure?

"A. Yes.

"Q. Same questions, answers, read-backs, notes, whole bit?

"A. Yes, sir.

[*Footnote 1 is continued on p. 119*]

an inquiry into whether the prosecutors' notes were producible under subsection (e)(1). At the same time, the Court purports to recognize that interview notes, whether prepared by a prosecutor or by some other interviewer, are not routinely producible.

> "Every witness interview will, of course, involve conversation between the lawyer and the witness, and the lawyer will necessarily inquire of the witness to be certain that he has correctly understood what the witness has said. Such discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer's notes within § 3500 (e)(1), which is satisfied only when the witness has 'signed or otherwise adopted or approved' what the lawyer has written. This requirement clearly is not met when the lawyer does not read back, or the witness does not read, what the lawyer has written." *Ante,* at 110–111, n. 19.

Compare *Campbell* v. *United States,* 365 U. S. 85 (1961) (*Campbell I*), and *Campbell* v. *United States,* 373 U. S. 487 (1963) (*Campbell II*), with *Palermo* v. *United States,* 360 U. S. 343 (1959). In my view, the fact that interview notes frequently will not be produc-

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"Q. How long were you in conference with the Government representative on the 16th?

"A. Well, I have a recollection of arriving at the Federal Building a little after 1:00 o'clock. I think we met until 5 or 6.

"Q. How long on the 17th?

"A. From about 11 to 5 or so.

"Q. When was the next time that you met with Government representatives after the 17th?

"A. I have met with them during portions of each day since.

"Q. Did they go over your proposed testimony with you?

. . . . .

"A. Yes, they went over my testimony with me.

"MR. SMALTZ: Your honor, at this time, under 3500, I move for the—"

ible means that collateral proceedings into their producibility should not be required unless there is good reason to believe they may be "statements."[2] In this light, it is evident that Newman's cursory and ambiguous testimony was wholly insufficient to require the judge to interrupt the trial and conduct a collateral inquiry, for it showed nothing more than "discussions of the general substance of what the witness [had] said."

The questions asked simply failed to focus on the critical inquiry: whether a "statement" of the witness, embodied in the prosecutors' notes, had been "adopted or approved."[3] The conferences with Newman occurred from time to time over several weeks, with the prosecutors presumably taking notes at each conference. Goldberg's counsel, however, did not even ask whether notes were taken at the June 17 conference or at subsequent ones.[4] As to the June 11 meeting with Newman, counsel only asked whether notes had been taken.[5] The ques-

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[2] When the prosecutor is in possession of documents which he knows to be statutory "statements," he is required to produce them upon the defendant's motion without any showing on the part of the defendant. This opinion is addressed only to the problem that arises when the producibility of documents is disputed and the defendant seeks to obtain a collateral inquiry into the issue.

[3] Neither the Court nor the parties have considered whether the notes fall within the subsection (e)(2) definition of "a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously." 18 U. S. C. § 3500 (e)(2). The questions asked of Newman were too unfocused to raise that possibility, just as they were insufficient to elicit the type of information justifying inquiry into producibility under subsection (e)(1).

[4] The only question about the June 17 session related to its length. The only pertinent question about subsequent sessions was: "Q. Did they go over your proposed testimony with you?"

[5] "Q. Same procedure, you talked with them, they write down what you are saying?"

Newman's testimony ultimately suggested that there was in fact no meeting on June 11.

tions about the May 12 session were whether notes had been taken and, in essence, whether "discussions of the general substance" of the notes had occurred.[6] The questions about the June 9 and 10 conferences and the June 16 session were more illuminating, but only slightly. Counsel did ask whether the notes had been read back "occasionally" for commentary by Newman, but he never asked whether Newman had adopted or approved any portion of the final version of the prosecutors' notes or whether the reading back of the notes had merely elicited further discussion because Newman disputed the prosecutors' understanding.[7] The problem created by such aimless and unilluminating questions was compounded by counsel's satisfaction with vague and ambiguous answers that hardly evidenced the criti-

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[6] "Q. And did they take notes or jot down anything at all of what you were saying?

. . . . .

"Q. And as they took notes, did they sometimes question you about what you had just said to make sure that they got it down correctly?"

The latter question elicited an essentially negative response: "A. They may have. I don't really remember that that was part of the pattern."

Newman subsequently indicated that he met with the prosecutors on May 13 rather than May 12.

[7] "Q. Were they occasionally read back to you to see whether or not they correctly understood what you were saying?

"A. Probably from time to time.

"Q. All right, sir. Did you either correct them or say, 'Yes, that's right,' or 'No, that's not right because it went this way, I believe,' words to that effect?

"A. Yes, that would happen.

. . . . .

"Q. Same procedure?

"A. Yes.

"Q. Same questions, answers, read-backs, notes, whole bit?

"A. Yes, sir."

cal statutory fact of specific adoption or approval of a statement as the witness' own.[8]

A showing as generalized as this should never be sufficient to require the trial judge to conduct collateral proceedings on the producibility of prosecutors' notes. If it is, collateral inquiry always will be required, for competent prosecutors rarely will go to trial without such "discussions of the general substance" with key witnesses and the related taking of notes to be used in the examination of such witnesses.[9] Certainly this would be the case with a witness of Newman's importance. The "needless trial of collateral and confusing issues" that the Court's approach encourages is not necessary for "assuring the utmost fairness to a criminal defendant" in the administration of the Jencks Act. *Palermo* v. *United States,* 360 U. S., at 355.

II

In *Palermo* v. *United States, supra,* at 354, the Court recognized that the Act provides no procedure for resolving questions about whether a particular document is a "statement." Delineation of appropriate procedures therefore falls to the courts. To date, the cases of this Court's addressing procedures have been concerned with the nature of the collateral inquiry to be conducted by the trial judge when such inquiry is necessary. See,

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[8] See, *e. g.,* n. 5, *supra.*

[9] Indeed, only the foolish or exceptionally talented counsel will depend solely on his memory when preparing for the examination of a key witness. But the fact that counsel usually will take notes does not mean that the notes often will be "statements." Counsel rarely take down verbatim what witnesses say in these preparatory conferences. Consequently, prosecutors' notes may be expected to meet the requirements of subsection (e)(2) very infrequently. Cf. n. 3, *supra.* The notes taken will vary from cryptic "memory jogs" to full summaries of the anticipated testimony.

e. g., ibid.; Campbell I, 365 U. S. 85 (1961).[10] But, as shown above, the nature of the collateral inquiry is not the initial question faced by the trial judge. He must first determine whether *any* collateral inquiry at all is necessary. My disagreement with the Court on the adequacy of Goldberg's foundational showing in this case suggests that more attention should be focused on this distinction.

The proper administration of the Act requires that the defendant meet an initial burden of showing that collateral inquiry is necessary to protect his rights under the Act. The placing of such a burden on the defendant is consistent with the basically adversary posture of the Act, which requires production of "statements" only upon the defendant's motion. See 18 U. S. C. § 3500 (b).[11] This requirement also is appropriate because the trial should not be interrupted for collateral proceedings absent a genuine need for them. Cf. *Palermo* v. *United States, supra,* at 355.[12]

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[10] Neither *Palermo* nor *Campbell I* raised the question of what foundational showing a defendant must make to necessitate collateral proceedings. In both cases the disputed documents had been submitted for the trial judge's inspection. Attention in those cases therefore was focused on what the nature of collateral inquiry should be when such inquiry is appropriate.

[11] The adversary posture of the Act reflects "the directly opposed interests protected by the statute—the interest of the Government in safeguarding government papers from disclosure, and the interest of the accused in having the Government produce 'statements' which the statute requires to be produced." *Campbell I,* 365 U. S., at 95.

[12] An additional reason for putting such a burden on the moving defendant is that the Government's good faith in meeting its responsibilities under the Act should be presumed. Cf. *id.,* at 103–104 (Frankfurter, J., dissenting in part and concurring in result in part).

The burden on the moving defendant is not to prove the existence of a statutory "statement." The purpose of the collateral proceeding is to resolve that issue.[13] Rather, the burden is simply to establish by probative evidence—usually on cross-examination of the witness alleged to have given a statement—that there is reason to believe that a statutory "statement" may exist. Certainly more must be shown than a speculative possibility. If, as here, defendant's theory is that a prosecutor's notes meet the requirements of subsection (e)(1), questions must be asked the witness that focus on whether there was in fact an "adoption or approval" of a specific statement, rather than general concurrence in the correctness of the prosecutor's understanding of what the witness knows. Absent explicit answers to such questions that satisfy the defendant's burden, the trial judge should deny the motion for production without a collateral proceeding.

If a moving defendant meets the threshold burden of showing that a statutory "statement" may exist, the judge then must conduct a nonadversary inquiry suited to resolve the particular issue presented. *Campbell I, supra,* at 95–96; *Palermo* v. *United States, supra,* at 354–355. If the trial judge's inquiry is inadequate when inquiry is needed, it is appropriate for an appellate court to remand for further proceedings. In this case, however, the need for collateral proceedings was not

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[13] The very nature of the question in a collateral inquiry into producibility under subsection (e)(1) re-emphasizes the need for the defendant to make a showing that such a proceeding is needed. A considerable amount of time could be consumed in determining the producibility of prosecutors' notes, for it is not unusual for a diligent prosecutor to spend more time mastering the details of a key witness' knowledge and anticipated testimony than is required in the courtroom presentation of such testimony.

shown, and if the trial judge had denied Goldberg's motion on this ground the affirmance of denial by the Court of Appeals would have been appropriate.

III

In conducting collateral proceedings, when appropriate, the trial judge must be faithful to the substantive standards of producibility embodied in the Act. I agree with MR. JUSTICE STEVENS that when subsection (e)(1) is relied upon a prosecutor's notes are producible only upon a "finding of unambiguous and specific approval" of specific notes. *Ante,* at 116. In my view, such a finding depends upon the witness' having approved specific notes with the knowledge that he is formalizing a statement upon which he may be cross-examined. Nothing less is sufficiently "unambiguous" in this context. This requirement is implicit in the standards of producibility embodied in subsections (e)(1) and (e)(2). Moreover, the requirement is necessary to protect interests sought to be served by the Act.

In applying the Act to typical interview notes alleged to have been "adopted or approved" by a witness, we must remember that such notes do not fit within the core of the Act. Subsection (e)(1) includes "*written statement*[*s*] *made by* [the] witness and signed or otherwise adopted or approved by him." [14] Subsec-

[14] In *Campbell I, supra,* at 104–106, Mr. Justice Frankfurter, joined by three other Justices, expressed the view that nonverbatim interview notes were never producible under the Act because subsection (e)(1) was addressed only to documents written by the witness. This view was rejected by a majority of the Court, *id.,* at 93–94, and the majority position was reaffirmed in *Campbell II,* 373 U. S. 487 (1963). The *Campbell* majorities properly recognized that there is little difference between a formal statement drafted by the witness and one drafted by the interviewer for the witness' ap-

tion (e)(2), not relied upon in this case, requires a "substantially verbatim" reproduction of an "oral statement made by [the] witness and recorded contemporaneously." Typical interview notes are selective—even episodic—and therefore fall outside of subsection (e)(2). Even if "adopted or approved" by the witness, such notes were not written by the witness himself and therefore fall without the core of subsection (e)(1). Typical interview notes that allegedly have been "adopted or approved" thus lack important guarantees of dependability that Congress relied upon in the central concept of subsections (e)(1) and (e)(2).[15] These guarantees, it should be noted, arise partly from the sense that a witness normally would have of "going on the record" [16] when he makes a statement within the core of subsection (e)(1) or subsection (e)(2).[17] It is to supply a compa-

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proval. But the rule in *Campbell I* and *II* cannot be administered without sensitivity to the vast difference between the witness' approving a formally drafted statement and his approving far less formal interview notes. See the text, *infra,* at 126–127.

[15] Statements within the core of subsection (e)(1) have the dual guarantees of the witness' writing and his ratifying. Interview notes brought within subsection (e)(1) solely by the witness' ratification lack the former safeguard.

[16] It should not be forgotten that the Act provides for disclosure only of statements made by a "witness called by the United States." 18 U. S. C. § 3500 (b). In the ordinary course the Government in taking "statements" of such witnesses will impress upon them the probable use of the statements. Congress recognized as much, noting that one reason the Government takes statements is to "tie the witness down so that he will stand by the statement." H. R. Rep. No. 700, 85th Cong., 1st Sess., 6 (1957). The Government also may be expected to make producible statements available to such witnesses as aids to memory. See *Rosenberg* v. *United States,* 360 U. S. 367, 370 (1959).

[17] A witness would have an especially strong sense of "going on the record" in the context of subsection (e)(3), which governs a "statement . . . made by [the] witness to a grand jury." 18 U. S. C.

rable guarantee of dependability that the witness should know he is adopting the interview notes as a formalized statement.[18]

This exacting standard is required by the Act's attempt to assure fairness to witnesses and the Government as well as to defendants. See *Palermo* v. *United States,* 360 U. S., at 350; *Campbell I,* 365 U. S., at 95. As every trial lawyer knows, the testimony given in court rarely conforms precisely to what the witness

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§ 3500 (e)(3). Interestingly, Congress has required somewhat less in the way of recording safeguards under subsection (e)(3) than under subsections (e)(1) and (e)(2). See n. 18, *infra.* Presumably this is because procedural safeguards seem less necessary as the formality of the "statement" increases. This, of course, further supports the requirement elaborated in the text.

[18] The basic notion that the Act, at least at its core, contemplates a formalized statement finds additional support in subsection (e)'s definitional approach. In defining "statement" as used in subsections (b), (c), and (d), subsections (e)(1), (e)(2), and (e)(3) use the word "statement":

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

"(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

When it chose this language, Congress was not unaware that to lawyers "statement" connotes a formalized recordation of views:

"It has always been, and will remain, the practice of the FBI and every other Federal law enforcement agency to take written statements of important witnesses. This is vital not only to insure the accuracy of the statement at the time it is made but to tie the witness down so that he will stand by the statement which he has read and signed." H. R. Rep. No. 700, *supra,* at 6.

has said prior to trial in interviews with counsel. This is true in part because lengthy exploratory interviews often are required to refresh the witness' memory sufficiently to allow him to reconstruct events that may have transpired long before.[19] Such interviews and the related note taking serve to distill the essence of what the witness knows and to identify the relevant. The Act was not designed to allow a witness to be impeached by every arguable variation between his trial testimony and notes written by the prosecutor and casually approved by the witness during this process. The witness may have expressed only general assent to the prosecutor's understanding without any consciousness that he had to be ready to stand by every word in or nuance conveyed by the prosecutor's notes. If notes are producible on a showing of less than knowing adoption as a formal statement, honest and reliable witnesses will be postured wrongly before the jury as having made inconsistent statements. This is unfair to the witness, and it unduly handicaps the Government's efforts to convict guilty defendants.[20]

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[19] It also is true because in the absence of unique powers of recall no witness can repeat verbatim what he has said previously in long interviews. This is not to suggest that such deviations indicate that the basic substance of the witness' testimony changes. Precision as to some facts may be expected (*e. g.*, whether the witness was present when the bank robbery occurred), but some variations are inevitable in one's memory—and the articulation thereof—with respect to details (*e. g.*, the precise time sequence of collateral events, the exact words used by actors or other witnesses).

[20] Such a practice also would be unfair to the individual prosecutor. Without guidance as to what is producible he could never know which of his notes might be subject to court order, and he might well fail to take sufficient care in getting a witness' focused approval. Again, in the core area of subsection (e)(1) and in subsection (e)(2) the prosecutor is not faced with such uncertainty. He knows, for example, that if he elects to record or transcribe an

IV

For the reasons expressed in Parts I and II, the trial judge was entitled to deny Goldberg's motion without conducting a collateral inquiry. But he did not deny the motion because of the insufficient foundational showing. Rather, he ruled that the "work product" privilege protected the prosecutors' notes. Goldberg's counsel may not have sought to supplement his foundational showing because he had been led reasonably to believe that he had carried the burden of showing the necessity of an inquiry, and that the judge's denial was based solely on a mistaken view as to the "work product" privilege.[21] For this reason, I concur in the judgment to remand.

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entire interview with a witness, the recording or transcription will be a subsection (e)(2) statement. Such predictability was one of the goals of the Act.

[21] On the day after the trial judge originally denied the motion for production, Goldberg renewed his motion for disclosure orally. The following colloquy transpired:

"THE COURT: . . . Did you find a case that says they are compellable?

"MR. SMALTZ: No, sir, but I didn't find one that says they are not. And the Jencks Act—

"THE COURT: Tell you what you do, Mr. Smaltz. We are going to go ahead with the jury trial this morning and we are going to be here at least, from what you have both told me, another ten days, and over the weekend you can prepare whatever kind of a memorandum you want to give me on Monday that the Government can respond to Monday afternoon, and I will take a look at it and let's go on with the jury trial this morning.

"MR. SMALTZ: Well, all right, but one other—Okay, I'm happy to do that, Your Honor, except would you, at least, consider ordering the Government to make available for your in camera inspection their notes?

"THE COURT: I will order the Government to get their notes together and have them available in case an order is made, and I will see your memorandum first.

"MR. SMALTZ: All right, sir, thank you. I am ready to go."

BEER ET AL. *v.* UNITED STATES ET AL.

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

No. 73-1869. Argued March 26, 1975—Reargued November 12, 1975—Decided March 30, 1976

The 1954 New Orleans City Charter provides for a seven-member city council, with one member being elected from each of five councilmanic districts, and two being elected by the voters of the city at large. In 1961 the council, as it was required to do after each decennial census, redistricted the city based on the 1960 census so that in one councilmanic district Negroes constituted a majority of the population but only about half of the registered voters, and in the other four districts white voters outnumbered Negroes. No Negro was elected to the council from 1960 to 1970. After the 1970 census the council devised a reapportionment plan, under which there would be Negro population majorities in two councilmanic districts and a Negro voter majority in one. Section 5 of the Voting Rights Act of 1965 prohibits a State or political subdivision subject to § 4 of the Act (as New Orleans is) from enforcing a proposed change in voting procedures unless it has obtained a declaratory judgment from the District Court of the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or has submitted the change to the Attorney General and he has not objected to it. After the proposed plan had been objected to by the Attorney General, New Orleans sought a declaratory judgment in the District Court. That court refused to allow the plan to go into effect, holding that it would have the effect of abridging Negro voting rights, and that moreover the plan's failure to alter the city charter provision for two at-large seats in itself had such effect. *Held:*

1. Since § 5's language clearly provides that it applies only to proposed changes in voting procedures, and since the at-large seats existed without change since 1954, those seats were not subject to review under § 5. The District Court consequently erred in holding that the plan could be rejected under § 5 solely because it did not eliminate the two at-large seats. Pp. 138-139.

2. A legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the

electoral franchise cannot violate § 5 unless the new apportionment itself so discriminates racially as to violate the Constitution. Applying this standard here where, in contrast to the 1961 apportionment under which none of the five councilmanic districts had a clear Negro voting majority and no Negro had been elected to the council, Negroes under the plan in question will constitute a population majority in two of the five districts and a clear voting majority in one, it is predictable that by bloc voting one and perhaps two Negroes will be elected to the council. The District Court therefore erred in concluding that the plan would have the effect of denying or abridging the right to vote on account of race or color within the meaning of § 5. Pp. 139–142.

374 F. Supp. 363, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, *post*, p. 143. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 145. STEVENS, J., took no part in the consideration or decision of the case.

James R. Stoner reargued the cause for appellants. With him on the brief were *Blake G. Arata, Ernest L. Salatich, James R. Treese,* and *Ernest L. Ruffner.*

Deputy Solicitor General Wallace reargued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Pottinger, John P. Rupp, Brian K. Landsberg,* and *Walter W. Barnett. Stanley A. Halpin, Jr.,* reargued the cause for appellees Jackson et al. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Eric Schnapper,* and *Wiley Branton.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 5 of the Voting Rights Act of 1965 [1] prohibits

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[1] Section 5 provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon

a State or political subdivision subject to § 4 of the Act [2] from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with re-

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determinations made under the first sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the third sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *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, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the

[*Footnote 2 is on p. 133*]

spect to voting different from that in force or effect on November 1, 1964," unless it has obtained a declaratory judgment from the District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or has submitted the proposed change to the Attorney General and the Attorney General has not objected to it. The constitutionality of this procedure was upheld in *South Carolina* v. *Katzenbach,* 383 U. S. 301, and it is now well established that § 5 is applicable when a State or political subdivision adopts a legislative reapportionment plan. *Allen* v. *State Board of Elections,* 393 U. S. 544; *Georgia* v. *United States,* 411 U. S. 526.

The city of New Orleans brought this suit under § 5 seeking a judgment declaring that a reapportionment of New Orleans' councilmanic districts did not have the purpose or effect of denying or abridging the right to vote on account of race or color.[3] The District Court

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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 event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 79 Stat. 439, as amended, 89 Stat. 402, 404, 42 U. S. C. § 1973c (1970 ed., Supp. V).

[2] 42 U. S. C. § 1973b (1970 ed. and Supp. V). Louisiana and its political subdivisions are subject to the provisions of § 4. 30 Fed. Reg. 9897 (1965).

[3] The action was actually brought on behalf of the city of New Orleans by six of the seven members of its city council. For con-

entered a judgment of dismissal, holding that the new reapportionment plan would have the effect of abridging the voting rights of New Orleans' Negro citizens. 374 F. Supp. 363. The city appealed the judgment to this Court, claiming that the District Court used an incorrect standard in assessing the effect of the reapportionment in this § 5 suit. We noted probable jurisdiction of the appeal. 419 U. S. 822.

I

New Orleans is a city of almost 600,000 people. Some 55% of that population is white and the remaining 45% is Negro. Some 65% of the registered voters are white, and the remaining 35% are Negro.[4] In 1954, New Orleans adopted a mayor-council form of government. Since that time the municipal charter has provided that the city council is to consist of seven members, one to be elected from each of five councilmanic districts, and two to be elected by the voters of the city at large. The 1954 charter also requires an adjustment of the boundaries of the five single-member councilmanic districts following each decennial census to reflect population shifts among the districts.

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venience the appellants sometimes are referred to in this opinion as New Orleans or the city.

The defendants in the suit were the United States and the Attorney General of the United States. A group of Negro voters of New Orleans intervened on the side of the defendants in the District Court.

[4] The difference in the two figures is due in part to the fact that proportionately more whites of voting age are registered to vote than are Negroes and in part to the fact that the age structures of the white and Negro populations of New Orleans differ significantly—72.3% of the white population is of voting age, but only 57.1% of the Negro population is of voting age. See U. S. Civil Rights Commission, The Voting Rights Act: Ten Years After, pp. 368, 383.

In 1961, the city council redistricted the city based on the 1960 census figures. That reapportionment plan established four districts that stretched from the edge of Lake Pontchartrain on the north side of the city to the Mississippi River on the city's south side. The fifth district was wedge shaped and encompassed the city's downtown area. In one of these councilmanic districts, Negroes constituted a majority of the population, but only about half of the registered voters. In the other four districts white voters clearly outnumbered Negro voters. No Negro was elected to the New Orleans City Council during the decade from 1960 to 1970.

After receipt of the 1970 census figures the city council adopted a reapportionment plan (Plan I) that continued the basic north-to-south pattern of councilmanic districts combined with a wedge-shaped, downtown district. Under Plan I Negroes constituted a majority of the population in two districts, but they did not make up a majority of registered voters in any district. The largest percentage of Negro voters in a single district under Plan I was 45.2%. When the city submitted Plan I to the Attorney General pursuant to § 5, he objected to it, stating that it appeared to "dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts." He also expressed the view that "the district lines [were not] drawn as they [were] because of any compelling governmental need" and that the district lines did "not reflect numeric population configurations or considerations of district compactness or regularity of shape."

Even before the Attorney General objected to Plan I, the city authorities had commenced work on a second plan—Plan II.[5] That plan followed the general north-

[5] The decision to draft a new plan was in large part attributable to the opposition to Plan I expressed by the residents of Algiers—

to-south districting pattern common to the 1961 apportionment and Plan I.[6] It produced Negro population majorities in two districts and a Negro voter majority (52.6%) in one district. When Plan II was submitted to the Attorney General, he posed the same objections to it that he had raised to Plan I. In addition, he noted that "the predominantly black neighborhoods in the city are located generally in an east to west progression," and pointed out that the use of north-to-south districts in such a situation almost inevitably would have the effect of diluting the maximum potential impact of the Negro vote. Following the rejection by the Attorney General of Plan II, the city brought this declaratory judgment action in the United States District Court for the District of Columbia.

The District Court concluded that Plan II would have the effect of abridging the right to vote on account of race or color.[7] It calculated that if Negroes could elect city councilmen in proportion to their share of the city's registered voters, they would be able to choose 2.42 of the city's seven councilmen, and, if in proportion to their share of the city's population, to choose 3.15 councilmen.[8] But under Plan II the District Court concluded

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that part of New Orleans located south of the Mississippi River. The residents of Algiers have a common interest in promoting the construction of an additional bridge across the river. They had always been represented by one councilman, and they opposed Plan I primarily because it divided Algiers among three councilmanic districts.

[6] The opposition to Plan I in Algiers, see n. 5, *supra,* was quieted in Plan II by placing all of that section of the city in one councilmanic district.

[7] The District Court did not address the question whether Plan II was adopted with such a "purpose." See n. 1, *supra.*

[8] This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legisla-

that, since New Orleans' elections had been marked by bloc voting along racial lines, Negroes would probably be able to elect only one councilman—the candidate from the one councilmanic district in which a majority of the voters were Negroes. This difference between mathematical potential and predicted reality was such that "the burden in the case at bar was at least to demonstrate that nothing but the redistricting proposed by Plan II was feasible." 374 F. Supp., at 393. The court concluded that "[t]he City has not made that sort of demonstration; indeed, it was conceded at trial that neither that plan nor any of its variations was the City's sole available alternative." *Ibid.*[9]

As a separate and independent ground for rejecting Plan II, the District Court held that the failure of the plan to alter the city charter provision establishing two at-large seats had the effect in itself of "abridging the right to vote . . . on account of race or color." As the court put it: "[T]he City has not supported the choice of at-large elections by any consideration which would sat-

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tive bodies in proportion to their number in the general population. See *Whitcomb* v. *Chavis,* 403 U. S. 124, 149. It is worth noting, however, that had the District Court applied its mathematical calculations to the five seats that were properly subject to its scrutiny, see Part II–A of text, *infra,* it would have concluded on the basis of registered voter figures that Negroes in New Orleans had a theoretical potential of electing 1.7 of the five councilmen. A realistic prediction would seem to be that under the actual operation of Plan II at least one and perhaps two Negro councilmen would in fact be elected. See *infra,* at 142.

[9] At various points in its 40-page opinion the District Court described its understanding of the statutory criteria in terms somewhat different from those quoted in the text above. Since, as will hereafter appear, our understanding of the meaning of § 5 does not in any event coincide with that of the District Court, no purpose would be served by isolating and separately examining the various verbalizations of the statutory criteria contained in its opinion.

isfy the standard of compelling governmental interest, or the need to demonstrate the improbability of its realization through the use of single-member districts. These evaluations compel the conclusion that the feature of the city's electoral scheme by which two councilmen are selected at large has the effect of impermissibly minimizing the vote of its black citizens; and the further conclusion that for this additional reason the city's redistricting plan does not pass muster." *Id.*, at 402. (Footnotes omitted.)

The District Court therefore refused to allow Plan II to go into effect. As a result there have been no councilmanic elections in New Orleans since 1970, and the councilmen elected at that time (or their appointed successors) have remained in office ever since.

II

A

The appellants urge, and the United States on reargument of this case has conceded, that the District Court was mistaken in holding that Plan II could be rejected under § 5 solely because it did not eliminate the two at-large councilmanic seats that had existed since 1954. The appellants and the United States are correct in their interpretation of the statute in this regard.

The language of § 5 clearly provides that it applies only to proposed changes in voting procedures. "[D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under § 5]." U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, p. 347. The ordinance that adopted Plan II made no reference to the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not have altered them; any change in

the charter would have required approval by the city's voters. The at-large seats, having existed without change since 1954, were not subject to review in this proceeding under § 5.[10]

B

The principal argument made by the appellants in this Court is that the District Court erred in concluding that the makeup of the five geographic councilmanic districts under Plan II would have the effect of abridging voting rights on account of race or color. In evaluating this claim it is important to note at the outset that the question is not one of constitutional law, but of statutory construction.[11] A determination of when a legislative reapportionment has "the effect of denying or abridging the right to vote on account of race or color," must depend, therefore, upon the intent of

[10] In reaching this conclusion, we do not decide the question reserved in *Georgia* v. *United States,* 411 U. S. 526, 535 n. 7, whether a district in a proposed legislative reapportionment plan that is identical to a district in the previously existing apportionment may be subject to review under § 5. The at-large seats in the present case were not even part of the 1961 plan, let alone of Plan II.

[11] This Court has not before dealt with the question of what criteria a legislative reapportionment plan must satisfy under § 5. Last Term in *City of Richmond* v. *United States,* 422 U. S. 358, the Court had to decide under what circumstances § 5 would permit a city to annex additional territory when that annexation would have the effect of changing the city's Negro population from a majority into a minority. The Court held that the annexation should be approved under the "effect" aspect of § 5 if the system for electing councilmen would likely produce results that "fairly reflect[ed] the strength of the Negro community as it exists after the annexation." 422 U. S., at 371. The *City of Richmond* case thus decided when a change with an adverse impact on previous Negro voting power met the "effect" standard of § 5. The present case, by contrast, involves a change with no such adverse impact upon the former voting power of Negroes.

Congress in enacting the Voting Rights Act and specifically § 5.

The legislative history reveals that the basic purpose of Congress in enacting the Voting Rights Act was "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach,* 383 U. S., at 315. Section 5 was intended to play an important role in achieving that goal:

> "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' " H. R. Rep. No. 94–196, pp. 57–58. (Footnotes omitted.)

See also H. R. Rep. No. 439, 89th Cong., 1st Sess., 9–11, 26; S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 6–9, 24; H. R. Rep. No. 91–397, pp. 6–8; H. R. Rep. No. 94–196, pp. 8–11, 57–60; S. Rep. No. 94–295, pp. 15–19; *South Carolina* v. *Katzenbach, supra,* at 335.

By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from "undo[ing] or defeat[ing] the rights recently won" by Negroes. H. R. Rep. No. 91–397, p. 8. Section 5 was intended

"to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting . . . ." H. R. Rep. No. 94-196, p. 60 (emphasis added).[12] In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of § 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.

The application of this standard to the facts of the present case is straightforward. Under the apportionment of 1961 none of the five councilmanic districts had a clear Negro majority of registered voters, and no Negro

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[12] Cf. MR. JUSTICE BRENNAN's dissenting opinion in *City of Richmond* v. *United States, supra,* at 388: "I take to be the fundamental objective of § 5 . . . the protection of *present* levels of voting effectiveness for the black population." (Emphasis in original.)

has been elected to the New Orleans City Council while that apportionment system has been in effect. Under Plan II, by contrast, Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them. Thus, there is every reason to predict, upon the District Court's hypothesis of bloc voting, that at least one and perhaps two Negroes may well be elected to the council under Plan II.[13] It was therefore error for the District Court to conclude that Plan II "will . . . have the effect of denying or abridging the right to vote on account of race or color" within the meaning of § 5 of the Voting Rights Act.[14]

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[13] The intervenors have advised us of statistics indicating that as of 1974, the percentage of Negro registered voters in the city as a whole increased to 38.2%. Assuming the accuracy of these estimates, and that the increase has been proportionate in each councilmanic district, it is quite possible that by this time not only a majority of the population but also a majority of the registered voters in two of the Plan II districts are Negroes. See *Taylor* v. *McKeithen*, 499 F. 2d 893, 896 (CA5).

[14] It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional. The United States has made no claim that Plan II suffers from any such disability, nor could it rationally do so.

There is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment. Cf. *Wright* v. *Rockefeller,* 376 U. S. 52. The case closest to so holding is *Gomillion* v. *Lightfoot*, 364 U. S. 339, in which the Court found that allegations of racially motivated gerrymandering of a municipality's political boundaries stated a claim under that Amendment. The many cases in this Court involving the Fourteenth Amendment's "one man, one vote" standard are not relevant here. See *Reynolds* v. *Sims,* 377 U. S. 533. But in at least four cases the Court has considered claims that legislative apportionments violated the Fourteenth Amendment rights of identifiable racial or ethnic minorities. See *Fortson* v. *Dorsey,* 379 U. S. 433, 439; *Burns* v. *Richardson,* 384 U. S. 73, 86–89; *Whitcomb* v. *Chavis,*

Accordingly, the judgment of the District Court is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE WHITE, dissenting.

With MR. JUSTICE MARSHALL, I cannot agree that § 5 of the Voting Rights Act of 1965 reaches only those changes in election procedures that are more burdensome to the complaining minority than pre-existing procedures. As I understand § 5, the validity of *any* procedural change otherwise within the reach of the section must be determined under the statutory standard—whether the proposed legislation has the purpose or effect of abridging or denying the right to vote based on race or color.

This statutory standard is to be applied here in light of the District Court's findings, which are supported by the evidence and are not now questioned by the Court. The findings were that the nominating process in New Orleans' councilmanic elections is subject to majority vote and "anti-single-shot" rules and that there is a history of bloc racial voting in New Orleans, the predictable result being that no Negro candidate will win in any district in which his race is in the minority. In my view, where these facts exist, combined with a segregated residential pattern, § 5 is not satisfied unless, to the extent practicable, the new electoral districts afford the Negro minority the opportunity to achieve legislative representation roughly proportional to the Negro population

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403 U. S. 124, 149; *White* v. *Regester,* 412 U. S. 755. Plan II does not remotely approach a violation of the constitutional standards enunciated in those cases.

in the community. Here, with a seven-member city council, the black minority constituting approximately 45% of the population of New Orleans, would be entitled under § 5, as I construe it, to the opportunity of electing at least three city councilmen—more than provided by the plan at issue here.

Bloc racial voting is an unfortunate phenomenon, but we are repeatedly faced with the findings of knowledgeable district courts that it is a fact of life. Where it exists, most often the result is that neither white nor black can be elected from a district in which his race is in the minority. As I see it, Congress has the power to minimize the effects of racial voting, particularly where it occurs in the context of other electoral rules operating to muffle the political potential of the minority. I am also satisfied that § 5 was aimed at this end, among others, and should be so construed and applied. See *City of Richmond* v. *United States,* 422 U. S. 358, 370–372 (1975).

Minimizing the exclusionary effects of racial voting is possible here because whites and blacks are not scattered evenly throughout the city; to a great extent, each race is concentrated in identifiable areas of New Orleans. But like bloc voting by race, this too is a fact of life, well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district. It is here that § 5 intervenes to control these choices to the extent necessary to afford the minority the opportunity of achieving fair representation in the legislative body in question.

Applying § 5 in this way would at times require the drawing of district lines based on race; but Congress has this power where deliberate discrimination at the polls

and the relevant electoral laws and customs have effectively foreclosed Negroes from enjoying a modicum of fair representation in the city council or other legislative body.

Since Plan II at issue in this case falls short of satisfying § 5 and since I agree with MR. JUSTICE MARSHALL that the city has failed to present sufficiently substantial justifications for its proposal, I respectfully dissent and would affirm the judgment of the District Court.

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

Over the past 10 years the Court has, again and again, read the jurisdiction of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 89 Stat. 402, 404, 42 U. S. C. § 1973c (1970 ed., Supp. V), expansively so as "to give the Act the broadest possible scope" and to reach "any state enactment which altered the election law of a covered State in even a minor way." *Allen* v. *State Board of Elections,* 393 U. S. 544, 567, 566 (1969). See also *Georgia* v. *United States,* 411 U. S. 526 (1973); *Perkins* v. *Matthews,* 400 U. S. 379 (1971); *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). While we have settled the contours of § 5's jurisdiction, however, we have yet to devote much attention to defining § 5's substantive force within those bounds. Thus, we are faced today for the first time with the question of § 5's substantive application to a redistricting plan. Essentially, we must answer one question: When does a redistricting plan have the effect of "abridging" the right to vote on account of race or color?

The Court never answers this question. Instead, it produces a convoluted construction of the statute that transforms the single question suggested by § 5 into three questions, and then provides precious little guidance in answering any of them.

Under the Court's reading of § 5, we cannot reach the abridgment question unless we have first determined that a proposed redistricting plan would "lead to a retrogression in the position of racial minorities," *ante,* at 141, in comparison to their position under the existing plan. The Court's conclusion that § 5 demands this preliminary inquiry is simply wrong; it finds no support in the language of the statute and disserves the legislative purposes behind § 5.

Implicitly admitting as much, the Court adds another question, this one to be asked if the proposed plan is not "retrogressive": whether "the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Ante,* at 141. This addition does much—in theory, at least—to salvage the Court's test, since our decisions make clear that the proper test of abridgment under § 5 is essentially the constitutional inquiry.

Still, I cannot accept the Court's awkward construction. Not only is the Court's multiple-step inquiry unduly cumbersome and an unnecessary burden to place upon the Attorney General and the District Court for the District of Columbia, but the Court dilutes the meaning of unconstitutionality in this context to the point that the congressional purposes in § 5 are no longer served and the sacred guarantees of the Fourteenth and Fifteenth Amendments emerge badly battered. And in the process, the Court approves a blatantly discriminatory districting plan for the city of New Orleans. I dissent.

I

A

The Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States

> or by any State on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15, § 1.

Although the Amendment is self-enforcing, litigation to secure the rights it guarantees proved time consuming and ineffective, while the will of those who resisted its command was strong and unwavering. Finally Congress decided to intervene. In 1965 it enacted the Voting Rights Act, designed "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach,* 383 U. S., at 315. See also *id.,* at 308–315. The Act proclaims that its purpose is "to enforce the fifteenth amendment to the Constitution . . . ," 79 Stat. 437; the heart of its enforcement mechanism is § 5. In language that tracks that of the Fifteenth Amendment, § 5 declares that no State covered by the Act shall enforce any plan with respect to voting different from that in effect on November 1, 1964, unless the Attorney General or a three-judge District Court in the District of Columbia declares that such plan

> "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." 42 U. S. C. § 1973c (1970 ed., Supp. V).[1]

While the substantive reach of § 5 is somewhat broader than that of the Fifteenth Amendment in at least one regard—the burden of proof is shifted from discriminatee

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[1] Section 5 actually requires that "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in effect on November 1, 1964, be approved by the Attorney General or the District Court for the District of Columbia. 42 U. S. C. § 1973c (1970 ed., Supp. V). We have held that a redistricting plan is a "standard, practice, or procedure with respect to voting" within the meaning of § 5. *Georgia* v. *United States,* 411 U. S. 526 (1973).

to discriminator[2]—§ 5 is undoubtedly tied to the standards of the Constitution.[3] Thus, it is questionable whether the "purpose and effect" language states anything more than the constitutional standard,[4] and it is

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[2] We upheld the validity of the shifted burden of proof in *South Carolina* v. *Katzenbach,* 383 U. S. 301, 335 (1966).

[3] "The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment." *Id.,* at 334.

[4] The Court's decisions relating to the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web. The possible theoretical approaches are three: (1) purpose alone is the test of unconstitutionality, and effect is irrelevant, or relevant only insofar as it sheds light on purpose; (2) effect alone is the test, and purpose is irrelevant; and (3) purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. At various times in recent years the Court has seemed to adopt each of these approaches.

In the two Fifteenth Amendment redistricting cases, *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), and *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), the Court suggested that legislative purpose alone is determinative, although language in both cases may be isolated that seems to approve some inquiry into effect insofar as it elucidates purpose. See 376 U. S., at 52; 364 U. S., at 341. See also 376 U. S., at 73–74 (Goldberg, J., dissenting). *McGowan* v. *Maryland,* 366 U. S. 420, 453 (1961), an equal protection-First Amendment case, expressly states that effect is of relevance in imputing an improper purpose, but that legislation is invalidated only for having such a purpose. And *City of Richmond* v. *United States,* 422 U. S. 358, 378–379 (1975), suggests that bad purpose may invalidate a law under the Fifteenth Amendment even if there is no unconstitutional effect at all.

Completely contrary to these cases are those that hold that legislative purpose is wholly irrelevant to the constitutionality of legislation—indeed, that purpose may not be examined at all—and that a statute may be invalidated only if it has an unconstitutional effect. *Palmer* v. *Thompson,* 403 U. S. 217, 224–225 (1971), and *United States* v. *O'Brien,* 391 U. S. 367, 384–385 (1968), both vigorously

clear that the "denying or abridging" phrase does no more than directly adopt the language of the Fifteenth Amendment.

In justifying its convoluted construction of § 5, however, the Court never deals with the fact that, by its plain language, § 5 does no more than adopt, or arguably expand,[5] the constitutional standard. Since it has never

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attack purpose analysis and assert that *Gomillion* was decided as it was only because the statute in question had an unlawful effect.

Between these two positions are the cases that hold that either an impermissible purpose or an impermissible effect may alone be sufficient to invalidate a law. *Board of Education* v. *Allen,* 392 U. S. 236, 243 (1968); *Abington School District* v. *Schempp,* 374 U. S. 203, 222 (1963). While there is no need here to synthesize these three positions and the various cases, if indeed a synthesis is possible, it should be clear that the language of purpose and effect selected by Congress for use in § 5 is not necessarily an expansion of the constitutional standard. Congress did no more than adopt the third of the tests that the Court itself has juggled over the years, See generally Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970).

[5] We have recognized that § 5 of the Fourteenth Amendment gives Congress the power to expand the substantive reach of that Amendment. *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966). Undoubtedly, § 2 of the Fifteenth Amendment, under which the Voting Rights Act was enacted, confers similar power upon Congress with respect to the substantive reach of the Fifteenth Amendment. Thus, to the extent, if any, that analysis for purpose or for effect is not independently required for resolution of the constitutional question, see n. 4, *supra,* Congress may be said to have expanded the constitutional inquiry in § 5 of the Voting Rights Act. Insofar as redistricting legislation is concerned, however, I believe a showing of purpose or of effect is alone sufficient to demonstate unconstitutionality, and so I believe that in this context Congress enacted no more than the constitutional standard. Evaluation of the purpose of a legislative enactment is just too ambiguous a task to be the sole tool of constitutional analysis. See *Palmer* v. *Thompson, supra,* at 224–225; *United States* v. *O'Brien, supra,* at 384–385. Therefore, a demonstration of effect ordinarily should suffice. If,

been held, or even suggested, that the constitutional standard requires an inquiry into whether a redistricting plan is "ameliorative" or "retrogressive," *a fortiori* there is no basis for so reading § 5. While the Court attempts to provide a basis by relying on the asserted purpose of § 5—to preserve present Negro voting strength [6]—it is wholly unsuccessful. What superficial credibility the argument musters is achieved by ignoring not only the statutory language, but also at least three other purposes behind § 5.[7]

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of course, purpose may conclusively be shown, it too should be sufficient to demonstrate a statute's unconstitutionality.

[6] While the Court does quote language that suggests some of the other purposes that I see in the statute, *ante*, at 140, when it comes to giving substantive content to § 5, the Court relies solely on the purpose suggested in the text.

It may be that this single purpose looms so large to the Court because it thinks it would be counterproductive to bar enforcement of a proposed plan, even if discriminatory, that is at all less discriminatory than the pre-existing plan, which would otherwise remain frozen in effect. While this argument has superficial appeal, it is ultimately unrealistic because it will be a rare jurisdiction that can retain its pre-existing apportionment after the rejection of a modification by the Attorney General or District Court. Jurisdictions do not undertake redistricting without reason. In this case, for instance, the New Orleans City Charter requires redistricting every 10 years. If the plan before us now were disapproved, New Orleans would have to produce a new one or amend its charter. In other cases, redistricting will have been constitutionally compelled by our one-person, one-vote decisions. *Reynolds* v. *Sims,* 377 U. S. 533 (1964). The virtual necessity of prompt redistricting argues strongly in favor of rejecting "ameliorative" but still discriminatory redistricting plans. The jurisdictions will eventually have to return with a nondiscriminatory plan.

[7] Equally unsuccessful is the Court's attempt to paint the "ameliorative" changes in this case as dramatic. Negroes constitute 45% of the population of New Orleans and 34.5% of the city's registered

Thus, the legislative history of the Voting Rights Act makes clear, and the Court assiduously ignores, that § 5 was designed to preclude new districting plans that "perpetuate discrimination,"[8] to prevent covered jurisdictions

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voters. Under the 1961 redistricting plan currently in effect in New Orleans, that population is distributed as follows:

District	Population % Negro	Registered Voters % Negro
A	31.6	22.7
B	62.2	50.2
C	40.2	24.6
D	43.7	36.3
E	49.4	42.8

App. 621. Under Plan II, which is at issue in this lawsuit, the same population is distributed in this manner:

District	Population % Negro	Registered Voters % Negro
A	29.1	22.6
B	64.1	52.6
C	35.8	23.3
D	43.5	36.8
E	50.6	43.2

App. 624.

Thus the positive change that convinces the Court that no inquiry into possible "abridgment" is necessary is the change from a majority of registered voters in District B of 50.2% (which the Court fails to mention) to what the Court calls a "clear" majority (although the Court has no idea what percentage of registered Negro voters actually vote) in that district of 52.6%. The Court also emphasizes that now Negroes constitute a majority of the population in two districts, whereas under the existing plan they are a majority in only one district. This beneficial change is accomplished by the shift from a minority of 49.4% of the population in District E to a majority in that district of 50.6%.

[8] H. R. Rep. No. 91-397, pp. 6-7 (1969). See also H. R. Rep. No. 439, 89th Cong., 1st Sess., 10-11 (1965); S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 8, 12 (1965); *South Carolina* v. *Katzenbach,* 383 U. S., at 315-316, 335.

from "circumventing the guarantees of the 15th amendment" by switching to new, and discriminatory, districting plans the moment litigants appear on the verge of having an existing one declared unconstitutional,[9] and promptly to end discrimination in voting by pressuring covered jurisdictions to remove all vestiges of discrimination from their enactments before submitting them for preclearance.[10] None of these purposes is furthered by an inquiry into whether a proposed districting plan is "ameliorative" or "retrogressive." Indeed, the statement of these purposes is alone sufficient to demonstrate the error of the Court's construction.

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[9] S. Rep. No. 94–295, p. 15 (1975). See also H. R. Rep. No. 439, *supra,* at 10–11. It is for this reason that the existing plan remains "frozen" in effect while the proposed plan is submitted for approval. Thus, any constitutional litigation may proceed without interruption, unless the new plan is itself found to be nondiscriminatory and is substituted. See H. R. Rep. No. 94–196, p. 58 (1975). Either way, the litigant obtains the relief he seeks—a nondiscriminatory apportionment.

[10] The pressure of having proposed plans judged by rigorous standards and the fear of litigation over new plans were thought to encourage covered jurisdictions to end all discrimination in voting.

"The preclearance procedure—and this is critical—serves psychologically to control the proliferation of discriminatory laws and practices because each change must first be federally reviewed. Thus section 5 serves to prevent discrimination before it starts." 115 Cong. Rec. 38486 (1969) (remarks of Rep. McCulloch).

See also *id.,* at 38517 (remarks of Rep. Anderson); U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 30–31 (1975).

The Act's limited term is proof that Congress intended to secure prompt, and not gradual, relief. Originally, the Act was intended to be in effect for only five years. While it has been twice extended, each extension was also for only a few years: five more years in 1970, and seven more years in 1975. Thus, it cannot be argued that the Act contemplated slow forward movement, which the Court's construction sanctifies, rather than a quick remedial "fix."

All the purposes of the statute are met, however, by the inquiry § 5's language plainly contemplates: whether, in absolute terms, the covered jurisdiction can show that its proposed plan meets the constitutional standard. Because it is consistent with both the statutory language and the legislative purposes, this is the proper construction of the provision. Thus, it is the effect of the plan itself, rather than the effect of the change in plans, that should be at issue in a § 5 proceeding.[11]

Ultimately, the Court admits as much by adding an inquiry into whether the proposed plan, even if "ameliorative," is constitutional. After this admission, I cannot understand why the Court bothers at all with its preliminary inquiry into the nature of the change of plans, since the inquiry not only adds nothing, but will, I fear, prove to be a time-consuming distraction from the important business of assessing the constitutionality of the proposed plan.[12] Except for this unnecessary step, how-

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[11] While I read "abridge" in both § 5 and the Fifteenth Amendment as primarily involving an absolute assessment of dilution of Negro voting power from its potential, I do not hold that recognition of a relative change is absolutely irrelevant to this determination. For instance, it may often be useful to glean some indication of purpose from a minority's relative position under the existing and proposed plans. Moreover, there will be circumstances—annexations, for example—where dilution can fairly be measured only in comparison to the prior scheme. See *City of Richmond* v. *United States,* 422 U. S., at 378. Cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).

[12] Today the Court finds it simple to conclude that Plan II is "ameliorative," but it will not always be so easy to determine whether a new plan increases or decreases Negro voting power relative to the prior plan. To the contrary, I believe the Court's test will prove unduly difficult of application and excessively demanding of judicial energies.

For instance, the Court today finds that an increase in the size of the Negro majority in one district, with a concomitant increased likelihood of electing a delegate, conclusively shows that Plan II

ever, the Court's final reading of the statute, on its face, no more than duplicates my own.[13] Nonetheless, I still do not accept the Court's approach. After properly re-

is ameliorative. Will that always be so? Is it not as common for minorities to be gerrymandered into the same district as into separate ones? Is an increase in the size of an existing majority ameliorative or retrogressive? When the size of the majority increases in one district, Negro voting strength necessarily declines elsewhere. Is that decline retrogressive? Assuming that the shift from a 50.2% to a 52.6% majority in District B in this case is ameliorative, and is not outweighed by the simultaneous decrease in Negro voting strength in Districts A and C, when would an increase become retrogressive? As soon as the majority becomes "safe"? When the majority is achieved by dividing pre-existing concentrations of Negro voters?

Moreover, the Court implies, *ante,* at 139 n. 11, by its attempt to harmonize its holding today with *City of Richmond* v. *United States, supra,* that this preliminary inquiry into the nature of the change is the proper approach to all § 5 cases. The Court's test will prove even more difficult of application outside the redistricting context. Some changes just do not lend themselves to comparison in positive or negative terms; others will always seem negative—or positive—no matter how good or bad the result. For instance, when a city goes from an appointed town manager to an elected council form of government, can the change ever be termed retrogressive, even if the new council is elected at large and Negroes are a minority? Or where a jurisdiction in which Negroes are a substantial minority switches from at-large to ward voting, can that change ever constitute a negative change, no matter how badly the wards are gerrymandered?

I realize, of course, that determining the ultimate question of "abridgment" may involve answering questions similar to those I have posed above and that those questions will be just as difficult to answer. My point, however, is exactly that the inquiry is a difficult one, and that there is no reason substantially to compound that complexity by posing an unnecessary and equally complex preliminary inquiry.

[13] As I understand it, the Court views the constitutional inquiry as part of the § 5 inquiry. See *ante,* at 141. Thus, the burden of proof on constitutional issues, as on all § 5 issues, is on the covered jurisdiction. Although the Court's treatment of the point is

turning the constitutional inquiry to the § 5 proceeding, the Court inexplicably tosses off the question in a footnote, and never undertakes the analysis that both our constitutional cases and our § 5 cases have demanded.[14] This ultimate denigration of the constitutional standard is a result far short of the promise Congress held out in

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ambiguous, I read its observation that "[t]he United States has made no claim" that Plan II is unconstitutional, *ante,* at 142 n. 14, as indicating only that it is for the United States to raise the issue of unconstitutionality in the § 5 proceeding, and not as suggesting that, once the issue is raised, the United States must prove the claim as well. Any other reading would frustrate still another legislative purpose. The Act freezes the existing plan and places the burden of proof on the covered jurisdiction to justify the proposed plan expressly in order "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina* v. *Katzenbach,* 383 U. S., at 328. See also H. R. Rep. No. 94–196, p. 58 (1975). I do not understand the Court, in bringing the constitutional issue in through the back door, to eliminate the primary procedural advantage to the United States of the § 5 proceeding.

[14] The Court's treatment of the constitutional questions is all the more puzzling if it intends to confine its constitutional analysis to those seats brought before the District Court in the § 5 proceeding. In this case, the Court holds that it may avoid looking at the two at-large seats on the New Orleans City Council in deciding the § 5 claim, but see *infra,* at 158–159, and its exclusion of those seats appears to extend to its ultimate constitutional inquiry as well. Yet, it is obvious that an independent constitutional challenge to Plan II would also include a challenge to the at-large seats and that such a broadened attack would be considerably more difficult to reject than the question the Court evidently considers. The change in focus caused by an expanded challenge both accentuates the dilution of the Negro vote in New Orleans, see n. 19, *infra,* and necessitates recognition of the particularly dilutive effects of at-large districting schemes. See *White* v. *Regester,* 412 U. S. 755 (1973). If the Court has ignored these factors in finding Plan II constitutional, it has engaged in no more than a time-consuming hypothetical adjudication, for its holding will surely not bar a future constitutional challenge to the entire scheme.

enacting, and re-enacting, the Voting Rights Act, and it is one in which I cannot join.

B

The proper test in § 5 redistricting cases is preordained by our prior cases, which are ignored today by the Court. As suggested above, we have repeatedly recognized the relevance of constitutional standards to the proper construction of § 5. Thus, we have held that in passing that provision "'Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and protect Negroes against a dilution of their voting power.'" *Perkins* v. *Matthews,* 400 U. S., at 390, quoting *Allen* v. *State Board of Elections,* 393 U. S., at 588 (opinion of Harlan, J.). See also *Georgia* v. *United States,* 411 U. S., at 532–533; *Allen* v. *State Board of Elections, supra,* at 565–566, 569.[15] In the Fourteenth Amendment *Reynolds* line of cases, we have made clear that dilution of voting power refers to resulting voting strength that is something less

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[15] Because I read § 5 as incorporating the standards of the Fifteenth Amendment, see nn. 4–5, *supra,* I read these cases as holding, implicitly, that the Fourteenth and Fifteenth Amendments mandate the same test for assessing the validity, on racial grounds, of legislative apportionments. Since a person whose right to vote is denied or abridged on account of race is likewise denied equal protection of the laws, borrowing from the developed corpus of Fourteenth Amendment law is entirely appropriate.

Seeking another source for a § 5 test is particularly appropriate given the scarcity of Fifteenth Amendment case law. *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), and *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), the only relevant Fifteenth Amendment cases, predate not only the Voting Rights Act, its incorporation of the language of the Fifteenth Amendment, and our cases construing that incorporation, but also all the Fourteenth Amendment developments discussed in the text. For these reasons, and because neither case states a general test, *Wright* and *Gomillion* are of no help at all in formulating a test for § 5 cases.

than potential (*i. e.,* proportional) power, not to a reduction of existing power. *White* v. *Regester,* 412 U. S. 755, 765–766 (1973); *Whitcomb* v. *Chavis,* 403 U. S. 124, 149 (1971). Nonetheless, we have also acknowledged that a showing of less than proportional representation of Negroes by Negro-elected representatives is not alone sufficient to prove unconstitutional dilution:

> "To sustain such claims [of dilution], it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White* v. *Regester, supra,* at 765–766.

See also *Whitcomb* v. *Chavis, supra,* at 149.[16]

It is this constitutionally based concept of dilution that we have held to govern in § 5 proceedings. The concept may be readily transferred to the § 5 context simply by adjusting for the shifted burden of proof. Thus, if the proposed redistricting plan underrepresents minority group members, the burden is on the covered

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[16] The Court refers to the cited page for the proposition that members of a minority group have no federal right "to be represented in legislative bodies in proportion to their number in the general population." *Ante,* at 136–137, n. 8. *Whitcomb* v. *Chavis* stands for no such proposition. The language the Court refers to is substantively identical to that quoted in the text and supports only the notion that there is no right to proportional representation absent evidence of denial of access to the political process.

jurisdiction to show that "the political processes leading to nomination and election were . . . equally open to participation by the group in question." [17] If the jurisdiction cannot make such a showing, then the proposed plan must be rejected, unless compelling reasons for its adoption can be demonstrated.[18]

II

Application of these standards to the case before us is straightforward. Preliminarily, while I agree with the Court that the two at-large seats on the New Orleans City Council are not themselves before the Court for approval and cannot serve as an independent basis for the rejection of Plan II, I do not think Plan II should be assessed without regard to the seven-member council it is designed to fill. Proportional representation of Negroes among the five district seats on the council does not assure Negroes proportional representation on the entire council when, as the District Court found, the two at-large seats will be occupied by white-elected mem-

[17] The cases make clear that the inquiry is not meant to be limited to the ability of the minority group to participate in the voting plan under attack, but also includes sweeping analysis of the minority group's past and present treatment by the jurisdiction before the court. *White* v. *Regester,* 412 U. S., at 766–767; *Whitcomb* v. *Chavis,* 403 U. S., at 149–153.

[18] For instance, a city with a 20% Negro population and a five-member council elected in wards might be able to justify the placement of only 20% minority population in each district, despite a history of denial of access to the political process, by showing that the minority population was perfectly distributed throughout the municipality so that the creation of a Negro-majority ward was an impossibility. On the other hand, again assuming a history of denial of access to the political process, such a plan could not survive attack if the 20% Negro population of each ward were achieved by dividing five ways a concentrated bloc of Negro voters located in the center of the city.

bers. The Court's approach of focusing only on the five districts would allow covered municipalities to conceal discriminatory changes by making them a step at a time, and sending one two- or three-district alteration after another to the Attorney General for approval. If nothing beyond the districts actually before him could be considered, discriminatory effects could be camouflaged and the prophylactic purposes of the Act readily evaded.[19]

Thus the District Court correctly began by considering the seven-member council and a districting plan that, given New Orleans' long history of racial bloc voting,[20] allows Negroes the expectation of no more than one seat (14% of the council), if that, in a city with a 34.5% Negro voting population. Manifestly, the plan serves to underrepresent the Negro voting population. The District Court then, properly, turned to consider whether Negroes are excluded from full participation in the political processes in New Orleans. The court found con-

[19] This effect is clear in this case, where Negroes constitute 34.5% of the New Orleans electorate. Out of seven seats, Negroes should reasonably expect to control at least two. In considering only five seats, the Court suggests—properly, given its self-imposed limitation—that Negroes should have an expectancy of only one seat. *Ante,* at 137 n. 8. If only two of the five districts were before us, and assuming a 34.5% minority share of the voting population in those districts, the Court could properly conclude that Negroes could lay claim to neither of the two seats. Thus, under the Court's approach, the smaller the number of seats that the city may present for consideration, the grosser the discrimination that may be numerically tolerated.

[20] The tendency to racial bloc voting in New Orleans is a finding of fact by the District Court that is not challenged here. Such voting was encouraged until 1964 by a Louisiana statute, declared unconstitutional in *Anderson* v. *Martin,* 375 U. S. 399 (1964), that required the race of each candidate to be printed on the ballots used in all elections within the State.

siderable evidence of both past and present exclusion, none of which is seriously contested here.[21]

The court found that Louisiana's majority-vote requirement and "anti-single-shot" requirement operate as a practical matter to defeat Negroes in any district in which they do not constitute a majority,[22] that residual effects of Louisiana's long history of racial discrimination not only in voting, but also in public schools, public assemblies, public recreational facilities, public transportation, housing, and employment, remain; and that city officeholders have generally been unresponsive to the needs of the Negro community. The court looked to the many tactics that, until recently, had been employed with remarkable success to keep Negroes from voting in the State. See *Louisiana* v. *United States,* 380 U. S. 145, 147–150 (1965). And the court found that Negro access to the political process is even further narrowed by the fact that candidates in the all-important Democratic primary run on tickets. For a city council candidate to win nomination, which is tantamount to victory in the general election, it is critical to be placed on the ticket of the winning, always white, mayoral candidate. Negro candidates for city council, however, have never been placed on such a ticket. Indeed, no Negro has ever

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[21] Appellants challenge the propriety of looking at this evidence in assessing the effect of Plan II, not its accuracy.

[22] The majority-vote requirement is a rule that the winner of an election must have a majority of the vote. Thus, in a race involving three or more candidates, a plurality of voters cannot elect their candidate. If no candidate wins a majority, there is a run-off election.

The "anti-single-shot" rule is a requirement that in a multimember district the voter must vote for as many candidates as there are seats to be filled. Thus, although the voter may be interested in only one of the candidates, he must vote for others as well.

been elected to the city council, and the court found that on the rare occasions when a Negro has been elected to any office in the city, it has been because of the support of white candidates or of the white political organization, not because of the power of the Negro electorate. These findings plainly support the District Court's conclusion that the political processes of New Orleans are not open to Negroes on an equal basis with whites.

Since Negroes are underrepresented by Plan II and have been denied equal access to the political processes in New Orleans, Plan II infringes upon constitutionally protected rights, and only a compelling justification can save the plan. The very nature of the Negro community in New Orleans and the manner of its distortion by Plan II immediately place the city's explanations in a suspect light. The Negro community is not dispersed, but rather is collected in a concentrated curving band that runs roughly east-west. The districts in Plan II run north-south and divide the Negro community into five parts. Counsel for intervenor Jackson vividly described the effect of this division at oral argument:

> "You can walk from Jefferson Parish throughout the city for eight or ten miles through the St. Bernard Parish line and not see a white face along that band, that black belt, that parallels the river in a curve fashion throughout the city. White people live in the very wealthy sections of town out by the lake and along St. Charles Avenue to the river. The rest is left over for blacks, and these are heavy concentrations, and that plan devised by the City Council slices up that population like so many pieces of bologna . . . ." Tr. of Oral Arg. 30.

As Jonathan A. Eckert, the council staff member pri-

marily responsible for drafting Plan II, conceded in the District Court, the "inevitable result" of Plan II's north-south orientation is "to have districts in which blacks are generally in the minority, or at the most in a bare majority." 2 App. 346.

New Orleans relies on seven goals that it claims mandate a north-south scheme such as Plan II. The city's own belief in this conclusion is questionable in light of Mr. Eckert's testimony in the District Court that he and his staff had drafted at least two east-west plans that satisfied them. 1 App. 336–337. In any case, however, the asserted goals, whether taken alone or in combination, do not establish a compelling justification for the plan. One claimed purpose is to prevent dilution of the vote of minority groups. Plan II plainly does not achieve this goal. Two other asserted aims are to achieve substantial numerical equality among the five districts and to keep the resultant districts compact and contiguous. Both aims can be accomplished by any number of east-west plans as well. Three more proffered justifications are to preserve ward and precinct lines, natural boundaries, and manmade boundaries. But there are findings that ward lines cannot be observed in any case because of one-person, one-vote restrictions, and that precincts are sufficiently small that their integrity can be honored in east-west districts. This latter fact minimizes any adverse effects of violating natural and manmade boundaries, except to the extent that they divide communities of different social or economic interests. And Plan II only erratically keeps such communities intact.

It is only the seventh of the proffered goals that, if compelling, mandates a north-south scheme: keeping incumbents apart in the new districts so that they will

not have to run against one another for re-election.[23] Four of the five district councilmen live in an east-west line along the lake in the northern part of the city. East-west districts would place all four in the same one or two districts, 1 App. 125, 232, 235, and north-south lines are therefore necessary if these councilmen are to remain apart. 2 App. 344. While the desire to keep incumbents in separate districts may have merit in some contexts, it surely cannot stand alone to justify the substantial dilution of minority voting rights found here.

Thus, the city has failed to show an acceptable justification for the racially dilutive effect of Plan II. Accordingly, the District Court correctly concluded that appellants failed to demonstrate that Plan II would not have the effect of abridging the right to vote on account of race, and correctly denied the requested declaratory judgment.[24]

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[23] The city asserts that its seventh goal is to retain "historic and traditional councilmanic district boundaries" so as to "preserve continuity within the electorate." Brief for Appellants 28–29. In fact, the record is conclusive that the goal was purely to keep incumbents apart. 1 App. 206–207; 2 App. 344, 557.

[24] While the Court today finds that the District Court erred in finding a discriminatory effect, it does not address the issue not reached by the District Court: whether Plan II was drafted with a discriminatory purpose. Of course, this question remains on remand. See *City of Richmond* v. *United States*, 422 U. S., at 378–379.

UNITED STATES *v.* UNITED CONTINENTAL TUNA CORP.

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

No. 74-869. Argued November 3, 1975—Decided March 30, 1976

Prior to 1960 the Suits in Admiralty Act authorized suit against the United States in cases involving vessels owned by, possessed by, or operated by or for the United States, if such suit could have been maintained had the vessel been a private one, and provided further that such vessel was employed as a merchant vessel. In 1960, Congress amended the Act by deleting the latter proviso. The Public Vessels Act authorizes suit against the United States in cases involving "a public vessel of the United States," but bars such a suit by a foreign national unless it appears that his government allows a United States national to sue in its courts under similar circumstances. Respondent, a Philippine corporation, alleging jurisdiction under both Acts, sued the United States to recover damages resulting from the sinking of its fishing vessel after a collision with a United States naval destroyer. The District Court dismissed the complaint on the ground that since the destroyer was a "public vessel of the United States," the suit was governed by the Public Vessels Act, that therefore respondent was subject to that Act's reciprocity provision, and that since there was no such reciprocity, the suit was barred. The Court of Appeals reversed on the ground that the suit, although involving a public vessel, was maintainable under the Suits in Admiralty Act, as amended in 1960 to delete the "employed as a merchant vessel" proviso, free from the restrictions, including the reciprocity requirement, imposed by the Public Vessels Act. *Held:* Claims within the scope of the Public Vessels Act remain subject to its terms after the 1960 amendment to the Suits in Admiralty Act, and, since respondent's claim falls within the Public Vessels Act, the Court of Appeals erred in concluding that that Act's reciprocity provision did not apply. Pp. 166–182.

(a) The Court of Appeals' interpretation of the 1960 amendment to the Suits in Admiralty Act would render the Public Vessels Act's restrictions ineffectual and would effectively nullify

specific congressional policy judgments made when the latter Act was enacted, by enabling litigants to bring suits previously subject to that Act under the Suits in Admiralty Act. Pp. 166–169.

(b) The legislative histories of the Public Vessels Act, the Suits in Admiralty Act, and, in particular, the 1960 amendment to the latter, indicate clearly that Congress did not intend to authorize the wholesale evasion of the restrictions specifically imposed by the Public Vessels Act on suits for damages caused by public vessels, but deleted the "employed as a merchant vessel" proviso merely to remove uncertainty as to the proper forum in which to bring a maritime claim against the United States, especially a contract claim, where it had been uncertain whether it should be brought on the admiralty side of a district court under the Suits in Admiralty Act or Public Vessels Act or in the Court of Claims under the Tucker Act. Pp. 170–181.

499 F. 2d 774, reversed and remanded.

Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, White, Blackmun, Powell, and Rehnquist, JJ., joined. Stewart, J., filed a dissenting opinion, *post,* p. 182. Stevens, J., took no part in the consideration or decision of the case.

Robert E. Kopp argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Lee,* and *Acting Assistant Attorney General Jaffe.*

Francis J. MacLaughlin argued the cause and filed a brief for respondent.

Mr. Justice Marshall delivered the opinion of the Court.

Respondent, a Philippine corporation owned largely by Americans, brought this suit against the United States in the United States District Court for the Central District of California, alleging jurisdiction under the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U. S. C. § 741 *et seq.,* and the Public Vessels Act, 43 Stat. 1112, as amended, 46 U. S. C. § 781 *et seq.* It sought recovery

for damages resulting from the sinking of its fishing vessel, the MV *Orient,* after a collision with the U. S. S. *Parsons,* a naval destroyer of the United States.

Upon the United States' motion for summary judgment, the District Court held that since the naval destroyer was a "public vessel of the United States," the suit was governed by the provisions of the Public Vessels Act. See 46 U. S. C. § 781. In particular, the court held that respondent was subject to the Act's reciprocity provision, which bars any suit by a foreign national under the Act unless it appears that his government, "under similar circumstances, allows nationals of the United States to sue in its courts." § 785. Finding no such reciprocity, the District Court dismissed the complaint.

The Court of Appeals for the Ninth Circuit reversed on the ground that respondent's action, although involving a public vessel, is maintainable under the Suits in Admiralty Act without reference to the reciprocity provision of the Public Vessels Act. 499 F. 2d 774 (1974). We granted certiorari, 420 U. S. 971 (1975), and we now reverse.

I

It is undisputed that before 1960 suits involving public vessels could not be maintained under the Suits in Admiralty Act. The Act then authorized suits involving vessels owned by, possessed by, or operated by or for the United States as follows:

> "[I]n cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . *provided that such vessel is employed as a merchant ves-*

sel . . . ." 41 Stat. 525, 46 U. S. C. § 742 (1958 ed.) (emphasis added).[1]

In 1960, however, Congress amended this provision of the Suits in Admiralty Act by deleting the proviso, italicized above, that the vessel must be "employed as a merchant vessel." 74 Stat. 912. Reading the amended provision literally, the Court of Appeals held that suits involving public vessels could now be brought under the Suits in Admiralty Act, free from the restrictions imposed by the Public Vessels Act. The court reached this result in spite of its acknowledgment that "such a conclusion permits the [Public Vessels Act's] reciprocity provision to be circumvented in a manner neither explicitly authorized nor perhaps contemplated by Congress." 499 F. 2d, at 778.

The Court of Appeals' result would permit circumvention of not only the reciprocity requirement, but also several other significant limitations imposed upon suits brought under the Public Vessels Act. Under 46 U. S. C. § 784, for example, officers and members of the crew of a public vessel may not be subpoenaed in connection with any suit authorized by the Public Vessels Act without the consent of the Secretary of the Department, the commanding officer, or certain other persons. In time of war, the Secretary of the Navy can obtain a stay of any suit brought under the Public Vessels Act when it appears that prosecution of the suit would tend to interfere with naval operations. 10 U. S. C. §§ 7721–7730. And under the Public Vessels Act, unlike under the Suits in Admiralty Act, interest on judgments does not accrue prior to the time of judgment. Compare 46 U. S. C. § 782 with 46 U. S. C. § 745.

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[1] We need not concern ourselves in this case with the definitions of the terms "merchant vessel" and "public vessel." It suffices to say that the terms are mutually exclusive, and that the naval destroyer in this case is beyond question a "public vessel."

Under the Court of Appeals' interpretation of the 1960 amendment to the Suits in Admiralty Act, circumvention of these restrictive provisions of the Public Vessels Act would not be limited to a handful of cases. Since there is virtually no reason for a litigant to prefer to have his suit governed by the provisions of the Public Vessels Act,[2] the import of the Court of Appeals' interpretation is to render the restrictive provisions of the Public Vessels Act ineffectual in practically every case to which they would otherwise have application. If Congress had intended that result, it might just as well have repealed the Public Vessels Act altogether.

The Public Vessels Act was not amended in 1960, and, as the Court of Appeals recognized, the 1960 amendment to the Suits in Admiralty Act contains no language expressly permitting claims previously governed by the Public Vessels Act to be brought under the Suits in Admiralty Act, free from the restrictive provisions of the Public Vessels Act. What amounts to the effective repeal of those provisions is urged as a matter of implication. It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored. See, *e. g., Regional Rail Reorganization Act Cases,* 419 U. S. 102, 133 (1974); *Amell* v. *United States,* 384 U. S. 158, 165–166 (1966); *Silver* v. *New York Stock Exchange,*

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[2] The only apparent advantage to bringing suit under the Public Vessels Act lies in its broader venue provision. Both the Suits in Admiralty Act and the Public Vessels Act provide venue in the district in which the vessel or cargo is found, and in the district in which any plaintiff resides or has a place of business (under the Suits in Admiralty Act it must be the principal place of business in the United States). 46 U. S. C. §§ 742, 782. But the Public Vessels Act provides further that if there is no such district, suit may be brought in any district in the United States. 46 U. S. C. § 782.

373 U. S. 341, 357 (1963); *United States* v. *Borden Co.,* 308 U. S. 188, 198–199 (1939). The principle carries special weight when we are urged to find that a specific statute has been repealed by a more general one. See, *e. g., Morton* v. *Mancari,* 417 U. S. 535, 550–551 (1974); *Bulova Watch Co.* v. *United States,* 365 U. S. 753, 758 (1961); *Rodgers* v. *United States,* 185 U. S. 83, 87–89 (1902).

To be sure, the principle of these cases is not precisely applicable in this case—for here the argument is not that the Public Vessels Act can no longer have application to a particular set of facts, but simply that its terms can be evaded at will by asserting jurisdiction under another statute. We should, however, be as hesitant to infer that Congress intended to authorize evasion of a statute at will as we are to infer that Congress intended to narrow the scope of a statute. Both types of "repeal"—effective and actual—involve the compromise or abandonment of previously articulated policies, and we would normally expect some expression by Congress that such results are intended. Indeed, the expectation that there would be some expression of an intent to "repeal" is particularly strong in a case like this one, in which the "repeal" would extend to virtually every case to which the statute had application.

The ultimate question in this case is whether Congress intended, by the deletion of the "employed as a merchant vessel" proviso from the Suits in Admiralty Act, to authorize the wholesale evasion of the restrictions specifically imposed by the Public Vessels Act on suits for damages caused by public vessels. An examination of the history of the Suits in Admiralty Act, the Public Vessels Act, and, in particular, the 1960 amendment to the Suits in Admiralty Act, indicates quite clearly that Congress had no such intent.

II

A

The history of the Suits in Admiralty Act and the Public Vessels Act has been the subject of the Court's attention on several prior occasions. See *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, 218–225 (1945); *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, 450–454 (1947); *Johansen* v. *United States,* 343 U. S. 427, 432–434 (1952); *Amell* v. *United States, supra,* at 164–166. The history is quite clear and, for our purposes, can be stated briefly.

Prior to 1916, the doctrine of sovereign immunity barred any suit by a private owner whose vessel was damaged by a vessel owned or operated by the United States. Recognizing the inequities of denying recovery to private owners and the difficulties inherent in attempting to grant relief to deserving private owners through private Acts of Congress, Congress provided in the Shipping Act, 1916, that Shipping Board vessels employed as merchant vessels were subject to "all laws, regulations, and liabilities governing merchant vessels." 39 Stat. 730, 46 U. S. C. § 808. In *The Lake Monroe,* 250 U. S. 246 (1919), this Court held that the Shipping Act had subjected all Shipping Board merchant vessels to proceedings *in rem* in admiralty, including arrest and seizure. Congress, concerned that the arrest and seizure of Shipping Board merchant vessels would occasion unnecessary delay and expense, promptly responded to the *Lake Monroe* decision by enacting the Suits in Admiralty Act.[3] The Act prohibited the arrest or seizure of any vessel owned by, possessed by, or operated by or for the United States. 46 U. S. C. § 741. In the place of an

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[3] See S. Rep. No. 223, 66th Cong., 1st Sess. (1919); H. R. Rep. No. 497, 66th Cong., 2d Sess. (1919).

in rem proceeding, the Act authorized a libel *in personam* in cases involving such vessels, if such a proceeding could have been maintained had the vessel been a private vessel, and "provided that such vessel is employed as a merchant vessel." 41 Stat. 525, 46 U. S. C. § 742 (1958 ed.). Significantly, Congress was urged to include in the Suits in Admiralty Act authorization for suits against the United States for damages caused by public vessels, but the suggestion was rejected in committee as a "radical change" in policy that might "materially delay passage" of the Act.[4]

Until 1925 the only recourse for the owner of a vessel or cargo damaged by a public vessel was to apply to Congress for a private bill. In that year, Congress enacted the Public Vessels Act, which authorized a libel *in personam* against the United States "for damages caused by a public vessel of the United States." 46 U. S. C. § 781. The Act provided that suits involving public vessels "shall be subject to and proceed in accordance with the provisions of [the Suits in Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith . . . ." § 782. Some of the inconsistencies lay in the Public Vessels Act's provisions, referred to above, restricting subpoenas to officers and crew members of a public vessel, barring recovery of prejudgment interest, and imposing a requirement of reciprocity. Each of these provisions must be assumed to have reflected deliberate policy choices by Congress. In particular, the notion of reciprocity was central to the scheme enacted by Congress. One of the spurs to enactment of the Public Vessels Act was Congress' recognition that the principal maritime nations, notably England, France, and Germany, already permitted their nationals

[4] *Id.*, at 4.

and foreigners to bring suit for damages caused by public vessels.[5] And while the debates on the Public Vessels Act were sparse, the Act's requirement of reciprocity was specifically mentioned on the House floor in response to a question whether the Act gave foreign nationals the same rights as citizens to bring suit.[6]

B

The 1960 amendment to the Suits in Admiralty Act, which formed the basis of the Court of Appeals' decision, was an outgrowth of severe jurisdictional problems facing the plaintiff with a maritime claim against the United States. Both the Suits in Admiralty Act and the Public Vessels Act authorized suits on the admiralty side of the district courts, and were viewed as providing the exclusive remedy for claims within their coverage. See 46 U. S. C. § 745; *Johnson* v. *United States Shipping Board Emergency Fleet Corp.*, 280 U. S. 320 (1930); *Aliotti* v. *United States*, 221 F. 2d 598 (CA9 1955). But these Acts were not generally interpreted to encompass all actionable maritime claims against the United States. Maritime tort claims deemed beyond the reach of both Acts could be brought only on the law side of the district courts under the Federal Tort Claims Act. 28 U. S. C. §§ 1346 (b), 2671 *et seq.* More importantly for our purposes, contract claims not encompassed by either Act fell within the Tucker Act, which lodged exclusive jurisdiction in the Court of Claims for claims exceeding $10,000. 28 U. S. C. §§ 1346 (a)(2), 1491.

A plaintiff with a contract claim against the United States for more than $10,000 often found himself in a

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[5] H. R. Rep. No. 913, 68th Cong., 1st Sess., 5–6, 15–16 (1924); S. Rep. No. 941, 68th Cong., 2d Sess., 5–6, 15–16 (1925); 66 Cong. Rec. 2088 (1925) (remarks of Rep. Underhill).

[6] *Ibid.* (remarks of Reps. Denison, Underhill, and Bulwinkle).

difficult position. He had to choose between proceeding in the district court under one of the admiralty Acts, and proceeding in the Court of Claims under the Tucker Act. And he had to choose his forum wisely, for cases were not transferable between the district courts and the Court of Claims, and an incorrect choice could result in the applicable statute of limitations having run by the time the error was discovered.[7] The solution of filing claims in both the district court and the Court of Claims was unavailable, because under 28 U. S. C. § 1500 the Court of Claims has no jurisdiction over any claim that is the subject of a pending suit in any other court. See *Wessel, Duval & Co.* v. *United States,* 129 Ct. Cl. 464, 124 F. Supp. 636 (1954).

Because of serious uncertainties about the reach of the Suits in Admiralty and Public Vessels Acts on the one hand, and the Tucker Act on the other, the crucial determination of the appropriate forum for a claim was often a difficult one.[8] The jurisdictional uncertainties under these Acts were illustrated in *Calmar S. S. Corp.* v. *United States,* 345 U. S. 446 (1953). In that case the private

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[7] H. R. Rep. No. 523, 86th Cong., 1st Sess., 2 (1959) (hereinafter cited as House Report); S. Rep. No. 1894, 86th Cong., 2d Sess., 3 (1960) (hereinafter cited as Senate Report). The problem was most severe when suit was incorrectly brought in the Court of Claims under the Tucker Act, which has a six-year statute of limitations, 28 U. S. C. § 2401 (a); the Suits in Admiralty and Public Vessels Acts have two-year limitation periods. 46 U. S. C. §§ 745, 782.

[8] The respective House and Senate Committee Reports explained the problem as follows:

"Since the applicability of [the Suits in Admiralty, Public Vessels, and Tucker Acts] to a given factual situation is frequently exceedingly difficult to determine and a question on which reasonable men may differ, lawyers in maritime practice occasionally and unavoidably bring suit in the wrong forum." House Report 2; Senate Report 3.

owner of a steamship under charter to the United States brought suit for additional charter hire for the loss of its vessel, which was bombed by enemy airplanes while carrying military supplies and equipment. The vessel was clearly not a "public vessel" under the Public Vessels Act, because it was privately owned and operated. The question was whether the vessel, "undoubtedly 'operated . . . for the United States' was 'employed as a merchant vessel' within the meaning of the [Suits in Admiralty] Act while carrying military supplies and equipment for hire." *Id.,* at 447. The District Court held that it was a merchant vessel and assumed jurisdiction under the Suits in Admiralty Act. The Court of Appeals reversed on the ground that while the vessel could have been employed as a merchant vessel under its charter, it was not so employed while transporting war materiel. Having thus successfully argued to the Court of Appeals that the suit was not cognizable under either the Suits in Admiralty Act or the Public Vessels Act, the Government reversed its position in this Court. It argued, and the Court held, that the nature of the cargo was irrelevant and that the vessel was employed as a merchant vessel within the meaning of the Suits in Admiralty Act. The Court was clearly sensitive to the fact that a contrary ruling would have relegated the plaintiff to the Court of Claims, *id.,* at 455, but even after *Calmar* there remained the possibility that a particular vessel would be held to be neither a "public vessel" nor "employed as a merchant vessel."

The sharp reversals of position by the Government and the courts in the *Calmar* case were but illustrative of the jurisdictional uncertainties faced by potential litigants. In several instances, courts reached conflicting results as to whether certain types of claims should be brought in the district court under the Suits in Admiralty

Act or the Public Vessels Act on the one hand, or in the Court of Claims under the Tucker Act on the other.[9]

It was the difficulty in determining the appropriate forum for a maritime claim against the United States that moved Congress to amend the Suits in Admiralty Act in 1960. The amendment first passed by the House in 1959 was designed to ameliorate the harsh consequences of misfilings by authorizing the transfer of cases between the district courts and the Court of Claims.[10] The transfer provision would "prevent dismissal of suits which would become time-barred when the appropriate forum had finally been determined." [11] But the Senate Committee on the Judiciary found the House bill inadequate:

> "The transfer bill would operate to prevent ultimate loss of rights of litigants, but it did nothing to eliminate or correct the cause of original erroneous choices of forum while it could increase the existing delays." [12]

Accordingly, the committee, while accepting the House

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[9] See House Report 3; Senate Report 4. Compare *Aliotti* v. *United States,* 221 F. 2d 598 (CA9 1955), with *Eastern S. S. Lines* v. *United States,* 187 F. 2d 956 (CA1 1951); *Lykes Bros. S. S. Co.* v. *United States,* 129 Ct. Cl. 455, 124 F. Supp. 622 (1954), with *States Marine Corp.* v. *United States,* 120 F. Supp. 585 (SDNY 1954), rev'd, 220 F. 2d 655 (CA2 1955); *Smith-Johnson S. S. Corp.* v. *United States,* 135 Ct. Cl. 869, 139 F. Supp. 298, cert. denied, 351 U. S. 988 (1956), with *Sword Line* v. *United States,* 228 F. 2d 344 (CA2 1955), 230 F. 2d 75 (CA2), aff'd, 351 U. S. 976 (1956) (after *Sword Line* was affirmed, the Court of Claims reversed itself in *Smith-Johnson, supra,* in 135 Ct. Cl. 866, 142 F. Supp. 367 (1956)).

[10] The House had passed an identical bill in 1958, H. R. 3046, 85th Cong., 1st Sess., but it did not emerge from the Senate Committee on the Judiciary before the expiration of the 85th Congress.

[11] House Report 3; Senate Report 4.

[12] *Id.,* at 6.

amendment, proposed several additional amendments, whose purpose was stated succinctly as follows:

> "The purpose of the amendments is to make as certain as possible that suits brought against the United States for damages caused by vessels and employees of the United States through breach of contract or tort can be originally filed in the correct court so as to proceed to trial promptly on their merits." [13]

Two amendments were designed to clarify the jurisdictional language of the Suits in Admiralty Act. First, the committee added language authorizing suits against the United States where a suit would be maintainable "if a private person or property were involved." The prior version of the Act had authorized suits against the United States only when suits would be maintainable if the "vessel" or "cargo" were privately owned, operated, or possessed, and that language had generated considerable confusion.[14]

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[13] *Id.*, at 2.

[14] Senate Report 5, citing *Ryan Stevedoring Co.* v. *United States,* 175 F. 2d 490 (CA2), cert. denied, 338 U. S. 899 (1949). Compare *Lykes Bros. S. S. Co.* v. *United States, supra,* with *States Marine Corp.* v. *United States, supra.*

This amendment, which has no bearing on this case, has generally been held to require that those maritime tort claims that were previously cognizable only on the law side of the district courts under the Federal Tort Claims Act now be brought on the admiralty side of the district courts under the Suits in Admiralty Act. See *T. J. Falgout Boats, Inc.* v. *United States,* 361 F. Supp. 838 (CD Cal. 1972), aff'd, 508 F. 2d 855 (CA9 1974), cert. denied, 421 U. S. 1000 (1975); *Roberts* v. *United States,* 498 F. 2d 520 (CA9), cert. denied, 419 U. S. 1070 (1974); *De Bardeleben Marine Corp.* v. *United States,* 451 F. 2d 140 (CA5 1971); *Utzinger* v. *United States,* 246 F. Supp. 1022 (SD Ohio 1965); *Tankrederiet Gefion A/S* v. *United States,* 241 F. Supp. 83 (ED Mich. 1964);

Second, the committee made the change that concerns us in this case: it deleted the language in the jurisdictional section of the Suits in Admiralty Act requiring that a vessel be "employed as a merchant vessel." We have already noted the confusion evidenced by the Government and the courts in the *Calmar* case over whether the vessel in question was "employed as a merchant vessel." In addition, the Senate Report referred to other cases in which the "employed as a merchant vessel" language had caused jurisdictional difficulties. For example, in *Continental Cas. Co.* v. *United States,* 140 Ct. Cl. 500, 156 F. Supp. 942 (1957), the Court of Claims had held that a suit on a contract for the repair of a vessel that had been out of service for several years was not authorized by the Suits in Admiralty Act, because at the time the repairs were made "the vessel was not employed at all," and could not therefore be said to have been "employed as a merchant vessel." Similarly, in *Eastern S. S. Lines* v. *United States,* 187 F. 2d 956 (CA1 1951), the Court of Appeals affirmed the dismissal of a vessel owner's contract claim against the United States for the amount necessary to recondition its vessel as a cargo and passenger ship after the Army had used it for troop transport and hospital services. The Court of Appeals held that the Suits in Admiralty Act had no application because the Army had not employed the vessel as a merchant vessel. The results in *Continental Casualty* and *Eastern S. S. Lines* were, the Senate Report noted, contrary to results reached in other cases "on essentially identical facts." [15] It was

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Tebbs v. *Baker-Whitely Towing Co.,* 227 F. Supp. 656 (Md. 1964); *Beeler* v. *United States,* 224 F. Supp. 973 (WD Pa.), rev'd on other grounds, 338 F. 2d 687 (CA3 1964).

[15] Senate Report 5, citing *Shewan & Sons* v. *United States,* 266 U. S. 108 (1924); *Aliotti* v. *United States,* 221 F. 2d 598 (CA9 1955); *Sinclair Rfg. Co.* v. *United States,* 129 Ct. Cl. 474, 124 F.

to make clear that such cases could be brought on the admiralty side of the district courts that the committee recommended the deletion of the confusing "employed as a merchant vessel" proviso.

C

Respondent contends that the deletion of the "employed as a merchant vessel" proviso was intended to abolish the distinction between a merchant vessel and a public vessel, and thereby enable suits previously cognizable under the Public Vessels Act to be brought under the Suits in Admiralty Act, free from the restrictive provisions of the Public Vessels Act. There is no indication that Congress had any such broad purpose.[16] The legislative history contains no explicit suggestion that Congress intended to render nugatory the provisions of the Public Vessels Act. Nor does it express any broad intent to put an end to all litigation over whether a vessel is a public vessel.

The definitions of "merchant vessel" and "public vessel" were of interest to Congress only insofar as they related to Congress' basic purpose: to remove uncertainty over the proper forum for a claim against the United States. In this regard, it is quite clear that Congress' concern was not with uncertainty whether a suit should be brought under the Suits in Admiralty Act or under the Public Vessels Act, since in either event the proper forum was the admiralty side of the district court. See

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Supp. 628 (1954). Of course, this Court's decision in the *Calmar* case cast doubts on at least some decisions narrowly defining the scope of admiralty jurisdiction under the Suits in Admiralty and Public Vessels Acts. Congress was understandably of the view that confusion remained after *Calmar*.

[16] We do not view the dictum in *Amell* v. *United States*, 384 U. S. 158, 164 (1966), as requiring a result different from the one we reach today.

Calmar S. S. Corp., 345 U. S., at 454–455. The Senate Report stated the concern precisely:

> "The serious problem, and the one to which this bill is directed, arises in claims exceeding $10,000 where there is uncertainty as to whether a suit is properly brought under the Tucker Act [in the Court of Claims] on the one hand or the Suits in Admiralty or Public Vessels Act [on the admiralty side of the district court] on the other." [17]

In short, Congress saw confusion between the category of suits cognizable under the Suits in Admiralty Act or Public Vessels Act on the one hand, and the category of suits cognizable under the Tucker Act on the other. It attempted to eliminate the confusion between these two categories by expanding the scope of the Suits in Admiralty Act at the expense of the Tucker Act—thereby virtually eliminating the quasi-admiralty jurisdiction of the Court of Claims under the Tucker Act.[18] But Congress did nothing to alter the distinction between the Suits in Admiralty Act and the Public Vessels Act, or expand the one at the expense of the other.

That the House and Senate Reports contain a reference to "confusion in establishing whether a vessel is a 'merchant vessel' or a 'public vessel' " does not suggest otherwise. That reference appears in the course of a discussion of the difficulty in choosing the proper forum for a claim. To a limited extent, doubt whether a vessel

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[17] Senate Report 3.

[18] The Court of Claims has not been completely deprived of jurisdiction over claims arising in a maritime context. In *Amell* v. *United States, supra,* we held that wage claims exceeding $10,000 by Government employees working aboard Government vessels are still cognizable exclusively in the Court of Claims, where wage claims by Government employees have traditionally been cognizable.

was a merchant vessel or a public vessel created uncertainty over the proper forum. The Reports explained:

> "If [a vessel is] a 'merchant vessel,' under the Suits in Admiralty Act exclusive jurisdiction is in the district court in admiralty. If a 'public vessel,' jurisdiction may be either in admiralty under the Public Vessels Act or under the Tucker Act, depending on the nature of the claim. It will be recalled that a claim under the Tucker Act exceeding $10,000 must be brought in the Court of Claims." [19]

Congress' concern was that because of differences in the authorizational language of the Suits in Admiralty Act and the Public Vessels Act, some claims that would clearly have been within the jurisdiction of the district court if merchant vessels were involved had been held to be beyond the district court's jurisdiction when public vessels were involved. Thus, some courts had held that contract claims other than those expressly authorized by the Public Vessels Act were generally not cognizable under the Act.[20] Litigants with certain types of contract claims therefore faced the possibility that the appropriate forum would depend on the type of vessel involved. Congress' deletion of the "employed as a merchant vessel" proviso was clearly intended to remove such uncertainty as to the proper forum by bringing within the Suits in Admiralty Act whatever category of claims

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[19] House Report 2; Senate Report 3.

[20] See, *e. g., Eastern S. S. Lines* v. *United States*, 187 F. 2d, at 959; *Continental Cas. Co.* v. *United States*, 140 Ct. Cl. 500, 156 F. Supp. 942 (1957). Other than claims for "damages caused by a public vessel of the United States," the only claims expressly authorized by the Public Vessels Act are claims "for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States." 46 U. S. C. § 781.

involving public vessels was beyond the scope of the Public Vessels Act.[21] But claims like the instant one, that fell within the Public Vessels Act, presented none of the problems with which Congress was concerned in 1960, and there is therefore no reason to infer that Congress intended to affect them.

III

In sum, the interpretation of the 1960 amendment advanced by the respondent and adopted by the Court of Appeals would effectively nullify specific policy judgments made by Congress when it enacted the Public Vessels Act, by enabling litigants to bring suits previously subject to the terms of the Public Vessels Act under the Suits in Admiralty Act. The language of the amendment does not explicitly authorize such a result, and the legislative history reflects a narrow congressional purpose that would not be advanced by that result. We therefore hold that claims within the scope of the Public Vessels Act remain subject to its terms after the 1960 amendment to the Suits in Admiralty Act. Since there is no dispute that respondent's claim falls within the embrace of the Public Vessels Act, the Court of Appeals erred in concluding that the reciprocity provision of the Public Vessels Act is inapplicable.

Respondent urges two additional grounds for affirmance. First, it contends that the reciprocity provision, even if applicable, does not bar its claim, because the owners of 99% of its stock are Americans and it is in substance an American owner. The District Court rejected

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[21] It is not to be assumed that contract claims other than those expressly authorized by the Public Vessels Act were necessarily beyond the scope of the Act. As in *Calmar S. S. Corp.* v. *United States,* 345 U. S. 446, 456 n. 8 (1953), we intimate no view on the subject.

this contention, and the Court of Appeals did not address it since it found the reciprocity provision inapplicable. Second, respondent argues that if it is considered a national of the Philippines, whose suit would fall within the prohibition of the reciprocity provision, that provision denies it due process in violation of the Fifth Amendment. This argument was not even presented to the District Court, and was not addressed by the Court of Appeals. We leave the consideration of these two additional contentions, to the extent they were adequately raised, to the Court of Appeals on remand.

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

It is so ordered.

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

MR. JUSTICE STEWART, dissenting.

Congress amended the Suits in Admiralty Act in 1960 to eliminate the distinction the Act formerly drew between public vessels and merchant vessels owned or operated by the United States. 74 Stat. 912. See S. Rep. No. 1894, 86th Cong., 2d Sess., 3 (1960). See also S. Rep. No. 92–1079, pp. 5–6 (1972). Six years later the then Solicitor General explained the effect of that amendment in a brief filed on behalf of the Government in this Court:

> "As originally enacted, the Suits in Admiralty Act was limited to government merchant vessels and tugboats, and excluded public vessels. The latter were separately covered in the Public Vessels Act . . . . Because of uncertainty engendered by the public-merchant vessel distinction, . . . Congress in 1960 amended Section 2 of the Suits in Admiralty Act

to delete the reference to merchant vessels. . . . Thus, the Suits in Admiralty Act now extends to government public as well as merchant vessels." Brief for United States 9 n. 1, in *Amell* v. *United States,* No. 282, O. T. 1963.[1]

In the present case the Government has steered an entirely different course, arguing that Congress did not intend to expand the scope of the Suits in Admiralty Act to include public vessels, and that the plain language of the Act should be ignored. I cannot accept this boxing of the compass. At best, the United States has demonstrated only that the legislative history indicates that Congress was concerned with more than one problem in amending the law. But ambiguous legislative history surely cannot suffice to undermine the plain words of the statute, when no persuasive policy considerations[2] and no repeal by implication[3] are involved.

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[1] This Court agreed: "In 1960, . . . Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys . . . ." *Amell* v. *United States,* 384 U. S. 158, 164.

[2] Since the United States could have sued the owners of the fishing boat in the Philippines had the fishing boat rammed the destroyer, it would do no violence to the concept of reciprocity to allow the owners of the boat to sue the United States in a federal court. And while the United States would no longer be able *sua sponte* to prevent the enforcement of subpoenas or stay proceedings against naval vessels and their crews, it is not realistic to think that a federal court would refuse such relief if national security were in any way at stake. Finally, prejudgment interest is awardable under the Suits in Admiralty Act, and not under the Public Vessels Act, but the amount of money involved in such awards is not large and the award of interest is discretionary in any event. *The Scotland,* 118 U. S. 507, 519. None of these governmental interests supposedly served by the Public Vessels Act, but not by the Suits in Admiralty Act, is, therefore, significant.

[3] The judgment of the Court of Appeals does not amount to a repeal of the Public Vessels Act, since there will still be cases cog-

The plain language of the Suits in Admiralty Act authorizes anyone to sue the United States for damages caused by any United States vessel. There is no need to inquire further: "When there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States* v. *Wiltberger*, 5 Wheat. 76, 95-96 (Marshall, C. J.). As the Court said 10 years ago in construing the Suits in Admiralty Act: "If we are here misconstruing the intent of Congress, it can easily set the matter to rest by explicit language." *Amell* v. *United States*, 384 U. S. 158, 166. So long as the law reads as it now does, I think the Court of Appeals correctly understood it, and I would, therefore, affirm the judgment before us.[4]

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nizable only under that Act by reason of its broader venue provisions. Compare 46 U. S. C. § 742 with 46 U. S. C. § 782.

[4] While no other Court of Appeals has ruled on the precise issue presented here, two have indicated that they would reach the same result as did the Ninth Circuit. *United Philippine Lines, Inc.* v. *The Daniel Boone*, 475 F. 2d 478, 480 n. 5 (CA4); *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F. 2d 167, 169 (CA2). See also *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 145-146 (CA5).

Syllabus

ERNST & ERNST *v.* HOCHFELDER ET AL.

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

No. 74–1042. Argued December 3, 1975—Decided March 30, 1976

Petitioner accounting firm was retained to audit periodically a brokerage firm's books and records. Respondents, who were customers of the brokerage firm, invested in a securities scheme ultimately revealed as fraudulent and perpetrated by the firm's president and principal stockholder. After the fraud came to light, respondents filed an action for damages against petitioner under § 10 (b) of the Securities Exchange Act of 1934 (1934 Act), which makes it unlawful to use or employ "any manipulative or deceptive device or contrivance" in contravention of Securities and Exchange Commission (SEC) rules. It was alleged that the brokerage firm president's scheme violated § 10 (b) and SEC Rule 10b–5, and that petitioner had "aided and abetted" the violations by its "failure" to conduct proper audits of the firm, thereby failing to discover internal practices that prevented an effective audit. The District Court granted petitioner's motion for summary judgment and dismissed the action, holding that whether or not a cause of action could be based merely on allegations of negligence, there was no genuine issue of material fact as to whether petitioner had conducted its audits in accordance with generally accepted standards. The Court of Appeals reversed and remanded, holding that one who breaches a duty of inquiry and disclosure owed another is liable in damages for aiding and abetting a third party's violation of Rule 10b–5 if the fraud would have been discovered or prevented but for the breach, and that there were genuine issues of fact as to whether petitioner committed such a breach and whether inquiry and disclosure would have led to discovery or prevention of the president's fraud. *Held:*

1. A private cause of action for damages will not lie under § 10 (b) and Rule 10b–5 in the absence of any allegation of "scienter," *i. e.,* intent to deceive, manipulate, or defraud on the defendant's part. Pp. 194–214.

(a) The use of the words "manipulative," "device," and "contrivance" in § 10 (b) clearly shows that it was intended to

proscribe a type of conduct quite different from negligence, and more particularly the use of the word "manipulative," virtually a term of art used in connection with securities markets, connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities. Pp. 197–201.

(b) The 1934 Act's legislative history also indicates that § 10 (b) was addressed to practices involving some element of scienter and cannot be read to impose liability for negligent conduct alone. Pp. 201–206.

(c) The structure of the 1934 Act and the interrelated Securities Act of 1933 (1933 Act) does not support the contention that since § 10 (b), in contrast to certain other sections of these Acts, is not by its terms explicitly restricted to willful, knowing, or purposeful conduct, it should not be construed to require more than negligent action or inaction as a precondition for civil liability. In each instance that Congress in these Acts created express civil liability in favor of purchasers or sellers of securities it clearly specified whether recovery was to be premised on knowing or intentional conduct, negligence, or entirely innocent mistake. The express recognition of a cause of action premised on negligent behavior in § 11, for example, stands in sharp contrast to the language of § 10 (b). Moreover, each of the express civil remedies in the 1933 Act allowing recovery for negligent conduct is subject to significant procedural restrictions indicating that the judicially created private damages remedy under § 10 (b)—which has no comparable restrictions—cannot be extended, consistently with Congress' intent, to actions premised on negligence, since to do so would allow causes of action under these express 1933 Act remedies to be brought instead under § 10 (b), thereby nullifying the effectiveness of such restrictions on those remedies. Pp. 206–211.

(d) While there is language in Rule 10b–5 that could arguably be read as proscribing any type of material misstatement or omission and any course of conduct that has the effect of defrauding investors, whether the wrongdoing was intentional or not, such a reading does not comport with the Rule's administrative history which makes it clear that it was intended to apply only to activities involving scienter. More importantly, the scope of Rule 10b–5 cannot exceed the power granted the SEC under § 10 (b), whose language and history compel interpreting the Rule to apply only to intentional wrongdoing. Pp. 212–214.

2. The case will not be remanded for further proceedings to require proof of more than negligent misfeasance by petitioner, since throughout the history of the case respondents have proceeded on a theory of liability premised on negligence, in fact specifically disclaiming that petitioner had engaged in fraud or intentional misconduct. P. 215.

503 F. 2d 1100, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 215. STEVENS, J., took no part in the consideration or decision of the case.

Robert L. Berner, Jr., argued the cause for petitioner. With him on the briefs were *Francis D. Morrissey, Michael J. Madda,* and *Kenneth H. Lang.*

Willard L. King argued the cause and filed a brief for respondents Hochfelder et al. *Willard J. Lassers* argued the cause for respondents Allison et al. With him on the brief were *Donald L. Vetter, Leon M. Despres,* and *Alex Elson.*

Paul Gonson argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Bork, Deputy Solicitor General Friedman, Lawrence E. Nerheim,* and *Charles E. H. Luedde.**

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether an action for civil damages may lie under § 10 (b) of the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 891, 15 U. S. C.

**Kenneth J. Bialkin* and *Louis A. Craco* filed a brief for the American Institute of Certified Public Accountants as *amicus curiae* urging reversal.

§ 78j (b), and Securities and Exchange Commission Rule 10b–5, 17 CFR § 240.10b–5 (1975), in the absence of an allegation of intent to deceive, manipulate, or defraud on the part of the defendant.

I

Petitioner, Ernst & Ernst, is an accounting firm. From 1946 through 1967 it was retained by First Securities Company of Chicago (First Securities), a small brokerage firm and member of the Midwest Stock Exchange and of the National Association of Securities Dealers, to perform periodic audits of the firm's books and records. In connection with these audits Ernst & Ernst prepared for filing with the Securities and Exchange Commission (Commission) the annual reports required of First Securities under § 17 (a) of the 1934 Act, 15 U. S. C. § 78q (a).[1] It also prepared for First Securities responses to the financial questionnaires of the Midwest Stock Exchange (Exchange).

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[1] Section 17 (a) requires that securities brokers or dealers "make . . . and preserve . . . such accounts . . . books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors." During the period relevant here, Commission Rule 17a–5, 17 CFR § 240.17a–5 (1975), required that First Securities file an annual report of its financial condition that included a certificate stating "clearly the opinion of the accountant with respect to the financial statement covered by the certificate and the accounting principles and practices reflected therein." See SEC Release No. 3338 (Nov. 28, 1942), X–17A–5 (h). The Rule required Ernst & Ernst to state in its certificate, *inter alia*, "whether the audit was made in accordance with generally accepted auditing standards applicable in the circumstances" and provided that nothing in the Rule should "be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit for the purpose of expressing the opinions required" by the Rule.

Respondents were customers of First Securities who invested in a fraudulent securities scheme perpetrated by Leston B. Nay, president of the firm and owner of 92% of its stock. Nay induced the respondents to invest funds in "escrow" accounts that he represented would yield a high rate of return. Respondents did so from 1942 through 1966, with the majority of the transactions occurring in the 1950's. In fact, there were no escrow accounts as Nay converted respondents' funds to his own use immediately upon receipt. These transactions were not in the customary form of dealings between First Securities and its customers. The respondents drew their personal checks payable to Nay or a designated bank for his account. No such escrow accounts were reflected on the books and records of First Securities, and none was shown on its periodic accounting to respondents in connection with their other investments. Nor were they included in First Securities' filings with the Commission or the Exchange.

This fraud came to light in 1968 when Nay committed suicide, leaving a note that described First Securities as bankrupt and the escrow accounts as "spurious." Respondents subsequently filed this action[2] for damages against Ernst & Ernst[3] in the United States District Court for the Northern District of Illinois under

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[2] Two separate, but substantially identical, complaints initially were filed by different members of the present group of respondents. Subsequently the respondents jointly filed a First Amended Complaint. The two cases were treated by the District Court as if they were consolidated, and they were consolidated formally on appeal.

[3] The first count of the complaint was directed against the Exchange, charging that through its acts and omissions it had aided and abetted Nay's fraud. Summary judgment in favor of the Exchange was affirmed on appeal. *Hochfelder* v. *Midwest Stock Exchange,* 503 F. 2d 364 (CA7), cert. denied, 419 U. S. 875 (1974).

§ 10 (b) of the 1934 Act. The complaint charged that Nay's escrow scheme violated § 10 (b) and Commission Rule 10b-5,[4] and that Ernst & Ernst had "aided and abetted" Nay's violations by its "failure" to conduct proper audits of First Securities. As revealed through discovery, respondents' cause of action rested on a theory of negligent nonfeasance. The premise was that Ernst & Ernst had failed to utilize "appropriate auditing procedures" in its audits of First Securities, thereby failing to discover internal practices of the firm said to prevent an effective audit. The practice principally relied on was Nay's rule that only he could open mail addressed to him at First Securities or addressed to First Securities to his attention, even if it arrived in his absence. Respondents contended that if Ernst & Ernst had conducted a proper audit, it would have discovered this "mail rule." The existence of the rule then would have been disclosed in reports to the Exchange and to the Commission by Ernst & Ernst as an irregular procedure that prevented an effective audit. This would have led to an investigation of Nay that would have revealed the fraudulent scheme. Respondents specifically disclaimed the existence of fraud or intentional misconduct on the part of Ernst & Ernst.[5]

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[4] Immediately after Nay's suicide the Commission commenced receivership proceedings against First Securities. In those proceedings all of the respondents except two asserted claims based on the fraudulent escrow accounts. These claims ultimately were allowed in *SEC* v. *First Securities Co.*, 463 F. 2d 981, 986 (CA7), cert. denied, 409 U. S. 880 (1972), where the court held that Nay's conduct violated § 10 (b) and Rule 10b-5, and that First Securities was liable for Nay's fraud as an aider and abettor. The question of Ernst & Ernst's liability was not considered in that case.

[5] In their response to interrogatories in the District Court respondents conceded that they did "not accuse Ernst & Ernst of deliberate, intentional fraud," merely with "inexcusable negligence." App. 81.

After extensive discovery the District Court granted Ernst & Ernst's motion for summary judgment and dismissed the action. The court rejected Ernst & Ernst's contention that a cause of action for aiding and abetting a securities fraud could not be maintained under § 10 (b) and Rule 10b-5 merely on allegations of negligence. It concluded, however, that there was no genuine issue of material fact with respect to whether Ernst & Ernst had conducted its audits in accordance with generally accepted auditing standards.[6]

The Court of Appeals for the Seventh Circuit reversed and remanded, holding that one who breaches a duty of inquiry and disclosure owed another is liable in damages for aiding and abetting a third party's violation of Rule 10b-5 if the fraud would have been discovered or prevented but for the breach. 503 F. 2d 1100 (1974).[7]

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[6] The District Court also held that respondents' action was barred by the doctrine of equitable estoppel and the applicable Illinois statute of limitations of three years. See n. 29, *infra*. As customers of First Securities respondents were sent confirmation forms as required under § 17 (a) and Rule 17a-5 requesting that they verify the accuracy of the statements and notify Ernst & Ernst as to any exceptions. Although the confirmation forms contained no reference to the escrow accounts, Ernst & Ernst was not notified of this fact. The last audit of First Securities by Ernst & Ernst was completed in December 1967 and the first complaint in this action was not filed until February 1971.

[7] In support of this holding, the Court of Appeals cited its decision in *Hochfelder* v. *Midwest Stock Exchange, supra,* where it detailed the elements necessary to establish a claim under Rule 10b-5 based on a defendant's aiding and abetting a securities fraud solely by inaction. See n. 3 *supra*. In such a case the plaintiff must show "that the party charged with aiding and abetting had knowledge of or, but for a breach of a duty of inquiry, should have had knowledge of the fraud, and that possessing such knowledge the party failed to act due to an improper motive or breach of a duty of disclosure." 503 F. 2d, at 374. The court explained in the instant case that these "elements comprise a flexible standard of liability

The court reasoned that Ernst & Ernst had a common-law and statutory duty of inquiry into the adequacy of First Securities' internal control system because it had contracted to audit First Securities and to prepare for filing with the Commission the annual report of First Securities' financial condition required under § 17 of the 1934 Act and Rule 17a-5.[8] The court further reasoned that respondents were beneficiaries of the statutory duty to inquire [9] and the related duty to disclose any material

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which should be amplified according to the peculiarities of each case." *Id.*, at 1104. In view of our holding that an intent to deceive, manipulate, or defraud is required for civil liability under § 10 (b) and Rule 10b-5, we need not consider whether civil liability for aiding and abetting is appropriate under the section and the Rule, nor the elements necessary to establish such a cause of action. See, *e. g., Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (1966) and 286 F. Supp. 702 (ND Ind. 1968), aff'd, 417 F. 2d 147 (CA7 1969), cert. denied, 397 U. S. 989 (1970) (defendant held liable for giving active and knowing assistance to a third party engaged in violations of the securities laws). See generally Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, *In Pari Delicto,* Indemnification and Contribution, 120 U. Pa. L. Rev. 597, 620-645 (1972).

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

[9] The court concluded that the duty of inquiry imposed on Ernst & Ernst under § 17 (a) was "grounded on a concern for the protection of investors such as [respondents]," without reaching the question whether the statute imposed a "direct duty" to the respondents. 503 F. 2d, at 1105. The court held that Ernst & Ernst owed no common-law duty of inquiry to respondents arising from its contract with First Securities since Ernst & Ernst did not specifically foresee that respondents' limited class might suffer from a negligent audit, compare *Glanzer* v. *Shepard,* 233 N. Y. 236, 135 N. E. 275 (1922), with *Ultramares Corp.* v. *Touche,* 255 N. Y. 170, 174 N. E. 441 (1931); see, *e. g., Rhode Island Hospital Trust Nat. Bank* v. *Swartz,* 455 F. 2d 847, 851 (CA4 1972). Moreover, respondents conceded that they did not rely on the financial statements and reports prepared by Ernst & Ernst or on its certificate of opinion. 503 F. 2d, at 1107.

irregularities that were discovered. 503 F. 2d, at 1105–1111. The court concluded that there were genuine issues of fact as to whether Ernst & Ernst's failure to discover and comment upon Nay's mail rule[10] constituted a breach of its duties of inquiry and disclosure, *id.*, at 1111, and whether inquiry and disclosure would have led to the discovery or prevention of Nay's fraud. *Id.*, at 1115.[11]

We granted certiorari to resolve the question whether a private cause of action for damages will lie under § 10 (b) and Rule 10b–5 in the absence of any allegation of "scienter"—intent to deceive, manipulate, or defraud.[12] 421 U. S. 909 (1975). We conclude that it will not and therefore we reverse.[13]

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[10] In their briefs respondents allude to several other alleged failings by Ernst & Ernst in its audit of First Securities, principally its failure to inquire into the collectibility of certain loans by First Securities to Nay and and its failure to follow up on a 1965 memorandum that characterized First Securities' overall system of internal control as weak because of the centralization of functions in the cashier. The Court of Appeals mentioned none of these alleged deficiencies in its opinion in this case, although it did discuss the loans to Nay and certain other related matters in its opinion in *Hochfelder* v. *Midwest Stock Exchange,* 503 F. 2d, at 370–371, holding that the existence of these facts was insufficient to put the Exchange on notice that further inquiry into First Securities' financial affairs was required.

[11] The Court of Appeals also reversed the District Court's holding with respect to equitable estoppel and the statute of limitations. See n. 6, *supra.* In view of our disposition of the case we need not address these issues.

[12] Although the verbal formulations of the standard to be applied have varied, several Courts of Appeals have held in substance that negligence alone is sufficient for civil liability under § 10 (b) and Rule 10b–5. See, *e. g., White* v. *Abrams,* 495 F. 2d 724, 730 (CA9 1974) ("flexible duty" standard); *Myzel* v. *Fields,* 386 F. 2d 718, 735 (CA8 1967), cert. denied, 390 U. S. 951 (1968) (negligence suffi-

[*Footnote 13 is on p. 194*]

II

Federal regulation of transactions in securities emerged as part of the aftermath of the market crash in 1929.

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cient); *Kohler* v. *Kohler Co.*, 319 F. 2d 634, 637 (CA7 1963) (knowledge not required). Other Courts of Appeals have held that some type of scienter—*i. e.*, intent to defraud, reckless disregard for the truth, or knowing use of some practice to defraud—is necessary in such an action. See, *e. g.*, *Clegg* v. *Conk*, 507 F. 2d 1351, 1361–1362 (CA10 1974), cert. denied, 422 U. S. 1007 (1975) (an element of "scienter or conscious fault"); *Lanza* v. *Drexel & Co.*, 479 F. 2d 1277, 1306 (CA2 1973) ("willful or reckless disregard" of the truth). But few of the decisions announcing that some form of negligence suffices for civil liability under § 10 (b) and Rule 10b–5 actually have involved only negligent conduct. *Smallwood* v. *Pearl Brewing Co.*, 489 F. 2d 579, 606 (CA5), cert. denied, 419 U. S. 873 (1974); *Kohn* v. *American Metal Climax, Inc.*, 458 F. 2d 255, 286 (CA3 1972) (Adams, J., concurring and dissenting); Bucklo, Scienter and Rule 10b–5, 67 Nw. U. L. Rev. 562, 568–570 (1972).

In this opinion the term "scienter" refers to a mental state embracing intent to deceive, manipulate, or defraud. In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10 (b) and Rule 10b–5.

Since this case concerns an action for damages we also need not consider the question whether scienter is a necessary element in an action for injunctive relief under § 10 (b) and Rule 10b–5. Cf. *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963).

[13] Respondents further contend that Ernst & Ernst owed them a direct duty under § 17 (a) of the 1934 Act and Rule 17a–5 to conduct a proper audit of First Securities and that they may base a private cause of action against Ernst & Ernst for violation of that duty. Respondents' cause of action, however, was premised solely on the alleged violation of § 10 (b) and Rule 10b–5. During the lengthy history of this litigation they have not amended their original complaint to aver a cause of action under § 17 (a) and Rule 17a–5. We therefore do not consider that a claim of liability under § 17 (a) is properly before us even assuming respondents could assert such a claim independently of § 10 (b).

The Securities Act of 1933 (1933 Act), 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*, was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing. See H. R. Rep. No. 85, 73d Cong., 1st Sess., 1–5 (1933). The 1934 Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges. See S. Rep. No. 792, 73d Cong., 2d Sess., 1–5 (1934). Although the Acts contain numerous carefully drawn express civil remedies and criminal penalties, Congress recognized that efficient regulation of securities trading could not be accomplished under a rigid statutory program. As part of the 1934 Act Congress created the Commission, which is provided with an arsenal of flexible enforcement powers. See, *e. g.*, 1933 Act §§ 8, 19, 20, 15 U. S. C. §§ 77h, 77s, 77t; 1934 Act §§ 9, 19, 21, 15 U. S. C. §§ 78i, 78s, 78u.

Section 10 of the 1934 Act makes it "unlawful for any person . . . (b) [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78j. In 1942, acting pursuant to the power conferred by § 10 (b), the Commission promulgated Rule 10b–5, which now provides:

> "Employment of manipulative and deceptive devices.

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

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

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

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

"in connection with the purchase or sale of any security."

Although § 10 (b) does not by its terms create an express civil remedy for its violation, and there is no indication that Congress,[14] or the Commission when adopting Rule 10b-5,[15] contemplated such a remedy, the existence of a private cause of action for violations of the statute and the Rule is now well established. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 730 (1975); *Affiliated Ute Citizens* v. *United States,* 406 U. S. 128, 150-154 (1972); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U. S. 6, 13 n. 9 (1971). During the 30-year period since a private cause of action was first implied under § 10 (b) and Rule 10b-5,[16]

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[14] See, *e. g.,* S. Rep. No. 792, 73d Cong., 2d Sess., 5-6 (1934); Note, Implied Liability Under the Securities Exchange Act, 61 Harv. L. Rev. 858, 860 (1948).

[15] SEC Release No. 3230 (May 21, 1942); *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461, 463 (CA2), cert. denied, 343 U. S. 956 (1952).

[16] *Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512 (ED Pa. 1946).

a substantial body of case law and commentary has developed as to its elements. Courts and commentators long have differed with regard to whether scienter is a necessary element of such a cause of action, or whether negligent conduct alone is sufficient.[17] In addressing this question, we turn first to the language of § 10 (b), for "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps, supra,* at 756 (POWELL, J., concurring); see *FTC* v. *Bunte Bros., Inc.,* 312 U. S. 349, 350 (1941).

A

Section 10 (b) makes unlawful the use or employment of "any manipulative or deceptive device or contrivance" in contravention of Commission rules. The words "manipulative or deceptive" used in conjunction with "device or contrivance" strongly suggest that § 10 (b) was intended to proscribe knowing or intentional misconduct. See *SEC* v. *Texas Gulf Sulphur Co.,* 401 F. 2d 833, 868 (CA2 1968) (Friendly, J., concurring), cert. denied *sub nom. Coates* v. *SEC,* 394 U. S. 976 (1969); Loss, Summary Remarks, 30 Bus. Law. 163, 165 (Special Issue 1975). See also *Kohn* v. *American Metal Climax, Inc.,* 458 F. 2d 255, 280 (CA3 1972) (Adams, J., concurring and dissenting).

In its *amicus curiae* brief, however, the Commission contends that nothing in the language "manipulative or deceptive device or contrivance" limits its operation to

[17] See cases cited in n. 12, *supra.* Compare, *e. g.,* Comment, Scienter and Rule 10b-5, 69 Col. L. Rev. 1057, 1080–1081 (1969); Note, Negligent Misrepresentations under Rule 10b-5, 32 U. Chi. L. Rev. 824, 839–844 (1965); Note, Securities Acts, 82 Harv. L. Rev. 938, 947 (1969); Note, Civil Liability Under Section 10B and Rule 10B-5: A Suggestion for Replacing the Doctrine of Privity, 74 Yale L. J. 658, 682–689 (1965), with, *e. g.,* 3 L. Loss, Securities Regulation 1766 (2d ed. 1961); 6 *id.,* at 3883–3885 (1969).

knowing or intentional practices.[18] In support of its view, the Commission cites the overall congressional purpose in the 1933 and 1934 Acts to protect investors against false and deceptive practices that might injure them. See *Affiliated Ute Citizens* v. *United States, supra,* at 151; *Superintendent of Insurance* v. *Bankers Life & Cas. Co., supra,* at 11-12; *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 432-433 (1964). See also *SEC* v. *Capital Gains Res. Bur.,* 375 U. S. 180, 195 (1963). The Commission then reasons that since the "effect" upon investors of given conduct is the same regardless of whether the conduct is negligent or intentional, Congress must have intended to bar all such practices and not just those done knowingly or intentionally. The logic of this effect-oriented approach would impose liability for wholly faultless conduct where such conduct results in harm to investors, a result the Commission would be unlikely to support. But apart from where its logic might

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[18] The Commission would not permit recovery upon proof of negligence in all cases. In order to harmonize civil liability under § 10 (b) with the express civil remedies contained in the 1933 and 1934 Acts, the Commission would limit the circumstances in which civil liability could be imposed for negligent violation of Rule 10b-5 to situations in which (i) the defendant knew or reasonably could foresee that the plaintiff would rely on his conduct, (ii) the plaintiff did in fact so rely, and (iii) the amount of the plaintiff's damages caused by the defendant's conduct was definite and ascertainable. Brief for SEC as *Amicus Curiae* 23-33. The Commission concludes that the present record does not establish these conditions since Ernst & Ernst could not reasonably have foreseen that the financial statements of First Securities would induce respondents to invest in the escrow accounts, respondents in fact did not rely on Ernst & Ernst's audits, and the amount of respondents' damages was unascertainable. *Id.,* at 33-36. Respondents accept the Commission's basic analysis of the operative language of the statute and Rule, but reject these additional requirements for recovery for negligent violations.

lead, the Commission would add a gloss to the operative language of the statute quite different from its commonly accepted meaning. See, *e. g., Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 617–618 (1944).[19] The argument simply ignores the use of the words "manipulative," "device," and "contrivance"—terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence.[20] Use of the word "manipulative" is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.[21]

In addition to relying upon the Commission's argument with respect to the operative language of the stat-

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[19] "To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. . . . After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S., at 617–618. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 536–537 (1947).

[20] Webster's International Dictionary (2d ed. 1934) defines "device" as "[t]hat which is devised, or formed by design; a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice," and "contrivance" in pertinent part as "[a] thing contrived or used in contriving; a scheme, plan, or artifice." In turn, "contrive" in pertinent part is defined as "[t]o devise; to plan; to plot . . . [t]o fabricate . . . design; invent . . . to scheme . . . ." The Commission also ignores the use of the terms "[t]o use or employ," language that is supportive of the view that Congress did not intend § 10 (b) to embrace negligent conduct.

[21] Webster's International Dictionary, *supra,* defines "manipulate" as "to manage or treat artfully or fraudulently; as to *manipulate* accounts . . . . 4. *Exchanges.* To force (prices) up or down, as by matched orders, wash sales, fictitious reports . . . ; to rig."

ute, respondents contend that since we are dealing with "remedial legislation," *Tcherepnin* v. *Knight,* 389 U. S. 332, 336 (1967), it must be construed " 'not technically and restrictively, but flexibly to effectuate its remedial purposes.' " *Affiliated Ute Citizens* v. *United States,* 406 U. S., at 151, quoting *SEC* v. *Capital Gains Research Bureau, supra,* at 195. They argue that the "remedial purposes" of the Acts demand a construction of § 10 (b) that embraces negligence as a standard of liability. But in seeking to accomplish its broad remedial goals, Congress did not adopt uniformly a negligence standard even as to express civil remedies. In some circumstances and with respect to certain classes of defendants, Congress did create express liability predicated upon a failure to exercise reasonable care. *E. g.,* 1933 Act § 11 (b)(3)(B), 48 Stat. 82, as amended, 15 U. S. C. § 77k (b)(3)(B) (liability of "experts," such as accountants, for misleading statements in portions of registration statements for which they are responsible).[22] But in other situations good faith is an absolute defense. 1934 Act § 18, 48 Stat. 897, as amended, 15 U. S. C. § 78r (misleading statements in any document filed pursuant to the 1934 Act). And in still other circumstances Congress created express liability regardless of the defendant's fault, 1933 Act § 11 (a), 15 U. S. C. § 77k (a) (issuer liability for misleading statements in the registration statement).

It is thus evident that Congress fashioned standards of fault in the express civil remedies in the 1933 and 1934 Acts on a particularized basis. Ascertainment of congressional intent with respect to the standard of liability created by a particular section of the Acts must therefore rest primarily on the language of that section. Where, as here, we deal with a judicially implied liability, the statutory language certainly

[22] See *infra,* at 208, and n. 26.

is no less important. In view of the language of § 10 (b), which so clearly connotes intentional misconduct, and mindful that the language of a statute controls when sufficiently clear in its context, *United States* v. *Oregon,* 366 U. S. 643, 648 (1961); *Packard Motor Car Co.* v. *NLRB,* 330 U. S. 485, 492 (1947), further inquiry may be unnecessary. We turn now, nevertheless, to the legislative history of the 1934 Act to ascertain whether there is support for the meaning attributed to § 10 (b) by the Commission and respondents.

B

Although the extensive legislative history of the 1934 Act is bereft of any explicit explanation of Congress' intent, we think the relevant portions of that history support our conclusion that § 10 (b) was addressed to practices that involve some element of scienter and cannot be read to impose liability for negligent conduct alone.

The original version of what would develop into the 1934 Act was contained in identical bills introduced by Senator Fletcher and Representative Rayburn. S. 2693, 73d Cong., 2d Sess. (1934); H. R. 7852, 73d Cong., 2d Sess. (1934). Section 9 (c) of the bills, from which present § 10 (b) evolved, proscribed as unlawful the use of "any device or contrivance which, or any device or contrivance in a way or manner which the Commission may by its rules and regulations find detrimental to the public interest or to the proper protection of investors." The other subsections of proposed § 9 listed specific practices that Congress empowered the Commission to regulate through its rulemaking power. See §§ 9 (a) (short sale), (b) ("stop-loss order"). Soon after the hearings on the House bill were held, a substitute bill was introduced in both Houses which abbreviated and modified

§ 9 (c)'s operative language to read "any manipulative device or contrivance." H. R. 8720, 73d Cong., 2d Sess., § 9 (c) (1934); see S. 3420, 73d Cong., 2d Sess., § 10 (b) (1934). Still a third bill, retaining the Commission's power to regulate the specific practices enumerated in the prior bills, and omitting all reference to the Commission's authority to prescribe rules concerning manipulative or deceptive devices in general, was introduced and passed in the House. H. R. 9323, 73d Cong., 2d Sess., § 9 (1934). The final language of § 10 is a modified version of a Senate amendment to this last House bill. See H. R. Conf. Rep. No. 1838, 73d Cong., 2d Sess., 32–33 (1934).

Neither the intended scope of § 10 (b) nor the reasons for the changes in its operative language are revealed explicitly in the legislative history of the 1934 Act, which deals primarily with other aspects of the legislation. There is no indication, however, that § 10 (b) was intended to proscribe conduct not involving scienter. The extensive hearings that preceded passage of the 1934 Act touched only briefly on § 10, and most of the discussion was devoted to the enumerated devices that the Commission is empowered to proscribe under § 10 (a). The most relevant exposition of the provision that was to become § 10 (b) was by Thomas G. Corcoran, a spokesman for the drafters. Corcoran indicated:

> "Subsection (c) [§ 9 (c) of H. R. 7852—later § 10 (b)] says, 'Thou shalt not devise any other cunning devices.'
>
> . . . . .
>
> "Of course subsection (c) is a catch-all clause to prevent manipulative devices. I do not think there is any objection to that kind of clause. The Commission should have the authority to deal with new manipulative devices." Hearings on H. R. 7852

and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 115 (1934).

This brief explanation of § 10 (b) by a spokesman for its drafters is significant. The section was described rightly as a "catchall" clause to enable the Commission "to deal with new manipulative [or cunning] devices." It is difficult to believe that any lawyer, legislative draftsman, or legislator would use these words if the intent was to create liability for merely negligent acts or omissions.[23] Neither the legislative history nor the briefs supporting respondents identify any usage or authority for construing "manipulative [or cunning] devices" to include negligence.[24]

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

[24] In support of its position the Commission cites statements by Corcoran in the Senate hearings that "in modern society there are many things you have to make crimes which are sheer matters of negligence" and "intent is not necessary for every crime." Hearings before the Subcommittee on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., 6509–6510 (1934). The comments, taken in context, shed no light on the meaning of § 10 (b). Corcoran's remarks were made during a discussion of whether criminal violations could arise under § 8 (a) (3) of S. 2693, 73d Cong., 2d Sess., which in material part was incorporated in § 9 of the 1934 Act, 15 U. S. C. § 78i, in the absence of specific intent to influence security prices for personal gain. The remarks, moreover, were not addressed to the scope of § 8, but were general observations concerning activity society might proscribe under criminal law. Ferdinand Pecora, counsel to the committee and a draftsman of S. 2693, *Foremost-McKesson, Inc.* v. *Provident Securities Co.,* 423 U. S. 232, 249–250, n. 24 (1976), described the language as "[e]xcluding from its scope an act that is not done with any ulterior motives or purposes, as set forth in the act." Hearings before the Subcommittee on Stock Exchange Practices, *supra,* at 6510. Further, prior to the passage of the 1934 Act, proposed § 8 was amended to require willful behavior as a prerequisite to civil liability

The legislative reports do not address the scope of § 10 (b) or its catchall function directly. In considering specific manipulative practices left to Commission regulation, however, the reports indicate that liability would not attach absent scienter, supporting the conclusion that Congress intended no lesser standard under § 10 (b). The Senate Report of S. 3420 discusses generally the various abuses that precipitated the need for the legislation and the inadequacy of self-regulation by the stock exchanges. The Report then analyzes the component provisions of the statute, but does not parse § 10. The only specific reference to § 10 is the following:

> "In addition to the discretionary and elastic powers conferred on the administrative authority, effective regulation must include several clear statutory provisions reinforced by penal and civil sanctions, aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful

for violations. Compare § 9 (e) of the 1934 Act with § 8 (c) of S. 2693. See H. R. Rep. No. 1383, 73d Cong., 2d Sess., 21 (1934).

The Commission also relies on objections to a draft version of § 10 (b)—§ 9 (c) of S. 2693 and H. R. 7852, see *supra,* at 201–202—raised by representatives of the securities industry in the House and Senate hearings. They warned that the language was so vague that the Commission might outlaw anything. *E. g.,* Hearings before the Subcommittee on Stock Exchange Practices, *supra,* at 6988; Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 258 (1934). Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. See, *e. g., United States* v. *United Mine Workers,* 330 U. S. 258, 276–277 (1947); *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110, 125 (1942). This is especially so with regard to the statements of legislative opponents who "[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach." *NLRB* v. *Fruit Packers,* 377 U. S. 58, 66 (1964). See *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 394–395 (1951).

function. These sanctions are found in sections 9, 10 and 16." S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934).

In the portion of the general-analysis section of the Report entitled Manipulative Practices, however, there is a discussion of specific practices that were considered so inimical to the public interest as to require express prohibition, such as "wash" sales and "matched" orders,[25] and of other practices that might in some cases serve legitimate purposes, such as stabilization of security prices and grants of options. *Id.,* at 7–9. These latter practices were left to regulation by the Commission. 1934 Act §§ 9 (a)(6), (c), 48 Stat. 890, 15 U. S. C. §§ 78i (a)(6), (c). Significantly, we think, in the discussion of the need to regulate even the latter category of practices when they are manipulative, there is no indication that any type of criminal or civil liability is to attach in the absence of scienter. Furthermore, in commenting on the express civil liabilities provided in the 1934 Act, the Report explains:

"[I]f an investor has suffered loss by reason of illicit practices, it is equitable that he should be allowed to recover damages from the guilty party. . . . [T]he bill provides that any person who unlaw-

[25] "Wash" sales are transactions involving no change in beneficial ownership. "Matched" orders are orders for the purchase/sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security. Section 9 (a)(1) of the 1934 Act, 15 U. S. C. § 78i (a)(1), proscribes wash sales and matched orders when effectuated "[f]or the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or . . . with respect to the market for any such security." See *In re J. A. Latimer & Co.,* 38 S. E. C. 790 (1958); *In re Thornton & Co.,* 28 S. E. C. 208 (1948).

fully manipulates the price of a security, or who induces transactions in a security by means of false or misleading statements, or who makes a false or misleading statement in the report of a corporation, shall be liable in damages to those who have bought or sold the security at prices affected by such violation or statement. In such case the burden is on the plaintiff to show the violation or the fact that the statement was false or misleading, and that he relied thereon to his damage. The defendant may escape liability by showing that the statement was made in *good faith*." S. Rep. No. 792, *supra*, at 12–13 (emphasis supplied).

The Report therefore reveals with respect to the specified practices, an overall congressional intent to prevent "manipulative and deceptive practices which . . . fulfill no useful function" and to create private actions for damages stemming from "illicit practices," where the defendant has not acted in good faith. The views expressed in the House Report are consistent with this interpretation. H. R. Rep. No. 1383, 73d Cong., 2d Sess., 10–11, 20–21 (1934) (H. R. 9323). There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith. The catchall provision of § 10 (b) should be interpreted no more broadly.

C

The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities. See *Blue Chip Stamps*, 421 U. S., at 727–730. As the Court indicated in *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 466 (1969), "the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen . . . ." Recognizing this,

respondents and the Commission contrast § 10 (b) with other sections of the Acts to support their contention that civil liability may be imposed upon proof of negligent conduct. We think they misconceive the significance of the other provisions of the Acts.

The Commission argues that Congress has been explicit in requiring willful conduct when that was the standard of fault intended, citing § 9 of the 1934 Act, 48 Stat. 889, 15 U. S. C. § 78i, which generally proscribes manipulation of securities prices. Sections 9 (a)(1) and (a)(2), for example, respectively prohibit manipulation of security prices "[f]or the purpose of creating a false or misleading appearance of active trading in any security . . . or . . . with respect to the market for any such security," and "for the purpose of inducing the purchase or sale of such security by others." See also § 9 (a)(4). Section 9 (e) then imposes upon "[a]ny person who willfully participates in any act or transaction in violation of" other provisions of § 9 civil liability to anyone who purchased or sold a security at a price affected by the manipulative activities. From this the Commission concludes that since § 10 (b) is not by its terms explicitly restricted to willful, knowing, or purposeful conduct, it should not be construed in all cases to require more than negligent action or inaction as a precondition for civil liability.

The structure of the Acts does not support the Commission's argument. In each instance that Congress created express civil liability in favor of purchasers or sellers of securities it clearly specified whether recovery was to be premised on knowing or intentional conduct, negligence, or entirely innocent mistake. See 1933 Act, §§ 11, 12, 15, 48 Stat. 82, 84, as amended, 15 U. S. C. §§ 77k, 77*l*, 77*o*; 1934 Act §§ 9, 18, 20, 48 Stat. 889, 897, 899, as amended, 15 U. S. C. §§ 78i, 78r, 78t. For example, § 11 of the 1933 Act unambigu-

ously creates a private action for damages when a registration statement includes untrue statements of material facts or fails to state material facts necessary to make the statements therein not misleading. Within the limits specified by § 11 (e), the issuer of the securities is held absolutely liable for any damages resulting from such misstatement or omission. But experts such as accountants who have prepared portions of the registration statement are accorded a "due diligence" defense. In effect, this is a negligence standard. An expert may avoid civil liability with respect to the portions of the registration statement for which he was responsible by showing that "after reasonable investigation" he had "reasonable ground[s] to believe" that the statements for which he was responsible were true and there was no omission of a material fact.[26] § 11 (b)(3)(B)(i). See, *e. g., Escott* v. *Barchris Constr. Corp.,* 283 F. Supp. 643, 697–703 (SDNY 1968). The express recognition of a cause of action premised on negligent behavior in § 11 stands in sharp contrast to the language of § 10 (b), and significantly undercuts the Commission's argument.

We also consider it significant that each of the express civil remedies in the 1933 Act allowing recovery for negligent conduct, see §§ 11, 12 (2), 15, 15 U. S. C. §§ 77k, 77*l*

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[26] Other individuals who sign the registration statement, directors of the issuer, and the underwriter of the securities similarly are accorded a complete defense against civil liability based on the exercise of reasonable investigation and a reasonable belief that the registration statement was not misleading. §§ 11 (b)(3)(A), (C), (D), (c). See, *e. g., Feit* v. *Leasco Data Processing Equipment Corp.,* 332 F. Supp. 544, 575–583 (EDNY 1971) (underwriters, but not officer-directors, established their due-diligence defense). See generally R. Jennings & H. Marsh, Securities Regulation 1018–1027 (3d ed. 1972), and sources cited therein; Folk, Civil Liabilities Under the Federal Securities Acts: The Barchris Case, 55 Va. L. Rev. 199 (1969).

(2), 77*o*,[27] is subject to significant procedural restrictions not applicable under § 10 (b).[28] Section 11 (e) of the 1933 Act, for example, authorizes the court to require a

[27] Section 12 (2) creates potential civil liability for a seller of securities in favor of the purchaser for misleading statements or omissions in connection with the transaction. The seller is exculpated if he proves that he did not know, or, in the exercise of reasonable care, could not have known of the untruth or omission. Section 15 of the 1933 Act, as amended by § 208 of Title II of the 1934 Act, makes persons who "control" any person liable under § 11 or § 12 liable jointly and severally to the same extent as the controlled person, unless he "had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." 15 U. S. C. § 77*o*. See Act of June 6, 1934, c. 404, § 208, 48 Stat. 908.

[28] Each of the provisions of the 1934 Act that expressly create civil liability, except those directed to specific classes of individuals such as directors, officers, or 10% beneficial holders of securities, see § 16 (b), 15 U. S. C. § 78p (b), *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U. S. 232 (1976); *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U. S. 582 (1973), contains a state-of-mind condition requiring something more than negligence. Section 9 (e) creates potential civil liability for any person who "willfully participates" in the manipulation of securities on a national exchange. 15 U. S. C. § 78i (e). Section 18 creates potential civil liability for misleading statements filed with the Commission, but provides the defendant with the defense that "he acted in good faith and had no knowledge that such statement was false or misleading." 15 U. S. C. § 78r. And § 20, which imposes liability upon "controlling person[s]" for violations of the Act by those they control, exculpates a defendant who "acted in good faith and did not . . . induce the act . . . constituting the violation . . . ." 15 U. S. C. § 78t. Emphasizing the important difference between the operative language and purpose of § 14 (a) of the 1934 Act, 15 U. S. C. § 78n (a), as contrasted with § 10 (b), however, some courts have concluded that proof of scienter is unnecessary in an action for damages by the shareholder recipients of a materially misleading proxy statement against the issuer corporation. *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F. 2d 1281, 1299 (CA2 1973). See also *Kohn* v. *American Metal Climax, Inc.*, 458 F. 2d, at 289–290 (Adams, J., concurring and dissenting).

plaintiff bringing a suit under § 11, § 12 (2), or § 15 thereof to post a bond for costs, including attorneys' fees, and in specified circumstances to assess costs at the conclusion of the litigation. Section 13 specifies a statute of limitations of one year from the time the violation was or should have been discovered, in no event to exceed three years from the time of offer or sale, applicable to actions brought under § 11, § 12 (2), or § 15. These restrictions, significantly, were imposed by amendments to the 1933 Act adopted as part of the 1934 Act. Prior to amendment § 11 (e) contained no provision for payment of costs. Act of May 27, 1933, c. 38, § 11 (e), 48 Stat. 83. See Act of June 6, 1934, c. 404, § 206 (e), 48 Stat. 907. The amendments also substantially shortened the statute of limitations provided by § 13. Compare § 13, 48 Stat. 84, with 15 U. S. C. § 77m. See 1934 Act, § 207, 48 Stat. 908. We think these procedural limitations indicate that the judicially created private damages remedy under § 10 (b)—which has no comparable restrictions [29]—cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by §§ 11, 12 (2), and 15 to be brought instead under § 10 (b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions.[30] See, *e. g., Fisch-*

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[29] Since no statute of limitations is provided for civil actions under § 10 (b), the law of limitations of the forum State is followed as in other cases of judicially implied remedies. See *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395 (1946), and cases cited therein. Although it is not always certain which state statute of limitations should be followed, such statutes of limitations usually are longer than the period provided under § 13. 3 Loss, *supra,* n. 17, at 1773–1774. As to costs see n. 30, *infra.*

[30] Congress regarded these restrictions on private damages actions as significant. In introducing Title II of the 1934 Act, Senator

man v. *Raytheon Mfg. Co.,* 188 F. 2d 783, 786–787 (CA2 1951); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F. 2d, at 867–868 (Friendly, J., concurring); *Rosenberg* v. *Globe Aircraft Corp.,* 80 F. Supp. 123, 124 (ED Pa. 1948); 3 Loss, *supra,* n. 17, at 1787–1788; R. Jennings & H. Marsh, Securities Regulation 1070–1074 (3d ed. 1972). We would be unwilling to bring about this result absent substantial support in the legislative history, and there is none.[31]

Fletcher indicated that the amendment to § 11 (e) of the 1933 Act, providing for potential payment of costs, including attorneys' fees, "is the most important [amendment] of all." 78 Cong. Rec. 8669 (1934). One of its purposes was to deter actions brought solely for their potential settlement value. See *ibid.;* H. R. Conf. Rep. No. 1838, 73d Cong., 2d Sess., 42 (1934); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 740–741 (1975). This deterrent is lacking in the § 10 (b) context, in which a district court's power to award attorneys' fees is sharply circumscribed. See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240 (1975) ("bad faith" requirement); *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.,* 417 U. S. 116, 129 (1974).

[31] Section 18 of the 1934 Act creates a private cause of action against persons, such as accountants, who "make or cause to be made" materially misleading statements in reports or other documents filed with the Commission. 15 U. S. C. § 78r. We need not consider the question whether a cause of action may be maintained under § 10 (b) on the basis of actions that would constitute a violation of § 18. Under § 18 liability extends to persons who, in reliance on such statements, purchased or sold a security whose price was affected by the statements. Liability is limited, however, in the important respect that the defendant is accorded the defense that he acted in "good faith and had no knowledge that such statement was false or misleading." Consistent with this language the legislative history of the section suggests something more than negligence on the part of the defendant is required for recovery. The original version of § 18 (a), § 17 (a) of S. 2693, H. R. 7852 and H. R. 7855, see *supra,* at 201–202, provided that the defendant would not be liable if "he acted in good faith and in the exercise of reasonable care had no ground to believe that such statement was false

D

We have addressed, to this point, primarily the language and history of § 10 (b). The Commission contends, however, that subsections (b) and (c) of Rule 10b–5 are cast in language which—if standing alone—could encompass both intentional and negligent behavior. These subsections respectively provide that it is unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . ." and "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . ." Viewed in isolation the language of subsection (b), and arguably that of subsection (c), could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not.

We note first that such a reading cannot be harmonized with the administrative history of the Rule, a history making clear that when the Commission adopted the Rule it was intended to apply only to activities that involved scienter.[32] More importantly, Rule 10b–5 was

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or misleading." The accounting profession objected to this provision on the ground that liability would be created for honest errors in judgment. See Senate Hearings on Stock Exchange Practices, *supra,* n. 24, at 7175–7183; House Hearings on H. R. 7852 and H. R. 8720, *supra,* n. 24, at 653. In subsequent drafts the current formulation was adopted. It is also significant that actions under § 18 are limited by a relatively short statute of limitations similar to that provided in § 13 of the 1933 Act. § 18 (c). Moreover, as under § 11 (e) of the 1933 Act a district court is authorized to require the plaintiff to post a bond for costs, including attorneys' fees, and to assess such costs at the conclusion of the litigation. § 18 (a).

[32] Apparently the Rule was a hastily drafted response to a situation clearly involving intentional misconduct. The Commission's

adopted pursuant to authority granted the Commission under § 10 (b). The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather,

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Regional Administrator in Boston had reported to the Director of the Trading and Exchange Division that the president of a corporation was telling the other shareholders that the corporation was doing poorly and purchasing their shares at the resultant depressed prices, when in fact the business was doing exceptionally well. The Rule was drafted and approved on the day this report was received. See Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967) (remarks of Milton Freeman, one of the Rule's codrafters); *Blue Chip Stamps, supra,* at 767 (BLACKMUN, J., dissenting). Although adopted pursuant to § 10 (b), the language of the Rule appears to have been derived in significant part from § 17 of the 1933 Act, 15 U. S. C. § 77q. *E. g., Blue Chip Stamps, supra,* at 767 (BLACKMUN, J., dissenting); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F. 2d 833, 867 (CA2 1968) (Friendly, J., concurring), cert. denied *sub nom. Coates* v. *SEC,* 394 U. S. 976 (1969). There is no indication in the administrative history of the Rule that any of the subsections was intended to proscribe conduct not involving scienter. Indeed the Commission's release issued contemporaneously with the Rule explained:

"The Securities and Exchange Commission today announced the adoption of a rule prohibiting fraud by any person in connection with the purchase of securities. The previously existing rules against fraud in the purchase of securities applied only to brokers and dealers. The new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." SEC Release No. 3230 (May 21, 1942).

That same year, in its Annual Report, the Commission again stated that the purpose of the Rule was to protect investors against "fraud":

"During the fiscal year the Commission adopted Rule X-10B-5 as an additional protection to investors. The new rule prohibits fraud by any person in connection with the purchase of securities, while the previously existing rules against fraud in the purchase of securities applied only to brokers and dealers." 1942 Annual Report of the Securities Exchange Commission 10.

it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Dixon* v. *United States,* 381 U. S. 68, 74 (1965), quoting *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 134 (1936). Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10 (b). For the reasons stated above, we think the Commission's original interpretation of Rule 10b-5 was compelled by the language and history of § 10 (b) and related sections of the Acts. See, *e. g., Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F. 2d 1281, 1299 (CA2 1973); *Lanza* v. *Drexel & Co.,* 479 F. 2d 1277, 1304–1305 (CA2 1973); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F. 2d, at 868 (Friendly, J., concurring); 3 Loss, *supra,* n. 17, at 1766; 6 *id.,* at 3883–3885. When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct.[33]

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[33] As we find the language and history of § 10 (b) dispositive of the appropriate standard of liability, there is no occasion to examine the additional considerations of "policy," set forth by the parties, that may have influenced the lawmakers in their formulation of the statute. We do note that the standard urged by respondents would significantly broaden the class of plaintiffs who may seek to impose liability upon accountants and other experts who perform services or express opinions with respect to matters under the Acts. Last Term, in *Blue Chip Stamps,* 421 U. S., at 747–748, the Court pertinently observed:

"While much of the development of the law of deceit has been the elimination of artificial barriers to recovery on just claims, we are not the first court to express concern that the inexorable broadening of the class of plaintiff who may sue in this area of the law will ulti-

III

Recognizing that § 10 (b) and Rule 10b-5 might be held to require proof of more than negligent nonfeasance by Ernst & Ernst as a precondition to the imposition of civil liability, respondents further contend that the case should be remanded for trial under whatever standard is adopted. Throughout the lengthy history of this case respondents have proceeded on a theory of liability premised on negligence, specifically disclaiming that Ernst & Ernst had engaged in fraud or intentional misconduct.[34] In these circumstances, we think it inappropriate to remand the action for further proceedings.

The judgment of the Court of Appeals is

Reversed.

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

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

Once again—see *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 730 (1975)—the Court interprets

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mately result in more harm than good. In *Ultramares Corp.* v. *Touche,* 255 N. Y. 170, 174 N. E. 441 (1931), Chief Judge Cardozo observed with respect to 'a liability in an indeterminate amount for an indeterminate time to an indeterminate class:

" 'The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.' *Id.,* at 179-180, 174 N. E., at 444."

This case, on its facts, illustrates the extreme reach of the standard urged by respondents. As investors in transactions initiated by Nay, not First Securities, they were not foreseeable users of the financial statements prepared by Ernst & Ernst. Respondents conceded that they did not rely on either these financial statements or Ernst & Ernst's certificates of opinion. See n. 9, *supra.* The class

[*Footnote 34 is on p. 216*]

§ 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and the Securities and Exchange Commission's Rule 10b–5, 17 CFR § 240.10b–5 (1975), restrictively and narrowly and thereby stultifies recovery for the victim. This time the Court does so by confining the statute and the Rule to situations where the defendant has "scienter," that is, the "intent to deceive, manipulate, or defraud." Sheer negligence, the Court says, is not within the reach of the statute and the Rule, and was not contemplated when the great reforms of 1933, 1934, and 1942 were effectuated by Congress and the Commission.

Perhaps the Court is right, but I doubt it. The Government and the Commission doubt it too, as is evidenced by the thrust of the brief filed by the Solicitor General on behalf of the Commission as *amicus curiae*. The Court's opinion, to be sure, has a certain technical consistency about it. It seems to me, however, that an investor can be victimized just as much by negligent conduct as by positive deception, and that it is not logical to drive a wedge between the two, saying that Congress clearly intended the one but certainly not the other.

No one questions the fact that the respondents here were the victims of an intentional securities fraud practiced by Leston B. Nay. What is at issue, of course, is the petitioner accountant firm's involvement and that firm's responsibility under Rule 10b–5. The language of the Rule, making it unlawful for any person "in connection with the purchase or sale of any security"

"(b) To make any untrue statement of a material

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of persons eligible to benefit from such a standard, though small in this case, could be numbered in the thousands in other cases. Acceptance of respondents' view would extend to new frontiers the "hazards" of rendering expert advice under the Acts, raising serious policy questions not yet addressed by Congress.

[34] See 503 F. 2d, at 1104, 1119; n. 5, *supra*.

fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,"

seems to me, clearly and succinctly, to prohibit negligent as well as intentional conduct of the kind proscribed, to extend beyond common-law fraud, and to apply to negligent omission and commission. This is consistent with Congress' intent, repeatedly recognized by the Court, that securities legislation enacted for the purpose of avoiding frauds be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC* v. *Capital Gains Research Bureau,* 375 U. S. 180, 195 (1963); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U. S. 6, 12 (1971); *Affiliated Ute Citizens* v. *United States,* 406 U. S. 128, 151 (1972).

On motion for summary judgment, therefore, the respondents' allegations, in my view, were sufficient, and the District Court's dismissal of the action was improper to the extent that the dismissal rested on the proposition that suit could not be maintained under § 10 (b) and Rule 10b-5 for mere negligence. The opposite appears to be true, at least in the Second Circuit, with respect to suits by the SEC to enjoin a violation of the Rule. *SEC* v. *Management Dynamics, Inc.,* 515 F. 2d 801 (1975); *SEC* v. *Spectrum, Ltd.,* 489 F. 2d 535, 541 (1973); *SEC* v. *Texas Gulf Sulphur Co.,* 401 F. 2d 833, 854-855 (1968), cert. denied *sub nom. Coates* v. *SEC,* 394 U. S. 976 (1969). I see no real distinction between that situation and this one, for surely the question whether negligent conduct violates the Rule should not depend upon the plaintiff's identity. If negligence is a violation factor

when the SEC sues, it must be a violation factor when a private party sues. And, in its present posture, this case is concerned with the issue of violation, not with the secondary issue of a private party's judicially created entitlement to damages or other specific relief. See *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49 (1975).

The critical importance of the auditing accountant's role in insuring full disclosure cannot be overestimated. The SEC has emphasized that in certifying statements the accountant's duty "is to safeguard the public interest, not that of his client." *In re Touche, Niven, Bailey & Smart*, 37 S. E. C. 629, 670–671 (1957). "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F. 2d 854, 863 (CA2), cert. denied *sub nom. Howard* v. *United States*, 377 U. S. 953 (1964). In this light, the initial inquiry into whether Ernst & Ernst's preparation and certification of the financial statements of First Securities Company of Chicago were negligent, because of the failure to perceive Nay's extraordinary mail rule, and in other alleged respects, and thus whether Rule 10b–5 was violated, should not be thwarted.

But the Court today decides that it is to be thwarted, and so once again it rests with Congress to rephrase and to re-enact, if investor victims, such as these, are ever to have relief under the federal securities laws that I thought had been enacted for their broad, needed, and deserving benefit.*

*The Court, understandably, does not resolve a number of other issues suggested by the briefs. See *ante*, at 191–192, n. 7; 193 n. 11; 194 n. 12; 194 n. 13; and 214–216, n. 33. In view of the result reached by the Court, no purpose would be served by my considering those issues in dissent.

DANN, COMMISSIONER OF PATENTS AND TRADEMARKS v. JOHNSTON

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 74-1033. Argued December 9, 1975—Decided March 31, 1976

Respondent's "machine system for automatic record-keeping of bank checks and deposits," under which checks and deposits are customer-labeled with code categories which are "read," and then processed by a data processor, such as a programmable electronic digital computer, having data storage files and a control system, permitting a bank to furnish a customer with an individual and categorized breakdown of his transactions during the period in question, *held* unpatentable on grounds of obviousness. 35 U. S. C. § 103. Pp. 225-230.

502 F. 2d 765, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except BLACKMUN and STEVENS, JJ., who took no part in the consideration or decision of the case.

Howard E. Shapiro argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Assistant Attorney General Kauper, Gerald P. Norton, Richard H. Stern,* and *Karl E. Bakke.*

Morton C. Jacobs argued the cause and filed a brief for respondent.*

**John S. Voorhees* and *Kenneth E. Krosin* filed a brief for the Computer & Business Equipment Manufacturers Assn. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Carol A. Cohen* for Applied Data Research, Inc.; by *David Cohen* for the Association of Data Processing Service Organizations, Software Industry Assn.; and by *Charles Winn Sims* and *Francis Noel Carten* for Universal Software, Inc.

Briefs of *amici curiae* were filed by *Richard E. Kurtz, Jack C. Goldstein,* and *Arthur R. Whale* for the American Patent Law Assn.;

Mr. Justice Marshall delivered the opinion of the Court.

Respondent has applied for a patent on what is described in his patent application as a "machine system for automatic record-keeping of bank checks and deposits." The system permits a bank to furnish a customer with subtotals of various categories of transactions completed in connection with the customer's single account, thus saving the customer the time and/or expense of conducting this bookkeeping himself. As respondent has noted, the "invention is being sold as a computer program to banks and to other data processing companies so that they can perform these data processing services for depositors." Brief for Respondent 19A; *Application of Johnston*, 502 F. 2d 765 (CCPA 1974).

Petitioner and respondent, as well as various *amici*, have presented lengthy arguments addressed to the question of the general patentability of computer programs. Cf. *Gottschalk* v. *Benson*, 409 U. S. 63 (1972). We find no need to treat that question in this case, however, because we conclude that in any event respondent's system is unpatentable on grounds of obviousness. 35 U. S. C. § 103. Since the United States Court of Customs and Patent Appeals (CCPA) found respondent's system to be patentable, *Application of Johnston, supra*, the decision of that court is accordingly reversed.

I

While respondent's patent application pertains to the highly esoteric field of computer technology,

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by *Reed C. Lawlor, Theodore H. Lassagne, David E. Lovejoy*, and *John P. Sutton* for the California Patent Law Assn.; by *James W. Geriak* and *John C. Dorfman* for the Los Angeles and Philadelphia Patent Law Assns.; and by *Mr. Lawlor* for Software Associates, Inc.

the basic functioning of his invention is not difficult to comprehend. Under respondent's system a bank customer labels each check that he writes with a numerical category code corresponding to the purpose for which the funds are being expended. For instance, "food expenditures" might be a category coded "123," "fuel expenditures" a category coded "124," and "rent" still another category coded "125." Similarly, on each deposit slip, the customer, again through a category code, indicates the source of the funds that he is depositing. When the checks and deposit slips are processed by the bank, the category codes are entered upon them in magnetic ink characters, just as, under existing procedures, the amount of the check or deposit is entered in such characters. Entries in magnetic ink allow the information associated with them to be "read" by special document-reading devices and then processed by data processors. On being read by such a device, the coded records of the customer's transactions are electronically stored in what respondent terms a "transaction file." Respondent's application describes the steps from this point as follows:

> "To process the transaction file, the . . . system employs a data processor, such as a programmable electronic digital computer, having certain data storage files and a control system. In addition to the transaction file, a master record-keeping file is used to store all of the records required for each customer in accordance with the customer's own chart of accounts. The latter is individually designed to the customer's needs and also constructed to cooperate with the control system in the processing of the customer's transactions. The control system directs the generation of periodic output

reports for the customer which present the customer's transaction records in accordance with his own chart of accounts and desired accounting procedures." Pet. for Cert. 4A-5A.

Thus, when the time comes for the bank customer's regular periodic statement to be rendered, the programmed computer sorts out the entries in the various categories and produces a statement which groups the entries according to category and which gives subtotals for each category. The customer can then quickly see how much he spent or received in any given category during the period in question. Moreover, according to respondent, the system can "[adapt] to whatever variations in ledger format a user may specify." Brief for Respondent 66.

In further description of the control system that is used in the invention, respondent's application recites that it is made up of a general control and a master control. The general control directs the processing operations common to most customers and is in the form of a software computer program, *i. e.*, a program that is meant to be used in a general-purpose digital computer. The master control, directing the operations that vary on an individual basis with each customer, is in the form of a separate sequence of records for each customer containing suitable machine-instruction mechanisms along with the customer's financial data. Respondent's application sets out a flow chart of a program compatible with an IBM 1400 computer which would effectuate his system.

Under respondent's invention, then, a general purpose computer is programmed to provide bank customers with an individualized and categorized breakdown of their transactions during the period in question.

II

After reviewing respondent's patent application, the patent examiner rejected all the claims therein. He found that respondent's claims were invalid as being anticipated by the prior art, 35 U. S. C. § 102, and as not "particularly pointing out and distinctly claiming" what respondent was urging to be his invention. § 112.

Respondent appealed to the Patent and Trademark Office Board of Appeals. The Board rejected respondent's application on several grounds. It found first that under § 112, the application was indefinite and did not distinctly enough claim what respondent was urging to be his invention. It also concluded that respondent's claims were invalid under § 101 because they claimed nonstatutory subject matter. According to the Board, computer-related inventions which extend "beyond the field of technology . . . are nonstatutory," Pet. for Cert. 31A. See *Application of Foster,* 58 C. C. P. A. (Pat.) 1001, 1004, 438 F. 2d 1011, 1015 (1971); *Application of Musgrave,* 57 C. C. P. A. (Pat.) 1352, 431 F. 2d 882 (1970), and respondent's claims were viewed to be "nontechnological." Finally, respondent's claims were rejected on grounds of obviousness. 35 U. S. C. § 103. The Board found that respondent's claims were obvious variations of established uses of digital computers in banking and obvious variations of an invention, developed for use in business organizations, that had already been patented. Dirks, U. S. Patent No. 3,343,133.

The CCPA, in a 3–2 ruling, reversed the decision of the Board and held respondent's invention to be patentable. The court began by distinguishing its view of respondent's invention as a " 'record-keeping *machine* system for financial accounts' " from the Board's rather negative view of the claims as going solely to the " 'relationship of

a bank and its customers.' " 502 F. 2d, at 770 (emphasis in CCPA opinion). As such, the CCPA held, respondent's system was "clearly within the 'technological arts,' " *id.*, at 771, and was therefore statutory subject matter under 35 U. S. C. § 101. Moreover, the court held that respondent's claims were narrowly enough drawn and sufficiently detailed to pass muster under the definiteness requirements of § 112. Dealing with the final area of the Board's rejection, the CCPA found that neither established banking practice nor the Dirks patent rendered respondent's system "obvious to one of ordinary skill in the art who did not have [respondent's] specification before him." 502 F. 2d, at 772.

In order to hold respondent's invention to be patentable, the CCPA also found it necessary to distinguish this Court's decision in *Gottschalk* v. *Benson*, 409 U. S. 63 (1972), handed down some 13 months subsequent to the Board's ruling in the instant case. In *Benson*, the respondent sought to patent as a "new and useful process," 35 U. S. C. § 101, "a method of programming a general-purpose digital computer to convert signals from binary-coded decimal form into pure binary form." 409 U. S., at 65. As we observed: "The claims were not limited to any particular art or technology, to any particular apparatus or machinery, or to any particular end use." *Id.*, at 64. Our limited holding, *id.*, at 71, was that respondent's method was not a patentable "process" as that term is defined in 35 U. S. C. § 100 (b).[1]

The Solicitor of the Patent Office argued before the CCPA that *Benson*'s holding of nonpatentability as to the computer program in that case was controlling here.

[1] "The term 'process' means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." 35 U. S. C. § 100 (b).

However, the CCPA concluded that while *Benson* involved a claim as to the patentability of a "process," respondent in this case was advancing claims as to the patentability of an "apparatus" or "machine" which did not involve discoveries so abstract as to be unpatentable:

> " 'The issue considered by the Supreme Court in *Benson* was a narrow one, namely, is a formula for converting binary coded decimal numerals into pure binary numerals by a series of mathematical calculations a patentable *process?*' (Emphasis added.) [Quoting *In re Christensen,* 478 F. 2d 1392, 1394 (CCPA 1973).]
>
> "[T]he instant claims in *apparatus* form do not claim or encompass a law of nature, a mathematical formula, or an algorithm." 502 F. 2d, at 771 (emphasis in CCPA opinion).

Having disposed of the Board's rejections and having distinguished *Benson* to its satisfaction, the court held respondent's invention to be patentable. The Commissioner of Patents sought review in this Court and we granted certiorari. 421 U. S. 962 (1975). We hold that respondent's invention was obvious under 35 U. S. C. § 103 and therefore reverse.

III

As a judicial test, "invention"—*i. e.,* "an exercise of the inventive faculty," *McClain* v. *Ortmayer,* 141 U. S. 419, 427 (1891)—has long been regarded as an absolute prerequisite to patentability. See, *e. g., Keystone Driller Co.* v. *Northwest Engineering Corp.,* 294 U. S. 42 (1935); *Sharp* v. *Stamping Co.,* 103 U. S. 250 (1880); *Hotchkiss* v. *Greenwood,* 11 How. 248 (1851). However, it was only in 1952 that Congress, in the interest of "uniformity and definiteness," articulated the requirement in a stat-

ute, framing it as a requirement of "nonobviousness." [2] Section 103 of the Patent Act of 1952, 35 U. S. C. § 103, provides in full:

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

This Court treated the scope of § 103 in detail in *Graham* v. *John Deere Co.,* 383 U. S. 1 (1966). There, we held that § 103 "was not intended by Congress to change the general level of patentable invention," but was meant "merely as a codification of judicial precedents . . . with congressional directions that inquiries into the obviousness of the subject matter sought to be patented are a prerequisite to patentability." *Id.,* at 17. While recognizing the inevitability of difficulty in making the determination in some cases, we also set out in *Graham, supra,* the central factors relevant to any inquiry into obviousness: "the scope and content of the prior art," the "differences between the prior art and the claims at issue," and "the level of ordinary skill in the pertinent art." *Ibid.* Guided by these factors, we proceed to an inquiry into the obviousness of respondent's system.

As noted, *supra,* at 223, the Patent and Trademark Office Board of Appeals relied on two elements in the prior art in reaching its conclusion that respondent's

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[2] S. Rep. No. 1979, 82d Cong., 2d Sess., 6 (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess., 7 (1952).

system was obvious. We find both to be highly significant. The first was the nature of the current use of data processing equipment and computer programs in the banking industry. As respondent's application itself observes, that use is extensive:

> "Automatic data processing equipments employing digital computers have been developed for the handling of much of the record-keeping operations involved in a banking system. The checks and deposit slips are automatically processed by forming those items as machine-readable records . . . . With such machine systems, most of the extensive data handling required in a bank can be performed automatically." Pet. for Cert. 3A.

It is through the use of such data processing equipment that periodic statements are ordinarily given to a bank customer on each of the several accounts that he may have at a given bank. Under respondent's system, what might previously have been separate accounts are treated as a single account, and the customer can see on a single statement the status and progress of each of his "subaccounts." Respondent's "category code" scheme, see *supra*, at 221, is, we think, closely analogous to a bank's offering its customers multiple accounts from which to choose for making a deposit or writing a check. Indeed, as noted by the Board, the addition of a category number, varying with the nature of the transaction, to the end of a bank customer's regular account number, creates "in effect, a series of different and distinct account numbers . . . ." Pet. for Cert. 34A. Moreover, we note that banks have long segregated debits attributable to service charges *within* any given separate account and have rendered their customers subtotals for those charges.

The utilization of automatic data processing equipment in the traditional separate account system is, of course,

somewhat different from the system encompassed by respondent's invention. As the CCPA noted, respondent's invention does something other than "provide a customer with . . . a summary sheet consisting of net totals of plural separate accounts which a customer may have at a bank." 502 F. 2d, at 771. However, it must be remembered that the "obviousness" test of § 103 is not one which turns on whether an invention is equivalent to some element in the prior art but rather whether the difference between the prior art and the subject matter in question "is a difference sufficient to render the claimed subject matter unobvious to one skilled in the applicable art. . . ." *Id.,* at 772 (Markey, C. J., dissenting).

There is no need to make the obviousness determination in this case turn solely on the nature of the current use of data processing and computer programming in the banking industry. For, as noted, the Board pointed to a second factor—a patent issued to Gerhard Dirks—which also supports a conclusion of obviousness. The Dirks patent discloses a complex automatic data processing system using a programmed digital computer for use in a large business organization. Under the system transaction and balance files can be kept and updated for each department of the organization. The Dirks system allows a breakdown within each department of various areas, *e. g.,* of different types of expenses. Moreover, the system is sufficiently flexible to provide additional breakdowns of "sub-areas" within the areas and can record and store specially designated information regarding each of any department's transactions. Thus, for instance, under the Dirks system the disbursing office of a corporation can continually be kept apprised of the precise level and nature of the corporation's disbursements within various areas or, as the Dirks patent terms them, "Item Groups."

Again, as was the case with the prior art within the banking industry the Dirks invention is not equivalent to respondent's system. However, the departments of the business organization and the areas or "Item Groups" under the Dirks system are closely analogous to the bank customers and category number designations respectively under respondent's system. And each shares a similar capacity to provide breakdowns within its "Item Groups" or category numbers. While the Dirks invention is not designed specifically for application to the banking industry many of its characteristics and capabilities are similar to those of respondent's system. Cf. *Graham,* 383 U. S., at 35.

In making the determination of "obviousness," it is important to remember that the criterion is measured not in terms of what would be obvious to a layman, but rather what would be obvious to one "reasonably skilled in [the applicable] art." *Id.,* at 37. In the context of the subject matter of the instant case, it can be assumed that such a hypothetical person would have been aware both of the nature of the extensive use of data processing systems in the banking industry and of the system encompassed in the Dirks patent. While computer technology is an exploding one, "[i]t is but an evenhanded application to require that those persons granted the benefit of a patent monopoly be charged with an awareness" of that technology. *Id.,* at 19.

Assuming such an awareness, respondent's system would, we think, have been obvious to one "reasonably skilled in [the applicable] art." There may be differences between respondent's invention and the state of the prior art. Respondent makes much of his system's ability to allow "a large number of small users to get the benefit of large-scale electronic computer equipment and still continue to use their individual ledger format and

bookkeeping methods." Brief for Respondent 65. It may be that that ability is not possessed to the same extent either by existing machine systems in the banking industry or by the Dirks system.[3] But the mere existence of differences between the prior art and an invention does not establish the invention's nonobviousness. The gap between the prior art and respondent's system is simply not so great as to render the system nonobvious to one reasonably skilled in the art.[4]

Accordingly, we reverse the Court of Customs and Patent Appeals and remand this case to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

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[3] The Dirks patent does allow "the departments or other organizational users [*i. e.*, the analogues to bank customers under respondent's invention, to] retain their authority over operative file systems" and indicates that "[p]rogramming is very easy and different programs are very easily coordinated."

[4] While "commercial success without invention will not make patentability," *A&P Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 153 (1950), we did indicate in *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966), that "secondary considerations [such] as commercial success, long felt but unsolved needs, [and] failure of others" may be relevant in a determination of obviousness. *Id.*, at 17. Respondent does not contend nor can we conclude that any of these secondary considerations offer any substantial support for his claims of nonobviousness.

YOUAKIM ET AL. *v.* MILLER, DIRECTOR, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, ET AL.

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

No. 73-6935. Argued December 8, 1975—Decided March 31, 1976

Although appellants' complaint described their action challenging the foster care payment scheme provided by Illinois as part of the federal Aid to Families with Dependent Children program as an action seeking an injunction on equal protection grounds, and it does not appear that appellants separately relied on the Supremacy Clause or that the District Court, in holding that the scheme did not deny appellants equal protection, addressed the relationship between the scheme and the Social Security Act independently of the equal protection issue, nevertheless this Court is justified in dealing with the question of the conflict between the state scheme and the federal Act presented in the jurisdictional statement to the extent of vacating the judgment below and remanding the case for consideration of that question, where it appears that the question could have been pursued under certain allegations in the complaint and that the District Court, based on certain language in its opinion, would have rejected the Supremacy Clause claim, if made, as a separate ground for decision. Moreover, after the jurisdictional statement was filed, the Department of Health, Education, and Welfare issued a "Program Instruction" indicating, and the Solicitor General filed a statement in this Court urging, that the state scheme was inconsistent with the federal Act, neither of which developments was available to the appellants or the District Court when the case was there.

374 F. Supp. 1204, vacated and remanded.

Patrick A. Keenan argued the cause and filed briefs for appellants.

Paul J. Bargiel, Assistant Attorney General of Illinois, argued the cause for appellees. With him on the brief was *William J. Scott,* Attorney General.

PER CURIAM.

As part of the federal Aid to Families with Dependent Children (AFDC) program, 42 U. S. C. § 601 *et seq.*, the State of Illinois provides federally subsidized foster care (AFDC–FC) payments of $105 per month for a dependent child placed with unrelated foster parents. Under Illinois' administration of the program no foster care payments are made to foster parents who are related to the foster child. Related foster parents are eligible, however, to receive payments under the State's regular AFDC program for the support of dependent children in the amount of $63 per month. These payments are made without regard to the financial circumstances of the family caring for the child. In addition, as an exception to the State's regular policy, related foster parents, upon an adequate showing of financial need, may receive supplemental payments for child care which bring the payments in connection with the related foster child to approximately $105 per month.

Appellants are Linda Youakim and her husband, Marcel, and Linda's four minor brothers and sisters, Timothy, Mary Lou, Larry, and Sherry Robertson. Since 1972, the Youakims have been foster parents of Timothy and Mary Lou. Larry and Sherry have been living in separate, unrelated foster care facilities since 1969. Because Linda is related to Timothy and Mary Lou, the Youakims were ineligible for AFDC–FC foster care payments. They did apply for and receive the smaller AFDC payments for both children. Alleging injury resulting from financial inability to provide adequate care for Timothy and Mary Lou and to bring Larry and Sherry into their foster family, appellants filed suit in the District Court against the state officials on behalf of themselves and all other persons similarly situated. Their complaint described the suit as an action to enjoin

enforcement of the foster care payment scheme on the ground that it denied related foster families the equal protection of the laws and likewise discriminated against wards of the State and relatives who could not provide an adequate foster home without full foster care payments. They asked that a three-judge District Court convene and enjoin the enforcement of the Illinois statutes and regulations.

The three-judge court "approved" the Fed. Rule Civ. Proc. 23 (b)(2) class, granted appellees' motion for summary judgment, and ultimately held that the "Illinois scheme does not deny plaintiffs equal protection of the laws." 374 F. Supp. 1204, 1210 (ND Ill. 1974). The jurisdictional statement filed here expressly challenged the Illinois scheme both on equal protection grounds and on the ground of conflict with the Social Security Act. We noted probable jurisdiction. 420 U. S. 970 (1975).

Although the jurisdictional statement as to which we noted probable jurisdiction presented the question of conflict between the Illinois law and the Social Security Act, it appears that the Supremacy Clause claim was not presented to the District Court as an independent ground for invalidating the state law. The complaint described the suit as one seeking an injunction on equal protection grounds. The sole ground for relief expressly claimed in each of the three causes of action which the complaint purported to allege, as well as in the prayer for relief, was that the Illinois program denied appellants equal protection of the laws. It does not appear from the record in the District Court that as the case developed appellants rested on the Supremacy Clause as a separate basis for their injunction claim. Nor did the District Court address the relationship between state and federal law independently of the equal protection issue.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *California* v. *Taylor,* 353 U. S. 553, 557 n. 2 (1957); *Lawn* v. *United States,* 355 U. S. 339, 362–363, n. 16 (1958). But as *Pollard* v. *United States,* 352 U. S. 354, 359 (1957), and *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 412 (1947), for example, demonstrate, the rule is not inflexible. Cf. *Boynton* v. *Virginia,* 364 U. S. 454, 457 (1960). Its usual formulation is: "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States,* 274 U. S. 195, 200 (1927). Here, as we shall describe, the circumstances justify our dealing with the issue of conflict between state and federal statutes at least to the extent of vacating the judgment below and remanding the case for consideration of the claim that the Illinois foster care program is in conflict with the Social Security Act.

Initially, it should be noted that the statutory issue is not foreign to the subject matter of the complaint. Attacks on state welfare statutes often combine Equal Protection Clause and Supremacy Clause issues. The latter question could surely have been pursued under the complaint filed in this case, which, as part of the "facts" incorporated by reference in each of the three causes of action, alleged that the Illinois program was in conflict with the policy of the United States expressed in subchapter IV of the Social Security Act, 49 Stat. 627, as amended, 42 U. S. C. § 601 *et seq.,* specifically with the federal policy of encouraging the care of children in their own homes or in the homes of relatives wherever possible.

It is also apparent that the District Court was of the view that under *Townsend* v. *Swank,* 404 U. S. 282 (1971), "serious equal protection problems" might arise if "a state attempts to rely on the concept of fiscal

integrity to limit beyond statutory standards the class eligible to receive federally subsidized payments." 374 F. Supp., at 1210. For this reason, the District Court compared federal and state law, and concluded: "Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it. . . . Thus the federal statute makes the same classification as the Illinois statute." *Ibid.* Had appellants relied on the Supremacy Clause issue as a separate ground for decision it would appear that the claim would have been rejected by the District Court. In light of these circumstances, the case is at most only marginally subject to the rule that this Court will not consider issues "not pressed or passed upon" in the court below.

Beyond these considerations, on October 25, 1974, after the filing of the jurisdictional statement but before we noted probable jurisdiction, the Department of Health, Education, and Welfare issued Program Instruction APA–PI–75–9 stating that under the controlling federal law, "[w]hen a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified . . . , the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative." Also, in response to appellants' jurisdictional statement, the Solicitor General filed a statement in this Court urging that the Illinois foster care program was inconsistent with the Social Security Act insofar as it provided higher payments to unrelated foster parents than to those who were related. Neither the appellants nor the District Court had the benefit of either of these developments when the case was in the lower court. The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute, *New York Dept. of Social Services* v. *Dublino,*

413 U. S. 405, 421 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic Comm.*, 412 U. S. 94, 121 (1973); *Investment Co. Institute* v. *Camp*, 401 U. S. 617, 626–627 (1971); and appellants[1] now wish to press the issue of conflict between state and federal law. We think that it is appropriate to afford them the opportunity to do so, but that the claim should be aired first in the District Court. Vacating the judgment and remanding the case for this purpose will require the District Court first to decide the statutory issue, *Hagans* v. *Lavine*, 415 U. S. 528 (1974), and if appellants prevail on that question, it will be unnecessary for either the District Court or this Court to reach the equal protection issue at all. A remand is thus consistent with our usual practice of avoiding decisions on constitutional matters if a case may be resolved on other grounds.[2]

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[1] The appellee state officials have met both of appellants' claims on the merits and have not sought to restrict our review to the equal protection issue.

[2] From papers lodged with the Court, it appears, and appellants do not dispute, that since September 1, 1974, the Youakims have been receiving need-based payments supplementing the AFDC payments for Timothy and Mary Lou. They now receive monthly payments totaling $105, the same amount they would receive under the AFDC–FC program. Their receipt of these payments does not moot the case. The complaint alleged that ineligibility for regular foster care payments had precluded the Youakims "from even considering accepting for foster care the [two] other family members" who are living with nonrelatives in other foster care facilities. App. 12. Were it not for the Illinois program, they allege, the Youakims could seek to bring Larry and Sherry into their foster home and would receive the same monthly $105 AFDC–FC payments per child received as a matter of course by the foster care facilities now caring for Larry and Sherry without any showing of need and without applying for need-based funds supplementing the $63 AFDC payments. Whatever its strength, the Youakims' claim that it is unlawful to require them to demonstrate need and to rely on an exception to policy in order to receive the same child care payments is not mooted

The action we take here is similar to the order the Court entered in *Thorpe* v. *Housing Authority,* 386 U. S. 670 (1967). There, rather than deciding the constitutionality of an eviction from a public housing project, the Court remanded the case for reconsideration in light of a supervening administrative directive which was issued by federal authorities and which it was thought might provide a nonconstitutional basis for decision. Cf. *Richardson* v. *Wright,* 405 U. S. 208, 209 (1972).

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

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

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by current receipt of larger payments for Timothy and Mary Lou who are living in the Youakim home. Because we conclude that the case is not moot as to the Youakims, we need not decide whether the District Court properly identified the Rule 23 (b) (2) class, compare *Sosna* v. *Iowa,* 419 U. S. 393 (1975), with *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975), so that the class action might be maintained notwithstanding mootness as to the named plaintiffs, or whether appellant Linda Youakim properly sued as "next friend" of her four brothers and sisters, see Fed. Rule Civ. Proc. 17 (c), so that their constitutional interests could be adjudicated by the court.

KELLEY, COMMISSIONER, SUFFOLK COUNTY POLICE DEPARTMENT *v.* JOHNSON

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

No. 74–1269. Argued December 8, 1975—Decided April 5, 1976

A county regulation limiting the length of county policemen's hair *held* not to violate any right guaranteed respondent policeman by the Fourteenth Amendment. Pp. 244–249.

(a) Respondent sought the protection of the Fourteenth Amendment, not as an ordinary citizen, but as a law enforcement employee of the county, a subdivision of the State, and this distinction is one of considerable significance since a State has wider latitude and notably different interests in imposing restrictive regulations on its employees than it does in regulating the citizenry at large. P. 245.

(b) Choice of organization, dress, and equipment for law enforcement personnel is entitled to the same sort of presumption of legislative validity as are state choices to promote other aims within the cognizance of the State's police power. Thus, the question is not whether the State can "establish" a "genuine public need" for the specific regulation, but whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property. Pp. 245–247.

(c) Whether a state or local government's choice to have its police uniformed reflects a desire to make police officers readily recognizable to the public or to foster the esprit de corps that similarity of garb and appearance may inculcate within the police force itself, the justification for the hair-style regulation is sufficiently rational to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment. Pp. 247–248.

508 F. 2d 836, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 249. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined,

post, p. 249. STEVENS, J., took no part in the consideration or decision of the case.

Patrick A. Sweeney argued the cause for petitioner. With him on the brief was *Howard E. Pachman*.

Leonard D. Wexler argued the cause for respondent. With him on the brief was *Richard T. Haefeli*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The District Court for the Eastern District of New York originally dismissed respondent's complaint seeking declaratory and injunctive relief against a regulation promulgated by petitioner limiting the length of a policeman's hair. On respondent's appeal to the Court of Appeals for the Second Circuit, that judgment was reversed, and on remand the District Court took testimony and thereafter granted the relief sought by respondent. The Court of Appeals affirmed, and we granted certiorari, 421 U. S. 987 (1975), to consider the constitutional doctrine embodied in the rulings of the Court of Appeals. We reverse.

I

In 1971 respondent's predecessor, individually and as president of the Suffolk County Patrolmen's Benevolent Association, brought this action under the Civil Rights Act of 1871, 42 U. S. C. § 1983, against petitioner's predecessor, the Commissioner of the Suffolk County Police Department. The Commissioner had promulgated Order No. 71-1, which established hair-grooming standards applicable to male members of the police force.[1] The

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*James vanR. Springer filed a brief for the International Brotherhood of Police Officers as *amicus curiae* urging affirmance.

[1] Order No. 71-1 (1971), amending Chapter 2 of the Rules and Procedures, Police Department, County of Suffolk, N. Y., provided:

"2/75.0 Members of the Force and Department shall be neat and

regulation was directed at the style and length of hair, sideburns, and mustaches; beards and goatees were prohibited, except for medical reasons; and wigs conforming to the regulation could be worn for cosmetic reasons. The regulation was attacked as violative of respondent patrolman's right of free expression under the First Amendment and his guarantees of due process and equal

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clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by the Police Commissioner due to special assignment:

"2/75.1 HAIR: Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.

"2/75.2 SIDEBURNS: If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.

"2/75.3 MUSTACHES: A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.

"2/75.4 BEARDS & GOATEES: The face will be clean-shaven other than the wearing of the acceptable mustache or sideburns. Beards and goatees are prohibited, except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

"2/75.5 WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards." App. 57–58.

protection under the Fourteenth Amendment, in that it was "not based upon the generally accepted standard of grooming in the community" and placed "an undue restriction" upon his activities therein.

The Court of Appeals held that cases characterizing the uniformed civilian services as "para-military," and sustaining hair regulations on that basis, were not soundly grounded historically.[2] It said that the fact that a police force is organized "with a centralized administration and a disciplined rank and file for efficient conduct of its affairs" did not foreclose respondent's claim, but instead bore only upon "the existence of a legitimate state interest to be reasonably advanced by the regulation." *Dwen* v. *Barry,* 483 F. 2d 1126, 1128–1129 (1973). The Court of Appeals went on to decide that "choice of personal appearance is an ingredient of an individual's personal liberty" [3] and is protected by the Fourteenth Amendment. It further held that the police department had "failed to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote." *Id.,* at 1130–1131. On the basis of this reasoning it concluded that neither dismissal nor summary judgment in the District Court was appropriate, since the department "has the burden of establishing

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[2] *E. g., Stradley* v. *Andersen,* 478 F. 2d 188 (CA8 1973); *Greenwald* v. *Frank,* 40 App. Div. 2d 717, 337 N. Y. S. 2d 225 (1972), aff'd without opinion, 32 N. Y. 2d 862, 299 N. E. 2d 895 (1973). The District Court's dismissal was based on cases upholding the discretionary power of the military and National Guard to regulate a soldier's hair length. See *Gianatasio* v. *Whyte,* 426 F. 2d 908 (CA2), cert. denied, 400 U. S. 941 (1970); *Raderman* v. *Kaine,* 411 F. 2d 1102 (CA2), cert. dismissed, 396 U. S. 976 (1969).

[3] 483 F. 2d, at 1130. While it recognized the distinction between citizens and uniformed employees of police and fire departments, the Court of Appeals stated that the individual's status did not bear on the existence of his right but on whether the right was outweighed by a legitimate state interest. *Id.,* at 1130 n. 9.

a genuine public need for the regulation." *Id.*, at 1131.

Thereafter the District Court, under the compulsion of the remand from the Court of Appeals, took testimony on the question of whether or not there was a "genuine public need." The sole witness was the Deputy Commissioner of the Suffolk County Police Department, petitioner's subordinate, who testified as to the police department's concern for the safety of the patrolmen, and the need for some standards of uniformity in appearance.[4] The District Court held that "[n]o proof" was offered to support any claim of the need for the protection of the police officer, and that while "proper grooming" is an ingredient of a good police department's esprit de

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[4] On remand, the complaint was appropriately amended to reflect the interim renumbering and modification of the hair-grooming regulation. The former sections 2/75.0–2/75.3, see n. 1, *supra*, were modified to provide as follows:

"Members of the Force will be neat and clean at all times while on duty. Male personnel will comply with the following grooming standards unless excluded by the Police Commissioner due to special assignments:

"A. Hair will be neat, clean, trimmed and present a groomed appearance. Hair will not go below the ears or the collar except the closely cut hair on the back of the neck. Pony tails are prohibited. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear.

"B. If a member chooses to wear sideburns, they will be neatly trimmed. Sideburns will not extend below the lowest part of the ear. Sideburns shall not be flared beyond 2″ in width and will end with a clean-shaven horizontal line. Sideburns shall not connect with the mustache.

"C. A neatly trimmed mustache may be worn." Rules and Procedures, Police Department, County of Suffolk, N. Y., 2/2.16 (hereinafter Rules and Procedures).

Sections 2/75.4–2/75.5, see n. 1, *supra*, were simply renumbered as 2/2.16, subdivisions D and E, respectively. Deputy Commissioner Rapp's testimony on remand was directed to the regulation as modified. For present purposes, the differences are immaterial.

corps, petitioner's standards did not establish a public need because they ultimately reduced to "[u]niformity for uniformity's sake." [5] The District Court granted the

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[5] Illustrating one safety problem, Rapp showed that an assailant could throw an officer off balance by grabbing his hair from the rear and levering against the patrolman's back. After noting that the prohibition against "ponytails" was thus a proper one, the District Court stated:

"The remainder of 2/2.16A, however, bears no relationship to safety but rather related to hair styling. The potential danger in hairdress is the ability of the offender to grip the hair and hold the fate of the police officer in his hand. Bulk and length of the hair is not regulated except as it interferes with 'the proper wear of any authorized headgear.' Thus the regulation would permit bulky and lengthy hair on the top of the head, thereby presenting the very problem that was demonstrated. In the remaining subdivisions, sideburns, mustaches and wigs are regulated and beards are barred. No proof was offered to support any claim of the need for the protection of the police officer in the pertinent regulations." Pet. for Cert. 7a.

The District Court's findings with respect to the relationship between morale and grooming standards are as follows:

"The high morale of police personnel is a matter of grave concern to the department. Proper grooming is an ingredient of the esprit de corps of a good law enforcement organization. The self-esteem generated in the individual and the respect commanded from the public it serves promotes [*sic*] the efficiency of the organization's work. However, with the exception of the general requirement that hair, sideburns and mustaches be neatly trimmed, the regulations do not provide standards for proper grooming. Rather, the standards do nothing more than demand uniformity. Uniformity for uniformity's sake does not establish a public need. Defendant offered no proof that beards, goatees, hair styles that extend below the ears or collar, or sideburns that extend below the lowest part of the ear or beyond 2″ in width and do not end with a clean-shaven horizontal line affect the morale of the members of the police department or earn the disrespect of the public." *Id.*, at 7a–8a.

While noting Rapp's testimony that uniformity was required for identification, the District Court stated: "It would appear, however,

relief prayed for by respondent, and on petitioner's appeal that judgment was affirmed without opinion by the Court of Appeals. 508 F. 2d 836.

II

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

This section affords not only a procedural guarantee against the deprivation of "liberty," but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State. *Board of Regents* v. *Roth,* 408 U. S. 564, 572 (1972); *Griswold* v. *Connecticut,* 381 U. S. 479, 502 (1965) (WHITE, J., concurring).

The "liberty" interest claimed by respondent here, of course, is distinguishable from the interests protected by the Court in *Roe* v. *Wade,* 410 U. S. 113 (1973); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Stanley* v. *Illinois,* 405 U. S. 645 (1972); *Griswold* v. *Connecticut, supra;* and *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). Each of those cases involved a substantial claim of infringement on the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life. But whether the citizenry at large has some sort of "liberty" interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance. We can, nevertheless, assume an affirmative answer for purposes of deciding this case, because we find that assumption insufficient to carry the day for respondent's claim.

Respondent has sought the protection of the Four-

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that the uniform (issued by the department) supplies the necessary identification for police work."

teenth Amendment, not as a member of the citizenry at large, but on the contrary as an employee of the police department of Suffolk County, a subdivision of the State of New York. While the Court of Appeals made passing reference to this distinction, it was thereafter apparently ignored. We think, however, it is highly significant. In *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968), after noting that state employment may not be conditioned on the relinquishment of First Amendment rights, the Court stated that "[a]t the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. *CSC* v. *Letter Carriers,* 413 U. S. 548 (1973); *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973). If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.

The hair-length regulation here touches respondent as an employee of the county and, more particularly, as a policeman. Respondent's employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large. Respondent must wear a standard uniform, specific in each detail.[6] When in uniform he must

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[6] Rules and Procedures 4/1.0–4/1.3.

salute the flag.[7] He may not take an active role in local political affairs by way of being a party delegate or contributing or soliciting political contributions.[8] He may not smoke in public.[9] All of these and other regulations [10] of the Suffolk County Police Department infringe on respondent's freedom of choice in personal matters, and it was apparently the view of the Court of Appeals that the burden is on the State to prove a "genuine public need" for each and every one of these regulations.

This view was based upon the Court of Appeals' reasoning that the "unique judicial deference" accorded by the judiciary to regulation of members of the military was inapplicable because there was no historical or functional justification for the characterization of the police as "para-military." But the conclusion that such cases are inapposite, however correct, in no way detracts from the deference due Suffolk County's choice of an organizational structure for its police force. Here the county has chosen a mode of organization which it undoubtedly deems the most efficient in enabling its police to carry out the duties assigned to them under state and local law.[11] Such a choice necessarily gives weight to the overall need for discipline, esprit de corps, and uniformity.

The county's choice of an organizational structure, therefore, does not depend for its constitutional validity on any doctrine of historical prescription. Nor, indeed, has respondent made any such claim. His argument does

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[7] *Id.*, 6/2.2.

[8] *Id.*, 2/2.5.

[9] *Id.*, 2/5.1.

[10] See, *e. g.*, *id.*, 2/14.0 *et seq.* (Code of Ethics).

[11] The Court of Appeals itself found that while there was no desire on the part of local governments like Suffolk County to create a "military force," "[t]he use of such organization evolved as a *practical administrative solution* . . . ." 483 F. 2d, at 1128–1129 (emphasis added).

not challenge the constitutionality of the organizational structure, but merely asserts that the present hair-length regulation infringes his asserted liberty interest under the Fourteenth Amendment. We believe, however, that the hair-length regulation cannot be viewed in isolation, but must be rather considered in the context of the county's chosen mode of organization for its police force.

The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952); *Prince* v. *Massachusetts,* 321 U. S. 158, 168–170 (1944); *Olsen* v. *Nebraska,* 313 U. S. 236, 246–247 (1941). Having recognized in other contexts the wide latitude accorded the government in the "dispatch of its own internal affairs," *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 896 (1961), we think Suffolk County's police regulations involved here are entitled to similar weight. Thus the question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property. *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100–101 (1947); *Jacobson* v. *Massachusetts,* 197 U. S. 11, 30–31, 35–37 (1905).

We think the answer here is so clear that the District Court was quite right in the first instance to have dis-

missed respondent's complaint. Neither this Court, the Court of Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service. The constitutional issue to be decided by these courts is whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded "arbitrary," and therefore a deprivation of respondent's "liberty" interest in freedom to choose his own hairstyle. *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 487–488 (1955). The overwhelming majority of state and local police of the present day are uniformed. This fact itself testifies to the recognition by those who direct those operations, and by the people of the States and localities who directly or indirectly choose such persons, that similarity in appearance of police officers is desirable. This choice may be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself. Either one is a sufficiently rational justification for regulations so as to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment.

The Court of Appeals relied on *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), and *amicus* in its brief in support of respondent elaborates an argument based on the language in *Garrity* that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Id.,* at 500. *Garrity,* of course, involved the protections afforded by the Fifth Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). Certainly its language cannot be taken to suggest that the claim of a member

of a uniformed civilian service based on the "liberty" interest protected by the Fourteenth Amendment must necessarily be treated for constitutional purposes the same as a similar claim by a member of the general public.

The regulation challenged here did not violate any right guaranteed respondent by the Fourteenth Amendment to the United States Constitution, and the Court of Appeals was therefore wrong in reversing the District Court's original judgment dismissing the action. The judgment of the Court of Appeals is

Reversed.

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

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court and write to make clear that, contrary to the concern expressed in the dissent, I find no negative implication in the opinion with respect to a liberty interest within the Fourteenth Amendment as to matters of personal appearance. See *Poe* v. *Ullman,* 367 U. S. 497, 541–543 (1961) (Harlan, J., dissenting). When the State has an interest in regulating one's personal appearance, as it certainly does in this case, there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation. This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context.

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

The Court today upholds the constitutionality of Suffolk County's regulation limiting the length of a police-

man's hair. While the Court only assumes for purposes of its opinion that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance . . . ," *ante,* at 244, I think it clear that the Fourteenth Amendment does indeed protect against comprehensive regulation of what citizens may or may not wear. And I find that the rationales offered by the Court to justify the regulation in this case are insufficient to demonstrate its constitutionality. Accordingly, I respectfully dissent.

I

As the Court recognizes, the Fourteenth Amendment's guarantee against the deprivation of liberty "protects substantive aspects of liberty against unconstitutional restrictions by the State." *Ante,* at 244. And we have observed that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954). See also *Poe* v. *Ullman,* 367 U. S. 497, 543 (1961) (Harlan, J., dissenting).[1] It seems to me manifest that that "full range of conduct" must encompass one's interest in dressing according to his own taste. An individual's personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his

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[1] We have held that the Constitution's protection of liberty encompasses the interest of parents in having their children learn German, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); the interest of parents in being able to send their children to private as well as public schools, *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535 (1925); the interest of citizens in traveling abroad, *Kent* v. *Dulles,* 357 U. S. 116, 125 (1958); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505 (1964); the interest of a woman in deciding whether or not to terminate her pregnancy, *Roe* v. *Wade,* 410 U. S. 113, 153 (1973); and the interest of a student in the damage to his reputation caused by a 10-day suspension from school. *Goss* v. *Lopez,* 419 U. S. 565, 574–575 (1975).

attitude and lifestyle.[2] In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well. To say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect. See *Roe* v. *Wade,* 410 U. S. 113 (1973); *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); *Griswold* v. *Connecticut,* 381 U. S. 479, 485 (1965); *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

If little can be found in past cases of this Court or indeed in the Nation's history on the specific issue of a citizen's right to choose his own personal appearance, it is only because the right has been so clear as to be beyond question. When the right has been mentioned, its existence has simply been taken for granted. For instance, the assumption that the right exists is reflected in the 1789 congressional debates over which guarantees should be explicitly articulated in the Bill of Rights. I. Brant, The Bill of Rights 53–67 (1965). There was considerable debate over whether the right of assembly should be expressly mentioned. Congressman Benson of New York argued that its inclusion was necessary to assure that the right would not be infringed by the government. In response, Congressman Sedgwick of Massachusetts indicated:

"If the committee were governed by that general

[2] While the parties did not address any First Amendment issues in any detail in this Court, governmental regulation of a citizen's personal appearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well. *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503 (1969).

principle . . . they might have declared that *a man should have a right to wear his hat if he pleased* . . . but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, *in a Government where none of them were intended to be infringed.*" *Id.,* at 54–55 (emphasis added).

Thus, while they did not include it in the Bill of Rights, Sedgwick and his colleagues clearly believed there to be a right in one's personal appearance. And, while they may have regarded the right as a trifle as long as it was honored, they clearly would not have so regarded it if it were infringed.

This Court, too, has taken as an axiom that there is a right in one's personal appearance.[3] Indeed, in 1958 we used the existence of that right as support for our recognition of the right to travel:

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . *It may be as close to the heart of the individual as the choice*

[3] There has been a substantial amount of lower-court litigation concerning the constitutionality of hair-length and dress-code regulations as applied to schoolchildren. Some of the cases have found the rationales offered for such regulations to be sufficient to support their constitutionality. See, *e. g., King* v. *Saddleback Junior College Dist.,* 445 F. 2d 932 (CA9), cert. denied, 404 U. S. 979 (1971); *Gfell* v. *Rickelman,* 441 F. 2d 444 (CA6 1971); *Ferrell* v. *Dallas Independent School Dist.,* 392 F. 2d 697 (CA5), cert. denied, 393 U. S. 856 (1968). Other cases have found similar regulations unconstitutional. See, *e. g., Richards* v. *Thurston,* 424 F. 2d 1281 (CA1 1970); *Breen* v. *Kahl,* 419 F. 2d 1034 (CA7 1969), cert. denied, 398 U. S. 937 (1970). None of the cases, however, have indicated that the Constitution may offer no protection at all against comprehensive regulation of the personal appearance of the citizenry at large.

of what he eats, or wears, or reads." *Kent* v. *Dulles,* 357 U. S. 116, 125–126 (1958) (emphasis added).

To my mind, the right in one's personal appearance is inextricably bound up with the historically recognized right of "every individual to the possession and control of his own person," *Union Pacific R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891), and, perhaps even more fundamentally, with "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States, supra,* at 478 (Brandeis, J., dissenting). In an increasingly crowded society in which it is already extremely difficult to maintain one's identity and personal integrity, it would be distressing, to say the least, if the government could regulate our personal appearance unconfined by any constitutional strictures whatsoever.[4]

[4] History is dotted with instances of governments regulating the personal appearance of their citizens. For instance, in an effort to stimulate his countrymen to adopt a modern lifestyle, Peter the Great issued an edict in 1698 regulating the wearing of beards throughout Russia. W. & A. Durant, The Age of Louis XIV, p. 398 (1963). Anyone who wanted to grow a beard had to pay an annual tax of from one kopek for a peasant to one hundred rubles for a rich merchant. *Ibid.* Of those who could not afford the "beard tax," there were many "who, after having their beards shaved off, saved them preciously, in order to have them placed in their coffins, fearing that they would not be allowed to enter heaven without them." J. Robinson, Readings in European History 390 (1906).

There are more recent instances, too, of governments regulating the personal appearance of their citizens. See, *e. g.,* N. Y. Times, Feb. 18, 1974, p. 22, col. 4 (Czech police stop long-haired young men, telling them to get haircuts); *id.,* July 23, 1972, p. 4, col. 1 (Libyan Government tells youths to trim hair and wear more sober clothes or submit themselves for training in the army); *id.,* July 7, 1971, p. 22, col. 8 (over 1,000 young men rounded up and given haircuts by South Korean police in what was described by government officials as a "social purification" campaign); *id.,* Oct. 13, 1970, p. 11, col. 1 (police force more than 1,400 South Vietnamese youths to cut

II

Acting on its assumption that the Fourteenth Amendment does encompass a right in one's personal appearance, the Court justifies the challenged hair-length regulation on the grounds that such regulations may "be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself." *Ante*, at 248. While fully accepting the aims of "identifiability" and maintenance of esprit de corps, I find no rational relationship between the challenged regulation and these goals.[5]

As for the first justification offered by the Court, I simply do not see how requiring policemen to maintain hair of under a certain length could rationally be argued to contribute to making them identifiable to the public as policemen. Surely, the fact that a uniformed police officer is wearing his hair below his collar will make him

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their hair). It is inconceivable to me that the Constitution would offer no protection whatsoever against the carrying out of similar actions by either our Federal or State Governments.

[5] A policeman does not surrender his right in his own personal appearance simply by joining the police force. See *Tinker* v. *Des Moines School Dist.,* 393 U. S., at 506. I agree with the Court of Appeals that the "status of the individual raising the claim bears [not on the existence of the right, but rather] on the question of whether the right is outweighed by a legitimate state interest." 483 F. 2d, at 1130 n. 9. Thus, the need to evaluate the governmental interest and the connection between it and the challenged governmental action is as present when the party whose rights have allegedly been violated is a public employee as when he is a private employee. See *CSC* v. *Letter Carriers,* 413 U. S. 548, 564–567 (1973). To hold that citizens somehow automatically give up constitutional rights by becoming public employees would mean that almost 15 million American citizens are currently affected by having "executed" such "automatic waivers." Statistical Abstract of the United States 1975, p. 272.

no less identifiable as a policeman. And one cannot easily imagine a plainclothes officer being readily identifiable as such simply because his hair does not extend beneath his collar.

As for the Court's second justification, the fact that it is the president of the Patrolmen's Benevolent Association, in his official capacity, who has challenged the regulation here would seem to indicate that the regulation would if anything, decrease rather than increase the police force's esprit de corps.[6] And even if one accepted the argument that substantial similarity in appearance would increase a force's esprit de corps, I simply do not understand how implementation of this regulation could be expected to create any increment in similarity of appearance among members of a uniformed police force. While the regulation prohibits hair below the ears or the collar and limits the length of sideburns, it allows the maintenance of any type of hairstyle, other than a ponytail. Thus, as long as their hair does not go below their collars, two police officers, one with an "Afro" hair style and the other with a crewcut could both be in full compliance with the regulation.[7]

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[6] Nor, to say the least, is the esprit de corps argument bolstered by the fact that the International Brotherhood of Police Officers, a 25,000-member union representing uniformed police officers, has filed a brief as *amicus curiae* arguing that the challenged regulation is unconstitutional.

[7] The regulation itself eschews what would appear to be a less intrusive means of achieving similarity in the hair length of on-duty officers. According to the regulation, a policeman cannot comply with the hair-length requirements by wearing a wig with hair of the proper length while on duty. The regulation prohibits the wearing of wigs or hairpieces "on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration." *Ante,* at 240 n. 1. Thus, while the regulation in terms applies to grooming standards of policemen while on duty, the hair-length provision effectively controls both on-duty and off-duty appearance.

The Court cautions us not to view the hair-length regulation in isolation, but rather to examine it "in the context of the county's chosen mode of organization for its police force." *Ante*, at 247. While the Court's caution is well taken, one should also keep in mind, as I fear the Court does not, that what is ultimately under scrutiny is neither the overall structure of the police force nor the uniform and equipment requirements to which its members are subject, but rather the regulation which dictates acceptable hair lengths. The fact that the uniform requirement, for instance, may be rationally related to the goals of increasing police officer "identifiability" and the maintenance of esprit de corps does absolutely nothing to establish the legitimacy of the hair-length regulation. I see no connection between the regulation and the offered rationales[8] and would accordingly affirm the judgment of the Court of Appeals.

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[8] Because, to my mind, the challenged regulation fails to pass even a minimal degree of scrutiny, there is no need to determine whether, given the nature of the interests involved and the degree to which they are affected, the application of a more heightened scrutiny would be appropriate.

OHIO v. GALLAGHER

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 74-492. Argued December 2, 1975—Decided April 5, 1976

The Ohio Supreme Court held that testimony relating the statements of an accused in response to questions by a parole officer in an interview in a jail is inadmissible at trial if, prior to the questioning, the parole officer failed to advise the accused of his rights under *Miranda* v. *Arizona,* 384 U. S. 436. When, as here, it is not clear from the whole record whether the state court rested its decision upon the Fifth and Fourteenth Amendments to the United States Constitution or upon the Ohio Constitution, the judgment is vacated and the case is remanded to permit the Ohio Supreme Court to explicate whether or not its judgment relies on federal law.

38 Ohio St. 2d 291, 313 N. E. 2d 396, vacated and remanded.

Herbert M. Jacobson argued the cause for petitioner. With him on the brief was *Lee C. Falke.*

Jack T. Schwarz, by appointment of the Court, 421 U. S. 985, argued the cause and filed a brief for respondent.*

Per Curiam.

We granted certiorari [1] to determine whether the admission in evidence of statements made by an accused in response to in-custody questioning by his parole officer violates the rule of *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

On June 21, 1972, the respondent, Terry L. Gallagher, was arrested and later charged with the armed robbery

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**Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *S. Clark Moore,* Assistant Attorney General, *Frederick R. Millar, Jr.,* and *Theodora Berger,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging reversal.

[1] 420 U. S. 1003 (1975).

of a food store. On the morning following his arrest, two detectives advised respondent of his rights under *Miranda* and then questioned him.[2]

Four days later, respondent's parole officer, William Sykes, went to the jail to talk to him about the food store robbery as a possible violation of parole. Respondent refused to discuss it, but on a return visit a week later, Gallagher gave Sykes a detailed account of his participation in the crime. It is undisputed that, at no time, did the parole officer advise Gallagher that he had a right to remain silent or that any statements he made would be used as evidence against him. At trial, the parole officer was called as a prosecution witness and testified, over defense objection, to the incriminating statements made to him by Gallagher.

Respondent was convicted of armed robbery in the Ohio Court of Common Pleas. The Ohio Court of Appeals affirmed. 36 Ohio App. 2d 29, 301 N. E. 2d 888 (1973).

The Supreme Court of Ohio granted respondent's motion for leave to appeal and reversed the judgment of conviction. 38 Ohio St. 2d 291, 313 N. E. 2d 396 (1974). In its opinion, the state court defined the question presented by respondent's appeal as "whether testimony, concerning certain statements made by [respondent] to his parole officer about his involvement in a crime, was received at trial in violation of [respondent's] privilege against self-incrimination, as guaranteed by Section 10, Article I of the Ohio Constitution, and the Fifth Amendment to the United States Constitution." *Id.*, at 294, 313 N. E. 2d, at 398–399. The Ohio Su-

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[2] Statements elicited from the respondent during this police interrogation were later suppressed by the trial court on the ground that they were induced by promises of leniency and, as such, were involuntary.

preme Court held that testimony relating the statements of an accused in response to questions by his parole officer is inadmissible at trial if, prior to the questioning, the parole officer failed to advise the accused of his right to remain silent and his right to be provided with counsel prior to questioning, and to warn him that any statement might be used as evidence against him. *Id.*, at 297, 313 N. E. 2d, at 400.

From the briefs and oral argument, we are unable to determine whether the Ohio Supreme Court rested its decision upon the Fifth and Fourteenth Amendments to the Constitution of the United States, or Art. I, § 10, of the Ohio Constitution, or both. In its full opinion, the Ohio court cited with approval an excerpt from the opinion of the Court of Appeals for the Fifth Circuit in *United States* v. *Deaton,* 468 F. 2d 541 (1972), a case which, in the view of the state court, presented the precise question then before it. We are unsure whether the Ohio court made reference to *Deaton* merely to lend support to its view that a parolee is under heavy pressure to cooperate with his parole officer or whether the court intended to demonstrate its reliance on a federal constitutional ground. Indeed, we cannot be certain that the Ohio court did not construe its constitutional provision to be identical to that contained in the Fifth Amendment and thus render judgment simultaneously under both state and federal law.

We also note that, except for *per curiam* opinions, it is the settled rule in Ohio that its Supreme Court speaks as a court only through the syllabi of its cases. See *Cassidy* v. *Glossip,* 12 Ohio St. 2d 17, 24, 231 N. E. 2d 64 (1967); see also *Beck* v. *Ohio,* 379 U. S. 89, 93 (1964). The italicized headnote which appears in the instant syllabus can be read as a holding based only on points of *criminal law* and the law of *evidence;* it contains

nothing to indicate that a point of federal *constitutional law* is decided. Because we decline to speculate from the choice of words used in the syllabus and the authorities cited by the author of the opinion as to which constitutional provision formed the basis for the judgment of the state court, we vacate the judgment of the Supreme Court of Ohio and remand the cause to permit that court to explicate whether or not its judgment relies on federal law. *California* v. *Krivda,* 409 U. S. 33 (1972); *Mental Hygiene Dept.* v. *Kirchner,* 380 U. S. 194 (1965); *Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940). We intimate no view on the merits of the Fifth and Fourteenth Amendment issue presented.

Vacated and remanded.

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

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN concur, dissenting.

It is clear to me that the judgment of the Supreme Court of Ohio rests upon both the Constitution of the State of Ohio and the Constitution of the United States. That being so, the writ of certiorari must be dismissed as improvidently granted under the doctrine of *Jankovich* v. *Toll Road Comm'n,* 379 U. S. 487.

The issue that the Ohio court thought it had to decide could hardly have been more unambiguously stated than it was by Justice William B. Brown in the opening paragraph of the opinion of the court:

> "The question presented is whether testimony, concerning certain statements made by appellant to his parole officer about his involvement in a crime, was received at trial in violation of appellant's privilege against self-incrimination, as guaranteed by

Section 10, Article I of the Ohio Constitution, and the Fifth Amendment to the United States Constitution." 38 Ohio St. 2d 291, 294, 313 N. E. 2d 396, 398–399.*

I would dismiss the writ of certiorari as improvidently granted.

*For more than 100 years the Ohio Supreme Court in other than *per curiam* opinions has stated the law of the case only in the syllabus. The syllabus in the present case makes no reference whatever to constitutional law, state *or* federal, but appears to be no more than a ruling in the area of state-evidence law. If the law of this case is to be so understood, it would *a fortiori* present no federal question.

BUTLER ET AL. v. DEXTER

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

No. 75-623. Decided April 19, 1976

This Court has no jurisdiction under 28 U. S. C. § 1253 over an appeal from a three-judge District Court's order enjoining appellants from prosecuting appellee theater operator on the felony charge that his motion picture projector used to exhibit an allegedly obscene film was a "criminal instrument" under § 16.01 of the Texas Penal Code. The ground for the injunction was not that § 16.01 was unconstitutional but that the local officials had acted in bad faith and unconstitutionally in using that statute (which the District Court found could "by no stretch of the imagination" be read as applying) as a pretext for forcing appellee to stop exhibiting the film, without any design to convict him on the felony charge. Since a three-judge court was therefore not required, the appeal should have been taken to the Court of Appeals.

404 F. Supp. 33, vacated and remanded.

PER CURIAM.

This is an appeal under 28 U. S. C. § 1253 from an order of a three-judge District Court enjoining the appellants from prosecuting the appellee on the felony charge that his motion picture projector is a "criminal instrument" under § 16.01 of the Texas Penal Code.[1]

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[1] Texas Penal Code Ann. § 16.01 (1974):

"Unlawful Use of Criminal Instrument

"(a) A person commits an offense if:

"(1) he possesses a criminal instrument with intent to use it in the commission of an offense; or

"(2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument.

"(b) For purposes of this section, 'criminal instrument' means anything that is specially designed, made, or adapted for the commission of an offense.

"(c) An offense under this section is a felony of the third degree."

Since no substantial question about the constitutionality of § 16.01 has been raised, we dismiss the appeal for want of jurisdiction in this Court.[2]

The facts of this case are relatively simple. The appellee, Richard Dexter, ran the Fiesta Theatre in San Antonio, Tex., which in June and July 1974 was exhibiting the film "Deep Throat." On three[3] separate occasions, an officer of the San Antonio police force paid for admission, entered the theater, and viewed the film. The officer, on each occasion, then wrote out a "Motion for Adversary Hearing" to determine whether there was probable cause to seize the film for violating the Texas obscenity laws. Each time, a magistrate held a short "hearing" in the lobby of the theater, at which he heard the testimony of the police officer, then viewed the film. Each time, the magistrate then issued a warrant to seize the film *and* to seize the projector as a "criminal instrument" under § 16.01 of the Texas Penal Code. Appellee was then arrested and charged with "commercial obscenity" in violation of Texas Penal Code, § 43.23, and "use of a criminal instrument" in violation of § 16.01. The charge of commercial obscenity is a Class B misdemeanor, carrying a fine not to exceed $1,000, confinement not to exceed 180 days, or both.[4] Appellee did not, according to the trial court, pursue any complaint about these charges in the federal court. He was brought to trial on these charges in the state courts and they are not in issue here. His challenge, rather, was against the prosecutor's charging him with violations of the criminal

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[2] Although the appellee has not moved to dismiss the appeal, this Court must take notice on its own motion where jurisdiction does not appear. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 306 (1962).

[3] There was another occasion where substantially the same events occurred, but appellee was not arrested, although a theater employee named William Walker was.

[4] Tex. Penal Code Ann. § 12.22 (1974).

instruments statute for his possession of ordinary 16-mm. movie projectors. Violation of that statute is a third-degree felony, and carries a penalty of from 2 to 10 years' confinement and a fine not to exceed $5,000.[5] Although the felony complaints were lodged and appellee was forced to post some $31,000 in bonds, these charges were never presented to the grand jury.[6]

A "criminal instrument," for purposes of the Texas statute, is anything "specially designed, made, or adapted for the commission of an offense." [7] From an examination of the "clear language of the statute" and from an examination of the unofficial "practice commentary" to the statute, the District Court concluded that "[b]y no stretch of the imagination could this statute be used to cover the plaintiff's actions or the possession of an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels." [8]

From its conclusion as to the obvious inapplicability of the statute, and from the prosecutor's failure to present the charges to the grand jury, the District Court found that "[c]harging the plaintiff with a § 16.01 violation . . . cannot have been undertaken with any design to actually convict the plaintiff of the crime. . . . Such a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony was effective in requir-

[5] Tex. Penal Code Ann. § 12.34 (1974).

[6] Appellants argued below that the District Attorney believed he was precluded from pursuing those charges by the restraining order issued by the federal court. However, the restraining order specifically provided that "no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases." The District Judge also informed the appellants on at least two occasions during the hearings that the restraining order did not bar the bringing of indictments on any pending charges.

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

[8] *Universal Amusement Co.* v. *Vance*, 404 F. Supp. 33, 48, 51 (SD Tex. 1975).

ing that bail for a felony offense be set, not once but several times. The authorities could not believe, however, that Dexter would ultimately be convicted." [9]

Appellants present several contentions regarding the jurisdiction of the District Court and the correctness of its decision. We do not reach these questions, however, as we have concluded that we have no jurisdiction to consider this case on direct appeal. Jurisdiction is predicated on 28 U. S. C. § 1253, granting the right of direct appeal from an order "granting an . . . injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Title 28 U. S. C. § 2281 provides that "[a]n . . . 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 . . . shall not be granted . . . 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 this statute a three-judge court is required if "a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, . . . even though nonconstitutional grounds of attack are also alleged . . . ." *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, 85 (1960). However, in this case the District Court ruled that the actions of the appellants were not taken in the enforcement of the statute and thus no serious question about the constitutionality of the statute was presented.

As noted above, the District Court found that the felony "criminal instruments" charges were made in bad faith and without any design actually to convict appellee on those charges. Rather, the felony charges were made as part of a pattern of harassment by the San

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[9] *Id.,* at 48.

Antonio police designed to force appellee to stop exhibiting "Deep Throat." But the arrests and the charges were not made in any attempt to enforce § 16.01.[10] Nor was the injunction granted on the ground that § 16.01 was unconstitutional; rather, it was granted on the ground that the local officials had acted unconstitutionally in using that statute as a pretext for arrest and the setting of felony bonds when they knew that the statute was inapplicable and that no conviction could ever be obtained. Since no substantial question concerning the constitutionality of § 16.01 was presented to the District Court, a three-judge court was not required.[11] Cf. *Bailey* v. *Patterson,* 369 U. S. 31 (1962).

A somewhat better argument might be made that the prosecutor's actions were part of an effort to enforce the commercial obscenity statute, albeit in a somewhat irregular manner. However, it could not be contended that the District Court grounded its injunction in any way on the unconstitutionality of the commercial obscenity

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[10] Cf. *Phillips* v. *United States,* 312 U. S. 246, 252 (1941): "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . . . It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law." This situation is, of course, to be distinguished from an attack on a statute said to be unconstitutional "as applied." See also *Ex parte Bransford,* 310 U. S. 354 (1940).

[11] We have no occasion to consider whether the District Court was correct in deciding that § 16.01 did not—and that appellants knew it did not—authorize appellants' actions. Nor do we consider whether, having so decided, the court was empowered to grant appellee relief enjoining the State from prosecuting him on the pending felony charges purportedly filed pursuant to that section. We hold only that by having made that decision, the court removed from the case any possibility that the statute might be enjoined on the grounds of its unconstitutionality.

statute; the constitutionality of that statute was not even considered in this case.[12]

Since a three-judge court was not required in this case, the appeal should have been taken to the Court of Appeals for the Fifth Circuit. Since the time for appeal may have passed, we vacate the judgment and remand to the District Court so that it may enter a fresh decree from which a timely appeal can, if desired, be taken. *Gonzalez* v. *Automatic Employees Credit Union,* 419 U. S. 90 (1974); *Moody* v. *Flowers,* 387 U. S. 97 (1967).

It is so ordered.

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[12] This case was consolidated in the District Court with several other cases, at least some of which did bring into question the constitutionality of a state statute. Each case before this Court, however, must be considered separately to determine whether or not this Court has jurisdiction to consider its merits.

DIAMOND NATIONAL CORP. ET AL. *v.* STATE BOARD OF EQUALIZATION

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 75–1038. Decided April 19, 1976

The incidence of state and local sales taxes falls upon appellant national bank as purchaser and not upon vendors, and therefore the national bank is exempt from the taxes under former 12 U. S. C. § 548 (1964 ed.), which was in effect at the time here pertinent.

49 Cal. App. 3d 778, 123 Cal. Rptr. 160, reversed.

PER CURIAM.

The judgment is reversed. We are not bound by the California court's contrary conclusion and hold that the incidence of the state and local sales taxes falls upon the national bank as purchaser and not upon the vendors. The national bank is therefore exempt from the taxes under former 12 U. S. C. § 548 (1964 ed.), which was in effect at the time here pertinent. *First Agricultural Nat. Bank* v. *Tax Comm'n*, 392 U. S. 339, 346–348 (1968).

Reversed.

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Appellants contend that California may not impose its sales tax on the sale of printed forms and other tangibles to Crocker-Citizens National Bank because the legal incidence of the tax falls upon a federal instrumentality. The California Court of Appeal, applying a construction of the California statute that has been consistently followed for over 40 years, held that the legal incidence of the tax falls upon the vendor rather than the purchaser.[1]

[1] 49 Cal. App. 3d 778, 123 Cal. Rptr. 160 (1975).

Since the case involves a federal claim of immunity from state taxation, we are not bound by the California court's determination of where the incidence of the tax falls.[2] On the other hand, we are not free simply to disregard the state court's determination.[3] More narrowly, I believe we must accept the state court's interpretation of the meaning of a state statute insofar as it defines the legal obligations of the vendor, the purchaser, and the tax collector independently of any claim of federal immunity.

In this case we have the benefit of completely consistent construction by the California courts since the statute was enacted in 1933. Both in cases involving a federal claim of immunity,[4] and also in cases which involved no question of federal law,[5] the California courts

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[2] See *Society for Savings* v. *Bowers,* 349 U. S. 143, 151.

[3] As we said in *American Oil Co.* v. *Neill,* 380 U. S. 451, 455–456: "When a state court has made its own definitive determination as to the operating incidence [of a tax], our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive."

[4] The very question which confronts us here arose in *Western Lithograph Co.* v. *State Board of Equalization,* 11 Cal. 2d 156, 78 P. 2d 731 (1938); in that case the plaintiff-vendor claimed not to be liable for taxes measured by sales made to the Bank of America National Trust and Savings Association. The Supreme Court of California affirmed the denial of a refund, holding that the incidence of the tax was on the retailer, not on the consumer.

[5] In *National Ice & Cold Storage Co. of California* v. *Pacific Fruit Express Co.,* 11 Cal. 2d 283, 79 P. 2d 380 (1938), the court held that the vendor could not add sales tax reimbursement to the price paid by a vendee under a pre-existing contract, even though the court was required, in order to reach this result, to hold unconstitutional a section of the taxing statute which expressly allowed such a result. The court reasoned that while it

have unambiguously held that the statute imposes no legal obligation on a purchaser either to pay the tax himself or to reimburse his vendor.

That consistent, nondiscriminatory construction of California law avoids appellants' reliance on *First Agricultural Nat. Bank* v. *Tax Comm'n,* 392 U. S. 339. In that case we held that "a sales tax which *by its terms must* be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser." *Id.,* at 347 (emphasis added).[6] This is not a case in which the state statute, either by its own terms or as construed by the

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was not beyond the power of the legislature to impose a tax on the consumer, it had not done so, and it was beyond the power of the legislature to require the vendee to pay the vendor's debt.

That this left the California sales tax reimbursement as a matter of contract between vendor and vendee is affirmed by the later holdings of the lower California courts in *Clary* v. *Basalt Rock Co.,* 99 Cal. App. 2d 458, 222 P. 2d 24 (1950), which held that there was no venue against the vendee in a particular county because it could not be found that any tax obligation arose against the vendee when a sale was made, and *Livingston Rock & Gravel Co.* v. *DeSalvo,* 136 Cal. App. 2d 156, 288 P. 2d 317 (1955), where the vendor under a lease-sale overlooked providing for sales tax reimbursement. Although the vendor had been held liable for payment to the State, the court held that the vendor could not collect the tax from the vendee.

[6] We have recently explained "the controlling significance" of *First Agricultural Bank* in this way:

"But the controlling significance of *First Agricultural Bank* for our purposes is the test formulated by that decision for the determination where the legal incidence of the tax falls, namely, that where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States* v. *Mississippi Tax Comm'n,* 421 U. S. 599, 608.

In this case, unlike *First Agricultural Bank,* the State does not *require* that its sales tax be passed on to the purchaser.

state courts, imposes any legal obligation on the purchaser.[7]

It is true that the bank expressly agreed to assume the economic burden imposed by the tax and, furthermore, that the statutory scheme contemplates that as a practical matter the vendor will pass that burden on to his customers. As I understand our cases, however, these facts do not provide a sufficient basis for concluding that the legal incidence of the tax falls upon the purchaser.[8]

Deciding where the legal incidence of a state tax falls is not the most intriguing task that judges are called

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[7] Appellants have placed great stress on the wording of § 6052 of the California Revenue and Taxation Code (1970), which provides:

"§ 6052 Collection by retailer from consumer. The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done."

On its face this provision could reasonably be read to require that the tax be paid by the consumer. However, in the face of the state courts' consistent interpretation of the state statute as not requiring that result, we are not free to place our own interpretation on the statute.

[8] In *Gurley* v. *Rhoden,* 421 U. S. 200, 204–205, we explained:

"The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer. The Court has laid to rest doubts on that score raised by such decisions as *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218 (1928); *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570 (1931); and *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110 (1954), at least under taxing schemes, as here, where neither statute required petitioner to pass the tax on to the purchaser-consumer. See *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941); *Lash's Products Co.* v. *United States,* 278 U. S. 175 (1929); *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572 (1930); *First Agricultural Nat. Bank* v. *Tax Comm'n,* 392 U. S. 339 (1968); *American Oil Co.* v. *Neill,* 380 U. S. 451 (1965)."

upon to perform. Such work is facilitated, however, when the controlling standards are expressed in simple language. I had thought two rather clear rules controlled this case. First, the location of the economic impact of a tax does not identify the place where its legal incidence falls. Second, it is only if the State imposes a legal obligation on the purchaser either to pay the tax, or to reimburse the vendor for a tax payment, that the legal incidence is on the purchaser. The Court's disposition of this appeal apparently is not predicated on either of those rules. However, I am persuaded that they require us to affirm the judgment of the California Court of Appeal.

SAKRAIDA v. AG PRO, INC.

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

No. 75-110. Argued March 3, 1976—Decided April 20, 1976

Respondent's patent covering a water flush system to remove cow manure from the floor of a dairy barn *held* invalid for obviousness, it being a combination patent all the elements of which are old in the dairy business and were well known before the filing of the patent application. The system's exploitation of the principle of gravity to effect the abrupt release of water "did not produce a 'new or different function' . . . within the test of validity of combination patents." *Anderson's-Black Rock* v. *Pavement Co.*, 396 U. S. 57, 60. Pp. 274-283.

512 F. 2d 141, reversed.

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

Stephen B. Tatem, Jr., argued the cause for petitioner. With him on the briefs was *James F. Hulse.*

J. Pierre Kolisch argued the cause for respondent. With him on the brief was *John W. Stuart.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Ag Pro, Inc., filed this action against petitioner Sakraida on October 8, 1968, in the District Court for the Western District of Texas for infringement of United States Letters Patent 3,223,070, entitled "Dairy

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**Mary Helen Sears* filed a brief for the Texas Farmers Union as *amicus curiae* urging reversal.

Helen W. Nies, Donald R. Dunner, and *David N. Webster* filed a brief for the Bar Association of the District of Columbia as *amicus curiae.*

Establishment," covering a water flush system to remove cow manure from the floor of a dairy barn. The patent was issued December 14, 1965, to Gribble and Bennett, who later assigned it to respondent.

The District Court's initial grant of summary judgment for petitioner was reversed by the Court of Appeals for the Fifth Circuit. 437 F. 2d 99 (1971). After a trial on remand, the District Court again entered a judgment for petitioner. The District Court held that the patent "does not constitute invention, is not patentable, and is not a valid patent, it being a combination patent, all of the elements of which are old in the dairy business, long prior to 1963, and the combination of them as described in the said patent being neither new nor meeting the test of non-obviousness." The Court of Appeals again reversed and held the patent valid. 474 F. 2d 167 (1973). On rehearing, the court remanded "with directions to enter a judgment holding the patent valid, subject, however, to . . . consideration of a motion under Rule 60 (b)(2), F. R. Civ. P., to be filed in the District Court by the [petitioner] Sakraida on the issue of patent validity based on newly discovered evidence." 481 F. 2d 668, 669 (1973). The District Court granted the motion and ordered a new trial. The Court of Appeals again reversed, holding that the grant of the motion was error, because "the record on the motion establishes that [petitioner] failed to exercise due diligence to discover the new evidence prior to entry of the former judgment." 512 F. 2d 141, 142 (1975). The Court of Appeals further held that "[o]ur prior determination of patent validity is reaffirmed." *Id.*, at 144. We granted certiorari. 423 U. S. 891 (1975). We hold that the Court of Appeals erred in holding the patent valid and also in reaffirming its determination of patent validity. We therefore reverse and direct the reinstatement of the Dis-

trict Court's judgment for petitioner, and thus we have no occasion to decide whether the Court of Appeals properly found that petitioner had not established a case for a new trial under Rule 60 (b)(2).

Systems using flowing water to clean animal wastes from barn floors have been familiar on dairy farms since ancient times.[1] The District Court found, and respondent concedes, that none of the 13 elements of the Dairy Establishment combination is new,[2] and many of those

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[1] Among the labors of Hercules is the following:

"Heracles now set out to perform his fifth Labour, and this time his task was to cleanse the stables of Augeas in a single day. Augeas was a rich king of Elis, who had three thousand cattle. At night the cattle always stood in a great court surrounded with walls, close to the king's palace, and as it was quite ten years since the servants had cleaned it out, there was enough refuse in the court to build up a high mountain. Heracles went to Augeas and asked if he would give him the tenth part of his flocks if he thoroughly cleansed his stables in a single day. The king looked upon this as such an absolutely impossible feat that he would not have minded promising his kingdom as a reward for it, so he laughed and said, 'Set to work, we shall not quarrel about the wages,' and he further promised distinctly to give Heracles what he asked, and this he did in the presence of Phyleus, his eldest son, who happened to be there. The next morning Heracles set to work, but even his strong arms would have failed to accomplish the task if they had not been aided by his mother-wit. He compelled a mighty torrent to work for him, but you would hardly guess how he did it. First he opened great gates on two opposite sides of the court, and then he went to the stream, and when he had blocked up its regular course with great stones, he conducted it to the court that required to be cleansed, so that the water streamed in at one end and streamed out at the other, carrying away all the dirt with it. Before evening the stream had done its work and was restored to its usual course." C. Witt, Classic Mythology 119–120 (1883).

[2] The District Court found as follows respecting Claims 1 and 3, the only claims involved in the case:

"1. I find that the 'dairy establishment' as described in United

elements, including storage of the water in tanks or pools, appear in at least six prior patented systems.[3] The prior art involved spot delivery of water from tanks or pools

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States Letters Patent 3,223,070 is composed of 13 separate items, as follows:

"(a) '. . . a smooth, evenly contoured, paved surface forming a floor providing a walking surface. . . .'

"(b) '. . . drain means for draining wash water from such floor opening to the top of the floor.'

"(c) '. . . said smooth, evenly contoured surface which forms such floor sloping toward said drain. . . .'

"(d) '. . . multiple rest areas with individual stalls for each cow and with each of said stalls having a bottom which is also a smooth pavement. . . .'

"(e) '. . . which is disposed at an elevation above the paved surface forming the floor. . . .'

"(f) '. . . said stalls being dimensioned so that a cow can comfortably stand or lie in the stall, but offal from the cow falls outside the stall bottom and onto the floor providing the walking surface in the barn. . . .'

"(g) '. . . said barn further including defined feeding areas having feeding troughs. . . .'

"(h) '. . . a cow-holding area.'

"(i) '. . . a milking area.'

"(j) '. . . a transfer area all bottomed with the walking surface forming said floor in the barn. . . .'

"(k) '. . . and floor washing means for washing the floor providing the walking surface in the barn where said floor bottom, said feeding, holding, milking and transfer areas operable to send wash water flowing over the floor with such water washing any cow offal thereon into the said drain means, said floor washing means including means located over a region of said floor which is uphill from said drain means constructed to collect water as a pool above said floor and operable after such collection of water as a pool to dispense the water as a sheet of water over said floor.'

"(l) A tank on a mounting, so that it can be tilted, and the water poured out to cascade on the floor to form a sheet.

"(m) A floor-washing means comprising a dam for damming or collecting water as a pool directly on the floor, which such dam

[*Footnote 3 is on p. 277*]

to the barn floor by means of high pressure hoses or pipes. That system required supplemental hand labor, using tractor blades, shovels, and brooms, and cleaning by these methods took several hours. The only claimed inventive feature of the Dairy Establishment combination of old elements is the provision for abrupt release of the water from the tanks or pools directly onto the barn floor, which causes the flow of a sheet of water that washes all animal waste into drains within minutes and requires no supplemental hand labor. As an expert witness for respondent testified concerning the effect of Dairy Establishment's combination: "[W]ater at the bottom has more friction than this water on the top and it keeps moving ahead and as this water keeps moving ahead we get a rolling action of this water which produced the cleaning action. . . . You do not get this in a hose. . . . [U]nless that water is continuously directed toward the cleaning area the cleaning action almost ceases instantaneously. . . ." [4]

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abruptly openable to send water cascading as a sheet over the floor towards the drain.

"2. I further find that each of the items above-described were not new, but had been used in the dairy business prior to the time the application for the said Gribble patent, made the subject of this action, had been filed in the Patent Office of the United States on November 5, 1963."

[3] The District Court found:

"[M]any of the items going to make up Plaintiff's claim for a patent were disclosed in prior patents, known respectively as the McCornack patent, the Holz patent, the Ingraham patent, the Kreutzer patent, the Bogert patent, and the Luks patent; and that the statements of the Examiner's opinions refusing to issue a patent are true as to all items there stated to be covered in prior patents or publications."

[4] This witness further testified:

"[W]ater has energy and it can be used in many different ways. In a hose the energy is used by impact, under pressure, external force

The District Court found that "[n]either the tank which holds the water, nor the means of releasing the water quickly is new, but embrace[s] tanks and doors which have long been known," and further that "their use in this connection is one that is obvious, and the patent in that respect is lacking in novelty. The patent does not meet the non-obvious requirements of the law." The District Court therefore held that Dairy Establishment "may be relevant to commercial success, but not to invention," because the combination "was reasonably obvious to one with ordinary skill in the art." Moreover, even if the combination filled a "long-felt want and . . . has enjoyed commercial success, those matters, without invention, will not make patentability." Finally, the District Court concluded: "[T]o those skilled in the art, the use of the old elements in combination was not an invention by the obvious-nonobvious standard. Even

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that is applied to this pressure—to this water, whereas the water that comes down as a sheet or wall of water has built in energy because of its elevation and as this water is released it does the same thing water does in a flooded stream. As this water—I will try to make this clear, and I hope I can, on the surface of this pavement there are these piles of manure droppings. This pavement is smooth and this water moves down over this manure. The water at the bottom has more friction than this water on the top and it keeps moving ahead and as this water keeps moving ahead we get a rolling action of this water which produced the cleaning action. That is the key to this method of cleaning. You do not get this in a hose. You do not get it in a gutter as has been used in the past. I might just mention a little bit about the hose. This squirting water on a floor—probably have done it on our own sidewalks or walkways, and I just mention that, that unless that water is continuously directed towards the cleaning area the cleaning action almost ceases instantaneously. Now the movie that was shown earlier very dramatically illustrated that point. The cleaning action—as soon as the hoses moved to one side the cleaning action ceased here and that is why this hose was moved back and forth, to drive this stuff on down to where we want it."

though the dairy barn in question attains the posture of a successful venture, more than that is needed for invention."[5] The Court of Appeals disagreed with the District Court's conclusion on the crucial issue of obviousness.

It has long been clear that the Constitution requires that there be some "invention" to be entitled to patent protection. *Dann* v. *Johnston, ante,* p. 219. As we explained in *Hotchkiss* v. *Greenwood,* 11 How. 248, 267 (1851): "[U]nless more ingenuity and skill . . . were required . . . than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skillful mechanic, not that of the inventor." This standard was enacted in 1952 by Congress in 35 U. S. C. § 103 "as a codification of judicial precedents . . . with congressional directions that inquiries into the obviousness of the subject matter sought to be patented are a prerequisite to patentability." *Graham* v. *John Deere Co.,* 383 U. S. 1, 17 (1966). Section 103 provides:

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

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[5] The court also concluded that "while the combination of old elements may have performed a useful function, it added nothing to the nature and quality of dairy barns theretofore used."

The ultimate test of patent validity is one of law, *Great A. & P. Tea Co.* v. *Supermarket Corp.,* 340 U. S. 147, 155 (1950), but resolution of the obviousness issue necessarily entails several basic factual inquiries, *Graham* v. *John Deere Co., supra,* at 17.

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

The Court of Appeals concluded that "the facts presented at trial clearly do not support [the District Court's] finding of obviousness under the three-pronged *Graham* test . . . ." 474 F. 2d, at 172. We disagree and hold that the Court of Appeals erroneously set aside the District Court's findings.

The scope of the prior art was shown by prior patents, prior art publications, affidavits of people having knowledge of prior flush systems analogous to respondent's, and the testimony of a dairy operator with 22 years of experience who described flush systems he had seen on visits to dairy farms throughout the country. Our independent examination of that evidence persuades us of its sufficiency to support the District Court's finding "as a fact that each and all of the component parts of this patent . . . were old and well-known throughout the dairy industry long prior to the date of the filing of the application for the Gribble patent . . . . What Mr. Gribble referred to . . . as the essence of the patent, to-wit, the manure flush system, was old, various means for flushing manure from dairy barns having been used long before the filing of the application . . . ."[6] Indeed,

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[6] The court stated:

"I therefore find as a fact that each and all of the component parts of this patent as listed under the applicant's claims set out

respondent admitted at trial "that the patent is made up of a combination of old elements" and "that all elements are individually old . . . ." Accordingly, the District Court properly followed our admonition in *Great A. & P. Tea Co.* v. *Supermarket Corp., supra,* at 152: "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. . . . A patent for a combination which only unites old elements with no change in their respective functions . . . obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. . . ."

The Court of Appeals recognized that the patent combined old elements for applying water to a conventional sloped floor in a dairy barn equipped with drains at the bottom of the slope and that the purpose of the storage tank—to accumulate a large volume of water capable of being released in a cascade or surge—was equally conventional. 474 F. 2d, at 169. It concluded, however, that the element lacking in the prior art was any evidence of an arrangement of the old elements to effect the abrupt release of a flow of water to wash animal wastes from the floor of a dairy barn. *Ibid.* Therefore,

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in said patent, were old and well-known throughout the dairy industry long prior to the date of the filing of the application for the Gribble patent. I further find that what Mr. Gribble referred to in his deposition as the essence of the patent, to-wit, the manure flush system, was old, various means for flushing manure from dairy barns having been used long before the filing of the application for the Gribble patent, the general idea in that connection being a hard surfaced sloping floor onto which the cows' offal was dropped, and some system of introducing water in sufficient quantities and force onto said floor to wash the offal therefrom, with a ditch or drain to carry the offal so washed away from the barn, either into a manure container or otherwise."

"although the [respondent's] flush system does not embrace a complicated technical improvement, it does achieve a synergistic result through a novel combination." *Id.*, at 173.

We cannot agree that the combination of these old elements to produce an abrupt release of water directly on the barn floor from storage tanks or pools can properly be characterized as synergistic, that is, "result[ing] in an effect greater than the sum of the several effects taken separately." *Anderson's-Black Rock* v. *Pavement Co.,* 396 U. S. 57, 61 (1969). Rather, this patent simply arranges old elements with each performing the same function it had been known to perform, although perhaps producing a more striking result than in previous combinations. Such combinations are not patentable under standards appropriate for a combination patent. *Great A. & P. Tea Co.* v. *Supermarket Corp., supra; Anderson's-Black Rock* v. *Pavement Co., supra.* Under those authorities this assembly of old elements that delivers water directly rather than through pipes or hoses to the barn floor falls under the head of "the work of the skilful mechanic, not that of the inventor." *Hotchkiss* v. *Greenwood,* 11 How., at 267. Exploitation of the principle of gravity adds nothing to the sum of useful knowledge where there is no change in the respective functions of the elements of the combination; this particular use of the assembly of old elements would be obvious to any person skilled in the art of mechanical application. See *Dann* v. *Johnston, ante,* at 229–230.

Though doubtless a matter of great convenience, producing a desired result in a cheaper and faster way, and enjoying commercial success, Dairy Establishment "did not produce a 'new or different function' . . . within the test of validity of combination patents." *Anderson's-Black Rock* v. *Pavement Co., supra,* at 60. These

desirable benefits "without invention will not make patentability." *Great A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S., at 153. See *Dann* v. *Johnston, ante,* at 230 n. 4.

Reversed.

HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* GAUTREAUX ET AL.

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

No. 74-1047. Argued January 20, 1976—Decided April 20, 1976

Respondents, Negro tenants in or applicants for public housing in Chicago, brought separate class actions against the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD), alleging that CHA had deliberately selected family public housing sites in Chicago to "avoid the placement of Negro families in white neighborhoods" in violation of federal statutes and the Fourteenth Amendment, and that HUD had assisted in that policy by providing financial assistance and other support for CHA's discriminatory housing projects. The District Court on the basis of the evidence entered summary judgment against CHA, which was ordered to take remedial action. The court then granted a motion to dismiss the HUD action, which meanwhile had been held in abeyance. The Court of Appeals reversed, having found that HUD had committed constitutional and statutory violations by sanctioning and assisting CHA's discriminatory program. The District Court thereafter consolidated the CHA and HUD cases and, having rejected respondents' motion to consider metropolitan area relief, adopted petitioner's proposed order for corrective action in Chicago. The Court of Appeals reversed and remanded the case "for additional evidence and for further consideration of the issue of metropolitan area relief." *Held:* A metropolitan area remedy in this case is not impermissible as a matter of law. *Milliken* v. *Bradley,* 418 U. S. 717, distinguished. Pp. 296-306.

(a) A remedial order against HUD affecting its conduct in the area beyond Chicago's geographic boundaries but within the housing market relevant to the respondents' housing options is warranted here because HUD, in contrast to the suburban school districts in *Milliken,* committed violations of the Constitution and federal statutes. *Milliken* imposes no *per se* rule that federal courts lack authority to order corrective action beyond the municipal boundaries where the violations occurred. Pp. 297-300.

(b) The order affecting HUD's conduct beyond Chicago's boundaries would not impermissibly interfere with local governments and suburban housing authorities that were not implicated in HUD's unconstitutional conduct. Under the § 8 Lower-Income Housing Assistance program of the Housing and Community Development Act of 1974 HUD may contract directly with private owners and developers to make leased housing units available to eligible lower income persons, with local governmental units retaining the right to comment on specific proposals, to reject certain programs that are inconsistent with their approved housing assistance plans, and to require that zoning and other land use restrictions be observed by builders. Pp. 300–306.

503 F. 2d 930, affirmed.

Stewart, J., delivered the opinion of the Court in which all Members joined, except Stevens, J., who took no part in the consideration or decision of the case. Marshall, J., filed a concurring statement, in which Brennan and White, JJ., joined, *post*, p. 306.

Solicitor General Bork argued the cause for petitioner. With him on the brief were *Assistant Attorney General Lee, Deputy Solicitor General Jones, Harriet S. Shapiro, William Kanter,* and *Anthony J. Steinmeyer.*

Alexander Polikoff argued the cause for respondents. With him on the brief were *Milton I. Shadur, Bernard Weisberg, Merrill A. Freed,* and *Robert J. Vollen.**

**James M. P. D'Amico* filed a brief for the city of Joliet, Ill., as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Martin E. Sloane* and *Arthur D. Wolf* for the National Committee Against Discrimination in Housing, Inc.; and by *Howard A. Glickstein, William L. Taylor,* and *Richard F. Bellman* for the Notre Dame Center for Civil Rights et al.

Briefs of *amici curiae* were filed by *J. Harold Flannery, Paul R. Dimond, William E. Caldwell, Norman J. Chachkin,* and *Nathaniel R. Jones* for the Lawyers' Committee for Civil Rights Under Law et al.; and by *Stephen J. Pollak, Richard M. Sharp,* and *David Rubin* for the National Education Association.

MR. JUSTICE STEWART delivered the opinion of the Court.

The United States Department of Housing and Urban Development (HUD) has been judicially found to have violated the Fifth Amendment and the Civil Rights Act of 1964 in connection with the selection of sites for public housing in the city of Chicago. The issue before us is whether the remedial order of the federal trial court may extend beyond Chicago's territorial boundaries.

I

This extended litigation began in 1966 when the respondents, six Negro tenants in or applicants for public housing in Chicago, brought separate actions on behalf of themselves and all other Negro tenants and applicants similarly situated against the Chicago Housing Authority (CHA) and HUD.[1] The complaint filed against CHA in the United States District Court for the Northern District of Illinois alleged that between 1950 and 1965 substantially all of the sites for family public housing selected by CHA and approved by the Chicago City Council were "at the time of such selection, and are now," located "within the areas known as the Negro Ghetto." The respondents further alleged that CHA deliberately selected the sites to "avoid the placement of Negro families in white neighborhoods" in violation of federal statutes and the Fourteenth Amendment. In a companion suit against HUD the respondents claimed that it had "assisted in the carrying on and continues to assist in the carrying on of a racially discriminatory public housing system within the City of Chicago" by providing

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[1] The original complaint named the Housing Assistance Administration, then a corporate agency of HUD, as the defendant. Although the petitioner in this case is the current Secretary of HUD, this opinion uses the terms "petitioner" and "HUD" interchangeably.

financial assistance and other support for CHA's discriminatory housing projects.[2]

The District Court stayed the action against HUD pending resolution of the CHA suit.[3] In February 1969, the court entered summary judgment against CHA on the ground that it had violated the respondents' constitutional rights by selecting public housing sites and assigning tenants on the basis of race.[4] *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907. Uncon-

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[2] The complaint sought to enjoin HUD from providing funds for 17 projects that had been proposed by CHA in 1965 and 1966 and from making available to CHA any other financial assistance to be used in connection with the racially discriminatory aspects of the Chicago public housing system. In addition, the respondents requested that they be granted "such other and further relief as the Court may deem just and equitable."

[3] Before the stay of the action against HUD, the District Court had certified the plaintiff class in the CHA action and had rejected CHA's motion to dismiss or for summary judgment on the counts of the complaint alleging that CHA had intentionally selected public housing sites to avoid desegregating housing patterns. 265 F. Supp. 582.

[4] CHA admitted that it had followed a policy of informally clearing proposed family public housing sites with the alderman in whose ward the proposed site was located and of eliminating each site opposed by the alderman. 296 F. Supp. 907, 910, 913. This procedure had resulted in the rejection of 99½% of the units proposed for sites in white areas which had been initially selected as suitable for public housing by CHA. *Id.,* at 912.

With regard to tenant assignments, the court found that CHA had established a racial quota to restrict the number of Negro families residing in the four CHA family public housing projects located in white areas in Chicago. The projects, all built prior to 1944, had Negro tenant populations of 7%, 6%, 4%, and 1% despite the fact that Negroes composed about 90% of the tenants of CHA family housing units and a similar percentage of the waiting list. A CHA official testified that until 1968 the four projects located in white areas were listed on the Authority's tenant-selection form as suitable for white families only. *Id.,* at 909.

tradicted evidence submitted to the District Court established that the public housing system operated by CHA was racially segregated, with four overwhelmingly white projects located in white neighborhoods and with 99½% of the remaining family units located in Negro neighborhoods and 99% of those units occupied by Negro tenants. *Id.*, at 910.[5] In order to prohibit future violations and to remedy the effects of past unconstitutional practices, the court directed CHA to build its next 700 family units in predominantly white areas of Chicago and thereafter to locate at least 75% of its new family public housing in predominantly white areas inside Chicago or in Cook County. *Gautreaux* v. *Chicago Housing Authority*, 304 F. Supp. 736, 738–739.[6] In addition, CHA was ordered to modify its tenant-assignment and site-selection procedures and to use its best efforts to increase the supply of dwelling units as rapidly as possible in conformity with the judgment. *Id.*, at 739–741.

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[5] In July 1968, CHA had in operation or development 54 family housing projects with a total of 30,848 units. Statistics submitted to the District Court established that, aside from the four overwhelmingly white projects discussed in n. 4, *supra,* 92% of all of CHA's family housing units were located in neighborhoods that were at least 75% Negro and that two-thirds of the units were situated in areas with more than 95% Negro residents. *Id.*, at 910.

[6] The District Court's remedial decree divided Cook County into a "General Public Housing Area" and a "Limited Public Housing Area." The "Limited Public Housing Area" consisted of the area within census tracts having a 30% or more nonwhite population or within one mile of the boundary of any such census tract. The remainder of Cook County was included in the "General Public Housing Area." 304 F. Supp., at 737. Following the commencement of construction of at least 700 family units in the General Public Housing Area of the city of Chicago, CHA was permitted by the terms of the order to locate up to one-third of its General Public Housing Area units in the portion of Cook County outside of Chicago. See *id.*, at 738–739.

The District Court then turned to the action against HUD. In September 1970, it granted HUD's motion to dismiss the complaint for lack of jurisdiction and failure to state a claim on which relief could be granted. The United States Court of Appeals for the Seventh Circuit reversed and ordered the District Court to enter summary judgment for the respondents, holding that HUD had violated both the Fifth Amendment and § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, by knowingly sanctioning and assisting CHA's racially discriminatory public housing program. *Gautreaux* v. *Romney,* 448 F. 2d 731, 739–740.[7]

On remand, the trial court addressed the difficult problem of providing an effective remedy for the racially segregated public housing system that had been created by the unconstitutional conduct of CHA and HUD.[8]

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[7] The Court of Appeals found that "HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority" and that the Secretary had exercised those powers "in a manner which perpetuated a racially discriminatory housing system in Chicago." 448 F. 2d, at 739. Although the appellate court stated that it was "fully sympathetic" with the "very real 'dilemma' " presented by the need for public housing in Chicago, it ruled that the demand for housing did not justify "the Secretary's past actions [which] constituted racially discriminatory conduct in their own right." *Ibid.*

[8] The court's July 1969 order directing CHA to use its best efforts to increase public housing opportunities in white areas as rapidly as possible had not resulted in the submission of a single housing site to the Chicago City Council. A subsequent order directing the submission of sites for 1,500 units by September 20, 1970, had eventually prompted CHA to submit proposed sites in the spring of 1971, but inaction by the City Council had held up the approval of the sites required for their development. See *Gautreaux* v. *Romney,* 332 F. Supp. 366, 368.

The District Court subsequently took additional measures in an

The court granted the respondents' motion to consolidate the CHA and HUD cases and ordered the parties to formulate "a comprehensive plan to remedy the past effects of unconstitutional site selection procedures." The order directed the parties to "provide the Court with as broad a range of alternatives as seem . . . feasible" including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago." After consideration of the plans submitted by the parties and the evidence adduced in their support, the court denied the respondents' motion to consider metropolitan area relief and adopted the petitioner's

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attempt to implement the remedial orders entered against CHA. In May 1971, the city of Chicago and HUD agreed to a letter of intent that provided that the city would process sites suitable for use by CHA to permit the Authority to commence acquisition of sites for 1,700 units in accordance with a specified timetable. HUD then released certain Model Cities funds on the condition that the City Council and CHA continue to show progress toward meeting the goals set forth in the May letter. After the city fell far behind schedule, the District Court granted the respondents' request for an injunction directing HUD to withhold $26 million in Model Cities funds until the city remedied its existing deficit under the timetable. See *id.*, at 368–370. The Court of Appeals reversed the injunction, holding that the District Court had abused its discretion in ordering funding cut off. 457 F. 2d 124.

Between July 1971 and April 1972, the City Council failed to conduct any hearings with respect to acquisition of property for housing sites and did not approve land acquisition for any sites. *Gautreaux* v. *Chicago Housing Authority,* 342 F. Supp. 827, 829. Following the filing of a supplemental complaint naming the mayor and the members of the City Council as defendants, the District Court found that their inaction had prevented CHA from providing relief in conformity with the court's prior orders. In a further effort to effectuate relief, the court ruled that the provision of Illinois law requiring City Council approval of land acquisition by CHA "shall not be applicable to CHA's actions . . . taken for the purpose of providing Dwelling Units." *Id.*, at 830. The Court of Appeals upheld this decision. *Gautreaux* v. *City of Chicago,* 480 F. 2d 210.

proposed order requiring HUD to use its best efforts to assist CHA in increasing the supply of dwelling units and enjoining HUD from funding family public housing programs in Chicago that were inconsistent with the previous judgment entered against CHA. The court found that metropolitan area relief was unwarranted because "the wrongs were committed within the limits of Chicago and solely against residents of the City" and there were no allegations that "CHA and HUD discriminated or fostered racial discrimination in the suburbs."

On appeal, the Court of Appeals for the Seventh Circuit, with one judge dissenting, reversed and remanded the case for "the adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago . . . but will increase the supply of dwelling units as rapidly as possible." 503 F. 2d 930, 939. Shortly before the Court of Appeals announced its decision, this Court in *Milliken* v. *Bradley,* 418 U. S. 717, had reversed a judgment of the Court of Appeals for the Sixth Circuit that had approved a plan requiring the consolidation of 54 school districts in the Detroit metropolitan area to remedy racial discrimination in the operation of the Detroit public schools. Understanding *Milliken* "to hold that the relief sought there would be an impractical and unreasonable overresponse to a violation limited to one school district," the Court of Appeals concluded that the *Milliken* decision did not bar a remedy extending beyond the limits of Chicago in the present case because of the equitable and administrative distinctions between a metropolitan public housing plan and the consolidation of numerous local school districts. 503 F. 2d, at 935-936. In addition, the appellate court found that, in contrast to *Milliken,* there was evidence of suburban discrimination and

of the likelihood that there had been an "extra-city impact" of the petitioner's "intra-city discrimination." *Id.,* at 936–937, 939–940. The appellate court's determination that a remedy extending beyond the city limits was both "necessary and equitable" rested in part on the agreement of the parties and the expert witnesses that "the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work." *Id.,* at 936–937. HUD subsequently sought review in this Court of the permissibility in light of *Milliken* of "inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation." [9] We granted certiorari to consider this important question. 421 U. S. 962.

II

In *Milliken* v. *Bradley, supra,* this Court considered the proper scope of a federal court's equity decree in the context of a school desegregation case. The respondents in that case had brought an action alleging that the Detroit public school system was segregated on the basis of race as the result of official conduct and sought an order establishing " 'a unitary, nonracial school system.' " 418 U. S., at 723. After finding that constitutional violations committed by the Detroit School Board and state officials had contributed to racial segregation in the Detroit schools, the trial court had proceeded to the formulation of a remedy. Although there had been neither proof of unconstitutional actions on the part of neighboring school districts nor a demonstration that the Detroit violations had produced significant segregative effects in those districts, the court established

[9] Although CHA participated in the proceeding before the Court of Appeals, it did not seek review of that court's decision and has not participated in the proceedings in this Court.

a desegregation panel and ordered it to prepare a remedial plan consolidating the Detroit school system and 53 independent suburban school districts. *Id.*, at 733–734.[10] The Court of Appeals for the Sixth Circuit affirmed the desegregation order on the ground that, in view of the racial composition of the Detroit school system, the only feasible remedy required "the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts." 484 F. 2d 215, 249. This Court reversed the Court of Appeals, holding that the multidistrict remedy contemplated by the desegregation order was an erroneous exercise of the equitable authority of the federal courts.

Although the *Milliken* opinion discussed the many practical problems that would be encountered in the consolidation of numerous school districts by judicial decree, the Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. That power is not plenary. It "may be exercised 'only on the basis of a constitutional violation.'" 418 U. S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16. See *Rizzo* v. *Goode,* 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to

[10] Although the trial court's desegregation order in *Milliken* did not direct the adoption of a specific metropolitan area plan, it did contain detailed guidelines for the panel appointed to draft the desegregation plan. 345 F. Supp. 914 (ED Mich.). The framework for the plan called for the division of the designated 54-school-district desegregation area into 15 clusters, each containing a part of the Detroit school system and two or more suburban districts. Within this framework, the court charged the panel with the responsibility for devising a plan that would produce the maximum actual desegregation. *Id.*, at 918, 928–929. See 418 U. S., at 733–734.

tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." 418 U. S., at 744; *Swann, supra,* at 16. In *Milliken,* there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations committed in the operation of the Detroit school system had had any significant segregative effects in the suburbs. See 418 U. S., at 745, 748. The desegregation order in *Milliken* requiring the consolidation of local school districts in the Detroit metropolitan area thus constituted direct federal judicial interference with local governmental entities without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct. Under these circumstances, the Court held that the interdistrict decree was impermissible because it was not commensurate with the constitutional violation to be repaired.

Since the *Milliken* decision was based on basic limitations on the exercise of the equity power of the federal courts and not on a balancing of particular considerations presented by school desegregation cases, it is apparent that the Court of Appeals erred in finding *Milliken* inapplicable on that ground to this public housing case.[11]

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[11] The Court of Appeals interpreted the *Milliken* opinion as limited to a determination that, in view of the administrative complexities of school district consolidation and the deeply rooted tradition of local control of public schools, the balance of equitable factors weighed against metropolitan area school desegregation remedies. See 503 F. 2d, at 935–936. But the Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context. See 418 U. S., at 744.

In addition, the Court of Appeals surmised that either an interdistrict violation or an interdistrict segregative effect may have been present in this case. There is no support provided for either con-

The school desegregation context of the *Milliken* case is nonetheless important to an understanding of its discussion of the limitations on the exercise of federal judicial power. As the Court noted, school district lines cannot be "casually ignored or treated as a mere administrative convenience" because they separate independent governmental entities responsible for the operation of autono-

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clusion. The sole basis of the appellate court's discussion of alleged suburban discrimination was the respondents' Exhibit 11 illustrating the location of 12 public housing projects within the portion of the Chicago Urbanized Area outside the city limits of Chicago. That exhibit showed that 11 of the 12 projects were located in areas that, at the time of the hearing in November 1972, were within one mile of the boundary of a census tract with less than a 70% white population. The exhibit was offered to illustrate the scarcity of integrated public housing opportunities for the plaintiff class and for lower income white families and to indicate why the respondents did not "expect cooperation from the suburban areas" in providing housing alternatives in predominately white areas. In discussing the data underlying the exhibit, counsel for the respondents in the trial court expressly attempted to avoid the "possible misconception" that he was then asserting that the suburban municipalities and housing authorities were "guilty of any discrimination or wrongdoing." In view of the purpose for which the exhibit was offered and the District Court's determination that "the wrongs were committed within the limits of Chicago," it is apparent that the Court of Appeals was mistaken in supposing that the exhibit constitutes evidence of suburban discrimination justifying metropolitan area relief.

In its brief opinion on rehearing, the Court of Appeals asserted that "it is reasonable to conclude from the record" that the intracity violation "may well have fostered racial paranoia and encouraged the 'white flight' phenomenon which has exacerbated the problems of achieving integration." 503 F. 2d, at 939–940. The Court of Appeals' speculation about the effects of the discriminatory site selection in Chicago is contrary both to expert testimony in the record and the conclusions of the District Court. Such unsupported speculation falls far short of the demonstration of a "significant segregative effect in another district" discussed in the *Milliken* opinion. See 418 U. S., at 745.

mous public school systems. 418 U. S., at 741–743. The Court's holding that there had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts.[12] The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

III

The question presented in this case concerns only the authority of the District Court to order HUD to take remedial action outside the city limits of Chicago. HUD does not dispute the Court of Appeals' determination that it violated the Fifth Amendment and § 601 of the Civil Rights Act of 1964 by knowingly funding CHA's racially discriminatory family public housing program, nor does it question the appropriateness of a remedial order designed to alleviate the effects of past segregative practices by requiring that public housing be developed in areas that will afford respondents an opportunity to reside in desegregated neighborhoods. But HUD contends that the *Milliken* decision bars a remedy affecting

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[12] The Court in *Milliken* required either a showing of an interdistrict violation or a significant segregative effect "[b]efore the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes." *Id.*, at 744. In its *amicus* memorandum in *Milliken*, the United States argued that an interdistrict remedy in that case would require "the restructuring of state or local government entities" and result in "judicial interference with state prerogatives concerning the organization of local governments."

its conduct beyond the boundaries of Chicago for two reasons. First, it asserts that such a remedial order would constitute the grant of relief incommensurate with the constitutional violation to be repaired. And, second, it claims that a decree regulating HUD's conduct beyond Chicago's boundaries would inevitably have the effect of "consolidat[ing] for remedial purposes" governmental units not implicated in HUD's and CHA's violations. We address each of these arguments in turn.

A

We reject the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order against HUD that will affect its conduct in the greater metropolitan area. The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief. See 418 U. S., at 744. Our prior decisions counsel that in the event of a constitutional violation "all reasonable methods be available to formulate an effective remedy," *North Carolina State Board of Education* v. *Swann,* 402 U. S. 43, 46, and that every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Davis* v. *School Comm'rs of Mobile County,* 402 U. S. 33, 37. As the Court observed in *Swann* v. *Charlotte-Mecklenburg Board of Education:* "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U. S., at 15.

Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.[13] As we noted in Part II, *supra,* the District Court's proposed remedy in *Milliken* was impermissible because of the limits on the federal judicial power to interfere with the operation of state political entities that were not implicated in unconstitutional conduct. Here, unlike the desegregation remedy found erroneous in *Milliken,* a judicial order directing relief beyond the boundary lines of Chicago will not necessarily entail coercion of uninvolved governmental units, because both CHA and HUD have the authority to operate outside the Chicago city limits.[14]

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[13] Although the State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 U. S., at 734–735, n. 16, the Court in *Milliken* concluded that the interdistrict order was a wrongful exercise of judicial power because prior cases had established that such violations are to be dealt with in terms of "an established geographic and administrative school system," *id.,* at 746, and because the State's educational structure vested substantial independent control over school affairs in the local school districts. See *id.,* at 742–744. In *Milliken,* a consolidation order directed against the State would of necessity have abrogated the rights and powers of the suburban school districts under Michigan law. See *id.,* at 742 n. 20. Here, by contrast, a metropolitan area remedy involving HUD need not displace the rights and powers accorded suburban governmental entities under federal or state law. See Part III–B, *infra.*

[14] Illinois statutes permit a city housing authority to exercise its powers within an "area of operation" defined to include the territorial boundary of the city and all of the area within three miles beyond the city boundary that is not located within the boundaries of another city, village, or incorporated town. In addition, the housing authority may act outside its area of operation by contract with another housing authority or with a state public body

In this case, it is entirely appropriate and consistent with *Milliken* to order CHA and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs. Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits. That HUD recognizes this reality is evident in its administration of federal housing assistance programs through "housing market areas" encompassing "the geographic area 'within which all dwelling units . . .' are in competition with one another as alternatives for the users of housing." Department of Housing and Urban Development, FHA Techniques of Housing Market Analysis 8 (Jan. 1970), quoting the Institute for Urban Land Use and Housing Studies, Housing Market Analysis: A Study of Theory and Methods, c. 2 (1953). The housing market area "usually extends beyond the city limits" and in the larger markets "may extend into several adjoining counties." FHA Techniques of Housing Market Analysis, *supra*, at 12.[15] An order against HUD and CHA regulating their conduct in the greater metropolitan area will

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not within the area of operation of another housing authority. Ill. Rev. Stat. c. 67½, §§ 17 (b), 27c (1973).

Although the state officials in *Milliken* had the authority to operate across school district lines, the exercise of that authority to effectuate the court's desegregation order would have eliminated numerous independent school districts or at least have displaced important powers granted those uninvolved governmental entities under state law. See n. 13, *supra*.

[15] In principal markets such as Chicago, the Standard Metropolitan Statistical Area is coterminous with the housing market area. See Department of Housing and Urban Development, FHA Techniques of Housing Market Analysis 13 (Jan. 1970); Department of Housing and Urban Development, Urban Housing Market Analysis 5 (1966).

do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with the "nature and extent of the constitutional violation." 418 U. S., at 744. To foreclose such relief solely because HUD's constitutional violation took place within the city limits of Chicago would transform *Milliken*'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct.

B

The more substantial question under *Milliken* is whether an order against HUD affecting its conduct beyond Chicago's boundaries would impermissibly interfere with local governments and suburban housing authorities that have not been implicated in HUD's unconstitutional conduct. In examining this issue, it is important to note that the Court of Appeals' decision did not endorse or even discuss "any specific metropolitan plan" but instead left the formulation of the remedial plan to the District Court on remand. 503 F. 2d, at 936. On rehearing, the Court of Appeals characterized its remand order as one calling "for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in Milliken v. Bradley." *Id.,* at 940. In the current posture of the case, HUD's contention that any remand for consideration of a metropolitan area order would be impermissible as a matter of law must necessarily be based on its claim at oral argument "that court-ordered metropolitan relief in this case, no matter how gently it's gone about, no matter how it's framed, is bound to require HUD to ignore the safeguards of local autonomy and local political processes" and therefore to violate the limitations on federal judicial power

established in *Milliken*. In addressing this contention we are not called upon, in other words, to evaluate the validity of any specific order, since no such order has yet been formulated.

HUD's position, we think, underestimates the ability of a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without overstepping the limits of judicial power established in the *Milliken* case. HUD's discretion regarding the selection of housing proposals to assist with funding as well as its authority under a recent statute to contract for low-income housing directly with private owners and developers can clearly be directed toward providing relief to the respondents in the greater Chicago metropolitan area without preempting the power of local governments by undercutting the role of those governments in the federal housing assistance scheme.

An order directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well-established federal housing policy.[16] Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in federally assisted programs including, of course, public housing programs.[17] Based upon this statutory prohibition, HUD in 1967 issued site-approval rules for low-rent

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[16] In the District Court, HUD filed an appendix detailing the various federal programs designed to secure better housing opportunities for low-income families and represented that "the Department will continue to use its best efforts in review and approval of housing programs for Chicago which address the needs of low income families."

[17] It was this statutory prohibition that HUD was held to have violated by its funding of CHA's housing projects. See 448 F. 2d, at 740.

housing designed to avoid racial segregation and expand the opportunities of minority group members "to locate outside areas of [minority] concentration." Department of Housing and Urban Development, Low-Rent Housing Manual, § 205.1, ¶ 4g (Feb. 1967 rev.). Title VIII of the Civil Rights Act of 1968 expressly directed the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" the Act's fair housing policy. 82 Stat. 85, 42 U. S. C. § 3608 (d)(5).

Among the steps taken by HUD to discharge its statutory duty to promote fair housing was the adoption of project-selection criteria for use in "eliminating clearly unacceptable proposals and assigning priorities in funding to assure that the best proposals are funded first." HUD Evaluation of Rent Supplement Projects and Low-Rent Housing Assistance Applications, 37 Fed. Reg. 203 (1972). In structuring the minority housing opportunity component of the project-selection criteria, HUD attempted "to assure that building in minority areas goes forward only after there truly exist housing opportunities for minorities elsewhere" in the housing market and to avoid encouraging projects located in substantially racially mixed areas. *Id.,* at 204. See 24 CFR § 200.710 (1975). See generally Maxwell, HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness"?, 48 Notre Dame Law. 92 (1972).[18] More recently, in

[18] A HUD study of the implementation of the project-selection criteria revealed that the actual operation of the minority housing opportunity criterion depends on the definition of "area of minority concentration" and "racially mixed" area employed by each field office. The meaning of those terms, which are not defined in the applicable regulations, 24 CFR § 200.710 (1975), varied among field offices and within the jurisdiction of particular field offices. Department of Housing and Urban Development, Implementation of HUD Project Selection Criteria for Subsidized Housing: An Evaluation 116–117 (Dec. 1972).

the Housing and Community Development Act of 1974, Congress emphasized the importance of locating housing so as to promote greater choice of housing opportunities and to avoid undue concentrations of lower income persons. See 88 Stat. 633, 42 U. S. C. §§ 5301 (c)(6), 5304 (a)(4)(A), (C)(ii) (1970 ed., Supp. IV); H. R. Rep. No. 93-1114, p. 8 (1974).

A remedial plan designed to insure that HUD will utilize its funding and administrative powers in a manner consistent with affording relief to the respondents need not abrogate the role of local governmental units in the federal housing-assistance programs. Under the major housing programs in existence at the time the District Court entered its remedial order pertaining to HUD, local housing authorities and municipal governments had to make application for funds or approve the use of funds in the locality before HUD could make housing-assistance money available. See 42 U. S. C. §§ 1415 (7)(b), 1421b (a)(2). An order directed solely to HUD would not force unwilling localities to apply for assistance under these programs but would merely reinforce the regulations guiding HUD's determination of which of the locally authorized projects to assist with federal funds.

The Housing and Community Development Act of 1974, amending the United States Housing Act of 1937, 88 Stat. 653, 42 U. S. C. § 1437 *et seq.* (1970 ed., Supp. IV), significantly enlarged HUD's role in the creation of housing opportunities. Under the § 8 Lower-Income Housing Assistance program, which has largely replaced the older federal low-income housing programs,[19] HUD

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[19] In fiscal year 1975, new contract commitments under the § 8 program were approximately $10.7 billion, as compared to total estimated new contract commitments of approximately $16.35 billion for all federally subsidized housing programs. The comparable figures for fiscal year 1976 indicate that $22.725 billion of a total

may contract directly with private owners to make leased housing units available to eligible lower income persons.[20] As HUD has acknowledged in this case, "local governmental approval is no longer explicitly required as a condition of the program's applicability to a locality." Brief for Petitioner 33–34. Regulations governing the § 8 program permit HUD to select "the geographic area or areas in which the housing is to be constructed," 24 CFR § 880.203 (b) (1975), and direct that sites be chosen to "promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons." §§ 880.112 (d), 883.209 (a)(3). See §§ 880.112 (b), (c), 883.209 (a)(2), (b)(2). In most cases the Act grants the unit of local government in which the assistance is to be provided the right to comment on the application and, in certain specified circumstances, to preclude the Secretary of HUD from approving the application. See 42 U. S. C. §§ 1439 (a)–(c) (1970 ed., Supp. IV).[21]

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of $24.8 billion in new contract commitments are to be made under the § 8 program. See Hearings on Department of Housing and Urban Development—Independent Agencies Appropriations for 1976, before a Subcommittee of the House Committee on Appropriations, 94th Cong., 1st Sess., pt. 5, pp. 85–86 (1975). See also *id.*, at 119 (testimony of HUD Secretary Hills).

[20] Under the § 8 program, HUD contracts to make payments to local public housing agencies or to private owners of housing units to make up the difference between a fair market rent for the area and the amount contributed by the low-income tenant. The eligible tenant family pays between 15% and 25% of its gross income for rent. See 42 U. S. C. § 1437f (1970 ed., Supp. IV).

[21] If the local unit of government in which the proposed assistance is to be provided does not have an approved housing-assistance plan, the Secretary of HUD is directed by statute to give the local governmental entity 30 days to comment on the proposal, after which time the Secretary may approve the project unless he determines that there is not a need for the assistance. 42 U. S. C. § 1439 (c) (1970 ed., Supp. IV). In areas covered by an approved

Use of the § 8 program to expand low-income housing opportunities outside areas of minority concentration would not have a coercive effect on suburban municipalities. For under the program, the local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing-assistance plans, and to require that zoning and other land-use restrictions be adhered to by builders.

In sum, there is no basis for the petitioner's claim that court-ordered metropolitan area relief in this case would be impermissible as a matter of law under the *Milliken* decision. In contrast to the desegregation order in that case, a metropolitan area relief order directed to HUD would not consolidate or in any way restructure local

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plan, the local governmental entity is afforded a 30-day period in which to object to the project on the ground that it is inconsistent with the municipality's approved housing-assistance plan. If such an objection is filed, the Secretary may nonetheless approve the application if he determines that the proposal is consistent with the housing-assistance plan. § 1439 (a). The local comment and objection procedures do not apply to applications for assistance involving 12 or fewer units in a single project or development. § 1439 (b).

The ability of local governments to block proposed § 8 projects thus depends on the size of the proposed project and the provisions of the approved housing-assistance plans. Under the 1974 Act, the housing-assistance plan must assess the needs of lower income persons residing in or expected to reside in the community and must indicate the general locations of proposed housing for lower income persons selected in accordance with the statutory objective of "promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons." 42 U. S. C. §§ 5304 (a)(4)(A), (C)(ii) (1970 ed., Supp. IV). See H. R. Rep. No. 93-1114, p. 8 (1974). See also *City of Hartford* v. *Hills,* 408 F. Supp. 889 (Conn. 1976). In view of these requirements of the Act, the location of subsidized housing in predominantly white areas of suburban municipalities may well be consistent with the communities' housing-assistance plans.

governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD.

Since we conclude that a metropolitan area remedy in this case is not impermissible as a matter of law, we affirm the judgment of the Court of Appeals remanding the case to the District Court "for additional evidence and for further consideration of the issue of metropolitan area relief." 503 F. 2d, at 940. Our determination that the District Court has the authority to direct HUD to engage in remedial efforts in the metropolitan area outside the city limits of Chicago should not be interpreted as requiring a metropolitan area order. The nature and scope of the remedial decree to be entered on remand is a matter for the District Court in the exercise of its equitable discretion, after affording the parties an opportunity to present their views.

The judgment of the Court of Appeals remanding this case to the District Court is affirmed, but further proceedings in the District Court are to be consistent with this opinion.

It is so ordered.

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

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, concurring.

I dissented in *Milliken* v. *Bradley*, 418 U. S. 717

(1974), and I continue to believe that the Court's decision in that case unduly limited the federal courts' broad equitable power to provide effective remedies for official segregation. In this case the Court distinguishes *Milliken* and paves the way for a remedial decree directing the Department of Housing and Urban Development to utilize its full statutory power to foster housing projects in white areas of the greater Chicago metropolitan area. I join the Court's opinion except insofar as it appears to reaffirm the decision in *Milliken.*

BAXTER ET AL. v. PALMIGIANO

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

No. 74–1187. Argued December 15, 1975—Decided April 20, 1976*

Respondent state prison inmates in No. 74–1194 filed an action for declaratory and injunctive relief alleging that procedures used in prison disciplinary proceedings violated their rights to due process and equal protection of the laws under the Fourteenth Amendment. The District Court granted relief, and the Court of Appeals affirmed, holding that minimum notice and a right to respond are due an inmate faced even with a temporary suspension of privileges, that an inmate at a disciplinary hearing who is denied the privilege of confronting and cross-examining witnesses must receive written reasons or the denial will be deemed prima facie evidence of abuse of discretion, and that an inmate facing prison discipline for a violation that might also be punishable in state criminal proceedings has a right to counsel (not just counsel-substitute) at the prison hearing. Respondent state prison inmate in No. 74–1187, upon being charged with inciting a prison disturbance, was summoned before prison authorities and informed that he might be prosecuted for a violation of state law, that he should consult an attorney (although the attorney would not be permitted to be present during the disciplinary hearing), and that he had a right to remain silent during the hearing but that if he did so his silence would be held against him. On the basis of the hearing, at which respondent remained silent, he was placed in "punitive segregation" for 30 days. He then filed an action for damages and injunctive relief, claiming that the disciplinary hearing violated the Due Process Clause of the Fourteenth Amendment. The District Court denied relief, but the Court of Appeals reversed, holding that an inmate at a prison disciplinary proceeding must be advised of his right to remain silent, that he must not be questioned further once he exercises that right, that such silence may not be used against him at that time or in future proceedings, and that where criminal charges

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*Together with No. 74–1194, *Enomoto, Corrections Director, et al.* v. *Clutchette et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

are a realistic possibility prison authorities should consider whether defense counsel, if requested, should be permitted at the proceeding. *Held:* The procedures required by the respective Courts of Appeals are either inconsistent with the "reasonable accommodation" reached in *Wolff* v. *McDonnell,* 418 U. S. 539, between institutional needs and objectives and the constitutional provisions of general application, or are premature on the basis of the case records. Pp. 314–324.

(a) Prison inmates do not "have a right to either retained or appointed counsel in disciplinary hearings." *Wolff, supra,* at 570. Pp. 314–315.

(b) Permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice, and there is no basis in the record for invalidating it as applied to respondent in No. 74–1187. Pp. 316–320.

(c) Mandating that inmates should have the privilege of confrontation and cross-examination of witnesses at prison disciplinary proceedings, except where prison officials can justify their denial of such privilege on grounds that would satisfy a court of law, effectively pre-empts the area that *Wolff, supra,* left to the sound discretion of prison officials, and there is no evidence of abuse of such discretion by the prison officials in No. 74–1194. Pp. 320–323.

(d) Where there was no evidence that any of the respondents in No. 74–1194 were subject to the "lesser penalty" of loss of privileges, but rather it appeared that all were charged with "serious misconduct," the Court of Appeals acted prematurely to the extent it required procedures such as notice and an opportunity to respond even when an inmate is faced with a temporary suspension of privileges. Pp. 323–324.

No. 74–1187, 510 F. 2d 534; No. 74–1194, 510 F. 2d 613, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Part V of which BRENNAN and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post,* p. 324. STEVENS, J., took no part in the consideration or decision of the cases.

Ronald A. Dwight, Special Assistant Attorney General of Rhode Island, argued the cause for petitioners in No. 74–1187. With him on the brief was *Julius C.*

Michaelson, Attorney General. *William D. Stein*, Deputy Attorney General of California, argued the cause for petitioners in No. 74–1194. With him on the brief were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, and *W. Eric Collins* and *Morris Lenk*, Deputy Attorneys General.

Stephen J. Fortunato, Jr., argued the cause for respondent in No. 74–1187. With him on the brief was *David Carliner*. *William Bennett Turner* argued the cause for respondents in No. 74–1194. With him on the brief were *John Thorne, Lowell Johnston, Jack Greenberg, Stanley A. Bass,* and *Fay Stender*.†

MR. JUSTICE WHITE delivered the opinion of the Court.

These cases present questions as to procedures required at prison disciplinary hearings and as to the reach of our recent decision in *Wolff* v. *McDonnell*, 418 U. S. 539 (1974).

I

A. *No. 74–1194*

Respondents are inmates of the California penal institution at San Quentin. They filed an action under 42 U. S. C. § 1983 seeking declaratory and injunctive relief and alleging that the procedures used in disciplinary proceedings at San Quentin violated their rights to due process and equal protection of the laws under the Fourteenth Amendment of the Constitution.[1] After an evi-

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†*Solicitor General Bork, Assistant Attorney General Thornburgh, Jerome M. Feit,* and *George S. Kopp* filed a brief for the United States as *amicus curiae* in both cases.

[1] Respondents John Wesley Clutchette and George L. Jackson brought suit "on their own behalf, and, pursuant to Rule 23 (b) (1) and Rule 23 (b)(2) of the Federal Rules of Civil Procedure, on

dentiary hearing, the District Court granted substantial relief. *Clutchette* v. *Procunier,* 328 F. Supp. 767 (ND Cal. 1971). The Court of Appeals for the Ninth Circuit, with one judge dissenting, affirmed, 497 F. 2d 809 (1974), holding that an inmate facing a disciplinary proceeding at San Quentin was entitled to notice of the charges against him, to be heard and to present witnesses, to confront and cross-examine witnesses, to face a neutral and detached hearing body, and to receive a decision based solely on evidence presented at the hearing. The court also held that an inmate must be provided with counsel or a counsel-substitute when the consequences

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behalf of all other inmates of San Quentin State Prison subject to defendants' jurisdiction and affected by the policies, practices or acts of defendants complained of herein." Plaintiffs' Amended Complaint, 1 Record 33 (No. 74–1194). The District Court treated the suit as a class action, *Clutchette* v. *Procunier,* 328 F. Supp. 767, 769–770 (ND Cal. 1971), but did not certify the action as a class action within the contemplation of Fed. Rules Civ. Proc. 23 (c)(1) and 23 (c)(3). Without such certification and identification of the class, the action is not properly a class action. *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975). We were advised at oral argument in No. 74–1194 that respondent Clutchette was paroled in 1972, two years after the suit was filed; counsel for respondents conceded that the case is moot as to him. Tr. of Oral Arg. (No. 74–1194), p. 34. We were further advised that respondent Jackson died after the suit was filed. However, the parties stipulated on June 21, 1972, to the intervention of Alejandro R. Ferrel as a named party plaintiff in the suit. 3 Record 285 (No. 74–1194). The parties further stipulated the facts that, like Clutchette and Jackson, Ferrel was an inmate at San Quentin who was brought before a disciplinary committee for an infraction that could have also led to state criminal proceedings, that he asked for and was denied an attorney at the hearing, and that he was assigned to "segregation" for an unspecified number of days for the infraction. Ferrel, we were told at oral argument, is still incarcerated at San Quentin. Tr. of Oral Arg. 34 (No. 74–1194). He thus has standing as a named plaintiff to raise the issues before us in No. 74–1194.

of the disciplinary action are "serious," such as prolonged periods of "isolation." *Id.*, at 821. The panel of the Court of Appeals, after granting rehearing to reconsider its conclusions in light of our intervening decision in *Wolff, supra,* reaffirmed its initial judgment—again with one judge dissenting—but modified its prior opinion in several respects. 510 F. 2d 613 (1975). The Court of Appeals held that minimum notice and a right to respond are due an inmate faced even with a temporary suspension of privileges, that an inmate at a disciplinary hearing who is denied the privilege of confronting and cross-examining witnesses must receive written reasons for such denial or the denial "will be deemed prima facie evidence of abuse of discretion," *id.*, at 616, and—reaffirming its initial view—that an inmate facing prison discipline for a violation that might also be punishable in state criminal proceedings has a right to counsel (not just counsel-substitute) at the prison hearing. We granted certiorari and set the case for oral argument with No. 74–1187. 421 U. S. 1010 (1975).

B. *No. 74–1187*

Respondent Palmigiano is an inmate of the Rhode Island Adult Correctional Institution serving a life sentence for murder. He was charged by correctional officers with "inciting a disturbance and disrupt[ion] of [prison] operations, which might have resulted in a riot." App. 197 (No. 74–1187). He was summoned before the prison Disciplinary Board and informed that he might be prosecuted for a violation of state law, that he should consult his attorney (although his attorney was not permitted by the Board to be present during the hearing), that he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him. Respondent availed himself of the counsel-substitute provided for by prison rules and re-

mained silent during the hearing. The Disciplinary Board's decision was that respondent be placed in "punitive segregation" for 30 days and that his classification status be downgraded thereafter.

Respondent filed an action under 42 U. S. C. § 1983 for damages and injunctive relief, claiming that the disciplinary hearing violated the Due Process Clause of the Fourteenth Amendment of the Constitution.[2] The Dis-

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[2] The United States as *amicus curiae* suggests that No. 74-1187 is not properly before the Court because the case involves the constitutionality of regulations of the Rhode Island Adult Corrections Authority and hence should have been heard by a three-judge court, subject to review here on direct appeal. The applicable regulations of the Authority when this case was brought had been promulgated as the result of a negotiated settlement of litigation in the District Court for the District of Rhode Island. *Morris* v. *Travisono,* 310 F. Supp. 857 (1970). It is conceded that they have become state law, and it would appear that they are of statewide effect. The rules on their face, however, although regulating in some detail the procedures required in prison disciplinary hearings, do not expressly grant or deny, or even mention, the right to counsel where charges brought are also a crime under state law. Nor do they suggest, one way or the other, whether an inmate's silence may be used against him in the proceeding itself. Palmigiano's complaint did not mention or challenge any rule or regulation of the Authority; nor did it seek an injunction against the enforcement of any identified rule. What it asked was that the Board's disciplinary decision be declared invalid and its enforcement enjoined. Neither Palmigiano nor the State asked or suggested that a three-judge court be convened. It would not appear that the District Court considered the validity of any of the Authority's rules to be at stake. That court ruled Palmigiano was not entitled to be represented by counsel, not because the applicable rules forbade it but because it considered the controlling rule under the relevant cases was to this effect. The Court of Appeals, although quite aware that constitutional attacks on the Rhode Island prison rules might necessitate a three-judge court, see *Souza* v. *Travisono,* 498 F. 2d 1120, 1121-1122 (CA1 1974), evidently did not doubt its jurisdiction in this case. On the record before us, the provisions of 28 U. S. C. § 2281 with respect to three-judge courts would not appear to be applicable.

trict Court held an evidentiary hearing and denied relief. The Court of Appeals for the First Circuit, with one judge dissenting, reversed, holding that respondent "was denied due process in the disciplinary hearing only insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing." 487 F. 2d 1280, 1292 (1973). We granted certiorari, vacated the judgment of the Court of Appeals, and remanded to that court for further consideration in light of *Wolff* v. *McDonnell, supra,* decided in the interim. 418 U. S. 908 (1974). On remand, the Court of Appeals affirmed its prior decision but modified its opinion. 510 F. 2d 534 (1974). The Court of Appeals held that an inmate at a prison disciplinary proceeding must be advised of his right to remain silent, that he must not be questioned further once he exercises that right, and that such silence may not be used against him at that time or in future proceedings. With respect to counsel, the Court of Appeals held:

> "[I]n cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* [v. *Arizona,* 384 U. S. 436 (1966)] requires it in light of future criminal prosecution." *Id.,* at 537.

We granted certiorari and heard the case with No. 74–1194. 421 U. S. 1010 (1975).

II

In *Wolff* v. *McDonnell, supra,* drawing comparisons to *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), we said:

> "The insertion of counsel into the [prison] disciplinary process would inevitably give the proceedings

a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings." 418 U. S., at 570.

Relying on *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and *Mathis* v. *United States,* 391 U. S. 1 (1968), both Courts of Appeals in these cases held that prison inmates are entitled to representation at prison disciplinary hearings where the charges involve conduct punishable as a crime under state law, not because of the services that counsel might render in connection with the disciplinary proceedings themselves, but because statements inmates might make at the hearings would perhaps be used in later state-court prosecutions for the same conduct.

Neither *Miranda, supra,* nor *Mathis, supra,* has any substantial bearing on the question whether counsel must be provided at "[p]rison disciplinary hearings [which] are not part of a criminal prosecution." *Wolff* v. *McDonnell, supra,* at 556. The Court has never held, and we decline to do so now, that the requirements of those cases must be met to render pretrial statements admissible in other than criminal cases.

We see no reason to alter our conclusion so recently made in *Wolff* that inmates do not "have a right to either retained or appointed counsel in disciplinary hearings." 418 U. S., at 570. Plainly, therefore, state authorities were not in error in failing to advise Palmigiano to the contrary, *i. e.,* that he was entitled to counsel at the hearing and that the State would furnish counsel if he did not have one of his own.

III

Palmigiano was advised that he was not required to testify at his disciplinary hearing and that he could remain silent but that his silence could be used against him. The Court of Appeals for the First Circuit held that the self-incrimination privilege of the Fifth Amendment, made applicable to the States by reason of the Fourteenth Amendment, forbids drawing adverse inferences against an inmate from his failure to testify. The State challenges this determination, and we sustain the challenge.

As the Court has often held, the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973). Prison disciplinary hearings are not criminal proceedings; but if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered "whatever immunity is required to supplant the privilege" and may not be required to "waive such immunity." *Id.,* at 85; *Garrity* v. *New Jersey,* 385 U. S. 493 (1967); *Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r,* 392 U. S. 280 (1968). In this line of cases from *Garrity* to *Lefkowitz,* the States, pursuant to statute, sought to interrogate individuals about their job performance or about their contractual relations with the State; insisted upon waiver of the Fifth Amendment privilege not to respond or to object to later use of the incriminating statements in criminal prosecutions; and, upon refusal to waive, automatically

terminated employment or eligibility to contract with the State. Holding that the State could not constitutionally seek to compel testimony that had not been immunized by threats of serious economic reprisal, we invalidated the challenged statutes.

The Court has also plainly ruled that it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his case. *Griffin* v. *California,* 380 U. S. 609 (1965). This holding paralleled the existing statutory policy of the United States, *id.,* at 612, and the governing statutory or constitutional rule in the overwhelming majority of the States. 8 J. Wigmore, Evidence 425–439 (McNaughton rev. 1961).

The Rhode Island prison rules do not transgress the foregoing principles. No criminal proceedings are or were pending against Palmigiano. The State has not, contrary to *Griffin,* sought to make evidentiary use of his silence at the disciplinary hearing in any criminal proceeding. Neither has Rhode Island insisted or asked that Palmigiano waive his Fifth Amendment privilege. He was notified that he was privileged to remain silent if he chose. He was also advised that his silence could be used against him, but a prison inmate in Rhode Island electing to remain silent during his disciplinary hearing, as respondent Palmigiano did here, is not in consequence of his silence automatically found guilty of the infraction with which he has been charged. Under Rhode Island law, disciplinary decisions "must be based on substantial evidence manifested in the record of the disciplinary proceeding." *Morris* v. *Travisono,* 310 F. Supp. 857, 873 (RI 1970). It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In

this respect, this case is very different from the circumstances before the Court in the *Garrity-Lefkowitz* decisions, where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege. The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent.

Had the State desired Palmigiano's testimony over his Fifth Amendment objection, we can but assume that it would have extended whatever use immunity is required by the Federal Constitution. Had this occurred and had Palmigiano nevertheless refused to answer, it surely would not have violated the Fifth Amendment to draw whatever inference from his silence that the circumstances warranted. Insofar as the privilege is concerned, the situation is little different where the State advises the inmate of his right to silence but also plainly notifies him that his silence will be weighed in the balance.

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a *party to a civil cause*." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). In criminal cases, where the stakes are

higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.

It is important to note here that the position adopted by the Court of Appeals is rooted in the Fifth Amendment and the policies which it serves. It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions. Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. *Adamson* v. *California,* 332 U. S. 46 (1947); *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 153–154 (1923); *Raffel* v. *United States,* 271 U. S. 494 (1926); *Twining* v. *New Jersey,* 211 U. S. 78 (1908). See also *United States* v. *Hale,* 422 U. S. 171, 176–177 (1975); *Gastelum-Quinones* v. *Kennedy,* 374 U. S. 469, 479 (1963); *Grunewald* v. *United States,* 353 U. S. 391, 418–424 (1957). Indeed, as Mr. Justice Brandeis declared, speaking for a unanimous court in the *Tod* case, *supra,* which involved a deportation: "Silence is often evidence of the most persuasive character." 263 U. S., at 153–154. And just last Term in *Hale, supra,* the Court recognized that "[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question." 422 U. S., at 176.[3]

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[3] The Court based its statement on 3A J. Wigmore, Evidence § 1042 (Chadbourn rev. 1970), which reads as follows:

"Silence, omissions, or negative statements, as inconsistent: (1) Silence, etc., as constituting the impeaching statement. A

The short of it is that permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice; and there is no basis in the record for invalidating it as here applied to Palmigiano.[4]

IV

In *Wolff* v. *McDonnell,* we held that "the inmate facing disciplinary proceedings should be allowed to call

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failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence (§ 1071 *infra*). There may be explanations, indicating that the person had in truth no belief of that tenor; but the conduct is 'prima facie' an inconsistency.

"There are several common classes of cases:

"(1) Omissions *in legal proceedings* to assert what would naturally have been asserted under the circumstances.

"(2) Omissions to assert anything, or to speak with such detail or positiveness, *when formerly narrating,* on the stand or elsewhere, the matter now dealt with.

"(3) *Failure to take the stand* at all, when it would have been natural to do so.

"In all of these much depends on the individual circumstances, and in all of them the underlying test is, would it have been natural for the person to make the assertion in question?" (Emphasis in original.) (Footnotes omitted.)

[4] The record in No. 74–1187 shows that Palmigiano was provided with copies of the Inmate Disciplinary Report and the superior's investigation report, containing the charges and primary evidence against him, on the day before the disciplinary hearing. At the hearing, Captain Baxter read the charge to Palmigiano and summarized the two reports. In the face of the reports, which he had seen, Palmigiano elected to remain silent. The Disciplinary Board's decision was based on these two reports, Palmigiano's decision at the hearing not to speak to them, and supplementary reports made by the officials filing the initial reports. All of the documents were introduced in evidence at the hearing before the District Court in this case. App. 197–202 (No. 74–1187).

witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U. S., at 566. We noted that "[o]rdinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution." *Ibid.* The right to call witnesses, like other due process rights delineated in *Wolff,* is thus circumscribed by the necessary "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.,* at 556. Within the reasonable limitations necessary in the prison disciplinary context, we suggested, but did not require, that the disciplinary committee "state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases." *Id.,* at 566.

We were careful to distinguish between this limited right to call witnesses and other due process rights at disciplinary hearings. We noted expressly that, in comparison to the right to call witnesses, "[c]onfrontation and cross-examination present greater hazards to institutional interests." *Id.,* at 567. We said:

> "If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability." *Ibid.*

We therefore concluded that "[t]he better course at this time, in a period where prison practices are diverse and

somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Id.*, at 569.

Although acknowledging the strictures of *Wolff* with respect to confrontation and cross-examination, the Court of Appeals for the Ninth Circuit, on rehearing in No. 74–1194, went on to require prison authorities to provide reasons in writing to inmates denied the privilege to cross-examine or confront witnesses against them in disciplinary proceedings; absent explanation, failure to set forth reasons related to the prevention of one or more of the four concerns expressly mentioned in *Wolff* would be deemed prima facie abuse of discretion.

This conclusion is inconsistent with *Wolff*. We characterized as "useful," but did not require, written reasons for denying inmates the limited right to call witnesses in their defense. We made no such suggestion with respect to confrontation and cross-examination which, as was there pointed out, stand on a different footing because of their inherent danger and the availability of adequate bases of decision without them. See 418 U. S., at 567–568. Mandating confrontation and cross-examination, except where prison officials can justify their denial on one or more grounds that appeal to judges, effectively preempts the area that *Wolff* left to the sound discretion of prison officials.[5] We add that on the record before us

[5] The Court of Appeals also held, in its initial opinion (unmodified in rehearing with respect to this point), that "the disciplinary committee must be required to make its fact finding determinations based solely upon the evidence presented at the hearing" in order "[f]or the right to confront and cross-examine adverse witnesses to be meaningful." 497 F. 2d, at 820. Because we have held that there is no general right to confront and cross-examine adverse witnesses, it follows that the Court of Appeals' holding on this point must fall with its rejected premise. Due to the peculiar environment of the prison setting, it may be that certain facts

there is no evidence of the abuse of discretion by the state prison officials.

V

Finally, the Court of Appeals for the Ninth Circuit in No. 74–1194 held that minimum due process—such as notice, opportunity for response, and statement of reasons for action by prison officials—was necessary where inmates were deprived of privileges. 510 F. 2d, at 615. We did not reach the issue in *Wolff;* indeed, we said: "We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges." 418 U. S., at 572 n. 19. Nor do we find it necessary to reach the issue now in light of the record before us. None of the named plaintiffs in No. 74–1194 was subject solely to loss of privileges; all were brought before prison disciplinary hearings for allegations of the type of "serious misconduct," 418 U. S., at 558, that we held in *Wolff* to trigger procedures therein outlined. See n. 1, *supra.* Without such a record, we are unable to consider the degree of "liberty" at stake in loss of privileges and thus whether some sort of procedural safeguards are due when only such "lesser penalties" are at stake. To the extent that the Court of Appeals for the Ninth Circuit required any procedures in such circumstances, the Court of Ap-

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relevant to the disciplinary determination do not come to light until after the formal hearing. It would be unduly restrictive to require that such facts be excluded from consideration, inasmuch as they may provide valuable information with respect to the incident in question and may assist prison officials in tailoring penalties to enhance correctional goals. In so stating, however, we in no way diminish our holding in *Wolff* that "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." 418 U. S., at 564.

peals acted prematurely, and its decision on the issue cannot stand.[6]

We said in *Wolff* v. *McDonnell:* "As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution." 418 U. S., at 572. We do not retreat from that view. However, the procedures required by the Courts of Appeals in Nos. 74–1187 and 74–1194 are either inconsistent with the "reasonable accommodation" reached in *Wolff,* or premature on the bases of the records before us. The judgments in Nos. 74–1187 and 74–1194 accordingly are

Reversed.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I agree that consideration of the procedural safeguards necessary where an inmate is deprived only of privileges is premature on this record, and thus I join Part V of the Court's opinion, which leaves open whether an inmate may be deprived of privileges in the absence of due process safeguards.

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[6] Petitioners in No. 74–1194 have not challenged the holdings of the Court of Appeals for the Ninth Circuit with respect to notice, 497 F. 2d, at 818, or to the right to be heard by a "neutral and detached" hearing body, *id.,* at 820. Cf. 418 U. S., at 570–571. Because these holdings are no longer in issue, it is unnecessary for us to consider them.

Parts II and IV of the Court's opinion simply reaffirm *Wolff* v. *McDonnell,* 418 U. S. 539 (1974). I continue to believe that *Wolff* approved procedural safeguards short of the minimum requirements of the Due Process Clause, and I dissent from Parts II and IV for the reasons stated by my Brother MARSHALL, 418 U. S., at 580.

Part III of the Court's opinion, however, confronts an issue not present in *Wolff* [1] and in my view reaches an erroneous conclusion. The Court acknowledges that inmates have the right to invoke the privilege against compulsory self-incrimination in prison disciplinary proceedings, *ante,* at 316, but nevertheless holds that "permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice," *ante,* at 320, and was proper in the circumstances of this case. This conclusion cannot be reconciled with the numerous cases holding that the government is barred from penalizing an individual for exercising the privilege; precedents require the holding that if government officials ask questions of an indi-

[1] I agree that No. 74-1194 is not moot, since the intervening plaintiff (Ferrell) has a personal stake in the outcome of this litigation. But the citation of *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975), is inapposite. We held that case moot because the named plaintiffs no longer had a personal stake in the outcome, and the action had not been formally certified as a class action. *Id.,* at 129. We did not, however, hold that without such formal certification "the action is not properly a class action." *Ante,* at 311 n. 1. *Jacobs* applies only to the determination of mootness, and did not deal with whether, for example, a court of appeals may treat an action as a class action in the absence of formal certification by the district court. Moreover, the propriety of the certification need not be addressed, since there is a plaintiff with a personal interest in the outcome. *Youakim* v. *Miller, ante,* at 236-237, n. 2.

vidual to elicit incriminating information, as happened here, the imposition of any substantial sanction on that individual for remaining silent violates the Fifth Amendment. That principle prohibits reliance on any inference of guilt from the exercise of the privilege in the context of a prison disciplinary hearing.

I

As we have frequently and consistently recognized:

> "The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, see, *e. g., Counselman* v. *Hitchcock,* 142 U. S. 547; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. See, *e. g., Haynes* v. *Washington,* 373 U. S. 503." *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 57 n. 6 (1964).

Indeed, only weeks ago we said that "the privilege protects against the use of compelled statements *as well as* guarantees the right to remain silent absent immunity." *Garner* v. *United States,* 424 U. S. 648, 653 (1976) (emphasis supplied). *Malloy* v. *Hogan,* 378 U. S. 1 (1964), held that the Fifth Amendment—the "essential mainstay" of our "American system of criminal prosecution," *id.,* at 7—protects "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Id.,* at 8. See *Spevack* v. *Klein,* 385 U. S. 511, 514 (1967). As THE CHIEF JUSTICE noted last Term: "This Court has always broadly construed [the Fifth Amendment] protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." *Maness* v. *Meyers,* 419 U. S. 449, 461

(1975). Further, "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar* v. *United States,* 406 U. S. 441 (1972)." *Lefkowitz* v. *Turley,* 414 U. S. 70, 78 (1973). See *Maness* v. *Meyers, supra,* at 473 (WHITE, J., concurring in result).

Thus, the Fifth Amendment not only excludes from use in criminal proceedings any evidence obtained from the defendant in violation of the privilege, but also is operative before criminal proceedings are instituted: it bars the government from using compulsion to obtain incriminating information from any person. Moreover, the protected information "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution . . . . *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951)." *Maness* v. *Meyers, supra,* at 461. And it is not necessary that a person be guilty of criminal misconduct to invoke the privilege; an innocent person, perhaps fearing that revelation of information would tend to connect him with a crime he did not commit, also has its protection. " 'The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.' " *Grunewald* v. *United States,* 353 U. S. 391, 421 (1957), quoting *Slochower* v. *Board of Education,* 350 U. S. 551, 557–558 (1956). See E. Griswold, The Fifth Amendment Today 10–22 (1955); Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. Chi. L. Rev. 472 (1957).

Accordingly, the fact that no criminal proceedings were pending against Palmigiano, *ante,* at 317, does not answer the crucial question posed by this case. The evidentiary

use of his statements in a criminal proceeding lurked in the background, but the significant element for this case is that the Fifth Amendment also prohibits the government from compelling an individual to disclose information that might tend to connect him with a crime. *Maness* v. *Meyers, supra,* pointed up this distinction in its recognition that availability of motions to suppress compelled testimonial evidence do not remedy the Fifth Amendment violation. 419 U. S., at 460, 463.

II

It was this aspect of the privilege that we relied on in a line of cases beginning with *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), and leading up to *Lefkowitz* v. *Turley, supra.* The Court says today that "this case is very different," *ante,* at 318, but in my view the *Garrity-Lefkowitz* cases are compelling authority that drawing an adverse inference from an inmate's exercise of the privilege to convict him of a disciplinary offense violates the Fifth Amendment.

In *Garrity* policemen were summoned to testify in the course of an investigation of police corruption. They were told that they could claim the privilege, but would be discharged if they did. *Garrity* held that imposition of the choice between self-incrimination and job forfeiture denied the constitutionally required "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California,* 314 U. S. 219, 241 (1947). Subsequent criminal convictions were therefore set aside on the ground that the unconstitutionally compelled testimony should not have been admitted in evidence at trial.

In *Spevack* v. *Klein, supra,* decided the same day as *Garrity,* an attorney refused to honor a subpoena calling for production of certain financial records; the sole basis for the refusal was the privilege against self-incrimination. He was disbarred for exercising the privilege, and

the disbarment was challenged in this Court as infringing the Fifth Amendment. Relying on *Malloy* v. *Hogan, supra,* at 8, *Spevack* held that the privilege protects individuals against any penalty for their silence and that its protection bars "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" 385 U. S., at 515.[2] See *Griffin* v. *California,* 380 U. S. 609, 614 (1965). *Spevack* expressly stated that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion," 385 U. S., at 516, and therefore held that by inferring professional misconduct, and penalizing that misconduct, solely on the basis of an invocation of the privilege, the State had violated the Fifth Amendment.

Gardner v. *Broderick,* 392 U. S. 273 (1968), involved a policeman called to testify before a grand jury investigating police corruption. He was warned of his constitutional right to refuse to give any incriminating information, but was also asked to waive immunity, and told that if he refused to do so, a state statute required that he be discharged. He refused to waive immunity and was discharged. *Gardner* invalidated the state statute on the ground that the Fifth Amendment does not permit the government to use its power to discharge employees to coerce disclosure of incriminating evidence. *Id.,* at 279. *Sanitation Men* v. *Sanitation Comm'r,* 392

[2] Although this quotation is from the plurality opinion of four Justices, Mr. Justice Fortas, who concurred in the judgment, "agree[d] that Spevack could not be disbarred for asserting his privilege against self-incrimination," 385 U. S., at 520, thus providing a majority for that proposition. He wrote separately because he was of the view that state employees enjoyed a lesser protection. He agreed with the result, however, because Spevack—like Palmigiano—was not a state employee. *Ibid.* See *Gardner* v. *Broderick,* 392 U. S. 273 (1968).

U. S. 280 (1968), decided the same day, turned on the same ground.[3]

Lefkowitz v. *Turley, supra,* the most recent decision involving noncriminal penalties for exercising the privilege, concerned two architects summoned to testify before a grand jury investigating charges of corruption relating to state contracts. They refused to waive the privilege, and a state statute provided that such a refusal would result in cancellation of existing state contracts and ineligibility for future contracts for five years. The architects brought suit, claiming that the statute violated the privilege against compulsory self-incrimination. The Court held that in the absence of a grant of immunity the government may not compel an individual to give incriminating answers. 414 U. S., at 79.[4] A "substantial economic sanction" in the form of loss of contracts was held sufficient to constitute compulsion within the meaning of the Fifth Amendment. *Id.,* at 82. The penalty, again imposed in a noncriminal context, was held to infringe the Fifth Amendment.

It follows that settled jurisprudence until today has been that it is constitutionally impermissible for the government to impose noncriminal penalties as a means of compelling individuals to forgo the privilege. The Court therefore begs the question by "declin[ing] to extend the

[3] In *Sanitation Men* 15 sanitation employees called before the Sanitation Commissioner investigating alleged improprieties were told that a claim of the privilege as a basis for refusing to answer questions concerning their official duties would result in their discharge. Three employees answered and denied the charges, but when later called before grand juries refused to waive immunity and were discharged for doing so. The Court held that to put the employees to a choice between their constitutional rights and their jobs was compulsion that violated the privilege. 392 U. S., at 284.

[4] "[T]he State intended to accomplish what *Garrity* has specifically prohibited—to compel testimony that had not been immunized." 414 U. S., at 82.

Griffin rule" to prison disciplinary proceedings, *ante,* at 319. Affirmance of the Court of Appeals' holding that reliance on an inmate's silence is barred by the Fifth Amendment is required by *Spevack, Gardner, Sanitation Men,* and *Lefkowitz.*

The Court's attempted distinction of those cases plainly will not wash. To be sure, refusal to waive the privilege resulted in automatic imposition of some sanction in all of those cases. The Court reasons that because disciplinary decisions must be based on substantial record evidence, *Morris* v. *Travisono,* 310 F. Supp. 857, 873 (RI 1970),[5] and Palmigiano's silence "at the hearing in the face of evidence that incriminated him . . . was given no more evidentiary value than was warranted by the facts surrounding his case," *ante,* at 318, no automatic imposition of a sanction results, and therefore the use of such silence "does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege," *ibid.*

But the premise of the *Garrity-Lefkowitz* line was not that compulsion resulted from the automatic nature of the sanction, but that a sanction was imposed that made costly the exercise of the privilege. Plainly the penalty imposed on Palmigiano—30 days in punitive segregation and a downgraded classification—made costly the exercise of the privilege no less than loss of govern-

[5] Although *Morris* imposes a substantial-evidence standard for appellate review of findings in disciplinary proceedings, nothing in that case supports the Court's assumption that an inmate's silence alone would not meet this evidentiary standard. *Ante,* at 317; cf. *ante,* at 313 n. 2. But if silence alone provides an evidentiary premise sufficient for discipline, the Court's distinction of the *Garrity-Lefkowitz* cases crumbles. I therefore read the Court's opinion to imply that the Fifth Amendment bars conviction of a disciplinary violation based solely on an inmate's silence. In No. 74–1187, petitioners concede that an inmate's silence, without more, would not be substantial evidence.

ment contracts or discharge from a state job. Even accepting the Court's assertion that a disciplinary conviction does not automatically follow from an inmate's silence, in sanctioning reliance on silence as probative of guilt of the disciplinary offense charged, the Court allows prison officials to make costly the exercise of the privilege, something *Garrity-Lefkowitz* condemned as prohibited by the Fifth Amendment. For it cannot be denied that the disciplinary penalty was imposed to some extent, if not solely,[6] as a sanction for exercising the constitutional privilege. See *Griffin* v. *California, supra; United States* v. *Jackson,* 390 U. S. 570, 581–582 (1968). That plainly violates the Fifth Amendment.

It is inconsequential that the State is free to determine the probative weight to be attached to silence. *Garrity-Lefkowitz* did not consider probative value, and other precedents deny the State power to attach any probative weight whatever to an individual's exercise of the privilege, as I develop more fully in Part IV.

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[6] As the Court notes, the only evidence, other than Palmigiano's silence, before the Disciplinary Board consisted of written reports made by the prison officials who filed the initial charges against Palmigiano. On the whole, the record inspires little confidence that his silence was not the sole basis for his disciplinary conviction. At the hearing a prison official read the disciplinary charges to Palmigiano and then asked him: "What happened here, Nick?" Palmigiano's response was again to request the presence of counsel, which had previously been denied. When the renewed request was denied, Palmigiano stated that he would remain silent on the advice of counsel. The official thereafter asked: "Do you intend to answer any questions for the board?" Consistent with his earlier statement, Palmigiano replied that he did not. The Board excused him from the hearing room; he was called back within five minutes and informed that he had been found guilty and sentenced to 30 days' punitive segregation, with a possible downgrade in his classification.

The compulsion upon Palmigiano is as obvious as the compulsion upon the individuals in *Garrity-Lefkowitz*. He was told that criminal charges might be brought against him. He was also told that anything he said in the disciplinary hearing could be used against him in a criminal proceeding.[7] Thus, the possibility of self-incrimination was just as real and the threat of a penalty just as coercive. Moreover, the Fifth Amendment does not distinguish among types or degrees of compulsion. It prohibits "'inducement of any sort.'" *Bram* v. *United States*, 168 U. S. 532, 548 (1897). "We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed." *Malloy* v. *Hogan*, 378 U. S., at 7. Palmigiano was forced to choose between self-incrimination and punitive segregation or some similar penalty. Since the Court does not overrule the *Garrity-Lefkowitz* group of decisions, those precedents compel the conclusion that this constituted impermissible compulsion.

III

The Court also draws support from the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they re-

[7] In this respect it is not clear that all of the *Morris* requirements were observed in Palmigiano's disciplinary hearing. Under the prison's rules, each inmate must be advised that "statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial." Brief for Petitioners in No. 74–1187, pp. 4–5. Palmigiano, however, was told that anything he said could be used against him at a criminal trial. In any event, the uncertain warning required by the prison rules would hardly satisfy constitutional requirements. See n. 8, *infra*. In this respect, the Court's holding that the prisoner has no right to counsel exacerbates the difficulty, for surely the advice of counsel is essential in this complex area. See *Maness* v. *Meyers*, 419 U. S. 449 (1975).

fuse to testify in response to probative evidence offered against them." *Ante,* at 318. That rule may prevail, but it did not have the approval of this Court until today. Some commentators have suggested that permitting an adverse inference in some civil cases violates the Fifth Amendment. Comment, Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination, 24 U. Fla. L. Rev. 541, 546 (1972); Comment, 1968 U. Ill. L. F. 75; Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 Va. L. Rev. 322 (1966). I would have difficulty holding such an inference impermissible in civil cases involving only private parties. But I would hold that compulsion violating the privilege is present in any proceeding, criminal or civil, where *a government official* puts questions to an individual with the knowledge that the answers might tend to incriminate him. See *Garner* v. *United States,* 424 U. S., at 655–656; *Sanitation Men* v. *Sanitation Comm'r,* 392 U. S., at 284.

Such a distinction is mandated by one of the fundamental purposes of the Fifth Amendment: to preserve our adversary system of criminal justice by preventing *the government* from circumventing that system by abusing its powers. *Garner* v. *United States, supra,* at 655–656. Only a few weeks ago, we said: "That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures." *Ibid.*

> "One of the most important functions of the privilege is to protect all persons, whether suspected of crime or not, from abuse by the government of its powers of investigation, arrest, trial and punishment. It was not solicitude for persons accused of crime but the desire to maintain the proper balance between government and the persons governed that

gave rise to the adoption of these constitutional provisions." Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. Chi. L. Rev. 472, 484 (1957) (footnote omitted).

In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn from exercise of the privilege does not implicate the policy considerations underlying the privilege. But where the government "deliberately seeks" the answers to incriminatory questions, allowing it to benefit from the exercise of the privilege aids, indeed encourages, governmental circumvention of our adversary system. In contrast, an affirmance of the judgment in Palmigiano's case would further obedience of the government to the commands of the Fifth Amendment. Cf. *United States* v. *Karathanos,* 531 F. 2d 26, 35 (CA2 1976) (Oakes, J., concurring); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974).

Nothing in this record suggests that the State does not use the disciplinary procedure as a means to gather evidence for criminal prosecutions. On the contrary, Palmigiano was told that he might be prosecuted, which indicates that criminal proceedings are brought in some instances. And if the State does not intend to initiate criminal proceedings, the Fifth Amendment problem can be readily avoided simply by granting immunity for any testimony given at disciplinary hearings.[8]

[8] Although my view is that only transactional immunity can remove the self-incrimination problem, *Piccirillo* v. *New York,* 400 U. S. 548, 562 (1971) (BRENNAN, J., dissenting), that view is not presently the law. See, *e. g., Lefkowitz* v. *Turley,* 414 U. S. 70, 84 (1973); *Kastigar* v. *United States,* 406 U. S. 441 (1972).

Although Rhode Island prison officials are not authorized by statute to grant immunity, my Brother WHITE has suggested that

IV

I would therefore affirm the judgment of the Court of Appeals in No. 74–1187 insofar as that court held that an inmate's silence may not be used against him in a prison disciplinary proceeding. This would make unnecessary addressing the question whether exercise of the privilege may be treated as probative evidence of guilt. Since the Court, however, indicates that invocation of the privilege is probative in these circumstances, *ante*, at 319, I express my disagreement. For we have repeatedly emphasized that such an inference has no foundation. Indeed, the very cases relied upon by the Court expose its error and support the conclusion that Palmigiano's silence could not be treated as probative.

United States ex rel. Bilokumsky v. *Tod*, 263 U. S. 149 (1923), quoted *ante*, at 319, involved a deportation proceeding in which the deportee failed to deny that he was an alien. But he also failed to claim or attempt to prove that he was a citizen. Alienage was not an element of any crime, and his silence was held probative of his

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a witness who fails to persuade a judge that a prospective answer is incriminatory "is nevertheless protected by a constitutionally imposed use immunity if he answers in response to the [judge's] order and under threat of contempt." *Maness* v. *Meyers*, 419 U. S., at 474 (concurring in result). See *Fowler* v. *Vincent*, 366 F. Supp. 1224, 1228 (SDNY 1973); *Sands* v. *Wainwright*, 357 F. Supp. 1062, 1093 (MD Fla. 1973). Although an inmate would not be testifying in response to a court order, his answers in response to questions of prison officials are nevertheless compelled within the meaning of the Fifth Amendment. Thus, there would be immunity for any statements given. The inmate must, however, be informed of the existence of the immunity. As my Brother WHITE said, "a witness may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him." *Maness* v. *Meyers*, *supra*, at 473 (emphasis in original).

alienage. The inference was plainly permissible since the deportee faced no possibility of incrimination, and there was therefore no implication of the privilege. But Palmigiano's predicament was that answers to the questions put to him by the prison officials could connect him with a crime.

The Court also quotes part of a sentence from *United States* v. *Hale,* 422 U. S. 171 (1975). We said in *Hale* that "[i]n most circumstances silence is so ambiguous that it is of little probative force." *Id.,* at 176. We also noted that its probative force increases where a person "would be more likely than not to dispute an untrue accusation." *Ibid.* We emphasized that "[f]ailure to contest an assertion, however, is considered evidence of acquiescence *only* if it would have been natural under the circumstances to object to the assertion in question." *Ibid.* (emphasis supplied). That was not the case since Hale's silence was in response to notice that he had a right to remain silent, and that any statements he made would be used against him in court. These excerpts from *Hale* require the conclusion that Palmigiano's silence also had no probative force. Palmigiano was also advised that he had a right to remain silent, that he might be prosecuted, and that anything he said could be used against him in court.

Finally, *Grunewald* v. *United States,* 353 U. S. 391 (1957), is particularly persuasive authority that Palmigiano's silence is not probative. We there considered whether one Halperin's exercise of the privilege was probative of guilt, and we concluded that his silence, in the circumstances, was "wholly consistent with innocence." *Id.,* at 421. "Halperin repeatedly insisted . . . that he was innocent and that he pleaded his Fifth Amendment privilege solely on the advice of counsel." *Id.,* at 422. Similarly, Palmigiano here maintained that he was innocent and that he claimed the privilege on

the advice of counsel. *Grunewald* was a situation where "the Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him." *Ibid.* That was similar to Palmigiano's situation; inmates have only a very limited right to call witnesses, and an even more limited right of cross-examination, *ante,* at 321–322. *Grunewald* is thus most persuasive authority that Palmigiano's silence was not probative. See *Flint* v. *Mullen,* 499 F. 2d 100, 103 (CA1), cert. denied, 419 U. S. 1026 (1974).[9]

To accord silence probative force in these cases overlooks the hornbook teaching "that one of the basic functions of the privilege is to protect *innocent* men." *Grunewald* v. *United States, supra,* at 421 (emphasis in original). If this Court's insensitivity to the Fifth

[9] The other cases cited by the Court likewise do not support a holding that Palmigiano's silence should have probative force. No self-incrimination problem was presented in *Gastelum-Quinones* v. *Kennedy,* 374 U. S. 469 (1963). That case involved a deportation proceeding, and the subject of that proceeding remained silent, but not for Fifth Amendment reasons. Moreover, the Court held that "deportation is a drastic sanction" and "must therefore be premised upon evidence . . . more directly probative than a mere inference based upon the alien's silence." *Id.,* at 479. We held that particular deportation order not based on substantial evidence. *Id.,* at 480. Similarly, the Court did not address any self-incrimination issue relevant to the instant case in *Adamson* v. *California,* 332 U. S. 46 (1947), and *Twining* v. *New Jersey,* 211 U. S. 78 (1908). Those cases were based on the premise, overruled in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), that the Fifth Amendment protection against self-incrimination was not applicable to the States. Finally, whether *Raffel* v. *United States,* 271 U. S. 494 (1926), remains law is subject to much doubt. See *United States* v. *Hale,* 422 U. S. 171, 175 n. 4 (1975); *United States* v. *Grunewald,* 233 F. 2d 556, 575 (CA2 1956) (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957).

Amendment violation present in this case portends still more erosion of the privilege, state courts and legislatures will remember that they remain free to afford protections of our basic liberties as a matter of state law. See *Michigan* v. *Mosley,* 423 U. S. 96, 120–121 (1975) (BRENNAN, J., dissenting). Contrary to this Court's interpretation of the Federal Constitution's privilege against compulsory self-incrimination in *Harris* v. *New York,* 401 U. S. 222 (1971), the California Supreme Court recently construed California's constitutional prohibition to forbid use of an accused's inculpatory statement obtained in violation of custodial interrogation safeguards announced in *Miranda* v. *Arizona,* 384 U. S. 436 (1966). The co"rt said, *People* v. *Disbrow,* 16 Cal. 3d 101, 113–115, 545 P. 2d 272, 280 (1976): "We . . . declare that *Harris* is not persuasive authority in any state prosecution in California. . . . We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution." [10]

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[10] Other state courts have also rejected *Harris* as a matter of state constitutional law. *Commonwealth* v. *Triplett,* 462 Pa. 244, 341 A. 2d 62 (1975); *State* v. *Santiago,* 53 Haw. 254, 492 P. 2d 657 (1971). In addition, admission of incriminating statements for impeachment purposes can be prohibited by statute notwithstanding the decision in *Harris. Butler* v. *State,* 493 S. W. 2d 190 (Tex. Crim. App. 1973). See *United States* v. *Jordan,* 20 U. S. C. M. A. 614, 44 C. M. R. 44 (1971). Finally, it should be noted that there need not be a state constitutional counterpart to the Fifth Amendment or a specific statutory prohibition to reach this result; use of incriminating statements can be prohibited by a state court as a matter of public policy in that State. See *In re Pillo,* 11 N. J. 8, 93 A. 2d 176 (1952); *State* v. *Miller,* 67 N. J. 229, 245 n. 1, 337 A. 2d 36, 45 n. 1 (1975) (Clifford, J., concurring in part and dissenting in part).

The fact that Palmigiano is a prison inmate cannot, of course, distinguish this case from the cases in the *Garrity-Lefkowitz* line, since "a prisoner does not shed his basic constitutional rights at the prison gate." *Wolff* v. *McDonnell,* 418 U. S., at 581 (MARSHALL, J., dissenting); see *Jackson* v. *Bishop,* 404 F. 2d 571, 576 (CA8 1968) (Blackmun, J.). I must therefore view today's decision as another regrettable disregard of Mr. Justice Frankfurter's admonition that our interpretation of the privilege is not faithful to the Founding Fathers' purpose when it does not reflect the teaching of history:

> "This command of the Fifth Amendment . . . registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann* v. *United States,* 350 U. S. 422, 426–427 (1956) (footnotes omitted).

BECKWITH *v.* UNITED STATES

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

No. 74-1243. Argued December 1, 1975—Decided April 21, 1976

Statements made by petitioner taxpayer to Internal Revenue agents during the course of a noncustodial interview in a criminal tax investigation *held* admissible against him in the ensuing criminal tax fraud prosecution even though he was not given warnings required by *Miranda* v. *Arizona,* 384 U. S. 436. Although the "focus" of the investigation may have been on petitioner when he was interviewed, in the sense that his tax liability was under scrutiny, that is not the equivalent of "focus" for *Miranda* purposes, which involves "questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, at 444 (emphasis supplied). Pp. 344-348.

166 U. S. App. D. C. 361, 510 F. 2d 741, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, *post,* p. 348. BRENNAN, J., filed a dissenting opinion, *post,* p. 349. STEVENS, J., took no part in the consideration or decision of the case.

John G. Gill, Jr., argued the cause and filed a brief for petitioner.

Assistant Attorney General Crampton argued the cause for the United States. With him on the brief were *Solicitor General Bork, Deputy Solicitor General Frey, Stuart A. Smith,* and *Robert E. Lindsay.*

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

The important issue presented in this case is whether a special agent of the Internal Revenue Service, investigating potential criminal income tax violations, must, in

an interview with a taxpayer, not in custody, give the warnings called for by this Court's decision in *Miranda* v. *Arizona,* 384 U. S. 436 (1966). We granted certiorari to resolve the conflict between the holding of the Court of Appeals in this case, which is consistent with the weight of authority on the issue,[1] and the position adopted by the United States Court of Appeals for the Seventh Circuit.[2]

The District Court conducted a thorough inquiry into the facts surrounding the interview of petitioner before ruling on his motion to suppress the statements at issue. After a considerable amount of investigation, two special agents of the Intelligence Division of the Internal Revenue Service met with petitioner in a private home where petitioner occasionally stayed. The senior agent testified that they went to see petitioner at this private residence at 8 a. m. in order to spare petitioner the possible embarrassment of being interviewed at his place of employment which opened at 10 a. m. Upon their arrival, they identified themselves to the person answering the door and asked to speak to petitioner. The agents were invited into the house and, when petitioner entered the room where they were waiting, they introduced them-

[1] See, *e. g., Taglianetti* v. *United States,* 398 F. 2d 558, 566 (CA1 1968), aff'd on another ground, 394 U. S. 316 (1969); *United States* v. *Mackiewicz,* 401 F. 2d 219, 221–222 (CA2), cert. denied, 393 U. S. 923 (1968); *United States* v. *Jaskiewicz,* 433 F. 2d 415, 417–420 (CA3 1970), cert. denied, 400 U. S. 1021 (1971); *United States* v. *Browney,* 421 F. 2d 48, 51–52 (CA4 1970); *United States* v. *Prudden,* 424 F. 2d 1021, 1027–1031 (CA5), cert. denied, 400 U. S. 831 (1970); *United States* v. *Stribling,* 437 F. 2d 765, 771 (CA6), cert. denied, 402 U. S. 973 (1971); *United States* v. *MacLeod,* 436 F. 2d 947, 950 (CA8), cert. denied, 402 U. S. 907 (1971); *United States* v. *Robson,* 477 F. 2d 13, 16 (CA9 1973); *Hensley* v. *United States,* 406 F. 2d 481, 484 (CA10 1968); but cf. *United States* v. *Lockyer,* 448 F. 2d 417, 422 (CA10 1971).

[2] *United States* v. *Dickerson,* 413 F. 2d 1111 (1969).

selves and, according to the testimony of the senior agent, Beckwith then excused himself for a period in excess of five minutes, to finish dressing.[3] Petitioner then sat down at the dining room table with the agents; they presented their credentials and stated they were attached to the Intelligence Division and that one of their functions was to investigate the possibility of criminal tax fraud. They then informed petitioner that they were assigned to investigate his federal income tax liability for the years 1966 through 1971. The senior agent then read to petitioner from a printed card the following:

> "As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws, and related offenses.
>
> "Under the Fifth Amendment to the Constitution of the United States, I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding." App. 65–66.

Petitioner acknowledged that he understood his rights. The agents then interviewed him until about 11 o'clock. The agents described the conversation as "friendly" and "relaxed." The petitioner noted that the agents did not "press" him on any question he could not or chose not to answer.

Prior to the conclusion of the interview, the senior agent requested that petitioner permit the agents to

[3] Petitioner claimed at the suppression hearing that he was fully dressed when he first met the agents. The District Court did not explicitly resolve this conflict in testimony.

inspect certain records. Petitioner indicated that they were at his place of employment. The agents asked if they could meet him there later. Having traveled separately from petitioner, the agents met petitioner approximately 45 minutes later and the senior agent advised the petitioner that he was not required to furnish any books or records; petitioner, however, supplied the books to the agents.

Prior to trial, petitioner moved to suppress all statements he made to the agents or evidence derived from those statements on the ground that petitioner had not been given the warnings mandated by *Miranda*. The District Court ruled that he was entitled to such warnings "when the court finds as a fact that there were custodial circumstances." The District Judge went on to find that "on this record . . . there is no evidence whatsoever of any such situation." The Court of Appeals affirmed the judgment of conviction. 166 U. S. App. D. C. 361, 510 F. 2d 741 (1975). It noted that the reasoning of *Miranda* was based "in crucial part" on whether the suspect "has been taken into custody or otherwise deprived of his freedom in any significant way," *id.*, at 362, 510 F. 2d, at 742, citing *Miranda*, *supra*, at 477; and agreed with the District Court that "Beckwith was neither arrested nor detained against his will." 166 U. S. App. D. C., at 362, 510 F. 2d, at 742. We agree with the analysis of the Court of Appeals[4] and, therefore, affirm its judgment.

Petitioner contends that the "entire starting point" for the criminal prosecution brought against him was secured from his own statements and disclosures during the interview with the Internal Revenue agents from the

[4] On petition for writ of certiorari to this Court, Beckwith does not challenge the further holding of the Court of Appeals that, the *Miranda* question aside, the "entire interview was free of coercion," 166 U. S. App. D. C., at 363, 510 F. 2d, at 743 (footnote omitted).

Intelligence Division. He correctly points out that cases are assigned to the Intelligence Division only when there is some indication of criminal fraud and that, especially since tax offenses rarely result in pretrial custody, the taxpayer is clearly the "focus" of a criminal investigation when a matter is assigned to the Intelligence Division. Given the complexity of the tax structure and the confusion on the part of taxpayers between the civil and criminal function of the Internal Revenue Service, such a confrontation, argues petitioner, places the taxpayer under "psychological restraints" which are the functional, and, therefore, the legal, equivalent of custody. In short we agree with Chief Judge Bazelon, speaking for a unanimous Court of Appeals, that

> "[t]he major thrust of Beckwith's argument is that the principle of *Miranda* and *Mathis* [5] should be extended to cover interrogation in non-custodial circumstances after a police investigation has focused on the suspect." *Ibid.*

With the Court of Appeals, we "are not impressed with this argument in the abstract nor as applied to the particular facts of Beckwith's interrogation." *Ibid.* It goes far beyond the reasons for that holding and such an extension of the *Miranda* requirements would cut this Court's holding in that case completely loose from its own explicitly stated rationale. The narrow issue before the Court in *Miranda* was presented very precisely in the opening paragraph of that opinion—"the admissibility of statements obtained from an individual who is subjected to *custodial* police interrogation." 384 U. S., at 439.[6] (Emphasis supplied.) The Court concluded

[5] *Mathis* v. *United States,* 391 U. S. 1 (1968).

[6] The Court also stated: "The constitutional issue we decide . . . is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action

that compulsion is "inherent in custodial surroundings," [7] *id.*, at 458, and, consequently, that special safeguards were required in the case of "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Id.*, at 445. In subsequent decisions, the Court specifically stressed that it was the *custodial* nature of the interrogation which triggered the necessity for adherence to the specific requirements of its *Miranda* holding. *Orozco* v. *Texas*, 394 U. S. 324 (1969); *Mathis* v. *United States*, 391 U. S. 1 (1968). See generally *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 247 (1973).

Petitioner's argument that he was placed in the functional, and, therefore, legal, equivalent of the *Miranda* situation asks us now to ignore completely that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar "nature and setting of . . . in-custody interrogation," 384 U. S., at 445. That Courts of Appeals have so read *Miranda* is suggested by Chief Judge Lumbard in *United States* v. *Caiello*, 420 F. 2d 471, 473 (CA2 1969):

> " 'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the

in any significant way." 384 U. S., at 445. The Court specifically defined "custodial interrogation" to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, at 444.

[7] The Court gave great weight to contemporaneous police manuals and concluded that custodial interrogation was "psychologically . . . oriented," *id.*, at 448, and that the principal psychological factor contributing to successful interrogation was isolating the suspect in unfamiliar surroundings "for no purpose other than to subjugate the individual to the will of his examiner." *Id.*, at 457.

Miranda requirements with regard to custodial questioning.' "

Mathis v. *United States, supra,* directly supports this conclusion in holding that the *Miranda* requirements are applicable to interviews with Internal Revenue agents concerning tax liability, *when the subject is in custody;* the Court thus squarely grounded its holding on the custodial aspects of the situation, not the subject matter of the interview.[8]

An interview with Government agents in a situation such as the one shown by this record simply does not present the elements which the *Miranda* Court found so inherently coercive as to require its holding. Although the "focus" of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding. *Miranda* implicitly defined "focus," for its purposes, as "questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U. S., at 444. (Emphasis supplied.) It may well be true, as petitioner contends, that the "starting point" for the criminal prosecution was the information obtained from petitioner and the records exhibited by him. But this amounts to no more than saying that a tax return signed by a taxpayer can be the "starting point" for a prosecution.

We recognize, of course, that noncustodial interrogation might possibly in some situations, by virtue of some

[8] Four Members of the Court joined Mr. Justice Black; the dissenters regarded *Mathis* as an extension of *Miranda* largely because the custody and the interrogation were in no way related and because a prisoner interrogated in prison was not in unfamiliar surroundings.

special circumstances, be characterized as one where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . ." *Rogers* v. *Richmond,* 365 U. S. 534, 544 (1961). When such a claim is raised, it is the duty of an appellate court, including this Court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis* v. *North Carolina,* 384 U. S. 737, 741–742 (1966). Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive. *Frazier* v. *Cupp,* 394 U. S. 731, 739 (1969); *Davis* v. *North Carolina, supra,* at 740–741. In the present case, however, as Chief Judge Bazelon noted, "[t]he entire interview was free of coercion," 166 U. S. App. D. C., at 363, 510 F. 2d, at 743 (footnote omitted).

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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

MR. JUSTICE MARSHALL, concurring in the judgment.

While the Internal Revenue Service agents in this case did not give petitioner the full warnings prescribed in *Miranda* v. *Arizona,* 384 U. S. 436 (1966), they did give him the following warning before questioning him:

> "As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws, and related offenses.
>
> "Under the Fifth Amendment to the Constitution of the United States, I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate

> you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding." App. 65–66.

Under the circumstances of this case, in which petitioner was not under arrest and the interview took place in a private home where petitioner occasionally stayed, the warning recited above satisfied the requirements of the Fifth Amendment. If this warning had not been given, however, I would not join the judgment of the Court.

MR. JUSTICE BRENNAN, dissenting.

I respectfully dissent. In my view the District Court should have granted petitioner's motion to suppress all statements made by him to the agents because the agents did not give petitioner the warnings mandated by *Miranda* v. *Arizona,* 384 U. S. 436 (1966). The Court affirms the conviction on the ground that "[a]lthough the 'focus' of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the *custodial* situation described by the *Miranda* Court as the basis for its holding." *Ante,* at 347 (emphasis supplied). But the fact that Beckwith had not been taken into formal "custody" is not determinative of the question whether the agents were required to give him the *Miranda* warnings. I agree with the Court of Appeals for the Seventh Circuit that the warnings are also mandated when the taxpayer is, as here, interrogated by Intelligence Division agents of the Internal Revenue Service in surroundings where, as in the case of the subject in "custody," the practical com-

pulsion to respond to questions about his tax returns is comparable to the psychological pressures described in *Miranda*. *United States* v. *Dickerson,* 413 F. 2d 1111 (1969); *United States* v. *Oliver,* 505 F. 2d 301 (1974). Interrogation under conditions that have the practical consequence of compelling the taxpayer to make disclosures, and interrogation in "custody" having the same consequence, are in my view peas from the same pod. *Oliver* states the analysis with which I agree and which requires suppression of Beckwith's statements:

> "The application of *Miranda* does not turn on such a simple axis as whether or not the suspect is in custody when he is being questioned. As the Court repeatedly indicated, the prescribed warnings are required if the defendant is in custody 'or otherwise deprived of his freedom of action in any significant way.' The fact of custody is emphasized in the [*Miranda*] opinion as having the practical consequence of compelling the accused to make disclosures. But the test also differentiates between the questioning of a mere witness and the interrogation of an accused for the purpose of securing his conviction; the test serves the purpose 'of determining when the adversary process has begun, i. e., when the investigative machinery of the government is directed toward the ultimate conviction of a particular individual and when, therefore, a suspect should be advised of his rights.'
>
> "Since the constitutional protection is expressly applicable to testimony in the criminal case itself, for the purpose of determining when warnings are required, the *Miranda* analysis treats the adversary proceeding as though it commences when a prospective defendant is taken into custody or otherwise significantly restrained. After that point is reached, it is not unreasonable to treat any compelled disclos-

ure as protected by the Fifth Amendment unless, of course, the constitutional protection has been waived. Adequate warnings, or the advise [*sic*] of counsel, are essential if such a waiver is to be effective.

"The requirement of warnings set forth in *Dickerson* rests on the same underlying rationale. While the commencement of adversary proceedings against Dickerson had not been marked by taking him into custody, the I.R.S., by assigning the matter to the Intelligence Division, had commenced the preparation of its criminal case. When the agents questioned him about his tax return, without clearly explaining their mission, the dual criminal-civil nature of an I.R.S. interrogation created three key misapprehensions for the taxpayer.

" 'Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to *the nature of the inquiry, his obligation to respond,* and *the possible consequences of doing so* must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings.' 413 F. 2d, at 1116 (emphasis added).

"The practical effect of these misapprehensions during questioning of a taxpayer was to 'compel' him to provide information that could be used to obtain his conviction in a criminal tax fraud proceeding, in much the same way that placing a suspect under physical restraint leads to psychological compulsion. Thus, the misapprehensions are tantamount to the deprivation of the suspect's 'freedom of action in any significant way,' repeatedly referred to in *Miranda.*" 505 F. 2d, at 304–305. (Footnotes omitted.)

I would reverse the judgment of conviction and remand to the District Court for a new trial.

DEPARTMENT OF THE AIR FORCE ET AL. *v.* ROSE ET AL.

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

No. 74-489. Argued October 8, 1975—Decided April 21, 1976

Under the United States Air Force Academy's Honor Code, which is administered by a cadet committee, cadets pledge that they will not lie, steal, or cheat, or tolerate among their number anyone who does. If a cadet investigatory team finds that a hearing before an Honor Board concerning a suspected violation is warranted, the accused may call witnesses, and cadet observers attend. The Board, consisting of eight members, may adjudge guilt only by unanimous vote but may if at least six members concur grant the guilty cadet "discretion," which returns him to his squadron in good standing. A cadet found guilty without discretion may resign, or request a hearing by a Board of officers or trial by court-martial. The Honor Board hearing is confidential but the committee prepares a summary, which is posted on 40 squadron bulletin boards and distributed among Academy faculty and officials. In not-guilty and discretion cases, names are deleted. In guilty cases names are not deleted but posting is deferred until the cadet has left the Academy. Ethics Code violations, for less serious breaches, are handled more informally, though on a similarly confidential basis. Respondents, present or former student law review editors researching for an article, having been denied access to case summaries of honors and ethics hearings (with identifying data deleted), brought this suit to compel disclosure under the Freedom of Information Act (FOIA) against the Department of the Air Force and certain Academy officers (hereinafter collectively the Agency). The District Court without *in camera* inspection granted the Agency's motion for summary judgment on the ground that the summaries were "matters . . . related solely to the internal personnel rules and practices of an agency," and thus exempted from mandatory disclosure under Exemption 2 of the FOIA. The Court of Appeals reversed, holding that exemption inapplicable. The Agency had made the contention, which the District Court rejected, that the case summaries fell within Exemption 6 as constituting "personnel and medical files and similar files the disclosure of which would constitute a clearly un-

warranted invasion of personal privacy." The Court of Appeals, while disagreeing with the District Court's approach, did not hold that the Agency without any prior court inspection had to turn over the summaries to respondents with only the proper names removed or that Exemption 6 covered all or any part of the summaries, but held that because the Agency had not maintained its statutory burden in the District Court of sustaining its action by means of affidavits or testimony further inquiry was required and that the Agency had to produce the summaries for an *in camera* inspection, cooperating with the District Court in redacting the records so as to delete personal references and all other identifying information. *Held:*

1. The limited statutory exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant legislative objective of the FOIA. Pp. 360–362.

2. Exemption 2 does not generally apply to matters, such as the summaries here involved, in which there is a genuine and important public interest. Pp. 362–370.

(a) The phrasing of that exemption reflected congressional dissatisfaction with the "internal management" exemption of former § 3 of the Administrative Procedure Act and was generally designed, as the Senate Report made clear, to delineate between, on the one hand, trivial matters and, on the other, more substantial matters in which the public might have a legitimate interest. Pp. 362–367.

(b) The public has a substantial concern with the Academy's administration of discipline and procedures that affect the training of Air Force officers and their military careers. Pp. 367–369.

3. Exemption 6 does not create a blanket exemption for personnel files. With respect to such files and "similar files" Congress enunciated a policy, to be judicially enforced, involving a balancing of public and private interests. Regardless of whether the documents whose disclosure is sought are in "personnel" or "similar" files, nondisclosure is not sanctioned unless there is a showing of a clearly unwarranted invasion of personal privacy, and redaction of documents to permit disclosure of nonexempt portions is appropriate under Exemption 6. Pp. 370–376.

4. Even if "personnel files" were to be considered as wholly exempt from disclosure under Exemption 6 without regard to whether disclosure would constitute a clearly unwarranted invasion of personal privacy, the case summaries here were not in that category although they constituted "similar files" relating as they

do to the discipline of cadets, and their disclosure implicating similar privacy values. Pp. 376–377.

5. The Court of Appeals did not err in ordering the Agency to produce the case summaries for the District Court's *in camera* examination, a procedure that represents "a workable compromise between individual rights 'and the preservation of public rights to [G]overnment information,'" which is the statutory goal of Exemption 6. Pp. 378–381.

(a) The limitation in Exemption 6 to cases of "clearly unwarranted" invasions of privacy indicates that Congress did not intend a matter to be exempted from disclosure merely because it could not be guaranteed that disclosure would not trigger recollection of identity in any person whatever, and Congress vested the courts with the responsibility of determining *de novo* whether the exemption was properly invoked. Pp. 378–380.

(b) Respondents' request for access to summaries "with personal references or other identifying information deleted" respected the confidentiality interests embodied in Exemption 6 and comported with the Academy's tradition of confidentiality. Pp. 380–381.

495 F. 2d 261, affirmed.

Brennan, J., delivered the opinion of the Court, in which Stewart, White, Marshall, and Powell, JJ., joined. Burger, C. J., *post*, p. 382, Blackmun, J., *post*, p. 385, and Rehnquist, J., *post*, p. 389, filed dissenting opinions. Stevens, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Friedman argued the cause for petitioners. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Lee, Acting Assistant Attorney General Jaffe, Allan Abbot Tuttle, Leonard Schaitman,* and *Donald Etra.*

Barrington D. Parker, Jr., argued the cause for respondents. With him on the brief were *Melvin L. Wulf* and *John H. F. Shattuck.*

Mr. Justice Brennan delivered the opinion of the Court.

Respondents, student editors or former student editors of the New York University Law Review researching

disciplinary systems and procedures at the military service academies for an article for the Law Review,[1] were denied access by petitioners to case summaries of honor and ethics hearings, with personal references or other identifying information deleted, maintained in the United States Air Force Academy's Honor and Ethics Code reading files, although Academy practice is to post copies of such summaries on 40 squadron bulletin boards throughout the Academy and to distribute copies to Academy faculty and administration officials.[2] Thereupon respondents brought this action under the Freedom of Information Act, as amended, 5 U. S. C. § 552 (1970 ed. and Supp. V), in the District Court for the Southern District of New York against petitioners, the Department

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[1] Respondent Michael T. Rose, a graduate of the United States Air Force Academy and at that time a First Lieutenant in the Air Force, was the student editor charged with preparing the study. It finally appeared as a book, M. Rose, A Prayer for Relief: The Constitutional Infirmities of the Military Academies' Conduct, Honor and Ethics Systems (NYU 1973). Respondents Lawrence B. Pedowitz and Charles P. Diamond were, at the time this suit was filed, respectively the former and current Editor-in-Chief of the Review.

[2] Upon respondent Rose's request for documents, Academy officials gave him copies of the Honor Code, the Honor Reference Manual, Lesson Plans, Honor Hearing Procedures, and various other materials explaining the Honor and Ethics Codes. They denied him access to the case summaries, however, on the grounds that even with the names deleted "[s]ome cases may be recognized by the reader by the circumstances alone without the identity of the cadet given" and "[t]here is no way of determining just how these facts will be or could be used." App. 21, 155. On appeal to the Secretary of the Air Force, the Secretary, by letter from his Administrative Assistant, refused disclosure of the case summaries on the ground that they were exempted from disclosure by Exemption 6 of the Freedom of Information Act, 5 U. S. C. § 552 (b)(6), and by Air Force Regulations 12-30, ¶¶ 4 (f) and 4 (g)(1)(b), 32 CFR §§ 806.5 (f), (g)(1)(ii) (1974), App. 21, 121-122.

of the Air Force and Air Force officers who supervise cadets at the United States Air Force Academy (hereinafter collectively the Agency).[3] The District Court granted petitioner Agency's motion for summary judg-

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[3] The Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V), provides in pertinent part:

"(a) Each agency shall make available to the public information as follows:

. . . . .

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

"(4)(A) . . . .

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

. . . . .

"(b) This section does not apply to matters that are—

. . . . .

"(2) related solely to the internal personnel rules and practices of an agency;

. . . . .

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

. . . . .

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

"(c) This section does not authorize withholding of information

ment—without first requiring production of the case summaries for inspection—holding in an unreported opinion that case summaries even with deletions of personal references or other identifying information were "matters . . . related solely to the internal personnel rules and practices of an agency," exempted from mandatory disclosure by § 552 (b)(2) of the statute.[4] The Court of Appeals for the Second Circuit reversed, holding that § 552 (b)(2) did not exempt the case summaries from mandatory disclosure. 495 F. 2d 261 (1974). The Agency argued alternatively, however, that the case summaries constituted "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," exempted from mandatory disclosure by § 552 (b)(6). The District Court held this exemption inapplicable to the case summaries, because it concluded that disclosure of the summaries without names or other identifying information would not subject any former cadet to public identification and stigma, and the possibility of identification by another former cadet could not, in the context of the Academy's practice of distribution and official posting of the summaries, constitute an invasion of personal privacy proscribed by § 552

or limit the availability of records to the public, except as specifically stated in this section. . . ."

[4] Respondents also sought access to a complete study of resignations of Academy graduates from the Air Force. The Agency claimed that the study was exempted from disclosure by 5 U. S. C. § 552 (b)(5), concerning "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The District Court held that since the study had already been offered for dissemination to the public the Agency had waived its rights under the exemption, and accordingly it granted respondents partial summary judgment, requiring the Agency to disclose the complete study to respondents. Pet. for Cert. 35A–38A. The Agency complied with this order.

(b)(6). Pet. for Cert. 32A. The Court of Appeals disagreed with this approach, stating that it "ignores certain practical realities" which militated against the conclusion "that the Agency's internal dissemination of the summaries lessens the concerned cadets' right to privacy, as embodied in Exemption six." 495 F. 2d, at 267. But the court refused to hold, on the one hand, either "that [the Agency] must now, without any prior inspection by a court, turn over the summaries to [respondents] with only the proper names removed . . ." or, on the other hand, "that Exemption Six covers all, or any part of, the summaries in issue." *Id.*, at 268. Rather, the Court of Appeals held that because the Agency had not carried its burden in the District Court, imposed by the Act, of "sustain[ing] its action" by means of affidavits or testimony, further inquiry was required, and "the Agency must now produce the summaries themselves in court" for an *in camera* inspection

> "and cooperate with the judge in redacting the records so as to delete personal references and all other identifying information. . . . We think it highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy." *Ibid.* (Footnotes omitted.)

We granted certiorari, 420 U. S. 923 (1975). We affirm.

I

The District Court made factual findings respecting the administration of the Honor and Ethics Codes at the Academy. See Pet. for Cert. 28A–29A, nn. 5, 6. Under the Honor Code enrolled cadets pledge: "We will not lie, steal, or cheat, nor tolerate among us any-

one who does." The Honor Code is administered by an Honor Committee composed of Academy cadets. Suspected violations of the Code are referred to the Chairman of the Honor Committee, who appoints a three-cadet investigatory team which, with advice from the legal adviser, evaluates the facts and determines whether a hearing before an Honor Board of eight cadets, is warranted. If the team finds no hearing warranted, the case is closed. If it finds there should be a hearing, the accused cadet may call witnesses to testify in his behalf, and each cadet squadron may ordinarily send two cadets to observe.

The Board may return a guilty finding only upon unanimous vote. If the verdict is guilty, under certain circumstances the Board may grant the guilty cadet "discretion," for which a vote of six of the eight members is required. A verdict of guilty with discretion is equivalent to a not-guilty finding in that the cadet is returned to his cadet squadron in good standing. A verdict of guilty without discretion results in one of three alternative dispositions: the cadet may resign from the Academy, request a hearing before a Board of Officers, or request a trial by court-martial.

At the announcement of the verdict, the Honor Committee Chairman reminds all cadets present at the hearing that all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an honor representative. A case summary consisting of a brief statement, usually only one page, of the significant facts is prepared by the Committee. As we have said, copies of the summaries are posted on 40 squadron bulletin boards throughout the Academy, and distributed among Academy faculty and administration officials. Cadets are instructed not to read the summaries, unless they have a need, beyond mere curiosity, to know their contents, and the reading

files are covered with a notice that they are "for official use only." Case summaries for not-guilty and discretion cases are circulated with names deleted; in guilty cases, the guilty cadet's name is not deleted from the summary, but posting on the bulletin boards is deferred until after the guilty cadet has left the Academy.

Ethics Code violations are breaches of conduct less serious than Honor Code violations, and administration of Ethics Code cases is generally less structured, though similar. In many instances, ethics cases are handled informally by the cadet squadron commander, the squadron ethics representative, and the individual concerned. These cases are not necessarily written up and no complete file is maintained; a case is written up and the summary placed in back of the Honor Code reading files only if it is determined to be of value for the cadet population. Distribution of Ethics Code summaries is substantially the same as that of Honor Code summaries, and their confidentiality, too, is maintained by Academy custom and practice.

II

Our discussion may conveniently begin by again emphasizing the basic thrust of the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V). We canvassed the subject at some length three years ago in *EPA* v. *Mink,* 410 U. S. 73, 79–80 (1973), and need only briefly review that history here. The Act revises § 3, the public disclosure section, of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.). The revision was deemed necessary because "Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." *Mink, supra,* at 79. Congress therefore structured a revision whose basic purpose reflected "a general philosophy of full agency disclosure unless in-

formation is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) (hereinafter S. Rep. No. 813). To make crystal clear the congressional objective—in the words of the Court of Appeals, "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," 495 F. 2d, at 263—Congress provided in § 552 (c) that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated . . . ." Consistently with that objective, the Act repeatedly states "that official information shall be made available 'to the public,' 'for public inspection.'" *Mink, supra,* at 79. There are, however, exemptions from compelled disclosure. They are nine in number and are set forth in § 552 (b). But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. "These exemptions are explicitly made exclusive, 5 U. S. C. § 552 (c) . . . ," *Mink, supra,* at 79, and must be narrowly construed. *Vaughn* v. *Rosen,* 157 U. S. App. D. C. 340, 343, 484 F. 2d 820, 823 (1973); 173 U. S. App. D. C. 187, 193, 523 F. 2d 1136, 1142 (1975); *Soucie* v. *David,* 145 U. S. App. D. C. 144, 157, 448 F. 2d 1067, 1080 (1971). In sum, as said in *Mink, supra,* at 80:

> "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was

not 'an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.' S. Rep. No. 813, p. 3."

Mindful of the congressional purpose, we then turn to consider whether mandatory disclosure of the case summaries is exempted by either of the exemptions involved here, discussing, *first,* Exemption 2, and, *second,* Exemption 6.

III

The phrasing of Exemption 2 is traceable to congressional dissatisfaction with the exemption from disclosure under former § 3 of the Administrative Procedure Act of "any matter relating solely to the internal management of an agency." 5 U. S. C. § 1002 (1964 ed.). The sweep of that wording led to withholding by agencies from disclosure of matter "rang[ing] from the important to the insignificant." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 5 (1966) (hereinafter H. R. Rep. No. 1497). An earlier effort at minimizing this sweep, S. 1666 introduced in the 88th Congress in 1963, applied the "internal management" exemption only to matters required to be published in the Federal Register; agency orders and records were exempted from other public disclosure only when the information related "solely to the internal personnel rules and practices of any agency." The distinction was highlighted in the Senate Report on S. 1666 by reference to the latter as the "more tightly drawn" exempting language. S. Rep. No. 1219, 88th Cong., 2d Sess., 12 (1964).

No final action was taken on S. 1666 in the 88th Congress; the Senate passed the bill, but it reached the

House too late for action. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 18 n. 18 (1974). But the bill introduced in the Senate in 1965 that became law in 1966 dropped the "internal management" exemption for matters required to be published in the Federal Register and consolidated all exemptions into a single subsection. Thus, legislative history plainly evidences the congressional conclusion that the wording of Exemption 2, "internal personnel rules and practices," was to have a narrower reach than the Administrative Procedure Act's exemption for "internal management" matters.

But that is not the end of the inquiry. The House and Senate Reports on the bill finally enacted differ upon the scope of the narrowed exemption. The Senate Report stated:

> "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 813, p. 8.

The House Report, on the other hand, declared:

> "2. Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." H. R. Rep. No. 1497, p. 10.

Almost all courts that have considered the difference between the Reports have concluded that the Senate Report more accurately reflects the congressional pur-

pose.[5] Those cases relying on the House, rather than the Senate, interpretation of Exemption 2, and permitting agency withholding of matters of some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function. See, *e. g., Tietze* v. *Richardson,* 342 F. Supp. 610 (SD Tex. 1972); *Cuneo* v. *Laird,* 338 F. Supp. 504 (DC 1972), rev'd on other grounds *sub nom. Cuneo* v. *Schlesinger,* 157 U. S. App. D. C. 368, 484 F. 2d 1086 (1973); *City of Concord* v. *Ambrose,* 333 F. Supp. 958 (ND Cal. 1971) (dictum). Moreover, the legislative history indicates that this was the primary concern of the committee drafting the House Report. See Hearings on H. R. 5012 before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 29-30 (1965), cited in H. R. Rep. No. 1497, p. 10 n. 14. We need not consider in this case the applicability of Exemption 2 in such circumstances, however, because, as the Court of Appeals recognized, this is not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards. Release of the [sanitized] summaries, which constitute quasi-legal records, poses no such danger to the effective operation of the Codes at the Academy." 495 F. 2d, at 265 (footnote omitted). Indeed, the materials sought in this case are distributed to the

[5] *E. g., Stokes* v. *Brennan,* 476 F. 2d 699, 703 (CA5 1973); *Hawkes* v. *IRS,* 467 F. 2d 787, 796 (CA6 1972); *Stern* v. *Richardson,* 367 F. Supp. 1316, 1320 (DC 1973); *Consumers Union of United States, Inc.* v. *Veterans Administration,* 301 F. Supp. 796, 801 (SDNY 1969), appeal dismissed as moot, 436 F. 2d 1363 (CA2 1971); *Benson* v. *GSA,* 289 F. Supp. 590, 595 (WD Wash. 1968), aff'd, 415 F. 2d 878 (CA9 1969) (Exemption 2 apparently not raised on appeal).

subjects of regulation, the cadets, precisely in order to assure their compliance with the known content of the Codes.

It might appear, nonetheless, that the House Report's reference to "[o]perating rules, guidelines, and manuals of procedure" supports a much broader interpretation of the exemption than the Senate Report's circumscribed examples. This argument was recently considered and rejected by Judge Wilkey speaking for the Court of Appeals for the District of Columbia Circuit in *Vaughn* v. *Rosen,* 173 U. S. App. D. C., at 193–194, 523 F. 2d, at 1142:

> "Congress intended that Exemption 2 be interpreted narrowly and specifically. In our view, the House Report carries the potential of exempting a wide swath of information under the category of 'operating rules, guidelines, and manuals of procedure. . . .' The House Report states that the exemption 'would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures . . .' and yet it gives precious little guidance as to which matters are covered by the exemption and which are not. Although it is equally terse, the Senate Report indicates that the line sought to be drawn is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest.
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> "This is a standard, a guide, which an agency and then a court, if need be, can apply with some certainty, consistency and clarity. . . .
>
> "Reinforcing this interpretation is 'the clear legislative intent [of the FOIA] to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.'

[*Soucie* v. *David,* 145 U. S. App. D. C. 144, 157, 448 F. 2d 1067, 1080 (1971)]. As a result, we have repeatedly stated that '[t]he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.' [*Ibid.; Vaughn* v. *Rosen,* 157 U. S. App. D. C. 340, 343, 484 F. 2d 820, 823 (1973).] Thus, faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure.

"The second major consideration favoring reliance upon the Senate Report is the fact that it was the only committee report that was before both houses of Congress. The House unanimously passed the Senate Bill without amendment, therefore no conference committee was necessary to reconcile conflicting provisions. . . .

". . . [W]e as a court viewing the legislative history must be wary of relying upon the House Report, or even the statements of House sponsors, where their views differ from those expressed in the Senate. As Professor Davis said: 'The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one.' [See generally K. Davis, Administrative Law Treatise § 3A.31, p. 175 (1970 Supp.).] By unanimously passing the Senate Bill without amendment, the House denied both the Senate Committee and the entire Senate an opportunity to object (or concur) to the interpretation written into the House Report (or voiced in floor colloquy). This being the case, we choose to rely upon the Senate Report."

For the reasons stated by Judge Wilkey, and because we think the primary focus of the House Report was on exemption of disclosures that might enable the regulated

to circumvent agency regulation, we too "choose to rely upon the Senate Report" in this regard.

The District Court had also concluded in this case that the Senate Report was "the surer indication of congressional intent." Pet. for Cert. 34A n. 21. The Court of Appeals found it unnecessary to take "a firm stand on the issue," concluding that "the difference of approach between the House and Senate Reports would not affect the result here." 495 F. 2d, at 265. The different conclusions of the two courts in applying the Senate Report's interpretation centered upon a disagreement as to the materiality of the public significance of the operation of the Honor and Ethics Codes. The District Court based its conclusion on a determination that the Honor and Ethics Codes "[b]y definition . . . are meant to control only those people in the agency. . . . The operation of the Honor Code cannot possibly affect anyone outside its sphere of voluntary participation which is limited by its function and its publication to the Academy." Pet. for Cert. 34A. The Court of Appeals on the other hand concluded that under "the Senate construction of Exemption Two, [the] case summaries . . . clearly fall outside its ambit" because "[s]uch summaries have a substantial potential for public interest outside the Government." 495 F. 2d, at 265.

We agree with the approach and conclusion of the Court of Appeals. The implication for the general public of the Academy's administration of discipline is obvious, particularly so in light of the unique role of the military. What we have said of the military in other contexts has equal application here: it "constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953), in which the internal law of command and obedience invests the military officer with "a particular position of responsibility." *Parker* v. *Levy*,

417 U. S. 733, 744 (1974). Within this discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior.[6] The importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military. Moreover, the same essential integrity is critical to the military's relationship with its civilian direction. Since the purpose of the Honor and Ethics Codes administered and enforced at the Air Force Academy is to ingrain the ethical reflexes basic to these responsibilities in future Air Force officers, and to select out those candidates apparently unlikely to serve these standards, it follows that the nature of this instruction—and its adequacy or inadequacy—is significantly related to the substantive public role of the Air Force and its Academy. Indeed, the public's stake in the operation of the Codes as they affect the training of future Air Force officers and their military careers is underscored by the Agency's own proclamations of the importance of cadet-administered Codes to the Academy's educational and training program. Thus, the Court of Appeals said, and we agree:

"[Respondents] have drawn our attention to various

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[6] The Honor Reference Handbook of the Air Force Cadet Wing 1 (1970) recites:

"Former Secretary of War, Newton Baker, said, '. . . the inexact or untruthful soldier trifles with the lives of his fellow men and with the honor of his government. . . .' The young officer needs to be able to trust his men as does any commander. In these times of expensive and increasingly complex weapons systems, the officer must rely on fellow officers and airmen for his own safety and the safety of his men." App. 47.

items such as newspaper excerpts, a press conference by an Academy officer and a White House Press Release, which illustrate the extent of general concern with the working of the Cadet Honor Code. As the press conference and the Press Release show, some of the interest has been generated—or at least enhanced—by acts of the Government itself. Of course, even without such official encouragement, there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets. The very study involved in this case bears additional witness to the degree of professional and academic interest in the Academy's student-run system of discipline. . . . [This factor] differentiate[s] the summaries from matters of daily routine like working hours, which, in the words of Exemption Two, do relate '*solely* to the internal personnel rules and practices of an agency.'" 495 F. 2d, at 265 (emphasis in Court of Appeals opinion).

In sum, we think that, at least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest. The exemption was not designed to authorize withholding of all matters except otherwise secret law bearing directly on the propriety of actions of members of the public. Rather, the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to

have an interest.[7] The case summaries plainly do not fit that description. They are not matter with merely internal significance. They do not concern only routine matters. Their disclosure entails no particular administrative burden. We therefore agree with the Court of Appeals that, given the Senate interpretation, "the Agency's withholding of the case summaries (as edited to preserve anonymity) cannot be upheld by reliance on the second exemption." *Id.*, at 266.[8]

IV

Additional questions are involved in the determination whether Exemption 6 exempts the case summaries from mandatory disclosure as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The first question is whether the clause "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" modifies "personnel and medical files" or only "similar files." The Agency argues that Exemption 6 distinguishes "personnel" from "similar" files, exempting all "personnel files" but only those "similar files" whose disclosure constitutes "a

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[7] See, *e. g.*, Note, the Freedom of Information Act: A Seven-Year Assessment, 74 Col. L. Rev. 895, 956 (1974); Note, Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame Law. 417, 445 (1965). See also *Vaughn* v. *Rosen*, 173 U. S. App. D. C. 187, 201, 523 F. 2d 1136, 1150 (1975) (Leventhal, J., concurring).

[8] The Agency suggests that the disclosure of the identities of disciplined cadets through release of the case summaries will weaken the Honor and Ethics Codes, principally because other cadets will be less likely to report misconduct if they cannot be assured of the absolute confidentiality of their reports. But even assuming that this speculation raises an argument under Exemption 2—rather than Exemption 6 alone—it is unpersuasive in light of the deletion process ordered by the Court of Appeals to be conducted on remand.

clearly unwarranted invasion of personal privacy," and that the case summaries sought here are "personnel files." On this reading, if it is determined that the case summaries are "personnel files," the Agency argues that judicial inquiry is at an end, and that the Court of Appeals therefore erred in remanding for determination whether disclosure after redaction would constitute "a clearly unwarranted invasion of personal privacy."

The Agency did not argue its suggested distinction between "personnel" and "similar" files to either the District Court or the Court of Appeals, and the opinions of both courts treat Exemption 6 as making no distinction between "personnel" and "similar" files in the application of the "clearly unwarranted invasion of personal privacy" requirement. The District Court held that "[i]t is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of [the] sixth exemption." Pet. for Cert. 30A–31A. The Court of Appeals stated: "[W]e are dealing here with 'personnel' or 'similar files.' But the key words, of course, are 'a clearly unwarranted invasion of personal privacy' . . . ." 495 F. 2d, at 266.

We agree with these views, for we find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files. Judicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy, whether the documents are filed in "personnel" or "similar" files. See, *e. g., Wine Hobby USA, Inc.* v. *IRS,* 502 F. 2d 133, 135 (CA3 1974); *Rural Housing Alliance* v. *United States Dept. of Agriculture,* 162 U. S. App. D. C. 122, 126, 498 F. 2d 73, 77 (1974); *Vaughn* v. *Rosen,* 157 U. S. App. D. C. 340, 484 F. 2d 820 (1973); *Getman* v. *NLRB,* 146 U. S.

App. D. C. 209, 213, 450 F. 2d 670, 674 (1971). Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its "personnel" files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for "clearly unwarranted" invasions of personal privacy.

Both House and Senate Reports can only be read as disclosing a congressional purpose to eschew a blanket exemption for "personnel . . . and similar files" and to require a balancing of interests in either case. Thus the House Report states, H. R. Rep. No. 1497, p. 11: "The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." Similarly, the Senate Report, S. Rep. No. 813, p. 9, states: "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." [9] Plainly

[9] The Report states further, S. Rep. No. 813, p. 3:

"At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally

Congress did not itself strike the balance as to "personnel files" and confine the courts to striking the balance only as to "similar files." To the contrary, Congress enunciated a single policy, to be enforced in both cases by the courts, "that will involve a balancing" of the private and public interests.[10] This was the conclusion of the Court of Appeals for the District of Columbia Circuit as to medical files, and that conclusion is equally applicable to personnel files:

> "Exemption (6) of the Act covers '. . . medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' Where a purely medical file is withheld under authority of Exemption (6), it will be for the District Court ultimately to determine any dispute as to whether that exemption was properly invoked." *Ackerly* v. *Ley,* 137 U. S. App. D. C. 133, 136–137, n. 3, 420 F. 2d 1336, 1339–1340, n. 3 (1969) (ellipses in original).

See also *Wine Hobby USA, Inc.* v. *IRS, supra,* at 135.

Congress' recent action in amending the Freedom of Information Act to make explicit its agreement with

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important rights of privacy with respect to certain information in Government files, such as medical and personnel records . . . .

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

[10] See generally H. R. Rep. No. 1497, p. 11: "A *general* exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance . . . ." (Emphasis supplied.) The Senate Report, as well, speaks of a "general exemption" which is "held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" S. Rep. No. 813, p. 9.

judicial decisions [11] requiring the disclosure of nonexempt portions of otherwise exempt files is consistent with this conclusion. Thus, 5 U. S. C. § 552 (b) (1970 ed., Supp. V) now provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." [12] And § 552 (a)(4)(B) (1970 ed., Supp. V) was added explicitly to authorize *in camera* inspection of matter claimed to be exempt "to determine whether such records *or any part* thereof shall be withheld." (Emphasis supplied.) The Senate Report accompanying this legislation explains, without distinguishing "personnel and medical files" from "similar files," that its effect is to require courts

> "to look beneath the label on a file or record when the withholding of information is challenged. . . .
>
> ". . . [W]here files are involved [courts will] have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply." S. Rep. No. 93-854, p. 32 (1974).

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[11] *E. g., Vaughn* v. *Rosen,* 157 U. S. App. D. C. 340, 345, 484 F. 2d 820, 825 (1973); *Soucie* v. *David,* 145 U. S. App. D. C. 144, 156, 448 F. 2d 1067, 1079 (1971); *Bristol-Myers Co.* v. *FTC,* 138 U. S. App. D. C. 22, 26, 424 F. 2d 935, 938-939 (1970). Accord, *Rural Housing Alliance* v. *United States Dept. of Agriculture,* 162 U. S. App. D. C. 122, 126-127, 498 F. 2d 73, 78 (1974). Cf. 5 U. S. C. § 552 (a)(2)(C) (1970 ed., Supp. V) providing:

"To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction."

[12] The Senate Report on this amendment cited with evident approval the decision of the Court of Appeals in this case remanding to the District Court for redaction of the case summaries to accommodate the dual interests. S. Rep. No. 93-854, pp. 31-32 (1974).

The remarks of Senator Kennedy, a principal sponsor of the amendments, make the matter even clearer.

> "For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.'" 120 Cong. Rec. 17018 (1974).

In so specifying, Congress confirmed what had perhaps been only less clear earlier. For the Senate and House Reports on the bill enacted in 1966 noted specifically that Health, Education, and Welfare files, Selective Service files, or Veterans' Administration files, which as the Agency here recognizes[13] were clearly included within the congressional conception of "personnel files,"[14] were nevertheless intended to be subject to mandatory disclosure in redacted form if privacy could be sufficiently protected. As the House Report states, H. R.

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[13] Brief for Petitioners 13–16.

[14] There is sparse legislative history as to the precise scope intended for the term "personnel files," a detail which itself suggests that Congress intended that particular characterization not to be critical in the application of Exemption 6. But it is quite clear from the committee reports that the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters in such files as those maintained by the Department of Health, Education, and Welfare, the Selective Service, and the Veterans' Administration. S. Rep. No. 813, p. 9; H. R. Rep. No. 1497, p. 11. Moreover, the Senate Report on S. 1666, the principal source for the bill ultimately enacted as the Freedom of Information Act, and Exemption 6 in particular, specifically refers to such files as "personnel files." S. Rep. No. 1219, 88th Cong., 2d Sess., 14 (1964). See also Hearings on H. R. 5012 before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 265, 267 (analysis of agency comments on S. 1666) (1965).

Rep. No. 1497, p. 11: "The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records." Similarly, the Senate Report emphasized, S. Rep. No. 813, p. 9: "For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public."

Moreover, even if we were to agree that "personnel files" are wholly exempt from any disclosure under Exemption 6, it is clear that the case summaries sought here lack the attributes of "personnel files" as commonly understood. Two attributes of the case summaries require that they be characterized as "similar files." First, they relate to the discipline of cadet personnel, and while even Air Force Regulations themselves show that this single factor is insufficient to characterize the summaries as "personnel files," [15] it supports the conclusion that they are "similar." Second, and most significantly, the disclosure of these summaries implicates similar privacy values; for as said by the Court of

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[15] Air Force Regulations in force at the time of the decisions below drew a distinction between "personnel and medical files," 32 CFR § 806.5 (f) (1974), and "files similar to medical and personnel files," 32 CFR § 806.5 (g) (1974), which clearly categorized case summaries among the latter: "Examples of similar files are those: . . . containing reports, records, and other material pertaining to *personnel matters* in which administrative action, including *disciplinary action,* may be taken or has been taken." 32 CFR § 806.5 (g) (1)(ii) (1974), 36 Fed. Reg. 4701 (1971) (emphasis supplied). After the Court of Appeals' decision, these regulations were amended, *inter alia* deleting the last four words, 32 CFR § 806.23 (f)(1)(ii), 40 Fed. Reg. 7904 (1975), but this alteration is in any event insignificant to the point here.

Appeals, 495 F. 2d, at 267, "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." See generally, *e. g., Wine Hobby USA, Inc.* v. *IRS,* 502 F. 2d, at 135–137; *Rural Housing Alliance* v. *United States Dept. of Agriculture,* 162 U. S. App D. C., at 125–126, 498 F. 2d, at 76–77; *Robles* v. *EPA,* 484 F. 2d 843, 845–846 (CA4 1973). But these summaries, collected only in the Honor and Ethics Code reading files and the Academy's honor records, do not contain the "vast amounts of personal data," S. Rep. No. 813, p. 9, which constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance. Moreover, access to these files is not drastically limited, as is customarily true of personnel files, only to supervisory personnel directly involved with the individual (apart from the personnel department itself), frequently thus excluding even the individual himself. On the contrary, the case summaries name no names except in guilty cases, are widely disseminated for examination by fellow cadets, contain no facts except such as pertain to the alleged violation of the Honor or Ethics Codes, and are justified by the Academy solely for their value as an educational and instructional tool the better to train military officers for discharge of their important and exacting functions. Documents treated by the Agency in such a manner cannot reasonably be claimed to be within the common and congressional meaning of what constitutes a "personnel file" under Exemption 6.

The Agency argues secondly that, even taking the case summaries as files to which the "clearly unwarranted invasion of personal privacy" qualification applies, the Court of Appeals nevertheless improperly ordered the Agency to produce the case summaries in the District Court for *in camera* examination to eliminate information that could result in identifying cadets involved in Honor or Ethics Code violations. The argument is, in substance, that the recognition by the Court of Appeals of "the harm that might result to the cadets from disclosure" itself demonstrates "[t]he ineffectiveness of excision of names and other identifying facts as a means of maintaining the confidentiality of persons named in government reports . . . ." Brief for Petitioners 17–18.

This contention has no merit. First, the argument implies that Congress barred disclosure in any case in which the conclusion could not be guaranteed that disclosure would not trigger recollection of identity in any person whatever. But this ignores Congress' limitation of the exemption to cases of "clearly unwarranted" [16] invasions

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[16] The addition of this qualification was a considered and significant determination. *Robles* v. *EPA,* 484 F. 2d 843, 846 (CA4 1973); *Getman* v. *NLRB,* 146 U. S. App. D. C. 209, 213, 450 F. 2d 670, 674 (1971). The National Labor Relations Board and the Treasury Department urged at the hearings on the Act that the "clearly" or "clearly unwarranted" qualification in Exemption 6 be deleted. See Hearings on S. 1160 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 36 (Treasury), 491 (NLRB) (1965); Hearings on H. R. 5012 before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 56, 230 (Treasury), 257 (NLRB) (1965). See also Hearings on S. 1160, *supra,* at 417 (Department of Defense; objecting to "heavy" burden of showing a *clearly unwarranted* invasion of personal privacy). But see also Hearings on H. R. 5012, *supra,* at 151 (testimony of Clark R. Mollenhoff, Vice Chairman, Sigma Delta Chi Committee for

of personal privacy.[17] Second, Congress vested the courts with the responsibility ultimately to determine "*de novo*" any dispute as to whether the exemption was properly invoked in order to constrain agencies from withholding nonexempt matters.[18] No court has yet seen the case

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Advancement of Freedom of Information; advocating the retention of "clearly" in Exemption 6). The terms objected to were nevertheless retained, as a "proper balance," H. R. Rep. No. 1497, p. 11, to keep the "scope of the exemption . . . within bounds," S. Rep. No. 813, p. 9.

The legislative history of the 1974 amendment of Exemption 7, which applies to investigatory files compiled for law enforcement purposes, stands in marked contrast. Under H. R. 12471, 93d Cong., 2d Sess. (1974), as originally amended and passed by the Senate, 120 Cong. Rec. 17033, 17040, 17047 (1974), although not as originally passed by the House, 120 Cong. Rec. 6819–6820 (1974), Exemption 7 was amended to exempt investigatory files compiled for law enforcement purposes only to the extent that their production would "constitute a clearly unwarranted invasion of personal privacy" or meet one of several other conditions. In response to a Presidential request to delete "clearly unwarranted" from the amendment in the interests of personal privacy, the Conference Committee dropped the "clearly," 120 Cong. Rec. 33158–33159 (letters between President Ford and Sen. Kennedy), 34162 (letters between President Ford and Cong. Moorhead) (1974), and the bill was enacted as reported by the conference committee, 88 Stat. 1563.

[17] The Court of Appeals held that the argument raised by the Agency that courts have a broad equitable power to decline to order release when disclosure would damage the public interest was not a substantial one in the context of Exemption 6, since that exemption itself requires a court to exercise a large measure of discretion. 495 F. 2d, at 269. The Agency has not renewed this argument in this Court.

[18] 5 U. S. C. § 552 (a)(4)(B) (1970 ed., Supp. V). One of the prime shortcomings of § 3 of the Administrative Procedure Act, in the view of the Congress which passed the Freedom of Information Act, was precisely that it provided no judicial remedy for the unauthorized withholding of agency records. *EPA* v. *Mink*, 410 U. S. 73, 79 (1973).

histories, and the Court of Appeals was therefore correct in holding that the function of examination must be discharged in the first instance by the District Court. *Ackerly* v. *Ley,* 137 U. S. App. D. C. 133, 420 F. 2d 1336 (1969); *Rural Housing Alliance* v. *United States Dept. of Agriculture, supra.*

In striking the balance whether to order disclosure of all or part of the case summaries, the District Court, in determining whether disclosure will entail a "clearly unwarranted" invasion of personal privacy, may properly discount its probability in light of Academy tradition to keep identities confidential within the Academy.[19] Respondents sought only such disclosure as was consistent with this tradition. Their request for access to summaries "with personal references or other identifying information deleted," respected the confidentiality interests embodied in Exemption 6. As the Court of Appeals recognized, however, what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets or Academy staff, with other aspects of his career at the Academy. Despite the summaries' distribution within the Academy, many of this group with earlier access to summaries may never have identified a particu-

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[19] The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities. The House Report explains that the exemption was intended to exclude files "the disclosure of which might harm the individual . . . [and] detailed Government records on an individual which *can* be identified as applying to that individual . . . ." H. R. Rep. No. 1497, p. 11 (emphasis supplied). And the Senate Report states that the balance to be drawn under Exemption 6's "clearly unwarranted invasion of personal privacy" clause is one between "the protection of an individual's private affairs from *unnecessary* public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813, p. 9 (emphasis supplied).

lar cadet, or may have wholly forgotten his encounter with Academy discipline. And the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial. We nevertheless conclude that consideration of the policies underlying the Freedom of Information Act, to open public business to public view when no "clearly unwarranted" invasion of privacy will result, requires affirmance of the holding of the Court of Appeals, 495 F. 2d, at 267, that although "no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty," it sufficed to protect privacy at this stage in these proceedings by enjoining the District Court, *id.,* at 268, that if in its opinion deletion of personal references and other identifying information "is not sufficient to safeguard privacy, then the summaries should not be disclosed to [respondents]." We hold, therefore, in agreement with the Court of Appeals, "that the in camera procedure [ordered] will further the statutory goal of Exemption Six: a workable compromise between individual rights 'and the preservation of public rights to Government information.' " *Id.,* at 269.

To be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts [20] and exemptions to disclosure under the Act were intended to be prac-

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[20] The Court of Appeals cited as examples Revenue Rulings collected in the Cumulative Bulletin of the Internal Revenue Service, and American Bar Association, Opinions on Professional Ethics (1967). 495 F. 2d, at 268 n. 18.

tical workable concepts, *EPA* v. *Mink,* 410 U. S., at 79; S. Rep. No. 813, p. 5; H. R. Rep. No. 1497, p. 2. Moreover, we repeat, Exemption 6 does not protect against disclosure every incidental invasion of privacy—only such disclosures as constitute "clearly unwarranted" invasions of personal privacy.

Affirmed.

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

MR. CHIEF JUSTICE BURGER, dissenting.

If "hard cases make bad law," unusual cases surely have the potential to make even worse law. Today, on the basis of a highly unusual request for information about a unique governmental process, a military academy honor system, the Court interprets definitively a substantial and very significant part of a major federal statute governing the balance between the public's "right to know" and the privacy of the individual citizen.

In my view, the Court makes this case carry too much jurisprudential baggage. Consequently, the basic congressional intent to protect a reasonable balance between the availability of information in the custody of the Government and the particular individual's right of privacy is undermined. In addition, district courts are burdened with a task Congress could not have intended for them.

(1) This case does not compel us to decide whether the summaries at issue here are "personnel files" or whether files so categorized are beyond the proviso of Exemption 6 that disclosure constitute "a clearly unwarranted invasion of personal privacy." Even assuming, *arguendo,* that the Government must show that the summaries are subject to the foregoing standard, it is quite

clear, in my view, that the disclosure of the material at issue here constitutes such an invasion, no matter what excision process is attempted by a federal judge.

The Court correctly notes that Congress, in enacting Exemption 6, intended to strike "a proper balance between the protection of the individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 11 (1966). Having acknowledged the necessity of such a balance, however, the Court, in my view, blandly ignores and thereby frustrates the congressional intent by refusing to weigh, realistically, the grave consequences implicit in release of this particular information, in any form, against the relatively inconsequential claim of "need" for the material alleged in the complaint.

The opinions of this Court have long recognized the opprobrium which both the civilian and the military segments of our society attribute to allegations of dishonor among commissioned officers of our Armed Forces. See, *e. g., Parker* v. *Levy,* 417 U. S. 733, 744 (1974), quoting *Orloff* v. *Willoughby,* 345 U. S. 83, 91 (1953). The stigma which our society imposes on the individual who has accepted such a position of trust [1] and abused it is not erasable, in any realistic sense, by the passage of time

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[1] As the Court noted in *Orloff* v. *Willoughby,* 345 U. S., at 91: "The President's commission [uses the words] 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee. . . ." An officer may be punitively dismissed (the equivalent of a dishonorable discharge) when found guilty of *any* offense by a general court-martial, regardless of the limitations placed on the punishment for the offense when committed by enlisted personnel. Manual for Courts-Martial ¶ 126*d* (1969). See generally *United States* v. *Goodwin,* 5 U. S. C. M. A. 647, 18 C. M. R. 271 (1955).

or even by subsequent exemplary conduct. The absence of the broken sword, the torn epaulets, and the Rogue's March from our military ritual does not lessen the indelibility of the stigma. Significantly, cadets and midshipmen—"*inchoate* officers" [2]—have traditionally been held to the same high standards and subjected to the same stigma as commissioned officers when involved in matters with overtones of dishonor.[3] Indeed, the mode of punitive separation as the result of court-martial is the same for both officers and cadets—dismissal. *United States* v. *Ellman,* 9 U. S. C. M. A. 549, 26 C. M. R. 329 (1958). Moreover, as the Court of Appeals noted, it is unrealistic to conclude, in most cases, that a finding of "not guilty" or "discretion" exonerates the cadet in anything other than the purely technical and legal sense of the term.

Admittedly, the Court requires that, before release, these documents be subject to *in camera* inspection with power of excising parts. But, as the Court admits, any such attempt to "sanitize" these summaries would still leave the very distinct possibility that the individual would still be identifiable and thereby injured. In light of Congress' recent manifest concern in the Privacy Act of 1974, 5 U. S. C. § 552a (1970 ed., Supp. V), for "governmental respect for the privacy of citizens . . . ," S. Rep. No. 93-1183, p. 1 (1974), it is indeed difficult to attribute to Congress a willingness to subject an individual citizen to the risk of possible severe damage to his reputation simply to permit law students to invade individual privacy to prepare a law journal article. Its definition of a "clearly unwarranted invasion of personal

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[2] 7 Op. Atty. Gen. 332 (1855).

[3] Article 133, Uniform Code of Military Justice, 10 U. S. C. § 933, states, for example:

"Any commissioned officer, *cadet, or midshipman* who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." (Emphasis supplied.)

privacy" as equated with "protect[ing] an individual's private affairs from *unnecessary* public scrutiny . . . ," S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965) (emphasis supplied), would otherwise be rendered meaningless.

(2) Moreover, excision would not only be ineffectual in accomplishing the legislative intent of protecting an individual's affairs from unnecessary public scrutiny, but it would place an intolerable burden upon a district court which, in my view, Congress never intended to inflict. Although the 1974 amendments to the Freedom of Information Act require that "[a]ny reasonably segregable portion of a record . . . ," 5 U. S. C. § 552 (b) (1970 ed., Supp. V), otherwise exempt, be provided, there is nothing in the legislative history of the original Act or its amendments which would require a district court to construct, in effect, a new document. Yet, the excision process mandated here could only require such a sweeping reconstruction of the material that the end product would constitute an entirely new document. No provision of the Freedom of Information Act contemplates a federal district judge acting as a "rewrite editor" of the original material.

If the Court's holding is indeed a fair reflection of congressional intent, we are confronted with a "split-personality" legislative reaction, by the conflict between a seeming passion for privacy and a comparable passion for needless invasions of privacy.

Accordingly, I would reverse the judgment of the Court of Appeals.

MR. JUSTICE BLACKMUN, dissenting.

We are here concerned with the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V), and with two of the exemptions provided by § 552 (b). The Court in the very recent past has not hesitated consist-

ently to provide force to the congressionally mandated exemptions. See *FAA Administrator* v. *Robertson,* 422 U. S. 255 (1975); *Renegotiation Board* v. *Grumman Aircraft,* 421 U. S. 168 (1975); *NLRB* v. *Sears, Roebuck & Co.,* 421 U. S. 132 (1975); *EPA* v. *Mink,* 410 U. S. 73 (1973). See also *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U. S. 1 (1974). Today, I fear, the Court does just the opposite.

A. The Act's second exemption, § 552 (b)(2), extends to matters that are "related solely to the internal personnel rules and practices of an agency." There can be no doubt that the Department of the Air Force, including the faculty and staff who supervise cadets at the Air Force Academy, qualifies as an "agency," within the meaning of § 522 (b)(2), and the Court so recognizes. *Ante,* at 355–356. I would have thought, however, that matters that concern the established Honor Codes of our military academies, codes long in existence and part of our military society and tradition, see *Parker* v. *Levy,* 417 U. S. 733, 743–744 (1974), and the disciplining of cadets as they move along in their Government-supplied education, would clearly qualify as "internal personnel . . . practices" of that agency. By its very nature, this smacks of personnel and personnel problems and practices. It is the agency's internal business and not the public's, and, because it is, the exemption is, or should be, afforded. Thus, although the Court does not, I find great support in the language of the second exemption for the petitioners' position here. To me, it makes both obvious and common sense, and I would hold, as did the District Court, that the Act's second exemption applies to the case summaries respondent Rose so ardently desired, and removes them from his eager grasp.

I cannot accept the rationale of the Court of Appeals majority that the existence of a "substantial potential for

public interest outside the Government," 495 F. 2d 261, 265 (1974), makes these case summaries any less related "solely" to internal personnel rules and practices. Surely, public interest, which is secondary and a by-product, does not measure "sole relationship," which is a primary concept. These summaries involve the discipline, fitness, and training of cadets. They are administered and enforced on an Academy-limited basis by the cadets themselves, and they exist wholly apart from the formal system of courts-martial and the Uniform Code of Military Justice.

B. The Act's sixth exemption, § 522 (b)(6), is equally supportive for the petitioners here and for the result opposite to that which the Court reaches today. This exemption applies to matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Once again, we have a specific reference to "personnel . . . files," and what I have said above applies equally here. But, in addition, the sixth exemption covers "similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The added restrictive phrase applies not to "personnel," and surely not to "medical files," but only to "similar files." See *Robles* v. *EPA*, 484 F. 2d 843, 845–846 (CA4 1973). The emphasis is on personnel files and on medical files and on "similar" files to the extent that privacy invasion of the latter would be unwarranted. The exemption as to personnel files and as to medical files is clear and unembellished. It is almost inconceivable to me that the Court is willing today to attach the qualification phrase to medical files and thereby open to the public what has been recognized as almost the essence of ultimate privacy. The law's long established physician-patient privilege establishes this.

Anyone who has had even minimal contact with the practice of medicine surely cannot agree with this extension by judicial construction and with the reasoning of another Court of Appeals in *Ackerly* v. *Ley,* 137 U. S. App. D. C. 133, 136–137, n. 3, 420 F. 2d 1336, 1339–1340, n. 3 (1969), referred to and seemingly approved by the Court. *Ante,* at 373.

If, then, these case summaries are something less than "personnel files," a proposition I do not accept, they surely are "similar" to personnel files and, when invaded, afford an instance of a "clearly unwarranted invasion of personal privacy." It is hard to imagine something any more personal. It seems to me that the Court is blinding itself to realities when it concludes, as it does, that Rose's demands do not result in invasions of the personal privacy of the cadets concerned. And I do not regard it as any less unwarranted just because there are court-ordered redaction, a most impractical solution, and judicial rationalization that because the case summaries were posted "on 40 squadron bulletin boards throughout the Academy," *ante,* at 355, and copies distributed to faculty and administration officials, the invasion is not an invasion at all. The "publication" is restricted to the Academy grounds and to the private, not public, portions of those facilities. It is disseminated to the corps alone and to faculty and administration, and is a part of the Academy's general pedagogical and disciplinary purpose and program. To be sure, 40 may appear to some to be a large number, but the Academy's "family" and the area confinement are what are important. And the Court's reasoning must apply, awkwardly it seems to me, to 20 or 10 or five or two posting places, or, indeed, to only one.

I should add that I see little assistance for the Court in the legislative history. As is so often the case, that

history cuts both ways and is particularly confusing here. The Court's struggle with it, *ante,* at 362–370, so demonstrates.

Finally, I note the Court's candid recognition of the personal risks involved. *Ante,* at 380–381. Today's decision, of course, now makes those risks a reality for the cadet, "particularly one who has remained in the military," and the risks are imposed upon the individual in return for a most questionable benefit to the public and personal benefit to respondent Rose. So often the pendulum swings too far.

I fear that the Court today strikes a severe blow to the Honor Codes, to the system under which they operate, and to the former cadets concerned. It is sad to see these old institutions mortally wounded and passing away and individuals placed in jeopardy and embarrassment for lesser incidents long past.

I would reverse the judgment of the Court of Appeals.

Mr. Justice Rehnquist, dissenting.

Although this case requires our consideration of a claim of a right to "privacy," it arises in quite a different context from some of our other recent decisions such as *Paul* v. *Davis,* 424 U. S. 693 (1976). In that case custodians of public records chose to disseminate them, and one of the subjects of the record claimed that the Fourteenth Amendment to the United States Constitution prohibited the custodian from doing so. Here the custodian of the records, petitioner Department of the Air Force, has chosen *not* to disseminate the records, and its decision to that effect is being challenged by a citizen under the Freedom of Information Act. That Act, as both the Court's opinion and the dissenting opinion of The Chief Justice point out, requires the federal courts to balance the claim of right of access to the informa-

tion against any consequent "clearly unwarranted invasion of personal privacy." For the reasons stated in Part 2 of the dissenting opinion of THE CHIEF JUSTICE, I agree that the Act did not contemplate virtual reconstruction of records under the guise of excision of a segregable part of the record. I therefore agree with THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN that, in the absence of such redaction, the sixth exemption of the Act is applicable and the judgment of the Court of Appeals should be reversed.

Syllabus

FISHER ET AL. v. UNITED STATES ET AL.

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

No. 74-18. Argued November 3, 1975—Decided April 21, 1976*

In each of these cases taxpayers, who were under investigation for possible civil or criminal liability under the federal income tax laws, after having obtained from their respective accountants certain documents relating to the accountants' preparation of their tax returns, transferred the documents to their respective attorneys to assist the taxpayers in connection with the investigations. Subsequently, the Internal Revenue Service served summonses on the attorneys directing them to produce the documents, but the attorneys refused to comply. The Government then brought enforcement actions, and in each case the District Court ordered the summons enforced. In No. 74-18 the Court of Appeals affirmed, holding that the taxpayers had never acquired a possessory interest in the documents and that the documents were not immune from production in the attorney's hands. But in No. 74-611 the Court of Appeals reversed, holding that by virtue of the Fifth Amendment the documents would have been privileged from production pursuant to a summons directed to the taxpayer if he had retained possession, and that, in light of the attorney-client relationship, the taxpayer retained such privilege after transferring the documents to his attorney. *Held:*

1. Compelled production of the documents in question from the attorneys does not implicate whatever Fifth Amendment privilege the taxpayer-clients might have enjoyed from being themselves compelled to produce the documents. Pp. 396-401.

(a) Whether or not the Fifth Amendment would have barred a subpoena directing the taxpayers to produce the documents while they were in their hands, the taxpayers' privilege under that Amendment is not violated by enforcing the summonses because enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything, and certainly would not

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*Together with No. 74-611, *United States et al.* v. *Kasmir et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

compel him to be a "witness" against himself, and the fact that the attorneys are agents of the taxpayers does not change this result. *Couch* v. *United States,* 409 U. S. 322. Pp. 396-398.

(b) These cases do not present a situation where constructive possession of the documents in question is so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the taxpayer substantially intact, since the documents sought were obtainable without personal compulsion upon the taxpayers. *Couch, supra.* P. 398.

(c) The taxpayers, by transferring the documents to their attorneys, did not lose any Fifth Amendment privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession, and *this* personal privilege was in no way decreased by the transfer. Pp. 398-399.

(d) Even though the taxpayers, after transferring the documents to their attorneys, may have had a reasonable expectation of privacy with respect to the documents, the Fifth Amendment does not protect private information obtained without compelling self-incriminating testimony. Pp. 399-401.

2. Although the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment, the taxpayer-clients in these cases would not be protected by that Amendment from producing the documents in question, because production of such documents involves no incriminating testimony and therefore the documents in the hands of the taxpayers' attorneys were not immune from production. Pp. 402-414.

(a) The Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. P. 408.

(b) Here, however incriminating the contents of the accountants' workpapers might be, the act of producing them—the only thing that the taxpayers are compelled to do—would not itself involve testimonial self-incrimination, and implicitly admitting the existence and possession of the papers does not rise to the level of testimony within the protection of the Fifth Amendment. Pp. 409-414.

No. 74-18, 500 F. 2d 683, affirmed; No. 74-611, 499 F. 2d 444, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *post*, p. 414, and MARSHALL, J., *post*, p. 430, filed opinions concurring in the judgment. STEVENS, J., took no part in the consideration or decision of the cases.

Richard L. Bazelon argued the cause for petitioners in No. 74–18. With him on the brief was *Solomon Fisher. Deputy Solicitor General Wallace* argued the cause for petitioners in No. 74–611 and respondents in No. 74–18. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Crampton, Stuart A. Smith,* and *Robert E. Lindsay. Robert E. Goodfriend* argued the cause for respondents in No. 74–611. With him on the brief were *Edward A. Copley* and *Cyril D. Kasmir.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

In these two cases we are called upon to decide whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the client and retained that immunity in the hands of the attorney.

I

In each case, an Internal Revenue agent visited the taxpayer or taxpayers[1] and interviewed them in con-

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†*Stanley H. Stearman* filed a brief for the National Society of Public Accountants as *amicus curiae* urging affirmance in No. 74–611. *Richard H. Appert, Louis Bender, Michael I. Saltzman,* and *James D. Fellers* filed a brief for the American Bar Association as *amicus curiae* in both cases.

[1] In No. 74–18, the taxpayers are husband and wife who filed a joint return. In No. 74–611, the taxpayer filed an individual return.

nection with an investigation of possible civil or criminal liability under the federal income tax laws. Shortly after the interviews—one day later in No. 74–611 and a week or two later in No. 74–18—the taxpayers obtained from their respective accountants certain documents relating to the preparation by the accountants of their tax returns. Shortly after obtaining the documents—later the same day in No. 74–611 and a few weeks later in No. 74–18—the taxpayers transferred the documents to their lawyers—respondent Kasmir and petitioner Fisher, respectively—each of whom was retained to assist the taxpayer in connection with the investigation. Upon learning of the whereabouts of the documents, the Internal Revenue Service served summonses on the attorneys directing them to produce documents listed therein. In No. 74–611, the documents were described as "the following records of Tannebaum Bindler & Lewis [the accounting firm].

> "1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.[2]
>
> "2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.
>
> "3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971."

In No. 74–18, the documents demanded were analyses by the accountant of the taxpayers' income and expenses which had been copied by the accountant from the taxpayers' canceled checks and deposit receipts.[3] In No.

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[2] The "books and records" concerned the taxpayer's large medical practice.

[3] The husband taxpayer's checks and deposit receipts related to his textile waste business. The wife's related to her women's wear shop.

74–611, a summons was also served on the accountant directing him to appear and testify concerning the documents to be produced by the lawyer. In each case, the lawyer declined to comply with the summons directing production of the documents, and enforcement actions were commenced by the Government under 26 U. S. C. §§ 7402 (b) and 7604 (a). In No. 74–611, the attorney raised in defense of the enforcement action the taxpayer's accountant-client privilege, his attorney-client privilege, and his Fourth and Fifth Amendment rights. In No. 74–18, the attorney claimed that enforcement would involve compulsory self-incrimination of the taxpayers in violation of their Fifth Amendment privilege, would involve a seizure of the papers without necessary compliance with the Fourth Amendment, and would violate the taxpayers' right to communicate in confidence with their attorney. In No. 74–18 the taxpayers intervened and made similar claims.

In each case the summons was ordered enforced by the District Court and its order was stayed pending appeal. In No. 74–18, 500 F. 2d 683 (CA3 1974), petitioners' appeal raised, in terms, only their Fifth Amendment claim, but they argued in connection with that claim that enforcement of the summons would involve a violation of the taxpayers' reasonable expectation of privacy and particularly so in light of the confidential relationship of attorney to client. The Court of Appeals for the Third Circuit after reargument en banc affirmed the enforcement order, holding that the taxpayers had never acquired a possessory interest in the documents and that the papers were not immune in the hands of the attorney. In No. 74–611, a divided panel of the Court of Appeals for the Fifth Circuit reversed the enforcement order, 499 F. 2d 444 (1974). The court reasoned that by virtue of the Fifth Amendment the documents would have been privileged

from production pursuant to summons directed to the taxpayer had he retained possession and, in light of the confidential nature of the attorney-client relationship, the taxpayer retained, after the transfer to his attorney, "a legitimate expectation of privacy with regard to the materials he placed in his attorney's custody, that he retained constructive possession of the evidence, and thus . . . retained Fifth Amendment protection."[4] *Id.*, at 453. We granted certiorari to resolve the conflict created. 420 U. S. 906 (1975). Because in our view the documents were not privileged either in the hands of the lawyers or of their clients, we affirm the judgment of the Third Circuit in No. 74-18 and reverse the judgment of the Fifth Circuit in No. 74-611.

II

All of the parties in these cases and the Court of Appeals for the Fifth Circuit have concurred in the proposition that if the Fifth Amendment would have excused a *taxpayer* from turning over the accountant's papers had he possessed them, the *attorney* to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena. Although we agree with this proposition for the reasons set forth in Part III, *infra,* we are convinced that, under our decision in *Couch* v. *United States,* 409 U. S. 322 (1973), it is not the taxpayer's Fifth Amendment privilege that would excuse the *attorney* from production.

The relevant part of that Amendment provides:

> "No person . . . shall be *compelled* in any criminal case to be a *witness against himself.*" (Emphasis added.)

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[4] The respondents in No. 74-611 did not, in terms, rely on the attorney-client privilege or the Fourth Amendment before the Court of Appeals.

The taxpayer's privilege under this Amendment is not violated by enforcement of the summonses involved in these cases because enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything—and certainly would not compel him to be a "witness" against himself. The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege, *Perlman* v. *United States,* 247 U. S. 7, 15 (1918); *Johnson* v. *United States,* 228 U. S. 457, 458 (1913); *Couch* v. *United States, supra,* at 328, 336. See also *Holt* v. *United States,* 218 U. S. 245, 252–253 (1910); *United States* v. *Dionisio,* 410 U. S. 1 (1973); *Schmerber* v. *California,* 384 U. S. 757, 765 (1966); *Burdeau* v. *McDowell,* 256 U. S. 465, 476 (1921); *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 55 (1974). In *Couch* v. *United States, supra,* we recently ruled that the Fifth Amendment rights of a taxpayer were not violated by the enforcement of a documentary summons directed to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. We did so on the ground that in such a case "the ingredient of personal compulsion against an accused is lacking." 409 U. S., at 329.

Here, the taxpayers are compelled to do no more than was the taxpayer in *Couch.* The taxpayers' Fifth Amendment privilege is therefore not violated by enforcement of the summonses directed toward their attorneys. This is true whether or not the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands.

The fact that the attorneys are agents of the taxpayers does not change this result. *Couch* held as much, since the accountant there was also the taxpayer's agent, and in this respect reflected a longstanding view. In

Hale v. *Henkel,* 201 U. S. 43, 69–70 (1906), the Court said that the privilege "was never intended to permit [a person] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person .... [T]he Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself.*" (Emphasis in original.) "It is extortion of information from the accused himself that offends our sense of justice." *Couch* v. *United States, supra,* at 328. Agent or no, the lawyer is not the taxpayer. The taxpayer is the "accused," and nothing is being extorted from him.

Nor is this one of those situations, which *Couch* suggested might exist, where constructive possession is so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the taxpayer substantially intact. 409 U. S., at 333. In this respect we see no difference between the delivery to the attorneys in these cases and delivery to the accountant in the *Couch* case. As was true in *Couch,* the documents sought were obtainable without personal compulsion on the accused.

Respondents in No. 74–611 and petitioners in No. 74–18 argue, and the Court of Appeals for the Fifth Circuit apparently agreed, that if the summons was enforced, the taxpayers' Fifth Amendment privilege would be, but should not be, lost solely because they gave their documents to their lawyers in order to obtain legal advice. But this misconceives the nature of the constitutional privilege. The Amendment protects a person from being compelled to be a witness against himself. Here, the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. *This* personal privilege was in no way decreased by the transfer. It is simply that by

reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer. The protection of the Fifth Amendment is therefore not available. "A party is privileged from producing evidence but not from its production." *Johnson* v. *United States, supra,* at 458.

The Court of Appeals for the Fifth Circuit suggested that because legally and ethically the attorney was required to respect the confidences of his client, the latter had a reasonable expectation of privacy for the records in the hands of the attorney and therefore did not forfeit his Fifth Amendment privilege with respect to the records by transferring them in order to obtain legal advice. It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. See, *e. g., Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964); *Couch* v. *United States, supra,* at 332, 335–336; *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 416 (1966); *Davis* v. *United States,* 328 U. S. 582, 587 (1946). But the Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.[5]

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[5] There is a line of cases in which the Court stated that the Fifth Amendment was offended by the use in evidence of documents or property seized in violation of the Fourth Amendment. *Gouled* v. *United States,* 255 U. S. 298, 306 (1921); *Agnello* v. *United States,* 269 U. S. 20, 33–34 (1925); *United States* v. *Lefkowitz,* 285 U. S. 452, 466–467 (1932); *Mapp* v. *Ohio,* 367 U. S. 643, 661 (1961) (Black,

The proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear statements of this Court that under appropriate safeguards private incriminating statements of an accused may be overheard and used in evidence, if they are not compelled at the time they were uttered, *Katz* v. *United States,* 389 U. S. 347, 354 (1967); *Osborn* v. *United States,* 385 U. S. 323, 329-330 (1966); and *Berger* v. *New York,* 388 U. S. 41, 57 (1967); cf. *Hoffa* v. *United States,* 385 U. S. 293, 304 (1966); and that disclosure of private information may be compelled if immunity removes the risk of incrimination. *Kastigar* v. *United States,* 406 U. S. 441 (1972). If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness. The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.

J., concurring). But the Court purported to find elements of compulsion in such situations. "In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case." *Gouled* v. *United States, supra,* at 306. In any event the predicate for those cases, lacking here, was a violation of the Fourth Amendment. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465, 475-476 (1921).

We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information." *United States* v. *Nobles,* 422 U. S. 225, 233 n. 7 (1975).

Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources[6]—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described,'" *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 208 (1946); *In re Horowitz,* 482 F. 2d 72, 75–80 (CA2 1973) (Friendly, J.); the First Amendment, see *NAACP* v. *Alabama,* 357 U. S. 449, 462 (1958); or evidentiary privileges such as the attorney-client privilege.[7]

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[6] In *Couch* v. *United States,* 409 U. S. 322 (1973), on which taxpayers rely for their claim that the Fifth Amendment protects their "legitimate expectation of privacy," the Court differentiated between the things protected by the Fourth and Fifth Amendments. "We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." *Id.,* at 336.

[7] The taxpayers and their attorneys have not raised arguments of a Fourth Amendment nature before this Court and could not be successful if they had. The summonses are narrowly drawn and seek only documents of unquestionable relevance to the tax investigation. Special problems of privacy which might be presented by subpoena of a personal diary, *United States* v. *Bennett,* 409 F. 2d 888, 897 (CA2 1969) (Friendly, J.), are not involved here.

First Amendment values are also plainly not implicated in these cases.

III

Our above holding is that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself. The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears to agree unqualifiedly. The difficulty is that the taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.[8]

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[8] Federal Rule Evid. 501, effective January 2, 1975, provides that with respect to privileges the United States district courts "shall be governed by the principles of the common law . . . interpreted . . . in the light of reason and experience." Thus, whether or not Rule 501 applies to this case, the attorney-client privilege issue is governed by the principles and authorities discussed and cited *infra.* Fed. Rule Crim. Proc. 26.

In No. 74–611, the taxpayer did not intervene, and his rights have been asserted only through his lawyer. The parties disagree on the question whether an attorney may claim the Fifth Amendment privilege of his client. We need not resolve this question. The only privilege of the taxpayer involved here is the attorney-client privilege, and it is universally accepted that the attorney-client privilege may be raised by the attorney, C. McCormick, Evidence § 92, p. 193, § 94, p. 197 (2d ed. 1972) (hereinafter McCormick); *Republic Gear Co.* v. *Borg-Warner Corp.,* 381 F. 2d 551 (CA2 1967); *Bouschor* v. *United States,* 316 F. 2d 451 (CA8 1963); *Colton* v.

Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. 8 J. Wigmore, Evidence § 2292 (McNaughton rev. 1961) (hereinafter Wigmore); McCormick § 87, p. 175. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. 8 Wigmore § 2291, and § 2306, p. 590; McCormick § 87, p. 175, § 92, p. 192; *Baird* v. *Koerner,* 279 F. 2d 623 (CA9 1960); *Modern Woodmen of America* v. *Watkins,* 132 F. 2d 352 (CA5 1942); *Prichard* v. *United States,* 181 F. 2d 326 (CA6), aff'd *per curiam,* 339 U. S. 974 (1950); *Schwimmer* v. *United States,* 232 F. 2d 855 (CA8 1956); *United States* v. *Goldfarb,* 328 F. 2d 280 (CA6 1964). As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege. *In re Horowitz, supra,* at 81 (Friendly, J.); *United States* v. *Goldfarb, supra;* 8 Wigmore § 2291, p. 554; McCormick § 89, p. 185. This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order

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United States, 306 F. 2d 633 (CA2 1962); *Schwimmer* v. *United States,* 232 F. 2d 855 (CA8), cert. denied, 352 U. S. 833 (1956); *Baldwin* v. *Commissioner,* 125 F. 2d 812 (CA9 1942).

to obtain more informed legal advice. *Grant* v. *United States,* 227 U. S. 74, 79-80 (1913); 8 Wigmore § 2307, and cases there cited; McCormick § 90, p. 185; *Falsone* v. *United States,* 205 F. 2d 734 (CA5 1953); *Sovereign Camp, W. O. W.* v. *Reed,* 208 Ala. 457, 94 So. 910 (1922); *Andrews* v. *Mississippi R. Co.,* 14 Ind. 169, 98 N. E. 49 (1860); *Palatini* v. *Sarian,* 15 N. J. Super. 34, 83 A. 2d 24 (1951); *Pearson* v. *Yoder,* 39 Okla. 105, 134 P. 421 (1913); *State ex rel Sowers* v. *Olwell,* 64 Wash. 2d 828, 394 P. 2d 681 (1964). The purpose of the privilege requires no broader rule. Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered. It is otherwise if the documents are not obtainable by subpoena *duces tecum* or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged in the latter's hands. Where the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." 8 Wigmore § 2307, p. 592. Lower courts have so held. *Id.,* § 2307, p. 592 n. 1, and cases there cited; *United States* v. *Judson,* 322 F. 2d 460, 466 (CA9 1963); *Colton* v. *United States,* 306 F. 2d 633, 639 (CA2 1962). This proposition was accepted by the Court of Appeals for the Fifth Circuit below, is asserted by petitioners

in No. 74–18 and respondents in No. 74–611, and was conceded by the Government in its brief and at oral argument. Where the transfer to the attorney is for the purpose of obtaining legal advice, we agree with it.

Since each taxpayer transferred possession of the documents in question from himself to his attorney in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege. We accordingly proceed to the question whether the documents could have been obtained by summons addressed to the taxpayer while the documents were in his possession. The only bar to enforcement of such summons asserted by the parties or the courts below is the Fifth Amendment's privilege against self-incrimination. On this question the Court of Appeals for the Fifth Circuit in No. 74–611 is at odds with the Court of Appeals for the Second Circuit in *United States* v. *Beattie,* 522 F. 2d 267 (1975), cert. pending, Nos. 75–407, 75–700.

IV

The proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd* v. *United States,* 116 U. S. 616 (1886). *Boyd* involved a civil forfeiture proceeding brought by the Government against two partners for fraudulently attempting to import 35 cases of glass without paying the prescribed duty. The partnership had contracted with the Government to furnish the glass needed in the construction of a Government building. The glass specified was foreign glass, it being understood that if part or all of the glass was furnished from the partnership's existing duty-paid in-

ventory, it could be replaced by duty-free imports. Pursuant to this arrangement, 29 cases of glass were imported by the partnership duty free. The partners then represented that they were entitled to duty-free entry of an additional 35 cases which were soon to arrive. The forfeiture action concerned these 35 cases. The Government's position was that the partnership had replaced all of the glass used in construction of the Government building when it imported the 29 cases. At trial, the Government obtained a court order directing the partners to produce an invoice the partnership had received from the shipper covering the previous 29-case shipment. The invoice was disclosed, offered in evidence, and used, over the Fifth Amendment objection of the partners, to establish that the partners were fraudulently claiming a greater exemption from duty than they were entitled to under the contract. This Court held that the invoice was inadmissible and reversed the judgment in favor of the Government. The Court ruled that the Fourth Amendment applied to court orders in the nature of subpoenas *duces tecum* in the same manner in which it applies to search warrants, *id.,* at 622; and that the Government may not, consistent with the Fourth Amendment, seize a person's documents or other property as evidence unless it can claim a proprietary interest in the property superior to that of the person from whom the property is obtained. *Id.,* at 623–624. The invoice in question was thus held to have been obtained in violation of the Fourth Amendment. The Court went on to hold that the accused in a criminal case or the defendant in a forfeiture action could not be forced to produce evidentiary items without violating the Fifth Amendment as well as the Fourth. More specifically, the Court declared, "a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against him-

self, within the meaning of the Fifth Amendment to the Constitution." *Id.,* at 634–635. Admitting the partnership invoice into evidence had violated both the Fifth and Fourth Amendments.

Among its several pronouncements, *Boyd* was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible. *Gouled* v. *United States,* 255 U. S. 298 (1921); *Agnello* v. *United States,* 269 U. S. 20 (1925); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932). That rule applied to documents as well as to other evidentiary items—"[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized . . . ." *Gouled* v. *United States, supra,* at 309. Private papers taken from the taxpayer, like other "mere evidence," could not be used against the accused over his Fourth and Fifth Amendment objections.

Several of *Boyd*'s express or implicit declarations have not stood the test of time. The application of the Fourth Amendment to subpoenas was limited by *Hale* v. *Henkel,* 201 U. S. 43 (1906), and more recent cases. See, *e. g., Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186 (1946). Purely evidentiary (but "nontestimonial") materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances, *Warden* v. *Hayden,* 387 U. S. 294 (1967).[9] Also, any notion that "testimonial" evidence may never be seized and used in evidence is

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[9] Citing to *Schmerber* v. *California,* 384 U. S. 757 (1966), *Warden* v. *Hayden,* 387 U. S., at 302–303, reserved the question "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

inconsistent with *Katz* v. *United States,* 389 U. S. 347 (1967); *Osborn* v. *United States,* 385 U. S. 323 (1966); and *Berger* v. *New York,* 388 U. S. 41 (1967), approving the seizure under appropriate circumstances of conversations of a person suspected of crime. See also *Marron* v. *United States,* 275 U. S. 192 (1927).

It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber* v. *California,* 384 U. S. 757, 763–764 (1966);[10] to the giving of handwriting exemplars, *Gilbert* v. *California,* 388 U. S. 263, 265–267 (1967); voice exemplars, *United States* v. *Wade,* 388 U. S. 218, 222–223 (1967); or the donning of a blouse worn by the perpetrator, *Holt* v. *United States,* 218 U. S. 245 (1910). Furthermore, despite *Boyd,* neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds. *Bellis* v. *United States,* 417 U. S. 85 (1974). It would appear that under that case the precise claim sustained in *Boyd* would now be rejected for reasons not there considered.

The pronouncement in *Boyd* that a person may not be forced to produce his private papers has nonetheless often appeared as dictum in later opinions of this Court. See, *e. g., Wilson* v. *United States,* 221 U. S. 361, 377 (1911); *Wheeler* v. *United States,* 226 U. S. 478, 489 (1913); *United States* v. *White,* 322 U. S. 694, 698–699

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[10] The Court's holding was: "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner, it was not inadmissible on privilege grounds." 384 U. S., at 765.

(1944); *Davis* v. *United States,* 328 U. S., at 587–588; *Schmerber, supra,* at 763–764; *Couch* v. *United States,* 409 U. S., at 330; *Bellis* v. *United States, supra,* at 87. To the extent, however, that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for "mere evidence," including documents, violated the Fourth Amendment and therefore also transgressed the Fifth, *Gouled* v. *United States, supra,* the foundations for the rule have been washed away. In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony" that incriminates him. Accordingly, we turn to the question of what, if any, incriminating testimony within the Fifth Amendment's protection, is compelled by a documentary summons.

A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. *Schmerber* v. *California, supra; United States* v. *Wade, supra;* and *Gilbert* v. *California, supra.* The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled

testimonial evidence, either of the taxpayers or of anyone else.[11] The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio* v. *United States,* 354 U. S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof. In light of the records now before us, we are confident that however incriminating the

[11] The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege, *Wilson* v. *United States,* 221 U. S. 361, 378 (1911). And, unless the Government has compelled the subpoenaed person to write the document, cf. *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968), the fact that it was written by him is not controlling with respect to the Fifth Amendment issue. Conversations may be seized and introduced in evidence under proper safeguards, *Katz* v. *United States,* 389 U. S. 347 (1967); *Osborn* v. *United States,* 385 U. S. 323 (1966); *Berger* v. *New York,* 388 U. S. 41 (1967); *United States* v. *Bennett,* 409 F. 2d, at 897 n. 9, if not compelled. In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. McCormick § 128, p. 269.

contents of the accountant's workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.

It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truthtelling" of the taxpayer to prove the existence of or his access to the documents. 8 Wigmore § 2264, p. 380. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender." *In re Harris*, 221 U. S. 274, 279 (1911).

When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege. This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the

hands of their possessor. *E. g., Wilson* v. *United States,* 221 U. S. 361 (1911); *Dreier* v. *United States,* 221 U. S. 394 (1911); *United States* v. *White,* 322 U. S. 694 (1944); *Bellis* v. *United States,* 417 U. S. 85 (1974); *In re Harris, supra.* The existence and possession or control of the subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable.

Moreover, assuming that these aspects of producing the accountant's papers have some minimal testimonial significance, surely it is not illegal to seek accounting help in connection with one's tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.

As for the possibility that responding to the subpoena would authenticate[12] the workpapers, production would

[12] The "implicit authentication" rationale appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas. *Schmerber* v. *California,* 384 U. S., at 763–764 ("the privilege reaches . . . the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States,* 116 U. S. 616"); *Couch* v. *United States,* 409 U. S., at 344, 346 (MARSHALL, J., dissenting) (the person complying with the subpoena "implicitly testifies that the evidence he brings forth is in fact the evidence demanded"); *United States* v. *Beattie,* 522 F. 2d 267, 270 (CA2 1975) (Friendly, J.) ("[a] subpoena demanding that an accused produce his own records is . . . the equivalent of requiring him to take the stand and admit their genuineness"), cert. pending, Nos. 75-407, 75-700; 8 Wigmore § 2264, p. 380 (the testimonial component involved in compliance with an order for production of documents or chattels "is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded"); McCormick § 126, p. 268 ("[t]his rule [applying the Fifth Amendment privilege to documentary subpoenas] is defended on the

express nothing more than the taxpayer's belief that the papers are those described in the subpoena. The taxpayer would be no more competent to authenticate the accountant's workpapers or reports [13] by producing them than he would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination. Moreover, in *Wilson* v. *United States, supra; Dreier* v. *United States, supra; United States* v. *White, supra; Bellis* v. *United States, supra;* and *In re Harris, supra,* the custodian of corporate, union, or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business' books even though doing so involved a "representation that the documents produced are those demanded by the subpoena," *Curcio* v. *United States,* 354 U. S., at 125.[14]

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theory that one who produces documents (or other matter) described in the subpoena *duces tecum* represents, by his production, that the documents produced are in fact the documents described in the subpoena"); *People* v. *Defore,* 242 N. Y. 13, 27, 150 N. E. 585, 590 (1926) (Cardozo, J.) ("A defendant is 'protected from producing his documents in response to a *subpoena duces tecum,* for his production of them in court would be his voucher of their genuineness.' There would then be 'testimonial compulsion' ").

[13] In seeking the accountant's "retained copies" of correspondence with the taxpayer in No. 74–611, we assume that the summons sought only "copies" of original letters sent from the accountant to the taxpayer—the truth of the contents of which could be testified to only by the accountant.

[14] In these cases compliance with the subpoena is required even though the books have been kept by the person subpoenaed and his producing them would itself be sufficient authentication to permit their introduction against him.

Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States,* 116 U. S., at 634–635. We do hold that compliance with a summons directing the taxpayer to produce the accountant's documents involved in these cases would involve no incriminating testimony within the protection of the Fifth Amendment.

The judgment of the Court of Appeals for the Fifth Circuit in No. 74–611 is reversed. The judgment of the Court of Appeals for the Third Circuit in No. 74–18 is affirmed.

So ordered.

Mr. Justice Stevens took no part in the consideration or disposition of these cases.

Mr. Justice Brennan, concurring in the judgment.

I concur in the judgment. Given the prior access by accountants retained by the taxpayers to the papers involved in these cases and the wholly business rather than personal nature of the papers, I agree that the privilege against compelled self-incrimination did not in either of these cases protect the papers from production in response to the summonses. See *Couch* v. *United States,* 409 U. S. 322, 335–336 (1973); *id.,* at 337 (Brennan, J., concurring). I do not join the Court's opinion, however, because of the portent of much of what is said of a serious crippling of the protection secured by the privilege against compelled production of one's private books and papers. Like today's decision in *United States* v. *Miller, post,* p. 435, it is but another step in the denigration of privacy principles settled nearly 100 years ago in *Boyd* v. *United States,* 116 U. S. 616

(1886). According to the Court, "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers.'" *Ante,* at 414. This implication that the privilege might not protect against compelled production of tax records that are his "private papers" is so contrary to settled constitutional jurisprudence that this and other like implications throughout the opinion [1] prompt me to conjecture that once again the Court is laying the groundwork for future decisions that will tell us that the question here formally reserved was actually answered against the availability of the privilege. *Semble, Hudgens* v. *NLRB,* 424 U. S. 507 (1976). It is therefore appropriate to recall that history and this Court have construed the constitutional privilege to safeguard against governmental intrusions of personal privacy to compel either self-incriminating oral statements or the production of self-incriminating evidence recorded in one's private books and papers. Although as phrased in the Fifth Amendment—"nor shall [any person] be compelled in any criminal case to be a witness against himself"—the privilege makes no express reference, as does the Fourth Amendment, to "papers, and effects," private papers have long been held to have the protection of the privilege, designed as it is "to maintain inviolate large areas of personal privacy." *Feldman* v. *United States,* 322 U. S. 487, 490 (1944).

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[1] For example, the Court's notation that "[s]pecial problems of privacy which might be presented by subpoena of a diary . . . are not involved here," *ante,* at 401 n. 7, is only made in the context of discussion of the Fourth Amendment and thus may readily imply that even a subpoena of a personal diary containing forthright confessions of crime may not be resisted on grounds of the privilege.

I

Expressions are legion in opinions of this Court that the protection of personal privacy is a central purpose of the privilege against compelled self-incrimination. "[I]t is the invasion of [a person's] indefeasible right of personal security, personal liberty and private property" that "constitutes the essence of the offence" that violates the privilege. *Boyd* v. *United States, supra,* at 630. The privilege reflects "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'" *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964). "It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch* v. *United States, supra,* at 327. See also *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 416 (1966); *Miranda* v. *Arizona,* 384 U. S. 436, 460 (1966). "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965). See also *Katz* v. *United States,* 389 U. S. 347, 350 n. 5 (1967).

The Court pays lip service to this bedrock premise of privacy in the statement that "[w]ithin the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests," *ante,* at 399. But this only makes explicit what elsewhere highlights the opinion, namely, the view that protection of personal privacy is merely a byproduct and not, as our precedents and history teach, a factor controlling in part the determination of the scope of the privilege. This cart-before-the-horse approach is fundamentally at odds with the settled principle that the scope of the privilege is not constrained by the limits of the

wording of the Fifth Amendment but has the reach necessary to protect the cherished value of privacy which it safeguards. See *Schmerber* v. *California*, 384 U. S. 757, 761–762, n. 6 (1966). The "Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. . . ." *United States* v. *Lefkowitz*, 285 U. S. 452, 467 (1932). "It has been repeatedly decided that [the Fifth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by [it], by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled* v. *United States*, 255 U. S. 298, 304 (1921). See *Maness* v. *Meyers*, 419 U. S. 449, 461 (1975). History and principle, not the mechanical application of its wording, have been the life of the Amendment.[2]

That the privilege does not protect against the production of private information where there is no compulsion, or where immunity is granted, or where there is no threat of incrimination in nowise supports the Court's argument demeaning the privilege's protection of privacy. The unavailability of the privilege in those cases only evidences that, as is the case with the First and Fourth Amendments, the protection of privacy afforded by the privilege is not absolute. The critical question then is the definition of the scope of privacy that is sheltered by the privilege.

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[2] "The privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" *Ullmann* v. *United States*, 350 U. S. 422, 438 (1956) (Frankfurter, J.). "The previous history of the right, both in England and America, proves that it was not bound by rigid definition." L. Levy, Origins of the Fifth Amendment 428 (1968).

History and principle teach that the privacy protected by the Fifth Amendment extends not just to the individual's immediate declarations, oral or written, but also to his testimonial materials in the form of books and papers.[3] "The right was originally a 'right of silence' . . . only in the sense that legal process could not force incriminating statements from the defendant's own lips. Beginning in the early eighteenth century the English courts widened that right to include protection against the necessity of producing books and documents that might tend to incriminate the accused. . . . Lord Mansfield summed up the law by declaring that the defendant, in a criminal case, could not be compelled to produce any incriminating documentary evidence 'though he should hold it in his hands in Court.'" L. Levy, Origins of the Fifth Amendment 390 (1968).[4] Thus, in recognizing

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[3] Indeed, *Schmerber* v. *California,* 384 U. S. 757, 764 (1966), held:

"Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' . . ."

[4] "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman,* 267 U. S. 87, 108–109 (1925). But, "the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions." *Grosjean* v. *American Press Co.,* 297 U. S. 233, 249 (1936). Without a doubt, the common-law privilege against self-incrimination in England extended to protection against the production of incriminating personal papers prior to the adoption of the United States Constitution. See, *e. g.,*

the privilege's protection of private books and papers, *Boyd* v. *United States,* 116 U. S., at 633, 634–635, was faithful to this historical conception of the privilege. *Boyd* was reaffirmed in this respect in *Ballmann* v. *Fagin,* 200 U. S. 186 (1906), which held that an individual could not be compelled to produce a personal cashbook containing incriminating evidence. *Schmerber* v. *California,* 384 U. S., at 761, most recently expressly held "that the privilege protects an accused . . . from being compelled to testify against himself, or *otherwise provide the State with evidence of a testimonial or communicative nature* . . . ." (Emphasis supplied.) Indeed, *Boyd's* holding has often been reiterated without question. *E. g., Bellis* v. *United States,* 417 U. S. 85, 87 (1974); *United States* v. *Calandra,* 414 U. S. 338, 346 (1974); *Couch* v. *United States,* 409 U. S. 322 (1973); *United States* v. *Wade,* 388 U. S. 218, 221 (1967); *Gilbert* v. *California,* 388 U. S. 263, 266 (1967); *Davis* v. *United States,* 328 U. S. 582, 587–588 (1946); *United States* v. *White,* 322 U. S. 694, 698–699 (1944); *Wheeler* v. *United States,* 226 U. S. 478, 489 (1913); *Wilson* v. *United States,* 221 U. S. 361, 375 (1911); *ICC* v. *Baird,* 194 U. S. 25, 45 (1904). It may therefore be emphatically stated that until today, there was no room to doubt that it is the Fifth Amendment's "historic function [to protect an individual] from compulsory incrimination through his

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Roe v. *Harvey,* 98 Eng. Rep. 302, 305 (K. B. 1769); *King* v. *Heydon,* 96 Eng. Rep. 195 (K. B. 1762); *King* v. *Purnell,* 95 Eng. Rep. 595, 597 (K. B. 1748); *King* v. *Cornelius,* 93 Eng. Rep. 1133, 1134 (K. B. 1744); *Queen* v. *Mead,* 92 Eng. Rep. 119 (K. B. 1703); *King* v. *Worsenham,* 91 Eng. Rep. 1370 (K. B. 1701). The significance of this English development on the construction of our Constitution is not in any way diminished by this country's experience with the privilege prior to the Constitution's adoption. See Levy, *supra,* n. 2, at 368–404.

own testimony or *personal records*." *United States* v. *White*, *supra*, at 701 (emphasis supplied).

The common-law and constitutional extension of the privilege to testimonial materials, such as books and papers, was inevitable. An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly. Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. Under a contrary view, the constitutional protection would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions however invalidly imposed. Indeed, it was the very reality of those fears that helped provide the historical impetus for the privilege. See *Boyd* v. *United States*, *supra*, at 631–632; E. Griswold, The Fifth Amendment Today 8–9 (1955); 8 J. Wigmore, Evidence § 2250, pp. 277–281 (McNaughton rev. 1961); *id.*, § 2251, pp. 313–314; McKay, Self-Incrimination and the New Privacy, 1967 Supreme Court Review 193, 212.[5]

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[5] "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the

The Court's treatment of the privilege falls far short of giving it the scope required by history and our precedents.[6] It is, of course, true "that the Fifth Amendment

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pure atmosphere of political liberty and personal freedom." *Boyd* v. *United States,* 116 U. S., at 631-632.

The proposition, *ante,* at 409, that *Boyd's* holding ultimately rested on the Fourth Amendment could not be more incorrect. *Boyd* did observe that the purposes to be served by the Fourth and Fifth Amendments shed light on each other, 116 U. S., at 633, but the holdings that the compelled production of the papers involved there violated the Fourth and Fifth Amendments were independent of each other. In holding that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment," *id.,* at 634-635, the Court plainly did not make the Fourth Amendment violation a predicate, let alone an essential predicate, for its holding that there was also a Fifth Amendment violation. The Court is incorrect in suggesting that "the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for 'mere evidence,' including documents, violated the Fourth Amendment and therefore also transgressed the Fifth." *Ante,* at 409. The relation of the Fourth Amendment to the Fifth Amendment violation in *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *Agnello* v. *United States,* 269 U. S. 20 (1925); and *Gouled* v. *United States,* 255 U. S. 298 (1921), was merely that the illegal searches and seizures in those cases were held to establish the element of compulsion essential to a Fifth Amendment violation. See *ante,* at 399-400, n. 5. Even if the Fourth Amendment violations were now held not to establish the element of Fifth Amendment compulsion, it, of course, would not follow that the Fifth Amendment's protection against compelled production of incriminating private papers is lost.

Furthermore, that purely evidentiary material may have been seized in those cases was neither relied upon to establish the Fourth Amendment violations nor, in turn, to establish the Fifth Amendment violations. Indeed, in *Agnello,* contraband, not mere evidence,

[*Footnote 6 is on p. 422*]

protects against 'compelled self-incrimination, not [the disclosure of] private information,'" *ante,* at 401, but it is also true that governmental compulsion to produce private information that might incriminate violates the protection of the privilege. Similarly, although it is necessary that the papers "contain no testimonial declarations by [the taxpayer]" in order for the privilege not to operate as a bar to production, *ante,* at 409, it does not fol-

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was illegally seized. Subsequent decisions modifying the "mere evidence" rule, therefore, have left untouched the Fifth Amendment's prohibition against the compelled production of incriminating testimonial evidence. Indeed, citing *Warden* v. *Hayden,* 387 U. S. 294 (1967), the Court notes, that the question is open whether the *legal* search and seizure of some forms of testimonial evidence would violate the Fifth Amendment, *ante,* at 407 n. 9. *Warden* v. *Hayden* observed: "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." 387 U. S., at 302–303. That observation was plainly addressed not to application of the Fourth Amendment but to application of the Fifth.

Contrary to the Court's intimations, *ante,* at 407–408, neither *Katz* v. *United States,* 389 U. S. 347 (1967); *Osborn* v. *United States,* 385 U. S. 323 (1966); nor *Berger* v. *New York,* 388 U. S. 41 (1967), all involving the Fourth Amendment, lends support to an argument that the Fifth Amendment would not protect the seizure of the private papers of a person suspected of crime. Fifth Amendment challenges to the seizure and use of private papers were not involved in those cases.

[6] The grudging scope the Court today gives the privilege against self-incrimination is made evident by its observation that "[i]n the case of a documentary subpoena the only thing compelled is the act of producing the document . . . ." *Ante,* at 410 n. 11. Obviously disclosure or production of testimonial evidence is also compelled, and the heart of the protection of the privilege is in its safeguarding against compelled disclosure or production of that evidence.

low that papers are not "testimonial" and thus producible because they contain no declarations. And while it may be that the unavailability of the privilege depends on a showng that "the preparation of all of the papers sought in these cases was wholly voluntary," *ibid.*, again it does not follow that the protection is necessarily unavailable if the papers were prepared voluntarily, for it is the compelled *production* of testimonial evidence, not just the compelled creation of such evidence, against which the privilege protects.

Though recognizing that a subpoena served on a taxpayer involves substantial compulsion, the Court concludes that since the subpoena does not compel oral testimony or require the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought, compelled production of the documents by the taxpayer would not violate the privilege, even though the documents might incriminate the taxpayer. *Ante,* at 409. This analysis is patently incomplete: the threshold inquiry is whether the taxpayer is compelled to produce incriminating papers. That inquiry is not answered in favor of production merely because the subpoena requires neither oral testimony from nor affirmation of the papers' contents by the taxpayer. To be sure, the Court correctly observes that "[t]he taxpayer cannot avoid compliance with the subpoena *merely* by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Ante,* at 410 (emphasis supplied). For it is not enough that the production of a writing, or books and papers, is compelled. Unless those materials are such as to come within the zone of privacy recognized by the Amendment, the privilege against compulsory self-incrimination does not protect against their production.

We are not without guideposts for determining what books, papers, and writings come within the zone of privacy recognized by the Amendment. In *Wilson* v. *United States,* 221 U. S. 361 (1911), for example, the Court held that the Fifth Amendment did not protect against subpoenaing corporate records in the possession and control of the president of a corporation, even though the records might have incriminated him. Though the evidence was testimonial, though its production was compelled, and though it would have incriminated the party producing it, the Fifth Amendment was no bar. The Court recognized that the Amendment "[u]ndoubtedly . . . protected [the president] against the compulsory production of his private books and papers," *id.,* at 377, but with respect to corporate records, the Court held:

> "[T]hey are of a character which subjects them to the scrutiny demanded. . . . This was clearly implied in the *Boyd Case* where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction." *Id.,* at 380 (emphasis in original).

Couch v. *United States* expressly held that the Fifth Amendment protected against the compelled production of testimonial evidence only if the individual resisting production had a reasonable expectation of privacy with respect to the evidence. 409 U. S., at 336. *Couch* relied on *Perlman* v. *United States,* 247 U. S.

7 (1918), where the Court permitted the use against the defendant of documentary evidence belonging to him because "there was a voluntary exposition of the articles" rather than "an invasion of the defendant's privacy." *Id.*, at 14. Under *Couch,* therefore, one criterion is whether or not the information sought to be produced has been disclosed to or was within the knowledge of a third party. 409 U. S., at 332–333. That is to say, one relevant consideration is the degree to which the paper holder has sought to keep private the contents of the papers he desires not to produce.

Most recently, *Bellis* v. *United States,* 417 U. S. 85 (1974), followed the approach taken in *Wilson. Bellis* held that the partner of a small law firm could not invoke the privilege against self-incrimination to justify his refusal to comply with a subpoena requiring production of the partnership's financial records. *Bellis* stated: "It has long been established . . . that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. . . . The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." 417 U. S., at 87–88. *Bellis* also recognized that the Court's "decisions holding the privilege inapplicable to the records of a collective entity also reflect . . . the protection of an individual's right to a 'private enclave where he may lead a private life.' . . . Protection of individual privacy was the major theme running through the Court's decision in *Boyd* . . . and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private papers at issue in *Boyd.*" *Id.*, at 91–92. "[C]or-

porate records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach." *Id.*, at 92. *Bellis* concluded that the same considerations which precluded reliance upon the privilege with respect to corporate records also precluded reliance upon it with respect to partnership records in the circumstances of that case.[7]

A precise cataloguing of private papers within the ambit of the privacy protected by the privilege is probably impossible. Some papers, however, do lend themselves to classification. See generally Comment, The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations, 6 Loyola (LA) L. Rev. 274, 300–303 (1973). Production of documentary materials created or authenticated by a State or the Federal Government, such as automobile registrations or property deeds, would seem ordinarily to fall outside the protection of the privilege. They hardly reflect an extension of the person.

Economic and business records may present difficulty in particular cases. The records of business entities generally fall without the scope of the privilege. But, as noted, the Court has recognized that the privilege extends to the business records of the sole proprietor or practitioner. Such records are at least an extension of an aspect of a person's activities, though con-

[7] With respect to a partnership invoice, it thus seems fair to say, as the Court does, *ante*, at 408, "that under [*Bellis*] the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." *Bellis*, however, took care to point out: "We do not believe the Court in *Boyd* can be said to have decided the issue presented today," 417 U. S., at 95 n. 2, thereby leaving unaltered *Boyd's* more general or "imprecise" holding protecting against the compelled production of private papers.

cededly not the more intimate aspects of one's life. Where the privilege would have protected one's mental notes of his business affairs in a less complicated day and age, it would seem that that protection should not fall away because the complexities of another time compel one to keep business records. Cf. *Olmstead* v. *United States*, 277 U. S. 438, 474 (1928) (Brandeis, J., dissenting). Nonbusiness economic records in the possession of an individual, such as canceled checks or tax records, would also seem to be protected. They may provide clear insights into a person's total lifestyle. They are, however, like business records and the papers involved in these cases, frequently, though not always, disclosed to other parties; and disclosure, in proper cases, may foreclose reliance upon the privilege. Personal letters constitute an integral aspect of a person's private enclave. And while letters, being necessarily interpersonal, are not wholly private, their peculiarly private nature and the generally narrow extent of their disclosure would seem to render them within the scope of the privilege. Papers in the nature of a personal diary are *a fortiori* protected under the privilege.

The Court's treatment in the instant cases of the question whether the evidence involved here is within the protection of the privilege is, with all respect, most inadequate. The gaping hole is in the omission of any reference to the taxpayer's privacy interests and to whether the subpoenas impermissibly invade those interests. The observations that the "accountant's workpapers are not the taxpayer's" and "were not prepared by the taxpayer," *ante*, at 409, touch on matters relevant to the taxpayer's expectation of privacy, but do not of themselves determine the availability of the privilege. *Wilson* v. *United States*, 221 U. S., at 378, stated: "[T]he mere fact that

the appellant himself wrote, or signed, the [documents], neither conditioned nor enlarged his privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." [8] Thus, although "[t]he fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege," *ante,* at 410 n. 11, and "the fact that it was written by him is not controlling . . . ," *ibid.,* this is not to say that the privilege is available only as to documents written by him. For the reasons I have stated at the outset, however, I do not believe that the evidence involved in these cases falls within the scope of privacy protected by the Fifth Amendment.

II

I also question the Court's treatment of the question whether the act of producing evidence is "testimonial." I agree that the act of production implicitly admits the existence of the evidence requested and possession or control of that evidence by the party producing it. It also implicitly authenticates the evidence as that identified in the order to compel. I disagree, however, that implicit admission of the existence and possession or control of the papers in this case is not "testimonial" merely because the Government could readily have otherwise proved existence and possession or control in these cases.

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[8] Similarly, *United States* v. *Nobles,* 422 U. S. 225 (1975), held that the Fifth Amendment did not bar production of a defense investigator's summaries of interviews with witnesses. The Court carefully noted, however, that there was no indication that the summaries contained any information conveyed by the defendant to the investigator. *Id.,* at 234.

I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him.

Nor do I consider the taxpayers' implicit authentication an insubstantial threat of self-incrimination. Actually, authentication of the papers as those described in the subpoenas establishes the papers as the taxpayers', thereby supplying an incriminatory link in the chain of evidence against them. It is not the less so because the taxpayers' accountants may also provide the link, since the protection against self-incrimination cannot, I repeat, turn on the strength of the Government's case.

This Court's treatment of handwriting exemplars is not supportive of its position. See *Gilbert* v. *California,* 388 U. S. 263 (1967). The Court has only recognized that "[a] mere handwriting exemplar . . . , like the voice or body itself, is an identifying physical characteristic outside its protection." *Id.,* at 266–267. It is because handwriting exemplars are viewed as strictly nontestimonial, not because they are insufficiently testimonial, that the Fifth Amendment does not protect against their compelled production. Also not supportive of the Court's position is the principle that the custodian of documents of a collective entity is not protected from the act of producing those documents. Nothing in the language of those cases, either expressly or impliedly, indicates that the act of production with respect to the records of business entities is insufficiently testimonial for purposes of the Fifth Amendment. At most, those issues, though considered, were disposed of on the ground, not that production was insufficiently testimonial, but that one in control of the records of an artificial organiza-

tion undertakes an obligation with respect to those records foreclosing any exercise of his privilege.[9]

MR. JUSTICE MARSHALL, concurring in the judgment.

Today the Court adopts a wholly new approach for deciding when the Fifth Amendment privilege against self-incrimination can be asserted to bar production of documentary evidence.[1] This approach has, in various

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[9] Individuals acting as representatives of a collective group "assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations." *United States* v. *White,* 322 U. S. 694, 699 (1944). "In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations." *Bellis* v. *United States,* 417 U. S., at 90. Indeed, in one of the more recent corporate records cases, *Curcio* v. *United States,* 354 U. S. 118, 125 (1957), the Court expressly recognized that "[t]he custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena." The Court in *Curcio,* however, apparently did not note any self-incrimination problem because of the undertaking by the custodian with respect to the documents. (One charged with failure to comply with an order to produce, however, may not thereafter be compelled to testify as to the existence or his control of the documents. See *Curcio* v. *United States, supra.*) In the present cases, of course, the taxpayers are not representatives of any artificial entity and have not undertaken any obligation with respect to that entity or its documents. They have stipulated, however, that the documents involved here exist and are those described in the subpoenas, thereby obviating any problem as to self-incrimination in these cases resulting from the act of production itself.

[1] The Court's theory would appear to apply to real evidence as well.

forms, been discussed by commentators for some time; nonetheless, as I noted a few years ago, the theory "has an odd sound to it." *Couch* v. *United States,* 409 U. S. 322, 348 (1973) (dissenting). The Fifth Amendment basis for resisting production of a document pursuant to subpoena, the Court tells us today, lies not in the document's contents, as we previously have suggested, but in the tacit verification inherent in the act of production itself that the document exists, is in the possession of the producer, and is the one sought by the subpoena.

This technical and somewhat esoteric focus on the testimonial elements of production rather than on the content of the evidence the investigator seeks is, as MR. JUSTICE BRENNAN demonstrates, contrary to the history and traditions of the privilege against self-incrimination both in this country and in England, where the privilege originated. A long line of precedents in this Court, whose rationales if not holdings are overturned by the Court today, support the notion that "any forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of crime" compels him to be a witness against himself within the meaning of the Fifth Amendment to the Constitution. *Boyd* v. *United States,* 116 U. S. 616, 630 (1886). See also *Bellis* v. *United States,* 417 U. S. 85, 87 (1974); *Couch* v. *United States, supra,* at 330; *Schmerber* v. *California,* 384 U. S. 757, 763–764 (1966); *Davis* v. *United States,* 328 U. S. 582, 587–588 (1946); *United States* v. *White,* 322 U. S. 694, 698–699 (1944); *Wheeler* v. *United States,* 226 U. S. 478, 489 (1913); *Wilson* v. *United States,* 221 U. S. 361, 377 (1911).

However analytically imprecise these cases may be, they represent a deeply held belief on the part of the Members of this Court throughout its history that there

are certain documents no person ought to be compelled to produce at the Government's request. While I welcome the Court's attempt to provide a rationale for this long-standing rule, it is incumbent upon the Court, I believe, to fashion its theory so as to protect those documents that have always stood at the core of the Court's concern. Thus, I would have preferred it had the Court found some room in its theory for recognition of the import of the contents of the documents themselves. See *Couch* v. *United States, supra,* at 350 (MARSHALL, J., dissenting).

Nonetheless, I am hopeful that the Court's new theory, properly understood and applied, will provide substantially the same protection as our prior focus on the contents of the documents. The Court recognizes, as others have argued, that the act of production can verify the authenticity of the documents produced. See, *e. g., United States* v. *Beattie,* 522 F. 2d 267 (CA2 1975), cert. pending, Nos. 75-407, 75-700. But the promise of the Court's theory lies in its innovative discernment that production may also verify the documents' very existence and present possession by the producer. This expanded recognition of the kinds of testimony inherent in production not only rationalizes the cases, but seems to me to afford almost complete protection against compulsory production of our most private papers.

Thus, the Court's rationale provides a persuasive basis for distinguishing between the corporate-document cases and those involving the papers of private citizens. Since the existence of corporate record books is seldom in doubt, the verification of their existence, inherent in their production, may fairly be termed not testimonial at all. On the other hand, there is little reason to assume the present existence and possession of most private papers, and certainly not those MR. JUSTICE BRENNAN places at the top of his list of documents that the privilege should protect. See *ante,* at 426-427 (concurring in judgment).

Indeed, there would appear to be a precise inverse relationship between the private nature of the document and the permissibility of assuming its existence. Therefore, under the Court's theory, the admission through production that one's diary, letters, prior tax returns, personally maintained financial records, or canceled checks exist would ordinarily provide substantial testimony. The incriminating nature of such an admission is clear, for while it may not be criminal to keep a diary, or write letters or checks, the admission that one does and that those documents are still available may quickly—or simultaneously—lead to incriminating evidence. If there is a "real danger" of such a result, that is enough under our cases to make such testimony subject to the claim of privilege. See *Rogers* v. *United States,* 340 U. S. 367 (1951); *Brown* v. *Walker,* 161 U. S. 591 (1896); *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892). Thus, in practice, the Court's approach should still focus upon the private nature of the papers subpoenaed and protect those about which *Boyd* and its progeny were most concerned.

The Court's theory will also limit the prosecution's ability to use documents secured through a grant of immunity. If authentication that the document produced is the document demanded were the only testimony inherent in production, immunity would be a useful tool for obtaining written evidence. So long as a document obtained under an immunity grant could be authenticated through other sources, as would often be possible, reliance on the immunized testimony—the authentication—and its fruits would not be necessary, and the document could be introduced. The Court's recognition that the act of production also involves testimony about the existence and possession of the subpoenaed documents mandates a different result. Under the Court's theory, if the document is to be obtained the

immunity grant must extend to the testimony that the document is presently in existence. Such a grant will effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony—that the document exists—and cannot usually be obtained without reliance on that testimony.[2] Accordingly, the Court's theory offers substantially the same protection against procurement of documents under grant of immunity that our prior cases afford.

In short, while the Court sacrifices our pragmatic, if somewhat *ad hoc,* content analysis for what might seem an unduly technical focus on the act of production itself, I am far less pessimistic than MR. JUSTICE BRENNAN that this new approach signals the end of Fifth Amendment protection for documents we have long held to be privileged. I am not ready to embrace the approach myself, but I am confident in the ability of the trial judges who must apply this difficult test in the first instance to act with sensitivity to our traditional concerns in this uncertain area.

For the reasons stated by MR. JUSTICE BRENNAN, I concur in the judgment of the Court.

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[2] Similarly, the Court's theory affords protection to one who possesses documents that he cannot authenticate. If authentication were the only relevant testimony inherent in the act of production, such a person would be forced to relinquish his documents, for he provides no authentication testimony of relevance by producing them in response to a subpoena. See *United States* v. *Beattie,* 522 F. 2d 267 (CA2 1975), cert. pending, Nos. 75-407, 75-700. Under the Court's theory, however, if the existence of these documents were in question, the custodian would still be able to assert a claim of privilege against their production.

UNITED STATES *v.* MILLER

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

No. 74–1179. Argued January 12, 1976—Decided April 21, 1976

Respondent, who had been charged with various federal offenses, made a pretrial motion to suppress microfilms of checks, deposit slips, and other records relating to his accounts at two banks, which maintained the records pursuant to the Bank Secrecy Act of 1970 (Act). He contended that the subpoenas *duces tecum* pursuant to which the material had been produced by the banks were defective and that the records had thus been illegally seized in violation of the Fourth Amendment. Following denial of his motion, respondent was tried and convicted. The Court of Appeals reversed, having concluded that the subpoenaed documents fell within a constitutionally protected zone of privacy. *Held:* Respondent possessed no Fourth Amendment interest in the bank records that could be vindicated by a challenge to the subpoenas, and the District Court therefore did not err in denying the motion to suppress. Pp. 440–446.

(a) The subpoenaed materials were business records of the banks, not respondent's private papers. Pp. 440–441.

(b) There is no legitimate "expectation of privacy" in the contents of the original checks and deposit slips, since the checks are not confidential communications but negotiable instruments to be used in commercial transactions, and all the documents obtained contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities. The Act's recordkeeping requirements do not alter these considerations so as to create a protectable Fourth Amendment interest of a bank depositor in the bank's records of his account. Pp. 441–443.

(c) Issuance of a subpoena to a third party does not violate a defendant's rights, even if a criminal prosecution is contemplated at the time the subpoena is issued. *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 53. Pp. 444–445.

(d) Access to bank records under the Act is to be controlled by "existing legal process." That does not mean that greater judicial scrutiny, equivalent to that required for a search warrant, is necessary when a subpoena is used to obtain a depositor's bank records. Pp. 445–446.

500 F. 2d 751, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., *post*, p. 447, and MARSHALL, J., *post*, p. 455, filed dissenting opinions.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh, Sidney M. Glazer,* and *Ivan Michael Schaeffer.*

D. L. Rampey, Jr., by appointment of the Court, 422 U. S. 1054, argued the cause and filed a brief for respondent.

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent was convicted of possessing an unregistered still, carrying on the business of a distiller without giving bond and with intent to defraud the Government of whiskey tax, possessing 175 gallons of whiskey upon which no taxes had been paid, and conspiring to defraud the United States of tax revenues. 26 U. S. C. §§ 5179, 5205, 5601 *et seq.;* 18 U. S. C. § 371. Prior to trial respondent moved to suppress copies of checks and other bank records obtained by means of allegedly defective subpoenas *duces tecum* served upon two banks at which he had accounts. The records had been maintained by the banks in compliance with the requirements of the Bank Secrecy Act of 1970, 84 Stat. 1114, 12 U. S. C. § 1829b (d).

The District Court overruled respondent's motion to suppress, and the evidence was admitted. The Court of Appeals for the Fifth Circuit reversed on the ground that a depositor's Fourth Amendment rights are violated when bank records maintained pursuant to the Bank Secrecy Act are obtained by means of a defective subpoena. It held that any evidence so obtained must be suppressed. Since we find that respondent had no protectable Fourth Amendment interest in the subpoenaed documents, we reverse the decision below.

I

On December 18, 1972, in response to an informant's tip, a deputy sheriff from Houston County, Ga., stopped a van-type truck occupied by two of respondent's alleged co-conspirators. The truck contained distillery apparatus and raw material. On January 9, 1973, a fire broke out in a Kathleen, Ga., warehouse rented to respondent. During the blaze firemen and sheriff department officials discovered a 7,500-gallon-capacity distillery, 175 gallons of non-tax-paid whiskey, and related paraphernalia.

Two weeks later agents from the Treasury Department's Alcohol, Tobacco and Firearms Bureau presented grand jury subpoenas issued in blank by the clerk of the District Court, and completed by the United States Attorney's office, to the presidents of the Citizens & Southern National Bank of Warner Robins and the Bank of Byron, where respondent maintained accounts. The subpoenas required the two presidents to appear on January 24, 1973, and to produce

> "all records of accounts, *i. e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller [respondent], 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive

> Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973, in the case of the Bank of Byron, and January 23, 1973, in the case of the Citizens & Southern National Bank of Warner Robins]."

The banks did not advise respondent that the subpoenas had been served but ordered their employees to make the records available and to provide copies of any documents the agents desired. At the Bank of Byron, an agent was shown microfilm records of the relevant account and provided with copies of one deposit slip and one or two checks. At the Citizens & Southern National Bank microfilm records also were shown to the agent, and he was given copies of the records of respondent's account during the applicable period. These included all checks, deposit slips, two financial statements, and three monthly statements. The bank presidents were then told that it would not be necessary to appear in person before the grand jury.

The grand jury met on February 12, 1973, 19 days after the return date on the subpoenas. Respondent and four others were indicted. The overt acts alleged to have been committed in furtherance of the conspiracy included three financial transactions—the rental by respondent of the van-type truck, the purchase by respondent of radio equipment, and the purchase by respondent of a quantity of sheet metal and metal pipe. The record does not indicate whether any of the bank records were in fact presented to the grand jury. They were used in the investigation and provided "one or two" investigatory leads. Copies of the checks also were introduced at trial to establish the overt acts described above.

In his motion to suppress, denied by the District Court, respondent contended that the bank documents were illegally seized. It was urged that the subpoenas were

defective because they were issued by the United States Attorney rather than a court, no return was made to a court, and the subpoenas were returnable on a date when the grand jury was not in session. The Court of Appeals reversed. 500 F. 2d 751 (1974). Citing the prohibition in *Boyd* v. *United States,* 116 U. S. 616, 622 (1886), against "compulsory production of a man's private papers to establish a criminal charge against him," the court held that the Government had improperly circumvented *Boyd*'s protections of respondent's Fourth Amendment right against "unreasonable searches and seizures" by "first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies." 500 F. 2d, at 757. The court acknowledged that the recordkeeping requirements of the Bank Secrecy Act had been held to be constitutional on their face in *California Bankers Assn.* v. *Shultz,* 416 U. S. 21 (1974), but noted that access to the records was to be controlled by "existing legal process." See *id.,* at 52. The subpoenas issued here were found not to constitute adequate "legal process." The fact that the bank officers cooperated voluntarily was found to be irrelevant, for "he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official." 500 F. 2d, at 758.

The Government contends that the Court of Appeals erred in three respects: (i) in finding that respondent had the Fourth Amendment interest necessary to entitle him to challenge the validity of the subpoenas *duces tecum* through his motion to suppress; (ii) in holding that the subpoenas were defective; and (iii) in determining that suppression of the evidence obtained was the appropriate remedy if a constitutional violation did take place.

We find that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest and that the District Court therefore correctly denied respondent's motion to suppress. Because we reverse the decision of the Court of Appeals on that ground alone, we do not reach the Government's latter two contentions.

II

In *Hoffa* v. *United States,* 385 U. S. 293, 301-302 (1966), the Court said that "no interest legitimately protected by the Fourth Amendment" is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into "the security a man relies upon when he places himself or his property within a constitutionally protected area." The Court of Appeals, as noted above, assumed that respondent had the necessary Fourth Amendment interest, pointing to the language in *Boyd* v. *United States, supra,* at 622, which describes that Amendment's protection against the "compulsory production of a man's private papers." [1] We think that the Court of Appeals erred in finding the subpoenaed documents to fall within a protected zone of privacy.

On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in *Boyd,* respondent can assert neither ownership nor possession. Instead, these are the business records of the banks. As we said in *California Bankers Assn.* v. *Shultz, supra,* at 48-49, "[b]anks are . . . not . . . neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance." The records of re-

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[1] The Fourth Amendment implications of *Boyd* as it applies to subpoenas *duces tecum* have been undercut by more recent cases. *Fisher* v. *United States, ante,* at 407-409. See *infra,* at 445-446.

spondent's accounts, like "all of the records [which are required to be kept pursuant to the Bank Secrecy Act,] pertain to transactions to which the bank was itself a party." *Id.*, at 52.

Respondent argues, however, that the Bank Secrecy Act introduces a factor that makes the subpoena in this case the functional equivalent of a search and seizure of the depositor's "private papers." We have held, in *California Bankers Assn.* v. *Shultz, supra,* at 54, that the mere maintenance of records pursuant to the requirements of the Act "invade[s] no Fourth Amendment right of any depositor." But respondent contends that the combination of the recordkeeping requirements of the Act and the issuance of a subpoena[2] to obtain those records permits the Government to circumvent the requirements of the Fourth Amendment by allowing it to obtain a depositor's private records without complying with the legal requirements that would be applicable had it proceeded against him directly.[3] Therefore, we must address the question whether the compulsion embodied in the Bank Secrecy Act as exercised in this case creates a Fourth Amendment interest in the depositor where none existed before. This question was expressly re-

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[2] Respondent appears to contend that a depositor's Fourth Amendment interest comes into play only when a *defective* subpoena is used to obtain records kept pursuant to the Act. We see no reason why the existence of a Fourth Amendment interest turns on whether the subpoena is defective. Therefore, we do not limit our consideration to the situation in which there is an alleged defect in the subpoena served on the bank.

[3] It is not clear whether respondent refers to attempts to obtain private documents through a subpoena issued directly to the depositor or through a search pursuant to a warrant. The question whether personal business records may be seized pursuant to a valid warrant is before this Court in No. 74–1646, *Andresen* v. *Maryland,* cert. granted, 423 U. S. 822.

served in *California Bankers Assn., supra,* at 53–54, and n. 24.

Respondent urges that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy. He relies on this Court's statement in *Katz* v. *United States,* 389 U. S. 347, 353 (1967), quoting *Warden* v. *Hayden,* 387 U. S. 294, 304 (1967), that "we have . . . departed from the narrow view" that " 'property interests control the right of the Government to search and seize,' " and that a "search and seizure" become unreasonable when the Government's activities violate "the privacy upon which [a person] justifiably relie[s]." But in *Katz* the Court also stressed that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." 389 U. S., at 351. We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate "expectation of privacy" concerning their contents. Cf. *Couch* v. *United States,* 409 U. S. 322, 335 (1973).

Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records

to be maintained because they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." 12 U. S. C. § 1829b (a)(1). Cf. *Couch* v. *United States, supra,* at 335.

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. *United States* v. *White,* 401 U. S. 745, 751–752 (1971). This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. *Id.,* at 752; *Hoffa* v. *United States,* 385 U. S., at 302; *Lopez* v. *United States,* 373 U. S. 427 (1963).[4]

This analysis is not changed by the mandate of the Bank Secrecy Act that records of depositors' transactions be maintained by banks. In *California Bankers Assn.* v. *Shultz,* 416 U. S., at 52–53, we rejected the contention that banks, when keeping records of their depositors' transactions pursuant to the Act, are acting solely as agents of the Government. But, even if the banks could be said to have been acting solely as Government agents in transcribing the necessary information and complying without protest[5] with the requirements of the subpoenas, there would be no intrusion upon the depositors' Fourth Amendment rights. See *Osborn* v. *United States,* 385 U. S. 323 (1966); *Lewis* v. *United States,* 385 U. S. 206 (1966).

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[4] We do not address here the question of evidentiary privileges, such as that protecting communications between an attorney and his client. Cf. *Fisher* v. *United States, ante,* at 403–405.

[5] Nor did the banks notify respondent, a neglect without legal consequences here, however unattractive it may be.

III

Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued. *California Bankers Assn.* v. *Shultz, supra,* at 53; *Donaldson* v. *United States,* 400 U. S. 517, 537 (1971) (Douglas, J., concurring). Under these principles, it was firmly settled, before the passage of the Bank Secrecy Act, that an Internal Revenue Service summons directed to a third-party bank does not violate the Fourth Amendment rights of a depositor under investigation. See *First National Bank of Mobile* v. *United States,* 267 U. S. 576 (1925), aff'g 295 F. 142 (SD Ala. 1924). See also *California Bankers Assn.* v. *Shultz, supra,* at 53; *Donaldson* v. *United States, supra,* at 522.

Many banks traditionally kept permanent records of their depositors' accounts, although not all banks did so and the practice was declining in recent years. By requiring that such records be kept by all banks, the Bank Secrecy Act is not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and long-standing law enforcement technique by insuring that records are available when they are needed.[6]

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[6] Respondent does not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort we addressed in *Buckley* v. *Valeo,* 424 U. S. 1, 60–84 (1976), nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491 (1975).

We are not confronted with a situation in which the Government, through "unreviewed executive discretion," has made a wide-ranging

We hold that the District Court correctly denied respondent's motion to suppress, since he possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas.

IV

Respondent contends not only that the subpoenas *duces tecum* directed against the banks infringed his Fourth Amendment rights, but that a subpoena issued to a bank to obtain records maintained pursuant to the Act is subject to more stringent Fourth Amendment requirements than is the ordinary subpoena. In making this assertion he relies on our statement in *California Bankers Assn., supra,* at 52, that access to the records maintained by banks under the Act is to be controlled by "existing legal process." [7]

In *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 208 (1946), the Court said that "the Fourth [Amendment], if applicable [to subpoenas for the production of business records and papers], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding

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inquiry that unnecessarily "touch[es] upon intimate areas of an individual's personal affairs." *California Bankers Assn.* v. *Shultz,* 416 U. S., at 78–79 (POWELL, J., concurring). Here the Government has exercised its powers through narrowly directed subpoenas *duces tecum* subject to the legal restraints attendant to such process. See Part IV, *infra.*

[7] This case differs from *Burrows* v. *Superior Court,* 13 Cal. 3d 238, 529 P. 2d 590 (1974), relied on by MR. JUSTICE BRENNAN in dissent, in that the bank records of respondent's accounts were furnished in response to "compulsion by legal process" in the form of subpoenas *duces tecum.* The court in *Burrows* found it "significant . . . that the bank [in that case] provided the statements to the police in response to an informal oral request for information." *Id.,* at 243, 529 P. 2d, at 593.

agency is authorized by law to make and the materials specified are relevant." See also *United States* v. *Dionisio,* 410 U. S. 1, 11–12 (1973). Respondent, citing *United States* v. *United States District Court,* 407 U. S. 297 (1972), in which we discussed the application of the warrant requirements of the Fourth Amendment to domestic security surveillance through electronic eavesdropping, suggests that greater judicial scrutiny, equivalent to that required for a search warrant, is necessary when a subpoena is to be used to obtain bank records of a depositor's account. But in *California Bankers Assn.,* 416 U. S., at 52, we emphasized only that access to the records was to be in accordance with "existing legal process." There was no indication that a new rule was to be devised, or that the traditional distinction between a search warrant and a subpoena would not be recognized.[8]

In any event, for the reasons stated above, we hold that respondent lacks the requisite Fourth Amendment interest to challenge the validity of the subpoenas.[9]

V

The judgment of the Court of Appeals is reversed. The court deferred decision on whether the trial court had improperly overruled respondent's motion to suppress

[8] A subpoena *duces tecum* issued to obtain records is subject to no more stringent Fourth Amendment requirements than is the ordinary subpoena. A search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes Government officers to seize evidence without requiring enforcement through the courts. See *United States* v. *Dionisio,* 410 U. S. 1, 9–10 (1973).

[9] There is no occasion for us to address whether the subpoenas complied with the requirements outlined in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186 (1946). The banks upon which they were served did not contest their validity.

distillery apparatus and raw material seized from a rented truck. We remand for disposition of that issue.

So ordered.

MR. JUSTICE BRENNAN, dissenting.

The pertinent phrasing of the Fourth Amendment—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"—is virtually *in haec verba* as Art. I, § 19, of the California Constitution—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." The California Supreme Court has reached a conclusion under Art. I, § 19, in the same factual situation, contrary to that reached by the Court today under the Fourth Amendment.[1] I dissent because in my view the California Supreme Court correctly interpreted the relevant constitutional language.

In *Burrows* v. *Superior Court,* 13 Cal. 3d 238, 529 P. 2d 590 (1974), the question was whether bank statements or copies thereof relating to an accused's bank accounts obtained by the sheriff and prosecutor without

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[1] The expectation of privacy relied upon by respondent to support his Fourth Amendment claim is similar to that rejected as to similar documents in *Couch* v. *United States,* 409 U. S. 322 (1973). But in *Couch* the taxpayer had delivered the documents to her accountant for preparation of income tax returns "knowing that mandatory disclosure of much of the information therein is required in an income tax return." *Id.,* at 335; see *id.,* at 337 (BRENNAN, J., concurring). In contrast, in the instant case the banks were obliged only to respond to lawful process, *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 52–54 (1974), and had no obligation to disclose the information voluntarily. The expectation of privacy asserted in *Fisher* v. *United States, ante,* p. 391, is distinguishable on similar grounds.

benefit of legal process,[2] but with the consent of the bank, were acquired as a result of an illegal search and seizure. The California Supreme Court held that the accused had a reasonable expectation of privacy in his bank statements and records, that the voluntary relinquishment of such records by the bank at the request of the sheriff and prosecutor did not constitute a valid consent by the accused, and that the acquisition by the officers of the records therefore was the result of an illegal search and seizure. In my view the same conclusion, for the reasons stated by the California Supreme Court, is compelled in this case under the practically identical phrasing of the Fourth Amendment. Addressing the threshold question whether the accused's right of privacy was invaded, and relying in part on the decision of the Court of Appeals in this case, Mr. Justice Mosk stated in his excellent opinion for a unanimous court:

> "It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable. The prosecution concedes as much, although it asserts that this expecta-

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[2] The Court distinguishes *Burrows* on the ground that it involved no legal process, while the instant case involves legal process in the form of subpoenas *duces tecum*. *Ante*, at 445 n. 7. But the Court also states that the Fourth Amendment issue does not turn on whether the subpoenas were defective. *Ante*, at 441 n. 2.

In any event, for present purposes I would accept the Court of Appeals' conclusion that the subpoenas in this case were defective. Moreover, although not relied upon by the Court of Appeals, neither the bank nor the Government notified respondent of the disclosure of his records to the Government. In my view, the absence of such notice is not just "unattractive," *ante*, at 443 n. 5; a fatal constitutional defect inheres in a process that omits provision for notice to the bank customer of an invasion of his protected Fourth Amendment interest.

tion is not constitutionally cognizable. Representatives of several banks testified at the suppression hearing that information in their possession regarding a customer's account is deemed by them to be confidential.

"In the present case, although the record establishes that copies of petitioner's bank statements rather than of his checks were provided to the officer, the distinction is not significant with relation to petitioner's expectation of privacy. That the bank alters the form in which it records the information transmitted to it by the depositor to show the receipt and disbursement of money on a bank statement does not diminish the depositor's anticipation of privacy in the matters which he confides to the bank. A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes. Thus, we hold petitioner had a reasonable expectation that the bank would maintain the confidentiality of those papers which originated with him in check form and of the bank statements into which a record of those same checks had been transformed pursuant to internal bank practice.

. . . . .

"The People assert that no illegal search and seizure occurred here because the bank voluntarily provided the statements to the police, and the bank rather than the police conducted the search of its records for papers relating to petitioner's accounts. If, as we conclude above, petitioner has a reasonable expectation of privacy in the bank statements, the voluntary relinquishment of such records by the bank at the request of the police does not constitute

a valid consent by this petitioner. . . . It is not the right of privacy of the bank but of the petitioner which is at issue, and thus it would be untenable to conclude that the bank, a neutral entity with no significant interest in the matter, may validly consent to an invasion of its depositors' rights. However, if the bank is not neutral, as for example where it is itself a victim of the defendant's suspected wrongdoing, the depositor's right of privacy will not prevail.

"Our rationale is consistent with the recent decision of *United States* v. *Miller* (5th Cir. 1974) 500 F. 2d 751. In *Miller*, the United States Attorney, without the defendant's knowledge, issued subpoenas to two banks in which the defendant maintained accounts, ordering the production of 'all records of accounts' in the name of the defendant. The banks voluntarily provided the government with copies of the defendant's checks and a deposit slip; these items were introduced into evidence at the trial which led to his conviction. The circuit court reversed the conviction. It held that the defendant's rights under the Fourth Amendment were violated by the search because the subpoena was issued by the United States Attorney rather than by a court or grand jury, and the bank's voluntary compliance with the subpoena was irrelevant since it was the depositor's right to privacy which was threatened by the disclosure.

"We hold that any bank statements or copies thereof obtained by the sheriff and prosecutor without the benefit of legal process were acquired as the result of an illegal search and seizure (Cal. Const., art. I, § 13), and that the trial court should have granted the motion to suppress such documents.

. . . . .

"The underlying dilemma in this and related cases is that the bank, a detached and disinterested entity, relinquished the records voluntarily. But that circumstance should not be crucial. For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography. While we are concerned in the present case only with bank statements, the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, savings, bonds, loan applications, loan guarantees, and all papers which the customer has supplied to the bank to facilitate the conduct of his financial affairs upon the reasonable assumption that the information would remain confidential. To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power.

"Cases are legion that condemn violent searches and invasions of an individual's right to the privacy of his dwelling. The imposition upon privacy, although perhaps not so dramatic, may be equally devastating when other methods are employed. Development of photocopying machines, electronic computers and other sophisticated instruments have

accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices." 13 Cal. 3d, at 243–248, 529 P. 2d, at 593–596 (footnote omitted).

The California Supreme Court also addressed the question of the relevance of *California Bankers Assn.* v. *Shultz,* 416 U. S. 21 (1974). In my view, for the reasons stated in *Burrows,* the decision of the Court of Appeals under review today, is in no way inconsistent with *California Bankers.*[3] The California Supreme Court said:

"[*California Bankers*] held, in a six-three decision, that the bank's rights under the Fourth Amendment were not abridged by the regulation, and that the depositor plaintiffs lacked standing to challenge the reporting requirement because there was no showing that they engaged in the type of transaction to which the regulation referred.

"The concurring views of two justices who provided the necessary votes to create a majority are of particular interest. Justice Powell's opinion, joined by Justice Blackmun [416 U. S., at 78] makes clear that a significant extension of the reporting requirement would pose substantial constitutional questions, and that concurrence with the

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[3] I continue to believe that the reporting and recordkeeping requirements of the Bank Secrecy Act are unconstitutional. *California Bankers Assn.* v. *Shultz,* 416 U. S., at 91 (BRENNAN, J., dissenting). But I disagree with the Court's reasoning in this case even assuming the constitutionality of the Act, and therefore it is unnecessary for me to rely on the infirmities inherent in the Act.

majority was based upon the provisions of the act as narrowed by the regulations. He wrote, 'In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. *United States* v. *United States District Court,* 407 U. S. 297, 316–317.' [416 U. S., at 78–79.]

"Justices Douglas and Marshall dissented on the ground that the act violated the Fourth Amendment. Justice Brennan also filed a dissent, stating that the recordkeeping and reporting requirements of the act constituted an impermissibly broad grant of power to the Secretary.

". . . [T]he only federal case decided after *Shultz* and directly confronting the issue of the depositor's rights is entirely consistent with the views we have set forth above. . . . *Miller* holds that *Shultz* may not be interpreted as 'proclaiming open season on personal bank records' or as permitting the government to circumvent the Fourth Amendment by first requiring banks to copy their depositors' checks and then calling upon the banks to allow inspection of those copies without appropriate legal process." 13 Cal. 3d, at 246–247, 529 P. 2d, at 595–596 (footnote omitted).

I would therefore affirm the judgment of the Court of Appeals. I add only that *Burrows* strikingly illustrates the emerging trend among high state courts of relying upon state constitutional protections of individual liberties[4]—protections pervading counterpart provisions of

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[4] See, *e. g.*, cases cited in *Baxter* v. *Palmigiano, ante,* at 339, and n. 10 (BRENNAN, J., dissenting); *Michigan* v. *Mosley,* 423 U. S. 96, 120–121 (1975) (BRENNAN, J., dissenting). See also Wilkes, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky. L. J. 421 (1974); Wilkes, More on the New Federalism in Criminal Procedure, 63 Ky. L. J. 873 (1975); Falk, The State Constitution: A More Than "Adequate" Nonfederal Ground, 61 Calif. L. Rev. 273 (1973); Project Report: Toward an Activist Role for State Bills of Rights, 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 271 (1973). In the past, it might have been safe for counsel to raise only federal constitutional issues in state courts, but the risks of not raising state-law questions are increasingly substantial, as revealed by a colloquy during argument in *Michigan* v. *Mosley, supra:*

"QUESTION: Why can't you argue all of this as being contrary to the law and the Constitution of the State of Michigan?

"MR. ZIEMBA: I can because we have the same provision in the Michigan Constitution of 1963 as we have in the Fifth Amendment of the Federal Constitution, certainly.

. . . . .

"QUESTION: Well, you argued the whole thing before.

"MR. ZIEMBA: In the Court of Appeals?

"QUESTION: Yes.

"MR. ZIEMBA: I really did not touch upon—I predicated my entire argument on the Federal Constitution, I must admit that. I did not mention the equivalent provision of the Michigan Constitution of 1963, although I could have. And I may assure this Court that at every opportunity in the future, I shall.

"[Laughter.]

"QUESTION: But you hope you don't have that opportunity in this case.

"MR. ZIEMBA: That's right." Tr. of Oral Arg. 43–44 (O. T. 1975, No. 74–653).

It would be unwise for counsel to rely on state courts to consider state-law questions *sua sponte.* But see *State* v. *Johnson,* 68 N. J. 349, 346 A. 2d 66 (1975).

the United States Constitution, but increasingly being ignored by decisions of this Court. For the most recent examples in this Court, but only in the privacy and Fourth Amendment areas, see, *e. g., Kelley* v. *Johnson, ante,* p. 238; *Doe* v. *Commonwealth's Atty., post,* p. 901; *Paul* v. *Davis,* 424 U. S. 693 (1976); *United States* v. *Watson,* 423 U. S. 411 (1976).

MR. JUSTICE MARSHALL, dissenting.

In *California Bankers Assn.* v. *Shultz,* 416 U. S. 21 (1974), the Court upheld the constitutionality of the recordkeeping requirements of the Bank Secrecy Act. 12 U. S. C. § 1829b (d). I dissented, finding the required maintenance of bank customers' records to be a seizure within the meaning of the Fourth Amendment and unlawful in the absence of a warrant and probable cause. While the Court in *California Bankers Assn.* did not then purport to decide whether a customer could later challenge the bank's delivery of his records to the Government pursuant to subpoena, I warned:

> "[I]t is ironic that although the majority deems the bank customers' Fourth Amendment claims premature, it also intimates that once the bank has made copies of a customer's checks, the customer no longer has standing to invoke his Fourth Amendment rights when a demand is made on the bank by the Government for the records. . . . By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late." 416 U. S., at 97.

Today, not surprisingly, the Court finds respondent's claims to be made too late. Since the Court in *Califor-*

nia Bankers Assn. held that a bank, in complying with the requirement that it keep copies of the checks written by its customers, "neither searches nor seizes records in which the depositor has a Fourth Amendment right," *id.,* at 54, there is nothing new in today's holding that respondent has no protected Fourth Amendment interest in such records. *A fortiori,* he does not have standing to contest the Government's subpoena to the bank. *Alderman* v. *United States,* 394 U. S. 165 (1969).

I wash my hands of today's extended redundancy by the Court. Because the recordkeeping requirements of the Act order the seizure of customers' bank records without a warrant and probable cause, I believe the Act is unconstitutional and that respondent has standing to raise that claim. Since the Act is unconstitutional, the Government cannot rely on records kept pursuant to it in prosecuting bank customers. The Government relied on such records in this case and, because of that, I would affirm the Court of Appeals' reversal of respondent's conviction. I respectfully dissent.

NEW YORK CIVIL SERVICE COMMISSION ET AL. *v.* SNEAD

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

No. 75-805. Decided April 26, 1976

Appellee's complaint making a challenge to the constitutionality of a New York statute governing leave of absence for mentally unfit civil service employees must be dismissed for lack of standing to assert such a challenge, where the record discloses that the statute was never in fact properly applied to appellee.

409 F. Supp. 994, vacated and remanded.

PER CURIAM.

A three-judge District Court was convened in response to appellee's complaint alleging that N. Y. Civil Service Law § 72 (1969), governing leave of absence for mentally unfit civil service employees, denied her the procedural due process guaranteed her by the Fourteenth Amendment of the United States Constitution. Joined as defendants in her action, which sought both declaratory and injunctive relief, were the appellants Civil Service Commission of the State of New York and its members, and the city of New York.

The District Court sustained appellee's federal constitutional claims, and enjoined the defendants from taking any action under the challenged statutory provision, and also ordered that appellee be reinstated in her civil service position and given backpay by the city of New York. The city has not appealed from the judgments.

Appellee, in addition to the previously described allegations, also asserted in her complaint that the city of New York in suspending her *had not followed* the procedures set forth in § 72. She particularly alleged that the doctor who examined her had not been selected

in the manner prescribed by that statute. Appellants have not denied this allegation and, indeed, now acknowledge that the state law was not followed. The record therefore now establishes that the statutory procedure which appellee challenged has not been applied to her. It follows that she may have had a claim under state law against the city of New York; she may indeed have had a claim against the city of New York based on the procedural guarantees of the Fourteenth Amendment by reason of the procedure which the city *in fact* followed in suspending her. Since the city has not appealed, we have no occasion to consider any aspect of her claim against it, other than to say that neither of the claims just described would authorize the convening of the three-judge District Court under 28 U. S. C. § 2281. *Phillips* v. *United States,* 312 U. S. 246, 253 (1941).

> "In so far as it is alleged that the assessments are void because unauthorized by the Arizona statute, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as tested by the Federal Constitution." *Ex parte Bransford,* 310 U. S. 354, 358 (1940).

Stripped of these related contentions, appellee's claim against appellant state Civil Service Commission amounts to a request for a determination of the constitutionality of a statute which, while administered by the Commission has never in fact been properly applied by the Commission or indeed by the city of New York to her. Since the record now makes it clear that she has no standing to assert such a challenge, her complaint as to the constitutionality of § 72 should be dismissed. See *Hagans* v. *Lavine,* 415 U. S. 528 (1974).

Appellee asserted no claim against appellant Civil Service Commission and its members other than her constitutional claim. On their appeal, therefore, the

judgment of the District Court as to them is vacated, and the case is remanded with instructions to dismiss appellee's complaint insofar as it sought relief against them.

So ordered.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would affirm without hearing oral argument.

NATIONAL BANK OF NORTH AMERICA *v.* ASSOCIATES OF OBSTETRICS AND FEMALE SURGERY, INC., ET AL.

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

No. 75-1106. Decided April 26, 1976

The provision in the venue section of the National Bank Act, 12 U. S. C. § 94, that actions against a national banking association lie "in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases," is not permissive but mandatory. *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555; *Michigan Nat. Bank* v. *Robertson,* 372 U. S. 591. Therefore, petitioner national banking association, which has its principal place of business in New York and has no offices or agents, and does not regularly conduct business, in Utah, could not be sued by respondent in a Utah state court, unless it can be shown that petitioner waived the provisions of § 94.

Certiorari granted; 542 P. 2d 1079, vacated and remanded.

PER CURIAM.

The petitioner is a national banking association with its principal place of business in New York. It has no offices or agents in Utah and does not regularly conduct business in that State. The respondent Associates of Obstetrics brought a breach-of-contract action against the petitioner in a Utah state court, seeking damages on the ground that the petitioner had induced the respondent to lend a large sum of money to a Utah corporation on the representation that the loan would be protected and that the petitioner had defaulted on this agreement. The petitioner moved to dismiss the complaint on the basis of the venue provision of the National Bank Act, Rev. Stat. § 5198, 12 U. S. C. § 94. That section provides that venue for actions against a national banking

association shall lie "in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases." After the Utah trial court granted the petitioner's motion, the respondent filed an amended complaint alleging that the petitioner had waived the protection of § 94 by making a loan to the Utah corporation and seeking to place that corporation into bankruptcy in a Federal District Court in Utah. The state trial court denied a motion to dismiss the amended complaint and the Utah Supreme Court affirmed, holding that the venue provision of the National Bank Act is "permissive and not exclusive," *Associates of Obstetrics* v. *Apollo Productions, Inc.,* 542 P. 2d 1079, 1080.

In *Mercantile Nat. Bank* v. *Langdeau,* 371 U. S. 555 (1963), and *Michigan Nat. Bank* v. *Robertson,* 372 U. S. 591 (1963), this Court held that the provision in § 94 concerning venue in state, county, or municipal courts is not permissive, but mandatory, and, therefore, "that national banks may be sued only in those state courts in the county where the banks are located." 371 U. S., at 561. Accordingly, we grant the petition for certiorari and vacate the judgment of the Utah Supreme Court. Since that court did not reach the respondent's contention that the petitioner had waived the provisions of § 94, the case is remanded for a determination of that issue.* See *Michigan Nat. Bank* v. *Robertson, supra,* at 594.

It is so ordered.

MR. JUSTICE REHNQUIST, concurring.

Charlotte Nat. Bank v. *Morgan,* 132 U. S. 141 (1889), recognized that the exemption of national banking asso-

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*The respondent also argues that § 94 does not apply because this action is local in nature. See *Casey* v. *Adams,* 102 U. S. 66 (1880). This argument is based on the fact that a loan was made by

ciations from suit in counties or cities other than those in which they were located was a personal privilege of the associations which could be waived by them. *Id.*, at 145. This exception to the otherwise mandatory nature of this venue limitation has been carried forward in the current recodification of the federally created privilege. *Michigan Nat. Bank* v. *Robertson,* 372 U. S. 591, 594 (1963). In *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U. S. 165 (1939), the Court held that by designating an agent for service of process within a State, a corporation gave its consent to be sued in federal court within that State notwithstanding the provisions of the predecessor to 28 U. S. C. § 1391 (c), which accorded defendants in federal courts a privilege regarding venue essentially equivalent to that found in 12 U. S. C. § 94. I see no reason for concluding that the venue privilege extended by § 94 is of a different nature from that contained in § 1391, or that it may not be similarly waived by the conduct of a national banking association. Thus, I believe *Neirbo* establishes that petitioner National Bank could be deemed to have consented to being sued in Utah by providing an agent for service of process in that State or otherwise qualifying to do business therein according to Utah law. The record before us does not reveal whether such facts may exist in this case, however, and the Utah courts apparently engaged in no inquiry along these lines. I therefore agree with the Court's decision to remand this case to the Utah court in order that it can examine whether petitioner may have waived the privilege afforded it by § 94.

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the petitioner to a Utah corporation and that the petitioner has claimed a security interest in the assets of that corporation in a bankrupcy petition. But the *Robertson* decision established that such factors do not bring a case within the local-action exception to § 94 carved out by *Casey* v. *Adams, supra.* See 372 U. S., at 593–594.

Syllabus

MOE, SHERIFF, ET AL. v. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION ET AL.

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

No. 74–1656. Argued January 20, 1976—Decided April 27, 1976*

An Indian tribe and some of its members residing on the tribal reservation in Montana brought actions challenging Montana's cigarette sales taxes and personal property taxes (in particular property taxes on motor vehicles) as applied to reservation Indians, and also the State's vendor licensing statute as applied to tribal members who sell cigarettes at "smoke shops" on the reservation, and seeking declaratory and injunctive relief. After finding that the actions were not barred by 28 U. S. C. § 1341, which prohibits district courts from enjoining the assessment, levy, or collection of any state tax where a plain, speedy, and efficient remedy may be had in the state courts, the District Court held that Montana was barred from imposing cigarette sales taxes with respect to on-reservation sales by tribal members to Indians residing on the reservation, from imposing the vendor license fee on a tribal member operating a "smoke shop" on the reservation, and from imposing a personal property tax as a condition precedent for registration of a motor vehicle, but that the State may require a precollection of the cigarette sales tax imposed by law upon a non-Indian purchaser of cigarettes. *Held:*

1. The actions were not barred by § 1341. The legislative history of 28 U. S. C. § 1362, which gives district courts original jurisdiction of all civil actions brought by any Indian tribe wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States, indicates that in certain respects Indian tribes suing under this section were to be accorded treatment similar to that of the United States suing as a tribe's trustee, and therefore, since the United States is not barred by

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*Together with No. 75–50, *Confederated Salish and Kootenai Tribes of the Flathead Reservation et al.* v. *Moe, Sheriff, et al.*, also on appeal from the same court.

§ 1341 from seeking to enjoin the enforcement of a state tax law, the Tribe is not barred from doing so in these cases. Pp. 470–475.

2. The tax on personal property located within the reservation, the vendor license fee, as applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land, and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the federal statutes that provide the basis for decision with respect to such impositions. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164; *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145. Pp. 475–481.

(a) There is no basis for distinguishing *McClanahan, supra*, on the ground that the tribal members are now so completely integrated with the non-Indian residents on the reservation that there is no longer any reason to accord them different treatment from other citizens, where it appears that the Tribe has not abandoned its tribal organization, that the Federal Government, not just the State, has made substantial expenditures for various purposes beneficial to the reservation Indians, and that the Tribe's own income contributed to its economic well-being. P. 476.

(b) Section 6 of the General Allotment Act, which provides that at the expiration of the Tribe's trust period and when the lands within the reservation have been conveyed to the Indians by patent in fee, then the allottees shall be subject to state laws, does not constitute a basis for permitting Montana to tax reservation Indians. To apply that statute so as to permit such taxation would result in an impractical pattern of "checkerboard" jurisdiction, now discredited by both Congress and this Court, whereby state or federal jurisdiction over the Indians would depend respectively on whether a particular parcel of land was "fee patented" or held in trust for the Tribe. Pp. 477–479.

(c) The tax immunity for reservation Indians does not constitute invidious racial discrimination against non-Indians, contrary to the Due Process Clause of the Fifth Amendment, since such immunity meets the test that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed," *Morton* v. *Mancari*, 417 U. S. 535, 555. Pp. 479–480.

3. To the extent that the on-reservation "smoke shops" sell to non-Indians upon whom the State has validly imposed a sales tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and

thereby aid the State's collection and enforcement of the tax. Such a requirement is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a lawful tax, and it does not frustrate tribal self-government or run afoul of any federal statute dealing with reservation Indians' affairs. Pp. 481–483.

392 F. Supp. 1297 and 392 F. Supp. 1325, affirmed.

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

Sam E. Haddon, Special Assistant Attorney General of Montana, argued the cause for appellants in No. 74–1656 and appellees in No. 75–50. With him on the briefs were *Robert L. Woodahl,* Attorney General, and *Jean A. Turnage,* Special Assistant Attorney General.

Richard A. Baenen argued the cause and filed a brief for appellees in No. 74–1656 and appellants in No. 75–50.†

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are called upon in these appeals to resolve several questions arising out of a conflict between the asserted taxing power of the State of Montana and the immunity claimed by the Confederated Salish and Kootenai Tribes (Tribe) and its members living on the tribal reservation. Convened as a three-judge court,[1] the District Court for the District of Montana considered separate attacks on the State's cigarette sales and personal property taxes as applied to reservation Indians. After finding that the suits were not barred by the prohibition of 28 U. S. C.

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†Briefs of *amici curiae* were filed by *Slade Gorton,* Attorney General, and *Richard H. Holmquist,* Assistant Attorney General, for the State of Washington; and by *Michael Taylor* for the Quinault Indian Nation.

[1] See 28 U. S. C. § 2281.

§ 1341,[2] the District Court entered final judgments which, with one exception, sustained the Tribe's challenges, and from which the State has appealed (No. 74–1656). The Tribe has cross-appealed from that part of the judgments upholding tax jurisdiction over on-reservation sales of cigarettes by members of the Tribe to non-Indians. We noted probable jurisdiction under 28 U. S. C. § 1253 and consolidated the appeal and cross-appeal.[3] 423 U. S. 819 (1975). Concluding that the District Court had the power to grant injunctive relief in favor of the Tribe, and that it was correct on the merits, we affirm in both cases.

I

In 1855 an expanse of land stretching across the Bitter Root River Valley and within the then Territory of Washington was reserved for "the use and occupation" of the "confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians," by the Treaty of Hell Gate, which in 1859 was ratified by the Senate and proclaimed by President Buchanan. 12 Stat. 975. Slightly over half of its 1.25 million acres is now owned in fee, by both Indians and non-Indians; most of the remaining half is held in trust by the United States for the Tribe. Approximately 50% of the Tribe's current membership of 5,749 resides on the reservation and in turn composes 19% of the total reservation population. Embracing portions of four Montana counties—Lake, Sanders, Missoula, and Flathead—the present reservation was generally described by the District Court:

"The Flathead Reservation is a well-developed

[2] See Part II, *infra,* for the discussion of the jurisdictional question.

[3] For ease of reference, the various parties involved in the appeal and cross-appeal will be referred to simply as the State and the Tribe, except as otherwise noted.

agricultural area with farms, ranches and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominantly Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.

"As Montana citizens, members of the Tribe are eligible to vote and do vote in city, county and state elections. Some hold elective and appointed state and local offices. All services provided by the state and local governments are equally available to Indians and non-Indians. The only schools on the Reservation are those operated by school districts of the State of Montana. The State and local governments have built and maintain a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction." 392 F. Supp. 1297, 1313 (1975).

Joseph Wheeler, a member of the Tribe, leased from it two tracts of trust land within the reservation whereon he operated retail "smoke shops." Deputy sheriffs arrested Wheeler and an Indian employee for failure to possess a cigarette retailer's license and for selling non-tax-stamped cigarettes, both misdemeanors under Montana law. These individuals, joined by the Tribe and the tribal chairmen, then sued[4] in the District Court for declaratory and injunctive relief against the State's cigarette tax and vendor-licensing statutes as applied to

[4] The defendants-appellants in the cigarette tax case are Montana's Department of Revenue, its director, and the sheriffs of the counties in which the "smoke shops" were located. No monetary relief has been sought in this action.

tribal members who sold cigarettes within the reservation.[5] That court by a divided vote held that our decision in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), barred Montana's efforts to impose its cigarette tax statutes on the Tribe's retail cigarette sales with one exception: it may require a precollection of the tax imposed by law upon the non-Indian purchaser of the cigarettes.[6]

In a later action, the Tribe and four enrolled members, all residents of the reservation, challenged[7] Montana's

[5] Suit was brought shortly after the arrests. The record does not indicate whether criminal proceedings were instituted in state court, and in any case the State has made no claim as to the propriety of the District Court's entry of relief under *Younger* v. *Harris*, 401 U. S. 37 (1971), and related decisions of this Court.

[6] The District Court noted that the State's present statutory scheme contemplates advance payment or "precollection" of the sales tax by the retailer when he purchases his inventory from the wholesaler. Recognizing that its holding—a distinction between sales to Indians and to non-Indians—would result in "complicated problems" of enforcement by the State, the District Court deferred passing on these problems pending a decision by this Court. We, of course, express no opinion on this question.

[7] Named as defendants were various county officials, the State's Department of Revenue and its director, and the State itself. In contrast to the cigarette tax case, however, the plaintiffs, suing as representatives of all other members of the Tribe residing on the reservation, demanded a refund of personal property taxes paid to the date of the District Court's final judgment. In the opinion accompanying the District Court's judgment entering the requested declaratory and injunctive relief in favor of the Tribe and the individual Indians, it stated that "any further questions" were reserved pending this Court's final determination of the constitutionality of the personal property tax statutes. Our conclusions in Parts II and III, *infra*, that the District Court, with subject-matter jurisdiction over the Tribe's claims, properly entered injunctive relief in its favor implicitly embrace a finding that the Tribe, *qua* Tribe, has a discrete claim of injury with respect to these forms of state

statutory scheme for assessment and collection of personal property taxes, in particular the imposition of such taxes on motor vehicles owned by tribal members residing on the reservation.[8] The District Court, again by a divided vote, found its earlier decision interpreting *McClanahan* controlling in the Tribe's favor. While recognizing, as did the Tribe, that a fee required for registration and issuance of state license plates for a motor vehicle could be exacted from Indians residing on the reservation,[9] the court held that the additional personal property tax which was likewise made a condition precedent for lawful registration of the vehicle could not be imposed on reservation Indians.

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taxation so as to confer standing upon it apart from the monetary injury asserted by the individual Indian plaintiffs. Since the substantive interest which Congress has sought to protect is tribal self-government, such a conclusion is quite consistent with other doctrines of standing. See, *e. g., Warth* v. *Seldin,* 422 U. S. 490, 498–499 (1975). Whether in like fashion standing rests in the Tribe to litigate the pending individual refund claims is a question properly left for the District Court as and when these claims are pursued, and we express no opinion thereon. We note, however, that if only the individual Indians have standing to sue for refunds, their claims must be properly grounded jurisdictionally. See, *e. g., Zahn* v. *International Paper Co.,* 414 U. S. 291, 294 (1973).

[8] The Tribe and the individual members had earlier filed an identical attack against Montana's personal income tax as applied to income earned by tribal members on the reservation. Shortly after this Court's decision in *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164 (1973), the State stipulated that *McClanahan* barred its taxing jurisdiction in this respect and agreed to cease voluntarily its collection efforts and make refunds. Relying on this settlement, the Tribe thereafter requested the State's Attorney General to order a similar cessation with respect to personal property taxes. Advised that its request was rejected, the Tribe instituted this action.

[9] The Tribe has from the beginning expressly disclaimed any immunity from this nondiscriminatory vehicle registration fee.

II

The important threshold question in both cases is whether the District Court was prohibited from entertaining jurisdiction over these suits to restrain Montana's taxing authority, inasmuch as Congress has provided that

> "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341.

By enacting this jurisdictional rule, Congress gave explicit sanction to the pre-existing federal equity practice: because interference with a State's internal economy is inseparable from a federal action to restrain state taxation,

> "'the mere illegality or unconstitutionality of a state . . . tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved.' *Matthews* v. *Rodgers,* [284 U. S. 521, 525–526 (1932)]." *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 298 (1943).

This broad jurisdictional barrier, however, has been held by this Court to be inapplicable to suits brought by the United States "to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States,* 385 U. S. 355, 358 (1966).[10]

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[10] There the United States sought injunctive relief against certain state taxation of its coplaintiff, the American National Red Cross, which on the merits this Court held was immune from same as a federal instrumentality.

The District Court, citing *Department of Employment* and cases from other courts, concluded:

> "While the exceptions to § 1341 have been expressed most often in terms of the Federal instrumentality doctrine, we do not view the exceptions as limited to cases where this doctrine is clearly applicable. It seems clear [that § 1341] does not bar federal court jurisdiction in cases where immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States *has a real and significant interest.*" 392 F. Supp., at 1303 (emphasis added).

In its brief the State argues that any reliance on the federal-instrumentality doctrine, either as such or as expanded by the District Court, for purposes of finding *jurisdiction* in these cases is contrary to the *substantive* decisions of this Court which "cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation." *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 150 (1973). See *McClanahan,* 411 U. S., at 170 n. 5; *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342 (1949); *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943).

We have indeed recently declined "the invitation to resurrect the expansive version of the intergovernmental-immunity doctrine that has been so consistently rejected" in this kind of case. *Mescalero, supra,* at 155. While the concept of a federal instrumentality may well have greater usefulness in determining the applicability of § 1341, *Department of Employment* v. *United States, supra,* than in providing the touchstone for deciding whether or not Indian tribes may be taxed, *Mescalero, supra,* we do not believe that the District Court's ex-

panded version of this doctrine, quoted above, can by itself avoid the bar of § 1341.

The District Court, however, also relied on a more recent jurisdictional statute, 28 U. S. C. § 1362, which provides:

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Sections 1341 and 1362 do not cross-reference each other. Since presumably all actions properly within the jurisdiction of the United States district courts are authorized by one or another of the statutes conferring jurisdiction upon those courts, the mere fact that a jurisdictional statute such as § 1362 speaks in general terms of "all" enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of § 1341.[11]

Looking to the legislative history of § 1362 for whatever light it may shed on the question, we find an indication of a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought. Section 1362 is characterized by the reporting House Judiciary Committee as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attor-

[11] Section 1341 itself, of course, includes a proviso that the remedy in state court must be "plain, speedy and efficient." The Tribe does not claim that it would not have had such a remedy under Montana law.

neys." [12] While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicit jurisdictional limitations, such as § 1341, it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under the Constitution, laws, or treaties" would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

That the United States could have brought these actions, by itself or as coplaintiff, seems reasonably clear. In *Heckman* v. *United States,* 224 U. S. 413 (1912), the United States sued to cancel numerous conveyances by Cherokee allottees-grantors, who were not parties, as violative of federal restrictions upon the Indians' power of alienation. In the course of concluding that the United States had the requisite interest in enforcing these restrictions for the Indians' benefit, the Court discussed *United States* v. *Rickert,* 188 U. S. 432 (1903), which upheld the right of the Government to seek injunctive relief against county taxation directed at improvements on and tools used to cultivate land allotted to and occupied by the Sioux Indians. Of *Rickert,* the Court in *Heckman* stated:

> "But the decision [that the United States had the requisite interest] rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection." 224 U. S., at 441.

Here the United States could have made the same attack on the State's assertion of taxing power as was in

[12] H. R. Rep. No. 2040, 89th Cong., 2d Sess., 2–3 (1966).

fact made by the Tribe. *Heckman* v. *United States, supra.*[13] We think that the legislative history of § 1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf. Since the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, *Department of Employment* v.

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[13] *Heckman* and *Rickert* were both cases in which the protection asserted by the United States on behalf of the Indians was grounded in the federal-instrumentality doctrine. Since *Mescalero,* as we have noted, effectively eliminated that doctrine as a basis for immunizing Indians from state taxation, there might appear to be a certain inconsistency in our reliance on *Heckman.* But the question of whether the United States has standing (*Heckman* used the term "capacity") to sue on behalf of others is analytically distinct from the question of whether the substantive theory on which it relies will prevail, and each is in turn separate from whether injunctive relief can issue at the United States' behest irrespective of § 1341. *Department of Employment,* see *supra,* at 470, and n. 10, did not hold that the United States had standing only in actions falling within the federal-instrumentality doctrine. Cases in the lower federal courts cited therein (385 U. S., at 358 n. 6), *e. g., United States* v. *Arlington County, Virginia,* 326 F. 2d 929, 931-933 (CA4 1964), and other cases from this Court, see *In re Debs,* 158 U. S. 564, 584 (1895); *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 284-286 (1888), indicate otherwise. The proper basis for the protection asserted here, of course, is not the federal-instrumentality doctrine eschewed in *Mescalero,* but is that which *McClanahan* identified, *i. e.,* that state taxing jurisdiction has been pre-empted by the applicable treaties and federal legislation. While not deciding what limits there are upon the United States' standing to sue absent enabling legislation, we conclude that the relationship between the United States and the Tribe—grounded in the Hell Gate Treaty and a century of subsequent legislation—would have established the former's standing to raise the pre-emption claim on behalf of the latter, and that an injunctive remedy to enforce that claim would not have been barred by § 1341.

United States, supra, we hold that the Tribe is not barred from doing so here.[14]

III

In *McClanahan* this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes "which define the limits of state power." 411 U. S., at 172. Reading them against the "backdrop" of the Indian sovereignty doctrine, the Court concluded "that Arizona ha[d] exceeded its lawful authority" by imposing the tax at issue. *Id.,* at 173. In *Mescalero,* the companion case, the import of *McClanahan* was summarized:

> "[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permit-

[14] The District Court went on to find jurisdiction over the individual Indian plaintiffs in both actions on the basis of 28 U. S. C. § 1343 (3), together with their allegation that these taxes deprived them of a right secured by the Commerce Clause. Noting that § 1362 by its terms goes only to an "Indian tribe or band," the State has argued that to hold § 1341 inapplicable merely because the state tax is attacked on constitutional grounds virtually strips it of force and is contrary to other federal-court decisions: *Bland* v. *McHann,* 463 F. 2d 21 (CA5 1972), cert. denied, 410 U. S. 966 (1973); *American Commuters Assn., Inc.* v. *Levitt,* 405 F. 2d 1148 (CA2 1969). Cf. *Lynch* v. *Household Finance Corp.,* 405 U. S. 538, 542 n. 6 (1972). The Tribe's brief does not discuss this aspect of the District Court's holding. We need not decide this question, however, since all of the substantive issues raised on appeal can be reached by deciding the claims of the Tribe alone, which did bring this action in the District Court under § 1362. See n. 7, *supra.* Cf. *California Bankers Assn.* v. *Shultz,* 416 U. S. 21 (1974). Any further proceedings with respect to refund claims by or on behalf of individual Indians, see n. 7, *supra,* would not appear to implicate § 1341.

ting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n, supra,* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." 411 U. S., at 148.

Aligning itself with the dissenting opinion below, the State first seeks to avoid *McClanahan* on two grounds: (1) the manner in which the Flathead Reservation has developed to its present state distinguishes it from the Navajo Reservation; (2) there does exist a federal statutory basis permitting Montana to tax.

The State pointed below to a variety of factors: reservation Indians benefited from expenditures of state revenues for education, welfare, and other services, such as a sewer system; the Indians had the right to vote and to hold local and state office; and the Indian and non-Indian residents within the reservation were substantially integrated as a business and social community. The District Court also found, however, that the Federal Government "likewise made substantial payments for various purposes," and that the Tribe's own income contributed significantly to its economic well-being. 392 F. Supp., at 1314. Noting this Court's rejection of a substantially identical argument in *McClanahan,* see 411 U. S., at 173, and n. 12, and the fact that the Tribe, like the Navajos, had not abandoned its tribal organization, the District Court could not accept the State's proposition that the tribal members "are now so completely integrated with the non-Indians . . . that there is no longer any reason to accord them different treatment than other citizens." 392 F. Supp., at 1315. In view of the District Court's findings, we agree that there is no basis for distinguishing *McClanahan* on this ground.

As to the second ground, we note that the State does not challenge the District Court's overall conclusion that the treaty and statutes upon which the Tribe relies in asserting the lack of state taxing authority "are essentially the same as those involved in *McClanahan.*"[15] We agree, and it would serve no purpose to retrace our analysis in this respect in *McClanahan,* 411 U. S., at 173–179. The State instead argues that the District Court failed to properly consider the effect of the General Allotment Act of 1887, 24 Stat. 388, and a later enactment in 1904, 33 Stat. 302, applying that Act to the Flathead Reservation. Section 6 of the General Allotment Act, 24 Stat. 390, as amended, 25 U. S. C. § 349, provides in part:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . ."

The State relies on *Goudy* v. *Meath,* 203 U. S. 146 (1906), where the Court, applying the above section, rejected the claim of an Indian patentee thereunder that state taxing jurisdiction was not among the "laws" to which he and his land had been made subject. Building on *Goudy* and the fact that the General Allotment Act has never been explicitly "repealed," the State claims that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present.

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[15] The quotation is taken from the first (unpublished) opinion of the District Court, Civ. No. 2145 (Mont., Oct. 10, 1973), Jurisdictional Statement, App. 73, 81 n. 9, the conclusions of which with respect to *McClanahan* were reaffirmed in the later opinions filed May 10, 1974, February 4, 1975, and March 19, 1975, published at 392 F. Supp. 1297, 1312; 392 F. Supp. 1325.

We find the argument untenable for several reasons. By its terms § 6 does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in *Seymour* v. *Superintendent*, 368 U. S. 351 (1962), to which we responded:

> "[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government." *Id.*, at 358.

We concluded that "[s]uch an impractical pattern of checkerboard jurisdiction," *ibid.*, was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also *United States* v. *Mazurie*, 419 U. S. 544, 554–555 (1975).

The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era:

> "Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians

with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390 . . . ." *Mattz* v. *Arnett,* 412 U. S. 481, 496 (1973).

"The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U. S. C. § 461 *et seq.*" *Id.,* at 496 n. 18.

The State has referred us to no decisional authority—and we know of none—giving the meaning for which it contends to § 6 of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands—statutes discussed, for example, in *McClanahan,* 411 U. S., at 173–179. See also *Kennerly* v. *District Court of Montana,* 400 U. S. 423 (1971). Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

A second, discrete claim advanced by the State is that the tax immunity extended by the District Court in applying federal law constitutes an invidious discrimination against non-Indians on the basis of race, contrary to the Due Process Clause of the Fifth Amendment. It is said that the Federal Government has forced this racially based exemption onto Montana so as to create a state statutory classification violative of the latter's duty under the Equal Protection Clause of the Fourteenth Amendment.

We need not dwell at length on this constitutional argument, for assuming that the State has standing to raise it on behalf of its non-Indian citizens and taxpayers,

we think it is foreclosed by our recent decision in *Morton* v. *Mancari,* 417 U. S. 535 (1974). In reviewing the variety of statutes and decisions according special treatment to Indian tribes and reservations, we stated, *id.,* at 552–555:

> "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.
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> . . . . .
>
> "On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment."

The test to be applied to these kinds of statutory preferences, which we said were neither "invidious" nor "racial" in character, governs here:

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.,* at 555.

For these reasons, the personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians,[16] conflict with

[16] The District Court noted two further distinctions within its ruling. It extended its holding to sales of cigarettes to Indians

the congressional statutes which provide the basis for decision with respect to such impositions. *McClanahan, supra; Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145 (1973).[17]

IV

The Tribe would carry these cases significantly further than we have done, however, and urges that the State cannot impose its cigarette tax on sales by Indians to non-Indians because "[i]n simple terms, [the Indian retailer] has been taxed, and . . . has suffered a measurable out-of-pocket loss." But this claim ignores the District Court's finding that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax

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living on the Flathead Reservation irrespective of their actual membership in the plaintiff Tribe. The State has not challenged this holding, and we therefore do not disturb it. Secondly, while recognizing that different rules may apply "where Indians have left the reservation and become assimilated into the general community," *McClanahan,* 411 U. S., at 171, the District Court on the present record did not decide whether the cigarette sales tax would apply to on-reservation sales to Indians who resided off the Flathead Reservation. That question, too, is therefore not before us.

[17] It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U. S. Const., Art. VI, cl. 2, and not any automatic exemptions "as a matter of constitutional law" either under the Commerce Clause or the intergovernmental-immunity doctrine as laid down originally in *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819). If so, then the basis for convening a three-judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 U. S. C. § 2281. *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965). Here, however, the District Court properly convened a § 2281 court, because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided. See *Goosby* v. *Osser,* 409 U. S. 512 (1973).

exemption." 392 F. Supp., at 1308. That finding necessarily follows from the Montana statute, which provides that the cigarette tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only." [18] Since nonpayment of the tax is a misdemeanor as to the retail purchaser,[19] the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.

The Tribe asserts that to make the Indian retailer an "involuntary agent" for collection of taxes owed by non-Indians is a "gross interference with [its] freedom from state regulation," and cites *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), as controlling. However, that case involved a gross income tax imposed on the on-reservation sales by the trader to reservation Indians. Unlike the sales tax here, the tax was imposed directly on the seller, and, in contrast to the Tribe's claim, there was in *Warren* no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians. *Id.*, at 686 n. 1. Our conclusion in *Warren* that assessment and collection of that tax "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations," *id.*, at 691, does not apply to the instant case.

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[18] Mont. Rev. Code Ann. § 84–5606 (1) (1947).

[19] §§ 84–5606.18, 84–5606.31 (Supp. 1975).

The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. Since this burden is not, strictly speaking, a tax at all, it is not governed by the language of *Mescalero,* quoted *supra,* at 475–476, dealing with the "special area of state taxation." We see nothing in this burden which frustrates tribal self-government, see *Williams* v. *Lee,* 358 U. S. 217, 219–220 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States* v. *McGowan,* 302 U. S. 535, 539 (1938): "Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments." See also *Thomas* v. *Gay,* 169 U. S. 264, 273 (1898). We therefore agree with the District Court that to the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.

For the foregoing reasons, the judgments of the District Court are

Affirmed.

HAMPTON, AKA BYERS *v.* UNITED STATES

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

No. 74-5822. Argued December 1, 1975—Decided April 27, 1976

As a result of selling to Government agents heroin supplied by a Government informant, petitioner was convicted of a federal offense. The Court of Appeals affirmed, rejecting petitioner's argument that if the jury believed that the drug was supplied to him by the Government informant he should have been acquitted under the defense of entrapment regardless of his predisposition to commit the crime. Petitioner contends that, although such predisposition renders unavailable an entrapment defense, the Government's outrageous conduct in supplying him with the contraband denied him due process. *Held:* The judgment is affirmed. Pp. 488-491; 491-495.

507 F. 2d 832, affirmed.

MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and MR. JUSTICE WHITE, concluded that where, as here, the Government agents, the Government informant, and the defendant acted in concert with one another, and the defendant conceded a predisposition to commit the crime in question, not only is the defense of entrapment unavailable but also a violation of due process rights cannot properly be claimed. *United States* v. *Russell,* 411 U. S. 423. Pp. 488-491.

MR. JUSTICE POWELL, joined by MR. JUSTICE BLACKMUN, concluded that *Russell, supra,* defeats the particular contention here but does not foreclose reliance on due process principles or on this Court's supervisory power to bar conviction of a defendant because of outrageous police conduct in every case, regardless of the circumstances, where the Government is able to prove predisposition. Pp. 491-495.

REHNQUIST, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and WHITE, J., joined. POWELL, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 491. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post,* p. 495. STEVENS, J., took no part in the consideration or decision of the case.

David A. Lang, by appointment of the Court, 421 U. S. 945, argued the cause and filed a brief for petitioner *pro hac vice.*

Deputy Solicitor General Jones argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh,* and *Jerome M. Feit.*

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

This case presents the question of whether a defendant may be convicted for the sale of contraband which he procured from a Government informant or agent. The Court of Appeals for the Eighth Circuit held he could be, and we agree.

I

Petitioner was convicted of two counts of distributing heroin in violation of 21 U. S. C. § 841 (a)(1) in the United States District Court for the Eastern District of Missouri and sentenced to concurrent terms of five years' imprisonment (suspended).[1] The case arose from two sales of heroin by petitioner to agents of the Federal Drug Enforcement Administration (DEA) in St. Louis on February 25 and 26, 1974. The sales were arranged by one Hutton, who was a pool-playing acquaintance of petitioner at the Pud bar in St. Louis and also a DEA informant.

According to the Government's witnesses, in late February 1974, Hutton and petitioner were shooting pool

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[1] Petitioner was placed on five years' probation which was to run concurrently with the remainder of a 28- to 30-year state armed robbery sentence from which petitioner had escaped.

at the Pud when petitioner, after observing "track" (needle) marks on Hutton's arms told Hutton that he needed money and knew where he could get some heroin. Hutton responded that he could find a buyer and petitioner suggested that he "get in touch with those people." Hutton then called DEA Agent Terry Sawyer and arranged a sale for 10 p. m. on February 25.[2]

At the appointed time, Hutton and petitioner went to a prearranged meetingplace and were met by Agent Sawyer and DEA Agent McDowell, posing as narcotics dealers. Petitioner produced a tinfoil packet from his cap and turned it over to the agents who tested it, pronounced it "okay," and negotiated a price of $145 which was paid to petitioner. Before they parted, petitioner told Sawyer that he could obtain larger quantities of heroin and gave Sawyer a phone number where he could be reached.

The next day Sawyer called petitioner and arranged for another "buy" that afternoon. Petitioner got Hutton to go along and they met the agents again near where they had been the previous night.

They all entered the agents' car, and petitioner again produced a tinfoil packet from his cap. The agents again field-tested it and pronounced it satisfactory. Petitioner then asked for $500 which Agent Sawyer said he would get from the trunk. Sawyer got out and opened the trunk which was a signal to other agents to move in and arrest petitioner, which they did.

Petitioner's version of events was quite different. According to him, in response to his statement that he was short of cash, Hutton said that he had a

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[2] The testimony of Hutton is confused as to the dates. At one point he indicated that the initial conversation and the sale both occurred on February 25. At another point he testified that they occurred on two separate days.

friend who was a pharmacist who could produce a non-narcotic counterfeit drug which would give the same reaction as heroin. Hutton proposed selling this drug to gullible acquaintances who would be led to believe they were buying heroin. Petitioner testified that they successfully duped one buyer with this fake drug and that the sales which led to the arrest were solicited by petitioner[3] in an effort to profit further from this ploy.

Petitioner contended that he neither intended to sell, nor knew that he was dealing in heroin and that all of the drugs he sold were supplied by Hutton. His account was at least partially disbelieved by the jury which was instructed that in order to convict petitioner they had to find that the Government proved "that the defendant knowingly did an act which the law forbids, purposely intending to violate the law." Thus the guilty verdict necessarily implies that the jury rejected petitioner's claim that he did not know the substance was heroin, and petitioner himself admitted both soliciting and carrying out sales. The only relevance of his version of the facts, then, lies in his having requested an instruction embodying that version.[4] He did not request a standard entrapment instruction but he did request the following:

> "The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.

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[3] On appeal, petitioner's counsel, who was also his counsel at trial, conceded that petitioner was predisposed to commit this offense. 507 F. 2d 832, 836 n. 5 (CA8 1974).

[4] The Court of Appeals treated the proffered instruction on its merits, rather than inquiring as to whether its refusal, in light of the other instructions given and of the jury's verdict, may have been harmless error. We therefore do likewise.

> "If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> "Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter." Brief for Petitioner 9.

The trial court refused the instruction and petitioner was found guilty. He appealed to the United States Court of Appeals for the Eighth Circuit, claiming that if the jury had believed that the drug was supplied by Hutton he should have been acquitted. The Court of Appeals rejected this argument and affirmed the conviction, relying on our opinion in *United States* v. *Russell,* 411 U. S. 423 (1973). 507 F. 2d 832 (1974).

II

In *Russell* we held that the statutory defense of entrapment was not available where it was conceded that a Government agent supplied a necessary ingredient in the manufacture of an illicit drug. We reaffirmed the principle of *Sorrells* v. *United States,* 287 U. S. 435 (1932), and *Sherman* v. *United States,* 356 U. S. 369 (1958), that the entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime," *Russell, supra,* at 429, rather than upon the conduct of the Government's agents. We ruled out the possibility that the defense of entrapment could ever be

based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.

In holding that "[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play," 411 U. S., at 436, we, of course, rejected the contrary view of the dissents in that case and the concurrences in *Sorrells* and *Sherman*. In view of these holdings, petitioner correctly recognizes that his case does not qualify as one involving "entrapment" at all. He instead relies on the language in *Russell* that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California*, 342 U. S. 165 (1952) . . . ." 411 U. S., at 431–432.

In urging that this case involves a violation of his due process rights, petitioner misapprehends the meaning of the quoted language in *Russell, supra*. Admittedly petitioner's case is different from Russell's but the difference is one of degree, not of kind. In *Russell* the ingredient supplied by the Government agent was a legal drug which the defendants demonstrably could have obtained from other sources besides the Government. Here the drug which the Government informant allegedly supplied to petitioner both was illegal and constituted the *corpus delicti* for the sale of which the petitioner was convicted. The Government obviously played a more significant role in enabling petitioner to sell contraband in this case than it did in *Russell*.

But in each case the Government agents were acting in concert with the defendant, and in each case either the jury found or the defendant conceded that he was

predisposed to commit the crime for which he was convicted. The remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment. But, as noted, petitioner's conceded predisposition rendered this defense unavailable to him.

To sustain petitioner's contention here wo ld run directly contrary to our statement in *Russell* that the defense of entrapment is not intended "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." 411 U. S., at 435.

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*. Here, as we have noted, the police, the Government informant, and the defendant acted in concert with one another. If the result of the governmental activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ," *Sorrells, supra,* at 442, the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. See *O'Shea* v. *Littleton,* 414 U. S. 488, 503 (1974); *Imbler* v. *Pachtman,* 424 U. S. 409, 428–429 (1976). But the police conduct here no more deprived defendant of any right

secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights.

Affirmed.

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

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

Petitioner, Charles Hampton, contends that the Government's supplying of contraband to one later prosecuted for trafficking in contraband constitutes a *per se* denial of due process. As I do not accept this proposition, I concur in the judgment of the Court and much of the plurality opinion directed specifically to Hampton's contention. I am not able to join the remainder of the plurality opinion, as it would unnecessarily reach and decide difficult questions not before us.

In *United States* v. *Russell,* 411 U. S. 423, 431 (1973), we noted that significant "difficulties [attend] the notion that due process of law can be embodied in fixed rules." See *Rochin* v. *California,* 342 U. S. 165, 173 (1952); cf. *Sherman* v. *United States,* 356 U. S. 369, 384–385 (1958) (Frankfurter, J., concurring in result). We also recognized that the practicalities of combating the narcotics traffic frequently require law enforcement officers legitimately to supply "some item of value that the drug ring requires." 411 U. S., at 432. Accordingly, we held that due process does not necessarily foreclose reliance on such investigative techniques. Hampton would distinguish *Russell* on the ground that here contraband itself was supplied by the Government, while the phenyl-2-propanone supplied in *Russell* was not contraband. Given the

characteristics of phenyl-2-propanone,[1] this is a distinction without a difference and *Russell* disposes of this case.

But the plurality opinion today does not stop there. In discussing Hampton's due process contention, it enunciates a *per se* rule:

> "[In *Russell,*] [w]e ruled out the possibility that the defense of entrapment could *ever* be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established." *Ante,* at 488–489. (Emphasis supplied.)
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> . . . . .
>
> "The remedy of the criminal defendant with respect to the acts of Government agents, which . . . are encouraged by him, lies *solely* in the defense of entrapment." *Ante,* at 490. (Emphasis supplied.)

The plurality thus says that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.

I do not understand *Russell* or earlier cases delineating the predisposition-focused defense of entrapment [2] to have

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[1] Although phenyl-2-propanone is not contraband, it is useful only in the manufacture of methamphetamine ("speed"), the contraband involved in *Russell.* Further, it is an essential ingredient in that manufacturing process and is very difficult to obtain. *United States* v. *Russell,* 411 U. S. 423, 425–427 (1973); *id.,* at 447 (STEWART, J., dissenting).

[2] I agree with the plurality that *Russell* definitively construed the defense of "entrapment" to be focused on the question of predisposition. "Entrapment" should now be employed as a term of art limited to that concept. See *ante,* at 488–489. This does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant.

gone so far, and there was no need for them to do so. In those cases the Court was confronted with specific claims of police "overinvolvement" in criminal activity involving contraband. Disposition of those claims did not require the Court to consider whether overinvolvement of Government agents in contraband offenses could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process.[3] Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses. Cf. *United States* v. *Archer,* 486 F. 2d 670 (CA2 1973). In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles.[4]

The plurality's use of the "chancellor's foot" passage from *Russell, ante,* at 490, may suggest that it also would foreclose reliance on our supervisory power to bar conviction of a predisposed defendant because of outrageous police conduct. Again, I do not understand *Russell* to

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[3] The entrapment defense was first recognized in the context of simple solicitation of an individual to sell contraband. See, *e. g., Sherman* v. *United States,* 356 U. S. 369 (1958); *Sorrells* v. *United States,* 287 U. S. 435 (1932). In *Russell* and in this case, however, we have been confronted with the Government's supplying of contraband in the course of an investigation. Official involvement in contraband offenses has reached more intensive levels than those revealed in this Court's cases. See *Greene* v. *United States,* 454 F. 2d 783 (CA9 1971).

[4] Judge Friendly recently expressed the view:

"[T]here is certainly a [constitutional] limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction." *United States* v. *Archer,* 486 F. 2d, at 676–677 (footnote omitted).

have gone so far. There we indicated only that we should be extremely reluctant to invoke the supervisory power in cases of this kind because that power does not give the "federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." 411 U. S., at 435, quoted *ante*, at 490.

I am not unmindful of the doctrinal [5] and practical [6]

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[5] The plurality finds no source for a doctrine limiting police involvement in crime. *Ante*, at 490–491; cf. *United States* v. *Russell*, 411 U. S., at 430–431. While such a conclusion ultimately might be reached in an appropriate case, we should not disregard lightly Mr. Justice Frankfurter's view that there is a responsibility "necessarily in [the Court's] keeping . . . to accommodate the dangers of overzealous law enforcement and civilized methods adequate to counter the ingenuity of modern criminals." *Sherman* v. *United States*, *supra*, at 381 (concurring in result). In another context Mr. Justice Frankfurter warned that exclusive focus on predisposition creates the risk that the Court will "shirk" the responsibility that he perceived. *Ibid.*

The discussion of predisposition, for example, often seems to overlook the fact that there may be widely varying degrees of criminal involvement. Taking the narcotics traffic as an example, those who distribute narcotics—the "pushers"—are the persons who, next to those who import or manufacture, merit most the full sanction of the criminal law. Yet, the criminal involvement of pushers varies widely. The hardcore professional, in the "business" on a large scale and for years, is to be contrasted with the high-school youth whose "pushing" is limited to a few of his classmates over a short span of time. Predisposition could be proved against both types of offenders, and under the flat rule enunciated today by the plurality the differences between the circumstances would be irrelevant despite the most outrageous conduct conceivable by Government agents relative to the circumstances. A fair system of justice normally should eschew unbending rules that foreclose, in their application, all judicial discretion.

[6] I recognize that, if limitations on police involvement are appropriate in particular situations, defining such limits will be difficult. But these difficulties do not themselves justify the plurality's absolute rule. Due process in essence means fundamental fairness, and the Court's cases are replete with examples of judgments as to when

difficulties of delineating limits to police involvement in crime that do not focus on predisposition, as Government participation ordinarily will be fully justified in society's "war with the criminal classes." *Sorrells* v. *United States,* 287 U. S. 435, 453 (1932) (opinion of Roberts, J.). This undoubtedly is the concern that prompts the plurality to embrace an absolute rule. But we left these questions open in *Russell,* and this case is controlled completely by *Russell.* I therefore am unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition.[7]

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

I joined my Brother STEWART's dissent in *United*

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such fairness has been denied an accused in light of all the circumstances. See, *e. g., Rochin* v. *California,* 342 U. S. 165 (1952); *Ham* v. *South Carolina,* 409 U. S. 524 (1973). The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances. *Rochin* v. *California, supra,* at 169–172. Much the same is true of analysis under our supervisory power. Nor do I despair of our ability in an appropriate case to identify appropriate standards for police practices without relying on the "chancellor's" "fastidious squeamishness or private sentimentalism." *Id.,* at 172; see *Sherman* v. *United States, supra,* at 384–385 (Frankfurter, J., concurring in result); cf. *Rochin* v. *California, supra,* at 172.

[7] I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement. One cannot easily exaggerate the problems confronted by law enforcement au-

States v. *Russell,* 411 U. S. 423, 439 (1973), and Mr. Justice Frankfurter's opinion concurring in the result in *Sherman* v. *United States,* 356 U. S. 369, 378 (1958). Those opinions and the separate opinion of Mr. Justice Roberts in *Sorrells* v. *United States,* 287 U. S. 435, 453 (1932), express the view, with which I fully agree, that "courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced." 356 U. S., at 380. The "subjective" approach to the defense of entrapment—followed by the Court today and in *Sorrells, Sherman,* and *Russell*—focuses on the conduct and propensities of the particular defendant in each case and, in the absence of a conclusive showing, permits the jury to determine as a question of fact the defendant's "predisposition" to the crime.[1] The focus of the view

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thorities in dealing effectively with an expanding narcotics traffic, cf. *United States* v. *Russell, supra,* at 432; L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 263–264 (1967), which is one of the major contributing causes of escalating crime in our cities. See President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 221–222 (1967). Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.

[1] While the Court has rejected any view of entrapment that does not focus on predisposition, a reasonable alternative inquiry might be whether the accused would have obtained the contraband from a source other than the Government. This factor could be brought into the case through the jury charge. Once the accused comes forward with evidence that the Government is the supplier, the prosecution would bear the burden of proving beyond a reasonable doubt either (1) that the Government is not the supplier or (2) that the defendant would have obtained the contraband elsewhere to complete the transaction. Cf. *United States* v. *West,* 511 F. 2d 1083, 1086 (CA3 1975); *United States* v. *Bueno,* 447 F. 2d 903 (CA5 1971).

espoused by Mr. Justice Roberts, Mr. Justice Frankfurter, and my Brother STEWART "is not on the propensities and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.'. . . Under this approach, the determination of the lawfulness of the Government's conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury." 411 U. S., at 441. Petitioner's claims in this case allege a course of police conduct that, under this view, would plainly be held to constitute entrapment as a matter of law.

In any event, I think that reversal of petitioner's conviction is also compelled for those who follow the "subjective" approach to the defense of entrapment. As MR. JUSTICE REHNQUIST notes, the Government's role in the criminal activity involved in this case was more pervasive than the Government involvement in *Russell*. *Ante,* at 489. In addition, I agree with MR. JUSTICE POWELL that *Russell* does not foreclose imposition of a bar to conviction—based upon our supervisory power or due process principles—where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be "predisposed." *Ante,* at 495. In my view, the police activity in this case was beyond permissible limits.

Two facts significantly distinguish this case from *Russell*. First, the chemical supplied in that case was not contraband. It is legal to possess and sell phenyl-2-propanone and, although the Government there supplied an ingredient that was essential to the manufacture of methamphetamine, it did not supply the contraband itself. In contrast, petitioner claims that the very nar-

cotic he is accused of selling was supplied by an agent of the Government. Compare *ante,* at 489, with *ante,* at 491–492.

Second, the defendant in *Russell* "was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent had left the scene." 411 U. S., at 436. Russell was charged with unlawfully manufacturing and processing methamphetamine, *id.,* at 424, and his crime was participation in an ongoing operation. In contrast, the two sales for which petitioner was convicted were allegedly instigated by Government agents and completed by the Government's purchase. The beginning and end of this crime thus coincided exactly with the Government's entry into and withdrawal from the criminal activity involved in this case, while the Government was not similarly involved in Russell's crime. See *Greene* v. *United States,* 454 F. 2d 783 (CA9 1971).

Whether the differences from the *Russell* situation are of degree or of kind, *ante,* at 489, I think they clearly require a different result. Where the Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser, the Government's role has passed the point of toleration. *United States* v. *West,* 511 F. 2d 1083 (CA3 1975). The Government is doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary. *United States* v. *Bueno,* 447 F. 2d 903, 905 (CA5 1971). There is little, if any, law enforcement interest promoted by such conduct; plainly it is not designed to discover ongoing drug traffic. Rather, such conduct deliberately entices an individual to commit a crime. That the accused is "predisposed" cannot possibly justify the action of government officials in purposefully creating

the crime. No one would suggest that the police could round up and jail all "predisposed" individuals, yet that is precisely what set-ups like the instant one are intended to accomplish. Cf. *United States* v. *Russell,* 411 U. S., at 443–444 (STEWART, J., dissenting). Thus, this case is nothing less than an instance of "the Government . . . seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells* v. *United States,* 287 U. S., at 451.

These considerations persuaded the Court of Appeals for the Fifth Circuit to hold that where the Government has provided the contraband that the defendant is convicted of selling, there is entrapment as a matter of law. *United States* v. *Bueno, supra.* That court has also concluded that this holding was not affected by *Russell.* See, *e. g., United States* v. *Oquendo,* 490 F. 2d 161 (1974); *United States* v. *Mosley,* 496 F. 2d 1012 (1974). The Court of Appeals for the Third Circuit agreed, and followed *Bueno* after *Russell* was decided.[2] *United States* v. *West, supra.* Even if these courts erred in holding that *Russell* did not foreclose the finding of "entrapment" as a matter of law in *Bueno,* see *ante,* at 492 n. 2, I agree with my Brother POWELL that "entrapment" under the "subjective" approach is only one possible defense—he suggests due process or appeal to our supervisory power as alternatives—in cases where the Government's conduct is as egregious as in this case. *Ante,* at 493–495.[3]

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[2] The Court of Appeals for the Seventh Circuit also followed *Bueno* in *United States* v. *McGrath,* 468 F. 2d 1027 (1972). This Court remanded that case for reconsideration in light of *Russell,* 412 U. S. 936 (1973), and the Court of Appeals apparently concluded that *Bueno* did not survive *Russell. United States* v. *McGrath,* 494 F. 2d 562 (1974).

[3] It might be suggested that the police must on occasion supply contraband to catch participants in drug traffic, but this justification is unconvincing. If the police believe an individual is a distributor of narcotics, all that is required is to set up a "buy"; the putative

Petitioner makes no claim to the benefit of an entrapment defense that focuses on predisposition. *Ante,* at 489. For the reasons stated I would at a minimum engraft the *Bueno* principle upon that defense and hold that conviction is barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent.[4] Cf. *Olmstead* v. *United States,* 277 U. S. 438, 470 (1928) (Holmes, J., dissenting); *Casey* v. *United States,* 276 U. S. 413, 423–425 (1928) (Brandeis, J., dissenting).

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pusher is worth the investigative effort only if he has ready access to a supply. See *United States* v. *Russell,* 411 U. S., at 448–449 (STEWART, J., dissenting).

[4] For present purposes it would be sufficient to adopt this rule under our supervisory power and leave to another day whether it ought to be made applicable to the States under the Due Process Clause. In addition to the authorities cited in *Russell, supra,* at 445 n. 3 (STEWART, J., dissenting), some state courts have adopted the objective approach. See, *e. g., State* v. *Mullen,* 216 N. W. 2d 375 (Iowa 1974); *People* v. *Turner,* 390 Mich. 7, 210 N. W. 2d 336 (1973); *Lynn* v. *State,* 505 P. 2d 1337 (Okla. 1973).

ESTELLE, CORRECTIONS DIRECTOR *v.* WILLIAMS

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

No. 74-676. Argued October 7, 1975—Decided May 3, 1976

Respondent, who was charged with a criminal offense and held in custody awaiting trial, asked a jail officer on the morning of trial for his civilian clothes to wear at trial; no action was taken. During *voir dire* his counsel expressly referred to respondent's jail attire. At no time before or during the ensuing jury trial was the issue raised to the trial judge concerning the jail attire. Respondent, whose conviction was upheld on appeal, sought federal habeas corpus. The District Court denied relief but the Court of Appeals reversed. Though there was evidence that in the county where the trial occurred the majority of nonbailed defendants were tried in jail clothes, there was no evidence that such a practice was followed if timely objection was made to the trial judge; and the practice of the particular trial judge was to permit any accused who so desired to be tried in civilian garb. *Held:* Although the State cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes negates the presence of the compulsion necessary to establish a constitutional violation. Nothing in the record here warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial. Pp. 503-513.

500 F. 2d 206, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, in which STEWART, J., joined, *post*, p. 513. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 515. STEVENS, J., took no part in the consideration or decision of the case.

Dunklin Sullivan, Assistant Attorney General of Texas,

argued the cause for petitioner. With him on the brief were *John L. Hill,* Attorney General, *David M. Kendall,* First Assistant Attorney General, and *Joe B. Dibrell* and *Lonny F. Zwiener,* Assistant Attorneys General.

Ben L. Aderholt, by appointment of the Court, 421 U. S. 907, argued the cause and filed a brief for respondent. [Reporter's Note: *Mr. Aderholt* represented the respondent before this Court only. Cf. *post,* at 513–514, 514, and 523.]

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

We granted certiorari in this case to determine whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws.

In November 1970, respondent Williams was convicted in state court in Harris County, Tex., for assault with intent to commit murder with malice. The crime occurred during an altercation between respondent and his former landlord on the latter's property. The evidence showed that respondent returned to the apartment complex where he had formerly resided to visit a female tenant. While there, respondent and his former landlord became involved in a quarrel. Heated words were exchanged, and a fight ensued. Respondent struck the landlord with a knife in the neck, chest, and abdomen, severely wounding him.

Unable to post bond, respondent was held in custody while awaiting trial. When he learned that he was to go on trial, respondent asked an officer at the jail for his civilian clothes. This request was denied. As a result, respondent appeared at trial in clothes that were distinctly marked as prison issue. Neither respondent nor his counsel raised an objection to the prison attire at any time.

A jury returned a verdict of guilty on the charge of assault with intent to murder with malice. The Texas Court of Criminal Appeals affirmed the conviction. *Williams* v. *State,* 477 S. W. 2d 24 (1972). Williams then sought release in the United States District Court on a petition for a writ of habeas corpus. Although holding that requiring a defendant to stand trial in prison garb was inherently unfair, the District Court denied relief on the ground that the error was harmless.

The Court of Appeals reversed on the basis of its own prior holding in *Hernandez* v. *Beto,* 443 F. 2d 634 (CA5), cert. denied, 404 U. S. 897 (1971). 500 F. 2d 206. The Fifth Circuit disagreed with the District Court solely on the issue of harmless error.

(1)

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope* v. *Missouri,* 420 U. S. 162, 172 (1975). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States,* 156 U. S. 432, 453 (1895).

To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *In re Winship,* 397 U. S. 358, 364 (1970).

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. *Estes* v. *Texas,* 381 U. S. 532 (1965); *In re Murchison,* 349 U. S. 133 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.

The potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions,[1] determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system. *Gaito* v. *Brierley,* 485 F. 2d 86 (CA3 1973); *Hernandez* v. *Beto, supra; Brooks* v. *Texas,* 381 F. 2d 619 (CA5 1967); *Commonwealth* v. *Keeler,* 216 Pa. Super. 193, 264 A. 2d 407 (1970); *Miller* v. *State,* 249 Ark. 3, 457 S. W. 2d 848 (1970); *People* v. *Shaw,* 381 Mich. 467, 164 N. W. 2d 7 (1969); *People* v. *Zapata,* 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (1963), cert. denied, 377 U. S. 406 (1964); *Eaddy* v. *People,* 115 Colo. 488, 174 P. 2d 717 (1946). The American Bar Association's Standards for Criminal Justice also disapprove the practice. ABA Project on Standards for Criminal Justice, Trial by Jury § 4.1 (b), p. 91 (App. Draft 1968). This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identi-

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[1] None of the authorities relied on by petitioner expressly approves the practice. Several cases hold, however, that a showing of actual prejudice must be made by a defendant seeking to have his conviction overturned on this ground. *Hall* v. *Cox,* 324 F. Supp. 786 (WD Va. 1971); *McFalls* v. *Peyton,* 270 F. Supp. 577 (WD Va. 1967), aff'd, 401 F. 2d 890 (CA4 1968), cert. denied, 394 U. S. 951 (1969).

fiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play. *Turner* v. *Louisiana,* 379 U. S. 466, 473 (1965).

That such factors cannot always be avoided is manifest in *Illinois* v. *Allen,* 397 U. S. 337 (1970), where we expressly recognized that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant . . . ," *id.,* at 344; yet the Court upheld the practice when necessary to control a contumacious defendant. For that reason, the Court authorized removal of a disruptive defendant from the courtroom or, alternatively, binding and gagging of the accused until he agrees to conduct himself properly in the courtroom.

Unlike physical restraints, permitted under *Allen, supra,* compelling an accused to wear jail clothing furthers no essential state policy. That it may be more convenient for jail administrators, a factor quite unlike the substantial need to impose physical restraints upon contumacious defendants,[2] provides no justification for the practice. Indeed, the State of Texas asserts no interest whatever in maintaining this procedure.

Similarly troubling is the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the

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[2] The contumacious defendant brings his plight upon himself and presents the court with a limited range of alternatives. Obviously, a defendant cannot be allowed to abort a trial and frustrate the process of justice by his own acts.

concept of equal justice embodied in the Fourteenth Amendment. *Griffin* v. *Illinois,* 351 U. S. 12 (1956).

(2)

The Fifth Circuit, in this as well as in prior decisions, has not purported to adopt a *per se* rule invalidating all convictions where a defendant had appeared in identifiable prison clothes. That court has held, for instance, that the harmless-error doctrine is applicable to this line of cases. 500 F. 2d, at 210–212. See also *Thomas* v. *Beto,* 474 F. 2d 981, cert. denied, 414 U. S. 871 (1973); *Hernandez* v. *Beto, supra,* at 637. Other courts are in accord. *Bentley* v. *Crist,* 469 F. 2d 854, 856 (CA9 1972); *Watt* v. *Page,* 452 F. 2d 1174, 1176–1177 (CA10), cert. denied, 405 U. S. 1070 (1972). In this case, the Court of Appeals quoted the language of Mr. Justice Douglas, speaking for the Court in *Harrington* v. *California,* 395 U. S. 250 (1969):

> "We held in *Chapman* v. *California* that 'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.' We said that . . . not all 'trial errors which violate the Constitution automatically call for reversal.'" *Id.,* at 251–252 (citations omitted).

In *Chapman* v. *California,* 386 U. S. 18 (1967), the Court, speaking through Mr. Justice Black, held:

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United

States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' . . . We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.*, at 21–22 (citation and footnote omitted).

In other situations, when, for example, the accused is being tried for an offense committed in confinement, or in an attempted escape, courts have refused to find error in the practice. In *United States ex rel. Stahl* v. *Henderson,* 472 F. 2d 556 (CA5), cert. denied, 411 U. S. 971 (1973), the Court of Appeals declined to overturn a conviction where the defendant, albeit tried in jail clothes, was charged with having murdered another inmate while confined in prison. "No prejudice can result from seeing that which is already known." 472 F. 2d, at 557. In the present case, the Court of Appeals concluded:

> "A different result may be appropriate where the defendant is on trial for an offense allegedly committed while he was in prison, because the jury would learn of his incarceration in any event." 500 F. 2d, at 209 n. 5.

Contra: *People* v. *Roman,* 35 N. Y. 2d 978, 324 N. E. 2d 885 (1975).

Consequently, the courts have refused to embrace a mechanical rule vitiating any conviction, regardless of the circumstances, where the accused appeared before the jury in prison garb. Instead, they have recognized that the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire. The

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reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury. *Anderson* v. *Watt,* 475 F. 2d 881, 882 (CA10 1973); *Watt* v. *Page, supra,* at 1176. Cf. *Garcia* v. *Beto,* 452 F. 2d 655, 656 (CA5 1971). This is apparently an accepted practice in Texas courts, *Barber* v. *State,* 477 S. W. 2d 868, 870 (Tex. Crim. App. 1972), including the court where respondent was tried.

Courts have therefore required an accused to object to being tried in jail garments, just as he must invoke or abandon other rights.[3] The Fifth Circuit has held: "A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." *Hernandez* v. *Beto,* 443 F. 2d, at 637. The essential meaning of the

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[3] We are not confronted with an alleged relinquishment of a fundamental right of the sort at issue in *Johnson* v. *Zerbst,* 304 U. S. 458 (1938). There, the Court understandably found it difficult to conceive of an accused making a knowing decision to forgo the fundamental right to the assistance of counsel, absent a showing of conscious surrender of a known right. The Court has not, however, engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused. See, *e. g., On Lee* v. *United States,* 343 U. S. 747, 749 n. 3 (1952). Cf. Fed. Rule Crim. Proc. 11.

The Second Circuit has noted in a different context:

"Federal courts, including the Supreme Court, have declined to notice [alleged] errors not objected to below even though such errors involve a criminal defendant's constitutional rights." *United States* v. *Indiviglio,* 352 F. 2d 276, 280 (1965), cert. denied, 383 U. S. 907 (1966).

The reason for this rule is clear: if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation.

Court of Appeals' decision in *Hernandez* has been described by that court as follows:

> "We held [in *Hernandez*] that the defendant and his attorney had the burden to make known that the defendant desired to be tried in civilian clothes before the state could be accountable for his being tried in jail clothes . . . ." *United States ex rel. Stahl* v. *Henderson,* 472 F. 2d, at 557.[4]

Similarly, the Ninth Circuit has indicated that the courts must determine whether an accused "was in fact compelled to wear prison clothing at his state court trial." *Bentley* v. *Crist,* 469 F. 2d, at 856. See also *Dennis* v. *Dees,* 278 F. Supp. 354, 359 (ED La. 1968), disapproved on other grounds, *United States ex rel. Stahl* v. *Henderson, supra,* at 557; *People* v. *Roman,* 35 N. Y. 2d, at 978–979, 324 N. E. 2d, at 885–886; *People* v. *Shaw,* 381 Mich. 467, 164 N. W. 2d 7 (1969).

(3)

The record is clear that no objection was made to the

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[4] Significantly, in the *Henderson* case the Fifth Circuit interpreted *Hernandez* as requiring the accused to take affirmative steps to apprise the trial court of his desire to be tried in civilian clothes. The *Hernandez* court had simply found, under the circumstances presented there, that the defendant "had met his burden." 472 F. 2d, at 557. This interpretation is particularly meaningful since the author of the *Hernandez* opinion was a member of the panel in the subsequent decision in *Henderson.* Moreover, the court in *Hernandez* indicated:

"We do not paint with a broad brush these types of cases. Each case must be considered in its own factual context." 443 F. 2d, at 637.

Moreover, there is nothing in the record in *Hernandez* to suggest that the state trial judge had, as here, a longstanding practice, known to members of the bar, to permit any defendant to change into civilian clothes on request. See *infra,* at 510–511.

trial judge concerning the jail attire either before or at any time during the trial. This omission plainly did not result from any lack of appreciation of the issue, for respondent had raised the question with the jail attendant prior to trial. At trial, defense counsel expressly referred to respondent's attire during *voir dire*. The trial judge was thus informed that respondent's counsel was fully conscious of the situation.[5]

Despite respondent's failure to raise the issue at trial, the Court of Appeals held:

> "Waiver of the objection cannot be inferred merely from failure to object if trial in prison garb is customary in the jurisdiction." 500 F. 2d, at 208.

The District Court had concluded that at the time of respondent's trial the majority of nonbailed defendants in Harris County were indeed tried in jail clothes. From this, the Court of Appeals concluded that the practice followed in respondent's case was customary. *Ibid.*

However, that analysis ignores essential facts adduced at the evidentiary hearing. Notwithstanding the evidence as to the general practice in Harris County, there was no finding that nonbailed defendants were compelled to stand trial in prison garments if timely objection was made to the trial judge. On the contrary, the District Court concluded that the practice of the particular judge presiding in respondent's case was to permit any accused who so desired to change into civilian clothes:

> "There is no doubt but that the [judge] had a

[5] The evidence showed that respondent was a Caucasian in his sixties. At the evidentiary hearing, he testified that he felt he had no real case to present at trial. The testimony of several eyewitnesses was clear and consistent. Under these circumstances, a desire to elicit jury sympathy would have been a reasonable approach and one which the trial judge might reasonably have assumed was deliberately undertaken.

practice of allowing defendants to stand trial in civilian clothing, if requested, a practice evidently followed by certain of the other judges as well." *Williams* v. *Beto,* 364 F. Supp. 335, 343 (1973).[6]

The state judge's policy was confirmed at the evidentiary hearing by the prosecutor and by a defense attorney who practiced in the judge's court.

Significantly, at the evidentiary hearing respondent's trial counsel did not intimate that he feared any adverse consequences attending an objection to the procedure.[7] There is nothing to suggest that there would have been any prejudicial effect on defense counsel had he made objection, given the decisions on this point in that jurisdiction. Four years before respondent's trial the United States Court of Appeals for the Fifth Circuit had held: "It is inherently unfair to try a defendant for crime while garbed in his jail uniform . . . ." *Brooks* v. *Texas,* 381 F. 2d, at 624. Similarly, the Texas Court of Criminal Appeals had held: "[E]very effort should be made to avoid trying an accused while in jail garb." *Ring* v. *State,* 450 S. W. 2d 85, 88 (1970).[8] Prior Texas cases

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[6] This was based on the state judge's affidavit, which stated in part:

"I have never compelled a defendant to go to trial in jail clothes, and on every occasion when a defendant or his attorney requested that he be allowed to wear civilian clothes at his trial I have granted the request." 364 F. Supp., at 338.

[7] Counsel testified that on a prior occasion, a different state judge had overruled his objection to the trial of his client in jail clothes. He also testified that he had seen other defendants dressed in jail garments in the courtroom where respondent was tried.

[8] The Texas courts had admittedly not established a rigid rule invalidating the practice *per se.* Instead, the courts ordinarily looked to whether actual injury or prejudice had resulted from the defendant's appearance in jail garb. *Garcia* v. *State,* 429 S. W. 2d 468, 471 (Tex. Crim. App. 1968); *Xanthull* v. *State,* 403 S. W. 2d

had made it clear that an objection should be interposed. See *Wilkinson* v. *State,* 423 S. W. 2d 311, 313 (Tex. Crim. App. 1968); *Ring* v. *State, supra,* at 88.

Nothing in this record, therefore, warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial.[9] Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. To impose this requirement suggests that the trial judge operates under the same burden here as he would in the situation in *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

Accordingly, although the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever rea-

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807, 809 (Tex. Crim. App. 1966). But these cases provided ample grounds for objection to the procedure, since they at least implicitly recognized that reversible error could result from the practice. Similarly, the 1970 decision in *Xanthull* v. *Beto,* 307 F. Supp. 903 (SD Tex.), did not render fruitless any objection on respondent's part. Instead, that case, like various state cases, simply imposed a burden on federal habeas petitioners to show actual prejudice resulting from a jury trial in jail garments.

[9] It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion.

son, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.[10]

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

Reversed and remanded.

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

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring.

I concur in the opinion of the Court. As the Court's opinion and the dissenting opinion take such divergent views of the case, I write separately to identify specifically the considerations I deem controlling.

Respondent, Harry Lee Williams, was tried while clad in prison issue. Despite differences over the relevance of "compulsion" in this case, the Court opinion and the dissenting opinion essentially agree that a defendant has a constitutional right not to be so tried. The disagreement is over the significance to be attributed to Williams' failure to object at trial.

As relevant to this case, there are two situations in which a conviction should be left standing despite the claimed infringement of a constitutional right. The first situation arises when it can be shown that the substantive right in question was consensually relinquished. The other situation arises when a defendant has made an "inexcusable procedural default" in failing to object at a time when a substantive right could have been pro-

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[10] Petitioner has contended in his brief and in oral argument that the Court of Appeals' decision in *Hernandez* should not be applied retroactively. The petition for certiorari did not raise this issue and our disposition of the case renders it unnecessary to decide it.

tected. Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 118 (1959); see American Bar Association Project on Standards for Criminal Justice, Post-Conviction Remedies 35–37 (App. Draft 1968).

Williams was represented by retained, experienced counsel. It is conceded that his counsel was fully aware of the "prison garb" issue [1] and elected to raise no objection simply because he thought objection would be futile. The record also shows that the state judge who presided at Williams' trial "had a practice of allowing defendants to stand trial in civilian clothing, if requested . . . ." 364 F. Supp. 335, 343 (1973). It thus is apparent that had an objection been interposed by Williams to trial in prison garb, the issue here presented would not have arisen.

This case thus presents a situation that occurs frequently during a criminal trial—namely, a defendant's failing to object to an incident of trial that implicates a constitutional right. As is often the case in such situations, a timely objection would have allowed its cure. As is also frequently the case with such trial-type rights as that involved here, counsel's failure to object in itself is susceptible of interpretation as a tactical choice. *Ante*, at 507–508.

It is my view that a tactical choice or procedural default of the nature of that involved here ordinarily should operate,[2] as a matter of federal law, to preclude

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[1] Williams' counsel did not claim, nor indeed could he have claimed, that a new issue was involved. Both the Court of Appeals for the Fifth Circuit and the Texas courts had recognized that trial in prison garb could be constitutional error as an impingement upon the presumption of innocence. *Ante*, at 511–512.

[2] Even when confronted by such a procedural default, discretion might sometimes be exercised to overturn a conviction on the familiar principles of plain error. See *United States* v. *Indiviglio*, 352 F. 2d 276 (CA2 1965).

the later raising of the substantive right.[3] We generally disfavor inferred waivers of constitutional rights. See *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1939); *Barker* v. *Wingo,* 407 U. S. 514, 525–526 (1972). That policy, however, need not be carried to the length of allowing counsel for a defendant deliberately to forgo objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile.[4]

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

I dissent. The Court's statement that "[t]he defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors" affecting the jurors' judgment, thus presenting the possibility of an unjustified verdict of guilt, *ante,* at 505, concedes that respondent's trial in identifiable prison garb [1] constituted a denial of

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[3] Previous cases of this Court make clear that a federal-law bar can be raised to the untimely presentation of constitutional claims. See *Fay* v. *Noia,* 372 U. S. 391, 433–434 (1963); *Henry* v. *Mississippi,* 379 U. S. 443, 451–452 (1965).

[4] The right involved here is a trial-type right. As a consequence, an attorney's conduct may bind the client. See *Henry* v. *Mississippi, supra,* at 451–452; cf. *Brookhart* v. *Janis,* 384 U. S. 1 (1966). The entitlement of courts ordinarily to rely on counsel to advise a defendant and to make timely assertion of rights even when the validity of a guilty plea is at issue was a factor in *McMann* v. *Richardson,* 397 U. S. 759, 766–771 (1970).

[1] Respondent appeared at trial wearing a white T-shirt with "Harris County Jail" stenciled across the back, oversized white dungarees that had "Harris County Jail" stenciled down the legs, and shower thongs. Both of the principal witnesses for the State at respondent's trial referred to him as the person sitting in the "uniform." Record on Appeal in Tex. Ct. of Crim. App. 108, 141 (No. 73–3854).

due process of law. The judgment setting aside respondent's conviction is nevertheless reversed on the ground that respondent was not *compelled* by the State to wear the prison garb. The Court does not—for on this record plainly the Court could not—rest the reversal on a finding that respondent knowingly, voluntarily, and intelligently consented to be tried in such attire, and thus had waived his due process right. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938). Rather, for the first time, the Court confines due process protections by *defining* a right that materially affects the fairness and accuracy of the fact-finding process in terms of state *compulsion,* a concept which, although relevant in the context of the Fifth Amendment's privilege against self-incrimination, is simply inapposite to constitutional analysis concerning due process in criminal proceedings. The end result of this definitional approach is to impute the effect of waiver to the failure of respondent or his counsel to apprise the trial judge of respondent's objection to being tried in prison garb. This not only results in an illogical delineation of the particular right involved in this case, but also introduces into this Court's jurisprudence a novel and dangerously unfair test of surrender of basic constitutional rights to which I cannot agree.[2]

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[2] In holding that only the "compelled" wearing of prison garb is constitutionally proscribed, the Court understandably cites no precedent for its startling result. For the only area in which the concept of compulsion is relevant to the definition of a substantive right is the Fifth Amendment privilege against self-incrimination. See, *e. g., Garner* v. *United States,* 424 U. S. 648 (1976). But by its terms the Self-Incrimination Clause of the Fifth Amendment speaks only to an individual's being "compelled" to be a witness against himself; due process rights to a fair trial do not, however, depend on the existence of state "compulsion." Moreover, it is clear that even in the Fifth Amendment's self-incrimination context, where state "compulsion" is required, steps should be taken to ensure

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The Court concedes that respondent was denied due process of law: there is a due process violation if the State denies an accused's objection to being tried in such garb, *ante,* at 504–505, 505, 512, 512–513, and as will be developed, there is no relevant constitutional difference concerning that due process right if the accused has not objected to the practice.

One of the essential due process safeguards that attends the accused at his trial is the benefit of the presumption of innocence—"that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship,* 397 U. S. 358, 363 (1970), quoting *Coffin* v. *United States,* 156 U. S. 432, 453 (1895). See also, *e. g., Deutch* v. *United States,* 367 U. S. 456, 471 (1961); *Sinclair* v. *United States,* 279 U. S. 263, 296–297 (1929).

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that constitutional rights only be knowingly and voluntarily waived. See, *e. g., Maness* v. *Meyers,* 419 U. S. 449, 466–467 (1975). See also nn. 5, 6, *infra.*

The Court's reliance on *Illinois* v. *Allen,* 397 U. S. 337 (1970), is particularly inexplicable. See *ante,* at 505. For the Court in *Allen* held that "courts must indulge every reasonable presumption against the loss of constitutional rights, *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938)," and further held that the accused could only be deprived of his right to be present at trial "if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." 397 U. S., at 343. *Allen* thus requires knowing, voluntary, and intelligent waiver of the constitutional right to be present at trial, the standard that in my view also applies to trial in prison garb.

This presumption of innocence is given concrete substance by the due process requirement that imposes on the prosecution the burden of proving the guilt of the accused beyond a reasonable doubt. "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship, supra,* at 363–364. The "prime instrument for reducing the risk of convictions resting on factual error," *id.,* at 363, is the reasonable-doubt standard. When an accused is tried in identifiable prison garb, the dangers of denial of a fair trial and the possibility of a verdict not based on the evidence are obvious.

Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt. Jurors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact he poses a danger to the community or has a prior criminal record; a significant danger is thus created of corruption of the factfinding process through mere suspicion. The prejudice may only be subtle and jurors may not even be conscious of its deadly impact, but in a system in which every person is presumed innocent until proved guilty beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk. Jurors required by the presumption of innocence to accept the accused as a peer, an individual like themselves who is innocent until proved guilty, may well

see in an accused garbed in prison attire an obviously guilty person to be recommitted by them to the place where his clothes clearly show he belongs. It is difficult to conceive of any other situation more fraught with risk to the presumption of innocence and the standard of reasonable doubt.

Trial in identifiable prison garb also entails additional dangers to the accuracy and objectiveness of the fact-finding process. For example, an accused considering whether to testify in his own defense must weigh in his decision how jurors will react to his being paraded before them in such attire. It is surely reasonable to be concerned whether jurors will be less likely to credit the testimony of an individual whose garb brands him a criminal. And the problem will most likely confront the indigent accused who appears in prison garb only because he was too poor to make bail. In that circumstance, the Court's concession that no prosecutorial interest is served by trying the accused in prison clothes, *ante,* at 505, has an ironical ring.[3]

In light of the effect of trial in prison garb in denying the accused the benefit of the presumption of innocence and undercutting the reasonable-doubt standard, it escapes me how the Court can delineate the right established in this case as the right not to be *compelled* to wear prison garb. If, as the Court holds, the clothes of the accused who has unsuccessfully objected to wearing prison garb (and thus is "compelled" to wear them) unconstitutionally disadvantages his case, obviously the prison clothes of the nonobjecting accused are similarly

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[3] The Court suggests that accused persons freely choose to wear prison garb, *ante*, at 505–506, 507–508, but mentions no case of a person free on bail (and thus truly able to make a voluntary choice with respect to what to wear at trial) who asked to wear prison garb at his trial.

unconstitutionally disadvantageous. From the *jury's* perspective, the situations of the objecting and the nonobjecting defendants are in every respect identical; if the clothes of the accused who has objected to the court will create improper negative inferences in the minds of the jurors, so too must the clothes of the nonobjecting accused. Nothing in logic or experience suggests that jurors, who need have no knowledge that an objection was lodged with the court, will react any differently in the two situations. It baffles me how the Court, having conceded that trial in identifiable prison garb denigrates the accused's presumption of innocence, can then make the constitutional determination turn on whether or not the accused informed the trial court that he objected; since an objection is irrelevant to the purpose underlying the prohibition of trial in prison garb, the Court's delineation of the due process right in this case—confining the due process safeguard to situations of state "compulsion"—is irrational on its face.[4]

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[4] The Court states that "[t]he cases show . . . that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." *Ante,* at 508. Insofar as this suggests that the practice is prevalent, I am confident that there are simply no empirical data to support the statement. In any event, prevalence of the practice does not explain the limitation of the acknowledged infirmity to cases of *compelled* appearance in prison clothes.

In a single reported case, *Garcia* v. *Beto,* 452 F. 2d 655 (CA5 1971), a defense attorney testified that given the particular circumstances of the case, in which he sought to portray his client as a drunk, he thought that by emphasizing the difference between the accused and the jurors he would be aided in making that defense. The Fifth Circuit found that this deliberate trial strategy constituted a waiver of the right to be tried in civilian clothes. Although the other cases cited by the Court today noted the *Garcia* opinion, none involved such a trial tactic. See *Watt* v. *Page,* 452 F. 2d 1174, 1176 (CA10 1972) (noting that cases refer to the "possibility" that there may be a trial strategy and remanding for an evidentiary hear-

To be sure, an accused may knowingly, voluntarily, and intelligently consent to be tried in prison garb. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938). But the Court, without any reason for departing from this standard, has simply subverted it by promulgating the novel and dangerous doctrine that a basic due process safeguard, affecting the fairness and accuracy of the factfinding procedure, is a contingent right that does not even come into existence until it is affirmatively asserted. Is the Court today thus signaling the demise of the *Johnson* v. *Zerbst* voluntary waiver test as the standard for determination of the surrender of constitutional protections? [5]

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ing on the matter); *Anderson* v. *Watt,* 475 F. 2d 881, 882 (CA10 1973) (affirming grant of habeas relief since no trial strategy was shown); *Barber* v. *State,* 477 S. W. 2d 868, 870 (Tex. Crim. App. 1972) (asserting that the Fifth Circuit in *Garcia* noted that a defendant "often wants to be tried in jail clothing and that it is common for a defense counsel to prove before the jury how long the accused has been confined in jail"; however, no demonstration was made that such was true in Barber's case or in any case other than *Garcia,* and the *Garcia* case never suggested that the practice was "common"). The single instance in which a defense attorney, confronted with the fact his client was being tried in prison garb, attempted to employ that fact to invoke jury sympathy and thereby waived any right he otherwise had to trial in civilian garb, hardly supports the Court's conclusion that defendants "frequently" hope to benefit by this "tactic," *ante,* at 508, or the concurring opinion's similarly myopic statement that "counsel's failure to object in itself is susceptible of interpretation as a tactical choice," *ante,* at 514. See also n. 3, *supra.* In any event, even if there were situations in which trial in prison garb was deliberately employed as a defense tactic, that would only justify a decision that those individuals waived their rights. Cf., *e. g., Barker* v. *Wingo,* 407 U. S. 514, 525–529 (1972).

[5] Indeed, although acknowledging that trial in prison garb destroys the presumption of innocence, the Court proclaims that "[w]e are not confronted with an alleged relinquishment of a fundamental right of the sort at issue in *Johnson* v. *Zerbst,*" *ante,* at 508 n. 3. It is difficult to see where such assertions, which are flatly inconsistent with this Court's precedents, see n. 6, *infra,* will cease. For

For certainly if failure to object to trial in prison garb, even where the accused has not been shown to know that he might object, surrenders so basic a constitutional

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example, since an accused has the right of self-representation in criminal trials, see *Faretta* v. *California,* 422 U. S. 806 (1975), will the Court now say that unless an indigent accused was *compelled* to forgo appointed counsel, he was simply exercising the right to represent himself, even if he was unaware of the right to court-appointed counsel? Cf, *e. g., Powell* v. *Alabama,* 287 U. S. 45 (1932); *Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972). And has the Court signaled that unless the accused makes and the State rejects a motion for a speedy trial, there is automatically no constitutional violation? Cf., *e. g., Barker* v. *Wingo, supra,* at 523–530. Or perhaps the Court will hold that there is no constitutional violation if an accused does not object to jury instructions that would otherwise deny him his due process right to be convicted only if the State proves every element of the offense beyond a reasonable doubt, since there has not been any state "compulsion"? Cf., *e. g., Mullaney* v. *Wilbur,* 421 U. S. 684 (1975). See also, *e. g., Camp* v. *Arkansas,* 404 U. S. 69 (1971). Such possibilities are legion, for this Court has often recognized constitutional rights even though the accused did not explicitly demand them during his trial. Thus, whether the Court's decision is read as importing the privilege against self-incrimination's "compulsion" notion into areas in which it properly has no applicability, or as abrogating the traditional waiver standard for rights affecting the fairness and accuracy of the factfinding process, it is a marked and indefensible departure from constitutional principles which have long been settled. Moreover, such notions may have a pervasive impact on habeas corpus proceedings. Will the Court eventually employ these principles to overrule the "deliberate by-pass" test of *Fay* v. *Noia,* 372 U. S. 391 (1963), and the holding that an adequate state procedural ground that precludes review by appeal does not mean that an accused cannot "pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim," *Henry* v. *Mississippi,* 379 U. S. 443, 452 (1965)? The concurring opinion would put such a gloss on the opinion for the Court, and the opinion today in *Francis* v. *Henderson, post,* p. 536, confirms that my fears are not groundless.

right as that securing fairness and accuracy of the fact-finding process, the Court has totally eviscerated the traditional doctrine that loss of such rights cannot be presumed from inaction.[6]

II

JUSTICES POWELL and STEWART concur in this evisceration of fundamental due process rights, but on the basis of a rationale essentially different from the rationale of the Court's opinion. In that circumstance their joining in the Court's opinion is puzzling. For although the opinion of the Court, admittedly obscure, may be interpreted either as importing the concept of "compulsion" into areas to which it is inapposite or as diluting the standard for waiver of fundamental constitutional rights, the concurring opinion would prefer to reverse the Court of Appeals on the ground that respondent—or more properly, respondent's attorney—committed "an inexcusable procedural default" or "tactical choice" that precludes his present assertion of this substantive right. *Ante,* at 513, 514. Because the concurring opinion obfuscates various issues, and because the import of this statement and the true rationale of the concurring opinion are brought into better focus by today's opinion for the Court in *Francis* v. *Henderson, post,* p. 536, which does properly present a question of procedural default, it

[6] Certainly a basic tenet of this Court's jurisprudence has consistently been that constitutional rights affecting the fairness and accuracy of the factfinding process are not lost unless the State demonstrates "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst, supra,* at 464; *Barker* v. *Wingo, supra,* at 525–529. See generally, *e. g., Schneckloth* v. *Bustamonte,* 412 U. S. 218, 235–246 (1973); *id.,* at 276 (BRENNAN, J., dissenting); *id.,* at 277 (MARSHALL, J., dissenting). By defining the due process right in prison-garb cases in terms of state compulsion, the Court opens the door for the complete abandonment of this waiver doctrine.

is essential to delineate two separate concepts relating to methods by which criminal defendants may yield or lose constitutional rights.

One concept is that of "waiver" which, at least with respect to constitutional rights affecting the fairness and accuracy of the factfinding process, means that the accused has engaged in conduct which may be characterized as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S., at 464; see n. 6, *supra.* If an accused has knowingly waived rights to which he was otherwise entitled, he has not, on the merits of his claim, been unconstitutionally deprived of anything. A separate concept is that of "procedural default," which involves the manner in which an accused may forfeit rights by not asserting them according to the strictures of a State's procedural rules. If the accused has committed a procedural default, there may never be an adjudication of the underlying constitutional claim on the merits. That problem was addressed in *Fay* v. *Noia,* 372 U. S. 391 (1963), which held that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.,* at 438. However, *Fay* was emphatic that it was to be "very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus," *id.,* at 439, and unambiguously explained that the "deliberate by-pass" test for procedural defaults was the analogue of the "knowing and intelligent" waiver standard for loss of constitutional rights in the absence of a procedural rule concerning their assertion:

> "The classic definition of waiver enunciated in *Johnson* v. *Zerbst,* 304 U. S. 458, 464—'an inten-

tional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question." *Ibid.*

See also *Francis* v. *Henderson, post,* at 543–545, and n. 2 (BRENNAN, J., dissenting). When an accused has deliberately bypassed the State's mechanisms for adjudicating constitutional rights, a federal court generally need not address the merits of the underlying constitutional claim; as a corollary, when the state courts address the constitutional claim on the merits, the State may not seek to prohibit habeas relief on the ground that the accused was precluded from raising the claim due to a procedural default. See, *e. g., Lefkowitz* v. *Newsome,* 420 U. S. 283, 292 n. 9 (1975).

With this background in mind, two glaring inadequa-

cies in the concurring opinion become manifest. First, the issue of procedural default under state law is not presented by this case. The Texas Court of Criminal Appeals did not render its decision on state procedural grounds but on its view of federal waiver doctrine as expounded in another Court of Appeals for the Fifth Circuit opinion. See *Williams* v. *State,* 477 S. W. 2d 24, 26–27 (1972). The issue of procedural default was never raised by the State or addressed by any court below, and it is simply indefensible to seize this ground as a purported justification under which to perpetuate respondent's unconstitutional confinement. See also n. 10, *infra.*

Second, and even more basic, the concurring opinion, without reference to the holding of *Fay* and without citing any precedent, would reverse the Court of Appeals under a standard which directly repudiates *Fay* and which implicitly undermines its precedential value with respect to the assertion in habeas proceedings of all constitutional rights. The concurring opinion, which converts the "deliberate by-pass" test of *Fay* into an "inexcusable" default test, would find an "inexcusable" procedural default in the mere failure to object to an unconstitutional practice, reasoning that if there had been a timely objection the unconstitutional action would have been remedied. Such logic could, as a hindsight matter, probably be invoked any time counsel inadvertently or inexplicably fails to object contemporaneously to the deprivation of his client's fundamental rights, and the *Fay* knowing-and-intelligent-bypass test would thus be rendered a hollow shell. Indeed, the concurring opinion would also appear to shift the *Fay* burden of proof, in a case in which an unconstitutional deprivation of an accused's rights has been shown, by requiring the accused to show that the default was not "inexcusable" rather than requiring the State to show that the default was "deliberate."

Moreover, *Fay* required that the decision not to assert most constitutional rights be the informed choice of the accused himself rather than of his counsel. The concurring opinion would alter this aspect of *Fay* when "trial-type rights" are involved. The concurring opinion provides no principled content, however, to that term.[7] How is the right of a defendant to the presumption of innocence—as impinged when the State hales the accused, clad in prison garb, before a judge who is supposedly charged with ensuring the fairness of a trial—more a "trial-type" right than is the right to a jury trial, the requirement that the State prove every element of the crime by proof beyond a reasonable doubt, or the right to counsel itself? The concurring opinion would apparently undermine settled doctrines concerning waiver or loss of these rights without ever addressing the departure of its methodology from the unswerving path charted by the Court's precedents.[8] And if actions of

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[7] The phrase "trial-type" rights might conceivably have some value with reference to potential constitutional challenges—for example, Confrontation Clause challenges to the introduction of hearsay evidence—which arise spontaneously during the course of the trial and concerning which there may be inadequate opportunity for counsel to consult with his client. The concurrence, however, invokes "trial-type" rights almost talismanically, with no indication of what the term connotes.

[8] All of these rights have been held by this Court to be violated unless the accused himself knowingly and intelligently waived them, and the burden of proof of demonstrating their waiver, which may not be presumed on a silent record, rests on the State. Surely the Court would not adulterate those standards in the context of procedural defaults. See *Francis* v. *Henderson, post,* at 553 n. 4 (BRENNAN, J., dissenting). Indeed, the knowing-and-deliberate-bypass test of *Fay* has been applied as the standard for measuring procedural defaults in such other situations affecting fundamental rights as the failure to take a timely appeal, the failure to challenge in a timely manner the introduction of unconstitutionally seized evidence, and the failure to object to a prosecutor's closing comments on a

counsel are to bind an accused in such "trial-type" situations, it would seem that the Court has an obligation to elucidate the standards by which counsel's actions are to be judged, particularly in a case such as this in which ineffective assistance of counsel is alleged. See nn. 13, 15, *infra*.

In any event, if the concurring opinion means that my Brothers STEWART and POWELL are forsaking the teaching of precedents such as *Fay*, I respectfully suggest that they have the clear responsibility not to do so by indirection, and to explicate at least the contours and outer limits of the novel and dangerous doctrines which they are formulating. See generally *Francis* v. *Henderson*, *post*, p. 542 (BRENNAN, J., dissenting). It is simply unacceptable that my Brethren, who concede that respondent was convicted in derogation of his constitutionally secured presumption of innocence, should nevertheless sanction his unconstitutional confinement on the basis of "procedural default" principles which are neither articulated nor justified in a case calling for such analysis, see *Francis* v. *Henderson*, and which are then conjured up as the ground for decision in a case in which those unarticulated principles are not even legitimately implicated. This hardly passes as reasoned adjudication, and is a grave disservice both to this Court and to the litigants who must come before it.

III

Even under the Court's standard of *compelled* appearance, the judgment of the Court of Appeals should be affirmed. The Court's holding relies on the *per curiam* statement of the Court of Appeals for the Fifth Circuit

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defendant's failure to testify at trial. See, *e. g.*, *Fay*; *Kaufman* v. *United States*, 394 U. S. 217 (1969); *Camp* v. *Arkansas*, 404 U. S. 69 (1971).

on petition for rehearing in *Hernandez* v. *Beto,* 443 F. 2d 634, 637, cert. denied, 404 U. S. 897 (1971), that a defendant may not willingly proceed to trial in prison garb and later protest that fact. *Ante,* at 508–509.[9] Yet applying the standard of *Hernandez,* see 364 F. Supp. 335, 340 (1973), the District Court in this case expressly found that respondent had *not* willingly gone to trial in identifiable prison garb, and that finding was affirmed by the Court of Appeals. Significantly, the District Court stated, *id.,* at 343 (emphasis supplied):

> "It is clear from the record in this case and consistent with the evidence adduced in *Dennison,* the companion case, that prior to *Hernandez* there did exist a common practice in Harris County courts to try incarcerated defendants in jail clothing unless they were able to secure some dispensation. . . .
>
> "There is no doubt but that the [judge] had a prac-

[9] In *Hernandez,* no formal objection was made to the trial judge. 443 F. 2d, at 636. Although the Fifth Circuit on petition for rehearing stated that a "defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error," *id.,* at 637, it is clear that the court was addressing the question from a traditional waiver perspective. The court continued, *ibid.:* "In this case Hernandez' counsel did not object to the jail clothing because, from past experience, he thought that a motion for change of attire would have been a frivolous motion. We cannot accept this as a voluntary waiver by Hernandez." In the present case, the factual situation as found by the District Court is virtually identical to that found in *Hernandez.* The Court would distinguish *Hernandez,* however, on the ground that there was nothing in the record of that case to "suggest that the state trial judge had, as here, a longstanding practice, known to members of the bar, to permit any defendant to change into civilian clothes on request." *Ante,* at 509 n. 4. In addition to failing to take account of the suspect nature of the trial judge's affidavit, see n. 15, *infra,* this statement ignores the District Court's finding that there was *no* indication that this purported practice was publicly known or known to respondent or his counsel. See *infra,* at 530, 532–534, and n. 14.

tice of allowing defendants to stand trial in civilian clothing, if requested, a practice evidently followed by certain of the other judges as well. . . . However, the record does not reveal that [the judge's] practice was publicly known or that it was known to defendants or their counsel. More reasonably, *at times material to the* [*respondent's*] *criminal trial it was the standard practice to have all defendants in custody dressed alike* without any policy such as that employed by [the judge] being uniformly adopted by all or even a majority of the criminal district judges in Harris County. Instead, *the evidence points to the strong likelihood that the trial climate at that time acted as a natural deterrent to the raising of objections to what was commonplace*—a trial in jail clothes, even assuming that defendants or their counsel thought about the problem and considered its legal implications. In the absence of such consideration it can scarcely be concluded that either [respondent] or his trial counsel knowingly, willingly and voluntarily waived the right to be tried in civilian clothing."

Since the Court does not hold that that finding of the two courts is clearly erroneous, the finding is conclusive on us for the purpose of deciding the merits [10] and compels affirmance of the Court of Appeals.

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[10] The "two-court" rule is the "long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous. See, *e. g., Blau* v. *Lehman,* 368 U. S. 403, 408–409 (1962); *Faulkner* v. *Gibbs,* 338 U. S. 267, 268 (1949); *United States* v. *Dickinson,* 331 U. S. 745, 751 (1947); *United States* v. *Commercial Credit Co.,* 286 U. S. 63, 67 (1932); *United States* v. *Chemical Foundation,* 272 U. S. 1, 14 (1926); *Baker* v. *Schofield,* 243 U. S. 114, 118 (1917); *Towson* v. *Moore,* 173 U. S. 17, 24 (1899); cf. *Boulden* v. *Holman,* 394 U. S. 478,

Indeed, even if the Court is *sub silentio* re-evaluating the factual findings concurred in by the two courts, the re-evaluation is not supported by the record. The Court states that defense counsel had nothing to fear from an objection, *ante,* at 511, yet the District Court found that the prevalent trial climate deterred the making of such objections. Further, the Court omits mention of the significant finding of the District Court that the practice followed in respondent's case was customary in the jurisdiction. The Court also omits mention of the fact that there was uncontradicted evidence that respondent's counsel failed to object only because objection was perceived to be futile, and that counsel had no purpose to elicit jury sympathy or otherwise acquiesce in the practice for purposes of trial tactics.[11] More crucial, the Court states that defense counsel was "conscious" of the problem of trial in jail garb, since he mentioned the point at *voir dire,* and that the judge was thus "informed" of counsel's knowledge. *Ante,* at 510.

480–481 (1969)." *Neil* v. *Biggers,* 409 U. S. 188, 202 (1972) (BRENNAN, J., concurring in part and dissenting in part). The Court implies that only the Court of Appeals made such findings and that in doing so it failed to take account of relevant evidence before the District Court. *Ante,* at 510–511. The District Court, presented with all of the data cited by the Court, nevertheless concluded that the trial climate was such that objections to trial in prison garb were deterred; the number of cases involving this issue, particularly the substantial number emanating from Harris County courts, merely reinforced that finding.

Moreover, there is no reason in this case why the Court should reassess the finding of two courts that respondent did not willingly proceed to trial in prison garb. Petitioner did not challenge that holding in his petition for a writ of certiorari, and sought resolution *only* of the basic question whether trial in prison garb is so inherently prejudicial that it destroys the presumption of innocence.

[11] See, *e. g.,* App. 47–49, 58–59, 62–63; Tr. 5 (concession by petitioner here during habeas evidentiary hearing that trial tactics were not involved in this case).

This impliedly suggests that the trial judge is for that reason relieved of his obligation affirmatively to inquire whether respondent actually desired to be tried in such garb, for the trial judge might conclude that respondent was engaging in a deliberate trial tactic to elicit jury sympathy. The record is wholly devoid of any basis for that analysis.

The jury's attention to respondent's jail garb was first directed by the *prosecution* on *voir dire*.[12] Indeed, it was done so matter-of-factly as to highlight the prevalence of the practice in the Harris County courts. If the trial judge was truly sensitive to the problem and willing, as suggested, to sustain any objection that was raised to the practice, it is curious that the comments provoked no reaction from him. The Court suggests that it mattered not at all because the case against respondent was so strong that respondent had "no real case" and the testimony of eyewitnesses was "clear and

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[12] The prosecutor, addressing his remarks to a specific member of the jury panel, stated:

"This defendant is sitting in jail clothes. I am assuming he's been in jail to the time of this trial. You are not to take this into consideration. The fact a man is in jail clothes shouldn't make you feel he is guilty any more than if he were in street clothes.

"The second thing, oftentimes evidence will come out that a person has been in jail for seven months or eight months awaiting trial. By the same token, this should not be taken into consideration on your verdict, because you are supposed to go straight down the line, guilty or not guilty, and not let how a person is dressed influence your decision." Exhibits, pp. 30–31.

Subsequently the prosecutor, again addressing a single juror, stated, *id.*, at 33:

"You have heard the questions I asked. I have gone over reasonable doubt, gone over the business of how the defendant was dressed, the fact he may or may not have been in the jail all this time."

If the jurors had ignored respondent's garb until then, these statements surely directed their attention to it.

consistent." *Ante,* at 510 n. 5. Even if true (and I do not share the Court's view of the strength of the trial evidence), that would not relieve the trial judge of his duty to inquire whether respondent was satisfied to proceed to trial in prison garb,[13] particularly since the judge had no knowledge at that time that respondent had "no real case." Indeed, the judge's uncommunicated good intentions and alleged sensitivity to prison garb are highly questionable in light of respondent's evidence that of the six cases involving nonbailed defendants tried in the same judge's courtroom during the two months surrounding respondent's case, every accused appeared in prison garb.[14] And the reasonableness of respondent's percep-

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[13] "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95 (1931). "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser* v. *United States,* 315 U. S. 60, 71 (1942). "If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings." *Geders* v. *United States, ante,* at 87. If the law relating to trial in prison garb was so clear, see *ante,* at 511–512, n. 8; concurring opinion, *ante,* at 514 n. 1, the devastating impact of such garb on the presumption of innocence so pervasive, and the trial judge's sensitivity so genuine, invocation of the "adversary system," see *ante,* at 512; concurring opinion, *ante,* at 515 n. 4, cannot justify the trial judge's failure to inquire into the matter, which certainly did not escape his attention. "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann* v. *Richardson,* 397 U. S. 759, 771 (1970). See *Francis* v. *Henderson, post,* at 553 n. 4 (BRENNAN, J., dissenting).

[14] See Williams' Exhibits 2–6. The cases involving nonbailed defendants constituted 50% of the jury cases before the trial judge during that period. See Williams' Exhibit 7. Respondent's trial counsel was aware that other defendants were appearing before the same trial judge in prison garb. App. 58–59.

tion that trial objection would be futile is accentuated by the fact that the deputy sheriff had already denied respondent's explicit request to wear at trial the clothes in which he was arrested.

At least, in light of the District Court's finding that there was no knowing and voluntary waiver and that trial objections were deterred by the then prevalent trial climate, I should think the Court would remand for further factual development concerning the practice in Harris County at the time of respondent's trial.[15] But

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[15] A remand for further factual development is particularly appropriate if the Court believes that it has delineated the due process contours of trial in prison garb differently than did the District Court, since the District Court might not have anlayzed all factors relevant to state "compulsion." For example, respondent objected to introduction of the trial judge's affidavit on the ground that it was not taken pursuant to the Federal Rules of Civil Procedure and thus afforded respondent's counsel no opportunity to cross-examine the judge and inquire into such matters as the number of times objections had actually been made to the practice of trial in prison garb, especially before the *Hernandez* decision, which brought about the elimination of the practice in Harris County courts. The fact that the Court seems to have delineated the right differently than did the lower courts is highlighted by the fact that the petition asked "Whether a defendant's trial in jail clothing destroys the 'presumption of innocence' so as to deny him a fair trial," Pet. for Cert. 2, while the Court states the question presented to be "whether an accused who is *compelled* to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws," *ante,* at 502 (emphasis supplied). Moreover, it is particularly incongruous, if the Court is actually premising its holding, as the concurring opinion suggests, on a procedural default ground never presented or explored below, that the Court is reversing on the merits of the prison-garb issue rather than remanding for an inquiry as to whether the alleged procedural default forecloses an inquiry into the merits of respondent's claims. See *supra,* at 523–526.

The Court of Appeals did not address respondent's contention that respondent was denied effective assistance of counsel, in light

the record before us plainly calls for an affirmance of the Court of Appeals.

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of its holding with respect to respondent's prison-garb contention. When the Court of Appeals now addresses the issue on remand, it should of course do so in light of the fact that the Court today declares that there were "ample grounds" for an objection to trial in prison garb, see *ante,* at 512 n. 8, concurring opinion, *ante,* at 514 n. 1, and the fact that trial counsel concededly had no tactical or other reason for desiring that respondent be tried in prison garb, see n. 11, *supra.*

FRANCIS *v.* HENDERSON, WARDEN

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

No. 74-5808. Argued December 9-10, 1975—Decided May 3, 1976

Six years after his conviction for felony murder from which he took no appeal, petitioner sought collateral relief from the state court on the ground, *inter alia,* that Negroes had been excluded from the grand jury that indicted him. Relief was denied on the ground that petitioner's failure to raise the claim before trial constituted a waiver of that claim under state law. Petitioner then sought habeas corpus in the District Court, which granted relief. The Court of Appeals reversed, relying on *Davis* v. *United States,* 411 U S. 233, which held that a federal prisoner who had failed to timely challenge the allegedly unconstitutional composition of the grand jury that indicted him could not after his conviction attack the grand jury's composition in an action for federal collateral relief. *Held:* The Court of Appeals correctly held that the *Davis* rule, which requires not only a showing of "cause" for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice, applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment. The Louisiana time limitation was designed to serve the same important purposes of sound judicial administration as were stressed in *Davis, supra,* at 241, and considerations of comity and federalism require that those purposes be accorded no less recognition when a federal court is asked to overturn a state conviction than when it is asked to overturn a federal conviction because of an allegedly unconstitutional grand jury indictment. Pp. 538-542.

496 F. 2d 896, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post,* p. 542. MARSHALL, J., took no part in the decision of the case. STEVENS, J., took no part in the consideration or decision of the case.

Bruce S. Rogow, by appointment of the Court, 421 U. S. 1009, argued the cause for petitioner. With him on the brief was *Louis Jepeway, Jr.*

Barbara Rutledge, Assistant Attorney General of Louisiana, argued the cause for respondent. With her on the brief were *William J. Guste, Jr.,* Attorney General, *Harry F. Connick,* and *Louise Korns.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Davis* v. *United States,* 411 U. S. 233, the Court held that a federal prisoner who had failed to make a timely challenge to the allegedly unconstitutional composition of the grand jury that indicted him could not after his conviction attack the grand jury's composition in an action for collateral relief under 28 U. S. C. § 2255. The question in this case is whether a state prisoner who failed to make a timely challenge to the composition of the grand jury that indicted him could after his conviction bring that challenge in a federal habeas corpus proceeding.

The petitioner, Abraham Francis, was brought to trial in a Louisiana court in 1965 upon an indictment for felony murder. He was represented by counsel provided by the State. The Louisiana law then in force clearly required that any objection by a defendant to the composition of the grand jury that had indicted him had to be made in advance of his trial. Otherwise, the law provided, "all such objections shall be considered as waived and shall not afterwards be urged or heard." [1] No such

[1] At the time of Francis' trial Art. 202 of the Louisiana Code of Criminal Procedure (1928) required that all objections to a grand jury must be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever was earlier. *State* v. *Wilson,* 204 La. 24, 14 So. 2d 873; *State* v. *Chianelli,* 226 La. 552, 76 So. 2d 727. See *Michel* v. *Louisiana,* 350

objection in any form was made by or on behalf of Francis. At the ensuing trial the jury found Francis guilty, and he was sentenced to life imprisonment.

He did not appeal the conviction, but in 1971 he sought collateral relief from a state court on the ground, *inter alia,* that Negroes had been excluded from the grand jury that had indicted him. The court held that Francis had waived this claim when he failed to raise it before trial as required by state law, and it accordingly denied relief. Francis thereafter sought a writ of habeas corpus in the United States District Court for the Eastern District of Louisiana. The District Court granted the writ on the ground that Negroes had been impermissibly excluded from the grand jury that had returned the indictment.[2] The Court of Appeals reversed the judgment, holding that in the light of this Court's decision in the *Davis* case, "the Louisiana waiver provision must be given effect by the federal district courts unless there is a showing of actual prejudice." 496 F. 2d 896, 899. Accordingly, the appellate court remanded the case to the District Court. We granted certiorari in order to consider a recurring and unresolved question of federal law. 421 U. S. 946.[3]

There can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this. 28 U. S. C. §§ 2241, 2254. The issue, as in the *Davis* case, goes rather to the appro-

U. S. 91. Louisiana now requires such objections to be made three judicial days prior to trial (or at any time prior to trial if permission of the court is obtained). La. Code Crim. Proc. Ann. Art. 535 (B) (3) (1967).

[2] While Negroes did serve on that grand jury, the District Court held that the practice the State followed at that time of excluding daily wage earners from grand jury service operated to exclude a disproportionate number of Negroes.

[3] This question has been explicitly left open in previous cases. See *Davis* v. *United States,* 411 U. S. 233, 242–243; *Parker* v. *North Carolina,* 397 U. S. 790, 798.

priate exercise of that power. This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power. See *Fay* v. *Noia,* 372 U. S. 391, 425–426. The question to be decided is whether the circumstances of this case are such as to invoke the application of those considerations and concerns.

In *Davis, supra,* the petitioner was indicted by a federal grand jury upon a charge of attempted bank robbery. Federal Rule Crim. Proc. 12 provides that a defendant in a federal criminal case who wants to challenge the constitutional validity of the grand jury that indicted him must do so by motion before trial; otherwise he is deemed to have waived such a challenge, except for "cause shown." [4] Davis made no such motion. Almost three years after his trial and conviction, Davis brought a proceeding under 28 U. S. C. § 2255 to set aside his conviction upon the ground of unconstitutional discrimination in the composition of the grand jury that had returned the indictment against him. In holding that § 2255 relief should under these circumstances be denied, the Court said:

> "We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12 (b)(2) is to provide that a claim

[4] Before December 1, 1975, this requirement was embodied in paragraph (b)(2) of Rule 12. It is now contained in paragraphs (b)(2) and (f) of that Rule.

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> once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12 (b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review." 411 U. S., at 242.

See also *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341, 361–364.

As the Court in *Davis* pointed out, a time requirement such as that contained in Rule 12 serves interests far more significant than mere judicial convenience:

> "The waiver provisions of Rule 12 (b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." 411 U. S., at 241.

The Louisiana time limitation applicable in the present case was obviously designed to serve precisely these same important purposes, as the Court specifically recognized more than 20 years ago in a case involving this

very Louisiana law, *Michel* v. *Louisiana,* 350 U. S. 91. There the Court said:

> "It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury." *Id.,* at 97 (footnote omitted).
>
> "Not only may the prompt determination of such preliminary matters avoid the necessity of a second trial, but a long delay in its determination, such as here, makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness. Furthermore, a successful attack on a grand jury that sat several years earlier may affect other convictions based on indictments returned by the same grand jury." *Id.,* at 98 n. 5.

If, as *Davis* held, the federal courts must give effect to these important and legitimate concerns in § 2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions. Those considerations require that recognition be given "to the legitimate interests of both State and National Governments, and . . . [that] the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always [endeavor] to do so in ways that will not unduly

interfere with the legitimate activities of the States." *Younger* v. *Harris,* 401 U. S. 37, 44. "Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations." *Kaufman* v. *United States,* 394 U. S. 217, 228.

We conclude, therefore, that the Court of Appeals was correct in holding that the rule of *Davis* v. *United States* applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment.[5] In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of "cause" for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice.[6] Accordingly, the judgment is affirmed.

It is so ordered.

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

MR. JUSTICE BRENNAN, dissenting.

I dissent. *Fay* v. *Noia,* 372 U. S. 391 (1963), was a

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[5] In a case where the state courts have declined to impose a waiver but have considered the merits of the prisoner's claim, different considerations would, of course, be applicable. See *Lefkowitz* v. *Newsome,* 420 U. S. 283.

[6] See *Davis* v. *United States,* 411 U. S., at 244–245. "The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Id.,* at 245.

decision attentive to this Court's solemn constitutional duty to preserve intact the sanctity of the Great Writ of habeas corpus and to ensure that "federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review," *id.*, at 424. The unjustified restriction imposed today on federal habeas jurisdiction betrays that promise.

We should call to mind what was said in *Fay*. *Fay* established the principle which was reaffirmed in *Henry* v. *Mississippi*, 379 U. S. 443, 452 (1965), and only last Term in *Lefkowitz* v. *Newsome*, 420 U. S. 283, 290 n. 6 (1975), that "even when state procedural grounds are adequate to bar direct review of a conviction in this Court, *federal habeas corpus relief is nonetheless available to litigate the defendant's constitutional claims unless there has been a deliberate bypass of the state procedures.*" *Ibid.* (emphasis supplied); 372 U. S., at 428–434, 438–439. See also, *e. g., Camp* v. *Arkansas*, 404 U. S. 69 (1971). *Fay* acknowledged that "orderly criminal procedure is a desideratum, and of course there must be sanctions for the flouting of such procedure. But that state interest 'competes . . . against an ideal . . . [the] ideal of fair procedure.' " 372 U. S., at 431 (citation omitted). *Fay* rejected the legitimacy of a "state interest in an airtight system of forfeitures," *id.*, at 432, explicitly addressed the extent to which considerations of federalism should bar federal habeas corpus review, and determined that "deliberate bypass" was the equivalent of the "knowing and intelligent" waiver standard of *Johnson* v. *Zerbst*, 304 U. S. 458 (1938):

> "We fully grant . . . that the exigencies of federalism warrant a limitation whereby the federal judge has the discretion to deny relief to one who has *deliberately sought to subvert or evade* the orderly adjudication of his federal defenses in the state courts. *Surely no stricter rule is a realistic neces-*

sity. . . . [I]f because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. *Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this Court, of affording an effective remedy for restraints contrary to the Constitution.*

. . . . .

"Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a *limited discretion* in the federal judge to deny relief to an applicant under certain circumstances . . . . Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. *We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.*

"But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The *classic definition of waiver enunciated in Johnson* v. *Zerbst,* 304 U. S. 458, 464—'an intentional relinquishment or abandonment of a known right or

privilege'—*furnishes the controlling standard. If a habeas applicant,* after consultation with competent counsel or otherwise, *understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits*—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price* v. *Johnston,* 334 U. S. 266, 291. At all events we wish it clearly understood that *the standard here put forth depends on the considered choice of the petitioner.* . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question." 372 U. S., at 433–434, 438–439 (emphasis supplied).

Despite *Fay*'s unqualified holding that a state procedural default can bar federal habeas relief sought by a state prisoner who was denied fundamental constitutional rights *only* if the petitioner deliberately bypassed orderly state procedures, the Court now rejects that "deliberate bypass" standard in the context of a constitutional challenge to the composition of a grand jury.[1]

[1] Although the Fifth Amendment's provision for presentment or indictment by grand jury has not been extended against the States, *Hurtado* v. *California,* 110 U. S. 516, 538 (1884), a properly constituted grand jury is a fundamental constitutional right when the State proceeds by grand jury indictment.

"For over 90 years, it has been established that a criminal convic-

Since the Court neither addresses the applicability of *Fay* to this situation nor makes any effort to distinguish the failure to challenge the composition of a grand jury within the time limits specified by a State's procedural rules from such other situations involving fundamental rights as the failure to take a timely appeal, the failure to challenge in a timely manner the introduction of unconstitutionally seized evidence, or the failure to object to a prosecutor's comments on a defendant's failure to testify at trial, cf., *e. g., Fay; Kaufman* v. *United States,* 394 U. S. 217 (1969); *Camp* v. *Arkansas, supra,* this holding portends one of two inevitable consequences—either the overruling of *Fay* or the denigration of the right to a constitutionally composed grand jury.

If this case were an isolated instance of infidelity to the teaching of *Fay,* it might be seen as a simple aberration. But it is particularly distressing in light of decisions such as *Estelle* v. *Williams, ante,* p. 501, where the Court also exposes its hostility toward and makes substantial inroads into the precedential force of *Fay*

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tion of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race. *Strauder* v. *West Virginia,* 100 U. S. 303 (1880); *Neal* v. *Delaware,* 103 U. S. 370 (1881). Although a defendant has no right to demand that members of his race be included on the grand jury that indicts him, *Virginia* v. *Rives,* 100 U. S. 313 (1880), he is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice. *Ex parte Virginia,* 100 U. S. 339 (1880); *Gibson* v. *Mississippi,* 162 U. S. 565 (1896). Cf. *Hernandez* v. *Texas,* 347 U. S. 475 (1954)." *Alexander* v. *Louisiana,* 405 U. S. 625, 628–629 (1972). See also, *e. g., Peters* v. *Kiff,* 407 U. S. 493 (1972); *Sims* v. *Georgia,* 389 U. S. 404 (1967); *Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Arnold* v. *North Carolina,* 376 U. S. 773 (1964); *Eubanks* v. *Louisiana,* 356 U. S. 584 (1958); *Smith* v. *Texas,* 311 U. S. 128 (1940).

without directly confronting its underlying premises, its continuing validity, or the possibility of distinguishing the failure to raise different constitutional rights in a timely manner in the state courts. Such "oversights" are especially ironical in light of the Court's recent admonition that "[o]ur institutional duty is to follow until changed the law as it now is, not as some members of the Court might wish it to be." *Hudgens* v. *NLRB,* 424 U. S. 507, 518 (1976). If the Court believes that *Fay* is no longer good law, and if the Court has the "institutional duty" to develop and explicate the law in a reasoned and consistent manner, then it has the duty to face squarely our prior cases interpreting the federal habeas statutes and honestly state the reasons, if any, for its altered perceptions of federal habeas jurisdiction. I, for one, do not relish the prospect of being informed several Terms from now that the Court overruled *Fay* this Term, cf., *e. g., Hudgens* v. *NLRB, supra,* when the Court never comes to grips with the constitutional and statutory principles and policy considerations underpinning that case. I adhere to the holding of *Fay* and our other precedents establishing that, absent a deliberate bypass of state procedures, a procedural default cannot justify the withholding of habeas relief from a state prisoner who was convicted in derogation of his constitutional rights; if the Court no longer shares that view, it is evident that it has an "institutional duty" to say so forthrightly and to explain why some other standard is to be applied in cases arising under 28 U. S. C. §§ 2241, 2254.

Today's opinion is notably deficient in that respect. After properly conceding that "[t]here can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this," *ante,* at 538, the Court notes that *Davis* v. *United States,* 411 U. S. 233 (1973), sustained Fed. Rule Crim.

Proc. 12 (b)(2), which requires a showing of "cause" before a *federal* defendant may interject an untimely challenge to the constitutional validity of the composition of the grand jury that indicted him. *Ante,* at 539–540. The Court then asserts that "considerations of comity and federalism require that [the federal courts] give no less effect to the same clear interests [deemed sufficient to sustain Rule 12 (b)(2) as a limitation on collateral proceedings under 28 U. S. C. § 2255]," *ante,* at 541, and that "the rule of *Davis* v. *United States* applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment." *Ante,* at 542. Finally, the Court concludes that applying the *Davis* rule with "equal force" means that petitioner must show not only "cause" for the untimely challenge, but also "actual prejudice" resulting from the failure to comply with the procedural rule. *Ibid.*

The defects in this analysis are glaring. As my Brother MARSHALL pointed out in dissent in *Davis,* see 411 U. S., at 245–257, there was no justifiable basis for the Court's holding there. I still concur in the reasoning of that dissent, and therefore I will not repeat those arguments here. But more fundamentally for purposes of this case, it must be emphasized that the decision in *Davis* was at least based on the notion that *Congress intended* that the availability of collateral relief for federal prisoners under § 2255 would be governed by the same rules it had determined would govern the availability of relief during the criminal proceeding itself. See 411 U. S., at 241–243.[2] I fail to comprehend how "con-

[2] Moreover, the Court has never fully addressed the constitutional dimensions of the waiver problem, and certainly failed to do so in *Davis.* "[W]aiver affecting federal rights is a federal question." *Fay* v. *Noia,* 372 U. S. 391, 439 (1963). If, as a matter of consti-

siderations of comity and federalism"—vague concepts that are given no content by the Court—grant this Court the power to circumscribe the scope of congressionally in-

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tutional law, a substantive constitutional right (for example, the right to counsel or the right to a speedy trial) may not be lost unless it has been knowingly and intelligently waived by the defendant, see, *e. g., Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938); *Barker* v. *Wingo,* 407 U. S. 514, 525–529 (1972); *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 235–246, 276–277 (1973), it is difficult to fathom how the existence *vel non* of a state procedural rule that a claim to that right must be asserted at a particular time can in any way dilute that constitutional waiver standard. For example, if a State passed a rule that any defendant must claim indigency upon arrest or be deemed to have waived his right to appointed counsel, I do not see how we could legitimately conclude that the substantive right was waived unless the defendant knew he had the right to appointed counsel and knowingly and intelligently failed to assert it. Similarly, even if we were to hold that a defendant may be bound by certain actions of his counsel, it would seem that counsel must be shown to have knowingly and intelligently acted on his client's behalf. Cf. *Henry* v. *Mississippi,* 379 U. S. 443 (1965). This symmetry between waiver of the substantive right in the absence of a procedural rule and forfeiture of that right by failure to assert it in compliance with a State's procedural rule was preserved in *Fay,* which adopted the analogue of the *Johnson* v. *Zerbst* knowing-and-intelligent-waiver standard—the deliberate bypass standard—as the appropriate standard for measuring procedural defaults. See 372 U. S., at 439. See also n. 4, *infra.*

Furthermore, I am puzzled by the Court's statement that "considerations of comity and federalism *require*" that the rule of *Davis* be applicable to federal habeas petitions brought by state prisoners. *E. g., ante,* at 541 (emphasis supplied). It is one thing to say that, for whatever unarticulated reason underlies today's decision, federal courts as a discretionary matter should not remedy certain unconstitutionally obtained convictions rendered by state courts. However, since I do not understand that today's is a constitutional decision, if Congress were legislatively to overrule it and require habeas relief in these circumstances, plainly the Court could not refuse to enforce the congressional mandate on the basis of its own notions of "comity and federalism."

tended relief for *state* prisoners under 28 U. S. C. § 2254. Such considerations, in our federal system in which the federal courts are the ultimate arbiters of federal constitutional rights, at most justify the postponement, not the abnegation, of federal jurisdiction. *Fay* interpreted § 2254 in light of such factors as the limitations on this Court's certiorari jurisdiction, the policy that federal rights not be denied "without the fullest opportunity for plenary federal judicial review," the concern that States are often not sufficiently sensitive to the need to protect those rights, and the historical significance and role of the Great Writ, see 372 U. S., at 399–435, and concluded that the discretionary power of federal courts to deny habeas relief to state petitioners deprived of constitutional rights is confined to the narrow category of situations in which they can be said to have waived the right to have their claims adjudicated by the knowing, intelligent, and deliberate bypassing of orderly state procedures. *Id.*, at 438–439. "Surely no stricter rule is a realistic necessity." *Id.*, at 433. Yet the Court, invoking "comity and federalism," would now essentially preclude federal habeas relief for state defendants deprived of their constitutional rights, so long as the State requires that they assert those rights within a certain time period; this absolute and automatic "waiver" of the underlying constitutional claim would apparently take effect whether or not the defendant knew of his rights, whether or not the "untimely" challenge was nevertheless made at a time when no legitimate state interest would be upset by an adjudication of the claim on the merits, and whether or not mere inadvertence or actual incompetence of counsel accounted for the untimely challenge. It is difficult to conceive of a more pervasive repudiation of federal judicial responsibility to safeguard and preserve those precious rights to fair criminal process enshrined in the

Federal Constitution. No support for such a proposition may be gleaned from such cases cited by the Court as *Younger* v. *Harris,* 401 U. S. 37 (1971). *Ante,* at 541–542. That case, which applied a strictly cabined concept of "comity and federalism" that recognized that salutary considerations dictate that federal courts in some situations defer, *as an initial matter,* to state adjudication of federal claims (a concern which is reflected in the habeas statutes in the requirement that state defendants exhaust available state remedies before seeking federal habeas relief), is simply inapposite as support for a holding that state action denying an accused fundamental rights can be immunized from review by the unintentional failure to comply with a state procedural rule. It is, unfortunately, but yet another example of the Court's current trend loosing the principle of "comity and federalism" from its original moorings and converting a doctrine of *timing* of federal adjudication of constitutional claims into a doctrine essentially *precluding* such adjudication. See, *e. g., Rizzo* v. *Goode,* 423 U. S. 362 (1976); *Estelle* v. *Williams, ante,* p. 501. The increasingly talismanic use of the phrase "comity and federalism"—itself essentially devoid of content other than in the *Younger* sense of determining the timing of federal review—has ominous portent; it has the look of an excuse being fashioned by the Court for stripping federal courts of the jurisdiction properly conferred by Congress.

Moreover, even if the Court were to carve out an exception to *Fay* for waiver of the right to challenge the composition of grand juries on the ground that the rule of *Davis* v. *United States* should apply "with equal force" to proceedings under § 2254 as to those under § 2255, there is no basis for the Court's inexplicable conclusion that petitioner must show not only "cause" for the untimeliness of the challenge, but also "actual preju-

dice." *Ante,* at 542.[3] This *ipse dixit,* baldly asserted by the Court in its penultimate sentence without the slightest veneer of reasoning to shield the obvious fiat by which it has reached its result, hardly qualifies as judicial craftsmanship. It is, beyond peradventure, a sad disservice to the Court's obligation to elaborate on its rationales for arriving at a particular rule of law.

Indeed, the Court's apparent overruling of *Fay* at least for constitutional challenges to the composition of grand

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[3] *Davis* v. *United States* does not support this holding. See *ante,* at 542 n. 6. *Davis,* in analyzing Rule 12 (b)(2), affirmed the District Court ruling that no "cause" for relief had been shown in light of the facts, *inter alia,* that the same method of grand jury selection had been employed for a number of years, that there were no racial overtones to the case, that the challenge was made three years after petitioner's conviction, and that the Government's case was strong. 411 U. S., at 235–236, 243–244. These factors, which were used in evaluating the existence of "cause," clearly are not all related to "prejudice." True, *Davis* also noted that the District Court had taken absence of prejudice into account in denying relief, and held that this was permissible. *Id.,* at 244. But plainly the existence of prejudice was deemed simply to be one means of demonstrating "cause" for relief. The Court thus addressed petitioner's contention that *Peters* v. *Kiff,* 407 U. S. 493 (1972), which held that prejudice is presumed in cases where racial discrimination is alleged in grand jury composition, mandated that sufficient prejudice was therefore demonstrated to establish "cause." The Court, in that context, made the statement quoted by the Court today, and concluded that although the unconstitutional composition of the grand jury alone would not justify relief, "actual prejudice" would be deemed sufficient to establish "cause" within the meaning of Rule 12 (b)(2). However, it was clear that in the absence of prejudice other factors could also establish "cause." Thus, *Davis* simply provides no support for the Court's implication in n. 6 that only "actual prejudice" justifies relief from a procedural default. Certainly the Court cannot be suggesting that the flexible "cause shown" standard of Rule 12 (b)(2) is now to be similarly contracted when federal judges exercise their discretion during the course of a trial or during collateral proceedings.

juries [4] and its unexplained imposition of an "actual prejudice" requirement on petitioner are particularly egregious in light of certain salient facts in this case,

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[4] Today's decision may be read to stop short of overruling *Fay* across the board only if the Court is holding that the attachment of the consequence of "waiver" to the failure to make timely objections required by state law depends upon the constitutional right involved. That would, of course, comport with the Court's unfortunate trend of diluting the standards by which waiver of constitutional rights might be accomplished. See, *e. g., Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973). Many of the quotations in the Court's opinion would appear to indicate that the Court conceives of the State's interest in securing waivers of the right to a constitutionally composed grand jury as somehow different from its interest in securing the waiver of other constitutional rights. Perhaps there is some notion of "harmless error" underlying that belief. Whatever it is, the Court should articulate any perceived bases for such a differentiation. I cannot believe that the Court would allow States, merely by passing numerous procedural rules requiring objections at particular times, to eviscerate the "knowing and intelligent waiver" doctrine of *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), with respect to such rights as the right to counsel and the right to a jury trial and a fair and impartial jury, or the requirement that the State prove every element of a crime by proof beyond a reasonable doubt. It may be, however, that the Court is rejecting *Fay*'s principle that waiver of constitutional rights must ordinarily be made personally by the defendant. See *Estelle* v. *Williams, ante,* p. 513 (POWELL, J., concurring). But here again, the Court should address that issue and inform us what "trial-type" rights, if any, may be waived for an accused by his lawyer. Moreover, if the Court is embarking on a program of diluting *Fay* standards to bind the accused by waivers by counsel, some concrete content should be given the Sixth Amendment guarantee of effective assistance of counsel and some explanation made of what actually constitutes action "within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson,* 397 U. S. 759, 771 (1970); *Tollett* v. *Henderson,* 411 U. S. 258, 266 (1973); see *Davis,* 411 U. S., at 234 n. 1. Indeed, if defendants' constitutional rights are to be controlled by counsel's conduct, a more exacting scrutiny of counsel's conduct over the full course of the criminal process should be made.

facts which the Court studiously avoids noting. Petitioner, then a 17-year-old black youth, was indicted by the Orleans Parish grand jury on a charge of felony murder. That charge was brought when, during the course of a robbery of a white couple perpetrated by several black males, one of the alleged robbers was killed. This was apparently the first time that anyone could recall such a novel charge, under which the State sought the death penalty for the three indicted confederates of the deceased, being brought in Orleans Parish.

Two months later, the State appointed uncompensated counsel for petitioner. During the period before trial petitioner's counsel, who was in failing health and who had not practiced criminal law for several years, took essentially no action with respect to petitioner's defense. Not until the day before trial did counsel file any motions in this capital case, and it was only then that he filed such elementary motions as an application for a bill of particulars, a motion to quash the indictment on vagueness grounds, and a discovery motion seeking production of copies of the confessions petitioner had allegedly made to the police while he was still unrepresented. No challenge was made to the composition of the grand jury that had indicted petitioner, and petitioner was informed neither of the fact that such a challenge was possible nor of the fact that his counsel had not made such a challenge. On the day of petitioner's one-day trial, his motion to exclude the statements made to the police was denied without hearing. Petitioner was convicted of felony murder and sentenced to life imprisonment, while his two older accomplices, who after plea bargaining had pled guilty, each received 8-year prison terms.[5]

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[5] Although there is some indication in the record that state law prohibited a guilty plea by a minor to a charge of manslaughter,

Although petitioner did not appeal his conviction, he pursued state collateral relief on the ground, *inter alia,* that he was unconstitutionally indicted because blacks had been disproportionately excluded from the grand jury that had indicted him. The state trial judge denied relief on the ground that petitioner had been represented by competent counsel, that counsel had considered but rejected the idea of challenging the grand jury array, and that the time limit for making such a challenge (under the Louisiana statute which held that any challenges not asserted in a timely fashion were automatically waived) had expired. After the Louisiana Supreme Court denied petitioner's combined petition for certiorari and writ of habeas corpus, he petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of Louisiana.

That court granted the writ on the ground that the Orleans Parish grand jury, which had been chosen by the Orleans Parish Jury Commission intentionally and systematically to exclude daily wage earners, was unconstitutionally constituted in that it excluded a disproportionate number of blacks and was not an impartial jury representing a cross-section of the community. The court, relying on *Fay* v. *Noia,* 372 U. S. 391 (1963), and *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), noted that although petitioner could not now raise his grand jury challenge in the state courts, there was no similar bar to federal habeas relief because petitioner had not intentionally relinquished or abandoned his constitutional

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see App. 29, it appears in any event that the State was unwilling to plea-bargain with petitioner, see *ibid.:*

"Q. Was there any reason why this man didn't plead guilty to manslaughter, Francis?

"A. Sure, there is a reason, the State was out to put him in the electric chair."

rights or deliberately bypassed the state procedure for raising those rights. In response to the State's contention that this collateral challenge to the grand jury's composition was precluded by the then recent decision in *Davis* v. *United States, supra,* the District Court held that assuming, *arguendo,* that mere failure to raise an issue could constitute a waiver, there was sufficient "cause" shown—the standard upheld in sustaining Rule 12 (b)(2) in *Davis*—to justify relief in light of the course of conduct of petitioner's counsel.[6]

Given these facts, the Court's unexplained imposition of an "actual prejudice" requirement for collateral relief from the state procedural default looms even more oppressive. The District Court has found that the grand jury that indicted petitioner was unconstitutionally composed, and that petitioner neither knowingly and intelligently waived his right to a proper grand jury indictment nor deliberately bypassed the state procedures for adjudicating his federal allegations, thus meeting *Fay's* prerequisites for habeas relief. Moreover, the District Court found that petitioner has shown sufficient "cause" for relief under the *Davis* test for relief from a procedural "waiver." This Court, recognizing that petitioner has overcome the hurdles of showing an unconstitution-

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[6] The Court of Appeals vacated the relief even though it agreed that "cause" had been shown sufficient to satisfy the *Davis* test for collateral review of federal convictions in "that Francis had been represented by a civil lawyer, unskilled in the intricacies of criminal practice, who had, by his inexperience, allowed the time for challenging the indictment to pass without objecting to the grand jury's composition." 496 F. 2d 896, 897–898 (CA5 1974). The Court of Appeals held, in an opinion also devoid of analysis, that a State might base a finding of waiver of a federal constitutional claim on failure to object within the time prescribed by a state procedural rule, without more, and that a federal habeas court must give effect to that state requirement "absent a showing of actual prejudice by the habeas petitioner." *Id.,* at 897.

ally composed grand jury and "cause" for failure to protest that fact within the time dictated by state law, nevertheless erects the further hurdle of "actual prejudice" in petitioner's path; at a minimum, the Court owes petitioner *some* explanation for this additional burden.

Moreover, the Court, in addition to failing to supply any justifications for this requirement, fails to supply any content to it. One suspects that a habeas petitioner will never be able to demonstrate "actual" prejudice, if the Court intends by that to mean he must prove, by some standard, that he would *not in fact* have been indicted for a particular crime had the grand jury met constitutional standards. The Fifth Circuit's hypothetical for "actual prejudice" was a situation in which petitioner's coparticipants were white, and the unconstitutionally composed grand jury failed to indict them. Of course, such a clear situation will seldom eventuate, and it is difficult to see how petitioner, whose coparticipants were also black, could ever show such "actual prejudice."

It would seem that, at a minimum, if the Court were to impose any "prejudice" requirement, it should require the State, once the racial bias of the grand jury is shown, to demonstrate that the constitutional deprivation was harmless error in that petitioner would have, beyond any reasonable doubt, been indicted for the same offense by a constitutionally composed grand jury. Such a test would at least allow the clearly justifiable relief sought in this case. For a constitutionally constituted grand jury was of the utmost importance to petitioner. The facts concerning the crime were essentially undisputed, and the pivotal decision in this case was invocation of the felony murder doctrine in an extremely rare factual context laden with racial overtones. If there was any case in which a constitutionally composed grand jury could perform its "historic function" of determining

whether petitioner should be so peculiarly indicted for this particular crime, see, *e. g., United States* v. *Calandra,* 414 U. S. 338, 342–344 (1974), and especially of determining whether the interests of society would best be served by prosecuting, for reasons of his specific conduct, a "terrified" youth of 17 for a crime carrying the sanction of capital punishment, this was such a case. It is simply incomprehensible that this Court would suggest that habeas relief for deprivation of *federally* secured rights under these circumstances is inappropriate because of principles of "comity and federalism."

I would reverse the Court of Appeals and remand with direction to reinstate the order of the District Court dated September 20, 1973, modified however to postpone execution of the writ and release of the petitioner to afford the State a specified time from the date of the entry of the reinstated order within which to indict and try the petitioner.

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* ANDREWS ET AL.

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

No. 74–1318. Argued March 3, 1976—Decided May 3, 1976

507 F. 2d 611, certiorari dismissed as improvidently granted.

William A. Allain and *Champ T. Terney* argued the cause for petitioners. With them on the briefs was *A. F. Summer*, Attorney General of Mississippi.

Charles Victor McTeer and *Rhonda Copelon* argued the cause for respondents. With them on the briefs were *Morton Stavis* and *Nancy Stearns*.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

*Briefs of *amici curiae* urging affirmance were filed by *Peter B. Sandmann* and *Susanne Martinez* for the Child Welfare League of America, and by *Mary C. Dunlap, Wendy W. Williams, Ruth Bader Ginsburg,* and *Melvin L. Wulf* for Equal Rights Advocates, Inc., et al.

Briefs of *amici curiae* were filed by *Solicitor General Bork, Assistant Attorney General Pottinger,* and *Abner W. Sibal* for the United States, and by *Stephen J. Pollak, Martin J. Flynn, Richard M. Sharp,* and *David Rubin* for the National Education Assn.

QUINN, COMMISSIONER, CHICAGO FIRE DEPARTMENT *v.* MUSCARE

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

No. 75-130. Argued March 30, 1976—Decided May 3, 1976

Writ of certiorari to review the Court of Appeals' judgment holding that respondent fireman was suspended without procedural due process for violating the challenged fire department personal-appearance regulation, and expressing doubt as to the validity of such regulation, is dismissed as improvidently granted, where, following the grant of certiorari, this Court in *Kelley* v. *Johnson, ante,* p. 238, upheld a similar police department regulation, and the applicable civil service rules were revised to provide for presuspension hearings in all nonemergency cases.

520 F. 2d 1212, certiorari dismissed as improvidently granted.

William R. Quinlan argued the cause for petitioner. With him on the briefs were *Daniel Pascale* and *Edmund Hatfield.*

Linda R. Hirshman argued the cause for respondent. With her on the brief was *Robert S. Sugarman.**

PER CURIAM.

The respondent, a lieutenant in the Chicago Fire Department, was suspended from his job for a 29-day period in 1974 as a result of charges related to his violation of

*Briefs of *amici curiae* urging affirmance were filed by *Michael P. Bucklo* and *David A. Goldberger* for the Illinois Division of the American Civil Liberties Union; by *Jerry D. Anker* for the Coalition of American Public Employees; and by *Victor J. Cacciatore* for the Chicago Patrolmen's Assn.

J. Albert Woll, Robert C. Mayer, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae.*

the department's personal-appearance regulation.[1] Following the suspension, the respondent brought an action in the United States District Court for the Northern District of Illinois seeking an injunction and backpay on the ground that the regulation infringed his constitutional right to determine "the details of his personal appearance." [2] The department defended the challenged regulation as a safety measure designed to insure proper functioning of gas masks worn by firefighters and as a means of promoting discipline in the department and the uniform, well-groomed appearance of its members. After a hearing focusing on the operation of the self-contained breathing apparatus used by members of the department, the District Court found that the personal-appearance regulation was justified "on safety grounds"

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[1] The personal-appearance regulation provided:

"All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible. Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.

"Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall, in order to present a neat appearance." § 51.133 of the Rules and Regulations of the Chicago Fire Department.

The respondent was also charged with conduct unbecoming a member of the Chicago Fire Department, § 61.001, and disobedience of orders, § 61.006, in connection with his failure to conform his appearance to the above regulation.

[2] The respondent contended that the personal-appearance regulation violated his "rights to personal freedom guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments." In addition, he claimed that the regulation proscribing conduct unbecoming a member of the department was vague and overbroad and that his suspension without a prior hearing was unconstitutional.

and that the respondent's goatee violated the regulation. Explaining that the other regulations cited in the discharge notice were not "relevant or pertinent to the issues," the court denied the respondent's motion for injunctive relief.

The Court of Appeals for the Seventh Circuit reversed, holding that the respondent "was suspended without procedural due process."[3] The appellate court concluded that the Constitution requires "that some opportunity to respond to charges against him be made available to the governmental employee prior to disciplinary action against him." The Court of Appeals did not dispute the District Court's determination that "the only issue" was whether the suspension for having a goatee was "justifiable under the circumstances." Although it did not reach the merits of the respondent's challenge to the constitutionality of the hair regulation, the Court of Appeals did note that the regulation "does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn."

Following the grant of certiorari and the oral argument in this case, this Court in another case upheld a police department hair regulation similar to that challenged by the respondent in the present litigation. *Kelley* v. *Johnson, ante,* p. 238. In that case, we concluded that "the overall need for discipline, esprit de corps, and uniformity" defeated the policeman's "claim based on the liberty guaranty of the Fourteenth Amendment." *Ante,* at 246, 248. *Kelley* v. *Johnson* renders immaterial the District Court's factual determination regarding the

[3] Although the respondent had not been afforded a pre-suspension hearing he had a right to a post-suspension hearing before the Civil Service Commission. The Commission was empowered to award backpay and to order the deletion of the suspension from the employee's service record.

safety justification for the department's hair regulation about which the Court of Appeals expressed doubt. Moreover, after the grant of certiorari, this Court was informed that the Civil Service Commission of the city of Chicago had revised its rules to provide for presuspension hearings in all nonemergency cases.[4] While this voluntary rule change was subject to rescission, counsel for the petitioner candidly advised the Court at oral argument that even if the petitioner should prevail, it was very doubtful that the Commission would revert to its former suspension procedures.

In view of these developments, the writ of certiorari is dismissed as improvidently granted.

So ordered.

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

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[4] Although the new rule was adopted in August 1975, before the grant of certiorari on October 14, 1975, it was first brought to our attention in the respondent's brief filed on February 4, 1976. The revised procedures providing an opportunity for a pre-suspension hearing apply to all Chicago civil service employees except members of the police department, who are governed by a different set of similar rules.

UNITED STATES *v.* MANDUJANO

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

No. 74-754. Argued November 5, 1975—Decided May 19, 1976

As a result of certain information concerning respondent's participation in an attempted sale of heroin, he was subpoenaed to testify before a grand jury investigating narcotics traffic in the area. The prosecutor warned him that he was not required to answer any questions that might incriminate him, that all other questions had to be answered truthfully or else he would be subject to a charge of perjury, and that if he desired a lawyer he could have one but that the lawyer could not be inside the grand jury room. Subsequently, respondent was charged with perjury for admittedly false statements made to the grand jury about his involvement in the attempted heroin sale. The District Court granted respondent's motion to suppress his grand jury testimony because he was not given the warnings called for by *Miranda* v. *Arizona,* 384 U. S. 436, holding that respondent was a "putative" or "virtual" defendant when called before the grand jury and therefore entitled to full *Miranda* warnings. The Court of Appeals affirmed. *Held:* The judgment is reversed and the case is remanded. Pp. 571-584; 584-609; 609.

496 F. 2d 1050, reversed and remanded.

THE CHIEF JUSTICE, joined by MR. JUSTICE WHITE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, concluded that *Miranda* warnings need not be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved, and that therefore the failure to give such warnings is no basis for having false statements made to the grand jury suppressed in a subsequent prosecution of the witness for perjury based on those statements. Pp. 571-584.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concluded that, even when the privilege against compulsory self-incrimination is implicated, when false answers are given, the witness may consistently with the Fifth Amendment privilege be prosecuted for perjury; that in the circumstances of this case respondent's false answers were not induced by governmental tactics so unfair as to constitute prosecution for perjury a violation of the

Due Process Clause of the Fifth Amendment; that in the absence of a knowing waiver of the privilege against compulsory self-incrimination the Fifth Amendment requires that testimony obtained by calling a putative defendant before a grand jury and compelling him to testify regarding the suspected crime be unavailable as evidence in a later prosecution for that crime; and that given the potential prejudice to a putative defendant's privilege against compulsory self-incrimination when called and compelled to testify before a grand jury and the ability of counsel to help avoid that prejudice, some guidance by counsel is required. Pp. 584–609.

MR. JUSTICE STEWART, joined by MR. JUSTICE BLACKMUN, concluded that the Fifth Amendment privilege against compulsory self-incrimination did not require the suppression of the respondent's grand jury testimony, since that testimony was relevant only to his prosecution for perjury and was not introduced in the prosecution for attempting to distribute heroin, and that this was not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process. P. 609.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 584. STEWART, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 609. STEVENS, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Keeney,* and *Shirley Baccus-Lobel.*

Michael Allen Peters, by appointment of the Court, 421 U. S. 944, argued the cause *pro hac vice* and filed a brief for respondent.*

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*Briefs of *amici curiae* were filed by *Philip I. Palmer, Jr.,* for Richard O. Kelly; and by *Frederick H. Weisberg* for Gregory V. Washington.

MR. CHIEF JUSTICE BURGER announced the judgment of the Court in an opinion in which MR. JUSTICE WHITE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join.

This case presents the question whether the warnings called for by *Miranda* v. *Arizona,* 384 U. S. 436 (1966), must be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved; and whether, absent such warnings, false statements made to the grand jury must be suppressed in a prosecution for perjury based on those statements.

(1)

During the course of a grand jury investigation into narcotics traffic in San Antonio, Tex., federal prosecutors assigned to the Drug Enforcement Administration Task Force learned of an undercover narcotics officer's encounter with respondent in March 1973. At that time, the agent had received information that respondent, who was employed as a bartender at a local tavern, was dealing in narcotics. The agent, accompanied by an informant, met respondent at the tavern and talked for several hours. During the meeting, respondent agreed to obtain heroin for the agent, and to that end placed several phone calls from the bar. He also requested and received $650 from the agent to make the purchase. Respondent left the tavern with the money so advanced to secure the heroin. However, an hour later respondent returned to the bar without the narcotics and returned the agent's money. Respondent instructed the agent to telephone him at the bar that evening to make arrangements for the transaction. The agent tried but was unable to contact respondent as directed. The record provides no explanation for respondent's failure to keep his appointment. No further action was taken by the agent, and the investigatory file on the matter

was closed. The agent did, however, report the information to federal prosecutors. At that time, the Government was seeking information on local drug traffic to present to a special grand jury investigating illicit traffic in the area.

Respondent was subpoenaed to testify before the grand jury on May 2, 1973; this was approximately six weeks after the abortive narcotics transaction at the tavern where respondent was employed. When called into the grand jury room and after preliminary statements, the following colloquy occurred between the prosecutor and respondent:

"Q. . . . Now, you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?

"A. Do I answer all the questions you ask?

"Q. You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

"A. Yes, sir.

"Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those [questions] truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?

"A. Yes, sir.

. . . . .

"Q. Have you contacted a lawyer in this matter?

. . . . .

"A. I don't have one. I don't have the money to get one.

"Q. Well, if you would like to have a lawyer, he

cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know." App. 5–6.

During the questioning respondent admitted that he had previously been convicted of distributing drugs, that he had recently used heroin himself, and that he had purchased heroin as recently as five months previously. Despite this admitted experience with San Antonio's heroin traffic, respondent denied knowledge of the identity of any dealers, save for a streetcorner source named Juan. Respondent steadfastly denied either selling or attempting to sell heroin since the time of his conviction 15 years before.

Respondent specifically disclaimed having discussed the sale of heroin with anyone during the preceding year and stated that he would not even try to purchase an ounce of heroin for $650. Respondent refused to amplify on his testimony when directly confronted by the prosecutor:

> "Q. Mr. Mandujano, our information is that you can tell us more about the heroin business here in San Antonio than you have today. Is there anything you would like to add telling us more about who sells heroin?
>
> "A. Well, sir, I couldn't help you because, you know, I don't get along with the guys and I just can't tell you, you know."

Following this appearance, respondent was charged by a grand jury on June 13, 1973, in a two-count indictment with attempting to distribute heroin in violation of 21 U. S. C. §§ 841 (a)(1), 846, and for willfully and

knowingly making a false material declaration to the grand jury in violation of 18 U. S. C. § 1623.[1] The falsity of his statements was conceded; his sole claim was that the testimony before the grand jury should be suppressed because the Government failed to provide the warnings called for by *Miranda*. Following an evidentiary hearing, the District Court granted respondent's motion to suppress. The court held that respondent was a "putative" or "virtual" defendant when called before the grand jury; respondent had therefore been entitled to full *Miranda* warnings. 365 F. Supp. 155 (WD Tex. 1973).[2]

The Court of Appeals affirmed. 496 F. 2d 1050 (CA5 1974). It recognized that certain warnings had in fact been given to respondent at the outset of his grand jury appearance. But the court agreed with the District Court that "full *Miranda* warnings should have been accorded Mandujano who was in the position of a virtual or putative defendant." *Id.*, at 1052. The essence of the Court of Appeals' holding is:

> "In order to deter the prosecuting officers from bringing a putative or virtual defendant before the grand jury, for the purpose of obtaining incriminating or

[1] Count 2 of the indictment charged that the following declarations were materially false:

"Q. Have you talked to anyone about selling heroin to them during the last year?

"A. No, sir.

"Q. And you have never told anyone that you would try to get heroin to sell to them?

"A. No, sir.

"Q. No one has ever given you any money—

"A. No.

"Q. —to go buy them heroin?

"A. No, sir."

[2] Respondent was subsequently tried and convicted under Count 1 of the indictment for attempting to distribute heroin. The grand jury testimony was not utilized by the prosecution at that trial.

perjur[i]ous testimony, the accused must be adequately apprised of his rights, *or all of his testimony, incriminating and perjur[i]ous, will be suppressed.*" *Id.*, at 1056. (Emphasis added.)

In so ruling, the court undertook to distinguish its own holding in *United States* v. *Orta,* 253 F. 2d 312 (1958), in which Judge Rives, speaking for the court, stated:

"[A grand jury witness] might answer truthfully and thereafter assert the constitutional guaranty. *Under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime.* As said in Glickstein v. United States, [222 U. S. 139, 142 (1911),] '. . . the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury.'" *Id.*, at 314. (Emphasis added; citations omitted.)

In the *Orta* opinion, Judge Rives went on to observe:

"The only debatable question is one of the supervision of the conduct of Government representatives in the interest of fairness. In United States v. Scully, 2 Cir., 1955, 225 F. 2d 113, 116, the Court of Appeals for the Second Circuit held:

"'. . . the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.'

"That holding is applicable to the present record. There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified." *Ibid.*

The Court of Appeals concluded that the "totality of the circumstances" commanded suppression of all the testimony on which the charge of perjury rested.

We agree with the views expressed by Judge Rives in *Orta, supra,* and disagree with the Court of Appeals in the instant case; accordingly, we reverse.

(2)

The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges. "Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States,* 350 U. S. 359, 362 (1956). Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.

Earlier we noted that the law vests the grand jury with substantial powers, because "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra,* 414 U. S. 338, 344 (1974); *Branzburg* v. *Hayes,* 408 U. S. 665, 700 (1972). Indispensable to the exercise of its power is the authority to compel the attendance and the testimony of witnesses, *Kastigar* v. *United States,* 406 U. S. 441, 443 (1972), and to require the production of evidence, *United States* v. *White,* 322 U. S. 694 (1944).

When called by the grand jury, witnesses are thus legally bound to give testimony. *Calandra, supra,* at 343. This principle has long been recognized. In *United States* v. *Burr,* 25 F. Cas. 38 (No. 14,692e) (CC Va. 1807), Mr. Chief Justice Marshall drew on English precedents, aptly described by Lord Chancellor Hardwicke in the 18th century, and long accepted in America as a hornbook proposition: "The public has a right to every man's evidence." This Court has repeatedly invoked this fundamental proposition when dealing with the powers of the grand jury. *United States* v. *Nixon,* 418 U. S. 683, 709 (1974); *Branzburg* v. *Hayes, supra,* at 688; *Kastigar* v. *United States, supra,* at 443; *United States* v. *Monia,* 317 U. S. 424, 432 (1943) (Frankfurter, J., dissenting).

The grand jury's authority to compel testimony is not, of course, without limits. The same Amendment that establishes the grand jury also guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The duty to give evidence to a grand jury is therefore conditional; every person owes society his testimony, unless some recognized privilege is asserted.

Under settled principles, the Fifth Amendment does not confer an absolute right to decline to respond in a grand jury inquiry; the privilege does not negate the duty to testify but simply conditions that duty. The privilege cannot, for example, be asserted by a witness to protect others from possible criminal prosecution. *Rogers* v. *United States,* 340 U. S. 367 (1951); *United States* v. *Murdock,* 284 U. S. 141 (1931); *Hale* v. *Henkel,* 201 U. S. 43 (1906). Nor can it be invoked simply to protect the witness' interest in privacy. "Ordinarily, of course, a witness has no right of privacy before the grand jury." *Calandra, supra,* at 353.

The very availability of the Fifth Amendment privilege to grand jury witnesses, recognized by this Court in *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892), suggests that occasions will often arise when potentially incriminating questions will be asked in the ordinary course of the jury's investigation. Probing questions to all types of witnesses is the stuff that grand jury investigations are made of; the grand jury's mission is, after all, to determine whether to make a presentment or return an indictment. "The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello* v. *United States, supra,* at 362.

It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete. This is true whether the grand jury embarks upon an inquiry focused upon individuals suspected of wrongdoing, or is directed at persons suspected of no misconduct but who may be able to provide links in a chain of evidence relating to criminal conduct of others, or is centered upon broader problems of concern to society. It is entirely appropriate—indeed imperative—to summon individuals who may be able to illuminate the shadowy precincts of corruption and crime. Since the subject matter of the inquiry is crime, and often organized, systematic crime—as is true with drug traffic—it is unrealistic to assume that all of the witnesses capable of providing useful information will be pristine pillars of the community untainted by criminality.

The Court has never ignored this reality of law enforcement. Speaking for the Court in *Kastigar* v. *United States,* MR. JUSTICE POWELL said:

"[M]any offenses are of such a character that the

> only persons capable of giving useful testimony are those implicated in the crime." 406 U. S., at 446.

MR. JUSTICE WHITE made a similar observation in the context of a state investigation:

> "[T]he very fact that a witness is called . . . is likely to be based upon knowledge, or at least a suspicion based on some information, that the witness is implicated in illegal activities . . . ." *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 102 (1964) (concurring opinion).

Moreover, the Court has expressly recognized that "[t]he obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry." *United States* v. *Dionisio,* 410 U. S. 1, 10 n. 8 (1973).

There is nothing new about the Court's recognition of this reality of grand jury inquiries. In one of the early cases dealing with the Fifth Amendment privilege, the Court observed: "[I]t is only from the mouths of those having knowledge of the [unlawful conduct] that the facts can be ascertained." *Brown* v. *Walker,* 161 U. S. 591, 610 (1896).

Accordingly, the witness, though possibly engaged in some criminal enterprise, can be required to answer before a grand jury, so long as there is no compulsion to answer questions that are self-incriminating; the witness can, of course, stand on the privilege, assured that its protection "is as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock,* 142 U. S., at 562. The witness must invoke the privilege, however, as the "Constitution does not forbid the asking of criminative questions." *United States* v. *Monia,* 317 U. S., at 433 (Frankfurter, J., dissenting).

> "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying volun-

> tarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Id.*, at 427.

Absent a claim of the privilege, the duty to give testimony remains absolute.

The stage is therefore set when the question is asked. If the witness interposes his privilege, the grand jury has two choices. If the desired testimony is of marginal value, the grand jury can pursue other avenues of inquiry; if the testimony is thought sufficiently important, the grand jury can seek a judicial determination as to the bona fides of the witness' Fifth Amendment claim, *Malloy* v. *Hogan*, 378 U. S. 1, 11–12 (1964); *Hoffman* v. *United States*, 341 U. S. 479, 486–487 (1951), in which case the witness must satisfy the presiding judge that the claim of privilege is not a subterfuge. If in fact " 'there is reasonable ground to apprehend danger to the witness from his being compelled to answer,' " *Brown* v. *Walker*, *supra*, at 599, the prosecutor must then determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness.

If immunity is sought by the prosecutor and granted by the presiding judge, the witness can then be compelled to answer, on pain of contempt, even though the testimony would implicate the witness in criminal activity. The reason for this is not hard to divine; Mr. Justice Frankfurter indicated as much in observing that immunity is the *quid pro quo* for securing an answer from the witness: "Immunity displaces the danger." *Ullmann* v. *United States*, 350 U. S. 422, 439 (1956); see also *Piemonte* v. *United States*, 367 U. S. 556, 560 (1961). Based on this recognition, federal

statutes conferring immunity on witnesses in federal judicial proceedings, including grand jury investigations, are so familiar that they have become part of our " 'constitutional fabric.' " *Lefkowitz* v. *Turley*, 414 U. S. 70, 81-82 (1973); *Ullmann* v. *United States*, *supra*, at 438. Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected; unless immunity is conferred, however, testimony may be suppressed, along with its fruits, if it is compelled over an appropriate claim of privilege. *United States* v. *Blue*, 384 U. S. 251, 255 (1966). On the other hand, when granted immunity, a witness once again owes the obligation imposed upon all citizens—the duty to give testimony—since immunity substitutes for the privilege.

In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is—and even the solemnity of the oath—cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.[3]

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[3] Congress' view was expressed in the legislative history of the statute relating to false declarations before a grand jury or court, 18 U. S. C. § 1623:

"A subpena can compel the attendance of a witness before a grand jury or at trial. . . . But only the possibility of some sanction such as a perjury prosecution can provide any guarantee that his testimony will be truthful." S. Rep. No. 91-617, p. 57 (1969).

Similarly, our cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry. See, *e. g.*, *United States* v. *Knox,* 396 U. S. 77 (1969); *Bryson* v. *United States,* 396 U. S. 64 (1969); *Dennis* v. *United States,* 384 U. S. 855 (1966); *Kay* v. *United States,* 303 U. S. 1 (1938); *United States* v. *Kapp,* 302 U. S. 214 (1937).

In *Bryson,* a union officer was required by federal labor law to file an affidavit averring that he was not a Communist. The affidavit was false in material statements. In a collateral attack on his conviction, Bryson argued that since the statute required him either to incriminate himself or lie, he could not lawfully be imprisoned for failure to comply. This Court rejected the contention:

> "[I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." 396 U. S., at 72. (Footnote omitted.)

Even where a statutory scheme granted blanket immunity from further use of testimony, the Court has found perjured statements to fall outside the grant. In *Glickstein* v. *United States,* 222 U. S. 139 (1911), a bankrupt was indicted for perjury committed in the course of a bankruptcy proceeding. The Bankruptcy Act expressly conferred broad immunity on a bankrupt: "[N]o testimony given by him shall be offered in evidence against him in any criminal proceeding." *Id.,* at 140–141. The Court rejected the bankrupt's literalistic

interpretation of the statute as conferring immunity from prosecution for perjury:

> "[T]he sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony, they are included in that grant of authority and are not prohibited by the immunity as to self-incrimination. . . . [I]t cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. . . . [T]he immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury." *Id.*, at 141-142.

(3)

In this case, the Court of Appeals required the suppression of perjured testimony given by respondent, as a witness under oath, lawfully summoned before an investigative grand jury and questioned about matters directly related to the grand jury's inquiry. The court reached this result because the prosecutor failed to give *Miranda* warnings at the outset of Mandujano's interrogation. Those warnings were required, in the Court of Appeals' view, because Mandujano was a "virtual" or "putative" defendant—that is, the prosecutor had specific information concerning Mandujano's participation in an attempted sale of heroin and the focus of the grand jury interrogation, as evidenced by the prosecutor's questions, centered on Mandujano's involvement in narcotics traffic. The fundamental error of the prosecutor, in the court's view, was to treat respondent in such a way as to " 'smack' of entrapment"; as a consequence, the court concluded that "elemental fairness" required the per-

jured testimony to be suppressed. 496 F. 2d, at 1058, and n. 8.

The court's analysis, premised upon the prosecutor's failure to give *Miranda* warnings, erroneously applied the standards fashioned by this Court in *Miranda*. Those warnings [4] were aimed at the evils seen by the Court as endemic to police interrogation of a person in custody.[5] *Miranda* addressed extrajudicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards. The decision expressly rested on the privilege against compulsory self-incrimination; the prescribed warnings sought to negate the "compulsion" thought to be inherent in police station interrogation. But the *Miranda* Court simply did not perceive judicial inquiries and custodial interrogation as equivalents: "[T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery." 384 U. S., at 461.

The Court thus recognized that many official investiga-

[4] "At the outset, if a person in [police] custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. . . .

* * * * *

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. . . .

* * * * *

"[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . .

* * * * *

"[I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." 384 U. S., at 467-473.

[5] *Id.*, at 444 n. 4.

tions, such as grand jury questioning, take place in a setting wholly different from custodial police interrogation. Indeed, the Court's opinion in *Miranda* reveals a focus on what was seen by the Court as police "coercion" derived from "factual studies [relating to] police violence and the 'third degree' . . . physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. . . ." *Id.*, at 445–446. To extend these concepts to questioning before a grand jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in *Miranda;* the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court.

The marked contrasts between a grand jury investigation and custodial interrogation have been commented on by the Court from time to time. MR. JUSTICE MARSHALL observed that the broad coercive powers of a grand jury are justified, because "in contrast to the police—it is not likely that [the grand jury] will abuse those powers." *United States* v. *Mara,* 410 U. S. 19, 46 (1973) (dissenting opinion). See also *In re Groban,* 352 U. S. 330, 347 (1957) (Black, J., dissenting).

(4)

The warnings volunteered by the prosecutor to respondent in this case were more than sufficient to inform him of his rights—and his responsibilities—and particularly of the consequences of perjury. To extend the concepts of *Miranda,* as contemplated by the Court of Appeals, would require that the witness be told that there was an absolute right to silence, and obviously any such warning would be incorrect, for there is no such right before a grand jury. Under *Miranda,* a person in police custody has, of course, an absolute right to de-

cline to answer any question, incriminating or innocuous, see *Michigan* v. *Mosley,* 423 U. S. 96 (1975), whereas a grand jury witness, on the contrary, has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim. And even when the grand jury witness asserts the privilege, questioning need not cease, except as to the particular subject to which the privilege has been addressed. Cf. *id.,* at 103–104. Other lines of inquiry may properly be pursued.

Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play. *Kirby* v. *Illinois,* 406 U. S. 682 (1972). A witness "before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel . . . ." *In re Groban, supra,* at 333.[6] Under settled principles the witness may not insist upon the presence of his attorney in the grand jury room. Fed. Rule Crim. Proc. 6 (d).

Respondent, by way of further explanation, was also warned that he could be prosecuted for perjury if he testified falsely. Since respondent was already under oath to testify truthfully, this explanation was redundant; it served simply to emphasize the obligation already imposed by the oath.

> "Once a witness swears to give truthful answers, *there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.'* It would render the sanctity of the oath quite mean-

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[6] The right to counsel mandated by *Miranda* was fashioned to secure the suspect's Fifth Amendment privilege in a setting thought inherently coercive. The Sixth Amendment was not implicated.

> ingless to require admonition to adhere to it." *United States* v. *Winter,* 348 F. 2d 204, 210 (CA2 1965). (Emphasis added.)

See also *United States* v. *Nickels,* 502 F. 2d 1173, 1176 (CA7 1974).

Similarly, a witness subpoenaed to testify before a petit jury and placed under oath has never been entitled to a warning that, if he violates the solemn oath to "tell the truth," he may be subject to a prosecution for perjury, for the oath itself is the warning. Nor has any case been cited to us holding that the absence of such warnings before a petit jury provides a shield against use of false testimony in a subsequent prosecution for perjury or in contempt proceedings.[7]

In any event, a witness sworn to tell the truth before a duly constituted grand jury will not be heard to call for suppression of false statements made to that jury, any more than would be the case with false testimony before a petit jury or other duly constituted tribunal.[8]

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[7] The fact that warnings were provided in this case to advise respondent of his Fifth Amendment privilege makes it unnecessary to consider whether any warning is required, as the Government asks us to determine. In addition to the warning implicit in the oath, federal prosecutors apparently make it a practice to inform a witness of the privilege before questioning begins.

[8] *Masinia* v. *United States,* 296 F. 2d 871, 877 (CA8 1961). Cases voiding convictions for perjury involved situations where the investigatory body was acting outside its lawful authority. *Brown* v. *United States,* 245 F. 2d 549 (CA8 1957); *United States* v. *Thayer,* 214 F. Supp. 929 (Colo. 1963); *United States* v. *Cross,* 170 F. Supp. 303 (DC 1959); *United States* v. *Icardi,* 140 F. Supp. 383 (DC 1956). For example, in *Brown* v. *United States, supra,* the Court of Appeals concluded that a federal grand jury in Nebraska had undertaken a "roving commission," investigating matters outside its lawful power. The District Court in that case had concluded that the grand jury's activities had come "'perilously close to being a fraud on the jurisdiction of this Court.'" Quoted in 245

In another context, this Court has refused to permit a witness to protect perjured testimony by proving a *Miranda* violation. In *Harris* v. *New York,* 401 U. S. 222 (1971), the Court held that notwithstanding a *Miranda* violation:

> "[The Fifth Amendment] privilege cannot be construed to include the right to commit perjury." *Id.,* at 225.

More recently, the Court reaffirmed this salutary principle:

> "[T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances." *Oregon* v. *Hass,* 420 U. S. 714, 722 (1975).

See also *Walder* v. *United States,* 347 U. S. 62 (1954); *United States* v. *DiGiovanni,* 397 F. 2d 409, 412 (CA7 1968); *Cargill* v. *United States,* 381 F. 2d 849 (CA10 1967); *United States* v. *DiMichele,* 375 F. 2d 959, 960 (CA3 1967).

The fact that here the grand jury interrogation had focused on some of respondent's specific activities does not require that these important principles be jettisoned; nothing remotely akin to "entrapment" or abuse of process is suggested by what occurred here. Cf. *Brown* v. *United States,* 245 F. 2d 549 (CA8 1957). Assuming, *arguendo,* that respondent was indeed a "putative defendant," that fact would have no bearing on the validity of a conviction for testifying falsely.

The grand jury was appropriately concerned about the sources of narcotics in the San Antonio area. The at-

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F. 2d, at 553. No such circumstances are presented by this case. We therefore have no occasion to address the correctness of the results reached by the courts in these inapposite instances.

tempted heroin sale by respondent provided ample reason to believe that he had knowledge about local heroin suppliers. It was, therefore, entirely proper to question him with respect to his knowledge of narcotics trafficking.[9] Respondent was free at every stage to interpose his constitutional privilege against self-incrimination, but perjury was not a permissible option. As the Tenth Circuit has held, the law provides "other methods for challenging the government's right to ask questions." *United States* v. *Pommerening,* 500 F. 2d 92, 100 (1974).

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

Reversed and remanded.

Mr. Justice Stevens took no part in the consideration or decision of this case.

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, concurring in the judgment.

I concur in the judgment of the Court, for "even when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prosecuted for making false statements." *Mackey* v. *United States,* 401 U. S. 667, 705 (1971) (Brennan, J., concurring in judgment). Although the

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[9] This is not to suggest that the questioning would have been improper if the principal aim of the grand jury's investigation had centered upon respondent's activities, rather than a general investigation into local narcotics traffic. As previously indicated, no impropriety results from summoning the target of its inquiry, *United States* v. *Dionisio,* 410 U. S. 1, 10 n. 8 (1973); it is appropriate, in fact, to give that individual an opportunity to explain potentially damaging information before the grand jury decides whether to return an indictment.

Fifth Amendment guaranteed respondent the right to refuse to answer the potentially incriminating questions put to him before the grand jury, in answering falsely he took "a course that the Fifth Amendment gave him no privilege to take." *United States* v. *Knox,* 396 U. S. 77, 82 (1969). "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States,* 396 U. S. 64, 72 (1969) (footnote omitted). See also *Glickstein* v. *United States,* 222 U. S. 139, 142 (1911). Further, the record satisfies me that the respondent's false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment.[1]

However, two aspects of the plurality opinion suggest a denigration of the privilege against self-incrimination and the right to the assistance of counsel with which I do not agree.

I

The plurality opinion, *ante,* at 574–575, mechanically quotes *United States* v. *Monia,* 317 U. S. 424 (1943), for the proposition:

> "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have

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[1] Of course, whether the allegations concerning prosecutorial misconduct complained of by respondent in his motion to suppress contain "the seeds of a 'duress' defense, or perhaps whether his false statement[s were] not made 'willfully' as required by [18 U. S. C. § 1623], . . . must be determined initially at his trial." *United States* v. *Knox,* 396 U. S. 77, 83 (1969). Nothing in the plurality opinion forecloses respondent from raising such defenses at his trial.

been 'compelled' within the meaning of the Amendment." *Id.*, at 427.

Monia concerned only the scope of statutory immunity from prosecution under the Sherman Act, although the dictum or similar ones may also be found in other contexts. *E. g., Smith* v. *United States,* 337 U. S. 137, 147 (1949). However, the serious Fifth Amendment issues implicit within the dictum have never been directly confronted, and the only authority cited in *Monia, United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103 (1927), is a slim reed upon which to rest that absolute proposition.[2] Moreover, the Court has repeatedly made other statements, clearly incompatible with the spirit if not the letter of the *Monia* dictum, evincing a much more accurate evaluation of the Fifth Amendment privilege, that "essential mainstay" of our "American system of criminal prosecution," *Malloy* v. *Hogan,* 378 U. S. 1, 7 (1964).[3] In my view, mechani-

[2] In *Vajtauer,* the only issue decided was the permissibility of using a prospective deportee's silence in a deportation proceeding as evidence against him where it was claimed that answers to the questions put might subject him to criminal penalties under state law. The Court clearly was skeptical of the "afterthought" assertion of the possibility of self-incrimination, 273 U. S., at 113, and, for reasons discussed, *infra,* at 591–592, properly concluded that in the circumstances there presented, the petitioner was obliged to put the immigration authorities on notice before he might assert the self-incrimination claim to defeat the evidentiary effect of his silence.

[3] For example, we have often said the Fifth Amendment prerequisite to the admissibility of an accused's statements is that they must have been " 'free and voluntary: that is, [they] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.' " *Bram* v. *United States,* 168 U. S. 532, 542–543 (1897); *Malloy* v. *Hogan,* 378 U. S., at 7. "In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow

cally to repeat—in further dictum [4]—a statement made in a different factual and legal context, with no analysis of crucial Fifth Amendment policies and resting upon inapposite precedential authority, is indefensibly to default in our responsibility. For our duty is to supply the jurisprudential foundation necessary to ensure that Fifth Amendment values are adequately preserved when threatened in the context of a putative defendant called by a prosecutor and interrogated before a grand jury concerning personal acts for which the prosecution plans his criminal indictment.

This Court has consistently emphasized and, more importantly, has stood fast to ensure the essential premise underlying our entire system of criminal justice that "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers* v. *Richmond,* 365 U. S. 534, 541 (1961).[5] Numerous opinions express the Court's deter-

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a suspect to call his wife before he confessed." *Ibid.* "In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Miranda* v. *Arizona,* 384 U. S. 436, 460 (1966). Furthermore, "the Court has evaluated the knowing and intelligent nature of the waiver [under the 'intentional relinquishment or abandonment of a known right or privilege' standard of *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938)] . . . of the privilege against compulsory self-incrimination before an administrative agency or a congressional committee." *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 238 (1973) (footnote omitted).

[4] Reference to the *Monia* dictum is also dictum in this case for, as the plurality notes, *ante,* at 569 n. 2, respondent's testimony before the grand jury was not utilized by the prosecution at respondent's trial on the substantive count of attempted distribution of heroin.

[5] "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice

mination to enforce the guarantee of an adversary system embodied in our Bill of Rights in the face of attempts, in the name of expediency and in ignorance of the lessons of history, to utilize inquisitional procedures. And the successful maintenance of the adversary system when threatened by these sometimes blatant but often more subtle assaults has had as a core underpinning the vigilance of this Court in jealously guarding the right of every person not to be compelled to be a witness against himself. *E. g., Watts* v. *Indiana,* 338 U. S. 49 (1949); *Blackburn* v. *Alabama,* 361 U. S. 199 (1960); *Culombe* v. *Connecticut,* 367 U. S. 568 (1961); *Malloy* v. *Hogan, supra; Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Garrity* v. *New Jersey,* 385 U. S. 493 (1967); *Lefkowitz* v. *Turley,* 414 U. S. 70 (1973). The Fifth Amendment privilege, the "essential mainstay of our adversary system," *Miranda* v. *Arizona, supra,* at 460, "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civi-

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since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, The Development of Present-Day Criminal Procedures in Europe and America, 48 Harv. L. Rev. 433, 457–458, 467–473 (1935). Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown, c. 46, § 34 (8th ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands." *Watts* v. *Indiana,* 338 U. S. 49, 54 (1949).

lized.'" *Ullmann* v. *United States,* 350 U. S. 422, 426 (1956).

> "Cardinal . . . is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law, that, in Hawkins' words, a prisoner is not 'to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown (8th ed. 1824), 595. . . . [The] essence [of the principle] is the requirement that the state which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe* v. *Connecticut, supra,* at 581–582.

It is in light of this fundamental role of the Fifth Amendment privilege—with a deep "appreciat[ion of] the breadth and significance of the values that the Fifth Amendment was designed to protect," *Piccirillo* v. *New York,* 400 U. S. 548, 567 (1971) (BRENNAN, J., dissenting)—that the proper scope and treatment of the privilege must be analyzed in the context of the interrogation of a putative defendant before a grand jury.

A

The institution of the grand jury—an institution mandated by the Fifth Amendment and "deeply rooted in Anglo-American history," *United States* v. *Calandra,* 414 U. S. 338, 342 (1974)—has historically also served as a bulwark for the individual citizen against use by officials of the powers of the Government in ways inconsistent with our notions of fundamental liberty. "[T]he Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by

'a presentment or indictment of a Grand Jury.'" *Id.*, at 343. "The basic purpose . . . was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello* v. *United States*, 350 U. S. 359, 362 (1956). It is no less clear, however, that the grand jury, as with all institutions of Government, is subject to the fundamental restraints which guarantee our liberty, including the Fifth Amendment privilege against self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). And in delineating the scope and operation of the Fifth Amendment privilege necessary to secure its fundamental policies in the grand jury context, we must note that the nature of the grand jury is, of course, primarily inquisitional rather than adversary: the grand jury is "a grand inquest, . . . with powers of investigation and inquisition." *Blair* v. *United States*, 250 U. S. 273, 282 (1919). Given this characterizing principle, we are alerted to the danger that in the absence of a subtle and flexible mode of constitutional analysis—an analysis certainly not illustrated in the *Monia* dictum—the fundamentals of the Fifth Amendment privilege may be subverted by talismanic invocation of the role of the grand jury in our constitutional system. A more discriminating analysis is fully in keeping with the historic role of this Court, for, as said by Mr. Chief Justice Marshall in the identical context of conflict between the role of the grand jury and the Fifth Amendment privilege: "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent." *United States* v. *Burr*, 25 F. Cas. 38, 39 (No. 14,692e) (CC Va. 1807).[6] Close

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[6] Only "[t]hrough the consistently liberal construction it has been afforded by the Supreme Court [has] the privilege . . . been the

scrutiny and attention to competing constitutional policies is required in this area of conflicting principles if the "Court [is] zealous[ly] to safeguard the values that underlie the privilege." *Kastigar* v. *United States,* 406 U. S. 441, 445 (1972).

In my view, the conception of the Fifth Amendment privilege expressed in the *Monia* dictum is explainable only by reference to the facts and circumstances of the only case cited in support by *Monia*—*United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103 (1927). That case involved questions concerning the Fifth Amendment privilege in a deportation proceeding. In holding that the prospective deportee's privilege against compulsory self-incrimination had not been violated in the circumstances, the Court rested on the failure to assert any claim of privilege in the proceeding. *Id.,* at 113. Essential to the Court's holding was the observation:

> "It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, . . . a determination which it cannot make if not advised of the contention. . . . The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." *Ibid.*

It is only in a context where this "lack of notice on the part of the government" rationale has significance that we can possibly justify the *Monia* dictum that a witness testifying under judicial compulsion—that classic form of compulsion to which the Fifth Amendment is cen-

firmest limitation upon inquisitorial power in the grand jury." Rief, The Grand Jury Witness and Compulsory Testimony Legislation, 10 Am. Crim. L. Rev. 829, 852 (1972).

trally addressed [7]—must claim the privilege or else, without any further analysis, "he will not be considered to have been 'compelled' within the meaning of the Amendment." 317 U. S., at 427.[8]

This view of the nature and scope of the Fifth Amendment privilege was reaffirmed by the Court this very Term:

> "Unless the Government *seeks* testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a noncriminal investigation of himself. . . . Unless a witness objects, a government *ordinarily may assume* that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the *apparently innocent* dis-

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[7] When the grand jury exercises its judicial power to compel the attendance and testimony of witnesses, it is, of course, exhibiting a classic instance of *judicial compulsion;* that very phenomenon against which the central meaning of the Fifth Amendment privilege is to confer on every citizen an absolute right to refuse testimony which may subject him to criminal prosecution. Meshbesher, Right to Counsel Before Grand Jury, 41 F. R. D. 189, 198–199 (1966). As Mr. Justice Rutledge said when sitting on the Court of Appeals for the District of Columbia Circuit:

"[The Fifth Amendment privilege] protects against the force of the court itself. It guards against the ancient abuse of judicial inquisition. Before it judicial power, including contempt, to enforce the usual duty to testify, dissolves. No other violence or duress is needed to bring it into play than the asking of a question." *Wood* v. *United States,* 75 U. S. App. D. C. 274, 277, 128 F. 2d 265, 268 (1942).

[8] See also *United States* v. *Monia,* 317 U. S., at 439–440, 442 (Frankfurter, J., dissenting); *United States* v. *Scully,* 225 F. 2d 113, 118 (CA2), cert. denied, 350 U. S. 897 (1955) (Frank, J., concurring in result).

> closure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. . . .
>
> "In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice. . . . *That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures.* In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings." *Garner* v. *United States,* 424 U. S. 648, 655–656 (1976) (emphasis added).

Indeed, in the situation where a prior claim is excused and a knowing and completely voluntary waiver of the privilege is required—the situation of the *Miranda*-type custodial interrogation—the reason is that "the inquiring government is *acutely aware* of the potentially incriminatory nature of the disclosures sought." *Garner, supra,* at 657 (emphasis added). Similarly, the prior claim is excused in the *Marchetti-Grosso* [9] situation, and the privilege confers an absolute right not to file an information return required by the government precisely because the required filing is directed to a class of persons "the great majority of whom [are] likely to incriminate themselves by responding," *Garner, supra,* at 660, and, therefore, "as in the coerced-confession cases, any compulsion to disclose [is] likely to compel self-incrimination." *Ibid.* I submit that this more discriminating analysis is also required in the situation in which

[9] *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968).

a putative or *de facto* defendant is called to testify under judicial compulsion before a grand jury; otherwise we countenance a serious erosion of fundamental guarantees of the Constitution.

B

It is clear that the government may not in the absence of an intentional and knowing waiver call an indicted defendant before a grand jury and there interrogate him concerning the subject matter of a crime for which he already stands formally charged. *Lawn* v. *United States,* 355 U. S. 339 (1958); *United States* v. *Calandra,* 414 U. S., at 345, 346. The Fifth Amendment requires suppression of any statements of the accused that were so obtained.[10] True, as noted *ante,* at 573–574, calling a person "who may himself be the subject of the grand jury inquiry" is not a violation *per se* of the Fifth Amendment. *United States* v. *Dionisio,* 410 U. S. 1, 10 n. 8 (1973). This general proposition may be justified as necessary to the basic policy that the public has a right to every man's evidence, *United States* v. *Nixon,* 418 U. S. 683, 709 (1974), but in my view it must yield in situations risking vast potential for abuse in the absence of further safeguards calculated to preserve the policies underlying our adversary system.

It cannot be gainsaid that prosecutors often do call before grand juries persons suspected of criminal activity to testify concerning that activity, *e. g., Grunewald* v.

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[10] Although there may be some ambiguity in the opinion in *Lawn* v. *United States* as to whether the multiple references to "tainted" evidence were based on the legal conclusion that the evidence, having been obtained by calling indicted defendants before a grand jury, was obtained in violation of the Fifth Amendment privilege, later decisions resolved any doubt on this score. *United States* v. *Calandra,* 414 U. S., at 345, 346.

United States, 353 U. S. 391, 423 (1957), and the availability of this device has often been fatally tempting to those aware of its potential for abuse.[11] There can be no doubt that sanctioning unfettered discretion in prosecutors to delay the seeking of criminal indictments pending the calling of criminal suspects before grand juries to be interrogated under conditions of judicial compulsion runs the grave risk of allowing "the prosecution [to] evade its own constitutional restrictions on its powers by turning the grand jury into its agent." *United States* v. *Mara,* 410 U. S. 19, 29 (1973) (Douglas, J., dissenting).[12] In such situations an individual's only protection against the mobilized power of the State is his Fifth Amendment privilege, but it is a protection of which there must be safeguards to make him aware. Careful measures are needed if the privilege is "still [to stand] guard when so much is attempted by inquisition, however subtle, at any stage of the [criminal] proceedings." *Wood* v. *United States,* 75 U. S. App. D. C. 274, 288, 128 F. 2d 265, 279 (1942) (per Rutledge, J.).

Given the prosecutor's authority to choose the precise timing of a criminal indictment, it is not surprising that commentary uniformly decries the attempted distinction between a *de facto* and *de jure* defendant in the determi-

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[11] *E. g., Hooley* v. *United States,* 209 F. 2d 234, 235 (CA1 1954); *United States* v. *Pepe,* 367 F. Supp. 1365, 1367, 1370 (Conn. 1973); *United States* v. *Garnes,* 156 F. Supp. 467, 469 (SDNY 1957), aff'd, 258 F. 2d 530 (CA2 1958), cert. denied, 359 U. S. 937 (1959).

[12] Federal prosecutors, it has been asserted, have also taken advantage of the *de facto/de jure* distinction to postpone indictments and thereby utilize the subpoena power of the grand jury to obtain discovery in evasion of the strictures on Government discovery pursuant to Fed. Rule Crim. Proc. 16 (c). Tigar & Levy, The Grand Jury as the New Inquisition, 50 Mich. St. B. J. 693, 700 (1971).

nation of the amount of protection accorded by the Fifth Amendment privilege.

> "Distinctions based on status have created an incongruous grand jury witness, the *de facto* defendant who, though not formally accused, is marked for prosecution. Functionally indistinguishable from a *de jure* defendant, he enjoys only the protection of an unimplicated witness and must submit to interrogation without apprisal of the charge pending against him or of his fifth amendment rights. The prosecutor can take advantage of this anomalous treatment by deferring formal charge, summoning a *de facto* defendant before the grand jury and seeking disclosures which ensure indictment and may be used at trial." Note, Self Incrimination by Federal Grand Jury Witnesses: Uniform Protection Advocated, 67 Yale L. J. 1271, 1276–1277 (1958) (footnotes omitted).[13]

Indeed, it seems obvious that a *de facto* defendant's privilege is placed in much greater jeopardy than that of a *de jure* defendant, who has at least been informed of the charges against him and is more likely to have consulted with counsel and thereby have been made aware of his privilege. *In re Kelly,* 350 F. Supp. 1198, 1202 (ED Ark. 1972).

Even more serious, the use by prosecutors of the tactic of calling a putative defendant before a grand jury and interrogating him regarding the transactions

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[13] See also Boudin, The Federal Grand Jury, 61 Geo. L. J. 1, 3 (1972); Dash, The Indicting Grand Jury: A Critical Stage?, 10 Am. Crim. L. Rev. 807, 809–810 (1972); Meshbesher, *supra,* n. 7, at 190; Note, The Rights of a Witness Before a Grand Jury, 1967 Duke L. J. 97; Note, Self-Incrimination Before a Federal Grand Jury, 45 Iowa L. Rev. 564, 571 (1960); Comment, The Grand Jury Witness' Privilege Against Self-Incrimination, 62 Nw. L. Rev. 207, 223 (1967).

and events for which he is about to be indicted is, in the absence of an "intentional relinquishment or abandonment" of his "known" privilege against compulsory self-incrimination, *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 235 (1973); *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938), a blatant subversion of the fundamental adversary principle—that the State "establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts* v. *Indiana,* 338 U. S., at 54. Where such prosecutorial tactics are employed, it borders on the absurd to say, as is said in justification of the *Monia* dictum, that the "government . . . may assume that its compulsory processes are not eliciting" incriminating information, *Garner,* 424 U. S., at 655. Rather, it is clear beyond question that the government is "acutely aware of the potentially incriminatory nature of the disclosures sought," *id.,* at 657, and thus one cannot avoid the conclusion that in condoning resort to such tactics, the courts become partners in "undermin[ing]" the "adversary system of criminal justice" by allowing prosecutors "deliberately [to seek] to avoid the burdens of independent investigation by compelling self-incriminating disclosures." *Id.,* at 655–656. Such tactics by prosecutors are exemplars of the very evils sought to be prevented by the enshrinement of the Fifth Amendment privilege in the Constitution.[14] In giving those tactics our stamp of approval we turn our backs on our recognition

[14] "[I]t was historically this situation [the preliminary inquisition of one not yet charged with an offense] which gave rise to the privilege. The system of 'inquisition,' properly so called, signifies an examination on mere suspicion, without prior presentment, indictment, or other formal accusation . . . ; and the contest for one hundred years centered solely on the abuse of such a system." 8 J. Wigmore, Evidence § 2251, p. 295 n. 1 (McNaughton rev. 1961).

heretofore that it is crucial that courts "be 'alert to repress' any abuses of the investigatory power invoked, bearing in mind that . . . 'the most valuable function of the grand jury . . . [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused.'" *Hoffman* v. *United States,* 341 U. S. 479, 485 (1951), quoting *Hale* v. *Henkel,* 201 U. S. 43, 65 (1906). "[A] defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury." *Michigan* v. *Tucker,* 417 U. S. 433, 441 (1974).

C

Thus, I would hold that, in the absence of an intentional and intelligent waiver by the individual of his known right to be free from compulsory self-incrimination, the Government may not call before a grand jury one whom it has probable cause—as measured by an objective standard [15]—to suspect of committing a crime, and by use of judicial compulsion compel him to testify with

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[15] Others have argued for a rule which would combine objective elements with the prosecutor's subjective intent subsequently to charge the individual by indictment. See *United States* v. *Scully,* 225 F. 2d, at 117 (Frank, J., concurring in result). But this subjective-intent requirement may pose grave administrative difficulties, see *United States* v. *Grossman,* 154 F. Supp. 813, 817 (NJ 1957), whereas the purely objective standard is easily manageable both for the prosecutor at the point of decision to call an individual suspect before the grand jury, and for the reviewing court. Clearly it costs the prosecutor nothing in terms of constitutionally permissible criteria to resolve any doubts in favor of warning the witness. I would at present leave open the proper answer to the case of a witness called to testify in the absence of probable cause, but whose testimony thereafter develops a case of probable cause.

regard to that crime.[16] In the absence of such a waiver, the Fifth Amendment requires that any testimony obtained in this fashion be unavailable to the Government

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[16] Cf. *United States* v. *Wong,* 553 F. 2d 576 (CA9 1974), cert. pending, No. 74-635 (*Miranda* warnings required for putative defendant); *United States* v. *Washington,* 328 A. 2d 98, 100 (Ct. App. DC 1974), cert. pending, Nos. 74-1106, 74-6579 (requiring a knowing and intelligent waiver of the privilege by a "potential" defendant); *United States* v. *Luxenberg,* 374 F. 2d 241, 246 (CA6 1967) (warning concerning the privilege required for one "virtually in the position of a defendant"); *United States* v. *Orta,* 253 F. 2d 312, 314 (CA5), cert. denied, 357 U. S. 905 (1958) (knowing and intelligent waiver of privilege required for "a witness"); *Stanley* v. *United States,* 245 F. 2d 427, 434 (CA6 1957) (protection afforded a defendant in custody extended to witnesses "virtually in the position of a defendant"); *United States* v. *Pepe,* 367 F. Supp., at 1369 (warning required for a "potential" defendant); *In re Kelly,* 350 F. Supp. 1198, 1205 (ED Ark. 1972) (warning required if "even a remote possibility of prosecution"); *United States* v. *Kreps,* 349 F. Supp. 1049, 1053-1054 (WD Wis. 1972) (*Miranda* warnings required for "prime suspect"); *United States* v. *Fruchtman,* 282 F. Supp. 534, 536 (ND Ohio 1968) (warning required for one " 'virtually in the position of a defendant' "); *Mattox* v. *Carson,* 295 F. Supp. 1054, 1059 (MD Fla. 1969) (*Miranda* warnings required for "potential defendants"), rev'd on other grounds, 424 F. 2d 202 (CA5), cert. denied, 400 U. S. 822 (1970); *United States* v. *Haim,* 218 F. Supp. 922, 932 (SDNY 1963) (warning required for "potential" defendant); *United States* v. *DiGrazia,* 213 F. Supp. 232, 234 (ND Ill. 1963) (warning and execution of formal waiver required for any witness); *United States* v. *Grossman, supra,* at 816 (warning required at least for "target" defendant). See also *Powell* v. *United States,* 96 U. S. App. D. C. 367, 372, 226 F. 2d 269, 274 (1955) (serious constitutional question whether prosecutor may call before grand jury "person against whom an indictment was being sought"); *United States* v. *Scully, supra,* at 116 ("suppos[ing] . . . as a matter of ethics or fair play or policy, a prosecutor would . . . refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused"); *id.,* at 118 (Frank, J., concurring in result) (suggesting a warning for any person called whom the prosecutor intends to indict); *United States* v. *Grunewald,* 233

for use at trial. Such a waiver could readily be demonstrated by proof that the individual was warned prior to questioning that he is currently subject to possible criminal prosecution for the commission of a stated crime, that he has a constitutional right to refuse to answer any and all questions that may tend to incriminate him, and by record evidence that the individual understood the nature of his situation and privilege prior to giving testimony.

> "Some courts have reasoned that because of the investigative function and inquisitorial nature of the grand jury, it cannot be burdened with affording a witness the full panoply of procedural safeguards. [However, i]t is *because* in a grand jury proceeding there is no right to other procedural safeguards that a witness should be told of his right to remain silent." *In re Kelly,* 350 F. Supp., at 1202.

Certainly to the extent that our task is to weigh "the potential benefits" to be derived from this requirement against the "potential injury to the historic role and functions of the grand jury," *United States* v. *Calandra,* 414 U. S., at 349, we must come down on the side of imposing this requirement if subversion of the adversary process is to be avoided where suspected persons are

F. 2d 556, 576 n. 10 (CA2 1956) (Frank, J., dissenting in part), rev'd, 353 U. S. 391 (1957) (warning required for any witness); *Connelly* v. *United States,* 249 F. 2d 576, 581 (CA8 1957), cert. denied, 356 U. S. 921 (1958) (approving suppression of all testimony, even in presence of warnings, after point prosecutor decided to indict); *United States* v. *Nickels,* 502 F. 2d 1173, 1176 (CA7 1974), cert. pending, No. 74–735 (by implication *Miranda* warning required for "potential defendant"); *Kitchell* v. *United States,* 354 F. 2d 715, 720 (CA1), cert. denied, 384 U. S. 1011 (1966) (by implication warning required for person "clearly suspected"); *United States* v. *De Sapio,* 299 F. Supp. 436, 440 (SDNY 1969) (by implication warning required for "target" defendant).

ignorant of their rights. In no way does the requirement of a knowing waiver "interfere with the effective and expeditious discharge of the grand jury's duties," *id.*, at 350;[17] or "saddle a grand jury with minitrials and preliminary showings [that] would . . . impede its investigation," *United States* v. *Dionisio*, 410 U. S., at 17; or "delay and disrupt grand jury proceedings," *Calandra, supra*, at 349. And plainly the requirements of an effective warning and an intelligent waiver by a putative defendant prior to attempts to elicit potentially incriminating information impose no onerous duty on the prosecutor. The reported decisions of the lower federal courts are replete with examples of prosecuting officials proffering such warnings as an essential element of our fundamental liberties.[18] Where uncertain whether the situation

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[17] It is certainly no response to argue that a *de facto* defendant is more likely to offer self-incriminatory testimony and thereby advance the needs of law enforcement if only he is left in ignorance of his constitutional rights. The Constitution has already made the underlying value choice, and it is not this Court's function to denigrate it.

"No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies." *Ullmann* v. *United States*, 350 U. S. 422, 428 (1956).

[18] *E. g., United States* v. *Wong, supra; United States* v. *Nickels, supra; United States* v. *Daniels*, 461 F. 2d 1076, 1077 (CA5 1972); *United States* v. *Friedman*, 445 F. 2d 1076, 1088 (CA9), cert. denied *sub nom. Jacobs* v. *United States*, 404 U. S. 958 (1971); *United States* v. *Mingoia*, 424 F. 2d 710, 713–714 (CA2 1970); *Gollaher* v. *United States*, 419 F. 2d 520, 523 (CA9), cert. denied, 396 U. S. 960 (1969); *United States* v. *Corallo*, 413 F. 2d 1306, 1328 (CA2), cert. denied, 396 U. S. 958 (1969); *United States* v. *Levinson*, 405

requires it, the prosecutor may safely err on the side of ensuring the knowing and intentional nature of the waiver, for he does no more than discharge his responsibility to safeguard a constitutional guarantee calculated to ensure the liberty of us all. Only when these safeguards are afforded a putative defendant called and interrogated before a grand jury may we truthfully proclaim that the Fifth Amendment "privilege . . . is as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock,* 142 U. S., at 562; *ante,* at 574.

II

A second and also disturbing facet of the plurality opinion today is its statement that "[n]o criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." *Ante,* at 581. It will not do simply to cite, as does the plurality opinion, *Kirby* v. *Illinois,* 406 U. S. 682 (1972), for this proposition. *Kirby*'s premise, so fundamental that it was "note[d] at the outset," was that "the constitutional privilege against compulsory self-incrimination is in no way implicated here." *Id.,* at 687. In sharp contrast, the privilege against compulsory self-incrimination is inextricably involved in this case since a putative defendant is called and interrogated before a grand

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F. 2d 971, 979 (CA6 1968), cert. denied *sub nom. Strang* v. *United States,* 395 U. S. 906 (1969); *United States* v. *DiMichele,* 375 F. 2d 959, 960 (CA3), cert. denied, 389 U. S. 838 (1967); *United States* v. *Irwin,* 354 F. 2d 192, 199 (CA2 1965), cert. denied, 383 U. S. 967 (1966); *Kitchell* v. *United States, supra,* at 720; *United States* v. *Winter,* 348 F. 2d 204, 205 (CA2), cert. denied, 382 U. S. 955 (1965); *Connelly* v. *United States, supra,* at 581; *United States* v. *De Sapio, supra,* at 440; *United States* v. *Zirpolo,* 288 F. Supp. 993, 1007 (NJ 1968); *United States* v. *Leighton,* 265 F. Supp. 27, 36–37 (SDNY 1967); *United States* v. *Haim, supra,* at 932; *United States* v. *Grunewald,* 164 F. Supp. 640, 641 (SDNY 1958); *United States* v. *Hoffa,* 156 F. Supp. 495, 510–512 (SDNY 1957).

jury. Clearly in such a case a defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.*, at 689.

It is true that dictum in *In re Groban,* 352 U. S. 330, 333 (1957), denied there is any constitutional right of a witness to be represented by counsel when testifying before a grand jury. But neither *Groban* nor any other case in this Court has squarely presented the question.[19] Moreover, more recent decisions, *e. g., Miranda* v. *Arizona,* 384 U. S. 436 (1966), and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), recognizing the "substantive affinity" and therefore the "coextensive[ness]" in certain circumstances of the right to counsel and the privilege against compulsory self-incrimination, *Wood* v. *United States,* 75 U. S. App. D. C., at 280, 128 F. 2d, at 271 (per Rutledge, J.), have led many to question the continuing vitality of such older dicta.[20]

Accepted principles require scrutiny of any situation wherein a right to the assistance of counsel is claimed by "analyz[ing] whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

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[19] Ironically, the greatest impediment to the development of the law concerning a grand jury witness' right to some form of assistance of counsel has been reliance upon the traditional absence of counsel in grand jury proceedings for denial of assistance of counsel in administrative proceedings. *E. g., In re Groban; Hannah* v. *Larche,* 363 U. S. 420 (1960). See Recent Developments, Criminal Procedure—Right to Counsel in Investigative Grand Jury Proceedings: Washington Criminal Investigative Act of 1971, 47 Wash. L. Rev. 511, 513 n. 11 (1972).

[20] *E. g.,* Boudin, *supra,* n. 13; Dash, *supra,* n. 13; Meshbesher, *supra,* n. 7; The Grand Jury: Powers, Procedures, and Problems, 9 Col. J. L. & Soc. Prob. 681, 713 (1973); The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 222 (1964); Note, 1967 Duke L. J., *supra,* n. 13; Recent Developments, *supra,* n. 19.

United States v. *Wade,* 388 U. S. 218, 227 (1967); *Coleman* v. *Alabama,* 399 U. S. 1, 7 (1970). And the question of whether the guidance of counsel is ordinarily required to enable an individual effectively to avoid prejudice to his Fifth Amendment privilege was clearly answered by this Court last Term.

> "The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion." *Maness* v. *Meyers,* 419 U. S. 449, 466 (1975).[21]

Given the inherent danger of subversion of the adversary system in the case of a putative defendant called to testify before a grand jury, and the peculiarly critical role of the Fifth Amendment privilege as the bulwark against such abuse, it is plainly obvious that some guidance by counsel is required. This conclusion entertains only the "realistic recognition of the obvious truth that the average [putative] defendant does not have the professional legal skill to protect himself when brought before a tribunal . . . wherein the prosecution is [repre-

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[21] See also *Sheridan* v. *Garrison,* 273 F. Supp. 673, 679 (ED La. 1967), rev'd on other grounds, 415 F. 2d 699 (CA5 1969); Boudin, *supra,* n. 13, at 17; Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 700 (1968); Meshbesher, *supra,* n. 7, at 190–191, 195–196; Steele, Right to Counsel at the Grand Jury Stage of Criminal Proceedings, 36 Mo. L. Rev. 193, 201 (1971); The Grand Jury, 9 Col. J. L. & Soc. Prob., *supra,* n. 20, at 719; The Supreme Court, 78 Harv. L. Rev., *supra,* n. 20, at 222; Note, 1967 Duke L. J., *supra,* n. 13, at 131–133; Recent Developments, *supra,* n. 19, at 517–518.

sented] by experienced and learned counsel." *Johnson* v. *Zerbst,* 304 U. S., at 462–463; *Schneckloth* v. *Bustamonte,* 412 U. S., at 236.

> "It is said that a witness can protect himself against some of the many abuses possible in a secret interrogation by asserting the privilege against self-incrimination. But this proposition collapses under anything more than the most superficial consideration. The average witness has little if any idea when or how to raise any of his constitutional privileges. . . . [I]n view of the intricate possibilities of waiver which surround the privilege he may easily unwittingly waive it." *In re Groban, supra,* at 345–346 (Black, J., dissenting).

Under such conditions it "would indeed be strange were this Court" to hold that a putative defendant, called before a grand jury and interrogated concerning the substance of the crime for which he is in imminent danger of being criminally charged, is simply to be left to "fend for himself." *Coleman* v. *Alabama, supra,* at 20 (Harlan, J., concurring and dissenting).

It may be that a putative defendant's Fifth Amendment privilege will be adequately preserved by a procedure whereby, in addition to warnings, he is told that he has a right to consult with an attorney prior to questioning, that if he cannot afford an attorney one will be appointed for him, that during the questioning he may have that attorney wait outside the grand jury room, and that he may at any and all times during questioning consult with the attorney prior to answering any question posed. See *United States* v. *Capaldo,* 402 F. 2d 821, 824 (CA2 1968), cert. denied, 394 U. S. 989 (1969); *United States* v. *Pepe,* 367 F. Supp. 1365, 1369 (Conn. 1973).[22]

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[22] Contra, arguing that the presence of counsel inside the grand jury room is required, Boudin, *supra,* n. 13, at 17; Friendly, *supra,*

At least if such minimal protections were present, a putative defendant would be able to consult with counsel prior to answering any question that he might in any way suspect may incriminate him. Thereafter, if the privilege is invoked and contested, a hearing on the propriety of its invocation will take place in open court before an impartial judicial officer, and the putative defendant will there have his counsel present. *Harris* v. *United States,* 382 U. S. 162, 166 n. 4 (1965); *In re Oliver,* 333 U. S. 257 (1948); *United States* v. *Pepe, supra,* at 1369. If the invocation of the privilege is disallowed, the putative defendant will then have the opportunity to answer the question posed prior to the imposition of sanctions for contempt. *Garner* v. *United States,* 424 U. S., at 663.

There is clearly no argument that a procedure allowing a putative defendant called to testify before a grand jury to consult at will with counsel outside the grand jury room prior to answering any given question would in any way impermissibly "delay and disrupt grand jury proceedings." *United States* v. *Calandra,* 414 U. S., at 349. This is clearly manifested by the plethora of reported instances in which just such procedures have been followed.[23] Nor would such a procedure damage

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n. 21, at 701; Meshbesher, *supra,* n. 7, at 193; Steele, *supra,* n. 21, at 203; The Grand Jury, 9 Col. J. L. & Soc. Prob., *supra,* n. 20, at 722; Note, 1967 Duke L. J., *supra,* n. 13, at 124–125.

Certainly there is no viable argument that allowing counsel to be present in the grand jury room for purposes of consultation regarding testimonial privileges would subvert the nature or functioning of the grand jury proceeding. Such a procedure is sanctioned by statute in several States. Kan. Stat. Ann. § 22–3009 (1974); S. D. Comp. Laws § 23–30–7 (1975); Utah Code Ann. § 77–19–3 (1975); Wash. Rev. Code § 10.27.120 (1974); Mich. Stat. Ann. § 28:943 (1972) (one-man grand jury).

[23] *E. g., United States* v. *George,* 444 F. 2d 310, 315 (CA6 1971)

the constitutional "role and functions of the grand jury," *ibid.*, for the only effect on its investigative function is to secure a putative defendant's Fifth Amendment privilege and thereby avoid subversion of the adversary system.[24]

It is, of course, unnecessary in this case to define the exact dimensions of the right to counsel since the testimony obtained by the grand jury interrogation was not

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(right to consult with attorney "after every question"); *United States* v. *Weinberg,* 439 F. 2d 743, 745 (CA9 1971) (right to confer with attorney exercised "after almost every question"); *United States* v. *Capaldo,* 402 F. 2d 821, 824 (CA2 1968), cert. denied, 394 U. S. 989 (1969) (permitted to consult with counsel "whenever he so desired"); *United States* v. *Isaacs,* 347 F. Supp. 743, 759 (ND Ill. 1972) ("provided every opportunity to consult with counsel"); *Application of Caldwell,* 311 F. Supp. 358, 362 (ND Cal. 1970) (permitted to consult with counsel "at any time he wishes"); *United States* v. *De Sapio,* 299 F. Supp., at 440 ("could consult with counsel during the interrogation if he so desired"); *United States* v. *Leighton,* 265 F. Supp., at 37 (right to consult with counsel "at any time he chose"); *United States* v. *Hoffa,* 156 F. Supp., at 512 ("given an opportunity to consult with [his] lawyer"). See also *Levine* v. *United States,* 362 U. S. 610, 611 (1960); *United States* v. *Nickels,* 502 F. 2d 1173 (CA7 1974), cert. pending, No. 74–735; *United States* v. *Daniels,* 461 F. 2d, at 1077; *Perrone* v. *United States,* 416 F. 2d 464, 466 (CA2 1969); *United States* v. *Corallo,* 413 F. 2d, at 1328; *United States* v. *DiMichele,* 375 F. 2d, at 960; *United States* v. *Irwin,* 354 F. 2d, at 199; *Kitchell* v. *United States,* 354 F. 2d, at 720; *United States* v. *Tramunti,* 343 F. 2d 548, 551 (CA2 1965), vacated, 384 U. S. 886 (1966); *United States* v. *Kane,* 243 F. Supp. 746, 753 (SDNY 1965); *United States* v. *Grunewald,* 164 F. Supp, at 641–642.

[24] The availability of counsel to help ensure the meaningful exercise of the constitutional privilege may in some instances "discourage the prosecutor's efforts to acquire privileged information, but it is exactly this effort which the law condemns in recognizing the privilege. To create privileges and at the same time inhibit their effective use is paradoxical indeed." Note, 1967 Duke L. J., *supra,* n. 13, at 125 n. 121.

introduced as evidence at respondent's trial on the charge concerning which he was questioned. I write only to make plain my disagreement with the implication in the plurality opinion that constitutional rights to counsel are not involved in a grand jury proceeding, and my disagreement with the further implication that there is a right to have counsel present for consultation outside the grand jury room but that it is not constitutionally derived and therefore may be enjoyed only by those wealthy enough to hire a lawyer.[25] I cannot accede to a return to the regime of "squalid discrimination," *Griffin* v. *Illinois,* 351 U. S. 12, 24 (1956) (Frankfurter, J., concurring in judgment), where the justice "a man gets depends on the amount of money he has." *Id.,* at 19 (opinion of Black, J.). Only recently THE CHIEF JUSTICE reminded us of "the basic command that justice be applied equally to all persons," and further that "the passage of time has heightened rather than weakened the attempts [by this Court] to mitigate the disparate treatment of indigents in the criminal process." *Williams* v. *Illinois,* 399 U. S. 235, 241 (1970). See *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972); *Tate* v. *Short,* 401 U. S. 395 (1971); *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Douglas* v. *California,* 372 U. S. 353 (1963); *Griffin* v. *Illinois, supra.* If indeed there is, as the plurality opinion says, a right to have counsel present outside the door to the grand jury room, it is

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[25] This appears to me to be the plain implication of the following passage:

"Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." *Ante,* at 581.

most assuredly in my view everyone's right, regardless of economic circumstance.

> "The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. . . . While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice." *Miranda* v. *Arizona, supra,* at 472.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

The Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Bryson* v. *United States,* 396 U. S. 64, 72 (footnote omitted). See *United States* v. *Knox,* 396 U. S. 77, 82; *Glickstein* v. *United States,* 222 U. S. 139, 142. The respondent's grand jury testimony is relevant only to his prosecution for perjury and was not introduced in the prosecution for attempting to distribute heroin. Since this is not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process,* I would reverse the judgment without reaching the other issues explored in THE CHIEF JUSTICE's opinion and in MR. JUSTICE BRENNAN's separate opinion.

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*Cf. *Brown* v. *United States,* 245 F. 2d 549 (CA8).

HYNES ET AL. *v.* MAYOR AND COUNCIL OF BOROUGH OF ORADELL ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 74-1329. Argued December 10, 1975—Decided May 19, 1976

A municipal ordinance requiring that advance written notice be given to the local police department by "[a]ny person [including representatives of Borough Civic Groups and Organizations] desiring to canvass, solicit or call from house to house . . . for a recognized charitable cause, or . . . for a Federal, State, County or Municipal political campaign or cause . . . for identification only" *held* invalid because of vagueness. A municipality has the power to enforce reasonable door-to-door soliciting and canvassing regulations to protect its citizens from crime and undue annoyance. The Court has consistently recognized that a narrowly drawn ordinance that does not vest in municipal officials the undefined power to determine what residents will hear or see may serve these interests consistent with the First Amendment. The ordinance in question must fall, however, because in certain respects "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391. First, the ordinance's coverage is unclear, since it does not explain whether a "*recognized* charitable cause" means one recognized by the Internal Revenue Service as tax exempt, one recognized by some community agency, or one approved by some municipal official; nor is it clear what is meant by a "Federal, State, County or Municipal . . . *cause*," or what groups fall into the class of "Borough Civic Groups and Organizations" that the ordinance covers. Secondly, the ordinance does not sufficiently specify what those within its reach must do in order to comply. Not only is a person desiring to solicit not told what he must set forth in the required notice or what the police will consider sufficient identification, but also the ordinance does not provide explicit standards for those who apply it. Pp. 616–622.

66 N. J. 376, 331 A. 2d 277, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined and in Part 3 of which BRENNAN, J., joined. BRENNAN, J., filed an opinion con-

curring in part, in which MARSHALL, J., joined, *post,* p. 623. REHNQUIST, J., filed a dissenting opinion, *post,* p. 630. STEVENS, J., took no part in the consideration or decision of the case.

Telford Taylor argued the cause for appellants. With him on the brief were *Kenneth Simon* and *Robert Funicello.*

James A. Major argued the cause for appellees. On the brief was *Everett I. Smith.*

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

The question presented in this case is whether a municipal ordinance requiring advance notice to be given to the local police department by "[a]ny person desiring to canvass, solicit or call from house to house . . . for a recognized charitable cause . . . or . . . political campaign or cause . . . in writing, for identification only" violates the guarantees of freedom of speech and due process of law embodied in the Fourteenth Amendment.

(1)

The Borough of Oradell, N. J., has enacted two ordinances that together regulate most forms of door-to-door canvassing and solicitation. A broad ordinance, No. 573, requires all solicitors to obtain a permit from the borough clerk, by making a formal application, accompanied by a description and photograph of the applicant, the description and license number of any automobile to be used in soliciting, a driver's license, and other data. The ordinance apparently requires that the chief of police approve issuance of the permit.[1]

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[1] Ordinance No. 573 provides in relevant part:

"*Section 1. Permit Required*

"No person shall canvass or solicit or call from house to house in the Borough to sell or attempt to sell goods by sample or to take

The ordinance at issue here, Ordinance No. 598A, is an amendment to this broader scheme, and imposes no permit requirement; it covers persons soliciting for "a recognized charitable cause, or any person desiring to

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or attempt to take orders for the future delivery of goods, merchandise, wares, or any personal property of any nature whatsoever, or take or attempt to take orders for services to be furnished or performed in the future, without first having received a written permit therefor.

"*Section 2. Application for Permit: Contents Thereof*

"a) Any person desiring a permit to canvass or solicit in the Borough shall file, on a form to be supplied by the Borough Clerk, an application with the Borough Clerk stating:

"(1) Name of applicant;

"(2) Permanent home address;

"(3) Name and address of employer or firm represented;

"(4) Place or places of residence of the applicant for the preceding three years;

"(5) Date on which he desires to commence canvassing or soliciting;

"(6) Nature of merchandise to be sold or offered for sale or the nature of the services to be furnished;

"(7) Whether or not the applicant has ever been convicted of a crime, misdemeanor, or violation of any ordinance concerning canvassing or soliciting, and if so, when, where and the nature of the offense;

"(8) Names of other communities in New Jersey in which applicant has worked as a solicitor or canvasser in the past 2 years.

"b) Said application shall also be accompanied by a letter or other written statement from the individual, firm or corporation employing the applicant, certifying that the applicant is authorized to act as the employer's representative.

"c) No such application shall be filed more than 3 months prior to the time such canvassing or soliciting shall commence.

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"*Section 4. Investigation: Issuance of Permit*

"The Borough Clerk shall give a copy of the application to the Chief of Police who shall cause such investigation to be made of the applicant's business and moral character as he deems necessary for the protection of the public good. He shall use any information

canvass, solicit or call from house to house for a Federal, State, County or Municipal political campaign or cause." Ordinance No. 598A also applies to "representatives of Borough Civic Groups and Organizations and any veterans honorably discharged or released under honorable circumstances" from the Armed Forces. Those covered by this ordinance are required only to "notify the Police Department, in writing, for identification only." Once given, the notice is "good for the duration of the campaign or cause." [2]

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available in other New Jersey cities, towns or boroughs, where the applicant has canvassed or solicited within 2 years last past.

. . . . .

"*Section 6. Penalty*

"Any person, firm or corporation violating any provision of this ordinance shall, upon conviction thereof, be fined in an amount not exceeding $500.00 or be imprisoned in the County Jail for a period not exceeding ninety (90) days, or be both fined and imprisoned. Each day said violation is permitted or is permitted to continue, shall constitute a separate offense and shall be subject to a penalty hereunder."

In *Collingswood* v. *Ringgold,* 66 N. J. 350, 331 A. 2d 262 (1975), appeal docketed, No. 74–1335, decided the same day as the case reviewed here, the New Jersey Supreme Court held that an ordinance quite similar to Ordinance No. 573 was invalid insofar as it vested in the chief of police too much discretion in deciding whether or not to grant a canvassing permit. The court in *Collingswood* accordingly struck that provision of the ordinance, but let the remainder stand.

[2] Ordinance No. 598A provides in relevant part:

"Whereas, The Borough of Oradell is primarily a one family residential town whose citizens are employed elsewhere, resulting in the wives of the wage earner being left alone during the day; and

"Whereas, because of the geographical location of most of the homes it is impossible to police all areas at the same time, resulting in a number of break and entries and larceny in the home; and

"Whereas, it is in the public interest and the public safety that persons not be permitted to call from house to house on the pretext of soliciting votes for a designated candidate or signatures for a nominating petition, or to solicit for a recognized charitable cause or

Appellants are Edward Hynes, a New Jersey state assemblyman whose district was redrawn in 1973 to include the Borough of Oradell, and three Oradell registered voters. They brought suit in the Superior Court of Bergen County, N. J., seeking a declaration that Ordinance No. 598A was unconstitutional and an injunction against its enforcement. Appellant Hynes alleged that he wished to campaign for re-election in Oradell. The other

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borough activity, without such persons being first identified by the Police Department; and

"WHEREAS, the Mayor and Borough Council of The Borough of Oradell feel that it is in the public interest and for the protection of The Borough of Oradell that such persons be required to notify the Police Department for the purpose of identification.

"NOW, THEREFORE, BE IT ORDAINED by the Borough Council of The Borough of Oradell, in the County of Bergen and State of New Jersey, that an ordinance entitled 'An ordinance to regulate and prohibit canvassing and soliciting in The Borough of Oradell and establish fees and provide penalties for the violation thereof' be amended and supplemented as follows:

"(1) That Section 1 be amended and supplemented by the addition of Section 1 (a) to be entitled 'Exceptions to Permit' as hereinafter set forth:

"Section 1 (a): Exceptions to Permit

"Any person desiring to canvass, solicit or call from house to house in the Borough for a recognized charitable cause, or any person desiring to canvass, solicit or call from house to house for a Federal, State, County or Municipal political campaign or cause, shall be required to notify the Police Department, in writing, for identification only. Said notification shall be good for the duration of the campaign or cause. The provisions of this section shall also apply to representatives of Borough Civic Groups and Organizations and any veterans honorably discharged or released under honorable circumstances from active service in any branch of the Armed Forces of the United States. All other Sections of Ordinance No. 573, with the exception of the penalty clause designated as Section 7 [*sic*], shall not be applicable to such persons or groups as designated herein.

"(2) All ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed."

appellants alleged either that they wished to canvass door to door in the borough for political causes or that they wished to speak with candidates who campaigned in Oradell. Each appellant claimed that the ordinance would unconstitutionally restrict such activity.

The Superior Court held the ordinance invalid for three reasons. First, the court noted that it contained no penalty clause, and hence was unenforceable under New Jersey law; second, the court held that the ordinance was not related to its announced purpose—the prevention of crime—since it required only candidates and canvassers to register.[3] Finally, the court concluded that the ordinance was vague and overbroad—unclear "as to what is, and what isn't required" of those who wished to canvass for political causes. The Appellate Division of the Superior Court affirmed, reaching and accepting only the first ground for the trial court's decision.

The Supreme Court of New Jersey reversed. 66 N. J. 376, 331 A. 2d 277 (1975). It noted that a penalty clause, enacted during the pendency of the appeal, cured the defect that had concerned the Appellate Division. Relying largely on a decision in a case dealing with a similar ordinance, *Collingswood* v. *Ringgold,* 66 N. J. 350, 331 A. 2d 262 (1975), appeal docketed, No. 74–1335, the court held that Ordinance No. 598A was a legitimate exercise of the borough's police power, enacted to prevent crime and to reduce residents' fears about strangers wandering door to door. The ordinance regulated conduct—door-to-door canvassing—as well as speech, and in doing so "it could hardly be more clear." 66 N. J., at 380, 331 A. 2d, at 279. The ordinance, the court thought, imposed

[3] The trial court's opinion in this regard appears to ignore the provisions of Ordinance No. 573, which covers other forms of door-to-door solicitation, and to which Ordinance No. 598A is an amendment.

minimal requirements which did not offend free speech interests:

> "It may be satisfied in writing, suggesting that resort may be had to the mails. It need be fulfilled only once for each campaign. There is no fee. The applicant does not have to obtain or carry a card or license. And perhaps most importantly, no discretion reposes in any municipal official to deny the privilege of calling door to door. The ordinance is plainly an identification device in its most basic form." *Ibid.*

Two of the court's seven members dissented. One justice thought the ordinance "plain silly" as a crime-prevention measure, for the reasons given by the trial court. *Id.*, at 382, 331 A. 2d, at 280; another justice thought that the "ordinance has the potential to have a significant chilling effect on the exercise of first amendment rights and thus infringes on these rights." *Id.*, at 389, 331 A. 2d, at 284.

(2)

We are not without guideposts in considering appellants' First Amendment challenge to Ordinance No. 598A. "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing," *Niemotko* v. *Maryland*, 340 U. S. 268, 275 (1951) (Frankfurter, J., concurring in result), and this Court has in several cases reviewed attempts by municipalities to regulate activities like canvassing and soliciting. Regulation in this area "must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly," *Thomas* v. *Collins*, 323 U. S. 516, 540–541 (1945). But in these very cases the Court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating

soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment.

In *Lovell* v. *Griffin,* 303 U. S. 444 (1938), the Court held invalid an ordinance that prohibited the distribution of "literature of any kind . . . without first obtaining written permission from the City Manager," *id.,* at 447. The ordinance contained "no restriction in its application with respect to time or place," and was "not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." *Id.,* at 451.

A year later, in *Schneider* v. *State,* 308 U. S. 147 (1939), the Court held unconstitutional an Irvington, N. J., ordinance that dealt specifically with house-to-house canvassers and solicitors. The ordinance required them to obtain a permit, which would not issue if the chief of police decided that "the canvasser is not of good character or is canvassing for a project not free from fraud." *Id.,* at 158. Because the Court concluded that the canvasser's "liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion," *id.,* at 164, the Court held the ordinance invalid. In *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), the Court held that a similar permit ordinance, as applied to prevent Jehovah's Witnesses from soliciting door to door, infringed upon the right to free exercise of religion, guaranteed by the First and Fourteenth Amendments. And in *Martin* v. *Struthers,* 319 U. S. 141 (1943), the Court struck down a municipal ordinance that made it a crime for a solicitor or canvasser to knock on the front door

of a resident's home or ring the doorbell. See also *Staub* v. *City of Baxley,* 355 U. S. 313 (1958).

In reaching these results, the Court acknowledged the valid and important interests these ordinances sought to serve. In *Martin, supra,* at 144, Mr. Justice Black writing for the Court stated:

> "Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime. Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit. . . . In addition, burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later. Crime prevention may thus be the purpose of regulatory ordinances."

As Mr. Justice Black suggested, the lone housewife has no way of knowing whether the purposes of the putative solicitor are benign or malignant, and even an innocuous caller "may lessen the peaceful enjoyment of a home." *Ibid.* In his view a municipality "can by identification devices" regulate canvassers in order to deter criminal conduct by persons "posing as canvassers," *id.*, at 148, relying on the Court's statement in *Cantwell, supra,* at 306:

> "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his

identity and his authority to act for the cause which he purports to represent."

These opinions of the Court and the dissenting opinions found common ground as to the important municipal interests at stake. See *Martin* v. *Struthers, supra,* at 152 (Frankfurter, J., dissenting); *id.,* at 154 (Reed, J., dissenting); *Douglas* v. *Jeannette,* 319 U. S. 157, 166 (1943) (Jackson, J., dissenting in *Martin* v. *Struthers*). Professor Zechariah Chafee articulated something of the householder's right to be let alone, saying:

> "Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires." Free Speech in the United States 406 (1954).

Professor Chafee went on to note: "[These cases] do not invalidate all ordinances that include within their scope . . . doorway dissemination of thought. Several sentences in the opinions state that ordinances suitably designed to take care of legitimate social interests are not void." *Id.,* at 407.

There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety. We cannot say, and indeed appellants do not argue, that door-to-door canvassing and solicitation are immune from regulation under the State's police power, whether the purpose of the regulation is to protect from danger or to protect the peaceful enjoyment of the home. See

Rowan v. *Post Office Dept.,* 397 U. S. 728, 735–738 (1970).

(3)

There remains the question whether the challenged ordinance meets the test that in the First Amendment area "government may regulate . . . only with narrow specificity." *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). As a matter of due process, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 (1939). The general test of vagueness applies with particular force in review of laws dealing with speech. "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U. S. 147, 151 (1959). See also *Buckley* v. *Valeo,* 424 U. S. 1, 76–82 (1976); *Broadrick* v. *Oklahoma,* 413 U. S. 601, 611–612 (1973).

Notwithstanding the undoubted power of a municipality to enforce reasonable regulations to meet the needs recognized by the Court in the cases discussed, we conclude that Ordinance No. 598A must fall because in certain respects "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Constr. Co.,* 269 U. S. 385, 391 (1926). Since we conclude that the ordinance is invalid because of vagueness, we need not reach the other arguments appellants advance.[4]

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[4] Appellants also argue that the ordinance bears no rational relationship to its announced purpose of crime prevention, that it is overbroad because it covers Oradell residents casually soliciting the votes of neighbors, and that it violates the Privileges and Immunities Clause of the Fourteenth Amendment by infringing on the right

First, the coverage of the ordinance is unclear; it does not explain, for example, whether a "*recognized* charitable cause" means one recognized by the Internal Revenue Service as tax exempt, one recognized by some community agency, or one approved by some municipal official. While it is fairly clear what the phrase "political campaign" comprehends, it is not clear what is meant by a "Federal, State, County or Municipal . . . *cause.*" Finally, it is not clear what groups fall into the class of "Borough Civic Groups and Organizations" that the ordinance also covers.[5]

Second, the ordinance does not sufficiently specify what those within its reach must do in order to comply. The citizen is informed that before soliciting he must "notify the Police Department, in writing, for identification only." But he is not told what must be set forth in the notice, or what the police will consider sufficient as "identification." This is in marked contrast to Ordinance No. 573 which sets out specifically what is required of commercial solicitors; it is not clear that the provisions of Ordinance 573 extend to Ordinance 598A. See n. 1, *supra.* Ordinance No. 598A does not have comparable precision. The New Jersey Supreme Court construed the ordinance to permit one to send the required identification by mail; a canvasser who used the mail might well find—too late—that the iden-

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to meet and discuss national candidates. We intimate no view as to these contentions.

[5] The flaw we find in this ordinance is vagueness, not the overbreadth at issue in *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973), on which the dissent relies. Several appellants alleged that their right to receive information would be infringed because persons canvassing for political causes would be uncertain whether the ordinance covered them. In the circumstances of this case these allegations are enough to put in issue the precision or lack of precision with which the ordinance defines the categories of "causes" it covers.

tification he provided by mail was inadequate. In this respect, as well as with respect to the coverage of the ordinance, this law "may trap the innocent by not providing fair warning." *Grayned* v. *City of Rockford,* 408 U. S. 104, 108 (1972). Nor does the ordinance "provide explicit standards for those who apply" it. *Ibid.* To the extent that these ambiguities and the failure to explain what "identification" is required give police the *effective* power to grant or deny permission to canvass for political causes, the ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell,* and *Staub.* See also *Papachristou* v. *City of Jacksonville,* 405 U. S. 156, 162 (1972); *Coates* v. *City of Cincinnati,* 402 U. S. 611, 614 (1971); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–85 (1960).

The New Jersey Supreme Court undertook to give the ordinance a limiting construction by suggesting that since the identification requirement "may be satisfied in writing, . . . resort may be had to the mails," 66 N. J., at 380, 331 A. 2d, at 279, but this construction of the ordinance does not explain either what the law covers or what it requires; for example, it provides no clue as to what is a "recognized charity"; nor is political "cause" defined. Cf. *Colten* v. *Kentucky,* 407 U. S. 104, 110–111 (1972); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941). Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out—a matter on which we intimate no view—we are without power to remedy the defects by giving the ordinance constitutionally precise content.[6] *Smith* v. *Goguen,* 415 U. S. 566, 575 (1974).

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[6] The agency charged with enforcement, the police department, has not adopted any regulations that would give more precise mean-

Accordingly, the judgment is reversed, and the case is remanded to the Supreme Court of New Jersey for further proceedings not inconsistent with this opinion.

It is so ordered.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part.

I join Part 3 of the Court's opinion holding that Oradell Ordinance No. 598A must be invalidated as impermissibly vague. The Court reserves decision on other constitutional contentions alleged to invalidate the ordinance. *Ante,* at 620–621, n. 4. Despite this reservation, Part 2 of the Court's opinion may be read as suggesting that, vagueness defects aside, an ordinance of this kind would ordinarily withstand constitutional attack. Because I believe that such ordinances must encounter substantial First Amendment barriers besides vagueness, I cannot join Part 2 and briefly state my reasons.

In considering the validity of laws regulating door-to-door solicitation and canvassing, Mr. Justice Black, speaking for the Court in *Martin* v. *Struthers,* 319 U. S.

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ing to the ordinance—if indeed it has the legal power to do so. Cf. *Broadrick,* 413 U. S., at 616–617; *CSC* v. *Letter Carriers,* 413 U. S. 548, 575 (1973); *Law Students Research Council* v. *Wadmond,* 401 U. S. 154, 162–163 (1971). The chief of police suggested in an affidavit that neither a photograph nor fingerprints are required, and that the canvasser must simply "let us know who he is." To the extent that this explanation adds any specificity to the ordinance, it does not purport to be binding on the enforcement authorities. Cf. *ibid.* Nor has the ordinance a history of "less formalized custom and usage" that might remedy the vagueness problems. *Parker* v. *Levy,* 417 U. S. 733, 754 (1974).

141 (1943), properly recognized that municipalities have an important interest in keeping neighborhoods safe and peaceful. But unlike the Court today, he did not stop there. Rather, he emphasized the other side of the equation—that door-to-door solicitation and canvassing is a method of communication essential to the preservation of our free society. He said:

> "While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. 'Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.' *Schneider* v. *State,* [308 U. S. 147, 164 (1939)]. Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people." *Id.,* at 145–146.

It can hardly be denied that an ordinance requiring

the door-to-door campaigner to identify himself discourages free speech. *Talley* v. *California,* 362 U. S. 60 (1960), invalidated a Los Angeles ordinance requiring handbills to carry the name and address of persons writing, printing, or distributing them. Since the requirement destroyed anonymity, "[t]here [could] be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression," *id.,* at 64, for:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.,* at 64–65.

No less may be said of anonymity sought to be preserved in the door-to-door exposition of ideas. That anonymity is destroyed by an identification requirement like the Oradell ordinance.[1] "[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance," *id.,* at 65, particularly where door-to-door solicitation seeks discussion of sensitive and controversial issues, such as civilian police

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[1] Ordinance 598A does not expressly require solicitors to identify the political campaign or candidate for whose cause they solicit. It may be that such a requirement is implicit in the provision that "notification [to the police] shall be good for the duration of the campaign or cause." If so, there may be a First Amendment question whether that disclosure can be compelled. Indeed, that question would be presented even if a requirement of personal identification could withstand First Amendment challenge.

review boards, the decriminalization of specified types of conduct, or the recall of an elected police official. Deplorably, apprehension of reprisal by the average citizen is too often well founded. The national scene in recent times has regrettably provided many instances of penalties for controversial expression in the form of vindictive harassment, discriminatory law enforcement, executive abuse of administrative powers, and intensive government surveillance.[2]

Nor is the threat to free expression by ordinances of this type limited to their jeopardization of anonymity. Perhaps an even greater threat lies in the impermissible burden they impose upon political expression, the core conduct protected by the First Amendment.[3] Unques-

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[2] Our recent decision in *Buckley* v. *Valeo,* 424 U. S. 1 (1976), is wholly consistent with this view. *Buckley* clearly recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.,* at 64. See *id.,* at 68, 71, 81–82. In *Buckley,* the Court did uphold the disclosure provisions of the Federal Election Campaign Act despite their effect on anonymity, distinguishing *Talley* v. *California,* 362 U. S. 60 (1960), as involving a disclosure law not narrowly limited to situations where the information sought has a substantial connection with the governmental interest sought to be advanced. Here, however, there are substantial questions whether identification requirements like Oradell's are so adequately related to their purpose as to withstand First Amendment challenge. See *infra,* at 628–630. Moreover, door-to-door solicitation, unlike the contribution of money, is an activity of high visibility. Consequently, the danger of deterrence is much greater here than with respect to contributions. Indeed, *Buckley,* in expressing its concern for the special problems of minority parties, recognized the greater threat posed to free speech where smaller numbers result in the clearer association of individuals with a cause. See 424 U. S., at 68–72.

[3] "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order

tionably, the lifeblood of today's political campaigning must be the work of volunteers. The oppressive financial burden of campaigns makes reliance on volunteers

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'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States,* 354 U. S. 476, 484 (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' *Winters* v. *New York,* 333 U. S. 507, 510 (1948), 'there is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . .' *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley* v. *Valeo, supra,* at 14–15.

"The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'...

"In the specific language of the Constitution, the governing activities of the people appear only in terms of casting a ballot. But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. . . .

"The responsibilities mentioned are of three kinds. We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness. . . . These are the activities to whose freedom [the First Amendment] gives its

absolutely essential and, in light of the enormous significance of citizen participation to the preservation and strength of the democratic ideal, absolutely desirable, indeed indispensable. Offensive to the sensibilities of private citizens, identification requirements such as the Oradell ordinance, even in their least intrusive form, must discourage that participation.

I recognize that there are governmental interests that may justify restraints on free speech. But in the area of First Amendment protections, "[t]he rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. . . . Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). Restraints implicit in identification requirements, however, extend beyond restrictions on time and place—they chill discussion itself. The Oradell type of ordinance therefore raises substantial First Amendment questions not presented by the usual time, place, and manner regulation.[4] See *Grayned* v. *City of Rockford,*

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unqualified protection." Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, 255.

[4] To be sure, Mr. Justice Black did observe in *Martin* v. *Struthers,* 319 U. S. 141, 148 (1943), that "[a] city can . . . by identification devices control the abuse of the privilege by criminals posing as canvassers." The validity of that passing remark, however, may be questioned in light of the later decisions in *Talley* v. *California, supra,* and *Thomas* v. *Collins,* 323 U. S. 516 (1945). Moreover, the footnote accompanying that statement apparently limited its applicability to solicitation of money. The footnote states: "'Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly *to solicit funds* for any purpose, to establish his identity and his authority to act for the cause which he purports to repre-

408 U. S. 104, 115 (1972). Under the ordinance, no authentication of identity need be submitted, and therefore the requirement can be easily evaded.[5] In that circumstance, the requirement can hardly be justified as protective of overriding governmental interests since evasion can easily thwart that objective. See *Buckley* v. *Valeo,* 424 U. S. 1, 45 (1976). But imposition of more burdensome identification requirements, such as authentication, would doubtless only serve further to discourage protected activity and, therefore, not eliminate the First Amendment difficulty. Moreover, the purported aid to crime prevention provided by identification of solicitors is not so self-evident as to relieve the State of the burden of proving that this asserted interest would be served. What Mr. Justice Harlan said of the handbill ordinance invalidated in *Talley* may equally be said of ordinances of the Oradell type:

> "Here the State says that this ordinance is aimed at the prevention of 'fraud, deceit, false advertising, negligent use of words, obscenity, and libel,' in that

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sent,'" 319 U. S., at 148 n. 14 (emphasis added) (quoting *Cantwell* v. *Connecticut,* 310 U. S. 296, 306 (1940)). But, as I suggest in the text, solicitation of support for a candidate in a political campaign presents a First Amendment question of a very different order. The opinion in *Thomas* draws the distinction:

"We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.

"Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. . . ." 323 U. S., at 540.

[5] Indeed, the opinion of the New Jersey Supreme Court suggests that mailing the information would satisfy the ordinance's identification requirements. See 66 N. J. 376, 380, 331 A. 2d 277, 279 (1975).

it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have." 362 U. S., at 66–67 (concurring opinion).[6]

Contrary to the thrust of Part 2 of the Court's opinion, it seems inescapable that ordinances of the Oradell type, however precisely drafted to avoid the pitfalls of vagueness, must present substantial First Amendment questions. The imperiling of precious constitutional values, for reasons however justifiable, cannot be taken lightly. The prevention of crime is, of course, one of the most serious of modern-day problems. But our perception as individuals of the need to solve that particular problem should not color our judgment as to the constitutionality of measures aimed at that end.

MR. JUSTICE REHNQUIST, dissenting.

I agree with virtually everything said in Parts 1 and 2 of the Court's opinion, which indicates that the Oradell

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[6] See also *Buckley* v. *Valeo,* 424 U. S., at 64: "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since [*NAACP* v. *Alabama,* 357 U. S. 449 (1958)] we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a 'relevant correla-

ordinance in question can survive a wide range of "as applied" challenges based on the First and Fourteenth Amendments. I do not agree with Part 3 of the Court's opinion, which concludes that the ordinance is unconstitutionally vague as presently drafted.

The Court recognizes that none of our cases have ever suggested that a regulation requiring only identification of canvassers or solicitors would violate any constitutional limitation. As noted by the Court in Part 2 of its opinion, at least two decisions have taken care to point out that such ordinances would unquestionably be valid. See *Cantwell* v. *Connecticut,* 310 U. S. 296, 306 (1940); *Martin* v. *Struthers,* 319 U. S. 141, 148 (1943).

I also agree with the Court's observation that:

> "A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." *Ante,* at 617.

The Court goes on to point out that this element of unbridled official discretion was present in all those cases in which the Court has invalidated laws which might otherwise be thought to bear a superficial resemblance to the ordinance at issue here. There is clearly no such vice in the Oradell ordinance. As the Court recognizes, Ordinance No. 598A "imposes no permit requirement." *Ante,* at 612. Instead, it comes to us with the binding, *NAACP* v. *Button,* 371 U. S. 415, 432 (1963), construction of the New Jersey Supreme Court that under Oradell's law "no discretion reposes in any municipal official to deny the privilege of calling door to door." *Ante,* at 616, quoting from 66 N. J. 376, 380, 331 A. 2d 277, 279 (1975).

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tion' or 'substantial relation' between the governmental interest and the information required to be disclosed."

After demonstrating the undoubted constitutional validity of Oradell's ordinance in all other respects, the Court proceeds in Part 3 of its opinion to determine that the ordinance is unconstitutional because of its asserted vagueness. But even allowing for the stricter standard which the Court says is appropriate in dealing with laws regulating speech, *ante,* at 620, I fail to see any vagueness in this ordinance which would not inhere in any ordinance or statute which has never been applied.

The first alleged infirmity cited by the Court is that the ordinance's coverage is unclear. It suggests that this occurs because it is difficult to ascertain precisely what "causes" are covered by the law or what groups come within a general definition found therein. Assuming for the moment that these references in the ordinance may be "vague," at least as that term is colloquially employed, there is no one in this case who may raise any claim that this "vagueness" is of constitutional dimension. From their verified complaint filed in Bergen County Superior Court, it is clear that appellants asserted interests only in the ordinance's effect upon political canvassing, either as it would deter their own ability to seek political support or in their desire to receive such entreaties in their homes. App. F. None of the appellants assert any connection with "charitable" or any other "causes," nor do they profess membership in any groups which might come within the class of "Borough Civic Groups and Organizations" which the Court believes to be somehow unclearly defined. And since the Court accepts that the only conduct which appellants present—political canvassing—may validly be regulated by means of an identification requirement more "narrowly drawn" than that at issue here, there would seem to be no justification, even on the Court's theory of this case, to permit appellants to raise claims which others might have against the

ordinance. *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973).

The Court seems initially to suggest in a footnote, *ante,* at 621 n. 5, that reliance upon a "vagueness" theory may somehow displace the normal prohibition against assertion of constitutional *jus tertii.* Any logic in such a purported distinction escapes me. *Broadrick* recognized that it is *only* the application of the doctrine of "overbreadth" which sometimes permits limited exceptions to traditional rules of standing in the First Amendment area. 413 U. S., at 610–616. Here no tenable overbreadth claim exists, and the Court correctly eschews reliance upon that doctrine. Thus the only claims properly before us are those based upon rights personal to the appellants.* I do not understand the Court to dispute this proposition: instead of attempting to rely upon whatever distinctions which invocation of "vagueness" may afford, the Court in its footnote goes on to discover allegations of several appellants regarding asserted personal "rights" to receive information of political *causes* which it concludes are sufficient to confer standing. I read the appellants' complaint differently than does the Court. But more fundamentally, I fail to see how assertion of a purported "right to receive information" may permit one to raise a challenge grounded upon hypo-

*Had appellants attempted to bring their action in the Federal District Court for the District of New Jersey, *Younger* v. *Harris,* 401 U. S. 37 (1971), and its companion cases would seem to pose insuperable barriers to its successful maintenance. But as the New Jersey courts chose to entertain appellants' constitutional challenge to the Oradell ordinance despite its having never been applied, the considerations of equity, comity, and federalism which underlie the holding in *Younger* are here largely absent. And since the judgment of the New Jersey Supreme Court is reviewable on our obligatory docket, 28 U. S. C. § 1257 (2), some of appellants' claims are properly before the Court.

thetical canvassers' potential uncertainty regarding coverage of an ordinance. And even if the Court were correct in determining that the scope of "political cause" is properly drawn into question, its expressions of uncertainty as to what constitutes a "recognized charitable cause" or a "Borough Civic Group [or] Organization" continue to float wholly detached from any plaintiff with standing to challenge those aspects of the ordinance's coverage.

Assuming, on the other hand, that such issues as to the clarity of the coverage of Ordinance No. 598A are properly before the Court, I can see no constitutional infirmity in its language. In *Broadrick* we held that claims of vagueness directed against indistinguishable phrasing found in Oklahoma's Merit System of Personnel Administration Act were "all but frivolous." 413 U. S., at 607. In so doing we recognized:

> "Words inevitably contain germs of uncertainty and . . . there may be disputes over the meaning of such terms . . . . But . . . 'there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the [definitions] may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'" *Id.,* at 608, quoting from *CSC* v. *Letter Carriers,* 413 U. S. 548, 578–579 (1973).

Broadrick's recognition of the inherent limitations upon anticipating and defining away every problem of interpretation which might arise regarding a new statute is undeniably sound, and it is largely dispositive of any claim that the ordinance's coverage is so unclear as to violate constitutional limitations.

The other shortcoming which the Court criticizes is the ordinance's failure to "sufficiently specify what those within its reach must do in order to comply." *Ante,* at 621. But, as the Court recognizes, the ordinance demands quite plainly that a person such as appellant Hynes who desires to canvass in the borough must "notify the Police Department, in writing, for identification only." As the chief of police of the borough of Oradell put it in an affidavit submitted to the Superior Court: "All that is asked is that [a political candidate] let us know who he is." App. G-5. I cannot see how this provision can possibly become the trap for the unwary the Court suggests in its opinion.

Appellant Hynes, for example, knows he is involved in a political campaign and that he must identify himself, in writing, to the Oradell Police Department if he desires to canvass door to door there. Should he have any doubts as to whether his identification is sufficiently detailed, he has simple recourse close at hand; he need only ask the Oradell police: "Is that enough? Do you require anything more?" Persons may thus learn exactly what is required in practice. The Court hypothesizes that a canvasser who chose to submit the requisite identification to the Oradell police by mail might learn "too late" that his submission was inadequate. Such good-faith attempts at compliance might be found to preclude liability, and the availability of similar narrowing constructions says a good deal about the wisdom of declaring this law unconstitutional before it has ever been applied. But even apart from these considerations the most that the ordinance imposes upon potential cassvassers is the necessity of identifying themselves sufficiently in advance to ensure they have satisfied the law before embarking door to door in Oradell. Such a delay, which can hardly be more than a few days, is surely not

an unconstitutional burden upon appellants' rights. Surely "the guarantees of freedom of speech and due process of law embodied in the Fourteenth Amendment," *ante,* at 611, do not require that an ordinance validly requiring the identification of citizens must specify every way in which they may satisfactorily provide that information. No constitutional value is served by permitting persons who have avoided any possibility of attempting to ascertain how they may comply with a law to claim that their studied ignorance demonstrates that the law is impermissibly vague.

Finally, I do not understand the Court's concluding observations regarding the vice of vagueness which it perceives in the ordinance's compliance directive. The Court suggests that unspecified ambiguities may "give police the *effective* power to grant or deny permission to canvass for political causes." *Ante,* at 622. But as the Court itself notes in Part 2 of its opinion, it has been authoritatively held as a matter of New Jersey law that this ordinance reposes "no discretion . . . in any municipal official to deny the privilege of calling door to door." Thus the authorities which the Court cites directly before the penultimate paragraph of its opinion afford no support for the result it reaches.

The Court "intimate[s] no view" as to appellants' other contentions, *ante,* at 621 n. 4. Since I do not agree that there exists any unconstitutional vagueness in Ordinance No. 598A, I have felt obliged to consider these contentions to determine if today's result can be defended upon some other ground. I do not believe that it can be. I would therefore affirm the judgment of the Supreme Court of New Jersey.

Syllabus

AMERICAN MOTORISTS INSURANCE CO. *v.* STARNES

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

No. 74-1481. Argued February 23, 1976—Decided May 19, 1976

Though Texas' general venue statute provides that no inhabitant of the State shall be sued outside the county of his domicile, an exception where a Texas corporation is the defendant provides in pertinent part for suit outside the domiciliary county only if at a preliminary venue hearing it is proved by a preponderance of evidence that the plaintiff has a cause of action. No such proof is required under another exception applicable in a suit against a foreign corporation like appellant, which has qualified to do business in Texas. On appellant's challenge to the constitutionality of this venue procedure as being invidiously discriminatory in that it does not accord a foreign corporation pretrial advantages that are given a domestic corporation such as, *inter alia,* previewing its adversary's case in chief and cross-examining the plaintiff's witnesses, *held* that the Texas statutory venue scheme is not violative of equal protection, since it appears that as a matter of practice, prima facie proof is regarded as meeting the burden of the plaintiff in a suit against a domestic corporation, with the result that a domestic corporation does not have any appreciable advantage over a foreign corporation. Thus, the Texas statutory procedure, though facially discriminatory, is nondiscriminatory in application. Pp. 642-646.

515 S. W. 2d 354, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, in which REHNQUIST, J., joined, *post,* p. 646.

Joel W. Westbrook argued the cause for appellant. With him on the brief was *Matt C. C. Bristol III.*

W. V. Dunnam, Jr., argued the cause for appellee. On the brief was *Fred J. Horner III.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant, American Motorists Insurance Co., is an Illinois corporation authorized to do business in Texas with its principal office in Dallas County. As such, it is a "person" and an "inhabitant" of Texas having its "domicile" in Dallas County for the purposes of Texas' general venue statute, Tex. Rev. Civ. Stat., Art. 1995 (1964). *Snyder* v. *Pitts*, 241 S. W. 2d 136 (Tex. 1951). Article 1995 provides, with specified exceptions: "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile . . . ." The exceptions pertinent to this case are Exceptions 23 and 27 of Art. 1995. Under Exception 23, suits against domestic corporations may be brought outside the domiciliary county upon proof by the plaintiff at a preliminary venue hearing, not only that the Texas corporation has an agency or representative in the county of suit and that plaintiff resided in or near such county at the time his cause of action arose, but also, by proof by a preponderance of the evidence, that he has a cause of action. *Victoria Bank & Trust Co.* v. *Monteith*, 158 S. W. 2d 63 (Tex. Comm'n App. 1941). Exception 27, on the other hand, allows suit against foreign corporations, including those like appellant, that have qualified to do business in Texas, to be brought "in any county where such company may have an agency or representative," and the plaintiff is not required to prove, by a preponderance of the evidence, the elements of his cause of action at the preliminary venue hearing.[1] The question for decision

[1] Article 1995 provides in pertinent part:

"No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

. . . . .

"23. Corporations and associations.—Suits against a private cor-

in this case, therefore, is whether Exception 27 effects an invidious discrimination against foreign corporations, constituting Exception 27 repugnant to the Equal Protection Clause of the Fourteenth Amendment.

Appellee Starnes, a resident of McLennan County, sued appellant in the District Court for McLennan County under the uninsured-motorist provisions of a liability insurance policy issued to appellee by appellant. The automobile collision out of which this cause of action and appellee's damages arose occurred in Tarrant County. Appellant filed a plea of privilege to be sued in the county of its residence, Dallas County. A plea of privi-

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poration, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.

. . . . .

"27. Foreign corporations.—Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside."

lege is a verified pleading by which, under Texas practice, a defendant challenges the venue of a suit. Tex. Rule Civ. Proc. 86. Appellee filed a controverting plea, a verified pleading by which, under Texas practice, the plaintiff states specifically the grounds relied upon to confer venue under one or more exceptions in Art. 1995. *Ibid.* The controverting plea asserted venue by virtue of both Exceptions 23 and 27, but at the preliminary venue hearing, appellee relied exclusively upon Exception 27 and a stipulation of the parties that appellant was a foreign corporation transacting business in Texas and that it had a local agent in McLennan County. Although appellant's counsel inquired "if Plaintiff has any evidence other than that contained in the stipulation" and appellee's counsel answered: "Not at this time," App. 15, appellee was not required by the court, nor did he attempt, to offer evidence as to any of the elements of his cause of action. The District Court overruled appellant's plea of privilege.

Appellant's appeal to the Court of Civil Appeals of Texas presented the single question whether Exception 27 "is unconstitutionally discriminatory because it permits a foreign corporation to be venue bound without [plaintiff's] proving a cause of action, but only . . . the existence within the venue county of defendant foreign corporation's agent as compared with the requirement that a Texas domestic corporation can be venue bound under Subdivision 23 only if the existence of a cause of action is demonstrated." 515 S. W. 2d 354, 355 (1974). The Court of Civil Appeals, relying upon a decision of the Texas Supreme Court, *Commercial Ins. Co.* v. *Adams,* 369 S. W. 2d 927 (1963),[2] held that "exception 27, Article

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[2] *Commercial Ins. Co.* v. *Adams* was a *per curiam* affirmance of a holding of the Houston Court of Civil Appeals, 366 S. W. 2d 801 (1963), that Exception 27 is not void and unconstitutional under

1995 is not void and unconstitutional under the 14th Amendment to the United States Constitution as affording a wider venue action against foreign corpora-

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the Equal Protection Clause. In rejecting the contention that the difference in treatment of foreign corporations under Exception 27 from that of domestic corporations under Exception 23 violated equal protection, the Court of Civil Appeals stated:

"There is no contention that the same and equal laws are not applicable and administered in all counties of Texas. Subdivision 27 applies to all foreign corporations. It is a matter of common knowledge that many foreign corporations do business in this state without taking advantage of the laws of this state authorizing them to do business in Texas and subjecting them to regulation. It would be difficult, if not impossible, for a plaintiff to ascertain the principal office of a foreign corporation not authorized to do business in this state. A foreign corporation qualified to do business in this state may designate as its principal office a county remote from the population centers of the state, in which it conducts little or no business since its principal office, in fact, ordinarily will be maintained in the state of incorporation. A domestic corporation would be likely to find such a procedure uneconomical. Competitive factors probably would dictate that its principal office be located where it intends to conduct its business. Thus the foreign corporation is favored over the domestic concern when it is permitted to choose any city as its principal place of business.

"There is little doubt that the difficulty of securing service on foreign corporations was a factor inducing the legislature to provide a wide venue for actions against them. . . .

"The degree of effective control which the state may exercise over domestic corporations as opposed to foreign corporations in general justifies the classification adopted by the state legislature. The state policy in this respect is not so arbitrary as to be unconstitutional. As regards foreign corporations submitting to a certain degree of control by qualifying to do business in the state, the justification is less evident, but nevertheless the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations. . . .

"It could well be that the legislature had in mind spreading litigation involving foreign corporations among the various courts of the

tions than is afforded against domestic corporations under Section 23 of the same Article." 515 S. W. 2d, at 355. The Supreme Court of Texas dismissed appellant's application for writ of error "for want of jurisdiction." We noted probable jurisdiction, 423 U. S. 819 (1975).[3] We affirm.

We are unable to say that the treatment of foreign corporations effected by Exception 27 constitutes discrimination repugnant to the Equal Protection Clause. The gist of appellant's argument is that, because Exception 27 does not require that plaintiff demonstrate the existence of his cause of action, there was "[d]enied to appellant . . . a virtually unique opportunity afforded to domestic corporations, to preview its adversary's case in chief (except as to the extent of damages); to cross-examine plaintiff's witnesses as to the nature and existence of the alleged cause of action; to obtain from the Court a venue ruling which would, under the circumstances, be tantamount to a judicial assessment of plaintiff's cause of action; to nip a frivolous or baseless claim 'in the bud,' before it could escalate into a lengthy, complex and time-consuming lawsuit; and finally, to obtain,

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state in order to avoid the possibility of increasing the congested condition of the dockets of the metropolitan courts. . . . The burden of proving unconstitutionality of this statute rests on appellant more heavily in view of the fact that the act attacked was undoubtedly constitutional when enacted and the question of its legality at this time arises, not by reason of a change in its provisions, but by reason of the enactment of a statute amending Section 23, and not because discriminatory burdens have been placed on foreign corporations, but because the same burden has been removed from domestic corporations." 366 S. W. 2d, at 808–809.

[3] Appellant has invoked this Court's jurisdiction under 28 U. S. C. § 1257 (2), which requires that the judgment for which review here is sought be final. For the reasons stated in *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 558 (1963), the judgment presently before the Court is final for purposes of § 1257 (2).

by demanding a jury trial of the venue facts, either an early trial on the merits or at least a preliminary assessment by a jury of the plaintiff's credibility." [4] It was suggested at oral argument, however, that the actual burden imposed upon the plaintiff falls far short of proving his cause of action by a preponderance of the evidence. While Texas case law seems to reject proof of a prima facie case as sufficient, see *Victoria Bank & Trust Co.* v. *Monteith,* 158 S. W. 2d, at 66–67, the parties suggest that in practice the venue proceedings are usually truncated and that prima facie proof is regarded as meeting the plaintiff's burden.[5] In that circumstance the domes-

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[4] Brief for Appellant 17–18. Texas Rule Civ. Proc. 87 provides that where a jury trial is demanded on a venue issue, "the court, in its discretion, may require the cause to be tried on its merits at the same time." Despite the absence of any limitation of this provision to suits against domestic corporations, appellant's argument implies that the provision is inapplicable to suits against foreign corporations, thereby denying them opportunity for an early trial on the merits. We have no occasion, however, to address the question whether, if applicable also to suits against foreign corporations, appellant could have eliminated this ground of their equal protection complaint simply by demanding a jury trial. No jury trial was demanded, and therefore we decide the equal protection issue in the context of the bench trial that occurred.

[5] This was disclosed by appellee's counsel at oral argument:

"[T]echnically, legally, according to decisions, it is preponderance of the evidence as a matter of actual truth and fact and then, in factual analysis, it was simply a matter of prima facie proof.

"Actually, the way the practice goes, a man makes out a prima facie case. He doesn't show anything other than a prima facie case. The trial judge—I have never known of one to cite it just on weighing the evidence and actual facts. If he makes out a prima facie case, the plea of privilege is overruled.

"That was the law for many, many years in the State of Texas and then they changed it to preponderance of the evidence and of course, trial courts being jealous of their own jurisdiction, your Honor, if a man files a case in this Court, if he shows that there was

tic corporate defendant would not appear to enjoy any appreciable advantage denied the foreign corporate defendant. At most the plaintiff suing a domestic corporation is subjected to some measure of discovery. But Texas has a summary judgment procedure, Tex. Rule Civ. Proc. 166–A, and broad pretrial discovery procedures, Rules 167–170, 177a, 186–215c, 737; and they are equally available to the foreign corporate defendant. We cannot say in that circumstance that the foreign corporate defendant suffers any discrimination in being denied comparable discovery available to the domestic corporation at a preliminary venue hearing. For, as the Court said in an analogous context: "[I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected

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a collision and his client says the light was green for him, the other—the defendant takes the stand, which they never do. The defendant never puts any evidence on a plea of privilege." Tr. of Oral Arg. 23.

Appellant's counsel appeared tacitly to concede that this was the case:

"QUESTION: Normally, what is it, sort of a prima facie case and just hears the plaintiff?

"MR. WESTBROOK: No, sir, it has to go beyond that. In our trials court, he has to prove it by the preponderance of the evidence but of course, if a judge is the finder of facts in this kind of preponderance business, it is not likely to be upset that it was the preponderance of the evidence." *Id.*, at 10.

Where a jury trial is demanded on a venue issue, however, the proceedings are not truncated, for then, under Tex. Rule Civ. Proc. 87, trial is usually also had on the merits. Tr. of Oral Arg. 22. But in that event, venue proceedings are effectively waived and the domestic defendant enjoys no advantage over the foreign defendant by virtue of any sort of opportunity to preview the plaintiff's case.

and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail." *Cincinnati Street R. Co.* v. *Snell,* 193 U. S. 30, 36–37 (1904). We are not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect. Just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, *Williams* v. *Illinois,* 399 U. S. 235, 242 (1970); *Griffin* v. *Illinois,* 351 U. S. 12, 17 n. 11 (1956), so may a statute discriminatory on its face be nondiscriminatory in its operation. There being no discriminatory effect achieved by the aspects of the Texas venue provisions calling for establishment of a cause of action, we have no difficulty in concluding that appellant's equal protection challenge to Exception 27 must be rejected.[6]

Beyond the superficial requirement of proof of a cause of action, the Texas venue statute, as noted, provides

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[6] Our conclusion makes unnecessary consideration of appellant's argument that *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490 (1927), requires invalidation of Exception 27. Though more recent decisions raise the question whether *Saunders* continues to be good law, *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959); *Metropolitan Cas. Ins. Co.* v. *Brownell,* 294 U. S. 580 (1935); *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499 (1931), as appellant argues, the Court in *Saunders* did conclude that the venue statute involved there treated foreign corporations without reasonable basis and arbitrarily. That statute allowed a suit for personal injuries to be brought against a foreign corporation in any county, without regard to whether the corporation maintained an agent there, whereas actions of the same character, if against a domestic corporation, had to be brought in a county where it had a place of business or in which its chief officer resided.

broader venue geographically for suits against foreign corporations than for suits against domestic corporations. Appellant, however, does not challenge this difference. See Tr. of Oral Arg. 4–5. In any event, proof of cause of action aside, under Texas law, a domestic corporation may be sued in the plaintiff's county of residence provided the corporation has an agency or representative in that county. The situation of appellant is precisely the same. It is undisputed that the appellant was sued in the plaintiff's county of residence and that appellant had an agent in that county.

Affirmed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

Like the Court, I am "unable to say that the treatment of foreign corporations effected by Exception 27 constitutes discrimination repugnant to the Equal Protection Clause." I reach this conclusion, however, for somewhat different reasons from those the Court sets out.

A plaintiff may sue a foreign or domestic corporation in Texas without proving up a cause of action at a preliminary hearing, by a preponderance of the evidence or by making out a prima facie case. The only "discrimination" between the two types of corporations is that a foreign corporation may be sued without such proof wherever it has "an agency or representative." Tex. Rev. Civ. Stat., Art. 1995, Exception 27 (1964). In my view, this does not amount to a denial of equal protection. "It is not . . . the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail." *Cincinnati Street R. Co.*

v. *Snell,* 193 U. S. 30, 37 (1904). To the extent that the statute treats foreign corporations differently, the difference has a rational basis.

> "The degree of effective control which the state may exercise over domestic corporations as opposed to foreign corporations in general justifies the classification adopted by the state legislature. The state policy in this respect is not so arbitrary as to be unconstitutional. As regards foreign corporations submitting to a certain degree of control by qualifying to do business in the state, the justification is less evident, but nevertheless the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations." *Commercial Ins. Co.* v. *Adams,* 366 S. W. 2d 801, 808–809 (Tex. Civ. App.), writ refused, 369 S. W. 2d 927 (Tex. 1963).

In *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 501 (1931), this Court held: "The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." See also *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490, 497 (1927) (Holmes, J., dissenting).

Appellee invoked the broad Texas provision for venue of suits against foreign corporations to sue in McLennan County, where appellant had an agent. Had appellant been a domestic corporation, the analogous venue provision would have permitted appellee to bring suit only in the corporation's home county. In neither instance would appellee have been required to prove up his cause of action in order to show proper venue, and there is thus no difference in the treatment of the two types of corporations beyond the provision for broader

venue against foreign corporations. In my view, this case raises no other issue.

It is true that, had appellant been a domestic corporation, appellee might also have sued in McLennan County, under a provision that permits suits against domestic corporations to be brought in the county where the plaintiff resided when the cause of action accrued, so long as the corporation has an agent there. Tex. Rev. Civ. Stat., Art. 1995, Exception 23 (1964). Had appellee used Exception 23 to sue this hypothetical domestic corporation outside its home county, the corporation could have required him to prove up his cause of action in order to show proper venue. The Court implies that *this* difference in treatment would create an equal protection problem were it not for the fact that the state courts do not really require proof of the cause of action by a preponderance of the evidence. Because a similarly situated domestic corporation could not have required appellee to use Exception 23, I fail to see how appellant could have a "right" to the procedures that attend its use, or how appellant was denied anything that a domestic corporation would have had.

It seems to me, in short, that the Court has posed a synthetic problem by casting the issue as it does. To dispose of it, the Court proceeds to rely on a rather novel proposition: so long as counsel for a private litigant states, on oral argument in this Court, that, in spite of what the state courts say to the contrary, the State does not in most cases enforce a law discriminatory on its face, this Court will uphold the law. I cannot believe the Court would accept this proposition in any case that presented a serious issue of equal protection, and I prefer not to rely upon it in this case.

NORTHERN CHEYENNE TRIBE *v.* HOLLOWBREAST ET AL.

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

No. 75–145. Argued March 29, 1976—Decided May 19, 1976

Section 3 of the Northern Cheyenne Allotment Act of 1926 (Act) reserves coal and other mineral deposits underlying lands on the Northern Cheyenne Reservation for the Tribe's benefit, but further provides that 50 years after approval of the Act such deposits "shall become the property of the respective allottees or their heirs" and that the "unallotted lands" shall be "subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians." In 1968 Congress amended the Act to reserve the mineral rights "in perpetuity for the benefit of the Tribe," subject to a prior judicial determination that the allottees had not been granted vested rights to the mineral deposits by the Act. As authorized by the 1968 amendment the Tribe brought suit against the allottees to determine whether the allottees, or their heirs or devisees, had received a vested property right in the minerals under the Act. The District Court held that the Act did not grant the allottees vested rights in the mineral deposits, construing "unallotted lands" in § 3 as including such deposits. The Court of Appeals reversed, construing § 3 as an unconditional, noncontingent grant of the mineral deposits to the allottees, in the absence of any express statement of Congress' intent to retain power over the deposits. *Held:* The Act did not give the allottees of surface lands vested rights in the mineral deposits underlying those lands. This reading of the Act is supported by its legislative history, which indicates a congressional intent to sever the surface estate from the interest in the minerals and no intent to grant allottees a vested future interest in the mineral deposits and thereby relinquish "control and management thereof as Congress may deem expedient for the benefit of said Indians." Such conclusion is also supported by the fact that the agency charged with executing the Act construed it as not granting the allottees any vested rights. Pp. 654–660.

505 F. 2d 268, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, *post*, p. 660.

Steven H. Chestnut argued the cause and filed briefs for petitioner.

Lewis E. Brueggemann argued the cause and filed a brief for the respondent class of Northern Cheyenne Indians. *Steven L. Bunch* argued the cause *pro hac vice* for respondents Williamson et al., and with him on the brief was *Neil Haight*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question to be decided is whether the Northern Cheyenne Allotment Act, Act of June 3, 1926, 44 Stat. 690, gave the allottees of surface lands vested rights in the mineral deposits underlying those lands. The District Court for the District of Montana held that the Act did not grant the allottees vested rights in the mineral deposits. 349 F. Supp. 1302 (1972). The Court of Appeals for the Ninth Circuit reversed. 505 F. 2d 268 (1974). We granted certiorari. 423 U. S. 891 (1975). We agree with the District Court and reverse.

I

The 1926 Act statutorily established the Northern Cheyenne Reservation pursuant to the federal policy expressed in the General Allotment Act of 1887, 24 Stat. 388,[1] and provided for the allotment of tracts of land

[1] The objects of this policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs. See Comment, Tribal Self-Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955, 959 (1972).

to individual tribal members. Section 1 of the Act declared the lands constituting the reservation "to be the property of [the Northern Cheyenne] Indians, subject to such control and management of said property as the Congress of the United States may direct." Section 2 set up a procedure for allotment of agricultural and grazing lands. Section 3, 44 Stat. 691, upon which the question for decision in this case turns, reads as follows:

> "That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

On its face, § 3 provides that title to the mineral deposits would pass to the allottees, or their heirs,[2] 50 years after approval of the Act, or in 1976. But the

[2] In 1961 Congress amended the Act to add the allottees' devisees as beneficiaries. Act of Sept. 22, 1961, Pub. L. 87–287, 75 Stat. 586. At the same time Congress amended § 3 to permit the Tribe to lease mineral rights beyond 1976 and provided that any interest that might be taken by the allottees would be "subject to any outstanding leases." Congress also prohibited the allottees from conveying their future interest and voided any conveyances entered into prior to 1961. Previously § 3 had been amended to grant the allottees the timber on the allotted lands. Act of July 24, 1947, c. 314, 61 Stat. 418.

phrasing might also be read to imply a reserved power in Congress to terminate the allottees' interest before that date. Thus, the critical question is whether Congress could, as it purports to have done in 1968, terminate the grant without rendering the United States constitutionally liable to pay the allottees just compensation.

A supervening event of particular significance was the considerable increase in value of coal reserves under the allotted lands that occurred in the 1960's due to increasing energy demand and the concomitant need for new sources of energy.[3] Until this occurred, the reservation of the deposits until 1976 for the benefit of the Tribe had not significantly benefited it, because mining of most of the coal was not economically feasible. There was also substantial concern that, because one-third of the allottees did not live on the reservation, if control of strip mining passed in 1976 to the individual allottees, serious adverse consequences might be suffered by the Indians living on the reservation. In addition, Congress believed that injustice might result if the benefits to be realized by individual Indians depended upon whether coal was found under particular allotted lands. S. Rep. No. 1145, 90th Cong., 2d Sess., 2 (1968); H. R. Rep. No. 1292, 90th Cong., 2d Sess., 2 (1968). These considerations led Congress in 1968 to terminate the grant to allottees and to reserve the mineral rights "in perpetuity for the benefit of the Tribe." Act of July 24, 1968, Pub. L. 90-424, 82 Stat. 424.[4] The termination

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[3] Petitioner informs us that its "conservative" estimate of the value of the coal reserves is $2 billion, based on a recent offer for coal under the Crow Reservation, which adjoins the Northern Cheyenne Reservation.

[4] The full text of § 3, as amended, is:

"(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the

was, however, expressly conditioned upon a prior judicial determination that the allottees had not been granted vested rights to the mineral deposits by the 1926 Act. Congress so conditioned the termination to avoid the possibility of a successful claim for damages against the United States by the allottees under the Just Compensation Clause of the Fifth Amendment. The 1968 amendment authorized the Tribe to commence an action against the allottees in the District Court for Montana "to determine whether under [the 1926 Act] the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment," and provided that the reservation of the minerals in perpetuity for the benefit of the Tribe "shall cease to have any force or effect" if the court determines that "the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment." [5]

Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U. S. C. [§] 396a–f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

Congress rejected the possibility of extending the Tribe's interest for a term of years, rather than in perpetuity, on the recommendation of the Department of the Interior. The Department took the view that an extension for a number of years—the original bill proposed 42 years—would create difficult and costly administrative problems in determining the heirs of the allottees; Congress accordingly extended the interest in perpetuity. H. R. Rep. No. 1292, 90th Cong., 2d Sess., 2 (1968); S. Rep. No. 1145, 90th Cong., 2d Sess., 2 (1968).

[5] Section 2 of the amendment, 82 Stat. 425, provides as follows:

"The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either indi-

II

Both the Tribe and the allottees argue that the plain meaning of § 3 of the 1926 Act, providing that the mineral deposits "shall become the property of the respective allottees" 50 years after the effective date of the Act, compels a declaratory judgment in their favor. The Tribe argues that this provision can only be read to grant an expectancy, while the allottees maintain that it unequivocally grants a vested future interest.[6] Both in-

vidually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21 [*sic*], 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act."

The Tribe sued 10 allottees, individually and as representatives of the class of allottees, heirs, and devisees, and sought a declaratory judgment that the class had no vested rights and that the Tribe owned the coal and other minerals in perpetuity. We shall refer to the class as "allottees."

[6] Respondents Williamson and Bowen also argue that the unusual review provision accompanying the 1968 amendment evidences "a *formidable Congressional apprehension*" concerning the constitutionality of extending the Tribe's interest in perpetuity. On the contrary, Congress merely recognized that a plausible argument might be made on behalf of the allottees and desired its merit to be judicially determined. The House Committee, however, expressly stated its belief that the allottees had only an expectancy. H. R. Rep. No. 1292, *supra*, at 3. Moreover, the concerns assertedly felt by Congress in 1968 undoubtedly were not present in 1961;

terpretations are consistent with the wording of the Act, and we therefore must determine the intent of Congress by looking to the legislative history against the background of principles governing congressional power to alter allotment plans.

The District Court agreed with the Tribe, reading "unallotted lands" in § 3 as including the mineral deposits, since the Act expressly severed the mineral deposits from the surface of the allotted lands and subjected unallotted lands "to the control and management thereof as Congress may deem expedient for the benefit of said Indians." 349 F. Supp., at 1309–1310. The Court of Appeals rejected the District Court's interpretation of "unallotted lands" as including the severed mineral deposits, rendering them subject to congressional control and management; rather, it read § 3 to be an "unconditional, noncontingent grant of [the mineral] deposits to the allottees," and noted the absence of any "clear expression of Congress's retained power." 505 F. 2d, at 271–272.

The Court of Appeals erred in its basic approach to construction of the 1926 Act. Its view was that Congress must be regarded as having relinquished its control over Indian lands in the absence of an express statement of its intent to retain the power.[7] Just the opposite is true. The Court has consistently recognized

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in that year Congress gave the Tribe authority to encumber the allottees' interest by signing long-term leases, expanded the class of beneficiaries to include devisees, and prohibited the allottees from conveying their future interests. See n. 2, *supra*.

[7] The court also relied on the canon that "statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor." 505 F. 2d, at 272. But this eminently sound and vital canon has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members.

the wide-ranging congressional power to alter allotment plans until those plans are executed. *E. g., Chase* v. *United States,* 256 U. S. 1, 7 (1921); *United States* v. *Rowell,* 243 U. S. 464, 468 (1917); *Sizemore* v. *Brady,* 235 U. S. 441, 449–450 (1914); *Gritts* v. *Fisher,* 224 U. S. 640, 648 (1912); *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 484 (1899). This principle has specifically been applied to uphold congressional imposition on allottees of restraints against alienation of their interests or expansion of the class of beneficiaries under an allotment Act. *E. g., United States* v. *Jim,* 409 U. S. 80 (1972); *Brader* v. *James,* 246 U. S. 88 (1918). The extensiveness of this congressional authority, as well as "Congress' unique obligation toward the Indians," *Morton* v. *Mancari,* 417 U. S. 535, 555 (1974), underlies the judicially fashioned canon of construction that these statutes are to be read to reserve Congress' powers in the absence of a clear expression by Congress to the contrary. *Chippewa Indians* v. *United States,* 307 U. S. 1, 5 (1939).

Read in this light, the statutory history of the Northern Cheyenne Reservation allotment supports the District Court's reading of the Act. Although prior to 1925 allotment Acts had been enacted for nearly all Indian reservations, none yet applied to the Northern Cheyenne Reservation. The Tribe in 1925 petitioned Senator Walsh of Montana to have the reservation allotted. The petition read in pertinent part:

> "We, the undersigned members of the Northern Cheyenne Indian Tribe, of the State of Montana, do hereby humbly beseech you to do all in your power to have a Bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.
>
> "To reserve all mineral, timber, and coal lands

> for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same."

Thus, the Tribe from the outset sought allotment provisions that would retain, for the benefit of the entire Tribe, the rights to the coal and other minerals underlying the reservation.

Shortly thereafter Hubert Work, Secretary of the Interior, sent Representative Leavitt of Montana, Chairman of the House Committee on Indian Affairs, a proposed draft of an allotment bill for the Northern Cheyenne Reservation. An accompanying letter reiterated the Tribe's desire to give individual Indians agricultural and grazing lands. Secretary Work also suggested that a survey of the land be made and further proposed that "[i]n the event any of the land listed for allotting is found to contain coal or other minerals, it is contemplated to reserve all such minerals for the tribe and to allot the surface only." H. R. Rep. No. 383, 69th Cong., 1st Sess., 2 (1926).

The proposed bill (H. R. 9558) introduced in the House two days later by Representative Leavitt followed this suggestion. Section 2 of this bill provided for a geological survey and required that

> "if any of the land shall be found to contain coal or other minerals, only the surface thereof may be allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe."

This language is clear evidence of an intent to sever the surface estate from the interest in the minerals, at least wherever minerals are found to exist. But nothing appears in the legislative history explaining the object of the proviso:

> "*Provided,* That at the expiration of fifty years from the date of the approval of this Act, the coal

or other mineral deposits of said allotments shall become the property of the respective allottees or their heirs or assigns."

We are persuaded for several reasons that it was not intended to grant the allottees a vested future interest in the mineral deposits and thereby relinquish congressional "control and management thereof as Congress may deem expedient for the benefit of said Indians."

The proposed bill plainly reveals a purpose to sever the mineral rights from the surface estate; "only the surface . . . may be allotted" under the bill. In fact, the limited object of the bill, as stated in its title, was "to provide for allotting in severalty agricultural lands" within the reservation. This limited object carries out Secretary Work's suggestion, and honors the Tribe's request, to limit the allotment to the surface lands to enable the Tribe to enjoy the full benefit of the mineral rights. Nothing in the legislative history shows any congressional purpose not to follow the Secretary's proposal; every indication is to the contrary.[8] Only the surface lands were to be subject to allotment. The House Committee's amendments to the bill make this purpose even clearer; the Committee retained the language that limited the allotment to surface lands but omitted the language imposing this limitation only in the event that minerals were found on the land.[9] H. R.

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[8] Documents on deposit in the National Archives show that Representative Leavitt's proposed bill was identical to the Secretary's draft, and the 50-year provision is thus even more clearly not intended to grant vested rights. Secretary Work's summary of the draft bill stated the intention "to reserve all . . . minerals for the tribe" and did not mention the allottees' future interest.

[9] The bill as reported by the Committee, with the deleted language in brackets, reads:

"[and if any of the land shall be found to contain coal or other minerals,] only the surface of any lands in this reservation may be

Rep. No. 383, *supra,* at 1. The House passed the bill as amended by the Committee. 67 Cong. Rec. 6522 (1926).

The Senate Committee reported out the House bill with several amendments, two of which have significance in support of our conclusion. S. Rep. No. 638, 69th Cong., 1st Sess. (1926). A new opening section, eventually § 1 of the Act, see *supra,* at 651, confirmed the Tribe's title to the reservation lands and expressly retained Congress' authority to manage those lands. The Committee also rewrote § 2 of the House bill and substituted the following as § 3 of its bill:

> "That the timber, coal or other minerals, including oil, gas, and other natural deposits on said reservation, are hereby reserved for the benefit of the tribe: *Provided,* That at the expiration of fifty years from the date of the approval of this act the coal or other minerals, including oil, gas, and other natural deposits of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

The changes from the House bill indicate no difference in purpose. The coal and other mineral rights were still "reserved for the benefit of the tribe," with no suggestion from the Senate Committee that it attached any more import to the 50-year provision than had the House. Most significantly, and a critical fact supporting the District Court's construction of § 3, the Committee added an express reservation of congressional authority

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allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe . . . ."

The balance of the provision was unchanged. See *supra,* at 657.

over "unallotted lands." [10] Since the House bill clearly allotted only the surface lands, we are compelled to conclude that when both Houses adopted the bill as amended by the Senate, "unallotted lands" in § 3 included the mineral deposits. See *British-American Oil Co.* v. *Board of Equalization,* 299 U. S. 159, 164–165 (1936).[11]

The conclusion we reach is also supported by the wording of the allotment trust patents. The patents "reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land," without any reference to the allottees' future interest. Thus, the agency charged with executing the Act construed it as not granting the allottees any vested rights. "While not conclusive, this construction given to the [allotment] act in the course of its actual execution is entitled to great respect." *La Roque* v. *United States,* 239 U. S. 62, 64 (1915). See *United States* v. *Jackson,* 280 U. S. 183, 193 (1930); *Assiniboine & Sioux Tribes* v. *Nordwick,* 378 F. 2d 426, 432 (CA9 1967), cert. denied, 389 U. S. 1046 (1968).

Reversed.

MR. JUSTICE BLACKMUN, concurring.

For me, and obviously for the Congress, this case is much closer and the legislative history much less clear

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[10] The bill was also amended before final passage to permit the Tribe to lease the reserved mineral estates, 67 Cong. Rec. 9735 (1926), and to require that all income from the minerals be held by the United States for the benefit of the Tribe, *id.,* at 9962.

[11] A reasonable explanation for the provision that the mineral rights would become the property of the allottees after 50 years is that it may have been thought to further the policy of assimilation underlying the allotment policy, see n. 1, *supra;* the provision is consistent with a desire to give the mineral rights to the allottees after they became assimilated. On the other hand, the vesting of an irrevocable future interest in 1926 would not be wholly consistent

than the Court's opinion makes them out to be. There are factors that distinctly favor the respondents. For one example, in other comparable statutes, there are *specific* reservations (*e. g.*, "unless otherwise provided by Congress") of the kind of congressional power that the Court finds implicit here. Our National Legislature obviously knew how expressly to reserve the power and yet did not employ the "magic words" here. On balance, however, the strength of the case rests with the petitioner. It is of some importance, I feel, that the minerals could have been leased and depleted during the 50-year period. This possibility surely diminishes the reliance interest of any allottee and his successors. I therefore join the Court's opinion and its judgment.

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with that policy, particularly since the policy as reflected in allotment statutes was already losing its appeal by 1926, and Congress might more logically be expected to have been reluctant to surrender its power to modify the Act.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* FEDERAL POWER COMMISSION

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

No. 74-1608. Argued February 25, 1976—Decided May 19, 1976*

The National Association for the Advancement of Colored People and various other organizations petitioned the Federal Power Commission (FPC) to issue a rule "requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees." The FPC refused, holding that it had no jurisdiction to issue such a rule. On petition for review, the Court of Appeals, while agreeing that the FPC lacked power to prescribe personnel practices in detail and act upon personnel complaints, held that the FPC does have "power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations." *Held:*

1. The FPC is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the FPC's establishment of just and reasonable rates in the public interest. To the extent that illegal, duplicative, or unnecessary labor costs are demonstrably the product of a regulatee's discriminatory employment practices and can be or have been demonstrably quantified by judicial decree or the final action of an administrative agency the FPC should disallow them. Pp. 666-669.

2. The FPC's asserted duty to advance the public interest, however, does not afford any basis for its prohibiting regulatees from engaging in discriminatory employment practices, as references to the "public interest" in the Federal Power Act and Natural Gas Act require the FPC to promote the orderly production of plentiful supplies of electric energy and natural gas at just

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*Together with No. 74-1619, *Federal Power Commission* v. *National Association for the Advancement of Colored People et al.*, also on certiorari to the same court.

and reasonable rates, and do not constitute a directive to the FPC to seek to eradicate discrimination. Pp. 669–671.

172 U. S. App. D. C. 32, 520 F. 2d 432, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 671. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 672. MARSHALL, J., took no part in the consideration or decision of the cases.

Howard A. Glickstein argued the cause for petitioners in No. 74–1608 and for respondents in No. 74–1619. With him on the brief were *William L. Taylor* and *Reuben B. Robertson III.*

Drexel D. Journey argued the cause for respondent in No. 74–1608 and for petitioner in No. 74–1619. With him on the briefs were *Robert W. Perdue* and *Allan Abbot Tuttle.*†

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue in this case is to what extent, if any, the Federal Power Commission, in the performance of its functions under the Federal Power Act, 41 Stat. 1063, as amended, 16 U. S. C. § 791a *et seq.* (Power Act), and the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.* (Gas Act), has authority to prohibit discriminatory employment practices on the part of its regulatees.

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†*Solicitor General Bork, Assistant Attorney General Pottinger,* and *Abner W. Sibal* filed a memorandum for the United States et al. as *amici curiae* urging affirmance in both cases.

Briefs of *amici curiae* were filed in both cases by *Jerome J. McGrath* and *Melvin Richter* for the Interstate Natural Gas Association of America; by *Cameron F. MacRae, Charles P. Sifton,* and *John A. Rudy* for the Edison Electric Institute; and by the National Black Media Coalition et al.

I

In 1972 the National Association for the Advancement of Colored People (NAACP) and several other organizations petitioned the Commission to issue a rule "requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees." The proposed rule would have required the regulated companies to adopt affirmative action programs to combat discrimination in employment and would have given any person who believed himself to have been subjected to employment discrimination by any such company the right to file a complaint with the Commission.[1]

The Commission refused to adopt the proposed rule, holding that it had no jurisdiction to do so because "the purposes of the Natural Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource developments. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify [adopting petitioners' proposed rule]." 48 F. P. C. 40, 44.

On petition for review, the Court of Appeals for the District of Columbia Circuit agreed that the Commission was without "power . . . to prescribe personnel practices in detail and to receive complaints, adjudicate them, and punish directly infractions of those practices." 172 U. S. App. D. C. 32, 35, 520 F. 2d 432, 435. The court held, however, that the Commission does have "power to take

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[1] Under the proposed rule, a complaint that indicated a probable violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, could be referred by the Commission to the Equal Employment Opportunity Commission. The proposed rule is reproduced in full as an appendix to the opinion of the Court of Appeals in this case. See 172 U. S. App. D. C. 32, 48, 520 F. 2d 432, 448.

into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations." *Ibid.*

Because of doubt as to the Commission's recognition of any power on its part to take into account the employment practices of its regulatees even in the narrower sense described above, the Court of Appeals vacated the Commission's order and remanded the case. *Id.*, at 47, 520 F. 2d, at 447. The Commission and the NAACP each petitioned for certiorari, and we granted both petitions in order to consider the scope of the Commission's authority to deal with discriminatory employment practices on the part of the companies that it regulates. 423 U. S. 890.

II

The question presented is not whether the elimination of discrimination from our society is an important national goal. It clearly is. The question is not whether Congress could authorize the Federal Power Commission to combat such discrimination. It clearly could. The question is simply whether or to what extent Congress did grant the Commission such authority. Two possible statutory bases have been advanced to justify the conclusion that the Commission can or must concern itself with discriminatory employment practices on the part of the companies it regulates.[2]

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[2] We deal here only with questions of statutory interpretation. In the Court of Appeals and in its cross-petition for certiorari the NAACP argued that the Commission has a duty under the Fifth Amendment to prevent employment discrimination by its regulatees. In its briefs on the merits, however, the NAACP notes that a decision on this constitutional question is unnecessary if we hold, as we do, that the Commission has statutory authority to consider the consequences of employment discrimination in performing its mandated regulatory functions.

The first of these statutory bases is the legislative command to the Commission under the Power and Gas Acts to establish "just and reasonable" rates for the transmission and sale of electric energy, 16 U. S. C. § 824d (a), and for the transportation and sale of natural gas, 15 U. S. C. § 717c (a), and, consequently, to allow only such rates as will prevent consumers from being charged any unnecessary or illegal costs.[3] The second and broader statutory basis advanced for Commission regulation of employment discrimination is the Commission's asserted duty to advance the public interest. The NAACP notes that Congress found that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest," 16 U. S. C. § 824 (a), and that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest," 15 U. S. C. § 717 (a). From these and other references to the "public interest" in the Gas and Power Acts,[4] it is argued that the Commission is charged with advancing the public interest in general, and that the Commission is thus authorized if not required to promulgate rules prohibiting its regulatees from engaging in discriminatory employment practices, since ending discrimination in employment is in the public interest.

A

The Court of Appeals basically accepted the first of these statutory arguments:

"The Commission's task in protecting the con-

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[3] See, *e. g., Acker* v. *United States,* 298 U. S. 426, 430–431; *Cities Serv. Gas Co.* v. *FPC,* 424 F. 2d 411 (CA10); *Safe Harbor Water Power Corp.* v. *FPC,* 179 F. 2d 179 (CA3). See also n. 5, *infra.*

[4] See, *e. g.,* 15 U. S. C. §§ 717b, 717f (a), 717n; 16 U. S. C. §§ 797 (e), (g), 800 (a), 803 (i), 806, 815, 824a (a–c), (e), 824b (a–b), 824c (a). See also 15 U. S. C. §§ 717f (b–c), (e).

sumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

"Obviously such costs of employment discrimination range from the very definite and easily ascertainable to the very questionable and virtually unquantifiable. The problem of how to see that they are not borne by the consumer could arise in any number of different regulatory contexts, including both rate and certificate proceedings. We therefore do not attempt to detail all the various ways the Commission may thus 'regulate' employment discrimination, leaving this in the first instance to the Commission itself." 172 U. S. App. D. C., at 44, 520 F. 2d, at 444 (footnote omitted).

Without necessarily endorsing the specific identification of the costs "arguably within" the Commission's "range of concern," we agree with the basic conclusion of the Court of Appeals on this branch of the case. The Commission clearly has the duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary labor costs. To the extent that such costs are demonstrably the product of a regulatee's discriminatory employment practices, the Commission should disallow them. For example, when a company complies with a backpay award resulting from a finding of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, it pays twice for work that was performed only once. The amount of the backpay award, therefore, can and should be disallowed as an unnecessary cost in a ratemaking proceeding.

To the extent that these and other similar costs, such as attorneys' fees, can be or have been demonstrably quantified by judicial decree or the final action of an administrative agency charged with consideration of such matters, the Commission clearly should treat these costs as it treats any other illegal, unnecessary, or duplicative costs. We were told by counsel during oral argument that the Commission would routinely disallow the costs of a backpay award resulting from an order of the National Labor Relations Board or the decree of a court based upon a finding of an unfair labor practice. The governing principle is no different in the area of discriminatory employment practices.

As a general proposition it is clear that the Commission has the discretion to decide whether to approach these problems through the process of rulemaking, individual adjudication, or a combination of the two procedures. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 202–203. The present Commission practice, we are told, is to con-

sider such questions only in individual ratemaking proceedings, under its detailed accounting procedures. Assuming that the Commission continues that practice, it has ample authority to consider whatever evidence and make whatever inquiries are necessary to determine whether a regulatee has incurred unnecessary or illegitimate costs because of racially discriminatory employment practices. 15 U. S. C. §§ 717c (e), 717m; 16 U. S. C. §§ 824d (e), 824f.

B

The Court of Appeals rejected the broader argument based upon the statutory criterion of "public interest," and we hold that it was correct in doing so. This Court's cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.

For example, in the case of the Interstate Commerce Commission, which is responsible for enforcing an Act "designed . . . to assure adequacy in transportation service," "the term 'public interest' . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities . . . ." *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24–25. See also *New Haven Inclusion Cases,* 399 U. S. 392, 432; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 216; *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285.

Thus, in order to give content and meaning to the words "public interest" as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted. In the case of the Power and Gas Acts it is clear that the principal purpose of those

Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.[5] While there are undoubtedly other subsidiary purposes contained in these Acts,[6] the parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words "public interest" in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.[7]

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[5] 16 U. S. C. § 824a (a) (The purpose of the Power Act is to "assur[e] an abundant supply of electric energy throughout the United States with the greatest possible economy"); *Pennsylvania Power Co.* v. *FPC,* 343 U. S. 414, 418 ("A major purpose of the [Power] Act is to protect power consumers against excessive prices"); *FPC* v. *Hope Gas Co.,* 320 U. S. 591, 610 (The "primary aim" of the Natural Gas Act is "to protect consumers against exploitation at the hands of natural gas companies"). See also S. Rep. No. 621, 74th Cong., 1st Sess., 17; *FPC* v. *Tennessee Gas Co.,* 371 U. S. 145, 154; *Atlantic Rfg. Co.* v. *Public Serv. Comm'n,* 360 U. S. 378, 388; *Permian Basin Area Rate Cases,* 390 U. S. 747, 770.

[6] For example, the Commission has authority to consider conservation, environmental, and antitrust questions. See 15 U. S. C. § 717s (a); 16 U. S. C. §§ 803 (a), (h); *Gulf States Utilities Co.* v. *FPC,* 411 U. S. 747; *Udall* v. *FPC,* 387 U. S. 428.

[7] The Federal Communications Commission has adopted regulations dealing with the employment practices of its regulatees. See 47 CFR §§ 73.125, 73.301, 73.599, 73.680, 73.793 (1975). These regulations can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.,* to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups. See *Office of Communication of United Church of Christ* v. *FCC,* 123 U. S. App. D. C. 328, 359 F. 2d 994; 33 Fed. Reg. 9960, 9962. It has nowhere been argued that the Federal Power Commission

It is useful again to draw on the analogy of federal labor law. No less than in the federal legislation defining the national interest in ending employment discrimination, Congress in its earlier labor legislation unmistakably defined the national interest in free collective bargaining. Yet it could hardly be supposed that in directing the Federal Power Commission to be guided by the "public interest," Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees.

We agree, in short, with the Court of Appeals that the Federal Power Commission is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest. Accordingly, we affirm the judgment before us.

It is so ordered.

Mr. Justice Marshall took no part in the consideration or decision of these cases.

Mr. Justice Powell, concurring.

Although I join in the opinion of the Court, I write briefly to emphasize a point that seems important.

The Court quotes a portion of the opinion of the Court of Appeals that identifies six categories of "costs" said to be "arguably within the Commission's range of concern." *Ante,* at 667. The Court of Appeals correctly noted, however, that these costs "range from the very definite and easily ascertainable to the very questionable and virtually unquantifiable." *Ibid.*

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needs similar regulations in order to promote energy production at reasonable rates.

The Court's opinion explicitly does not endorse all of these categories of costs, and requires that consideration be given only to costs that have been "demonstrably quantified by judicial decree or the final action of an administrative agency charged with consideration of such matters . . . ." *Ante,* at 668. Although implicit in what the Court says, I think it important to emphasize that the costs identified in the opinion of the Court of Appeals as categories (4), (5), and (6) could not be quantified without resort to wholly speculative assumptions that would be unacceptable for ratemaking purposes. It would be quite impossible, for example, to measure or determine with any exactitude "the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion." Nor is it likely that "the costs of strikes, demonstrations, and boycotts aimed against [a utility] because of employment discrimination," *ante,* at 667, could ever be determined with sufficient reliability.

In view of the inherently amorphous nature of these categories of costs, it would not be in the public interest to allow intervenors to delay the orderly progress of rate proceedings in the vain hope that such costs might, after protracted litigation, be quantified. I do not read the Court's opinion as requiring any such encumbering of the Commission's prescribed statutory authority and discretion.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I join the judgment of the Court even though I find it difficult to understand why the result reached by the Commission was not a reasonable administrative determination. The Court of Appeals read the Commission's order in this case as "ambiguous":

"We do not know whether its order asserted a lack

of jurisdiction to adopt (1) the specific proposed rule, or (2) *any* rule relating to employment discrimination by regulatees." 172 U. S. App. D. C. 32, 34, 520 F. 2d 432, 434 (emphasis in original).

In context, the FPC's order could fairly have been read simply as rejecting the rule proposed by the NAACP. This is particularly true in view of the Commission's auditing practice of disallowing duplicative costs, including those occasioned by backpay awards. *Ante*, at 668.

In contrast to this standard administrative practice, the rule proposed to the Commission called for extensive regulation of the employment practices of industries subject to FPC jurisdiction. Under the proposed rule, the Commission would, among other things, be required to: (a) enumerate unlawful employment practices; (b) require regulatees to establish a written program for equal employment opportunity which would be filed with the Commission; and (c) provide for individual employees to file discrimination complaints directly with the Commission.

The Court of Appeals correctly recognized that this far-reaching proposal would put the Federal Power Commission into the business of regulating the everyday employment practices of regulated industries. The necessary result of this intrusion would be the imposition of another layer of federal regulation of the same subject matter, with the inevitable potential for conflict between administrative agencies.* If Congress had

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*A former Assistant Secretary of the Treasury has observed:

"The proliferation of government controls has, perhaps inevitably, led to internal conflicts. In some cases, the rules of a given agency work at cross-purposes with each other. . . . More serious and more frequent are the contradictions between the rulings of two or more

mandated duplicative regulation, the result, however inefficient, would be none of our concern. But Congress did not do so. It centralized responsibility in the Equal Employment Opportunity Commission. To the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even more slowly. To suggest, for example, that the FPC could deny a license on account of a regulatee's discriminatory employment practices, 172 U. S. App. D. C., at 44, 520 F. 2d, at 444, is to thrust the Commission into a complex, volatile area for which Congress has already assigned authority to the EEOC.

No reason whatever exists to assume that Congress intended to enmesh the FPC so deeply in the regulation of employment practices. The Commission was thus confronted with a duplicative and unprecedented proposal; it could appropriately refuse to adopt the rule as beyond its jurisdiction; since the Court of Appeals concluded that the FPC was correct in this respect, the Commission's order could appropriately have been affirmed.

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government agencies where the regulated have little recourse." Weidenbaum, The New Wave of Government Regulation of Business, 15 Business and Society Review 81, 84 (1975).

See also U. S. News & World Report, May 10, 1976, p. 96. And as Mr. Justice Douglas reminded us:

"The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent." *Wyman* v. *James,* 400 U. S. 309, 335 (1971) (dissenting opinion).

CONNOR ET AL. *v.* COLEMAN, UNITED STATES CIRCUIT JUDGE, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

No. 75-1184. Decided May 19, 1976

Motion for leave to file a petition for writ of mandamus to compel the District Court to enter a final judgment embodying a permanent reapportionment plan for the Mississippi Legislature, is granted, there being no justification for delaying further a final decision in this 10-year litigation that complies with this Court's directive to the District Court that "[s]uch proceedings should go forward and be promptly concluded," *Connor* v. *Williams,* 404 U. S. 549, 551-552. Since the District Court may be expected to conform its proceedings accordingly, consideration of the mandamus petition is continued.

PER CURIAM.

This case is here on movants' motion, supported by the United States, for leave to file a petition for writ of mandamus. The motion is granted. Since the District Court may be expected to conform its proceedings to the views expressed in this opinion, consideration of the petition for writ of mandamus is continued to June 17, 1976.

Ten years of litigation have not yet resulted in a constitutionally apportioned Mississippi Legislature. The District Court for the Southern District of Mississippi in 1966 invalidated the 1962 apportionment. *Connor* v. *Johnson,* 256 F. Supp. 962 (1966). A legislative apportionment that followed was also declared unconstitutional. Thereupon the District Court promulgated its own plan for the 1967 elections. *Connor* v. *Johnson,* 265 F. Supp. 492 (1967). Still another legislative plan enacted in 1971 was held unconstitutional by the District Court and another court-ordered plan, this for the 1971

elections, was formulated. *Connor* v. *Johnson,* 330 F. Supp. 506 (1971). That court-promulgated plan, however, was stayed by this Court with direction that the District Court, "absent insurmountable difficulties," should "devise and put into effect a single-member district plan for Hinds County" by June 14, 1971. *Connor* v. *Johnson,* 402 U. S. 690, 692 (1971). The District Court did not divide Hinds County into single-member districts because the court found that there were insurmountable difficulties.

After the 1971 elections this Court addressed the constitutionality of the 1971 court-formulated plan. Because the District Court had retained jurisdiction over plans for Hinds, Harrison, and Jackson Counties and had stated its intention to appoint a special master in January 1972 to consider the subdivision of those counties into single-member districts, we vacated the District Court judgment, without disturbing the 1971 elections, and remanded with direction to the District Court that "[s]uch proceedings should go forward and be promptly concluded," declining meanwhile to consider the prospective validity of the court-formulated 1971 plan until the proceedings were completed and a final judgment was entered respecting the entire State. *Connor* v. *Williams,* 404 U. S. 549, 551–552 (1972). The District Court did not appoint a special master.

In April 1973 the Mississippi Legislature enacted an apportionment plan. Pending decision by the District Court of objections to that plan, however, the legislature in April 1975 adopted new legislation that differed from the 1971 court-formulated plan only in that Harrison, Hinds, and Jackson Counties remained multimember districts. The District Court thereupon dismissed the complaint addressed to the 1973 legislative plan and directed the filing of an amended complaint addressing the 1975

legislation. This was done and the District Court entered judgment approving the 1975 law. *Connor* v. *Waller,* 396 F. Supp. 1308 (1975). We reversed, holding that the 1975 legislation could not be effective as law until after clearance in compliance with § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, and holding further that the District Court erred in deciding constitutional challenges to the Mississippi legislation based upon claims of racial discrimination. *Connor* v. *Waller,* 421 U. S. 656 (1975). We stated expressly, however, *id.,* at 656–657, that the reversal was

> "without prejudice to the authority of the District Court, if it should become appropriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan* v. *Howell,* 410 U. S. 315 (1973); *Connor* v. *Williams,* 404 U. S. 549 (1972); and *Chapman* v. *Meier,* 420 U. S. 1 (1975)."

Thereafter Mississippi submitted the 1975 legislation to the Attorney General of the United States in compliance with § 5 of the Voting Rights Act. The Attorney General objected and accordingly the District Court held a hearing to formulate a court plan for the conduct of the 1975 elections. By orders entered in June 1975 the District Court promulgated a "temporary plan for the election of Senators and Representatives for the 1975 elections ONLY," Motion for Leave to File Pet., App. 85a, and ordered the parties to file alternative permanent reapportionment plans. The District Court's order of June 25, 1975, stated: "A permanent plan for reapportionment cannot be now formulated due to lack of time. When permanent plan for election of legislators in quadrennial elections of 1979 has been accomplished, special elections may be ordered in those legislative dis-

tricts where required by law, equity, or the Constitution of the U. S." *Ibid.* Motions by the United States and movants sought the fixing of a specific date by which a permanent plan would be formulated and the fixing of a definite schedule for special elections. February 1, 1976, was suggested by the movants as the outside date for making a permanent plan effective, and the date of the November 1976 Presidential election as the date for special elections. On August 1, 1975, the District Court entered an order, Motion for Leave to File Pet., App. 88a, stating: "The Court declines to set a deadline of 2–1–76 for completion of a permanent plan for reapportionment . . . but reiterates its firm determination to have such plan approved before 2–1–76; as to all instances in which a special election may be required, the Court expects to direct the same shall be held in conjunction with the 1976 Presidential election . . . ." Proposed permanent plans were thereafter submitted by the United States and movants, and on January 26, 1976, the United States moved that a hearing be held on February 10, 1976, on the proposed permanent plans. However, three days later, January 29, 1976, the District Court denied the motion stating as its sole and only ground, Motion for Leave to File Pet., App. 90a, that "[f]urther hearing and decision of this case will be deferred until the Supreme Court shall have decided cited cases, at which time this Court will bring this case to trial forthwith . . . ."

The "cited cases" are *East Carroll Parish School Board* v. *Marshall,* No. 73–861, cert. granted, 422 U. S. 1055 (1975); *Beer* v. *United States,* No. 73–1869, probable jurisdiction noted, 419 U. S. 822 (1974); and *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* No. 75–104, cert. granted, 423 U. S. 945 (1975). There is no occasion for the District Court any longer to postpone the hearing on the proposed permanent plan awaiting this Court's decisions of those cases. *East Carroll* was

decided March 8, 1976, 424 U. S. 636, and *Beer* was decided March 30, 1976, *ante,* p. 130. *United Jewish Organizations* is not scheduled for argument this Term but no question similar to the question presented in that case is presented in this case. There is accordingly no justification on the ground stated for delaying further a final decision in this long-pending case that complies with *Connor* v. *Williams, supra.* Rather, in our view the District Court should in the circumstances promptly carry out the assurance given in its order of January 29, 1976, to "bring this case to trial forthwith . . ." and schedule a hearing to be held within 30 days on all proposed permanent reapportionment plans to the end of entering a final judgment embodying a permanent plan reapportioning the Mississippi Legislature in accordance with law to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections to be held to coincide with the November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter. Assuming as we do that the District Court will promptly conform its proceedings to give effect to these views, consideration of the petition for writ of mandamus is continued to June 17, 1976.

It is so ordered.

THE CHIEF JUSTICE concurs in granting the motion but does not join the *per curiam* opinion.

MR. JUSTICE POWELL.

I concur in the granting of movants' motion, but I do not join the Court's opinion. The Court goes beyond what the Solicitor General has requested and beyond what seems necessary at this time. There is no question that the delay in this case appears inexcus-

able—when viewed from Washington. Nevertheless, I would deny the writ on the assumption that the District Court will perform its duty forthwith without the need for a prescribed schedule from this Court.

MR. JUSTICE REHNQUIST, dissenting.

In the course of what purports to be an opinion explaining its decision merely to grant a motion for leave to file a petition for writ of mandamus, the Court proceeds to lay out in minute detail what the District Court *should* do during the next 30 days while the Court "continues consideration" of the petition. Coincidentally, the actions which the Court "assumes" the District Court will take are precisely those sought in the petition for the extraordinary remedy of mandamus. By pretending that it has not passed upon the merits of the petition when it has actually afforded movants their relief, today's decision seems to me more legerdemain than law. If the Court is going to exercise its power to coerce the lower federal courts, I think it obligated to clearly announce that intention, to address directly the question of its authority to do so, see 28 U. S. C. § 1651 (a), and to analyze with care the propriety of such action in the case before it. I have no little doubt as to the Court's authority to afford the relief it pretends to pretermit, and the Court's opinion does nothing to dispel the doubt. But even assuming such authority exists, I believe movants have failed to demonstrate their entitlement to the iron fist which shows so clearly through the Court's velvet glove today. It is true that this case has not been a model for the speedy resolution of litigation. But our previous opinions established no rigid timetable to which the District Court was required to adhere, and I am not persuaded that it is deliberately avoiding its duty to apply the law. Accordingly, I pres-

ently believe I would deny the writ. But even if further consideration and argument on the merits might convince me otherwise, I cannot join today's opinion, which, without any analysis of the difficult legal issues involved, necessarily proceeds upon the unstated premise that mandamus will ultimately issue in this case.

ALFRED DUNHILL OF LONDON, INC. *v.* REPUBLIC OF CUBA ET AL.

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

No. 73-1288. Argued December 10, 1974—Reargued January 19, 1976—Decided May 24, 1976

After the "intervention" (nationalization) by Cuba in 1960 of the business and assets of five leading cigar manufacturers, the former owners (most of whom had fled to the United States) brought actions against petitioner and two other importers for, *inter alia,* the purchase price of cigars that had been shipped to the importers from the seized Cuban plants. Following conclusion of related litigation, the Cuban "interventors" (those named to possess and occupy the seized businesses, one of whom, and Cuba, are the respondents herein) were allowed to join in those actions, which were consolidated for trial. Both the former owners and the interventors asserted their right to sums due from the three importers for postintervention shipments. As of the date of intervention the importers owed various amounts for preintervention shipments, which they later paid to the interventors, who the importers mistakenly believed were entitled to collect accounts receivable. The former owners also claimed title to and demanded payment of these accounts. The District Court, acknowledging that under the "act of state" doctrine reaffirmed in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, it had to give effect to the 1960 confiscation insofar as it purported to take the property of Cubans in Cuba, held that the interventors could collect all due and unpaid amounts for postintervention shipments, but further held that the former owners were entitled to the preintervention accounts receivable, the situs of which was with the importer-debtors; and the former owners, rather than the interventors, were held entitled to collect those accounts from the importers, even though the latter had already mistakenly paid them to the interventors. The importers then claimed that they were entitled to recover the payments from the interventors by way of setoff or counterclaim. The interventors countered with the contention that any repayment obligation was a quasi-contractual debt whose situs was in Cuba, and that their refusal to pay was an act of state not subject to question in American courts. The District

Court rejected the interventors' claim on the grounds that the repayment obligation was deemed situated in the United States and that nothing had occurred qualifying for recognition as an act of state. The importers accordingly were allowed to set off their mistaken payments for preintervention shipments against the amounts they owed for postintervention purchases. Since petitioner's claim against the interventors exceeded their claim against it, petitioner was awarded judgment against the interventors for the full amount of its claim, from which the smaller judgment against it would be deducted. The Court of Appeals, while agreeing with the District Court in other respects, held that the interventors' obligation to repay the importers was situated in Cuba and that the interventors' counsel's repudiation of the obligation constituted an act of state. Nevertheless, relying on *First Nat. City Bank* v. *Banco Nacional de Cuba,* 406 U. S. 759, the court held that enforcement of the importers' counterclaims was not barred up to the limits of the respective claims asserted against them by the interventors, but that the affirmative judgment awarded petitioner was barred by the act of state doctrine to the extent that petitioner's claim exceeded its debt. In this respect the District Court's judgment was reversed, giving rise to the petition for certiorari in this case. *Held:* There is nothing in the record of this case revealing an act of state with respect to the interventors' obligation to return the sums mistakenly paid to them. Pp. 690–695.

(a) If the interventors, whose contentions, including the claimed act of state, with respect to the preintervention accounts, represented by the 1960 confiscation had been properly rejected by the courts below, were to escape repayment upon the basis of a second and later act of state involving the funds mistakenly paid to them, they had the burden of proving that act. P. 691.

(b) The interventors' refusal to repay the mistakenly paid funds does not constitute an act of state or indicate that the interventors had governmental, as opposed to merely commercial, authority for the refusal. *The "Gul Djemal,"* 264 U. S. 90. Pp. 691–694.

(c) The interventors' counsel's statement during trial that the Cuban Government and the interventors denied liability and had refused to make repayment is no proof of an act of state, and no statute, decree, order, or resolution of the Cuban Government was offered in evidence indicating Cuban repudiation of its obligations in general or of the obligations herein involved. Pp. 694–695.

485 F. 2d 1355, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS (except for Part III), JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 715. STEVENS, J., filed a concurring statement, *post*, p. 715. MARSHALL, J., filed a dissenting opinion in which BRENNAN, STEWART, and BLACKMUN, JJ., joined, *post*, p. 715.

Victor S. Friedman reargued the cause and filed a supplemental brief for the petitioner. With him on the brief on the original argument was *Peter D. Ehrenhaft*.

Victor Rabinowitz reargued the cause for respondents. With him on the briefs on reargument were *Michael Krinsky* and *Dorian Bowman*. With him on the brief on the original argument was *Mr. Bowman*.

Antonin Scalia argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Bork, Assistant Attorney General Lee, Deputy Solicitor General Jones,* and *Bruno A. Ristau*.*

MR. JUSTICE WHITE delivered the opinion of the Court.†

The issue in this case is whether the failure of respondents to return to petitioner Alfred Dunhill of London, Inc. (Dunhill), funds mistakenly paid by Dunhill for cigars that had been sold to Dunhill by certain expropriated Cuban cigar businesses was an "act of state" by Cuba precluding an affirmative judgment against respondents.

I

The rather involved factual and legal context in which this litigation arises is fully set out in the District Court's

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**Robert B. Fiske, Jr.,* and *Wilmot R. Hastings* filed a brief for the Bank of Boston International as *amicus curiae* urging reversal.

†Part III of this opinion is joined only by THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

opinion in this case, *Menendez* v. *Faber, Coe & Gregg, Inc.,* 345 F. Supp. 527 (SDNY 1972), and in closely related litigation, *F. Palicio y Compania, S. A.* v. *Brush,* 256 F. Supp. 481 (SDNY 1966), aff'd, 375 F. 2d 1011 (CA2), cert. denied, 389 U. S. 830 (1967). For present purposes, the following recitation will suffice. In 1960, the Cuban Government confiscated the business and assets of the five leading manufacturers of Havana cigars. These companies, three corporations and two partnerships, were organized under Cuban law. Virtually all of their owners were Cuban nationals. None were American. These companies sold large quantities of cigars to customers in other countries, including the United States, where the three principal importers were Dunhill, Saks & Co. (Saks), and Faber, Coe & Gregg, Inc. (Faber). The Cuban Government named "interventors" to take possession of and operate the business of the seized Cuban concerns. Interventors continued to ship cigars to foreign purchasers, including the United States importers.

This litigation began when the former owners of the Cuban companies, most of whom had fled to the United States, brought various actions against the three American importers for trademark infringement and for the purchase price of any cigars that had been shipped to importers from the seized Cuban plants and that bore United States trademarks claimed by the former owners to be their property. Following the conclusion of the related litigation in *F. Palicio y Compania, S. A.* v. *Brush, supra,*[1] the Cuban interventors[2] and the Republic

[1] When the prior owners sued the importers, the interventors and the Republic of Cuba brought separate litigation against the prior owners' attorneys seeking to restrain the further prosecution of the actions brought by the prior owners. The interventors

[*Footnote 2 is on p. 686*]

of Cuba were allowed to intervene in these actions, which were consolidated for trial. Both the former owners and the interventors had asserted their right to some $700,000 due from the three importers for postintervention shipments: Faber, $582,588.86; Dunhill, $92,949.70; and Saks, $24,250. It also developed that as of the date of intervention, the three importers owed sums totaling $477,200 for cigars shipped prior to intervention: Faber, $322,000; Dunhill, $148,600; and Saks, $6,600. These latter sums the importers had paid to interventors subsequent to intervention on the assumption that interventors were entitled to collect the accounts receivable of the intervened businesses. The former owners claimed title to and demanded payment of these accounts.

Based on the "act of state" doctrine which had been reaffirmed in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964), the District Court held in *F. Palicio y Compania, S. A.* v. *Brush, supra,* and here, that it was required to give full legal effect to the 1960 confiscation of the five cigar companies insofar as it purported to take the property of Cuban nationals located within Cuba. Interventors were accordingly entitled to collect from the importers all amounts due and unpaid with respect to shipments made after the date of intervention. The contrary conclusion was reached as to the accounts owing at the time of intervention: Because the United States

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were there held entitled to the proceeds of sales made to American buyers after intervention but the prior owners' trademark litigation was permitted to continue. *F. Palicio y Compania, S. A.* v. *Brush.*

[2] Prior to intervening in this lawsuit, interventor-respondent Pinera had replaced the original interventors as to the five companies on whose behalf he has pursued this suit. For convenience' sake we will refer to those representing the tobacco businesses as "interventors" both in discussing their conduct prior to the lawsuit and in discussing the single interventor's conduct as a party to the lawsuit.

courts will not give effect to foreign government confiscations without compensation of property located in the United States and because under *Republic of Iraq* v. *First Nat. City Bank,* 353 F. 2d 47 (CA2 1965), cert. denied, 382 U. S. 1027 (1966), the situs of the accounts receivable was with the importer-debtors, the 1960 seizures did not reach the preintervention accounts, and the former owners, rather than the interventors, were entitled to collect them from the importers—even though the latter had already paid them to interventors in the mistaken belief that they were fully discharging trade debts in the ordinary course of their business.

This conclusion brought to the fore the importers' claim that their payment of the preintervention accounts had been made in error and that they were entitled to recover these payments from interventors by way of set-off and counterclaim. Although their position that the 1960 confiscation entitled them to the sums due for preintervention sales had been rejected and the District Court had ruled that they "had no right to receive or retain such payment," [3] interventors claimed those payments on the additional ground that the obligation, if any, to repay was a quasi-contractual debt having a situs in Cuba and that their refusal to honor the obligation was an act of state not subject to question in our courts. The District Court rejected this position for two reasons. First, the repayment obligated was more properly deemed situated in the United States and hence remained unaffected by any purported confiscatory act of the Cuban Government. Second, in the District Court's

[3] The District Court also disagreed with interventors that there was insufficient evidence to show that they had actually received the sums assertedly paid them by the importers. Neither could the District Court agree that the importers, if they were entitled to the funds at all, were entitled to be repaid only in pesos. The Court of Appeals did not disturb these holdings.

view, nothing had occurred which qualified for recognition as an act of state:

> "[T]here was no formal repudiation of these obligations by Cuban Government decree of general application or otherwise. . . . Here, all that occurred was a statement by counsel for the interventors, during trial, that the Cuban Government and the interventors denied liability and had refused to make repayment. This statement was made after the interventors had invoked the jurisdiction of this Court in order to pursue their claims against the importers for post-intervention shipments. It is hard to conceive how, if such a statement can be elevated to the status of an act of state, *any* refusal by *any* state to honor *any* obligation at *any* time could be considered anything else." 345 F. Supp., at 545.

The importers were accordingly held entitled to set off their mistaken payments to interventors for preintervention shipments against the amounts due from them for their post-intervention purchases. Faber and Saks, because they owed more than interventors were obligated to return to them, were satisfied completely by the right to setoff. But Dunhill—and at last we arrive at the issue in this case—was entitled to more from interventors—$148,000—than it owed for postintervention shipments—$93,000—and to be made whole, asked for and was granted judgment against interventors for the full amount of its claim, from which would be deducted the smaller judgment entered against it.

The Court of Appeals, *Menendez* v. *Saks & Co.*, 485 F. 2d 1355 (CA2 1973), agreed that the former owners were entitled to recover from the importers the full amount of preintervention accounts receivable. It also held that the mistaken payments by importers to inter-

ventors gave rise to a quasi-contractual obligation to repay these sums. But, contrary to the District Court, the Court of Appeals was of the view that the obligation to repay had a situs in Cuba and had been repudiated in the course of litigation by conduct that was sufficiently official to be deemed an act of state: "[I]n the absence of evidence that the interventors were not acting within the scope of their authority as agents of the Cuban government, their repudiation was an act of state even though not embodied in a formal decree." [4] *Id.*, at 1371. Although the repudiation of the interventors' obligation was considered an act of state, the Court of Appeals went on to hold that *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759 (1972), entitled importers to recover the sums due them from interventors by way of setoff against the amounts due from them for postintervention shipments. The act of state doctrine was said to bar the affirmative judgment awarded Dunhill to the extent that its claim exceeded its debt. The judgment of the District Court was reversed in this respect, and it is this action which was the subject of the petition for certiorari filed by Dunhill. In granting the petition, 416 U. S. 981 (1974), we requested the parties to address certain questions,[5] the first being whether the statement by

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[4] The Court of Appeals rejected the importers' contention that the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U. S. C. § 2370 (e)(2), precluded interventors from invoking the act of state doctrine. The correctness of that judgment is not before us in this litigation.

[5] Our order granting certiorari directed counsel to brief and argue two questions:

"1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an act of state?

"2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759 (1972), where petitioner's counterclaim does not exceed

counsel for the Republic of Cuba that Dunhill's unjust-enrichment claim would not be honored constituted an act of state. The case was argued twice in this Court. We have now concluded that nothing in the record reveals an act of state with respect to interventors' obligation to return monies mistakenly paid to them. Accordingly we reverse the judgment of the Court of Appeals.

II

The District Court and the Court of Appeals held that for purposes of this litigation interventors were not entitled to the preintervention accounts receivable by virtue of the 1960 confiscation and that, despite other arguments to the contrary, nothing based on their claim to those accounts entitled interventors to retain monies mistakenly paid on those accounts by importers. We do not disturb these conclusions.[6] The Court of Appeals nevertheless observed that interventors had "ignored" demands for the return of the monies and had "fail[ed]

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the net balance owed to Cuba on its claims by petitioner's codefendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?"

When the case was restored to the calendar for reargument, 422 U. S. 1005 (1975), the Court directed:

"In addition to other questions presented by this case, counsel are requested to brief and discuss during oral argument: Should this Court's holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964), be reconsidered?"

[6] In addition to the present petition the Court has before it the petition of the interventors, *Republic of Cuba* v. *Saks & Co.,* No. 73-1287, challenging, on the ground that the intervention successfully seized the accounts receivable and that the $477,000 properly belonged to them, the propriety of permitting even a setoff, and the conditional cross-petition of the importers, *Saks & Co.* v. *Republic of Cuba,* No. 73-1289, challenging the propriety of the judgment against them and in favor of the owners for the $477,000 due on preintervention shipments. Today we deny these petitions, *post,* p. 991.

to honor the importers' demand (which was confirmed by the Cuban government's counsel at trial)." This conduct was considered to be "the Cuban government's repudiation of its obligation to return the funds" and to constitute an act of state not subject to question in our courts.[7] *Menendez* v. *Saks & Co.*, 485 F. 2d, at 1369, 1371. We cannot agree.

If interventors, having had their liability adjudicated and various defenses rejected, including the claimed act of state, with respect to preintervention accounts, represented by the Cuban confiscation in 1960, were nevertheless to escape repayment by claiming a second and later act of state involving the funds mistakenly paid them, it was their burden to prove that act. Concededly, they declined to pay over the funds; but refusal to repay does not necessarily assert anything more than what interventors had claimed from the outset and what they have continued to claim in this Court—that the preintervention accounts receivable were theirs and that they had no obligation to return payments on those accounts.[8] Neither does it demonstrate that in addition

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[7] The traditional formulation of the act of state doctrine is that in *Underhill* v. *Hernandez*, 168 U. S. 250, 252 (1897):

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

[8] Their entitlement to the $477,000 derived under this theory from the initial act of state—*i. e.*, the intervention of the owners' business. All parties agree that intervention is to be given effect with respect to all of the owners' tangible property in Cuba at the time of intervention. The Court of Appeals held, however, that since the accounts receivable were not in Cuba at the time of intervention, the intervention did not reach them. The dissent points to a statement by trial counsel that when Dunhill's money arrived in Cuba *after* the intervention "the Cuban government took this

to authority to operate commercial businesses, to pay their bills and to collect their accounts receivable, interventors had been invested with sovereign authority to

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money and under the act of state doctrine it belongs to the Cuban government." The statement was made during counsel's closing argument in the District Court and is not and does not purport to be a *factual* representation that a second act of state occurred. Indeed in his brief in this Court the same counsel states "counsel's in-court statements were 'no more than statements of a litigating position,'" Brief for Respondents 16, and "The statement of . . . a lawyer is not proof of anything." *Id.*, at 17 n. 8. Indeed, if counsel's statements were proof of anything, petitioner would have been entitled to cross-examine him under oath. As a legal argument that the original act of state automatically matured when Dunhill's money arrived in Cuba and transformed the account receivable from an intangible to a tangible asset, the statement was rejected by the Court of Appeals, which held that the original intervention did not seize the accounts receivable from the prior owners even with respect to accounts later paid by Dunhill. Finally, we are unwilling, absent proof, to infer from the fact that Cuba seized the assets of the cigar business from Cuban nationals that it must necessarily have intended to make and did make a later discriminatory and confiscatory seizure of money belonging to the United States companies. Indeed, respondents have argued vigorously before this Court that no international law issue is raised precisely because "[a]ll of the acts of the Cuban sovereign have been directed at its nationals . . ." and "there was no intent to divest Dunhill of ownership." Brief for Respondents on Reargument 4–5. In supporting its conclusion that Cuba necessarily did intend to seize Dunhill's money when it arrived in Cuba, the dissent quotes a remark by counsel—in the third brief filed in this Court by respondents—that they had contended below that the "refusal to acquiesce in the quasi-contractual obligation sought to be imposed by a foreign court, was . . . an act of state." Once again, this is merely a statement of respondents' incorrect litigating position that the failure to pay Dunhill established a refusal by Cuba to acquiesce in an admitted obligation and was therefore an act of state. The litigating position is incorrect because, as stated *supra*, at 691, respondents have never admitted an obligation to Dunhill and therefore their failure to pay Dunhill, without more, is inadequate to establish a sovereign repudiation of such an obligation.

repudiate all or any part of the debts incurred by those businesses. Indeed, it is difficult to believe that they had the power selectively to refuse payment of legitimate debts arising from the operation of those commercial enterprises.

In *The "Gul Djemal,"* 264 U. S. 90 (1924), a supplier libeled and caused the arrest of the *Gul Djemal,* a steamship owned and operated for commercial purposes by the Turkish Government, in an effort to recover for supplies and services sold to and performed for the ship. The ship's master, "a duly commissioned officer of the Turkish Navy," *id.,* at 94–95, appeared in court and asserted sovereign immunity, claiming that such an assertion defeated the court's jurisdiction. A direct appeal was taken to this Court, where it was held that the master's assertion of sovereign immunity was insufficient because his mere representation of his government as master of a commercial ship furnished no basis for assuming he was entitled to represent the sovereign in other capacities.[9] Here there is no more reason to suppose that the interventors possess governmental, as opposed to commercial, authority than there was to suppose that the master of the *Gul Djemal* possessed such authority. The master of the *Gul Djemal* claimed the authority to assert sovereign immunity while the interventors claim that they

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[9] "*The Anne,* 3 Wheat. 435, reaffirmed by *The Sao Vicente,* 260 U. S. 151, is enough to show that the immunity could not have been successfully set up by a duly recognized consul, *representative of his sovereign in commercial matters,* in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the *Gul Djemal* had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty, and was serving upon a vessel *not functioning in naval or military capacity but engaged in commerce* . . . . He was not shown to have any authority to represent his sovereign other than can be inferred from his position as master . . . ." (Emphasis added.) 264 U. S., at 95.

had the authority to commit an act of state, but the difference is unimportant. In both cases, a party claimed to have had the authority to exercise sovereign power. In both, the only authority shown is commercial authority.

We thus disagree with the Court of Appeals that the mere refusal of the interventors to repay funds followed by a failure to prove that interventors "were not acting within the scope of their authority as agents of the Cuban government" satisfied respondents' burden of establishing their act of state defense. *Menendez* v. *Saks & Co.,* 485 F. 2d, at 1371. Nor do we consider *Underhill* v. *Hernandez,* 168 U. S. 250 (1897), heavily relied upon by the Court of Appeals, to require a contrary conclusion.[10] In that case and in *Oetjen* v. *Central Leather Co.,* 246 U. S. 297 (1918), and *Ricaud* v. *American Metal Co.,* 246 U. S. 304 (1918), it was apparently concluded that the facts were sufficient to demonstrate that the conduct in question was the public act of those with authority to exercise sovereign powers and was entitled to respect in our courts. We draw no such conclusion from the facts of the case before us now. As the District Court found, the only evidence of an act of state other than the act of nonpayment by interventors was "a statement by counsel for the interventors, during trial, that the Cuban Government and the interventors denied liability and had refused to make repayment." *Menendez* v. *Faber, Coe & Gregg, Inc.,* 345 F. Supp., at 545. But this merely restated re-

[10] There the commander of a successful revolution, in control of the city of Bolivar, refused a passport to Underhill. Upon suit by Underhill for his detention, this Court refused to inquire into the propriety of the detention because "[t]he acts complained of were the acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." 168 U. S., at 254.

spondents' original legal position and adds little, if anything, to the proof of an act of state. No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.

III

If we assume with the Court of Appeals that the Cuban Government itself had purported to exercise sovereign power to confiscate the mistaken payments belonging to three foreign creditors and to repudiate interventors' adjudicated obligation to return those funds, we are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far, and we decline to expand their reach to the extent necessary to affirm the Court of Appeals.

Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach. As the Court stated through Mr. Chief Justice Marshall long ago in *Bank of the United States* v. *Planters' Bank of Georgia,* 9 Wheat. 904, 907 (1824):

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with

> whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

Cf. *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U. S. 549, 567–568 (1922). In this same tradition, *South Carolina* v. *United States*, 199 U. S. 437 (1905), drew a line for purposes of tax immunity between the historically recognized governmental functions of a State and businesses engaged in by a State of the kind which theretofore had been pursued by private enterprise. Similarly, in *Ohio* v. *Helvering*, 292 U. S. 360, 369 (1934), the Court said: "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function .... When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader ...." It is thus a familiar concept that "there is a constitutional line between the State as government and the State as trader ...." *New York* v. *United States*, 326 U. S. 572, 579 (1946). See also *Parden* v. *Terminal R. Co.*, 377 U. S. 184, 189–190 (1964); *California* v. *Taylor*, 353 U. S. 553, 564 (1957); *United States* v. *California*, 297 U. S. 175, 183 (1936).

It is the position of the United States, stated in an *amicus* brief filed by the Solicitor General, that such a line should be drawn in defining the outer limits of the act of state concept and that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts. Attached to the brief of the United States and to this opinion as Appendix 1 is the letter of November 26, 1975, in which the Department of State, speaking through its Legal Adviser agrees with the brief filed by the Solicitor General and, more specifically, declares that

"we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial,[11] and not public, in nature." [12]

The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S., at 427–428, 431–433. But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as

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[11] The dissent, assuming that the Republic of Cuba purported to exercise sovereign powers in refusing to return Dunhill's money, asserts that there is no distinction between the refusal to honor its obligation to return Dunhill's money and the original expropriation of the cigar businesses; and that the case therefore does not involve a purely commercial act. The dissent is wrong. Cuba's debt to Dunhill arose out of the *conduct* by Cuba's agents of a commercial business for profit. The same may not be said of conventional expropriations of foreign assets located *ab initio* inside a country's territorial borders. Dunhill was continuing to buy cigars from the interventors after intervention and Dunhill knew when the payments were made that the interventors would receive them. *Menendez* v. *Saks & Co.,* 485 F. 2d 1355, 1367–1368 (CA2 1973). The debt would never have arisen if Cuba's agents had not gone into the cigar business and sold to Dunhill. This case is therefore no different from any case in which a buyer overpays for goods sold by a commercial business operated by a foreign government—a commonplace event in international commerce.

[12] The letter also takes the position that sovereign immunity, as such, does not prevent entry of an affirmative judgment on a counterclaim arising out of the same "transaction or occurrence that is the subject matter of the claim of the foreign state," and inferentially that the act of state doctrine is likewise unavailable as a method of avoiding such an affirmative judgment. In light of our conclusion that repudiation by a sovereign of a commercial debt is not an act of state, we do not reach the State Department's alternative position. The letter also takes the position that the overruling of *Sabbatino,* so that acts of state would hereafter be subject

an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary, for the reasons to which we now turn, we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts.

Although it had other views in years gone by, in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our Government since that time as the attached letter of November 26, 1975, confirms:

> "Moreover, since 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity."

Repudiation of a commercial debt cannot, consistent with this restrictive approach to sovereign immunity, be treated as an act of state; for if it were, foreign govern-

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to adjudication in American courts under international law, would not result in embarrassment to the conduct of United States foreign policy. We need not resolve this issue either.

ments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our Government would not extend them under prevailing sovereign immunity principles in this country. This would undermine the policy supporting the restrictive view of immunity, which is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible.

Although at one time this Court ordered sovereign immunity extended to a commercial vessel of a foreign country absent a suggestion of immunity from the Executive Branch and although the policy of the United States with respect to its own merchant ships was then otherwise, *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562 (1926), the authority of that case has been severely diminished by later cases such as *Ex parte Peru,* 318 U. S. 578 (1943), and *Mexico* v. *Hoffman,* 324 U. S. 30 (1945). In the latter case the Court unanimously denied immunity to a commercial ship owned but not possessed by the Mexican Government. The decision rested on the fact that the Mexican Government was not in possession, but the Court declared, *id.,* at 35–36:

> "Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' *United States* v. *Lee, supra,* 209; *Ex parte Peru, supra,* 588.
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> "It is therefore not for the courts to deny an

immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. The judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. *Ex parte Peru, supra,* 588. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." (Footnote omitted.)

In a footnote the Court expressly questioned the *Berizzi Bros.* holding,[13] and two concurring Justices asserted that the Court had effectively overruled that case.[14]

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[13] "This salutary principle was not followed in *Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562, where the court allowed the immunity, for the first time, to a merchant vessel owned by a foreign government and in its possession and service, although the State Department had declined to recognize the immunity. The propriety of thus extending the immunity where the political branch of the government had refused to act was not considered.

"Since the vessel here, although owned by the Mexican Government, was not in its possession and service, we have no occasion to consider the questions presented in the *Berizzi* case. It is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it." 324 U. S., at 35 n. 1.

[14] Mr. Justice Frankfurter, joined by Mr. Justice Black, said:

"The fact of the matter is that the result in *Berizzi Bros. Co.* v. *The Pesaro, supra,* was reached without submission by the Department of State of its relevant policies in the conduct of our foreign relations and largely on the basis of considerations which have steadily lost whatever validity they may then have had. Compare

Since that time, as we have said, the United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of

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the overruling of *The Thomas Jefferson,* 10 Wheat. 428 (1825), by *The Genesee Chief,* 12 How. 443 (185[2]). The views of our State Department against immunity for commercial ships owned by foreign governments have been strongly supported by international conferences, some held after the decision in the *Pesaro* case. See Lord Maugham in *Compania Naviera Vascongado* v. *The Cristina* [1938] A. C. 485, 521–523. But the real change has been the enormous growth, particularly in recent years, of 'ordinary merchandising' activity by governments. See *The Western Maid,* 257 U. S. 419, 432. Lord Maugham in the *Cristina* thus put the matter:

" 'Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. These were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country?' [1938] A. C. 485, 521–522.

. . . . .

"It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when 'the department of the government charged with the conduct of our foreign relations,' or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsi-

foreign governments. It has based that policy in part on the fact that this approach has been accepted by a large and increasing number of foreign states in the international community;[15] in part on the fact that the United States had already adopted a policy of consenting to be sued in foreign courts in connection with suits against its merchant vessels; and in part because the enormous increase in the extent to which foreign sovereigns had become involved in international trade made essential "a practice which will enable persons doing business with them to have their rights determined in the courts." Appendix 2 to this opinion, *infra*, at 714.

In the last 20 years, lower courts have concluded, in

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bility by enforcement of the regular judicial processes." *Id.*, at 40–42.

[15] Austria: *Collision with Foreign Government-Owned Motor Car (Austria) Case*, [1961] 40 Int'l L. Rep. 73 (Sup. Ct.). Belgium: *"Socobel"* v. *Greek State*, [1951] 18 Int'l L. Rep. 3 (Trib. Civ. Brussels). Canada: *Penthouse Studios, Inc.* v. *Republic of Venezuela*, [1970] 8 D. L. R. 3d 686 (Quebec Ct. App., 1969). England: *Thai-Europe Tapioca Service* v. *Government of Pakistan*, [1975] 1 W. L. R. 1485 (C. A.). *Philippine Admiral* v. *Wallem Shipping*, [1976] 1 All E. R. 78 (P. C.). Egypt: *Federated People's Republic of Yugoslavia* v. *Kafr El-Zayat Cotton Co.*, [1951] 18 Int'l L. Rep. 225 (Civ. Trib. Alexandria) France: *Administration des Chemins de Fer Iraniens* v. *Société Levant Express Transport*, 73 Revue Générale de Droit International Public 883 (Sup. Ct. 1969). Germany: *Claim against the Empire of Iran Case*, [1963] 45 Int'l L. Rep. 57 (Fed. Const. Ct.). Greece: *Papaevangelou* v. *United States Government* (Athens First Instance Ct., Apr. 23, 1960). Hong Kong: *Midland Investment Co., Ltd.* v. *Bank of Communications*, [1956] 40 H. K. L. Rep. 42, 23 Int'l L. Rep. 234 (S. Ct.). Italy: *United States* v. *Soc. I. R. S. A.*, 86 Il Foro Italiano Part I, 1405 (Sup. Ct., en banc, Mar. 13, 1963). Pakistan: *Gammon-Layton* v. *Secretary of State, U. S. A.*, P. L. D. 1965 (W. P.) Karachi 425. Philippines: *Carried Lumber Co.* v. *United States of America* (Ct. App. Manila, Sept. 24, 1974). Yugoslavia: *Zarko* v. *Office of International Trade Fairs, U. S. Department of Commerce* (Dist. Ct. Zagreb, June 10, 1966).

light of this Court's decisions in *Ex parte Peru, supra,* and *Mexico* v. *Hoffman, supra,* and from the Tate letter and the changed international environment, that *Berizzi Bros. Co.* v. *S. S. Pesaro, supra,* no longer correctly states the law; and they have declined to extend sovereign immunity to foreign sovereigns in cases arising out of purely commercial transactions. *Victory Transport, Inc.* v. *Comisaria General,* 336 F. 2d 354 (CA2 1964), cert. denied, 381 U. S. 934 (1965); *Petrol Shipping Corp.* v. *Kingdom of Greece,* 360 F. 2d 103 (CA2), cert. denied, 385 U. S. 931 (1966); *Premier S. S. Co.* v. *Embassy of Algeria,* 336 F. Supp. 507 (SDNY 1971); *Ocean Transport Co.* v. *Government of Republic of Ivory Coast,* 269 F. Supp. 703 (ED La. 1967); *ADM Milling Co.* v. *Republic of Bolivia,* Civ. Action No. 75–946 (DC Aug. 8, 1975); *Et Ve Balik Kurumu* v. *B. N. S. Int'l Sales Corp.,* 25 Misc. 2d 299, 304 N. Y. S. 2d 971 (1960); *Harris & Co. Advtg., Inc.* v. *Republic of Cuba,* 127 So. 2d 687 (Fla. Ct. App. 1961). Indeed, it is fair to say that the "restrictive theory" of sovereign immunity appears to be generally accepted as the prevailing law in this country. ALI, Restatement (Second), Foreign Relations Law of the United States, § 69 (1965).

Participation by foreign sovereigns in the international commercial market has increased substantially in recent years. Cf. International Economic Report of the President 56 (1975). The potential injury to private businessmen—and ultimately to international trade itself—from a system in which some of the participants in the international market are not subject to the rule of law has therefore increased correspondingly. As noted above, courts of other countries have also recently adopted the restrictive theory of sovereign immunity. Of equal importance is the fact that subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than

would an attempt to pass on the legality of their governmental acts.[16] In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves." Moreover, as this Court has noted:

> "[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S., at 428.

See also *id.,* at 430 n. 34. There may be little codification or consensus as to the rules of international law concerning exercises of *governmental* powers, including military powers and expropriations, within a sovereign state's borders affecting the property or persons of aliens. However, more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market.[17] The restric-

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[16] In *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 428 (1964), the Court noted in the context of the act of state doctrine: "It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

[17] Schmitthoff, The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions, 17 Int'l & Comp. L. Q. 551, 563–564 (1968). See also A. Lowenfeld, International Private Trade 1–2 (1975); Gal, The Commercial Law of Nations

tive approach to sovereign immunity suggests that these established rules should be applied to the commercial transactions of sovereign states.

Of course, sovereign immunity has not been pleaded in this case; but it is beyond cavil that part of the foreign relations law recognized by the United States is that the commercial obligations of a foreign government may be adjudicated in those courts otherwise having jurisdiction to enter such judgments. Nothing in our national policy calls on us to recognize as an act of state a repudiation by Cuba of an obligation adjudicated in our courts and arising out of the operation of a commercial business by one of its instrumentalities. For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label "Act of State" than if it is given the label "sovereign immunity." [18]

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and the Law of International Trade, 6 Corn. Int'l L. J. 55, 64 (1972); H. Trammer, The Law of Foreign Trade in the Legal Systems of the Countries of Planned Economy, in The Sources of the Law of International Trade 41 (Schmitthoff ed. 1964) (hereinafter Schmitthoff); V. Knapp, The Function, Organization and Activities of Foreign Trade Corporations in the European Socialist Countries, Schmitthoff 52; A. Goldstajn, International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law—I, Schmitthoff 103; T. Ionasco & I. Nestor, The Limits of Party Autonomy—I, Schmitthoff 167; and Schmitthoff, Introduction, Schmitthoff ix.

[18] The dissent states that the doctrines of sovereign immunity and act of state are distinct—the former conferring on a sovereign "exemption from suit by virtue of its status" and the latter "merely [telling] a court what law to apply to a case." *Post*, at 725–726, 726. It may be true that the one doctrine has been described in jurisdictional terms and the other in choice-of-law terms; and it may be that the doctrines point to different results in certain cases. It cannot be gainsaid, however, that the proper application of each

In describing the act of state doctrine in the past we have said that it "precludes the courts of this country from inquiring into the validity of the *public* acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino, supra,* at 401 (emphasis added), and that it applies to "acts done within their own States, in the exercise of *governmental* authority." *Underhill* v. *Hernandez,* 168 U. S., at 252 (emphasis added). We decline to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations. Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit, the act was not an act of state.

Reversed.

APPENDIX 1 TO OPINION OF THE COURT

THE LEGAL ADVISER,
DEPARTMENT OF STATE,
Washington, November 26, 1975.

DEAR MR. SOLICITOR GENERAL:

In the case of *Alfred Dunhill of London, Inc.* v. *The*

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involves a balancing of the injury to our foreign policy, the conduct of which is committed primarily to the Executive Branch, through judicial affronts to sovereign powers, compare *Mexico* v. *Hoffman,* 324 U. S., at 35–36 (sovereign immunity), with *Banco Nacional de Cuba* v. *Sabbatino, supra,* at 423, 427–428 (act of state), against the injury to the private party, who is denied justice through judicial deference to a raw assertion of sovereignty, and a consequent injury to international trade. The State Department has concluded that in the commercial area the need for merchants "to have their rights determined in courts" outweighs any injury to foreign policy. This conclusion was reached in the context of the jurisdictional problem of sovereign immunity. We reach the same one in the choice-of-law context of the act of state doctrine.

Republic of Cuba, which is before the Supreme Court on petition for a writ of certiorari, No. 73–1288, the Court has requested the parties to discuss whether its holding in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, should be reconsidered.

The Department of State believes that the question of whether the *Sabbatino* case should be reconsidered involves matters of importance to the foreign policy interests of the United States and requests that its views be conveyed to the Supreme Court.

The views expressed herein are in addition to the arguments presented in the brief amicus curiae which the United States is filing in the *Dunhill* case. As urged in that brief, we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature. Moreover, since 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity.

In the event, however, that the Court reaches the question whether the *Sabbatino* holding should be reconsidered, we believe that the following considerations should be called to the Court's attention:

Since *Sabbatino* was decided in 1964, the Department of State has on two occasions expressed to courts in the United States its views concerning act of state adjudications. First, in the *Sabbatino* case itself, on remand, the Executive Branch declined to make a determination under the Hickenlooper Amendment, 22 U. S. C. 2370 (e)(2), "that application of the act of state doctrine is required in this case by the foreign policy

interests of the United States." *Banco Nacional de Cuba* v. *Farr,* 272 F. Supp. 836, 837 (S. D. N. Y.), aff'd, 383 F. 2d 166 (C. A. 2), certiorari denied, 390 U. S. 956. Having taken note of the Executive Branch's position, the district court in *Farr* applied the Hickenlooper Amendment and held that a Cuban decree of confiscation violated customary international law. 272 F. Supp., at 838.

Second, in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U. S. 759, the Department of State informed the Supreme Court that general foreign relations considerations did not require application of the act of state doctrine to bar adjudication of a counterclaim when the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, and when the amount of relief to be granted is limited to the amount of the foreign state's claim.[1] Relying on the precedent of *Bernstein* v. *N. V. Nederlandsche Amerikaanshe, Etc.,* 210 F. 2d 375 (C. A. 2), where the Department had advised that the act of state doctrine need not apply to a class of cases involving Nazi confiscations, the Department in *First National City Bank* concluded that the act of state doctrine need not be applied "in this or like cases."

[1] Since *First National City Bank* was decided, the Department of State has taken the position in the sovereign immunity area that even where a counterclaim exceeds the foreign state's claim, the courts may adjudicate the counterclaim if it arises from the same "transaction or occurrence that is the subject matter of the claim of the foreign state." S. 566, 93d Cong., 1st Sess., § 1607 (1); see, ALI, Restatement, Foreign Relations Law of the United States, Second, § 70 (2)(b). In our view, the adjudication of counterclaims against a foreign state, arising from the same transaction, occurrence or subject matter as the claim of the foreign state, does not pose foreign relations difficulties.

Significantly, the *Farr, Bernstein* and *First National City Bank* cases each involved an Executive Branch determination which opened the way for U. S. courts to review an act of state on the merits under international law. In each of these cases, the claim or counterclaim in question alleged that an act of state violated customary international law. Thus, at least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.

This trend is mirrored in other countries. Apart from the cases cited by Mr. Justice White in *Sabbatino,* 376 U. S., at 440 n. 1, there have been several recent decisions where foreign courts have reviewed state acts under international law.[2] English law, from

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[2] See, *e. g., In The Matter of Minera El Teniente, S. A.,* 12 Int'l Legal Materials 251 (Superior Ct. Hamburg, 1973) (a foreign state's act of expropriation that violates international law will not be recognized by German courts if the subject matter of the litigation has a substantial contact with Germany); *Braden Copper Co.* v. *Le Groupement d'Importation des Métaux,* 12 Int'l Legal Materials 187 (Ct. of Extended Jurisdiction Paris, 1972) (rejecting sovereign immunity of a state trading company that marketed expropriated copper); *Compagnie Française de Crédit et de Banque* v. *Consorts Atard,* Clunet, J. du Droit Int'l, 98 (1971), p. 86 (France: Cour d'Appel Amiens, 1970) (foreign expropriation decrees will not be recognized in France absent the payment of prompt, adequate and effective compensation); *Crédit Foncier d'Algerie et de Tunisie* v. *Narbonne,* Clunet, J. du Droit Int'l 96 (1969), p. 912 (France: Cou[r] de Cassation, 1969) (acts of expropriation not recognized in France unless equitable compensation is first determined); *Obe[r]ster Gerichtshof* (Austrian Supreme Court), decision of 22 December 1965, Osterr. Juristenzeitung 21 (1966), p. 204, Clunet, J. du Droit Int'l, 94 (1967), p. 941 (an expropriation without compensation violates international law, but no recovery against purchasers of expropriated property); *N. V. Assurantie Maatschappij*

which our act of state doctrine derives, does not require British courts to abstain from reviewing state acts under international law.[3] As far as can be determined, this exercise of the judicial function in foreign jurisdictions has not caused serious foreign relations consequences for the countries concerned.

The present case is similar to *Bernstein, Farr* and *First National City Bank.* This Department is of the opinion that there would be no embarrassment to the conduct of foreign policy if the Court should decide in this case to adjudicate the legality of any act of state found to have taken place and to make such adjudication in accordance with any principle of international law found to be relevant.

In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrass-

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de Nederlanden van 1845 v. *P. T. Escomptobank,* 33 Int'l L. Rep. 30 (D. Ct. The Hague, 1962) (rejecting act of state defense where there is a violation of international law).

[3] *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria,* [1935] 1 K. B. 140, 50 T. L. R. 284; *Re Helbert Wagg & Co. Ltd.,* [1956] Ch. 323, 346; 1 Lauterpacht, *Oppenheim's International Law,* 267–268 (8th ed. 1955). See also *Republic of Peru* v. *Peruvian Guano Co.,* [1887] 36 Ch. D. 489 and *Republic of Peru* v. *Dreyfus Brothers & Co.* [1888] 38 Ch. D. 348, where British courts, under international law, refused to give effect to Peruvian laws annulling acts of the preceding Peruvian government; cf. *Buttes Gas and Oil Co.* v. *Hammer* [1975] 2 W. L. R. 425, at 434–435.

ment to the conduct of the foreign policy of the United States.

Sincerely,

MONROE LEIGH.

APPENDIX 2 TO OPINION OF THE COURT*

May 19, 1952.

MY DEAR MR. ATTORNEY GENERAL:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the

*26 Dept. State Bull. 984–985 (1952).

property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive

theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign

governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE

Acting Legal Adviser

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court. Since the line between commercial and political acts of a foreign state often will be difficult to delineate, I write to reaffirm my view that even in cases deemed to involve purely political acts, it is the duty of the judiciary to decide for itself whether deference to the political branches of Government requires abstention. As I stated in *First Nat. City Bank* v. *Banco Nacional de Cuba,* 406 U. S. 759, 775–776 (1972) (concurring in judgment):

> "Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this."

Just as I saw no circumstances requiring judicial abstention in that case, I see none here. Nor can I foresee any in cases involving only the commercial acts of a foreign state.

MR. JUSTICE STEVENS, concurring.

For reasons stated in Parts I and II of the Court's opinion, I agree that the act of state doctrine does not bar the entry of the judgment in favor of Dunhill.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join, dissenting.

The act of state doctrine commits the courts of this country not to sit in judgment on the acts of a foreign

government performed within its own territory.[1] Under any realistic view of the facts of this case, the interventors' retention of and refusal to return funds paid to them by Dunhill constitute an act of state, and no affirmative recovery by Dunhill can rest on the invalidity of that conduct. The Court of Appeals so concluded, and I would affirm its judgment.

I

As of September 15, 1960, when the Cuban Government "intervened," or nationalized, five Cuban-owned cigar manufacturers, petitioner Dunhill had received some $148,600 worth of cigars for which it had not yet paid. In the period between intervention and February 1961, Dunhill took delivery of an additional $93,000 worth of shipments. Both the District Court and the Court of Appeals concluded that the intervention was to be given full legal effect with respect to the property of Cuban nationals located in Cuba, and that the interventors were therefore entitled to payment for postintervention shipments. *F. Palicio y Compania, S. A.* v. *Brush,* 256 F. Supp. 481, 486–490 (SDNY 1966), aff'd, 375 F. 2d 1011 (CA2), cert. denied *sub nom. Brush* v. *Republic of Cuba,* 389 U. S. 830 (1967). It is quite clear that that result was correct, and that it would have been no different had the intervened firms been owned by United States citizens. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964).

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[1] The classic American formulation of the doctrine, see *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 416 (1964), appears in *Underhill* v. *Hernandez,* 168 U. S. 250, 252 (1897):

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

Since the date of intervention, the interventors have taken the position that they were also entitled to receive the amounts due to the intervened firms for preintervention shipments—in the case of Dunhill, $148,600. And throughout this litigation, respondents, the interventors [2] and the Republic of Cuba, have insisted that the act of state doctrine requires our courts to give full legal effect to the intervention decree insofar as it purported to nationalize the accounts receivable of the intervened firms. Both the District Court and the Court of Appeals held, however, that the accounts receivable involved here had their situs in New York, that the act of state doctrine did not apply, and that the attempted confiscation was ineffective. *Menendez* v. *Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527, 536–540 (SDNY 1972); *Menendez* v. *Saks & Co.*, 485 F. 2d 1355, 1364–1365 (CA2 1973). In a separate petition for certiorari, which the Court today denies,[3] and in the course of its presentation in this case, respondents have pursued their contention that the initial intervention should be recognized as having reached the preintervention accounts receivable. But that is not the respondents' sole contention, and it is not necessary for us to consider it here. For, as the Court of Appeals recognized, the act of state question took on a wholly different light when Dunhill paid the amount due for preintervention shipments to the interventors in Cuba.[4]

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[2] Actually only one of the interventors is a party in this Court; he has apparently been designated as the single interventor for the five intervened tobacco companies. For the sake of convenience, I shall continue to refer to "the interventors."

[3] *Republic of Cuba* v. *Saks & Co.*, No. 73–1287, *post*, p. 991.

[4] Payment was made to collecting banks that had previously acted as agents for the former owners. The District Court expressly found that "the importers [including Dunhill] well knew that, following intervention, the collecting banks were acting as agents for the interventors and not the [former] owners, and also

The Court of Appeals held that Dunhill's claim for return of the monies paid to the interventors for preintervention shipments sounds in quasi-contract; it arises, the court observed, not from Dunhill's contractual obligation to the owners, which is situated in New York, but from the interventors' receipt, appropriation, and refusal to return the funds, all of which have occurred apart from the contract and in Cuba. If the interventors' course of conduct is itself an act of state, therefore, there can be no doubt that the act of state doctrine applies.

The interventors have not taken any discrete, overt action for which to claim the status of an act of state. Rather, they have received and long retained the money paid to them for preintervention shipments, and they have ignored Dunhill's demands for its return. The Court declines to view this course of conduct as reflecting an exercise of sovereign power to retain the funds at issue after they arrived in Cuba, explaining in part:

> "No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due [Dunhill and the other] foreign importers." *Ante*, at 695.

I do not understand the Court to suggest, however, that the act of state doctrine can be triggered only by a "statute, decree, order, or resolution" of a foreign government, or that the presence of an act of state can only be demonstrated by some affirmative action by the foreign sovereign. While it is true that an act of state

knew that the payments they were making to the collecting banks were ultimately received by the interventors in Cuba." 345 F. Supp., at 542. These findings were sustained by the Court of Appeals. 485 F. 2d, at 1367-1368.

generally takes the form of an executive or legislative step formalized in a decree or measure, see, *e. g., Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 403-405, n. 7 (1964); *Eastern States Petroleum Co.* v. *Asiatic Petroleum Corp.,* 28 F. Supp. 279 (SDNY 1939), that is only because duly constituted governments generally act through formal means. When they do not, their acts are no less the acts of a state, and the doctrine, being a practical one, is no less applicable. Thus, in *Underhill* v. *Hernandez,* 168 U. S. 250 (1897), where the plaintiff sought recovery for his detention in Venezuela by reason of the then revolutionary forces' refusal to grant him a passport out of Ciudad Bolivar, the Court held that the act of state doctrine "must necessarily extend to the agents of governments ruling by paramount force as [a] matter of fact." *Id.,* at 252. The cases of *Oetjen* v. *Central Leather Co.,* 246 U. S. 297 (1918), and *Ricaud* v. *American Metal Co.,* 246 U. S. 304 (1918), are further illustrations of the practical approach the Court has always taken in determining whether an act of state is present. In each case the plaintiff claimed title to goods purchased from Mexican sellers but confiscated by generals of the Constitutionalist Carranza forces before delivery to the plaintiffs. The Generals, Villa and Pereyra respectively, had sold the goods to intermediate purchasers for the furtherance of the revolution, and the goods thereafter came into the United States in the possession of the defendant-assignees. The Court held that the seizures in question must be viewed as the action, in time of civil war, of a duly commissioned agent of the prevailing Mexican Government, and could not be subjected to the scrutiny of another sovereign's courts.

These cases demonstrate not only that an act of state need not be formalized in any particular manner, but also that it need not take the form of active, rather than

passive, conduct. Had General Villa come accidentally into possession of the hides sought to be replevied in *Oetjen,* instead of seizing them, and then simply refused the plaintiff's demand for possession, the result could not have been any different. Indeed, so far as the report of the *Underhill* case reveals, the plaintiff, in seeking recovery for his detention, challenged no more than General Hernandez' refusal to do anything when he demanded his passport.

That a foreign sovereign has issued no formal decree and performed no "affirmative" act is not fatal, then, to an act of state claim. If the foreign state has exercised a sovereign power either to act or to refrain from acting, there is an act of state. In a case very similar to this one, the New York Court of Appeals held that the Cuban bank's dishonoring of tax exemption certificates, the redemption of which had been suspended by a decision of the Cuban Currency Stabilization Fund, was an act of state. *French* v. *Banco Nacional de Cuba,* 23 N. Y. 2d 46, 242 N. E. 2d 704 (1968). The act of state, the court wrote, "was the defendant's refusal to perform; the currency regulations, though equally the product of an act of state, were simply the justification for the refusal." [5]

The Court, I take it, does not dispute that a refusal to act constitutes an act of state when shown to reflect the exercise of sovereign power. Rather, the Court finds no exercise of sovereign power to retain the funds at issue after they arrived in Cuba. Refusal to repay, the Court suggests, does not necessarily reflect anything more than the interventors' initial contention, rejected by the Dis-

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[5] The quoted statement appears in the concurring opinion of Judge Hopkins, 23 N. Y. 2d, at 66, 242 N. E. 2d, at 717, which was joined by the same majority that subscribed to the opinion of Chief Judge Fuld, in which the court held: "[T]he breach of contract, of which the plaintiff complains, resulted from, and, indeed, itself constitutes, an act of state." *Id.*, at 53, 242 N. E. 2d, at 709.

trict Court and the Court of Appeals, that the September 15, 1960, intervention decree operated to seize the accounts receivable of the intervened firms. And the Court is unwilling "to infer from the fact that Cuba seized the assets of the cigar business from Cuban nationals that they must necessarily . . . have made a later discriminatory and confiscatory seizure of money belonging to the United States companies." *Ante,* at 692 n. 8.

As I have already indicated, however, the respondents' position has not been, and need not be, limited to the contention that the September 15 decree operated to seize the preintervention accounts receivable. Counsel for the interventors and the Republic of Cuba stated at trial, in his brief to this Court, and again in his oral argument in this Court:

> "[U]nder the act of state doctrine the Cuban government, in accepting, expropriating, seizing, nationalizing, whatever other words you want, to take this money, has done so pursuant to a regulation, a law, a decree of the government of Cuba, and therefore the courts of this state will not look into the matter nor will the federal court.
>
> "Now, I am not talking about the extraterritorial effect of an act of state. I am talking about a territorial effect, namely, the seizure or the acceptance or the appropriation of this money when it got down to Cuba. We are not now concerned with whether they expropriated debts on September 15th. The question is what happened on October 1st, and October 15th and on November 8th and December 12th, when the money came down. And at that time the Cuban government took this money and under the act of state doctrine it belongs to the Cuban government." Tr. 854–856; Brief for Respond-

ents in Reply to Brief for United States as *Amicus Curiae* 5 n. 3; Tr. of Oral Rearg. 38.

This statement confirms that while Cuba's retention of and refusal to return the funds once they arrived in Cuba was "pursuant to" the September 15 decree, it was without regard to whether that decree would, in the eyes of a United States court, have entitled the interventors to collect the accounts receivable in the first place.[6] And while the Court appears to suggest that Cuba would be more hesitant to seize money belonging to United States companies than it would be to seize property belonging to Cuban nationals, the fact is that in this case Cuba has made known its intent to retain the funds in question even if a United States court declares the funds to have been taken from Dunhill rather than from the former owners. Speaking once again on behalf of his client, the Republic of Cuba, counsel has announced Cuba's "refusal to acquiesce in the quasi-contractual obligation [to Dunhill] sought to be imposed by a foreign court." Brief for Respondents in Reply to Brief for United States as *Amicus Curiae* 5.[7]

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[6] In another brief filed in this Court, respondents' counsel observed:

"It matters not that the interventor may be wrong in the eyes of the United States court [in claiming that the September 15 decree nationalized the preintervention accounts receivable]. . . . Since the monies taken by the interventor were in Cuba, and he was a representative of the sovereign, it can hardly be denied that his conduct amounted to 'a taking of property within its own territory by a foreign sovereign government.' [*Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S., at 428.]" Brief for Respondents 18.

[7] The Court acknowledges that this statement reflects an alternative contention by respondents that, assuming the ineffectiveness of the September 15 decree in reaching the preintervention accounts receivable and the existence of a quasi-contractual obligation to return the monies at issue to Dunhill, their repudiation of that obli-

The above-quoted statements of counsel are not themselves acts of state. But as authoritative representations of the position of counsel's clients, the interventors and the Republic of Cuba, with respect to the monies in their possession, these statements do serve to confirm that the continued retention of those monies has been undertaken as an exercise of sovereign power.[8]

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gation was an act of state. *Ante*, at 692 n. 8. But the Court emphasizes the fact that respondents have not admitted the existence of an obligation to Dunhill, and concludes that it remains unclear whether respondents have determined to retain the monies even if a United States court declares the obligation to exist. The very fact that respondents are making the alternative argument referred to herein, however, should remove any doubt as to their intentions.

[8] *Compania Espanola de Navegacion Maritima* v. *The Navemar,* 303 U. S. 68 (1938), is not to the contrary. That was a suit in admiralty by the alleged owner of a Spanish merchant vessel to recover possession. The Spanish Ambassador sought leave to intervene as a claimant and produced an "affidavit of the Spanish Acting Consul General suggesting that when the suit was brought the vessel was the property of the Republic of Spain, by virtue of a decree of attachment promulgated by the President of the Republic, appropriating the vessel to the public use, and that it was then in the possession of the Spanish Government." *Id.,* at 70. The District Court, we held, "was not bound . . . to accept the allegations of the suggestion as conclusive" on the question of possession, *id.,* at 75, where there was no proof whatever that the foreign sovereign had ever held possession and no claim that "the alleged seizure [of the vessel] by the members of the crew was an act of or in behalf of the Spanish Government." *Id.,* at 72.

By contrast, in the present case it is settled that the interventors received the payments for preintervention shipments on behalf of the Cuban Government, *Menendez* v. *Faber, Coe & Gregg Inc.,* 345 F. Supp., at 532, and any lingering doubt that their retention was by virtue of a claim of right was dispelled by counsel for Cuba and the interventors at trial. Had possession been established in *The Navemar,* and the decree of appropriation been in doubt, the case would be in point, but in fact the contrary was true and the case is inapposite.

It was in response to the suggestion that *The Navemar* case con-

II

MR. JUSTICE WHITE advances a contention, not adopted by the Court, that even if the Cuban Government "had purported to exercise sovereign power to confiscate" the monies at issue, *ante,* at 695, the act of state doctrine is inapplicable because of the "purely commercial" nature of the confiscation. While I am prompted to make several observations on the suggested rationale for a broad "commercial act" exception to the act of state doctrine, ultimately there is no need to consider whether, and under what circumstances, an exception for commercial acts might be appropriate. It will suffice to say that no such exception is appropriate in this case.

A

I note at the outset that the commercial act exception to the act of state doctrine is supported by the Department of State. In its most recent *Bernstein* letter,[9] the Department has expressed the opinion that the conduct of foreign policy would suffer no embarrassment if the Court declined to apply the act of state doctrine to this case, if it declined to apply the doctrine to commercial cases in general, or, indeed, if it overruled *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964). MR. JUSTICE WHITE quite properly does not rely specifically upon the views of the Department; six Members of the Court in *First Nat. City Bank* v. *Banco Nacional de*

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trolled this one that counsel for respondents made the statement, relied upon by the Court, *ante,* at 692 n. 8: "The statement of an ambassador, like the statement of a lawyer, is not proof of anything. It is merely an assertion made by the representative of a sovereign as to the position taken by that sovereign in litigation." Brief for Respondent 17 n. 8. In this case, unlike in *The Navemar* case, it is precisely the position of the foreign sovereign with respect to property in its possession that is significant.

[9] The appellation "*Bernstein* letter" stems from the case *Bernstein* v. *N. V. Nederlandsche-Amerikaansche,* 210 F. 2d 375 (CA2 1954).

Cuba, 406 U. S. 759 (1972) (hereinafter *Citibank*), disapproved finally the so-called *Bernstein* exception to the act of state doctrine, thus minimizing the significance of any letter from the Department of State. *Id.,* at 773 (Douglas, J., concurring in result); *ibid.* (POWELL, J., concurring in judgment); *id.,* at 776–777 (BRENNAN, J., dissenting). Whether the act of state question in this case is viewed as being confined to a single dispute or as extending to a broad class of disputes, the task of defining the role of the Judiciary is for this Court, not the Executive Branch.[10]

B

In concluding that the act of state doctrine should not apply to the purely commercial acts of sovereign nations, MR. JUSTICE WHITE relies heavily upon the widespread acceptance of the "restrictive theory" of sovereign immunity, which declines to extend immunity to foreign governments acting in a "private," or commercial, capacity. The restrictive theory of sovereign immunity has not been adopted by this Court, but even if we assume that it is the law in this country, it does not follow that there should be a commercial act exception to the act of state doctrine.

It is true, of course, that a particular litigant's claim may be as effectively defeated by application of the act of state doctrine as by a foreign government's invocation of sovereign immunity. But the doctrines of sovereign immunity and act of state, while related, differ fundamentally in their focus and in their operation. Sovereign immunity accords a defendant exemption from

[10] It is noteworthy that while the Department of State now takes the position that *Sabbatino* can be overruled without embarrassment to the conduct of foreign policy, the result in *Sabbatino* had been urged by the Solicitor General at the time. See Brief for United States as *Amicus Curiae* in *Sabbatino,* O. T. 1963, No. 16.

suit by virtue of its status. By contrast, the act of state doctrine exempts no one from the process of the court. Equally applicable whether a sovereign nation is a party or not, the act of state doctrine merely tells a court what law to apply to a case; it "concerns the limits for determining the validity of an otherwise applicable rule of law." *Sabbatino,* 376 U. S., at 438.[11] In the absence of "unambiguous agreement regarding controlling . . . principles" of international law, *id.,* at 428, the act of state doctrine commands that the acts of a sovereign nation committed in its own territory be accorded presumptive validity.

The act of state doctrine, " 'although it shares with the immunity doctrine a respect for sovereign states,' serves important policies entirely independent of that rule." *Citibank, supra,* at 795 (BRENNAN, J., dissenting), quoting *Sabbatino, supra,* at 438. The act of state doctrine is not mandated by the text of the Constitution, but it does have " 'constitutional' underpinnings." *Sabbatino, supra,* at 423.

> "It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and

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[11] See also R. Falk, The Role of Domestic Courts in the International Legal Order 96–102 (1964); Henkin, Act of State Today: Recollections in Tranquility, 6 Col. J. Transnat'l L. 175, 178–180, 187–188 (1967).

for the community of nations as a whole in the international sphere." *Ibid.*[12]

As MR. JUSTICE BRENNAN has observed, the act of state doctrine reflects the notion that the validity of an act of a foreign sovereign is, under some circumstances, a "political question" not cognizable in our courts. The circumstances indicating the existence of a "political question" in *Sabbatino* included, as MR. JUSTICE BRENNAN summarized, "the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States

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[12] While *Sabbatino* found the act of state doctrine to reflect the "distribution of functions between the judicial and political branches of the Government," 376 U. S., at 427–428, it has also been suggested that a doctrine of deference based upon the absence of consensus as to controlling principles of international law allocates legal competence among nations in a manner that promotes the growth of international law. See generally R. Falk, The Status of Law in International Society 403–442 (1970); R. Falk, The Role of Domestic Courts in the International Legal Order 64–138 (1964). Whether considerations of its contribution to the development of international law provide a basis for the act of state doctrine independent of the notion of separation of powers is a question that the Court has not addressed and that we need not consider. It is worth noting, however, that the *Sabbatino* Court was sensitive to the fact that a court's invalidation of a foreign sovereign's acts on the basis of principles of international law that are not the subject of "unambiguous agreement," 376 U. S., at 428, is unlikely to be regarded as impartial. *Id.*, at 434–435. In the area of state responsibility for expropriations, the Court viewed the potential contribution of United States courts to the growth of international law as "highly conjectural," *id.*, at 434, and concluded that "progress toward the goal of establishing the rule of law among nations [is] best served by maintaining intact the act of state doctrine." *Id.*, at 437.

citizens who have been harmed." *Citibank, supra,* at 788; see *Sabbatino, supra,* at 427–437.

The doctrine of sovereign immunity, concerned only with the status of a party to a lawsuit, does not focus on the other circumstances just mentioned; it is simply not designed to be responsive to the particular considerations underlying the act of state doctrine. Whatever exceptions there may be to sovereign immunity ought not be transferred automatically, therefore, to the act of state doctrine.[13]

C

I question the wisdom of attempting the articulation of any broad exception to the act of state doctrine within the confines of a single case. The Court in *Sabbatino,* aware of the variety of situations presenting act of state questions and the complexity of the relevant considerations, eschewed any inflexible rule in favor of a case-by-case approach. 376 U. S., at 428. The carving out of broad exceptions to the doctrine is fundamentally at odds with the careful case-by-case approach adopted in *Sabbatino.*

Indeed, it is difficult to discern the precise scope of the "commercial act" exception contemplated by MR. JUSTICE WHITE.[14] In the final analysis, however, it is un-

[13] At least one commentator has proposed discarding the doctrine of sovereign immunity (except with respect to diplomatic and military activity), while retaining the nonreviewability accorded by the act of state doctrine to official acts of a sovereign performed within its territory. R. Falk, The Role of Domestic Courts in the International Legal Order 139–145, 164–169 (1964).

[14] The precise contours of the restrictive theory of sovereign immunity, on which the commercial act exception is based, are themselves unclear. See, *e. g., Victory Transport, Inc.* v. *Comisaria General,* 336 F. 2d 354, 359–360 (CA2 1964); Falk, The Immunity of Foreign Sovereigns in U. S. Courts—Proposed Legislation, 6 N. Y. U. J. Int'l L. & Pol. 473, 477 (1973); Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y. B. of Int'l L. 220, 222–226 (1951).

necessary to consider whether the exception would be responsive to the concerns underlying the act of state doctrine in every case to which it might apply.[15] If the exception covers this case, it is unresponsive.

Cuba's retention of and refusal to repay the funds at issue in this case took place against the background of the intervention, or nationalization, of the businesses and assets of five cigar manufacturers. As I have already indicated, the seizure and retention of the Dunhill funds were pursuant to the initial intervention decree. For all practical purposes, the seizure of the funds once they arrived in Cuba is indistinguishable from the seizure of the remainder of the cigar manufacturers' businesses. The seizure of the funds, like the initial seizures on September 15, reflected a purpose to exert sovereign power to its territorial limits in order to effectuate the intervention of ongoing cigar manufacturing businesses. It matters not that the funds have been determined by a United States court in this case to have belonged to Dunhill rather than the cigar manufacturers. What does matter is that Cuba retained the money in the course of its program of expropriating what it viewed as part and parcel of the businesses.[16]

The applicability of the act of state doctrine in these circumstances is controlled by *Sabbatino* itself. As the Court there noted: "There are few if any issues in inter-

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[15] The general observation that "more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market" than with regard to "exercises of *governmental* powers," *ante,* at 704, does not, however, approach the finding of "unambiguous agreement regarding controlling legal principles" contemplated by *Sabbatino.* 376 U. S., at 428.

[16] Quite apart from the significance that may be attached to the label, I find it difficult to accept MR. JUSTICE WHITE's characterization of the course of conduct involved here as "purely commercial."

national law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." 376 U. S., at 428. Indeed, the absence of any suggestion that Cuba's intervention program was discriminatory against United States citizens[17] renders the lack of consensus as to applicable principles of law even more apparent here than in *Sabbatino*. See *Citibank*, at 785 (BRENNAN, J., dissenting). And unless one takes the position that the amount of money or the value of property seized materially affects the sensitivity of the issues, we are guided in this case by the following observation in *Sabbatino:*

> "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." 376 U. S., at 430 (footnote omitted).

Regardless, then, of whether the presence of consensus as to controlling legal principles, or any other circumstances, would render the act of state doctrine inapplicable to some, or even most, acts that could be characterized as "purely commercial," the doctrine is fully applicable in this case.

III

Since in my view the retention of and refusal to repay the funds at issue constitute an act of state that would ordinarily preclude an affirmative judgment against Cuba and the interventors, it is necessary for me to proceed to

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[17] Under its view of the case as a run-of-the-mill commercial case, Dunhill does assert that the retention of the monies constitutes a discriminatory taking—the notion evidently being that Cuba has not generally repudiated its commercial debts. Supplemental Brief for Petitioner 15–17. But there has been no claim that Cuba has retained only those preintervention-shipment payments made by United States citizens, or that the intervention program was in any other sense discriminatory.

the second question on which we granted certiorari—whether Dunhill may nonetheless secure an affirmative judgment in the peculiar circumstances of this case.

A

A brief recapitulation of the facts is necessary to understand Dunhill's contention that it is entitled to an affirmative recovery in spite of the presence of an act of state. Dunhill was one of three importers that had at the time of the intervention received cigars for which it had not yet paid. During the three months following intervention, each of the importers paid the interventors the amounts due for preintervention shipments. And in the period between intervention and February 1961, each of the importers took delivery of additional shipments, for which payment was not made.

This suit stems from nine suits brought against the importers by the former owners of the five intervened firms, *inter alia,* to restrain payment to anyone else for goods manufactured by their firms or bearing their mark, and to recover for all such goods that the importers had already received. The interventors brought suit in the names of the intervened firms to enjoin the former owners' counsel from pursuing the nine actions in the firms' names, and to substitute their own attorneys for those of the former owners in the same nine suits. The District Court ruled as a preliminary matter that the interventors and not the former owners were entitled to sue for payment for the postintervention shipments. *F. Palicio y Compania, S. A.* v. *Brush,* 256 F. Supp. 481 (SDNY 1966), aff'd, 375 F. 2d 1011 (CA2), cert. denied *sub nom. Brush* v. *Republic of Cuba,* 389 U. S. 830 (1967). The original nine actions were then consolidated for trial, with the interventors pursuing their claim for payments for post-intervention shipments, and both the former owners and the interventors pursuing their claims to the payments for preintervention shipments.

The District Court concluded that the former owners, not the interventors, were entitled to payment for preintervention shipments. Under its view that the interventors' refusal to return the monies paid for preintervention shipments did not involve an act of state, the District Court set off that amount ($477,000) against the amount owed by the importers to the interventors for postintervention shipments ($700,000). *Menendez* v. *Faber, Coe & Gregg, Inc.,* 345 F. Supp. 527 (SDNY 1972). Alone among the importers, Dunhill had paid the interventors more for preintervention shipments ($148,000) than it owed for postintervention shipments ($93,000). Accordingly the District Court directed that an "affirmative judgment" be entered in Dunhill's favor.[18]

The Court of Appeals found an act of state in Cuba's retention of the monies paid for preintervention shipments. It interpreted the various views expressed in *Citibank* as indicating that this Court would nevertheless uphold the importers' counterclaims up to the limits of the respective claims asserted against them by the interventors. But the court reversed the judgment of the District Court insofar as it granted Dunhill affirmative recovery. *Menendez* v. *Saks & Co.,* 485 F. 2d 1355 (CA2 1973). The second question on which we granted certiorari is whether, if Cuba's conduct constitutes an act of state, Dunhill may nonetheless assert its full counterclaim in the circumstances of this case, where the counterclaim exceeds Cuba's claim against it but is less than the amount owed to Cuba by the importers as a group.

B

The Court in *Citibank* held that the act of state doc-

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[18] This was done by entry of judgment for the interventors against Dunhill for $93,000 and in favor of Dunhill against the interventors for $148,000.

trine does not necessarily bar a defendant from litigating the merits of a limited counterclaim against a foreign state suing in the courts of this country. Petitioner there was an American bank whose branches in Cuba had been nationalized. The bank responded by selling the collateral securing its loan of $10 million to the respondent Banco Nacional de Cuba, an instrumentality of the state. Banco Nacional then sued for the excess proceeds realized from the sale, and First National counterclaimed for an equal amount in damages resulting from the expropriation of its property. For various reasons asserted in three separate opinions, a bare majority of the Court allowed prosecution of the counterclaim, limited as it was to the amount recoverable against First National.

Because we are concerned here only with the status of a counterclaim in excess of a foreign state's principal claim, the precise question the Court addressed in *Citibank*—whether a counterclaim limited by the amount of the foreign state's claim may be barred by the act of state doctrine—does not cover the present situation.[19] The approach adopted in MR. JUSTICE BRENNAN's dissent in *Citibank,* which would have barred a counterclaim limited by the amount of a foreign state's claim, would be sufficient, *a fortiori,* to bar Dunhill's excessive counterclaim. But even putting that approach aside, the judgment of the Court of Appeals denying affirmative relief to Dunhill should be affirmed.

An affirmative judgment for the excess of a counterclaim over a foreign state's principal claim is indistinguishable in any important respect from an ordinary affirmative judgment. In this case, the situation is precisely as it would be if Cuba had voluntarily recognized the validity of Dunhill's claim in an amount equal to its

[19] Whether *Citibank's* approval of a setoff is applicable to the facts of this litigation is questioned in the petition in *Republic of Cuba* v. *Saks & Co.,* No. 73-1287.

own, the parties had agreed extrajudicially to consider the claims as canceling each other out *pro tanto,* and Dunhill had then sued Cuba for the unsettled remainder of its claim. The courts would then be presented with an unadorned suit against a foreign sovereign, barred by the act of state doctrine.[20] But an affirmative judgment offends the policy of judicial abstention from interference in international relations to an equal degree, whether it is founded upon a naked suit against a foreign state or an excessive counterclaim.[21]

Dunhill contends, however, that the nature of the act of state question is affected by the fortuity that its counterclaim, while exceeding Cuba's principal claim against it, is for a lesser amount than the sum of the judgments entered in favor of Cuba against the three

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[20] The bar of sovereign immunity, which yields to the extent of a counterclaim against a sovereign plaintiff and no further, *National City Bank* v. *Republic of China,* 348 U. S. 356 (1955), would be absolute quite apart from the availability of the act of state defense, unless the restrictive theory of sovereign immunity is followed and the case is considered purely commercial.

[21] When this case was initially briefed and argued, Dunhill attempted to distinguish an excessive counterclaim from a simple principal claim on the ground that the former was covered by the *Bernstein* letter in *Citibank,* in which the State Department advised the Court that foreign policy considerations did not require application of the act of state doctrine "to bar consideration of a defendant's counterclaim . . . in [that] or like cases." 406 U. S., at 764. The letter in *Citibank* provided little support for Dunhill, since it contained several qualifications to its determination that the act of state doctrine need not be applied, one of which was that "the amount of the relief to be granted is limited to the amount of the foreign state's claim." *Banco Nacional de Cuba* v. *First Nat. City Bank,* 442 F. 2d 530, 537 (CA2 1971). Since the State Department has now made known its view that the act of state doctrine need not be applied in this case, it is no longer necessary for Dunhill to rely on the letter in *Citibank.* But, as I have already noted, the significance of any views expressed by the State Department is minimal after *Citibank.*

importers whose cases were consolidated for trial. This contention suffers from two fatal flaws.

First, the actions against Dunhill and the other importers were not merged; they were simply consolidated for trial in the interest of economy.[22] The interventors, as substituted plaintiffs in the actions originally filed by the owners, asserted separate causes of action against each importer; no single transaction involved or gave rise to a claim against more than one importer. The actions thus did not lose their separate identities because of the consolidation.[23] In these circumstances, a ruling allowing for a counterclaim on the theory that it does not exceed the foreign state's total judgments against those parties that happen to be before the District Court would be capricious indeed. The limitation on counterclaims would then be determined by the presence or absence of actions suitable for consolidation at a particular time in a particular court,[24] and upon their outcomes.

In any event it has become quite clear that execution of Dunhill's affirmative judgment against the judgment debts that the other importers owe to the interventors would be prohibited by the Cuban Assets Control Regulations, 31 CFR pt. 515 (1975), promulgated by the Treasury Department's Office of Foreign Assets Control pursuant to the Trading With the Enemy Act, 50 U. S. C.

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[22] "[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson* v. *Manhattan R. Co.,* 289 U. S. 479, 496–497 (1933) (footnote omitted).

[23] See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2382, pp. 254–256 (1971).

[24] We are informed that the interventors had pending at least four other cases against tobacco importers in the District Court at the time the present cases were tried. See Brief for Respondents 26. The reason they were not consolidated with the present case is not a matter of record here.

App. § 5. The regulations prohibit, except as authorized by the Secretary, all transactions involving property in which Cuba has an interest, direct or indirect, including "the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order." [25] This scheme by which the Executive has frozen Cuban assets in the United States is designed to preserve a fund for the ultimate, orderly satisfaction of claims against Cuba by American nationals if diplomatic alternatives prove unavailing. See *Citibank,* 406 U. S., at 794 (BRENNAN, J., dissenting). In furtherance of this policy, the Treasury Department has stated that it will refuse "to authorize a judgment creditor of Cuba to execute against assets of Cuba which have been frozen" under the regulations.[26] An affirmative judgment in

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[25] Title 31 CFR § 515.201 (b) (1975) prohibits all transactions and transfers that "involve property in which [Cuba], or any national thereof, has at any time on or since [July 8, 1963] had any interest of any nature whatsoever, direct or indirect." "Transfer" is defined to mean any act or transaction the purpose, intent, or effect of which is to "create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property," including execution of a judgment. § 515.310. Property is defined to include a judgment. § 515.311. Discharge of a judgment debt on behalf of Cuba, even if by execution of a judgment against Cuba, would thus be prohibited.

[26] After certiorari was granted in this case, counsel for respondents corresponded with the Acting Director of the Office of Foreign Assets Control, stating:

"Dunhill had assumed that if it secured a judgment against Cuba, it could execute that judgment against money owing to Cuba from other creditors and it had in fact attempted to attach funds owing to Cuba by Faber, Coe & Gregg, another cigar importer whose claim is likewise in litigation. . . .

"It would be helpful if you would confirm my understanding that, generally speaking, you will not issue a license to permit a judgment-creditor of Cuba to execute against assets of Cuba which have been frozen pursuant to the Foreign Assets Control regulations. . . ."

The Acting Director responded by a letter confirming this under-

favor of Dunhill could not, therefore, be satisfied out of the other importers' judgment debts to Cuba, which are frozen for the benefit of all creditors or for such other disposition as future diplomatic negotiations direct.[27] To allow entry of an affirmative judgment against Cuba in these circumstances would thus mark a significant departure from our consistent policy of avoiding potential interference with the executive channels through which our Nation deals with others, while securing to Dunhill only the very speculative prospect of obtaining a preference over other United States claimants should national policy on the subject of Cuban assets change in the future.

IV

In conclusion, I would hold that the course of conduct undertaken by the interventors with respect to payments made for preintervention shipments constitutes an act of state, and that Dunhill is not entitled to an affirmative judgment on its counterclaim relating to those payments. I would affirm the judgment of the Court of Appeals.

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standing of the licensing policy. Both letters appear in Brief for Respondents, App. B.

[27] Execution of an affirmative judgment would, of course, be barred whether the basis for that judgment was the presence of other parties with judgment debts to Cuba, the absence of a sovereign act, or the application of a commercial act exception to the act of state doctrine. The point is particularly appropriate, however, in response to the contention that the presence of other parties with judgment debts to Cuba justifies an affirmative judgment in this case; this contention proceeds on the assumption that the policies behind the act of state doctrine would otherwise bar affirmative recovery by Dunhill, and permits affirmative recovery only because of the purported unfairness that would result if Cuba's debt to Dunhill were not deducted from its recovery from the other importers. As has been shown, granting an affirmative judgment to Dunhill in this way would not affect the fairness of the disposition, since execution of the judgment would be barred by the Treasury Department's freezing of Cuban assets for the benefit of all American nationals with claims against Cuba.

HOSPITAL BUILDING CO. *v.* TRUSTEES OF REX HOSPITAL ET AL.

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

No. 74-1452. Argued February 25, 1976—Decided May 24, 1976

Petitioner corporation, which operates a 49-bed proprietary hospital (Mary Elizabeth) in Raleigh, N. C., brought this antitrust action alleging that respondents, a private, tax-exempt hospital (Rex) in Raleigh, two of its officers, and a health planning officer, had violated the Sherman Act by conspiring along with others to block the relocation and expansion within Raleigh of Mary Elizabeth, for the purpose of enabling Rex to monopolize the business of providing hospital services in Raleigh. Petitioner alleged that a substantial portion of its medicines and supplies comes from out-of-state sellers; that a large portion of its revenue comes from out-of-state insurance companies or the Federal Government; that it pays a management service fee to its parent company, a Georgia-based Delaware corporation; and that the planned expansion would be largely financed through out-of-state lenders. Concluding that petitioner's business was strictly local, and that respondents' alleged conduct only incidentally and insubstantially affected interstate commerce, the District Court granted respondents' motion to dismiss the complaint. The Court of Appeals affirmed. *Held:* Petitioner's complaint states a cause of action upon which relief can be granted under the Sherman Act, the combination of factors involving petitioner in interstate commerce being sufficient to establish a "substantial effect" on interstate commerce, within the meaning of the Sherman Act, as a result of respondents' alleged conduct. Pp. 743-747.

(a) That respondents may not have had the intentional goal of affecting interstate commerce does not exempt their conduct from Sherman Act coverage. *Burke* v. *Ford,* 389 U. S. 320. Pp. 744-745.

(b) The "substantial effect" test can be satisfied even if the impact on interstate commerce of the conduct alleged falls short of causing petitioner's out-of-state suppliers to go out of business or the market price to be affected by the conspiracy. Pp. 745-746.

511 F. 2d 678, reversed and remanded.

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

John K. Train III argued the cause for petitioner. With him on the brief were *Timothy S. Perry* and *John R. Jordan, Jr.*

Ray S. Bolze argued the cause for respondents. With him on the brief were *John H. Anderson* and *Lillard Mount.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This is a suit brought under §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1–2. Petitioner has alleged that respondents are engaged in an unlawful conspiracy to restrain trade and commerce in the furnishing of medical and surgical hospital services, and that they are attempting to monopolize the hospital business in the Raleigh, N. C., metropolitan area. The District Court dismissed petitioner's amended complaint on the pleadings, finding that petitioner had not alleged a sufficient nexus between the alleged violations of the Sherman Act and interstate commerce. The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the judgment of the District Court, holding that the provision of hospital services is only a "local" activity, 511 F. 2d 678, 682 (1975), and that the amended complaint did not adequately allege a "substantial effect" *id.*, at 684, on interstate commerce. We granted certiorari, 423 U. S. 820 (1975), and now reverse. We hold that the amended complaint, fairly

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Bork, Assistant Attorney General Kauper, Barry Grossman, Robert B. Nicholson,* and *John J. Powers III* for the United States; and by *Carl Weissburg* and *Lyle R. Mink* for the Federation of American Hospitals.

read, adequately alleges a restraint of trade substantially affecting interstate commerce and that dismissal on the pleadings of petitioner's amended complaint was therefore inappropriate.

I

A

Since we are reviewing a dismissal on the pleadings, we must, of course, take as true the material facts alleged in petitioner's amended complaint. See, *e. g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 222 (1948). Petitioner is a corporation organized for profit under the laws of North Carolina. It operates the Mary Elizabeth Hospital, a 49-bed proprietary hospital in Raleigh, N. C., which offers a general range of medical and surgical services to the public. Respondent Trustees of Rex Hospital (Rex) is a North Carolina corporation which operates Rex Hospital, a private, tax-exempt hospital also located in Raleigh. The other three respondents are the administrator of Rex, one of its individual trustees, and the executive secretary of the local agency responsible for making recommendations to state officials concerning the Raleigh community's need for additional hospital beds. The amended complaint alleges that respondents, along with several co-conspirators not named as defendants in this action, have acted in concert to block the planned relocation of Mary Elizabeth Hospital within the city of Raleigh and its expansion from 49 beds to 140 beds. According to the amended complaint, respondents and their co-conspirators orchestrated a plan to delay and, if possible, prevent the issuance of the state authorization that was a necessary prerequisite to the expansion of Mary Elizabeth. After a delay of some months, the authorization was finally granted, but since then, it is alleged, respondents and

their co-conspirators have employed a series of bad-faith tactics, including the bringing of frivolous litigation, to block the implementation of the expansion. The amended complaint also alleges that respondents have maliciously instigated the publication of adverse information about petitioner's expansion plan in order to block the expansion. All these actions, it is contended, have been taken as part of an attempt by Rex to monopolize the business of providing compensated medical and surgical services in the Raleigh area.

Petitioner identifies several areas of interstate commerce in which it is involved. According to the amended complaint, petitioner purchases a substantial proportion—up to 80%—of its medicines and supplies from out-of-state sellers. In 1972, it spent $112,-000 on these items. A substantial number of the patients at Mary Elizabeth Hospital, it is alleged, come from out of State. Moreover, petitioner claims that a large proportion of its revenue comes from insurance companies outside of North Carolina or from the Federal Government through the Medicaid and Medicare programs. Petitioner also pays a management service fee based on its gross receipts to its parent company, a Delaware corporation based in Georgia. Finally, petitioner has developed plans to finance a large part of the planned $4 million expansion through out-of-state lenders. All these involvements with interstate commerce, the amended complaint claims, have been and are continuing to be adversely affected by respondents' anticompetitive conduct.

B

Respondents' motion to dismiss asserted both that the District Court had no jurisdiction over the subject matter of the amended complaint, Fed. Rule Civ. Proc. 12 (b)(1), and that the amended complaint failed to

state a claim upon which relief could be granted. Rule 12 (b)(6). Critical to respondents' motion was their contention that the amended complaint failed "to allege facts sufficient to state the requisite effect upon interstate commerce as required under the Sherman Act." App. 32. The District Court granted the motion to dismiss, concluding that the provision of hospital and medical services "is strictly a local, intra-state business," Pet. for Cert., App. D-3, and that "the conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it affect interstate commerce." *Id.*, at D-3—D-4.

A three-judge division of the Court of Appeals for the Fourth Circuit affirmed the ruling of the District Court. Thereupon, petitioner filed a motion for rehearing en banc, which was granted, and the division opinion was withdrawn. On rehearing en banc, the ruling of the District Court was again affirmed. 511 F. 2d 678 (1975). While the Court of Appeals perceived some ambiguity as to whether the District Court decision was grounded on Rule 12 (b)(1) or Rule 12 (b)(6), it treated the decision as holding that under Rule 12 (b)(6) petitioner had failed to state a claim upon which relief could be granted.[1] The court then held that the allegations in the amended complaint, even if true, were inadequate to support a conclusion that the alleged anticompetitive conduct was occurring in interstate commerce, or that it had or would have a substantial effect on interstate commerce.

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[1] We, too, will treat the dismissal as having been based on Rule 12 (b)(6). However, our analysis in this case would be no different if we were to regard the District Court's action as having been a dismissal for want of subject-matter jurisdiction under Rule 12 (b)(1). In either event, the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint.

II

The Sherman Act prohibits every contract, combination, or conspiracy "in restraint of trade or commerce among the several States," 15 U. S. C. § 1, and also prohibits monopolizing "any part of the trade or commerce among the several States." 15 U. S. C. § 2. It is settled that the Act encompasses far more than restraints on trade that are motivated by a desire to limit interstate commerce or that have their sole impact on interstate commerce. "[W]holly local business restraints can produce the effects condemned by the Sherman Act." *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 189 (1954). As long as the restraint in question "substantially and adversely affects interstate commerce," *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 195 (1974); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S., at 234, the interstate commerce nexus required for Sherman Act coverage is established. "'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" *Gulf Oil Corp.* v. *Copp Paving Co., supra,* at 195, quoting *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 464 (1949).[2]

In this case, the Court of Appeals, while recognizing

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[2] When Congress passed the Sherman Act in 1890, it took a very narrow view of its power under the Commerce Clause. See, *e. g.*, H. R. Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890); Slater, Antitrust and Government Action: A Formula for Narrowing *Parker* v. *Brown*, 69 Nw. U. L. Rev. 71, 84 (1974). Subsequent decisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S., at 201–202. Compare *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), with *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948), and *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186 (1954).

that Sherman Act coverage requires only that the conduct complained of have a substantial effect on interstate commerce, concluded that the conduct at issue did not meet that standard. We disagree. The complaint, fairly read, alleges that if respondents and their co-conspirators were to succeed in blocking petitioner's planned expansion, petitioner's purchases of out-of-state medicines and supplies as well as its revenues from out-of-state insurance companies would be thousands and perhaps hundreds of thousands of dollars less than they would otherwise be. Similarly, the management fees that petitioner pays to its out-of-state parent corporation would be less if the expansion were blocked. Moreover, the multimillion-dollar financing for the expansion, a large portion of which would be from out of State, would simply not take place if the respondents succeeded in their alleged scheme. This combination of factors is certainly sufficient to establish a "substantial effect" on interstate commerce under the Act.

The Court of Appeals found two considerations crucial in its refusal to find that the complaint alleged a substantial effect on interstate commerce. The Court's reliance on neither was warranted. First, the Court observed: "The effect [on interstate commerce] here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce." 511 F. 2d, at 684 (footnote omitted). But the fact that an effect on interstate commerce might be termed "indirect" because the conduct producing it is not "purposely directed" toward interstate commerce does not lead to a conclusion that the conduct at issue is outside the scope of the Sherman Act. For instance, in *Burke* v. *Ford,* 389 U. S. 320 (1967), Oklahoma liquor retailers brought a Sherman Act action against liquor wholesalers in the State, alleging that the wholesalers

had restrained commerce by dividing up the state market into exclusive territories. While the market division was patently not "purposely directed" toward interstate commerce, we held that it nevertheless substantially affected interstate commerce because as a matter of practical economics[3] that division could be expected to reduce significantly the magnitude of purchases made by the wholesalers from out-of-state distillers. "The wholesalers' territorial division . . . almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers." *Id.*, at 322 (footnote omitted). Whether the wholesalers intended their restraint to affect interstate commerce was simply irrelevant to our holding. See also *United States* v. *McKesson & Robbins*, 351 U. S. 305 (1956). In the same way, the fact that respondents in the instant case may not have had the purposeful goal of affecting interstate commerce does not lead us to exempt that conduct from coverage under the Sherman Act.

The Court of Appeals further justified its holding of "no substantial effect" by arguing that "no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected." 511 F. 2d, at 684. While this may be true, it is not of great relevance to the issue of whether the "substantial effect" test is satisfied. An effect can be "substantial" under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price. For instance in *United States* v. *Employing Plasterers Assn.*, *supra*, we considered a

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[3] We have noted that "[i]t is in a practical sense that we must view an effect on interstate commerce." *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 784 n. 11 (1975).

Sherman Act challenge to an alleged conspiracy between a trade association and union officials to restrain competition among Chicago plastering contractors. As in the instant case, the District Court dismissed the action on the pleadings. It did so on the ground that the complaint amounted to no more than charges of "local restraint and monopoly," 347 U. S., at 188, not reached by the Sherman Act. The United States appealed directly to this Court under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29, and we reversed. It was sufficient for us that the allegations in the complaint, if proved, could show that the conspiracy resulted in "*unreasonable burdens on the free and uninterrupted flow* of plastering materials into Illinois." 347 U. S., at 189 (emphasis added). We did not demand allegations, either express or implied, that the conspiracy threaten the demise of out-of-state businesses or that the conspiracy affect market prices.[4] Thus, since in this case the allegations fairly claim that the alleged conspiracy, to the extent it is successful, will place "unreasonable burdens on the free and uninterrupted flow" of interstate commerce, they are wholly adequate to state a claim.

We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45–46 (1957) (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," *Poller* v. *Columbia Broadcasting,* 368 U. S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that

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[4] See also *Goldfarb* v. *Virginia State Bar, supra,* at 783–785.

the instant case is not one in which dismissal should have been granted. Petitioner's complaint states a claim upon which relief can be granted under the Sherman Act.[5] Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[5] It may, of course, be that even though petitioner's complaint adequately alleges an effect on interstate commerce, further proceedings in this case will demonstrate that respondents' conduct in fact involves no violation of law, or indeed no substantial effect on interstate commerce. Cf. *United States* v. *Oregon Medical Soc.*, 343 U. S. 326 (1952).

VIRGINIA STATE BOARD OF PHARMACY ET AL. *v.* VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL.

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

No. 74–895. Argued November 11, 1975—Decided May 24, 1976

Appellees, as consumers of prescription drugs, brought suit against the Virginia State Board of Pharmacy and its individual members, appellants herein, challenging the validity under the First and Fourteenth Amendments of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. A three-judge District Court declared the statute void and enjoined appellants from enforcing it. *Held:*

1. Any First Amendment protection enjoyed by advertisers seeking to disseminate prescription drug price information is also enjoyed, and thus may be asserted, by appellees as recipients of such information. Pp. 756–757.

2. "Commercial speech" is not wholly outside the protection of the First and Fourteenth Amendments, and the Virginia statute is therefore invalid. Pp. 761–773.

(a) That the advertiser's interest in a commercial advertisement is purely economic does not disqualify him from protection under the First and Fourteenth Amendments. Both the individual consumer and society in general may have strong interests in the free flow of commercial information. Pp. 762–765.

(b) The ban on advertising prescription drug prices cannot be justified on the basis of the State's interest in maintaining the professionalism of its licensed pharmacists; the State is free to require whatever professional standards it wishes of its pharmacists, and may subsidize them or protect them from competition in other ways, but it may not do so by keeping the public in ignorance of the lawful terms that competing pharmacists are offering. Pp. 766–770.

(c) Whatever may be the bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by

the Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely. Pp. 770–771.

(d) No claim is made that the prohibited prescription drug advertisements are false, misleading, or propose illegal transactions, and a State may not suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Pp. 771–773.

373 F. Supp. 683, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., *post,* p. 773, and STEWART, J., *post,* p. 775, filed concurring opinions. REHNQUIST, J., filed a dissenting opinion, *post,* p. 781. STEVENS, J., took no part in the consideration or decision of the case.

Anthony F. Troy, Chief Deputy Attorney General of Virginia, argued the cause for appellants. With him on the brief were *Andrew P. Miller,* Attorney General, and *D. Patrick Lacy, Jr.,* Deputy Attorney General.

Alan B. Morrison argued the cause and filed a brief for appellees.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The plaintiff-appellees in this case attack, as violative of the First and Fourteenth Amendments,[1] that portion of § 54–524.35 of Va. Code Ann. (1974), which provides that a pharmacist licensed in Virginia is guilty of unpro-

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*Briefs of *amici curiae* urging affirmance were filed by *Alfred Miller* and *Stephen L. Solomon* for the American Association of Retired Persons et al.; by *Gilbert H. Weil, Philip B. Kurland,* and *Alan L. Unikel* for the Association of National Advertisers, Inc.; and by *Harold Rosenwald* for Osco Drug, Inc.

[1] The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. See, *e. g., Bigelow* v. *Virginia,* 421 U. S. 809, 811 (1975); *Schneider* v. *State,* 308 U. S. 147, 160 (1939).

fessional conduct if he "(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." [2] The three-judge District Court declared the quoted portion of the statute "void and of no effect," Jurisdictional Statement, App. 1, and enjoined the defendant-appellants, the Virginia State Board of Pharmacy and the individual members of that Board, from enforcing it. 373 F. Supp. 683 (ED Va. 1974). We noted probable jurisdiction of the appeal. 420 U. S. 971 (1975).

I

Since the challenged restraint is one that peculiarly concerns the licensed pharmacist in Virginia, we begin with a description of that profession as it exists under Virginia law.

The "practice of pharmacy" is statutorily declared to be "a professional practice affecting the public health, safety and welfare," and to be "subject to regulation and control in the public interest." Va. Code Ann. § 54-524.2 (a) (1974).[3] Indeed, the practice is subject to ex-

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[2] Section 54-524.35 provides in full:

"Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

[3] The parties, also, have stipulated that pharmacy "is a profession." Stipulation of Facts ¶ 11, App. 11.

tensive regulation aimed at preserving high professional standards. The regulatory body is the appellant Virginia State Board of Pharmacy. The Board is broadly charged by statute with various responsibilities, including the "[m]aintenance of the quality, quantity, integrity, safety and efficacy of drugs or devices distributed, dispensed or administered." § 54–524.16 (a). It also is to concern itself with "[m]aintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia." § 54–524.16 (d). The Board is empowered to "make such bylaws, rules and regulations . . . as may be necessary for the lawful exercise of its powers." § 54–524.17.

The Board is also the licensing authority. It may issue a license, necessary for the practice of pharmacy in the State, only upon evidence that the applicant is "of good moral character," is a graduate in pharmacy of a school approved by the Board, and has had "a suitable period of experience [the period required not to exceed 12 months] acceptable to the Board." § 54–524.21. The applicant must pass the examination prescribed by the Board. *Ibid.* One approved school is the School of Pharmacy of the Medical College of Virginia, where the curriculum is for three years following two years of college. Prescribed prepharmacy courses, such as biology and chemistry, are to be taken in college, and study requirements at the school itself include courses in organic chemistry, biochemistry, comparative anatomy, physiology, and pharmacology. Students are also trained in the ethics of the profession, and there is some clinical experience in the school's hospital pharmacies and in the medical center operated by the Medical College. This

is "a rigid, demanding curriculum in terms of what the pharmacy student is expected to know about drugs." [4]

Once licensed, a pharmacist is subject to a civil monetary penalty, or to revocation or suspension of his license, if the Board finds that he "is not of good moral character," or has violated any of a number of stated professional standards (among them that he not be "negligent in the practice of pharmacy" or have engaged in "fraud or deceit upon the consumer . . . in connection with the practice of pharmacy"), or is guilty of "unprofessional conduct." § 54–524.22:1. "Unprofessional conduct" is specifically defined in § 54–524.35, n. 2, *supra,* the third numbered phrase of which relates to advertising of the price for any prescription drug, and is the subject of this litigation.

Inasmuch as only a licensed pharmacist may dispense prescription drugs in Virginia, § 54–524.48,[5] advertising or other affirmative dissemination of prescription drug price information is effectively forbidden in the State. Some pharmacies refuse even to quote prescription drug prices over the telephone. The Board's position, however, is that this would not constitute an unprofessional publication.[6] It is clear, nonetheless, that all advertising of such prices, in the normal sense, is forbidden. The prohibition does not extend to nonprescription drugs, but neither is it confined to prescriptions that the pharmacist compounds himself. Indeed, about 95% of all prescriptions now are filled with dosage forms prepared by the pharmaceutical manufacturer.[7]

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[4] *Id.,* ¶ 8, App. 11. See generally *id.,* ¶¶ 6–16, App. 10–12.

[5] Exception is made for "legally qualified" practitioners of medicine, dentistry, osteopathy, chiropody, and veterinary medicine. § 54–524.53.

[6] Stipulation of Facts ¶ 25, App. 15.

[7] *Id.,* ¶ 18, App. 13.

II

This is not the first challenge to the constitutionality of § 54–524.35 and what is now its third-numbered phrase. Shortly after the phrase was added to the statute in 1968,[8] a suit seeking to enjoin its operation was instituted by a drug retailing company and one of its pharmacists. Although the First Amendment was invoked, the challenge appears to have been based primarily on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In any event, the prohibition on drug price advertising was upheld. *Patterson Drug Co.* v. *Kingery,* 305 F. Supp. 821 (WD Va. 1969). The three-judge court did find that the dispensation of prescription drugs "affects the public health, safety and welfare." *Id.,* at 824–825. No appeal was taken.

The present, and second, attack on the statute is one made not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim that they would greatly benefit if the prohibition were lifted and advertising freely allowed. The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis,[9] and two nonprofit organizations.[10] Their

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[8] Theretofore an administrative regulation to the same effect had been outstanding. The Board, however, in 1967 was advised by the State Attorney General's office that the regulation was unauthorized. The challenged phrase was added to the statute the following year. See *Patterson Drug Co.* v. *Kingery,* 305 F. Supp. 821, 823 n. 1 (WD Va. 1969).

[9] Stipulation of Facts ¶ 3, App. 9.

[10] The organizations are the Virginia Citizens Consumer Council, Inc., and the Virginia State AFL–CIO. Each has a substantial membership (approximately 150,000 and 69,000, respectively) many of whom are users of prescription drugs. *Id.*, ¶¶ 1 and 2, App. 9. The American Association of Retired Persons and the National Retired Teachers Association, also claiming many members who "de-

claim is that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond "the cost of 40 Achromycin tablets ranges from $2.59 to $6.00, a difference of 140% [*sic*]," and that in the Newport News-Hampton area the cost of tetracycline ranges from $1.20 to $9.00, a difference of 650%.[11]

The District Court seized on the identity of the plaintiff-appellees as consumers as a feature distinguishing the

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pend substantially on prescription drugs for their well-being," Brief 2, are among those who have filed briefs *amici curiae* in support of the appellees.

[11] Stipulation of Facts ¶¶ 22 (b) and (c), App. 14. The phenomenon of widely varying drug prices is apparently national in scope. The American Medical Association conducted a survey in Chicago that showed price differentials in that city of up to 1200% for the same amounts of a specific drug. A study undertaken by the Consumers Union in New York found that prices for the same amount of one drug ranged from 79¢ to $7.45, and for another from $1.25 to $11.50. *Id.*, ¶¶ 22 (d) and (e), App. 14. *Amici* American Association of Retired Persons and National Retired Teachers Association state that in 1974 they participated in a survey of three prescription drug prices at 28 pharmacies in Washington, D. C., and found pharmacy-to-pharmacy variances in the price of identical drugs as great as 245%. Brief as *Amici Curiae* 10. The prevalence of such discrepancies "throughout the United States" is documented in a recent report. Staff Report to the Federal Trade Commission, Prescription Drug Price Disclosures 119 (1975). The same report indicates that 34 States impose significant restrictions on dissemination of drug price information and, thus, make the problem a national one. *Id.*, at 34.

present case from *Patterson Drug Co.* v. *Kingery, supra.* Because the unsuccessful plaintiffs in that earlier case were pharmacists, the court said, "theirs was a prima facie commercial approach," 373 F. Supp., at 686. The present plaintiffs, on the other hand, were asserting an interest in their own health that was "fundamentally deeper than a trade consideration." *Ibid.* In the District Court's view, the expression in *Valentine* v. *Chrestensen,* 316 U. S. 52, 54–55 (1942), to the effect that "purely commercial advertising" is not protected had been tempered, by later decisions of this Court, to the point that First Amendment interests in the free flow of price information could be found to outweigh the countervailing interests of the State. The strength of the interest in the free flow of drug price information was borne out, the court felt, by the fact that three States by court decision had struck down their prohibitions on drug price advertising. *Florida Board of Pharmacy* v. *Webb's City, Inc.,* 219 So. 2d 681 (Fla. 1969); *Maryland Board of Pharmacy* v. *Sav-A-Lot, Inc.,* 270 Md. 103, 311 A. 2d 242 (1973); *Pennsylvania State Board of Pharmacy* v. *Pastor,* 441 Pa. 186, 272 A. 2d 487 (1971).[12] The District Court recognized that this Court had upheld—against federal constitutional challenges other than on First Amendment grounds—state restric-

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[12] The Florida and Pennsylvania decisions appear to rest on state constitutional grounds. The Maryland decision was based on the Due Process Clause of the Fourteenth Amendment as well as on provisions of the State Constitution.

Accord: *Terry* v. *California State Board of Pharmacy,* 395 F. Supp. 94 (ND Cal. 1975), appeal docketed, No. 75–336. Contra: *Urowsky* v. *Board of Regents,* 38 N. Y. 2d 364, 342 N. E. 2d 583 (1975); *Supermarkets General Corp.* v. *Sills,* 93 N. J. Super. 326, 225 A. 2d 728 (1966).

See Note: Commercial Speech—An End in Sight to *Chrestensen?* 23 De Paul L. Rev. 1258 (1974); Comment, 37 Brooklyn L. Rev. 617 (1971); Comment, 24 Wash. and Lee L. Rev. 299 (1967).

tions on the advertisement of prices for optometrists' services, *Head* v. *New Mexico Board,* 374 U. S. 424 (1963), for eyeglass frames, *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), and for dentists' services, *Semler* v. *Dental Examiners,* 294 U. S. 608 (1935).[13] The same dangers of abuse and deception were not thought to be present, however, when the advertised commodity was prescribed by a physician for his individual patient and was dispensed by a licensed pharmacist. The Board failed to justify the statute adequately, and it had to fall. 373 F. Supp., at 686–687.

III

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here,[14] the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad.

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[13] In *Head* v. *New Mexico Board,* the First Amendment issue was raised. This Court refused to consider it, however, because it had not been presented to the state courts, nor reserved in the notice of appeal here. 374 U. S., at 432 n. 12. The Court's action to this effect was noted in *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376, 387 n. 10 (1973). The appellants at the oral argument recognized that *Head* was a due process case. Tr. of Oral Arg. 10.

[14] "In the absence of Section 54–524.35 (3), some pharmacies in Virginia would advertise, publish and promote price information regarding prescription drugs." Stipulation of Facts ¶ 26, App. 15.

More recently, in *Kleindienst* v. *Mandel,* 408 U. S. 753, 762–763 (1972), we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech " 'necessarily protects the right to receive.' " And in *Procunier* v. *Martinez,* 416 U. S. 396, 408–409 (1974), where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. See, *e. g., Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 390 (1969); *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965); *Marsh* v. *Alabama,* 326 U. S. 501, 505 (1946); *Thomas* v. *Collins,* 323 U. S. 516, 534 (1945); *Martin* v. *Struthers,* 319 U. S. 141, 143 (1943). If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.[15]

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[15] The dissent contends that there is no such right to receive the information that another seeks to disseminate, at least not when the person objecting could obtain the information in another way, and could himself disseminate it. Our prior decisions, cited above, are said to have been limited to situations in which the information sought to be received "would not be otherwise reasonably available," see *post,* at 782; emphasis is also placed on the appellees' great need for the information, which need, assertedly, should cause them to take advantage of the alternative of digging it up themselves. We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated. Certainly, the recipients of the political publications in *Lamont* could have gone abroad and thereafter disseminated them

IV

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine* v. *Chrestensen, supra,* the Court upheld a New York statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed "no such restraint on government as respects purely commercial advertising." 316 U. S., at 54. Further support for a "commercial speech" exception to the First Amendment may perhaps be found in *Breard* v. *Alexandria,* 341 U. S. 622 (1951), where the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. The Court reasoned: "The selling . . . brings into the transaction a commercial feature," and it distinguished *Martin* v. *Struthers, supra,* where it had reversed a conviction for door-to-door distribution of leaflets publicizing a religious meeting, as a case involving "no element of the commercial." 341 U. S., at 642–643. Moreover, the Court several times has stressed that communications to which First Amendment protection was given were *not* "purely commercial." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266

themselves. Those in *Kleindienst* who organized the lecture tour by a foreign Marxist could have done the same. And the addressees of the inmate correspondence in *Procunier* could have visited the prison themselves. As for the recipients' great need for the information sought to be disseminated, if it distinguishes our prior cases at all, it makes the appellees' First Amendment claim a stronger rather than a weaker one.

(1964); *Thomas* v. *Collins,* 323 U. S., at 533; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 111 (1943); *Jamison* v. *Texas,* 318 U. S. 413, 417 (1943).

Since the decision in *Breard,* however, the Court has never *denied* protection on the ground that the speech in issue was "commercial speech." That simplistic approach, which by then had come under criticism or was regarded as of doubtful validity by Members of the Court,[16] was avoided in *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376 (1973). There the Court upheld an ordinance prohibiting newspapers from listing employment advertisements in columns according to whether male or female employees were sought to be hired. The Court, to be sure, characterized the advertisements as "classic examples of commercial speech," *id.,* at 385, and a newspaper's printing of the advertisements as of the same character. The Court, however, upheld the ordinance on the ground that the restriction it imposed was permissible because the discriminatory hirings proposed by the advertisements, and by their newspaper layout, were themselves illegal.

Last Term, in *Bigelow* v. *Virginia,* 421 U. S. 809 (1975), the notion of unprotected "commercial speech" all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the

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[16] See *Bigelow* v. *Virginia,* 421 U. S., at 820 n. 6, citing Mr. Justice Douglas' observation in *Cammarano* v. *United States,* 358 U. S. 498, 514 (1959) (concurring opinion), that the *Chrestensen* ruling "was casual, almost offhand. And it has not survived reflection"; the similar observation of four Justices in dissent in *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 314 n. 6 (1974); and expressions of three Justices in separate dissents in *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S., at 393, 398, and 401. See also Mr. Justice Douglas' comment, dissenting from the denial of certiorari in *Dun & Bradstreet, Inc.* v. *Grove,* 404 U. S. 898, 904–906 (1971).

processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen*'s continued validity was questioned, and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." 421 U. S., at 819. We concluded that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," and we observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.*, at 825–826.

Some fragment of hope for the continuing validity of a "commercial speech" exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. We noted that in announcing the availability of legal abortions in New York, the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" *Id.*, at 822. And, of course, the advertisement related to activity with which, at least in some respects, the State could not interfere. See *Roe* v. *Wade*, 410 U. S. 113 (1973); *Doe* v. *Bolton*, 410 U. S. 179 (1973). Indeed, we observed: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U. S., at 825.

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is

squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

V

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Buckley* v. *Valeo,* 424 U. S. 1, 35–59 (1976); *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S., at 384; *New York Times Co.* v. *Sullivan,* 376 U. S., at 266. Speech likewise is protected even though it is carried in a form that is "sold" for profit, *Smith* v. *California,* 361 U. S. 147, 150 (1959) (books); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501 (1952) (motion pictures); *Murdock* v. *Pennsylvania,* 319 U. S., at 111 (religious literature), and even though it may involve a solicitation to purchase or otherwise pay or contribute money. *New York Times Co.* v. *Sullivan, supra; NAACP* v. *Button,* 371 U. S. 415, 429 (1963); *Jamison* v. *Texas,* 318 U. S., at 417; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306–307 (1940).

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on

the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection. *Bigelow* v. *Virginia,* 421 U. S., at 822; *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940).

Our question is whether speech which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S., at 385, is so removed from any "exposition of ideas," *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942), and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' " *Roth* v. *United States,* 354 U. S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. See, *e. g., NLRB* v. *Gissel Packing Co.,* 395 U. S. 575, 617–618 (1969); *NLRB* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 477 (1941); *AFL* v. *Swing,* 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama,* 310 U. S., at 102. We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general

or to any subject beyond their immediate dispute.[17] It was observed in *Thornhill* that "the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing." *Id.*, at 103. Since the fate of such a "single factory" could as well turn on its ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.[18] When drug prices

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[17] The speech of labor disputants, of course, is subject to a number of restrictions. The Court stated in *NLRB* v. *Gissel Packing Co.*, 395 U. S., at 618, for example, that an employer's threats of retaliation for the labor actions of his employees are "without the protection of the First Amendment." The constitutionality of restrictions upon speech in the special context of labor disputes is not before us here. We express no views on that complex subject, and advert to cases in the labor field only to note that in some circumstances speech of an entirely private and economic character enjoys the protection of the First Amendment.

[18] The point hardly needs citation, but a few figures are illustrative. It has been estimated, for example, that in 1973 and 1974 per capita drug expenditures of persons age 65 and over were $97.27 and $103.17, respectively, more than twice the figures of $41.18 and $45.14 for all age groups. Cooper & Piro, Age Differences in Medical Care Spending, Fiscal Year 1973, 37 Social Security Bull., No. 5, p. 6 (1974); Mueller & Gibson, Age Differences in Health Care Spending, Fiscal Year 1974, 38 Social Security Bull., No.

vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, *Bigelow* v. *Virginia, supra;* that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, see *Fur Information & Fashion Council, Inc.* v. *E. F. Timme & Son,* 364 F. Supp. 16 (SDNY 1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs, cf. *Chicago Joint Board* v. *Chicago Tribune Co.,* 435 F. 2d 470 (CA7 1970), cert. denied, 402 U. S. 973 (1971). Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store dispari-

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6, p. 5 (1975). These figures, of course, reflect the higher rate of illness among the aged. In 1971, 16.9% of all Americans 65 years and over were unable to carry on major activities because of some chronic condition, the figure for all ages being only 2.9%. Statistical Policy Division, Office of Management and Budget, Social Indicators 1973, p. 36. These figures eloquently suggest the diminished capacity of the aged for the kind of active comparison shopping that a ban on advertising makes necessary or desirable. Diminished resources are also the general rule for those 65 and over; their income averages about half that for all age groups. *Id.,* at 176.

The parties have stipulated that a "significant portion of income of elderly persons is spent on medicine." Stipulation of Facts ¶ 27, App. 15.

ties in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See *Dun & Bradstreet, Inc.* v. *Grove,* 404 U. S. 898, 904–906 (1971) (Douglas, J., dissenting from denial of certiorari). See also *FTC* v. *Procter & Gamble Co.,* 386 U. S. 568, 603–604 (1967) (Harlan, J., concurring). And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy,[19] we could not say that the free flow of information does not serve that goal.[20]

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[19] For the views of a leading exponent of this position, see A. Meiklejohn, Free Speech And Its Relation to Self-Government (1948). This Court likewise has emphasized the role of the First Amendment in guaranteeing our capacity for democratic self-government. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269–270 (1964), and cases cited therein.

[20] Pharmaceuticals themselves provide a not insignificant illustra-

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists.[21] Indisputably, the State has a strong interest in maintaining that professionalism. It is exercised in a number of ways for the consumer's benefit. There is the clinical skill involved in the compounding of drugs, although, as has been noted, these now make up only a small percentage of the prescriptions filled. Yet, even with respect to manufacturer-prepared compounds, there is room for the pharmacist

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tion. The parties have stipulated that expenditures for prescription drugs in the United States in 1970 were estimated at $9.14 billion. Stipulation of Facts ¶ 17, App. 12. It has been said that the figure for drugs and drug sundries in 1974 was $9.695 billion, with that amount estimated to be increasing about $700 million per year. Worthington, National Health Expenditures 1929–1974, 38 Social Security Bull., No. 2, p. 9 (1975). The task of predicting the effect that a free flow of drug price information would have on the production and consumption of drugs obviously is a hazardous and speculative one. It was recently undertaken, however, by the staff of the Federal Trade Commission in the course of its report, see n. 11, *supra,* on the merits of a possible Commission rule that would outlaw drug price advertising restrictions. The staff concluded that consumer savings would be "of a very substantial magnitude, amounting to many millions of dollars per year." Staff Report, *supra,* n. 11, at 181.

[21] An argument not advanced by the Board, either in its brief or in the testimony proffered prior to summary judgment, but which on occasion has been made to other courts, see, *e. g., Pennsylvania State Board of Pharmacy* v. *Pastor,* 441 Pa. 186, 272 A. 2d 487 (1971), is that the advertisement of low drug prices will result in overconsumption and in abuse of the advertised drugs. The argument prudently has been omitted. By definition, the drugs at issue here may be sold only on a physician's prescription. We do not assume, as apparently the dissent does, that simply because low prices will be freely advertised, physicians will overprescribe, or that pharmacists will ignore the prescription requirement.

to serve his customer well or badly. Drugs kept too long on the shelf may lose their efficacy or become adulterated. They can be packaged for the user in such a way that the same results occur. The expertise of the pharmacist may supplement that of the prescribing physician, if the latter has not specified the amount to be dispensed or the directions that are to appear on the label. The pharmacist, a specialist in the potencies and dangers of drugs, may even be consulted by the physician as to what to prescribe. He may know of a particular antagonism between the prescribed drug and another that the customer is or might be taking, or with an allergy the customer may suffer. The pharmacist himself may have supplied the other drug or treated the allergy. Some pharmacists, concededly not a large number, "monitor" the health problems and drug consumptions of customers who come to them repeatedly.[22] A pharmacist who has a continuous relationship with his customer is in the best position, of course, to exert professional skill for the customer's protection.

Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing

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[22] Monitoring, even if pursued, is not fully effective. It is complicated by the mobility of the patient; by his patronizing more than one pharmacist; by his being treated by more than one prescriber; by the availability of over-the-counter drugs; and by the antagonism of certain foods and drinks. Stipulation of Facts ¶¶ 30–47, App. 16–19. Neither the Code of Ethics of the American Pharmaceutical Association nor that of the Virginia Pharmaceutical Association requires a pharmacist to maintain family prescription records. *Id.*, ¶ 42, App. 18. The appellant Board has never promulgated a regulation requiring such records. *Id.*, ¶ 43, App. 18.

of prescription drugs. Such services are time consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business. It is also claimed that prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will inflate the cost of drugs. It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention—and certainly the practice of monitoring—impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.[23]

The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject. And this case concerns the retail sale by the pharmacist more than it does his professional standards. Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his

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[23] Descriptions of the pharmacist's expertise, its importance to the consumer, and its alleged jeopardization by price advertising are set forth at length in the numerous summaries of testimony of proposed witnesses for the Board, and objections to testimony of proposed witnesses for the plaintiffs, that the Board filed with the District Court prior to summary judgment, the substance of which appellees did not contest. App. 4, 27–48, 52–53; Brief for Appellants 4–5, and n. 2.

license. At the same time, we cannot discount the Board's justifications entirely. The Court regarded justifications of this type sufficient to sustain the advertising bans challenged on due process and equal protection grounds in *Head* v. *New Mexico Board, supra; Williamson* v. *Lee Optical Co., supra;* and *Semler* v. *Dental Examiners, supra.*

The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance.

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for

the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown,* 317 U. S. 341 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

VI

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. Compare *Grayned* v. *City of Rockford,* 408 U. S. 104, 116 (1972); *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968); and *Kovacs* v. *Cooper,* 336 U. S. 77, 85–87 (1949), with *Buckley* v. *Valeo,* 424 U. S. 1; *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975); *Cantwell* v. *Connecticut,* 310 U. S., at 304–308; and *Saia* v. *New York,* 334 U. S. 558, 562 (1948). Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.

Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974); *Konigsberg* v. *State Bar,* 366 U. S. 36, 49, and n. 10 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem.[24] The First Amendment,

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[24] In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S., at 385, and other varieties. Even if the differences do not justify the conclusion

as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. See, for example, Va. Code Ann. § 18.2-216 (1975).

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Cf. *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973); *United States*

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that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. Compare *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), with *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898 (1971). They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. Compare *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), with *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969). Cf. *United States* v. *95 Barrels of Vinegar*, 265 U. S. 438, 443 (1924) ("It is not difficult to choose statements, designs and devices which will not deceive"). They may also make inapplicable the prohibition against prior restraints. Compare *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), with *Donaldson* v. *Read Magazine*, 333 U. S. 178, 189–191 (1948); *FTC* v. *Standard Education Society*, 302 U. S. 112 (1937); *E. F. Drew & Co.* v. *FTC*, 235 F. 2d 735, 739–740 (CA2 1956), cert. denied, 352 U. S. 969 (1957).

v. *Hunter,* 459 F. 2d 205 (CA4), cert. denied, 409 U. S. 934 (1972). Finally, the special problems of the electronic broadcast media are likewise not in this case. Cf. *Capitol Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582 (DC 1971), aff'd *sub nom. Capitol Broadcasting Co.* v. *Acting Attorney General,* 405 U. S. 1000 (1972).

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions,[25] we conclude that the answer to this one is in the negative.

The judgment of the District Court is affirmed.

It is so ordered.

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

MR. CHIEF JUSTICE BURGER, concurring.

The Court notes that roughly 95% of all prescriptions are filled with dosage units already prepared by the manufacturer and sold to the pharmacy in that form. These are the drugs that have a market large enough to make their preparation profitable to the manufacturer; for the same reason, they are the drugs that it is profitable for the pharmacist to advertise. In dispensing

[25] We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

these *prepackaged* items, the pharmacist performs largely a packaging rather than a compounding function of former times. Our decision today, therefore, deals largely with the State's power to prohibit pharmacists from advertising the retail price of *prepackaged drugs.* As the Court notes, *ante,* at 773 n. 25, quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 792 (1975). See also *Cohen* v. *Hurley,* 366 U. S. 117, 123–124 (1961). We have also recognized the State's substantial interest in regulating physicians. See, *e. g., United States* v. *Oregon Medical Society,* 343 U. S. 326, 336 (1952); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, 612 (1935). Attorneys and physicians are engaged *primarily* in providing services in which professional judgment is a large component, a matter very different from the retail *sale* of labeled drugs already prepared by others.

MR. JUSTICE STEWART aptly observes that the "differences between commercial price and product advertising . . . and ideological communication" allow the State a scope in regulating the former that would be unacceptable under the First Amendment with respect to the latter. I think it important to note also that the advertisement of professional services carries with it quite different risks from the advertisement of standard products. The Court took note of this in *Semler, supra,* at 612, in upholding a state statute prohibiting entirely certain types of advertisement by dentists:

"The legislature was not dealing with traders in

commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."

I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are "misleading" and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases. It is important to note that the Court wisely leaves these issues to another day.

MR. JUSTICE STEWART, concurring.

In *Thornhill* v. *Alabama,* 310 U. S. 88, the Court observed that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.,* at 102. Shortly after the *Thornhill* decision, the Court identified a single category of communications that is constitutionally unprotected: communications "which by their very utterance inflict

injury." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572. Yet only a month after *Chaplinsky,* and without reference to that decision, the Court stated in *Valentine* v. *Chrestensen,* 316 U. S. 52, 54, that "the Constitution imposes no such restraint on government as respects purely commercial advertising." For more than 30 years this "casual, almost offhand" statement in *Chrestensen* has operated to exclude commercial speech from the protection afforded by the First Amendment to other types of communication. *Cammarano* v. *United States,* 358 U. S. 498, 514 (Douglas, J., concurring).[1]

Today the Court ends the anomalous situation created by *Chrestensen* and holds that a communication which does no more than propose a commercial transaction is not "wholly outside the protection of the First Amendment." *Ante,* at 761. But since it is a cardinal principle of the First Amendment that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,"[2] the Court's decision calls into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising. I write separately to explain why I think today's decision does not preclude such governmental regulation.

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[1] In recent years the soundness of the sweeping language of the *Chrestensen* opinion has been repeatedly questioned. See *Bigelow* v. *Virginia,* 421 U. S. 809, 819–821; *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 314–315, and n. 6 (BRENNAN, J., dissenting); *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376, 398 (Douglas, J., dissenting); *id.,* at 401, and n. 6 (STEWART, J., dissenting); *Dun & Bradstreet, Inc.* v. *Grove,* 404 U. S. 898, 904–906 (Douglas, J., dissenting from denial of certiorari).

[2] *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95. See, *e. g., Hudgens* v. *NLRB,* 424 U. S. 507, 520; *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209; *Pell* v. *Procunier,* 417 U. S. 817, 828; *Grayned* v. *City of Rockford,* 408 U. S. 104, 115.

The Court has on several occasions addressed the problem posed by false statements of fact in libel cases. Those cases demonstrate that even with respect to expression at the core of the First Amendment, the Constitution does not provide absolute protection for false factual statements that cause private injury. In *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340, the Court concluded that "there is no constitutional value in false statements of fact." As the Court had previously recognized in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, however, factual errors are inevitable in free debate, and the imposition of liability for erroneous factual assertions can "dampe[n] the vigor and limi[t] the variety of public debate" by inducing "self-censorship." *Id.,* at 279. In order to provide ample "breathing space" for free expression, the Constitution places substantial limitations on the discretion of government to permit recovery for libelous communications. See *Gertz* v. *Robert Welch, Inc., supra,* at 347–349.

The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There

is, therefore, little need to sanction "some falsehood in order to protect speech that matters." *Id.*, at 341.

The scope of constitutional protection of communicative expression is not universally inelastic. In the area of labor relations, for example, the Court has recognized that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 617. See *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469. Yet, in that context, the Court has concluded that the employer's freedom to communicate his views to his employees may be restricted by the requirement that any predictions "be carefully phrased on the basis of objective fact." [3] 395 U. S., at 618. In response to the contention that the "line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis," the Court relied on the employer's intimate knowledge of the employer-employee relationship and his ability to "avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his em-

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[3] Speech by an employer or a labor union organizer that contains material misrepresentations of fact or appeals to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a certification election. See, *e. g., Sewell Mfg. Co.*, 138 N. L. R. B. 66; *United States Gypsum Co.*, 130 N. L. R. B. 901; *Gummed Products Co.*, 112 N. L. R. B. 1092. Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office. See *Vanasco* v. *Schwartz*, 401 F. Supp. 87 (EDNY) (three-judge court), summarily aff'd *sub nom. Schwartz* v. *Postel*, 423 U. S. 1041. Other restrictions designed to promote antiseptic conditions in the labor relations context, such as the prohibition of certain campaigning during the 24-hour period preceding the election, would be constitutionally intolerable if applied in the political arena. Compare *Peerless Plywood Co.*, 107 N. L. R. B. 427, with *Mills* v. *Alabama*, 384 U. S. 214.

ployees." *Id.*, at 620. Cf. *United States* v. *95 Barrels of Vinegar,* 265 U. S. 438, 443 ("It is not difficult to choose statements, designs and devices which will not deceive"). Although speech in the labor relations setting may be distinguished from commercial advertising,[4] the *Gissel Packing Co.* opinion is highly significant in the present context because it underscores the constitutional importance of the speaker's specific and unique knowledge of the relevant facts and establishes that a regulatory scheme monitoring "the impact of utterances" is not invariably inconsistent with the First Amendment.[5] See 395 U. S., at 620.

The Court's determination that commercial advertising of the kind at issue here is not "wholly outside the protection of" the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. See *ante,* at 771–772, n. 24. Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by

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[4] In the labor relations area, governmental regulation of expression by employers has been justified in part by the competing First Amendment associational interests of employees and by the economic dependence of employees on their employers. See *NLRB* v. *Gissel Packing Co.*, 395 U. S., at 617–618; *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477.

[5] The Court in *Gissel Packing Co.* emphasized the NLRB's expertise in determining whether statements by employers would tend to mislead or coerce employees. 395 U. S., at 620. The NLRB's armamentarium for responding to material misrepresentations and deceptive tactics includes the issuance of cease-and-desist orders and the securing of restraining orders. See 29 U. S. C. §§ 160 (c), (j).

the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the "truth" may be employed to give force to the underlying idea expressed by the speaker.[6] "Under the First Amendment there is no such thing as a false idea," and the only way that ideas can be suppressed is through "the competition of other ideas," *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 339–340.

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services.[7] The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, *Bigelow* v. *Virginia*, 421 U. S. 809, 822, rather than because of any direct contribution to the interchange of ideas. See *ante*, at 762–765, 770.[8] Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dis-

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[6] As the Court observed in *Cantwell* v. *Connecticut*, 310 U. S. 296, 310:

"To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

[7] See Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1030–1031 (1967).

[8] The information about price and product conveyed by commercial advertisements may, of course, stimulate thought and debate about political questions. The drug price information at issue in the present case might well have an impact, for instance, on a person's views concerning price control issues, government subsidy proposals, or special health care, consumer protection, or tax legislation.

semination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.

MR. JUSTICE REHNQUIST, dissenting.

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise. In coming to this conclusion, the Court has overruled a legislative determination that such advertising should not be allowed and has done so on behalf of a consumer group which is not directly disadvantaged by the statute in question. This effort to reach a result which the Court obviously considers desirable is a troublesome one, for two reasons. It extends standing to raise First Amendment claims beyond the previous decisions of this Court. It also extends the protection of that Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.

I

I do not find the question of the appellees' standing to urge the claim which the Court decides quite as easy

as the Court does. The Court finds standing on the part of the consumer appellees based upon a "right to 'receive information.'" *Ante,* at 757. Yet it has been stipulated in this case that the challenged statute does not prohibit anyone from receiving this information either in person or by phone. *Ante,* at 752, and n. 6. The statute forbids "only publish[ing], advertis[ing] or promot[ing]" prescription drugs.

While it may be generally true that publication of information by its source is essential to effective communication, it is surely less true, where, as here, the potential recipients of the information have, in the Court's own words, a "keen, if not keener by far," interest in it than "in the day's most urgent political debate." *Ante,* at 763. Appellees who have felt so strongly about their right to receive information as to litigate the issue in this lawsuit must also have enough residual interest in the matter to call their pharmacy and inquire.

The statute, in addition, only forbids *pharmacists* to publish this price information. There is no prohibition against a consumer group, such as appellees, collecting and publishing comparative price information as to various pharmacies in an area. Indeed they have done as much in their briefs in this case. Yet, though appellees could both receive and publish the information in question the Court finds that they have standing to protest that pharmacists are not allowed to advertise. Thus, contrary to the assertion of the Court, appellees are not asserting their "right to receive information" at all but rather the right of some third party to publish. In the cases relied upon by the Court, *ante,* at 756-757, the plaintiffs asserted their right to receive information which would not be otherwise reasonably available to them.* They did not seek to assert the right of a third

*The Court contends, *ante,* at 757-758, n. 15, that this case is indistinguishable from *Procunier, Kleindienst,* and *Lamont,* in that in all

party, not before the Court, to disseminate information. Here, the only group truly restricted by this statute, the pharmacists, have not even troubled to join in this litigation and may well feel that the expense and competition of advertising is not in their interest.

II

Thus the issue on the merits is not, as the Court phrases it, whether "[o]ur pharmacist" may communicate the fact that he "will sell you the X prescription drug at the Y price." No pharmacist is asserting any such claim to so communicate. The issue is rather whether appellee consumers may override the legislative determination that pharmacists should not advertise even though the pharmacists themselves do not object. In deciding that they may do so, the Court necessarily adopts a rule which cannot be limited merely to dissemination of price alone, and which cannot possibly be confined to pharmacists but must likewise extend to lawyers, doctors, and all other professions.

The Court speaks of the consumer's interest in the free flow of commercial information, particularly in the case of the poor, the sick, and the aged. It goes on to observe that "society also may have a strong interest in the free flow of commercial information." *Ante*, at 764. One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack. The Court speaks of the

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of those cases it was possible for the parties to obtain the information on their own. In *Procunier* this would have entailed traveling to a state prison; in *Kleindienst* and *Lamont,* traveling abroad. Obviously such measures would limit access to information in a way that the requirement of a phone call or a trip to the corner drugstore would not.

importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to allocation of resources. *Ante,* at 765. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession. *E. g., Nebbia* v. *New York,* 291 U. S. 502 (1934); *Olsen* v. *Nebraska,* 313 U. S. 236 (1941).

As Mr. Justice Black, writing for the Court, observed in *Ferguson* v. *Skrupa,* 372 U. S. 726, 730 (1963):

> "The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws."

Similarly in *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), the Court, in dealing with a state prohibition against the advertisement of eyeglass frames, held: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." *Id.,* at 490.

The Court addresses itself to the valid justifications which may be found for the Virginia statute, and apparently discounts them because it feels they embody a "highly paternalistic approach." *Ante,* at 770. It concludes that the First Amendment requires that channels of advertising communication with respect to prescription drugs must be opened, and that Virginia may not

keep "the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Ibid.*

The Court concedes that legislatures may prohibit false and misleading advertisements, and may likewise prohibit advertisements seeking to induce transactions which are themselves illegal. In a final footnote the opinion tosses a bone to the traditionalists in the legal and medical professions by suggesting that because they sell services rather than drugs the holding of this case is not automatically applicable to advertising in those professions. But if the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind. I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged. Nor is it apparent how the pharmacists in this case are less engaged in a regulatable profession than were the opticians in *Williamson, supra.*

Nor will the impact of the Court's decision on existing commercial and industrial practice be limited to allowing advertising by the professions. The Court comments that in labor disputes "it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome." *Ante,* at 762. But the first case cited by the Court in support of this proposition, *NLRB* v. *Gissel Packing Co.,* 395 U. S. 575, 617–618 (1969), falls a good deal short of supporting this general statement. The Court there said that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the

communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.*, at 618. This carefully guarded language is scarcely a ringing endorsement of even the second-class First Amendment rights which the Court has today created in commercial speech.

It is hard to see why an employer's right to publicize a promise of benefit may be prohibited by federal law, so long as the promise is neither false nor deceptive, if pharmacists' price advertising may not be prohibited by the Virginia Legislature. Yet such a result would be wholly inconsistent with established labor law.

Both the Courts of Appeals and the National Labor Relations Board have not hesitated to set aside representation elections in which the employer made statements which were undoubtedly truthful but which were found to be implicitly coercive. For instance, in *NLRB* v. *Realist, Inc.*, 328 F. 2d 840 (CA7 1964), an election was set aside when the employer, in a concededly nonthreatening manner, raised the specter of plant closings which would result from unionism. In *Oak Mfg. Co.*, 141 N. L. R. B. 1323, 1328–1330 (1963), the Board set aside an election where the employer stated "categorically" that the union "cannot and will not obtain any wage increase for you," and with respect to seniority said that it could "assure" the employees that the union's program "will be worse" than the present system. In *Freeman Mfg. Co.*, 148 N. L. R. B. 577 (1964), the employer sent letters to employees in which he urged that unionization might cause customers to cease buying the company's product because of delays and higher prices. The Board found this to be ground for invalidating the election. Presumably all of these holdings will require re-evaluation in the light of today's decision with a view toward allowing the employer's speech because it is now protected by the First Amendment, as expanded by this decision.

There are undoubted difficulties with an effort to draw a bright line between "commercial speech" on the one hand and "protected speech" on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own—that between "truthful" commercial speech, on the one hand, and that which is "false and misleading" on the other. The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." *Ante,* at 765. I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw, and that the mere fact that the former may have in it an element of commercialism does not strip it of First Amendment protection. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). But it is another thing to say that because that

line is difficult to draw, we will stand at the other end of the spectrum and reject out of hand the observation of so dedicated a champion of the First Amendment as Mr. Justice Black that the protections of that Amendment do not apply to a " 'merchant' who goes from door to door 'selling pots.' " *Breard* v. *City of Alexandria*, 341 U. S. 622, 650 (1951) (dissenting).

In the case of "our" hypothetical pharmacist, he may now presumably advertise not only the prices of prescription drugs, but may attempt to energetically promote their sale so long as he does so truthfully. Quite consistently with Virginia law requiring prescription drugs to be available only through a physician, "our" pharmacist might run any of the following representative advertisements in a local newspaper:

> "Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief."
>
> "Can't shake the flu? Get a prescription for Tetracycline from your doctor today."
>
> "Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."

Unless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict in any way commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation. But such a line simply makes no allowance whatever for what appears to have been a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste. The very real dangers that general advertising for such drugs

might create in terms of encouraging, even though not sanctioning, illicit use of them by individuals for whom they have not been prescribed, or by generating patient pressure upon physicians to prescribe them, are simply not dealt with in the Court's opinion. If prescription drugs may be advertised, they may be advertised on television during family viewing time. Nothing we know about the acquisitive instincts of those who inhabit every business and profession to a greater or lesser extent gives any reason to think that such persons will not do everything they can to generate demand for these products in much the same manner and to much the same degree as demand for other commodities has been generated.

Both Congress and state legislatures have by law sharply limited the permissible dissemination of information about some commodities because of the potential harm resulting from those commodities, even though they were not thought to be sufficiently demonstrably harmful to warrant outright prohibition of their sale. Current prohibitions on television advertising of liquor and cigarettes are prominent in this category, but apparently under the Court's holding so long as the advertisements are not deceptive they may no longer be prohibited.

This case presents a fairly typical First Amendment problem—that of balancing interests in individual free speech against public welfare determinations embodied in a legislative enactment. As the Court noted in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 399 (1950):

> "[L]egitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from the present excesses of direct, active conduct, are not presumptively bad because they

interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights."

Here the rights of the appellees seem to me to be marginal at best. There is no ideological content to the information which they seek and it is freely available to them—they may even publish it if they so desire. The only persons directly affected by this statute are not parties to this lawsuit. On the other hand, the societal interest against the promotion of drug use for every ill, real or imaginary, seems to me extremely strong. I do not believe that the First Amendment mandates the Court's "open door policy" toward such commercial advertising.

UNITED STATES v. FLORIDA

ON JOINT MOTION FOR ENTRY OF A DECREE

No. 52, Orig. Decided March 17, 1975—Decree entered May 24, 1976

Joint motion for the entry of a decree is granted, and a decree is entered.

Opinion reported: 420 U. S. 531.

DECREE

The joint motion for entry of a decree is granted.

For the purpose of giving effect to the decision and opinion of this Court announced in this case on March 17, 1975, 420 U. S. 531, and to the Supplemental Report of the Special Master filed January 26, 1976, it is ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. As against the State of Florida, the United States is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean more than 3 geographic miles seaward from the coastline of that State and extending seaward to the edge of the Continental Shelf, and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "coastline" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, as determined under the Convention on the Territorial Sea and the Contiguous Zone, 15 U. S. T. (Pt. 2) 1606.

2. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean extending seaward from its coastline for a distance of 3 geographic miles, and the United States is not entitled, as against

the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U. S. C. § 1313.

3. As against the State of Florida, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than 3 marine leagues from the coastline of that State; the State of Florida is not entitled to any interest in such lands, minerals, and resources. Where the historic coastline of the State of Florida is landward of its coastline, the United States is additionally entitled, as against the State of Florida, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico more than 3 marine leagues from the State's historic coastline (but not less than 3 geographic miles from its coastline), and the State of Florida is not entitled to any interest in such lands, minerals, and resources. As used in this decree, the term "historic coastline" refers to the coastline as it existed in 1868, as to be determined by the parties.

4. As against the United States, the State of Florida is entitled to all the lands, minerals, and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues from its coastline or its historic coastline, whichever is landward, but for not less than 3 geographic miles from its coastline; the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources, with the exceptions provided by Section 5 of the Submerged Lands Act, 43 U. S. C. § 1313.

5. For the purpose of this decree, the Gulf of Mexico lies to the north and west, and the Atlantic Ocean to the south and east, of a line that begins at a point on the northern coast of the island of Cuba in 83° west longitude, and extends thence to the northward along that meridian of longitude to 24°35′ north latitude, thence eastward along that parallel of latitude through Rebecca

Shoal and the Quicksands Shoal to the Marquesas Keys, and thence through the Florida Keys to the mainland at the eastern end of Florida Bay, the line so running that the narrow waters within the Dry Tortugas Islands, the Marquesas Keys, and the Florida Keys, and between the Florida Keys and the mainland, are within the Gulf of Mexico.

6. There is no historic bay on the coast of the State of Florida. There are no inland waters within Florida Bay, or within the Dry Tortugas Islands, the Marquesas Keys, and the lower Florida Keys (from Money Key to Key West), the closing lines of which affect the right of either the United States or the State of Florida under this decree.

7. Jurisdiction is reserved by this Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree.

ARIZONA *v.* NEW MEXICO

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

No. 70, Orig. Decided May 24, 1976

Motion by Arizona, purportedly in its proprietary capacity as a consumer of, and as *parens patriae* for its citizens who consume, electrical energy generated in New Mexico, for leave to file an original complaint in this Court against New Mexico seeking declaratory and injunctive relief on constitutional grounds against New Mexico's tax on the generation of electricity in that State, is denied. The pending state-court action in New Mexico by the Arizona utilities involved in this case raises the same constitutional issues and provides an appropriate forum for litigating such issues.

PER CURIAM.

The State of Arizona, as a consumer, and its citizens, as consumers, purchase substantial amounts of electrical energy generated in New Mexico by three Arizona utilities operating generating facilities there. Two of the utilities are investor-owned public service corporations; the third, Salt River Project Agricultural Improvement and Power District, operates a federal reclamation project and is a political subdivision of Arizona. The utilities retail their electrical energy through interstate lines only to consumers in Arizona and, for that reason, incur no liability to New Mexico for its gross receipts tax which is incurred at the point of retail sale.[1]

In 1975 New Mexico passed the Electrical Energy Tax Act[2] which imposes a tax on the generation of electricity at the rate of 4/10 of one mill per net kilowatt hour generated. The tax is nondiscriminatory on its face:

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[1] See N. M. Stat. Ann. § 72-16A-4 (Supp. 1975).

[2] N. M. Stat. Ann. § 72-34-1 *et seq.* (Supp. 1975).

it taxes all generation regardless of what is done with the electricity after generation. However, the 1975 Act provides a credit against gross receipts tax liability in the amount of the electrical energy tax paid for electricity consumed in New Mexico. The relevant section of the Act reads:

> "On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state." [3]

The State of New Mexico concedes [4] that the Arizona utilities will not be able to take advantage of the credit because their sales of electrical energy are outside the State and that, as to them, the practical effect of New Mexico's statutory scheme is to impose a tax no greater than 4% on the generation of electricity within New Mexico.

Seeking to invoke our original jurisdiction under Art. III, § 2, cls. 1 and 2, of the Constitution and 28 U. S. C. § 1251 (a)(1), the State of Arizona has filed a motion for leave to file a bill of complaint in which it asks for declaratory relief that the New Mexico electrical energy tax constitutes an unconstitutional discrimination against and burden upon interstate commerce, denies Arizona citizens due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution, and abridges the privileges and immunities guaranteed them by Art. IV, § 2, of the Constitution. The complaint also asks that we enjoin the State of New Mexico from assessing, levying, or collecting the tax imposed by the 1975 Act.

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[3] N. M. Stat. Ann. § 72-16A-16.1B (Supp. 1975).

[4] Brief in Opposition 3.

The State of Arizona purports to bring this suit in its proprietary capacity as a consumer of large quantities of electrical energy generated in New Mexico and as *parens patriae* for its citizens who consume and pay for electrical energy generated in New Mexico. Arizona urges that the economic incidence and burden of the electrical energy tax falls upon it and its citizens. It argues that the tax discriminates, and was intended to discriminate, against the citizens of Arizona, by placing upon them the burdens of the tax, a burden not borne by the citizens of New Mexico by reason of the credit provisions of the Act. Arizona claims to have no forum other than this Court in which to assert these claims.

The State of New Mexico represents that the three Arizona utilities involved in this suit chose not to pay the New Mexico tax which was due September 15, 1975, but, instead, joined in seeking a declaratory judgment by an action filed in the District Court for Santa Fe County, N. M.[5] That action raises the same constitutional issues as would be presented by the bill of complaint which the State of Arizona now seeks to file in this Court.[6]

We recently reaffirmed that "our original jurisdiction should be invoked sparingly" in *Illinois* v. *City of Milwaukee,* 406 U. S. 91, 93–94 (1972), where we additionally stated:

> "We construe 28 U. S. C. § 1251 (a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the

[5] *Id.,* at 5–6.

[6] See App. to Brief in Opposition.

availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

And, nearly 40 years ago in *Massachusetts* v. *Missouri,* 308 U. S. 1, 18-19 (1939), the Court said:

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection. . . . We have observed that the broad statement that a court having jurisdiction must exercise it . . . is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum."

See also *Washington* v. *General Motors Corp.,* 406 U. S. 109, 113-114 (1972).

In the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated. If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U. S. C. § 1257 (2).

In denying the State of Arizona leave to file, we are

not unmindful that the legal incidence of the electrical energy tax is upon the utilities. We also are not unmindful of Mr. Justice Harlan's cautionary advice in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 497 (1971):

> "As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies."

The motion for leave to file a bill of complaint is denied.

So ordered.

MR. JUSTICE STEVENS, concurring.

Unless the New Mexico electrical energy tax has some impact on the rates paid by consumers of electricity in Arizona, I do not believe those consumers have standing to challenge that tax. Arizona has failed to allege such impact. Accordingly, apart from its possible privity with the Salt River Project Agricultural Improvement and Power District, in my judgment the State of Arizona is not sufficiently affected by the New Mexico tax to justify its invocation of the "original and exclusive jurisdiction" of this Court conferred by 28 U. S. C. § 1251 (a)(1). Since the Salt River Project is able to litigate in another forum, I concur in the Court's disposition of the motion. However, except to the extent that they apply to Arizona's attempt to litigate on behalf of an

entity which has access to another forum, I do not believe the comments which the Court has previously made about its nonexclusive original jurisdiction adequately support an order denying a State leave to file a complaint against another State.*

*In this connection it should be noted that the statement quoted from *Massachusetts* v. *Missouri,* 308 U. S. 1, 18–19, referred to the complainant's alternative contention that jurisdiction might be sustained on the theory that a controversy between Massachusetts and the citizens of another State was presented. Under that theory this Court's jurisdiction would not have been exclusive. See 28 U. S. C. § 1251 (b)(3).

SOUTH PRAIRIE CONSTRUCTION CO. *v.* LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, ET AL.

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

No. 75-1097. Decided May 24, 1976*

Respondent union filed a complaint with the National Labor Relations Board alleging that two highway contractors (South Prairie and Kiewit), the wholly owned subsidiaries of another corporation, had committed an unfair labor practice in violation of §§ 8 (a)(1) and (5) of the National Labor Relations Act by refusing to apply to South Prairie's employees the collective-bargaining agreement between the union and Kiewit, that South Prairie and Kiewit constituted a single "employer" under the Act for purposes of applying the agreement, and that hence under § 9 of the Act South Prairie was obligated to recognize the union as the bargaining representative of its employees. The NLRB held that South Prairie and Kiewit were separate employers and dismissed the complaint. But the Court of Appeals held that South Prairie and Kiewit were a "single employer," that their combined employees constituted the appropriate bargaining unit under § 9, and that therefore they had committed an unfair labor practice as charged, and remanded the case to the NLRB for enforcement of an order. *Held:* The Court of Appeals invaded the NLRB's statutory province when it proceeded to decide the § 9 "unit" question in the first instance, instead of remanding the case to the NLRB so that it could make the initial determination. Since the selection of an appropriate bargaining unit lies largely within the discretion of the NLRB, whose decision, if not final, is rarely to be disturbed, the Court of Appeals' function ended when the NLRB's error on the "single employer" issue was "laid bare."

Certiorari granted; 171 U. S. App. D. C. 102, 518 F. 2d 1040, affirmed in part, vacated in part, and remanded.

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*Together with No. 75-1243, *National Labor Relations Board* v. *Local No. 627, International Union of Operating Engineers, AFL-CIO, et al.*, also on petition for writ of certiorari to the same court.

Per Curiam.

Respondent Union filed a complaint in 1972 with the National Labor Relations Board alleging that South Prairie Construction Co. (South Prairie) and Peter Kiewit Sons' Co. (Kiewit) had violated §§ 8 (a)(5) and (1) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. §§ 158 (a)(5) and (1), by their continuing refusal to apply to South Prairie's employees the collective-bargaining agreement in effect between the Union and Kiewit. The Union first asserted that since South Prairie and Kiewit are wholly owned subsidiaries of Peter Kiewit Sons', Inc. (PKS), and engage in highway construction in Oklahoma, they constituted a single "employer" within the Act for purposes of applying the Union-Kiewit agreement. That being the case, the Union contended, South Prairie was obligated to recognize the Union as the representative of a bargaining unit drawn to include South Prairie's employees.[1] Disagree-

[1] The relevant portions of the Act, §§ 8 and 9, 29 U. S. C. §§ 158 and 159, provide in part:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

. . . . .

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . .

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

On the facts of this case, the Union first had to establish that Kiewit and South Prairie were a single "employer." If it succeeded,

ing with the Administrative Law Judge on the first part of the Union's claim, the Board concluded that South Prairie and Kiewit were in fact separate employers, and dismissed the complaint.

On the Union's petition for review, the Court of Appeals for the District of Columbia Circuit canvassed the facts of record. It discussed, *inter alia,* the manner in which Kiewit, South Prairie, and PKS functioned as entities; PKS' decision to activate South Prairie, its non-union subsidiary, in a State where historically Kiewit had been the only union highway contractor among the latter's Oklahoma competitors; and the two firms' competitive bidding patterns on Oklahoma highway jobs after South Prairie was activated in 1972 to do business there.[2]

Stating that it was applying the criteria recognized by this Court in *Radio Union* v. *Broadcast Service,* 380 U. S. 255 (1965),[3] the Court of Appeals disagreed with the Board and decided that on the facts presented Kiewit and South Prairie were a single "employer." It reasoned that in addition to the "presence of a very substantial qualitative degree of centralized control of labor relations," the facts "evidence a substantial qualitative degree of interrelation of operations and common man-

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the existence of a violation under § 8 (a)(5) would then turn on whether under § 9 the "employer unit" was the "appropriate" one for collective-bargaining purposes.

[2] We need not for present purposes set out the facts as summarized at length in the Court of Appeals' opinion. See 171 U. S. App. D. C. 102, 104–107, 518 F. 2d 1040, 1042–1045 (1975).

[3] "[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, N. L. R. B. Twenty-first Ann. Rep. 14–15 (1956). The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership." 380 U. S., at 256.

agement—one that we are satisfied would not be found in the arm's length relationship existing among unintegrated companies." 171 U. S. App. D. C. 102, 108, 109, 518 F. 2d 1040, 1046, 1047 (1975). The Board's finding to the contrary was, therefore, in the view of the Court of Appeals "not warranted by the record." *Id.*, at 109, 518 F. 2d, at 1047.

Having set aside this portion of the Board's determination, however, the Court of Appeals went on to reach and decide the second question presented by the Union's complaint which had not been passed upon by the Board. The court decided that the employees of Kiewit and South Prairie constituted the appropriate unit under § 9 of the Act[4] for purposes of collective bargaining. On the basis of this conclusion, it decided that these firms had committed an unfair labor practice by refusing "to recognize Local 627 as the bargaining representative of South Prairie's employees or to extend the terms of the Union's agreement with Kiewit to South Prairie's employees." *Id.*, at 112, 518 F. 2d, at 1050. The case was remanded to the Board for "issuance and enforcement of an appropriate order against . . . Kiewit and South Prairie." *Ibid.*

Petitioners South Prairie and the Board in their petitions here contest the action of the Court of Appeals in setting aside the Board's determination on the "employer" question. But their principal contention is that the Court of Appeals invaded the statutory province of the Board when it proceeded to decide the § 9 "unit" question in the first instance, instead of remanding the case to the Board so that it could make the initial determination. While we refrain from disturbing the holding of the Court of Appeals that Kiewit and South Prairie are an "employer," see *NLRB* v. *Pittsburgh S. S. Co.*,

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

340 U. S. 498 (1951),[5] we agree with petitioners' principal contention.

The Court of Appeals was evidently of the view that since the Board dismissed the complaint it had necessarily decided that the employees of Kiewit and South Prairie would not constitute an appropriate bargaining unit under § 9. But while the Board's opinion referred to its cases in this area and included a finding that "the employees of each constitute a separate bargaining unit," 206 N. L. R. B. 562, 563 (1973), its brief discussion was set in the context of what it obviously considered was the dispositive issue, namely, whether the two firms were separate employers. We think a fair reading of its decision discloses that it did not address the "unit" question on the basis of any assumption, *arguendo,* that it might have been wrong on the threshold "employer" issue.[6]

Section 9 (b) of the Act, 29 U. S. C. § 159 (b), directs the Board to

> "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the

[5] "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders." 340 U. S., at 502.

[6] The Administrative Law Judge's decision in favor of the Union included a conclusion that the pertinent employees of Kiewit and South Prairie constituted an appropriate unit under § 9 (b). But that conclusion was, of course, preceded by the determination that the two firms were a single employer. In disagreeing on the "employer" issue, the Board was not compelled to reach the § 9 (b) question in order to dismiss the complaint.

employer unit, craft unit, plant unit, or subdivision thereof . . . ."

The Board's cases hold that especially in the construction industry a determination that two affiliated firms constitute a single employer "does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit." *Central New Mexico Chapter, National Electrical Contractors Assn., Inc.,* 152 N. L. R. B. 1604, 1608 (1965). See also *B & B Industries, Inc.,* 162 N. L. R. B. 832 (1967). Cf. *Gerace Constr., Inc.,* 193 N. L. R. B. 645 (1971).[7]

The Court of Appeals reasoned that the Board's principal case on the "unit" question, *Central New Mexico Chapter, supra,* was distinguishable because there the two affiliated construction firms were engaged in different types of contracting. It thought that this fact was critical to the Board's conclusion in that case that the employees did not have the same "community of interest" for purposes of identifying an appropriate bargaining unit. Whether or not the Court of Appeals was correct in this reasoning, we think that for it to take upon itself the initial determination of this issue was "incompatible with the orderly function of the process of judicial review." *NLRB* v. *Metropolitan Ins. Co.,* 380 U. S. 438, 444 (1965). Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, "if not final, is rarely to be disturbed," *Packard Motor Co.* v. *NLRB,* 330 U. S. 485, 491 (1947), we think the function of the Court of Appeals ended when the Board's error on the

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[7] Compare *Radio Union* v. *Broadcast Service,* 380 U. S. 255 (1965), with *Packard Motor Co.* v. *NLRB,* 330 U. S. 485, 491–492 (1947).

"employer" issue was "laid bare." *FPC* v. *Idaho Power Co.,* 344 U. S. 17, 20 (1952).

As this Court stated in *NLRB* v. *Food Store Employees,* 417 U. S. 1, 9 (1974):

> "It is a guiding principle of administrative law, long recognized by this Court, that 'an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.' *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 145 (1940)."

In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under § 9, the Court of Appeals did not give "due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141 (1940).

The petitions for certiorari are accordingly granted, and that part of the judgment of the Court of Appeals which set aside the determination of the Board on the question of whether Kiewit and South Prairie were a single employer is affirmed. That part of the judgment which held that the two firms' employees constituted the appropriate bargaining unit for purposes of the Act, and which directed the Board to issue an enforcement order, is vacated, and the case is remanded to the Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES *v.* ORLEANS ET AL.

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

No. 75-328. Argued March 22, 1976—Decided June 1, 1976

Under the Economic Opportunity Act of 1964 (EOA) the Federal Government, acting through an agency (at the relevant time herein the Office of Economic Opportunity (OEO)), furnishes financial assistance for community action programs undertaken by community action agencies. Such an agency is defined as a "State or political subdivision of a State . . . or a public or private nonprofit agency or organization which has been designated by a State or such a political subdivision" to plan and administer a community action program, consisting of "services and activities having a measurable and potentially major impact on causes of poverty in the community . . . ." The Warren-Trumbull Council is a community action agency operating as a nonprofit corporation under Ohio law and was funded entirely by the OEO, but also received 20% of its support locally from "in-kind" services in compliance with EOA funding requirements. One of the Council's activities was a Neighborhood Opportunity Center, which sponsored recreational outings for children. While returning from one of the Center's outings in a private car for which the Council had made arrangements a minor child was injured in a collision. The child and his father (respondents) brought suit in the District Court against the United States under the Federal Tort Claims Act (FTCA) alleging negligence on the part of agents of the United States in organizing and supervising the outing. The Government moved for summary judgment on the ground that the Council and Center were not "instrumentalities or agencies of the United States" within the purview of the FTCA. The District Court granted the motion, holding that the Council was a contractor with the OEO, not a corporation acting as a federal instrumentality, and that the Council's employees were not federal employees. The Court of Appeals reversed. *Held:* The Council and the Center are not federal agencies or instrumentalities and their employees are not federal employees within the meaning of the FTCA. Pp. 813-819.

(a) The FTCA, which is a limited waiver of sovereign immunity

applying to injuries caused by the negligent act of any Government employee while acting within the scope of his employment, but excluding from its coverage "any contractor with the United States," was never intended to reach employees or agents of all federally funded programs. The critical element in distinguishing an agency from a contractor is the Government's power "to control the detailed physical performance of the contractor," *Logue* v. *United States*, 412 U. S. 521, 528. The question here is not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its daily operations are supervised by the Federal Government. Cf. *Logue, supra; Maryland* v. *United States*, 381 U. S. 41. Pp. 813–815.

(b) Compliance with Government conditions and regulations to meet contract or grant goals does not convert a contractor to an agent of the Government. Pp. 815–816.

(c) The EOA emphasizes that a community action agency (which like myriads of other activities is federally funded) is a local enterprise, not a federal enterprise whose "detailed physical performance" is subject to Government control. P. 816.

(d) The legislative history relating to the community action programs manifests the congressional intent not to create new federal agencies but to strengthen community capabilities of eliminating poverty at the local level. P. 817.

(e) Local officials administer the programs. Though OEO regulations and guidelines must be observed, the OEO, none of whose employees may serve on a community action board, has no power to supervise the community action agency or its neighborhood program. Pp. 817–819.

509 F. 2d 197, reversed.

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

Harry R. Sachse argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Lee,* and *Leonard Schaitman.*

William E. Pfau, Jr., argued the cause for respondents. With him on the brief were *Charles F. Clarke* and *James P. Murphy.*

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

This case presents the question whether a community action agency funded under the Economic Opportunity Act of 1964 is a federal instrumentality or agency for purposes of Federal Tort Claims Act liability.

I

Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 81 Stat. 690, 42 U. S. C. § 2781 *et seq.*, was passed to "stimulate a better focusing of all available local, State, private, and Federal resources upon the goal of enabling low-income families, and low-income individuals . . . to become fully self-sufficient." 42 U. S. C. § 2781 (a). To this end the Act "provides for community action agencies and programs, prescribes the structure and describes the functions of community action agencies and authorizes financial assistance to community action programs and related projects and activities." *Ibid.*

Under the statute a community action agency is a "State or political subdivision of a State . . . or a public or private nonprofit agency or organization which has been designated by a State or such a political subdivision . . ." and which is "capable of planning, conducting, administering and evaluating a community action program . . . ." 42 U. S. C. § 2790 (a). A community action program "includes or is designed to include . . . a range of services and activities having a measurable and potentially major impact on causes of poverty in the community . . . ." *Ibid.*

The Warren-Trumbull Council for Economic Opportunity, Inc., is a community action agency; it is a nonprofit corporation incorporated under § 1702.01 *et seq.* of the Ohio Revised Code. At the time of this suit, the

Warren-Trumbull Council received all of its monetary resources from the Office of Economic Opportunity (OEO), the federal agency established to administer the Economic Opportunity Act.[1] The Council also received local "in-kind" contributions and was empowered to receive funding from other sources. The "in-kind" contributions supply the 20% local support which each community action agency must receive to qualify for federal grants. 42 U. S. C. § 2812 (c).

One of the activities of the Warren-Trumbull Council was the Westlawn Neighborhood Opportunity Center (Westlawn), established under 42 U. S. C. § 2811. Westlawn sponsored a recreational outing for a group of children. The Warren-Trumbull Council furnished a van for the outing. Since the van was not large enough to transport all the children, employees of the Council arranged for two young men from the Westlawn area to drive some of the children to and from the outing in privately owned automobiles. Respondent Joseph V. Orleans was one of the children on the outing who, while returning in one of the private cars, was injured when the car collided with a parked truck.

The injured boy and his father, having exhausted their administrative remedies, sued the United States in the United States District Court for the Northern District of Ohio under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b) and 2671 *et seq.*, alleging that agents of the United States in charge of the outing were negligent in its organization and supervision. The United States moved for summary judgment pursuant to Fed. Rule Civ. Proc. 56 on the ground that the Warren-Trumbull Council and Westlawn were not "instrumentalities or

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[1] The Community Service Administration succeeded the Office of Economic Opportunity. The CSA is the agency which currently furnishes financial assistance to community action agencies. 88 Stat. 2310, 42 U. S. C. § 2941 (1970 ed., Supp. IV).

agencies of the United States within the purview and scope of 28 U. S. C. 2671."

The District Court granted the Government's motion, holding that the Warren-Trumbull Council was a contractor with the OEO, "not a corporation acting as an instrumentality or agency of the United States." The District Court also found that employees of the Warren-Trumbull Council and Westlawn are not federal employees. *Orleans* v. *United States,* No. C72-260-Y (Sept. 13, 1973). In response to respondents' motion to reconsider, the District Court accepted "the four basic facts upon which plaintiffs base their conclusion": that the Warren-Trumbull Council "was created for the purpose of carrying out the community action programs contained in the Economic Opportunity Act of 1964," that the Council received no funds from any source other than the OEO, that the Council conducted only programs "formulated and funded by the federal government," and that the OEO closely supervised the Council and its activities. The District Court also noted that federal funding was stopped until the Warren-Trumbull Council was reorganized and a new chairman of the governing board was appointed. The District Court held, however, that the recited facts did not warrant a conclusion that the Council was an agency or instrumentality of the Federal Government. The District Court determined that Congress intended that community action agencies be locally controlled and that the Warren-Trumbull Council was empowered and encouraged to receive money and develop programs from federal and other sources. The District Court found that whether or not the Council used this power it "remains an independent, locally controlled and constituted non-profit corporation." The District Court, in reaffirming its prior ruling, thus held that the Council was a contractor conducting "prepackaged Federal programs."

The Court of Appeals for the Sixth Circuit reversed the District Court, 509 F. 2d 197 (1975), holding that it was necessary to examine the "type and extent of control retained by the principal." *Id.,* at 201. It noted, however, that it was "necessary to keep in mind the concept of the importance of using all the resources of the local community to fight poverty which underlies the Economic Opportunity Act of 1964." *Id.,* at 202.

> "The relationship between OEO and WTCEO [the Warren-Trumbull Council] meets a number of the criteria for establishing that WTCEO is an independent contractor. There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to." *Id.,* at 203.

The Court of Appeals considered it more important, however, that the OEO, by withholding funding, had required the selection of a new chairman of the Warren-Trumbull board to reorganize the agency; the Court of Appeals concluded that that was not the kind of authority usually reserved in a principal dealing with an independent contractor. This authority, along with the "voluminous regulations of OEO," the need to secure OEO approval for local programs, and the fact that Congress could have acted directly through the OEO at the local level rather than utilize community action agencies, led the Court of Appeals to hold that community action

agencies are not traditional independent contractors. *Id.*, at 204. The Court of Appeals reasoned that since both the Federal Tort Claims Act and the Economic Opportunity Act were designed to remedy hardship and suffering, they, when read together, indicate that Congress did not intend that beneficiaries of the Economic Opportunity Act who sustain injury in the course of federally approved programs be barred from recovery under the Federal Tort Claims Act. Under that court's holding such "beneficiaries" are in effect carved out as a special class to be covered by the Tort Claims Act independently of whether a member of the public injured by the same car could recover.

Subsequently, in April 1975 the Court of Appeals for the Eighth Circuit reached a contrary conclusion. *Vincent* v. *United States,* 513 F. 2d 1296. We granted the writ of certiorari in this case to resolve the conflict between the Circuits. 423 U. S. 911 (1975).

II

The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. The Tort Claims Act was never intended, and has not been construed by this Court, to reach employees or agents of all federally funded programs that confer benefits on people. The language of 28 U. S. C. § 1346 (b) is unambiguous, covering injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ." [2] The Act defines Govern-

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[2] Title 28 U. S. C. § 1346 (b) provides in full:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for

ment employees to include officers and employees of "any federal agency" but excludes "any contractor with the United States." 28 U. S. C. § 2671.[3] Since the United States can be sued only to the extent that it has waived its immunity, due regard must be given to the exceptions, including the independent contractor exception, to such waiver. See *Dalehite* v. *United States,* 346 U. S. 15, 30–31 (1953). A critical element in distinguishing an agency from a contractor is the power of the Federal Government "to control the detailed physical performance of the contractor." *Logue* v. *United States,* 412 U. S. 521, 528 (1973).

In *Logue* this Court held that employees of a county jail that housed federal prisoners pursuant to a contract with the Federal Bureau of Prisons were not federal em-

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the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[3] Title 28 U. S. C. § 2671 provides in full:

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

" 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

" 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

ployees or employees of a federal agency; thus, the United States was not liable for their torts. Although the contract required the county jail to comply with Bureau of Prisons' rules and regulations prescribing standards of treatment, and although the United States reserved rights of inspection to enter the jail to determine its compliance with the contract, the contract did not authorize the United States to physically supervise the jail's employees. In short it could take action to compel compliance with federal standards, but it did not supervise operations. In *Maryland* v. *United States,* 381 U. S. 41 (1965), this Court held that civilian caretakers of Air National Guard aircraft assigned to the National Guard, but owned by the United States, were state, not federal, employees although the caretakers were paid from federal funds and required to comply with federal standards. In *Logue* we noted that one of the factors which the Court in *Maryland* v. *United States* relied upon was the state supervision of the relevant military and civilian personnel. Thus, as in *Logue* and *Maryland,* the question here is not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government.[4]

Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the

[4] Ohio law applies the same test in distinguishing between an employee and an independent contractor. See, *e. g., Gillum* v. *Industrial Comm'n,* 141 Ohio St. 373, 381, 48 N. E. 2d 234, 237 (1943); *New York, C. & St. L. R. Co.* v. *Heffner Constr. Co.,* 9 Ohio App. 2d 174, 223 N. E. 2d 649 (1967). See generally Restatement (Second) of Agency § 2 (1958).

specifications of a contract or grant, but they are largely free to select the means of its implementation.[5] Perhaps part of the cost to the Government often includes the expense for public liability insurance, but that is a matter of either contract or choice. The respondents did not sue the community action agency itself. Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs—or of state governmental bodies—into federal governmental acts.[6] Cf. *Jackson* v. *Metropolitan Edison Co.,* 419 U. S. 345 (1974); *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163 (1972).

Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well. It is inconceivable that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of "beneficiaries." The Federal Government in no sense controls "the detailed physical performance" of all the programs and projects it finances by gifts, grants, contracts, or loans. *Logue* v. *United States, supra,* at 528. The underlying statute emphasizes that a community action agency is a local, not a federal, enterprise; thus agents and employees of a local community action agency are not "employee[s] of the [Federal] government." 28 U. S. C. § 2671.

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[5] Since the issue in this case is whether or not there was day-to-day control of a program, it is irrelevant whether the program is funded by means of a contract or a grant.

[6] The Court of Appeals placed reliance upon the suspension of federal funding pending changes in the local board; plainly the granting of funds can be conditional without changing the basic relationship between federal and local governments and their components.

This conclusion is supported by the relevant legislative reports relating to community action programs which reflect the congressional intent and purpose that "the role of the Federal Government will be to give counsel and help, *when requested,* and to make available substantial assistance in meeting the costs of those programs." H. R. Rep. No. 1458, 88th Cong., 2d Sess., 10 (1964) (emphasis in original). Other language similarly reflects that Congress intended not to create new federal agencies but rather "the strengthening of community capabilities for planning and coordinating Federal, State, and other assistance related to the elimination of poverty . . . through . . . local . . . organizations . . . ." 42 U. S. C. § 2781 (a)(1). See S. Rep. No. 1218, 88th Cong., 2d Sess., 18 (1964). Congress also aimed to promote local resident participation in "the development and implementation of all programs and projects designed to serve the poor or low-income areas," 42 U. S. C. § 2781 (a)(4), and to broaden private support and aid, § 2781 (a)(5). Tied in with the latter goal is the requirement that a community action agency receive at least 20% of its support from nonfederal sources. § 2812 (c).

Further support for our conclusion that a community action agency is not a federal agency is the fact that the Economic Opportunity Act provides that a community action agency is to be administered by a *community* action board composed of *local* officials, representatives of the poor and members of business, labor, and other groups in the community, 42 U. S. C. § 2791; no employee of the OEO can serve on the board. 45 CFR § 1015.735–19 (1974). Of course since the community action agencies receive federal funding, they must comply with extensive regulations which include employment policies and procedures, lobbying limitations, accounting and inspection procedures, expenditure limita-

tions, and programmatic limitations and application procedures. 45 CFR pts. 1060–1070 (1974). The OEO also issues numerous guidelines. These regulations and guidelines attempt to assure that the federal money is spent for the benefit of the poor. The regulations do not give the OEO power to supervise the daily operation of a community action agency or a neighborhood program.

Nothing could be plainer than the congressional intent that the local entities here in question have complete control over operations of their own programs with the Federal Government supplying financial aid, advice, and oversight only to assure that federal funds not be diverted to unauthorized purposes.[7] Until now every United States District Court confronted with the issue has so read the Economic Opportunity Act; no District Court has read the Economic Opportunity Act or the Federal Tort Claims Act to mean that whenever a benefit is conferred by Congress, liability for injury to those benefited in the execution of a program or project falls on the Federal Government. *Vincent* v. *United States,* 383 F. Supp. 471 (ED Ark. 1974), aff'd, 513 F. 2d 1296 (CA8 1975); *Orleans* v. *United States,* No. C72–260–Y (ND Ohio Sept. 13, 1973), rev'd, 509 F. 2d 197 (CA6 1975) (case below); *Hughes* v. *United States,* 383 F. Supp. 1071 (SD Iowa 1973); *Anderson* v. *Simpson,* Nos. CA62–18 and 63–58 (ED Tenn., Oct. 17, 1972); cf. *Prater* v. *United States,* 357 F. Supp. 1044 (ND Tex. 1973).[8] To convert the local executors of a locally planned program or project which receives conditional federal funding into federal

[7] It is thus irrelevant that the Warren-Trumbull Council did not obtain additional funds from other sources or conduct any programs without federal money.

[8] In another context a community action agency has been held to be a private, not a federal, employer. *Hines* v. *Cenla Community Action Comm., Inc.,* 474 F. 2d 1052, 1058 (CA5 1973).

employees distorts well-established concepts of master and servant relationships and extends the meaning of the Federal Tort Claims Act beyond the intent of Congress.

We therefore hold that the Warren-Trumbull Council for Economic Opportunity and the Westlawn Neighborhood Opportunity Center are not federal agencies or instrumentalities, nor are their employees federal employees within the meaning of the Federal Tort Claims Act, and the judgment before us is accordingly

Reversed.

BROWN *v.* GENERAL SERVICES ADMINISTRATION ET AL.

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

No. 74–768. Argued March 1–2, 1976—Decided June 1, 1976

Section 717 of the Civil Rights Act of 1964, as added by § 11 of the Equal Employment Opportunity Act of 1972, proscribes federal employment discrimination and establishes an administrative and judicial enforcement system. The statute provides that personnel actions affecting federal employees or job applicants "shall be made free from any discrimination based on race, color, religion, sex, or national origin," § 717 (a); delegates enforcement authority to the Civil Service Commission (CSC), § 717 (b); and permits an aggrieved employee to file a civil action in a federal district court for review of his claim of employment discrimination. After first seeking relief from the agency allegedly guilty of discrimination, he may seek further review from the CSC, or, alternatively, within 30 days of receipt of notice of the agency's final decision, file suit in federal district court without appealing to the CSC. If he appeals to the CSC he may file suit within 30 days of the CSC's final decision. In any event he may file a civil action if, after 180 days from the filing of the charge or appeal, the agency or the CSC has not taken final action. § 717 (c). Petitioner, a Negro, who claimed that respondent agency (GSA) had racially discriminated against him by not promoting him to a higher grade, filed a complaint with the GSA. After an adverse decision he was accorded a hearing by a CSC complaints examiner, who in February 1973 found that there was no discrimination, and in March 1973 the GSA rendered its final decision upholding the examiner. Petitioner was advised of that decision and of the further procedure available to him. Forty-two days later he brought suit in the District Court, alleging jurisdiction under Title VII of the Civil Rights Act of 1964 "with particular reference to" § 717. He also alleged jurisdiction under the general federal-question statute, the Declaratory Judgment Act, and 42 U. S. C. § 1981. The District Court granted respondents' motion to dismiss made on the ground that petitioner had not filed the complaint within the 30-day period specified by § 717 (c), and the Court of Appeals affirmed. *Held:* Section 717 provides the ex-

clusive judicial remedy for claims of discrimination in federal employment, and since petitioner failed to file a timely complaint under § 717 (c), the District Court properly dismissed his complaint. Pp. 824–835.

(a) The legislative history indicates that Congress, which was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy, intended by the 1972 legislation to create an exclusive, pre-emptive administrative scheme for the redress of federal employment discrimination. Pp. 824–829.

(b) The balance, completeness, and structural integrity of § 717 are inconsistent with petitioner's contention that the judicial remedy of § 717 (c) was designed merely to supplement other putative judicial remedies. *Johnson* v. *Railway Express Agency,* 421 U. S. 454, distinguished. Pp. 832–834.

(c) A precisely drawn, detailed statute pre-empts more general remedies. *Preiser* v. *Rodriguez,* 411 U. S. 475. Pp. 834–835.

507 F. 2d 1300, affirmed.

Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, Powell, and Rehnquist, JJ., joined. Stevens, J., filed a dissenting opinion, in which Brennan, J., joined, *post,* p. 835. Marshall, J., took no part in the consideration or decision of the case.

Eric Schnapper argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Melvyn R. Leventhal, Barry L. Goldstein,* and *Jeff Greenup.*

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Mark L. Evans, Robert E. Kopp,* and *Neil H. Koslowe.*

Mr. Justice Stewart delivered the opinion of the Court.

The principal question presented by this case is whether § 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment.

The petitioner, Clarence Brown, is a Negro who has been employed by the General Services Administration since 1957.[1] He is currently classified in grade GS-7 and has not been promoted since 1966. In December 1970 Brown was referred, along with two white colleagues, for promotion to grade GS-9 by his supervisors. All three were rated "highly qualified," and the promotion was given to one of the white candidates for the position. Brown filed a complaint with the GSA Equal Employment Opportunity Office alleging that racial discrimination had biased the selection process. That complaint was withdrawn when Brown was told that other GS-9 positions would soon be available.

Another GS-9 position did become vacant in June 1971, for which the petitioner along with two others was recommended as "highly qualified." Again a white applicant was chosen. Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office. After preparation and review of an investigative report, the GSA Regional Administrator notified the petitioner that there was no evidence that race had played a part in the promotion. Brown requested a hearing, and one was held before a complaints examiner of the Civil Service Commission. In February 1973, the examiner issued his findings and recommended decision. He found no evidence of racial discrimination; rather, he determined that Brown had not been advanced because he had not been "*fully* cooperative."

The GSA rendered its final decision in March 1973. The agency's Director of Civil Rights informed Brown

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[1] After the petition for writ of certiorari was filed, the petitioner was laterally transferred to another Government agency. That transfer does not affect his claim for backpay or for equitable relief. The petitioner is still classified as a GS-7 and still wants the specific GS-9 position in the GSA for which he applied in 1971.

by letter of his conclusion that considerations of race had not entered the promotional process. The Director's letter told Brown that if he chose, he might carry the administrative process further by lodging an appeal with the Board of Appeals and Review of the Civil Service Commission and that, alternatively, he could file suit within 30 days in federal district court.[2]

Forty-two days later Brown filed suit in a Federal District Court. The complaint alleged jurisdiction under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. IV), "with particular reference to" § 717; under 28 U. S. C. § 1331 (general federal-question jurisdiction); under the Declaratory Judgment Act, 28

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[2] The letter stated in part:

"Therefore, based upon my findings, I am rendering the final agency decision on the complaint as follows:

"That the evidence in the case does not support the complaint of racial discrimination for promotion against you, but that you should receive career and performance counseling from your immediate supervisor to help you formulate plans to receive appropriate training and to correct your deficiencies as noted by management.

"If this decision does not meet with your satisfaction, you may file an appeal in writing, either in person or by mail, with the Board of Appeals and Review, U. S. Civil Service Commission, Washington, DC 20415. The Board's decision is the final administrative appeal. This appeal must be filed within 15 calendar days of receipt of this letter.

"If you choose to appeal to the Board of Appeals and Review, you retain the right to file a civil action in Federal district court within 30 calendar days after receipt of the Board's final decision on your appeal. You also have the right to file a civil action in Federal district court within 30 calendar days of receipt of this letter or 180 days after filing an appeal with the Board of Appeals and Review if no decision has been made."

U. S. C. §§ 2201, 2202; and under the Civil Rights Act of 1866, as amended, 42 U. S. C. § 1981.[3]

The respondents moved to dismiss the complaint for lack of subject-matter jurisdiction, on the ground that Brown had not filed the complaint within 30 days of final agency action as required by § 717 (c) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-16 (c) (1970 ed., Supp. IV). The District Court granted the motion.

The Court of Appeals for the Second Circuit affirmed the judgment of dismissal. 507 F. 2d 1300 (1974). It held, first, that the § 717 remedy for federal employment discrimination was retroactively available to any employee, such as the petitioner, whose administrative complaint was pending at the time § 717 became effective on March 24, 1972.[4] The appellate court held, second, that § 717 provides the exclusive judicial remedy for federal employment discrimination, and that the complaint had not been timely filed under that statute. Finally, the court ruled that if § 717 did not pre-empt other remedies, then the petitioner's complaint was still properly dismissed because of his failure to exhaust available administrative remedies. We granted certiorari, 421 U. S. 987 (1975), to consider the important issues of federal law presented by this case.

The primary question in this litigation is not difficult to state: Is § 717 of the Civil Rights Act of 1964, as added by § 11 of the Equal Employment Opportunity Act of 1972, 42 U. S. C. § 2000e-16 (1970 ed., Supp. IV),

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[3] Brown later moved for leave to amend his complaint to allege additional grounds of jurisdiction under 28 U. S. C. § 1343 (4) and the Tucker Act, 28 U. S. C. §§ 1346 (a) and (b), and to allege that more than $10,000 was in controversy. The District Court denied the motion, and the Court of Appeals did not review that order of denial.

[4] The parties have apparently acquiesced in this holding by the Court of Appeals, and we have no occasion to disturb it.

the exclusive individual remedy available to a federal employee complaining of job-related racial discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways. As Mr. Chief Justice Marshall once wrote for the Court: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." *United States* v. *Fisher,* 2 Cranch 358, 386 (1805).

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex, or national origin. 42 U. S. C. §§ 2000e-2, 2000e-3 (1970 ed. and Supp. IV). Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect federal employees. 42 U. S. C. § 2000e (b). Although federal employment discrimination clearly violated both the Constitution, *Bolling* v. *Sharpe,* 347 U. S. 497 (1954), and statutory law, 5 U. S. C. § 7151, before passage of the 1972 Act, the effective availability of either administrative or judicial relief was far from sure. Charges of racial discrimination were handled parochially within each federal agency. A hearing examiner might come from outside the agency, but he had no authority to conduct an independent examination, and his conclusions and findings were in the nature of recommendations that the agency was free to accept or reject.[5] Although review lay in the Board of Appeals and Review of the Civil Service Commission, Congress found "skepticism" among federal employees "regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Com-

[5] S. Rep. No. 92-415, p. 14 (1971).

mission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement." [6]

If administrative remedies were ineffective, judicial relief from federal employment discrimination was even more problematic before 1972. Although an action seeking to enjoin unconstitutional agency conduct would lie,[7] it was doubtful that backpay or other compensatory relief for employment discrimination was available at the time that Congress was considering the 1972 Act. For example, in *Gnotta* v. *United States,* 415 F. 2d 1271, the Court of Appeals for the Eighth Circuit had held in 1969 that there was no jurisdictional basis to support the plaintiff's suit alleging that the Corps of Engineers had discriminatorily refused to promote him. Damages for alleged discrimination were held beyond the scope of the Tucker Act, 28 U. S. C. § 1346, since no express or implied contract was involved. 415 F. 2d, at 1278. And the plaintiff's cause of action under the Administrative Procedure Act, 5 U. S. C. §§ 701–706, and the Mandamus Act, 28 U. S. C. § 1361, was held to be barred by sovereign immunity, since his claims for promotion would necessarily involve claims against the Treasury:

> "A suit against an officer of the United States is one against the United States itself 'if the decree would operate against' the sovereign; Hawaii v. Gordon, 373 U. S. 57, 58 . . . (1963)[,] or if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U. S. 731, 738, . . . (1947); or if the effect of the judgment would be

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[6] *Ibid.;* see H. R. Rep. No. 92–238, p. 24 (1971).

[7] See, *e. g., Bolling* v. *Sharpe,* 347 U. S. 497 (1954); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952).

'to restrain the Government from acting, or to compel it to act,' Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 704, . . . (1949)." 415 F. 2d, at 1277.[8]

See also *Blaze* v. *Moon,* 440 F. 2d 1348 (CA5 1971) (no jurisdiction over suit by a Negro alleging wrongful discharge from Corps of Engineers).[9]

Concern was evinced during the hearings before the committees of both Houses over the apparent inability of federal employees to engage the judicial machinery in cases of alleged employment discrimination. See, *e. g.,* Hearings on S. 2515 *et al.* before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., 296, 301, 308, 318 (1971); Hearings on H. R. 1746 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess., 320, 322, 385–386, 391–392 (1971). Although there was considerable disagreement over whether a civil action would lie to remedy agency discrimination, the committees ultimately concluded that judicial review was not available at all or, if available, that some forms of relief were foreclosed. Thus, the Senate Report observed: "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U. S. Government defense of sovereign immunity or failure to exhaust administrative remedies

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[8] By parity of reasoning, sovereign immunity would, of course, also bar claims against federal agencies for damages and promotion brought under the Civil Rights Act of 1866, as amended, 42 U. S. C. § 1981, and under the general federal-question jurisdictional grant of 28 U. S. C. § 1331.

[9] But see *DeLong* v. *Hampton,* 422 F. 2d 21 (CA3 1970) (jurisdiction in district court to review determination by the Civil Service Commission that plaintiff was properly dismissed).

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with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt." S. Rep. No. 92-415, p. 16 (1971). Similarly, the House Committee stated: "There is serious doubt that court review is available to the aggrieved Federal employee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available." H. R. Rep. No. 92-238, p. 25 (1971).

The conclusion of the committees was reiterated during floor debate. Senator Cranston, coauthor of the amendment relating to federal employment, asserted that it would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases . . . ." 118 Cong. Rec. 4929 (1972). Senator Williams, sponsor and floor manager of the bill, stated that it "provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court." *Id.*, at 4922.

The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that that conclusion was entirely reasonable. Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover federal employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.[10]

This unambiguous congressional perception seems to

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[10] The petitioner maintains that in 1972, despite adverse court decisions, 42 U. S. C. § 1981; the Mandamus Act, 28 U. S. C. § 1361; the Tucker Act, 28 U. S. C. § 1346; 28 U. S. C. § 1331 (general federal-question jurisdiction); and the Administrative Procedure Act,

indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination. We need not, however, rest our decision upon this inference alone. For the structure of the 1972 amendment itself fully confirms the conclusion that Congress intended it to be exclusive and pre-emptive.

Section 717 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-16 (1970 ed., Supp. IV), proscribes federal employment discrimination and establishes an administrative and judicial enforcement system.[11] Section 717 (a) provides that all personnel actions affecting federal em-

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5 U. S. C. § 702, all conferred jurisdiction on the federal courts in federal employment discrimination cases.

[11] Title 42 U. S. C. § 2000e-16 (1970 ed., Supp. IV) reads in full:

"(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage.

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

"(b) Civil Service Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress.

"Except as otherwise provided in this subsection, the Civil Service

ployees and applicants for federal employment "shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

"(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

"(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

"(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

"The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

"(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

"(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

"With respect to employment in the Library of Congress, authorities

Sections 717 (b) and (c) establish complementary administrative and judicial enforcement mechanisms designed to eradicate federal employment discrimination. Subsection (b) delegates to the Civil Service Commission full authority to enforce the provisions of subsection (a)

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granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

"(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant.

"Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

"(d) Section 2000e-5 (f) through (k) of this title applicable to civil actions.

"The provisions of section 2000e-5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

"(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity.

"Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government."

"through appropriate remedies, including reinstatement or hiring of employees with or without back pay," to issue "rules, regulations, orders and instructions as it deems necessary and appropriate" to carry out its responsibilities under the Act, and to review equal employment opportunity plans that are annually submitted to it by each agency and department.

Section 717 (c) permits an aggrieved employee to file a civil action in a federal district court to review his claim of employment discrimination. Attached to that right, however, are certain preconditions. Initially, the complainant must seek relief in the agency that has allegedly discriminated against him. He then may seek further administrative review with the Civil Service Commission or, alternatively, he may, within 30 days of receipt of notice of the agency's final decision, file suit in federal district court without appealing to the Civil Service Commission. If he does appeal to the Commission, he may file suit within 30 days of the Commission's final decision. In any event, the complainant may file a civil action if, after 180 days from the filing of the charge or the appeal, the agency or Civil Service Commission has not taken final action.

Sections 706 (f) through (k), 42 U. S. C. §§ 2000e–5 (f) through 2000e–5 (k) (1970 ed. and Supp. IV), which are incorporated "as applicable" by § 717 (d), govern such issues as venue, the appointment of attorneys, attorneys' fees, and the scope of relief. Section 717 (e), finally, retains within each governmental agency "primary responsibility to assure nondiscrimination in employment . . . ."

The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717 (c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due

weight to the fact that unlike these other supposed remedies,[12] § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser* v. *Rodriguez,* 411 U. S. 475, 489–490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

The petitioner relies upon our decision in *Johnson* v. *Railway Express Agency,* 421 U. S. 454 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In *Johnson* the Court held that in the context of *private employment* Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the *Johnson* case. Second, the holding in *Johnson* rested upon the explicit legislative history of the 1964 Act which " 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' " 421 U. S., at 459, quoting *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 48 (1974). Congress made clear " 'that the remedies available to the individual

[12] See n. 10, *supra.*

under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U. S. C. § 1981, and that the two procedures augment each other and are not mutually exclusive.'" 421 U. S., at 459, quoting H. R. Rep. No. 92-238, p. 19 (1971). See also *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 415-417 (1968). There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary.

In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies. In *Preiser* v. *Rodriguez, supra,* for example, state prisoners whose good-time credits had been canceled for disciplinary reasons brought suit under the Civil Rights Act of 1871, as amended, 42 U. S. C. § 1983, in conjunction with a habeas corpus action. Although acknowledging that the civil rights statute was, by its terms, literally applicable, we held that challenges to the fact or duration of imprisonment appropriately lie only under habeas corpus, the "more specific act." Permitting such challenges to be brought under the general, civil rights statute, where exhaustion is not required, would undermine the "strong policy requiring exhaustion of state remedies" when prisoners challenge the length of their confinement. 411 U. S., at 488-490. The Court has reached similar results in cases in which injured federal employees have claimed the right to proceed under facially applicable tort recovery statutes. *E. g., United States* v. *Demko,* 385 U. S. 149 (1966) (18 U. S. C. § 4126; Federal Tort Claims Act); *Patterson* v. *United States,* 359 U. S. 495 (1959) (Federal Employees' Compensation Act; Suits in Admiralty Act); *Johansen* v. *United States,* 343 U. S. 427 (1952) (Federal Employees' Compensation Act; Public Vessels Act). We have con-

sistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery statutes. See also *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U. S. 222 (1957); *Stonite Products Co.* v. *Melvin Lloyd Co.,* 315 U. S. 561 (1942) (in patent cases, venue is governed exclusively by statute dealing specifically with patent cases; general venue statute held inapplicable).

In the case at bar, as in *Preiser* and the other cases cited above, the established principle leads unerringly to the conclusion that § 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment.

We hold, therefore, that since Brown failed to file a timely complaint under § 717 (c), the District Court properly dismissed the case. Accordingly, the judgment is affirmed.

It is so ordered.

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

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

Prior to the enactment of the Civil Rights Act of 1964 there was uncertainty as to what federal judicial remedies, if any, were available to persons injured by racially discriminatory employment practices in the private sector.[1] Against that background of uncertainty, Congress enacted a comprehensive remedial statute which did not expressly state whether it was exclusive of, or supplementary to, whatever other remedies might exist.

[1] *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, and *Johnson* v. *Railway Express Agency,* 421 U. S. 454, were not decided until 1974 and 1975 respectively.

In 1972 when Congress amended the statute to cover federal employees, there was similar uncertainty about what remedies were available to such employees. Since both the 1964 statute and the 1972 amendment were enacted in comparable settings, and since both pieces of legislation implement precisely the same important national interests, it is reasonable to infer that Congress intended to resolve the question of exclusivity in the same way at both times.

As the legislative history discussed in *Chandler* v. *Roudebush*, *post*, p. 840, demonstrates, Congress intended federal employees to have the same rights available to remedy racial discrimination as employees in the private sector.[2] Since the law is now well settled that victims of racial discrimination in the private sector have a choice of remedies and are not limited to Title VII,[3] federal employees should enjoy parallel rights.

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[2] "In 1972 Congress extended the protection of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. IV), to employees of the Federal Government. A principal goal of the amending legislation, the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, was to eradicate ' "entrenched discrimination in the Federal service," ' *Morton* v. *Mancari*, 417 U. S. 535, 547, by strengthening internal safeguards and by according '[a]ggrieved [federal] employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under title VII.' " *Chandler* v. *Roudebush*, *post*, at 841.

[3] In *Alexander* v. *Gardner-Denver Co.*, *supra*, at 47-49, MR. JUSTICE POWELL for a unanimous Court stated:

"[L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U. S. C. § 2000a *et seq.*, Congress indicated that it considered the policy against discrimination to be of the 'highest priority.' *Newman* v. *Piggie Park Enterprises*, [390 U. S. 400,] 402. Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U. S. C. § 2000e-5 (b) (1970 ed., Supp. II)

The reasoning which governed the decisions in *Johnson* v. *Railway Express Agency,* 421 U. S. 454, and *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, applies with equal force to federal employees. There is no evidence, either in the statute itself or in its history, that Congress intended the 1972 amendment to be construed differently from the basic statute.

The fact that Congress incorrectly assumed that federal employees would have no judicial remedy if § 717 had not been enacted [4] undermines rather than supports

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(EEOC); 42 U. S. C. § 2000e–5 (c) (1970 ed., Supp. II) (state and local agencies); 42 U. S. C. § 2000e–5 (f) (1970 ed., Supp. II) (federal courts). And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."

In *Johnson* v. *Railway Express Agency, supra,* at 459, it was noted:

"Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. . . . In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U. S. C. § 1981, and that the two procedures augment each other and are not mutually exclusive.' H. R. Rep. No. 92–238, p. 19 (1971). See also S. Rep. No. 92–415, p. 24 (1971). Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981. 118 Cong. Rec. 3371–3373 (1972)."

[4] Since the Court does not question the proposition that other remedies would have been available if not foreclosed by its exclusive reading of § 717, no purpose would be served by discussing the

the Court's conclusion that Congress intended to repeal or amend laws that it did not think applicable. Indeed, the General Subcommittee on Labor of the House Committee on Education and Labor rejected an amendment which would have explicitly provided that § 717 would be the exclusive remedy for federal employees.[5] In sum, the legislative history of § 717 discloses a clear intent to provide federal employees with rights that parallel those available to employees in the private sector, no evidence of an intention to make the remedy exclusive, and the rejection of an amendment which would have so provided.[6]

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status of any alternative remedy. In view of the Court's holding, it is equally pointless to discuss the respondents' contention that the action is barred by petitioner's failure to exhaust administrative remedies. In this connection, however, the discussion in *Johnson, supra,* at 461, is instructive.

[5] The minority of the Committee in stating its views on H. R. 1746 in the final Committee report included the following paragraph:

"Failure to Make Title VII an Exclusive Federal Remedy. Despite the enactment of title VII of the Civil Rights Act, charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as the National Labor Relations Act and the Civil Rights Act of 1866. In view of the comprehensive prohibitions against discrimination contained in title VII, and the intent of the Committee bill to consolidate procedures and remedies under one agency, it would be consistent to make title VII the exclusive remedy. No public interest is served in continuing to permit a multiplicity of statutes or forums to deal with discrimination in employment. However, our attempt to amend the Committee bill to make title VII an exclusive remedy (except for pattern or practice suits) was rejected. In our view, the failure to make this an exclusive remedy merely encourages an individual who has lost his case in one forum under one statute to relitigate his case in still another forum under another federal statute." H. R. Rep. No. 92-238, p. 66 (1971).

[6] To the extent that multiple remedies may impose an undesirable burden on employers, it seems to me that the problem is most apt

The burden of persuading us that we should interpolate such an important provision into a complex, carefully drafted statute is a heavy one. Since that burden has not been met, I would simply read the statute as Congress wrote it.

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to be redressed in an impartial manner by assuming that Congress intended to subject—and will continue to subject—public and private employers to similar rules.

CHANDLER *v.* ROUDEBUSH, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL.

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

No. 74-1599. Argued March 2, 1976—Decided June 1, 1976

Section 717 (c) of Title VII of the Civil Rights Act of 1964, as added by § 11 of the Equal Employment Opportunity Act of 1972, provides that within a specified period after notice of final administrative action on a federal employee's discrimination complaint by the employing agency, or by the Civil Service Commissoin (CSC), upon an appeal from the agency's order, or after a specified period of delay by the agency or the CSC, the employee "may file a civil action" as provided in the statute, against the agency head. Petitioner, a Negro, claiming that her failure to receive a promotion by the Veterans' Administration was sexually and racially discriminatory, after exhausting her administrative remedies brought suit under § 717 (c). She was not allowed to proceed with discovery, the District Court having determined that "the absence of discrimination is firmly establishsed by the clear weight of the administrative record." The court thereupon granted summary judgment in favor of respondents. The Court of Appeals affirmed. *Held:* The plain meaning of the statute, reinforced by the legislative history of the 1972 amendments, compels the conclusion that federal employees have the same right to a trial *de novo* as is enjoyed by private-sector or state-government employees under the amended Civil Rights Act of 1964. Pp. 843-864.

515 F. 2d 251, reversed and remanded.

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

Joel L. Selig argued the cause for petitioner. With him on the briefs were *Paul R. Dimond, J. Harold Flannery,* and *Stuart P. Herman.*

Assistant Attorney General Lee argued the cause for respondents. With him on the brief were *Solicitor Gen-*

eral Bork, Deputy Solicitor General Wallace, Kenneth S. Geller, and *Robert E. Kopp.**

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1972 Congress extended the protection of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. IV), to employees of the Federal Government. A principal goal of the amending legislation, the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, was to eradicate "'entrenched discrimination in the Federal service,'" *Morton* v. *Mancari,* 417 U. S. 535, 547, by strengthening internal safeguards and by according "[a]ggrieved [federal] employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under title VII."[1] The issue presented by this case is whether the 1972 Act gives federal employees the same right to a trial *de novo* of employment discrimination claims as "private sector" employees enjoy under Title VII.

I

The petitioner, Mrs. Jewell Chandler, is a Negro. In 1972 she was employed as a claims examiner by the Veterans' Administration. In August of that year she applied for a promotion to the position of supervisory claims examiner. Following a selection procedure she was designated as one of three finalists for the position.

**Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Melvyn Leventhal,* and *Eric Schnapper* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

[1] S. Rep. No. 92-415, p. 16 (1971) (hereinafter cited as Senate Report).

The promotion was awarded to a Filipino-American male. The petitioner subsequently filed a complaint with the Veterans' Administration alleging that she had been denied the promotion because of unlawful discrimination on the basis of sex and race. After an administrative hearing on the claim, the presiding complaints examiner submitted proposed findings to the effect that the petitioner had been discriminated against on the basis of sex but not race and recommended that she be given a retroactive promotion to the position for which she had applied. The agency rejected the proposed finding of sex discrimination as not "substantiated by the evidence," and accordingly granted no relief.[2] The petitioner filed a timely appeal to the Civil Service Commission Board of Appeals and Review, which affirmed the agency's decision.

Within 30 days after receiving notice of the Commission's decision, the petitioner brought the present suit in a Federal District Court under § 717 (c) of the Civil Rights Act of 1964, as added by § 11 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U. S. C. §§ 2000e-16 (c) (1970 ed., Supp. IV). After moving unsuccessfully for summary judgment, she initiated discovery proceedings by filing notice of two depositions and a request for the production of documents. The respondents moved for an order prohibiting discovery on the ground that the judicial action authorized by § 717 (c) is limited to a review of the administrative record. The petitioner opposed the motion, asserting that she had a right under § 717 (c) to a plenary judicial trial *de novo*. The District Court adopted the holding of the United States District Court for the District of Columbia in *Hackley* v. *Johnson,* 360 F. Supp. 1247, rev'd

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[2] The Veterans' Administration accepted the examiner's proposed finding of no race discrimination.

sub nom. Hackley v. *Roudebush,* 171 U. S. App. D. C. 376, 520 F. 2d 108, that a "trial *de novo* is not required [under § 717 (c)] in all cases" and that review of the administrative record is sufficient if "an absence of discrimination is affirmatively established by the clear weight of the evidence in the record . . . ." 360 F. Supp., at 1252.[3] Applying this standard of review, the District Court determined that "the absence of discrimination is firmly established by the clear weight of the administrative record" and granted summary judgment in favor of the respondents. The Court of Appeals affirmed the judgment, agreeing with the District Court's ruling that § 717 (c) contemplates not a trial *de novo* but the "intermediate scope of inquiry expounded in Hackley v. Johnson . . . ." *Chandler* v. *Johnson,* 515 F. 2d 251, 255 (CA9). We granted certiorari to resolve a conflict among the Circuits concerning the nature of the judicial proceeding provided by § 717 (c).[4] 423 U. S. 821.

II

We begin with the language of the statute. Section 717 (c), 42 U. S. C. § 2000e–16 (c) (1970 ed., Supp. IV),

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[3] The District Court in *Hackley* had held that even if that "exacting standard" were not met, a full trial *de novo* would not necessarily be required. Rather a district court could, "in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." 360 F. Supp., at 1252.

[4] Four Courts of Appeals have held that § 717 (c) gives federal employees the right to a trial *de novo* in the district court. *Abrams* v. *Johnson,* 534 F. 2d 1226 (CA6); *Caro* v. *Schultz,* 521 F. 2d 1084 (CA7); *Hackley* v. *Roudebush,* 171 U. S. App. D. C. 376, 520 F. 2d 108; *Sperling* v. *United States,* 515 F. 2d 465 (CA3). Three other Courts of Appeals have held that federal employees are not generally entitled to trials *de novo. Haire* v. *Calloway,* 526 F. 2d 246 (CA8); *Chandler* v. *Johnson,* 515 F. 2d 251 (CA9) (opinion below); *Salone* v. *United States,* 511 F. 2d 902 (CA10).

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states that within 30 days after notice of final adverse administrative action on a federal employee's discrimination complaint by either the employing agency or the Civil Service Commission (in the event a permissive appeal is taken), or after 180 days of delay by the agency or the Commission, the employee "may file a civil action as provided in section 706, in which civil action the head of the department agency, or unit, as appropriate, shall be the defendant." Section 717 (d), 42 U. S. C. § 2000e-16 (d) (1970 ed., Supp. IV), goes on to specify that "[t]he provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder."

Section 706 (f) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5 (f) (1970 ed., Supp. IV), authorizes the Equal Employment Opportunity Commission (EEOC) to bring "civil actions" on behalf of private sector employees in federal district court.[5] Alternatively, § 706 (f)(1) authorizes an individual employee to sue on his own behalf if a specified period of delay has elapsed or if the EEOC has declined to represent him on the basis of its initial determination that "there is not reasonable cause to believe that the charge is true . . . ." § 706 (b), 42 U. S. C. § 2000e-5 (b) (1970 ed., Supp. IV). Sections 706 (f) through (k), 42 U. S. C. §§ 2000e-5 (f) through (k) (1970 ed. and Supp. IV), provide specific rules and guidelines for private-sector "civil actions."

It is well established that § 706 of the Civil Rights Act of 1964 accords private-sector employees the right to *de novo* consideration of their Title VII claims. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36; *McDonnell*

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[5] The Attorney General of the United States is given responsibility for instituting Title VII civil actions on behalf of employees of state governments, governmental agencies, or political subdivisions. § 706 (f)(1), 42 U. S. C. § 2000e-5 (f)(1) (1970 ed., Supp. IV).

Douglas Corp. v. *Green,* 411 U. S. 792, 798–799; *Norman* v. *Missouri Pacific R. Co.,* 414 F. 2d 73, 75 n. 2 (CA8). The "employee's statutory right to a trial *de novo* under Title VII [of the Civil Rights Act of 1964] . . . ," *Alexander* v. *Gardner-Denver Co., supra,* at 38, embodies a congressional decision to "vest federal courts with plenary powers to enforce the [substantive] requirements [of Title VII] . . . ." *Id.,* at 47.

The 1972 amendments to the 1964 Act added language to § 706 which reflects the *de novo* character of the private sector "civil action" even more clearly than did the 1964 version.[6] Section 706 (f)(4), 42 U. S. C. § 2000e–5 (f)(4) (1970 ed., Supp. IV), for instance, requires the chief judge of the district in which a "civil action" is pending to "immediately . . . designate a judge in such district to hear and determine the case." The judge so designated must "assign the case for hearing at the earliest practicable date . . . ." § 706 (f)(5). If the case has not been "scheduled . . . for trial within one hundred and twenty days after issue has been joined," then the designated judge may appoint a special master to hear it. *Ibid.* And, as under the 1964 version, if the district court "finds" that the respondent has intentionally committed an unlawful employment practice, then the court may order appropriate relief. § 706 (g), 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. IV). The terminology employed by Congress—"assign the case for hearing," "scheduled . . . for trial," "finds"—indicates clearly that the "civil action" to which private-sector employees are entitled under the amended version of Title VII is to be a trial *de novo.*

Since federal-sector employees are entitled by § 717 (c) to "file a civil action as provided in section 706 [42 U. S. C. § 2000e–5 (1970 ed., Supp. IV)]" and since

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[6] Civil Rights Act of 1964, § 706, 78 Stat. 259.

the civil action provided in § 706 is a trial *de novo,* it would seem to follow syllogistically that federal employees are entitled to a trial *de novo* of their employment discrimination claims. The Court of Appeals, however, held that a contrary result was indicated by the words "as applicable" in § 717 (d) and by the legislative history of § 717, and in support of that position the respondents further argue that routine *de novo* trials of federal employees' claims would clash with the 1972 Act's delegation of enforcement responsibilities to the Civil Service Commission and would contravene this Court's view that "*de novo* review is generally not to be presumed." *Consolo* v. *FMC,* 383 U. S. 607, 619 n. 17.

A. *The Meaning of the Phrase "As Applicable"*

The opinion of the District Court for the District of Columbia in *Hackley* v. *Johnson,* relied on by the Court of Appeals here, expressed the view that the phrase "as applicable" in § 717 (d) evidences a congressional intent to restrict or qualify the right to a *de novo* proceeding granted by § 717 (c). 360 F. Supp., at 1252 n. 9. A careful reading of § 717 (d) and the provisions to which it refers indicates, however, that the phrase was intended merely to reflect the fact that certain provisions in §§ 706 (f) through (k) pertain to aspects of the Title VII enforcement scheme that have no possible relevance to judicial proceedings involving federal employees.

Section 717 (d) states that "[t]he provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder." Sections 706 (f) through (k) set forth specific procedures and guidelines to be followed in private-sector "civil actions." Several of these procedures could not possibly apply to civil actions involving federal employees. Section 706 (f)(1), for instance, provides that in the private sector the EEOC "may bring a civil action against any respondent

not a government, governmental agency, or political subdivision" and that the Attorney General of the United States may bring a civil action for employment discrimination against a state government, agency, or political subdivision. The individual complainant retains the right to intervene in suits brought by the EEOC or the Attorney General. In the case of a "civil action" maintained by an individual complainant against a private or state governmental employer, the EEOC or the Attorney General, respectively, may be permitted to intervene "upon certification that the case is of general public importance." These provisions, allowing suits and permissive intervention by the EEOC or the Attorney General, could have no possible application to "civil actions" under § 717 (c), because the individual federal employee or job applicant is the only party who can institute and maintain a "civil action" under that subsection.

Similarly, the provision in § 706 (f)(2) permitting the EEOC or the Attorney General to "bring an action for appropriate temporary or preliminary relief pending final disposition" of a charge where the EEOC has "conclude[d] on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act" could not possibly apply without modification to "civil actions" involving federal employees, because the EEOC is given no general responsibility for investigating or prosecuting the complaints of federal employees.

The most natural reading of the phrase "as applicable" in § 717 (d) is that it merely reflects the inapplicability of provisions in §§ 706 (f) through (k) detailing the enforcement responsibilities of the EEOC and the Attorney General.[7] We cannot, therefore, agree with the view

[7] See *Hackley* v. *Roudebush*, 171 U. S. App. D. C., at 387–388, 520 F. 2d, at 119–120.

expressed by the District Court in *Hackley* v. *Johnson, supra,* and relied on by the Court of Appeals here, that Congress used the words "as applicable" to voice its intent to disallow trials *de novo* by aggrieved federal employees who have received prior administrative hearings. As the Court of Appeals for the District of Columbia Circuit held in reversing *Hackley* v. *Johnson, supra,* such an interpretation of the phrase "as applicable" would require a strained and unnatural reading of §§ 706 (f) through (k). *Hackley* v. *Roudebush,* 171 U. S. App. D. C., at 389, 520 F. 2d, at 121. This Court pointed out in *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370, that " 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' " To read the phrase "as applicable" in § 717 (d) as obliquely qualifying the federal employee's right to a trial *de novo* under § 717 (c) rather than as merely reflecting the inapplicability to § 717 (c) actions of provisions relating to the enforcement responsibilities of the EEOC or the Attorney General would violate this elementary canon of construction.

B. *Legislative History*

The legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* as is enjoyed by private-sector employees and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964.

Two themes dominated the debates, proposals, and committee reports which preceded the enactment of the Equal Employment Opportunity Act of 1972. The first was the inadequacy of the individually instituted and

maintained trial *de novo* as an enforcement technique in the private sector under the Civil Rights Act of 1964.[8] The second was federal employees' lack of adequate internal safeguards against employment discrimination and Congress' perception of their lack of access to the courts to raise claims of job discrimination.[9]

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[8] As stated in the Senate Report:

"The most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination. In prohibiting discrimination in employment based on race, religion, color, sex or national origin, the 1964 Act limited the Commission's enforcement authority to 'informal methods of conference, conciliation and persuasion.'

"As a consequence, unless the Department of Justice concludes that a pattern or practice of resistance to Title VII is involved, the burden of obtaining enforceable relief rests upon each individual victim of discrimination, who must go into court as a private party, with the delay and expense that entails, in order to secure the rights promised him under the law. Thus, those persons whose economic disadvantage was a prime reason for enactment of equal employment opportunity provisions find that their only recourse in the face of unyielding discrimination is one that is time consuming, burdensome, and all too often, financially prohibitive." Senate Report 4.

[9] The Senate Report stated:

"The testimony before the Labor Subcommittee reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. Complaints have indicated skepticism regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement." *Id.*, at 14.

"The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U. S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt." *Id.*, at 16.

In 1971, the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare reported out bills designed to remedy these deficiencies. The proposed bills, H. R. 1746 and S. 2515, gave the EEOC cease-and-desist powers in the private sector while retaining the private-sector complainant's preexisting right to a trial *de novo* in certain instances.[10] The grant of cease-and-desist power to the EEOC provoked strong dissenting statements in both committee reports. While nearly all members of both committees agreed that the EEOC should be given enforcement powers in the private sector,[11] there was sharp disagreement over whether the EEOC should be given the power merely to institute *de novo* suits in federal trial courts on behalf of employees or the power actually to adjudicate discrimination controversies subject only to review on a substantial-evidence basis in the federal courts of appeals.

The dissenting members of the two committees favored the trial *de novo* approach. As Senator Dominick put it in a minority statement in the Senate Report:

> "The issue is no longer whether we need enforcement powers for Title VII, but rather what form

[10] Under both committee bills, the private-sector employee could bring a civil action within 60 days after the EEOC gave notice that it had dismissed the charge of employment discrimination or that 180 days had elapsed from the filing of the charge without the EEOC having issued a complaint or having entered into an acceptable conciliation agreement. H. R. 1746, 92d Cong., 1st Sess., § 8 (j) (1971) (hereinafter cited as H. R. 1746 or House Committee Bill); S. 2515, 92d Cong., 1st Sess., § 4 (a) (1971) (hereinafter cited as S. 2515 or Senate Committee Bill).

[11] Representatives Ashbrook and Landgrebe did not favor granting the EEOC any enforcement authority. H. R. Rep. No. 92-238, p. 70 (1971) (hereinafter cited as House Report).

and scope of enforcement is needed to best protect the rights of all parties involved. To accomplish this end the Senate is given two types of enforcement machinery to choose from—vesting EEOC with cease and desist powers or giving EEOC the authority to sue directly in Federal Courts.

"... Determination of employment civil rights deserves and requires non-partisan judgment. This judgment is best afforded by Federal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection and supported by historical judicial independence." [12]

In response to these criticisms and in justification of their contrary position, the majority members of the two committees set forth in considerable detail their reasons for choosing the approach of agency adjudication with appellate court review. The House committee majority thought that the EEOC was "better equipped to handle the complicated issues involved in employment discrimination cases" and "better suited to rapid resolution of such complex issues than are Courts." In addition, the majority thought that an administrative tribunal would offer procedural advantages in that it would be "less subject to technical rules governing such matters as pleadings and motion practice . . . and . . . less constrained by formal rules of evidence . . . ." [13] The Senate Report spelled out in even greater detail the perceived differences between "enforcement by district court trials rather than through agency hearings followed by appel-

[12] Senate Report 85. Similar minority views were expressed in the Report of the House committee. House Report 58-63.

[13] *Id.*, at 10-11.

late court review," [14] stressing the delays that would be occasioned by court trials and the need for administrative expertise in recognizing and remedying complex forms of employment discrimination.[15] The Report stated that the committee had given "full and careful consideration" to an "alternative measure providing for court enforcement for title VII" but that that proposal had been rejected in favor of the administrative agency approach.[16]

It was against this backdrop of focused debate on the issue of administrative agency versus wholly judicial enforcement machinery in the area of discrimination in private employment that the two committees proposed extending to a federal employee the right to file a "civil action" if "aggrieved" by his employing agency's action in dealing with his complaint of discrimination. The fact that the federal employee, prior to filing such a "civil action," would have enjoyed the benefit of improved internal safeguards, including "appropriate procedures for an impartial [agency] adjudication of the complain[t]," [17] might well have provided a rationale for reposing primary adjudicative authority in the appropriate federal agency rather than in the district courts. But the two committees clearly chose to permit *de novo* judicial trial of such complaints rather than mere judicial review of employing agency determinations: In both the House and Senate Committee Bills, the sections which accorded an aggrieved federal employee the right to file a "civil action" following adverse agency action referred not to the substantial-evidence review provisions applicable to EEOC cease-and-desist orders but rather to

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[14] Senate Report 18.

[15] *Id.,* at 17–19.

[16] *Id.,* at 17.

[17] House Report 26.

other provisions which retained the private-sector employee's right to a trial *de novo* in specified circumstances.[18] It is inconceivable that the two congressional committees, which were keenly aware of the consequences of vesting in an administrative agency rather than in the federal courts the primary adjudicative responsibility, did not act in a knowing and deliberate manner in thus equating a federal employee's "civil action" with private-sector plenary trials and in eschewing any reference to the private-sector provisions of the proposed legislation which provided for agency adjudication subject only to review on a substantial-evidence basis in the federal courts of appeals.[19]

In short, the bills reported out of the Senate and House committees and the accompanying Reports reveal a thorough and meticulous consideration of the question whether an administrative agency or a court should be given primary adjudicative responsibility for particular

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[18] The House Committee Bill, *supra,* n. 10, provided in relevant part that a federal employee, if aggrieved by final administrative disposition of his complaint, "may file a civil action as provided in section 715 . . . ." § 11. Section 715 of the proposed bill preserved the private-sector employee's right to institute a trial *de novo* in certain limited circumstances. § 8 (j). See n. 10, *supra.*

The Senate Committee Bill, *supra,* n. 10, provided in relevant part that a federal employee, if aggrieved by final administrative disposition of his complaint or by failure to take action on his complaint, "may file a civil action as provided in section 706 (q) . . . ." § 11. Section 706 (q) of the proposed bill preserved the private-sector employee's right to a trial *de novo* in specified instances. § 4 (a). See n. 10, *supra.*

[19] The House and Senate Reports as well as the Committee Bills themselves evince a detailed awareness of the interaction in the private sector of the new cease-and-desist remedy and the pre-existing right to a trial *de novo.* See House Committee Bill § 8 (j); House Report 12; Senate Committee Bill § 4 (a); Senate Report 24.

categories of Title VII complaints and an unambiguous choice to grant federal employees the right to plenary trials in the federal district courts.[20]

The House Committee Bill was opposed on the floor of the House on the ground that it placed primary adjudicative responsibility over private-sector Title VII complaints in an agency which was also responsible for prosecuting such complaints. Opponents contended that such a commingling of functions would bias the agency's adjudications.[21] This argument prevailed, and H. R. 1746 was amended on the floor by H. R. 9247,[22] which granted the EEOC the right to file private-sector "civil actions" in district court but not the power to issue cease-and desist orders.[23] The amendment changed H. R. 1746 in one other important respect: It deleted the provisions

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[20] The respondents argue that because private-sector employees enjoyed only a conditional right to plenary trials under the Senate Committee Bill and because the committee intended to give aggrieved federal employees the same "rights . . . in the courts as are granted to individuals in the private sector under title VII," Senate Report 16, it follows that the Senate committee intended federal employees to have trials *de novo* only in circumstances analogous to those where private-sector employees would enjoy the same right—*i. e.*, where the responsible agency had dismissed the charge without a hearing or where a sufficient period of delay had elapsed from the filing of the charge. This argument overlooks the fact that the provision in the Senate Committee Bill creating a federal employee's right to bring a "civil action" contained no reference to the substantial-evidence review provisions in the draft legislation but referred only to the provisions which pertained to private-sector trials *de novo*.

[21] *E. g.*, 117 Cong. Rec. 31958–31959 (1971) (remarks of Rep. Martin); *id.*, at 31969–31970 (remarks of Rep. Railsback); *id.*, at 31972–31973 (remarks of Rep. Erlenborn); *id.*, at 32091–32092 (remarks of Rep. Ford); *id.*, at 32106 (remarks of Rep. Broomfield); *id.*, at 32107–32108 (remarks of Rep. Shoup); *id.*, at 32109–32110 (remarks of Rep. Fisher).

[22] *Id.*, at 32111–32112.

[23] H. R. 9247, 92d Cong., 1st Sess., § 3 (c) (1971).

extending Title VII to federal employees.[24] As amended, H. R. 1746 passed the House.[25]

The Senate Committee Bill, like its House counterpart, was strongly opposed on the floor. As in the House, controversy centered on whether agency adjudication with limited appellate judicial review in the federal appellate courts should be the technique by which the EEOC would enforce Title VII in the private sector.[26] Early in the four-week Senate floor debate which preceded passage of S. 2515, Senator Dominick introduced an amendment which would replace the EEOC's cease-and desist authority with a right to institute *de novo* proceedings in the federal district courts on behalf of private-sector employees.[27] This amendment conformed to the dissenting views he had expressed in the Senate Report.[28] The principal aim of the amendment was to separate prosecutorial from adjudicative functions in private-sector Title VII proceedings.[29]

A central theme of Senator Dominick's argument, stressed repeatedly in the floor debate, was that the Committee Bill already contemplated the resolution of federal employees' claims through district court and not agency

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[24] See *id.;* S. Conf. Rep. No. 92-681, pp. 20-21 (1972) (hereinafter referred to as Conference Report).

[25] 117 Cong. Rec. 32113 (1971).

[26] *E. g.,* 118 Cong. Rec. 311-312 (1972) (remarks of Sen. Ervin); *id.,* at 595 (remarks of Sen. Tower); *id.,* at 731-732 (remarks of Sen. Saxbe); *id.,* at 732 (remarks of Sen. Brock); *id.,* at 735 (remarks of Sen. Williams); *id.,* at 928-929 (remarks of Sen. Mondale); *id.,* at 930 (remarks of Sen. Javits); *id.,* at 931-932 (remarks of Sen. Allen); *id.,* at 933 (remarks of Sen. Thurmond); *id.,* at 943-944 (remarks of Sen. Talmadge); *id.,* at 944 (remarks of Sen. Chiles); *id.,* at 1384 (remarks of Sen. Weicker).

[27] *Id.,* at 591-592.

[28] See Senate Report 86-87.

[29] 118 Cong. Rec. 592-593 (1972) (remarks of Sen. Dominick).

adjudication. Speaking of the Senate committee's deliberations, Senator Dominick stated that when the committee had "examined the Federal employee situation" he had

> "pointed out again that we were creating an agency czar in the EEOC which could determine personnel policies in all the other Federal agencies of the Government. I doubted the wisdom of creating such an omnipotent agency. After some discussion on this . . . we were able to work out an agreement whereby a Federal employee who feels he is discriminated against can go through his agency, and if he is still dissatisfied, he is empowered to bring suit in Federal court or through the existing Civil Service Board of Appeals and Reviews to Federal court. So on two of the major groups of employees covered by this legislation; namely, State and local employees on the one hand, and Federal employees on the other, the committee itself agreed to grievance remedy procedures through the Federal district courts; yet with the private employee they say, 'No, you cannot have that. We will have an agency that can do it all by itself.' That is discrimination in and of itself, right within the bill; and it strikes me that one of the first things we have to do is at least to put employees holding their jobs, be they government or private employees, on the same plane so that they have the same rights, so that they have the same opportunities, and so that they have the same equality within their jobs, to make sure that they are not being discriminated against and have the enforcement, investigatory procedure carried out the same way.
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> . . . . .
>
> "As I said earlier, it seems wrong to me to say to an aggrieved employee, 'Certainly we will hear your

case. We will do the investigating. We will bring the charges. We will do everything else, but you will not get a decision for over 2 years.' That is not justice. This is not equal employment opportunity. But if we have the investigator saying that this is a legitimate complaint, and that it will be brought to the district court and will get priority treatment there, we can get the matter decided in half the time it would take in any other way.

"It strikes me that this is right on principle. It is right in terms of administrative procedures. It conforms to what we did with State and local employees and with Federal employees." [30]

Senator Dominick reiterated the theme of remedial disparity throughout the floor debates, arguing for equal treatment of private-sector and federal-sector complainants: Since the latter were entitled to plenary adjudication of their claims by a federal district court, rather than mere appellate review on a substantial-evidence basis following agency adjudication, he contended, the former should be treated similarly.[31]

Senator Dominick's amendment was eventually adopted [32] and S. 2515, as amended, passed the Senate.[33] The House had already passed the amended version of H. R. 1746, which differed from the amended Senate Committee Bill in that it did not apply to federal employees. The bills accordingly went to a conference committee, which adopted the Senate Committee Bill's provision extending Title VII to federal employees.[34] The conference bill was enacted by the Senate and the House.

Since the federal employee provisions of the Senate

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[30] *Id.*, at 594.

[31] *Id.*, at 595, 942, 943, 3389, 3809, 3967.

[32] *Id.*, at 3979-3980.

[33] *Id.*, at 4944.

[34] Conference Report 1, 10-11, 20-21.

bill were eventually adopted by the conference committee and passed by Congress, the legislative history of that bill is the most helpful on the issue presented here.[35] The sequence of debate, amendment, and Senate passage of S. 2515 shows unmistakably that the Senate decided to provide both private- and federal-sector employees the adjudicative mechanism which the Senate committee had advocated for federal-, but not private-sector, employees. No changes were made or even proposed with respect to the committee's choice to allow federal employees judicial trials rather than "substantial evidence" review of administrative dispositions of their discrimination claims. On the contrary, it was the federal-sector *de novo* procedure which served as the model for Senator Dominick's proposed alteration of private-sector enforcement provisions. The passage of the Dominick amendment and the subsequent approval of S. 2515 by the Senate achieved the parity which Senator Dominick had advocated—judicial trial *de novo* for private as well as federal employees.[36]

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[35] See *Hackley* v. *Roudebush,* 171 U. S. App. D. C., at 413, 520 F. 2d, at 145; *Sperling* v. *United States,* 515 F. 2d, at 473.

[36] The respondents argue that a statement in the floor debate by Senator Williams and a statement purportedly made in that debate by Senator Cranston indicate that Congress did not intend to give federal employees the right to plenary judicial trials but only the right to record review of agency proceedings. Near the close of the debate on S. 2515 Senator Williams spoke as follows:

"Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U. S. District Court for a *review of the administrative proceeding record* after a final order by his agency or by the Civil Service Commission, if he is dissatisfied with that decision. Previously, there have been unrealistically high barriers which prevented or discouraged a Federal employee from taking a case to court. This will no longer be the case. There is no reason why a Federal employee should not have *the same private right of action enjoyed by individuals in the*

The Court of Appeals held that "the district judge faced with a demand for a trial de novo is entitled to determine, at a pretrial conference or otherwise, why the plaintiff believes that a trial de novo is necessary," 515 F. 2d, at 255, and concluded that the petitioner had presented "nothing before the district court to indicate that

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private sector, and I believe that the committee has acted wisely in this regard." 118 Cong. Rec. 4922 (1972) (emphasis added). Senator Williams had an expanded version of this statement printed in the Congressional Record. *Id.,* at 4923.

Despite the fact that Senator Williams was one of the original sponsors of S. 2515 and its floor manager, we decline to give controlling weight to the quoted statement for three reasons. First, it is self-contradictory: While characterizing the federal-sector "civil action" as a "review of the administrative proceeding record," Senator Williams stated in the same breath that "[t]here is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector . . . ." Yet the private right of action enjoyed by individuals in the private sector was to be a trial *de novo* under the pending bill. Second, the federal-sector provision before the Senate was precisely that which the Senate committee had proposed. Indeed, Senator Williams specifically applauded the committee for having "acted wisely in this regard." Yet the committee clearly chose to grant federal-sector employees the right to a trial *de novo* and omitted any reference to the record review provisions it advocated for private-sector cease-and-desist orders. The committee's unambiguous and unaltered treatment of federal-sector "civil actions" is more probative of congressional intent than the casual remark of a single Senator in the floor debate. Cf. *United States* v. *Automobile Workers,* 352 U. S. 567, 585; *Sperling* v. *United States, supra,* at 480. Finally, as Senator Williams himself acknowledged earlier in the debate, Senator Dominick rather than he was "[t]he principal architect of . . . changes dealing with the civil service area . . . ." 118 Cong. Rec. 595 (1972). That statement was made immediately after Senator Dominick's discussion of the Senate committee's decision to grant federal employees the right to bring "civil actions" in district court rather than the right to have administrative adjudication of their claims with substantial-evidence review in the courts. *Id.,* at 594.

The other statement relied on by the respondents was purportedly

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a useful purpose would be served by having a trial de novo." *Ibid.* This approach substantially parallels the holding in *Hackley* v. *Johnson:*

"The trial *de novo* is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it

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made by Senator Cranston during the final portion of the floor debate. The daily edition of the Congressional Record shows Senator Cranston as having made the following statement:

"For the first time, [my Federal EEO amendment would] permit Federal employees to sue the Federal Government in discrimination cases—under the theory of Federal sovereign immunity, courts have not generally allowed such suits—and to bring suit either prior to or after CSC review of the agency EEO decision in the case. As with other cases brought under title VII of the Civil Rights Act of 1964, Federal district court *review would be based on the agency and/or CSC record and would not be a trial de novo.*" 118 Cong. Rec. S 2287 (daily ed. Feb. 22, 1972) (emphasis added).

Approximately a year after the debate and 10 months after the enactment of the Equal Employment Opportunity Act of 1972, Senator Cranston informed the Senate that "the word 'not' was misplaced" in the daily edition and that when "set forth . . . in the correct manner" the italicized portion of the statement would read "review would not be based on the agency and/or CSC record and would be a trial de novo." 119 Cong. Rec. S 1219 (daily ed. Jan. 23, 1973). The language was so corrected, see 118 Cong. Rec. 4929. We agree with the respondents that this belated correction is not probative. But we cannot agree with their further argument and the view of the Eighth Circuit, *Haire* v. *Calloway,* 526 F. 2d, at 248 n. 4, that the uncorrected version, as originally printed in the daily edition of the Congressional Record, *is* probative. As with Senator Williams' remark, the uncorrected statement is self-contradictory: Senator Cranston first equated federal- and private-sector "civil actions" and then went on to characterize a federal-sector suit as "not . . . a trial de novo." Yet the private-sector suit *was* to be a trial *de novo.* And, as with Senator Williams' remark, the Senate committee's decision to equate federal-sector "civil actions" with private-sector trials *de novo* is more probative of congressional intent than a fleeting remark in the floor debate.

determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." 360 F. Supp., at 1252.

Nothing in the legislative history indicates that the federal-sector "civil action" was to have this chameleon-like character, providing fragmentary *de novo* consideration of discrimination claims where "appropriate," *ibid.*, and otherwise providing record review. On the contrary, the options which Congress considered were entirely straightforward. It faced a choice between record review of agency action based on traditional appellate standards and trial *de novo* of Title VII claims. The Senate committee selected trial *de novo* as the proper means for resolving the claims of federal employees. The Senate broadened the category of claims entitled to trial *de novo* to include those of private-sector employees, and the Senate's decision to treat private- and federal-sector employees alike in this respect was ratified by the Congress as a whole.

C. *Presumption Against De Novo Review*

Given the clear expression of congressional intent, as revealed in both the plain language of § 717 and the legislative history of the 1972 amendments, we find unpersuasive the respondents' reliance on decisions by this Court indicating that "*de novo* review is generally not to be presumed." *Consolo* v. *FMC,* 383 U. S., at 619 n. 17; *United States* v. *Carlo Bianchi & Co.,* 373 U. S. 709, 715. *Consolo* involved review of agency action under provisions of the Administrative Procedure Act giving "a reviewing court authority to 'set aside agency action,

findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence . . . .' " 383 U. S., at 619. In this context, the Court observed: "We do not read the opinion below as asserting that the Court of Appeals, in a direct review proceeding, may conduct a *de novo* review of the equities of a reparation award. We find nothing in the Shipping Act, the Hobbs Act, or the Administrative Procedure Act that would authorize a *de novo* review in these circumstances, and in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed." *Id.*, at 619 n. 17. Here, by contrast, there is a "specific statutory authorization" of a district court "civil action," which both the plain language of the statute and the legislative history reveal to be a trial *de novo*.[37]

[37] *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709, involved review of agency action under the Wunderlich Act, which provided that a governmental decision on a question of fact arising under a "disputes" clause of a Government contract should be final and conclusive " 'unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.' " *Id.*, at 714. The Court held that this language indicated that Congress intended to limit review to the administrative record and observed that even "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held." *Id.*, at 715. Here Congress has not "simply provided for review" but has affirmatively chosen to grant federal employees the right to maintain a trial *de novo*.

In most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like "substantial evidence," which has "become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court." *Ibid.* *E. g.*, 5 U. S. C. § 706 (scope-of-review provision of Administrative Procedure Act); 12 U. S. C. § 1848 (scope-of-review

The respondents' contention that administrative dispositions of federal employee discrimination complaints would, unlike arbitral decisions under collective-bargaining agreements or preliminary EEOC findings of "no reasonable cause," typically furnish an adequate basis for "substantial evidence" review cannot overcome the clear import of the statutory language and the legislative history. The Congress was aware of the fact that federal employees would have the benefit of "appropriate procedures for an impartial [agency] adjudication of the complain[t]," [38] and yet chose to give employees who had been through those procedures the right to file a *de novo* "civil action" equivalent to that enjoyed by private-sector employees.[39] It may well be, as the respondents have argued, that routine trials *de novo* in the federal courts will tend ultimately to defeat, rather than to

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provision applicable to certain orders of the Board of Governors of the Federal Reserve System); 15 U. S. C. § 21 (c) (scope-of-review provision applicable to certain orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, and the Federal Trade Commission); 21 U. S. C. § 371 (f)(3) (scope-of-review provision applicable to certain orders of the Secretary of Health, Education, and Welfare).

[38] House Report 26.

[39] The goal may have been to compensate for the perceived fact that "[t]he Civil Service Commission's primary responsibility over all personnel matters in the Government . . . create[s] a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which may result in a lack of true equal employment opportunity." Senate Report 15.

Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*. See Fed. Rule Evid. 803 (8)(C). Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 60 n. 21. Moreover, it can be expected that, in the light of the prior administrative proceedings, many potential issues can be eliminated by stipulation or in the course of pretrial proceedings in the District Court.

advance, the basic purposes of the statutory scheme. But Congress has made the choice, and it is not for us to disturb it.

Since the Court of Appeals in this case erroneously concluded that § 717 (c) does not accord a federal employee the same right to a trial *de novo* as private-sector employees enjoy under Title VII, its judgment must be reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 864 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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It is so ordered.

ORDERS FROM MARCH 29 THROUGH MAY 27, 1976

MARCH 29, 1976

Affirmed on Appeal

No. 75-676. BOWMAN TRANSPORTATION, INC. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. Affirmed on appeal from D. C. W. D. Ark. MR. JUSTICE STEVENS would reverse. Reported below: 399 F. Supp. 157.

No. 75-856. LEVIN *v.* GULOTTA, PRESIDING JUSTICE, ET AL.;

No. 75-972. MILDNER *v.* GULOTTA, PRESIDING JUSTICE, ET AL.; and

No. 75-1111. GERZOF *v.* GULOTTA, PRESIDING JUSTICE. Affirmed on appeal from D. C. E. D. N. Y. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL would postpone consideration of question of jurisdiction to hearing of cases on the merits. Reported below: 405 F. Supp. 182.

No. 75-896. DOE ET AL. *v.* COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND ET AL. Affirmed on appeal from D. C. E. D. Va. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 403 F. Supp. 1199.

Appeals Dismissed

No. 75-1124. GASKIN ET AL. *v.* TENNESSEE. Appeal from Ct. Crim. App. Tenn. dismissed for want of substantial federal question. Reported below: 530 S. W. 2d 533.

No. 75-6298. MCKELDIN *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdic-

tion. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: See 534 S. W. 2d 131.

Miscellaneous Orders

No. A-709 (75-6221). ROTI *v.* FLORIDA. Sup. Ct. Fla. Application for bail, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. A-748. GAERTNER *v.* UNITED STATES. C. A. 7th Cir. Application for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this application.

No. A-812. HOFF ET AL. *v.* UNITED STATES. Application for stay of execution and enforcement of judgment of the United States Court of Appeals for the Second Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE STEVENS would grant the application. Reported below: 527 F. 2d 237.

No. 75-251. FITZPATRICK ET AL. *v.* BITZER, CHAIRMAN, STATE EMPLOYEES' RETIREMENT COMMISSION, ET AL.; and

No. 75-283. BITZER, CHAIRMAN, STATE EMPLOYEES' RETIREMENT COMMISSION, ET AL. *v.* MATTHEWS ET AL. C. A. 2d Cir. [Certiorari granted, 423 U. S. 1031.] Motion of Lawrence Silver, Esquire, for additional time to permit Melvin R. Shuster, Esquire, to participate in oral argument as *amicus curiae, pro hac vice,* denied.

No. 75-510. FLINT RIDGE DEVELOPMENT CO. *v.* SCENIC RIVERS ASSOCIATION OF OKLAHOMA ET AL.; and

No. 75-545. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* SCENIC RIVERS ASSOCIATION OF OKLAHOMA ET AL. C. A. 10th Cir. [Certiorari granted, 423 U. S. 1013.] Motion of the Attorney Gen-

eral of California for leave to file an untimely brief as *amicus curiae* granted.

No. 75–382. FEDERAL ENERGY ADMINISTRATION ET AL. *v.* ALGONQUIN SNG, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 923.] Motion of respondents for additional time for oral argument denied. Alternative request for divided argument granted. Motion of McClure & Trotter for leave to file a brief as *amicus curiae* granted.

Certiorari Denied. (See also No. 75–6298, *supra.*)

No. 75–844. SUSENKEWA ET AL. *v.* KLEPPE, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 520 F. 2d 1324.

No. 75–877. ALONSO *v.* CALIFORNIA DEPARTMENT OF HUMAN RESOURCES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 50 Cal. App. 3d 242, 123 Cal. Rptr. 536.

No. 75–878. ACCU-NAMICS, INC. *v.* USERY, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 828.

No. 75–897. ENSLIN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 25 N. C. App. 662, 214 S. E. 2d 318.

No. 75–902. MITCHELL ET AL. *v.* HONGISTO, SHERIFF. C. A. 9th Cir. Certiorari denied.

No. 75–961. GENTILE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 252.

No. 75–964. SENECA-CAYUGA TRIBE OF OKLAHOMA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 958, 521 F. 2d 1406.

No. 75-965. SENECA-CAYUGA TRIBE OF OKLAHOMA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 959, 521 F. 2d 1406.

No. 75-982. PARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 992.

No. 75-984. SEARS *v.* DANN, COMMISSIONER OF PATENTS. C. A. 4th Cir. Certiorari denied.

No. 75-1011. SWEETON, CHIEF OF POLICE *v.* GENERAL CORP. Sup. Ct. Ala. Certiorari denied. Reported below: 294 Ala. 657, 320 So. 2d 668.

No. 75-1086. HENICAN ET AL. *v.* EXCHANGE NATIONAL BANK OF CHICAGO. Sup. Ct. La. Certiorari denied. Reported below: 321 So. 2d 338.

No. 75-1095. BANKERS LIFE & CASUALTY CO. *v.* PALM BEACH BILTMORE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75-1098. PARK ET AL. *v.* LANSING SCHOOL DISTRICT ET AL. Ct. App. Mich. Certiorari denied. Reported below: 62 Mich. App. 397, 233 N. W. 2d 592.

No. 75-1100. S. S. KRESGE CO. *v.* BAEZ. C. A. 5th Cir. Certiorari denied. Reported below: 518 F. 2d 349.

No. 75-1101. MELNICK ET AL. *v.* MCCLELLAN. C. A. 10th Cir. Certiorari denied.

No. 75-1113. HAHN *v.* SARGENT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 523 F. 2d 461.

No. 75-1117. MISHKIN ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75-1129. HFH, LTD., ET AL. *v.* SUPERIOR COURT OF LOS ANGELES COUNTY ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 3d 508, 542 P. 2d 237.

No. 75-5700. Gary *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 527 S. W. 2d 320.

No. 75-5959. Brown *v.* United States; and
No. 75-6059. Bryant *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6002. Alexander *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6004. De los Santos *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 941.

No. 75-6006. Malloy *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

No. 75-6013. Crim *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 527 F. 2d 289.

No. 75-6020. Weems *v.* Hogan, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 239.

No. 75-6024. Morgan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75-6032. Goodie *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 515.

No. 75-6034. Rose *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 745.

No. 75-6035. Wright, aka Morgan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 239.

No. 75-6037. Evans *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 70, 527 F. 2d 853.

No. 75-6042. Beaver *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 963.

No. 75-6039. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1279.

No. 75-6049. ARCHER *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 529 F. 2d 511.

No. 75-6062. WILLIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

No. 75-6068. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75-6069. ORTEGA (BELTRAN) *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 691.

No. 75-6070. JORDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75-6072. BURROUGHS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75-6175. LEMON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 74, 218 S. E. 2d 818.

No. 75-6180. WILSON ET UX. *v.* BOGGS. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75-6181. NIELSEN *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 544 P. 2d 489.

No. 75-6182. ST. ANDRE *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 75-6257. BELL *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 75-6197. Johnson *v.* Hy-Dynamic Co., Inc. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1403.

No. 75-527. Arnett, Director, Department of Fish and Game of California *v.* Five Gill Nets et al. Ct. App. Cal., 1st App. Dist. Motion of respondent Mattz for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 48 Cal. App. 3d 454, 121 Cal. Rptr. 906.

No. 75-905. Senak *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 527 F. 2d 129.

No. 75-1067. Regency Electronics, Inc. *v.* National Labor Relations Board et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 523 F. 2d 522.

No. 75-1127. E. J. Delaney Corp. et al. *v.* Bonne Bell, Inc., et al. C. A. 10th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice White would grant certiorari. Reported below: 525 F. 2d 296.

No. 75-1144. Hansen, Receiver *v.* Weyerhaeuser Co. C. A. 9th Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 526 F. 2d 505.

No. 75-6229. Moss *v.* Central of Georgia Railroad Co. Ct. App. Ga. Certiorari denied. Mr. Justice Powell took no part in the consideration or decision of this petition. Reported below: 135 Ga. App. 904, 219 S. E. 2d 593.

Rehearing Denied

No. 75–862. INGRAM *v.* GEORGIA, 424 U. S. 914;

No. 75–930. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. *v.* EAZOR EXPRESS, INC., ET AL., 424 U. S. 935; and

No. 75–5975. COZZETTI *v.* CENTRAL TELEPHONE CO. ET AL., 424 U. S. 925. Petitions for rehearing denied.

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Appeals Dismissed

No. 75–1024. CITIZENS FOR PARENTAL RIGHTS ET AL. *v.* SAN MATEO COUNTY BOARD OF EDUCATION ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 51 Cal. App. 3d 1, 124 Cal. Rptr. 68.

No. 75–6328. OGROD *v.* OGROD. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question.

No. 75–1128. PHOENIX NEWSPAPERS, INC., ET AL. *v.* CHURCH. Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 24 Ariz. App. 287, 537 P. 2d 1345.

No. 75–1176. KADANS *v.* STATE BAR OF NEVADA. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction.

Miscellaneous Orders

No. A–834 (75–1379). MEYER *v.* UNITED STATES. C. A. 5th Cir. Application for stay of execution and enforcement of judgment of conviction entered by the United States District Court for the Northern District of

Georgia, presented to Mr. Justice Marshall, and by him referred to the Court, denied.

No. A-844. Parham, Commissioner, Department of Human Resources of Georgia, et al. *v.* J. L. et al. Application for stay of order and judgment of the United States District Court for the Middle District of Georgia, dated February 26, 1976, and March 11, 1976, respectively, presented to Mr. Justice Powell, and by him referred to the Court, granted pending timely filing of appeal and final disposition thereon by this Court. Mr. Justice Stevens would deny the application.

No. 74-799. United States *v.* Foster Lumber Co., Inc. C. A. 8th Cir. [Restored to calendar, 424 U. S. 903.] Motion of Data Products Corp. for additional time to participate in oral argument as *amicus curiae*, or in the alternative for the Court to grant certiorari in No. 74-996 [*United States* v. *Data Products Corp.*] and set case for oral argument denied.

No. 74-1520. Elrod, Sheriff, et al. *v.* Burns et al. C. A. 7th Cir. [Certiorari granted, 423 U. S. 821.] Motion of Independent Voters of Illinois et al. for additional time to participate in oral argument as *amici curiae* denied.

No. 75-76. South Dakota *v.* Opperman. Sup. Ct. S. D. [Certiorari granted, 423 U. S. 923.] Motion of Illinois Public Defender Assn. for leave to file a brief as *amicus curiae* denied.

No. 75-679. Internal Revenue Service *v.* Fruehauf Corp. et al. C. A. 6th Cir. [Certiorari granted, 423 U. S. 1047.] Motion of respondents for oral argument during the current term of Court, or, in the alterna-

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tive, to vacate stay of judgment of the United States District Court for the Eastern District of Michigan denied.

Probable Jurisdiction Noted

No. 75-1150. City of Philadelphia et al. *v.* New Jersey et al. Appeal from Sup. Ct. N. J. Motion of National Solid Wastes Management Assn. for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Reported below: 68 N. J. 451, 348 A. 2d 505.

Certiorari Granted

No. 75-823. Belcher *v.* Stengel et al. C. A. 6th Cir. Certiorari granted. Reported below: 522 F. 2d 438.

No. 75-353. Piper et al. *v.* Chris-Craft Industries, Inc.;

No. 75-354. First Boston Corp. *v.* Chris-Craft Industries, Inc.; and

No. 75-355. Bangor Punta Corp. et al. *v.* Chris-Craft Industries, Inc. C. A. 2d Cir. Motion of Securities Industry Assn. for leave to file a brief as *amicus curiae* in No. 75-354 granted. Certiorari granted. Cases consolidated and a total of one and one-half hours allotted for oral argument. Reported below: 516 F. 2d 172.

No. 75-915. Bounds, Correction Commissioner, et al. *v.* Smith et al. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 538 F. 2d 541.

Certiorari Denied. (See also No. 75-1128, *supra.*)

No. 75-1028. Scanwell Laboratories, Inc. *v.* Thomas, Acting Administrator, Federal Aviation Administration, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 172 U. S. App. D. C. 281, 521 F. 2d 941.

No. 75–773. CALLEY *v.* HOFFMAN, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 184.

No. 75–908. SHAPE SPA FOR HEALTH & BEAUTY, INC., ET AL. *v.* ROUSSEVE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 64.

No. 75–920. MCNAMARA ET AL. *v.* JOHNSTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 522 F. 2d 1157.

No. 75–934. FLANAGAN ET AL. *v.* MCDONNELL DOUGLAS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 1083.

No. 75–939. MESCALERO APACHE TRIBE ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 369, 518 F. 2d 1309.

No. 75–997. MELNIK ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 521 F. 2d 1065.

No. 75–1014. ARIZONA PUBLIC SERVICE CO. ET AL. *v.* ARIZONA POWER POOLING ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 721.

No. 75–1030. WOROZBYT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 196.

No. 75–1060. METZGER ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 675, 339 N. E. 2d 170.

No. 73–1063. THRIFT DRUG, A DIVISION OF J. C. PENNEY CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 243.

No. 75–1068. LEA ASSOCIATES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 1059, 529 F. 2d 531.

No. 75–1071. BOGATIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 2d 674, 367 N. Y. S. 2d 824.

No. 75–1076. SKYDELL ET AL. *v.* ECOLOGICAL SCIENCE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 171.

No. 75–1088. COREX CORP., DBA QUICK CORPORATION OF AMERICA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 524 F. 2d 1017.

No. 75–1090. REDD, DBA ABAJO PETROLEUM *v.* SHELL OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 524 F. 2d 1054.

No. 75–1123. SMITH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 258 Ark. 601, 528 S. W. 2d 389.

No. 75–1125. SILVERTON *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied.

No. 75–1130. NIVENS *v.* SIGNAL OIL & GAS CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 1019.

No. 75–1131. CHANEYFIELD *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 1333.

No. 75–1134. USM CORP. *v.* SCHLEGEL MANUFACTURING CO. C. A. 6th Cir. Certiorari denied. Reported below: 525 F. 2d 775.

No. 75–1137. PACIERA *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 238.

No. 75-1143. YEE *v.* CHUN ET AL. Sup. Ct. Haw. Certiorari denied.

No. 75-1147. GLAZERS WHOLESALE DRUG CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1053.

No. 75-1161. COHOES HOUSING AUTHORITY *v.* IPPOLITO-LUTZ, INC. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 2d 1018, 373 N. Y. S. 2d 335.

No. 75-1168. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* LUECK. Sup. Ct. Ariz. Certiorari denied. Reported below: 111 Ariz. 560 and 112 Ariz. 277; 535 P. 2d 599 and 540 P. 2d 1258.

No. 75-1169. GABRIEL *v.* LEVIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 75-1179. RUTLAND ENVIRONMENTAL PROTECTION ASSN. ET AL. *v.* KANE COUNTY ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 31 Ill. App. 3d 82, 334 N. E. 2d 215.

No. 75-1195. TAMS-WITMARK MUSIC LIBRARY, INC. *v.* MUNICIPAL COURT, SACRAMENTO MUNICIPAL COURT DISTRICT, COUNTY OF SACRAMENTO. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75-1196. GILBERT *v.* AMERICAN EAGLE TANKER CORP. C. A. 2d Cir. Certiorari denied.

No. 75-5881. BERARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 2d 319.

No. 75-5935. BERGER ET AL. *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 235 N. W. 2d 254.

No. 75-5950. Richerson *v.* Wolff, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 797.

No. 75-6045. Bryant *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 529 F. 2d 511.

No. 75-6055. Jackson *v.* United States; and
No. 75-6078. Bradford *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6080. Clay *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75-6081. Wells *v.* Southern Airways, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 132 and 522 F. 2d 707.

No. 75-6087. Tyler *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75-6090. Kinnard *v.* United States. Ct. App. D. C. Certiorari denied.

No. 75-6091. Evans *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 75-6092. Velarde *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 387.

No. 75-6096. Gibbons *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 696.

No. 75-6130. Brooks *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 75-6132. Kelley *v.* United States; and
No. 75-6142. Bryant *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75-6192. Williams *v.* New York et al. C. A 2d Cir. Certiorari denied.

No. 75-6176. SAVAGE *v.* SALT LAKE CITY. Sup. Ct. Utah. Certiorari denied. Reported below: 541 P. 2d 1035.

No. 75-6199. RICH *v.* BONNER, JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 75-6201. BREAUX *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 75-6203. WICKER *v.* ROTH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 238.

No. 75-6208. CAMERON *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1278.

No. 75-6213. TYLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 527 F. 2d 877.

No. 75-6214. GAUSE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 112 Ariz. 296, 541 P. 2d 396.

No. 75-6215. DISHNER ET AL. *v.* MOFFETT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 172 U. S. App. D. C. 224, 521 F. 2d 324.

No. 75-6219. BOONE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 218 Kan. 482, 543 P. 2d 945.

No. 75-6221. ROTI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 75-6226. OWENS *v.* WARDEN, ILLINOIS STATE PENITENTIARY. C. A. 7th Cir. Certiorari denied.

No. 75-6228. POGUE *v.* GOVERNMENT EMPLOYEES INSURANCE CO. C. A. 5th Cir. Certiorari denied.

No. 75–6232. Jones *v.* Burgwyn. C. A. 4th Cir. Certiorari denied.

No. 75–6233. Jones *v.* Meeks. C. A. 4th Cir. Certiorari denied.

No. 75–6238. Torrez *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 112 Ariz. 525, 544 P. 2d 207.

No. 75–6244. Gary *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 112 Ariz. 470, 543 P. 2d 782.

No. 73 6642. Crosby et al. *v.* Middendorf, Secretary of the Navy. C. A. 9th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition.

No. 75–579. Esposito *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 523 F. 2d 242.

No. 75–1203. Fitzgerald et al. *v.* Porter Memorial Hospital et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 523 F. 2d 716.

No. 75–1120. Witt et al. *v.* California. Ct. App. Cal., 5th App. Dist. Applications for bail, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied. Reported below: 53 Cal. App. 3d 154, 125 Cal. Rptr. 653.

No. 75–1142. Mulligan et al. *v.* Dunne et al. Sup. Ct. Ill. Motion of Illinois Liquor Control Commission for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 61 Ill. 2d 544, 338 N. E. 2d 6.

No. 75-6275. OLDEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75-5687. WALKER *v.* UNITED STATES;
No. 75-5696. ROBERSON *v.* UNITED STATES; and
No. 75-5828. DUNCAN ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL would grant certiorari.

No. 75-5688. SCOTT ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 170 U. S. App. D. C. 158, 516 F. 2d 751.

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

The Court today again refuses to grant certiorari to consider the proper implementation of the "minimization" requirement of 18 U. S. C. § 2518 (5), one of the core provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See, *e. g., Bynum* v. *United States,* 423 U. S. 952 (1975) (BRENNAN, J., dissenting from denial of cert.). The "minimization" provision, which requires that every order and extension thereof authorizing electronic surveillance shall "contain a provision that the authorization to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter,"

> "constitutes the congressionally designed bulwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in *Berger* v. *New York,* 388 U. S. 41 (1967), and *Katz* v. *United States,* 389 U. S. 347 (1967). Congress has explicitly informed us that

the 'minimization' and companion safeguards [*e. g.*, §§ 2518 (3)(a), (b), (c), and (d)] were designed to assure that 'the order will link up specific person, specific offense, and specific place. Together [the provisions of Title III] are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity.' S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968)." *Bynum* v. *United States, supra,* at 952.

When the Court denied certiorari in *Bynum,* I indicated my reasons for believing that "we plainly fail in our judicial responsibility when we do not review these cases to give content to the congressional mandate of 'minimization,'" particularly since guidance for judges authorizing electronic surveillance "is absolutely essential if the congressional mandate to confine execution of authorized surveillances within constitutional and statutory bounds is to be carried out." *Id.,* at 958–959, 953. That review is no less appropriate now. Indeed, it is even more urgent in light of the proliferation of opinions—exemplified by this case from the Court of Appeals for the District of Columbia Circuit—sanctioning round-the-clock surveillance in which every conversation, whether innocuous or incriminating, is intercepted.

The facts of this case are relatively simple. The Government sought and obtained authorization to intercept wire communications over a certain specified telephone on the ground that there was probable cause to believe that certain named individuals were using that telephone in connection with the commission of narcotics offenses, and that information concerning the offenses would be obtained through the interception of the communications over the telephone. The order authorized the intercep-

tion of conversations relating to the illegal importation and transportation of narcotics and, as required by § 2518 (5), specified that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."

Although the monitoring agents were aware of the minimization requirement, the agent in charge testified that no attempt was made to minimize the interceptions. In fact, the agents listened to and recorded each and every one of the 384 calls completed over the subject telephone during the 30 days the surveillance was in effect, even though the agents' contemporaneous reports to the supervising judge classified the intercepted calls as only 40% narcotics-related and 60% non-narcotics-related. The agents also never informed the judge that they were taking no steps to minimize the amount of surveillance.

After the surveillance was terminated and petitioners and others were arrested, the District Judge conducted pretrial hearings on the question whether all evidence obtained during the surveillance, and the fruits thereof, had to be suppressed on the ground of noncompliance with the minimization mandate of the statute and the explicit provision of the wiretap authorization. The judge, finding that the agents "did not even attempt 'lip service compliance' with the provision of the order and statutory mandate but rather completely disregarded it," 331 F. Supp. 233, 247 (DC 1971), ordered the complete suppression of all evidence obtained directly or indirectly through the surveillance. *Id.*, at 248. On appeal, the Court of Appeals remanded for further consideration in light of another case in which it had adopted a test by which the statutory command of minimization was considered to be satisfied if monitoring agents made good-

faith efforts to minimize and if those efforts were reasonable. 164 U. S. App. D. C. 125, 504 F. 2d 194 (1974).

On remand, further hearings were held, and the District Judge again concluded that "the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the [subject's] telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion." Crim. No. 1088–70, Nov. 12, 1974; App. 14a. The judge again acknowledged the "knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements," *id.*, at 17a, and held that this "admitted" "conduct would be unreasonable even if every intercepted call were narcotic-related." *Id.*, at 18a.

On appeal, the Court of Appeals again reversed, concluding that the surveillance was reasonable because, in light of the conversations actually intercepted, it could not identify any categories of calls which could not have been reasonably intercepted even if minimization procedures had been instituted. 170 U. S. App. D. C. 158, 516 F. 2d 751 (1975). The bad faith of the monitoring agents in not instituting any minimization procedures was thus deemed essentially irrelevant: the "agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable." *Id.*, at 163, 516 F. 2d, at 756.

Rehearing en banc was denied, 173 U. S. App. D. C. 118, 522 F. 2d 1333, with four judges stating why they believed reconsideration by the full court was absolutely essential. Their statement is pertinent as an indication of the necessity for granting certiorari in this case. The dissenters observed, *id.*, at 118–119, 522 F. 2d, at 1333–1334 (Robinson, J., joined by Bazelon, C. J., and

Wright and Leventhal, JJ.) (emphasis supplied, footnotes omitted):

"The decision in these cases appears to be seriously inconsistent with our earlier decision in *United States* v. *James,* [161 U. S. App. D. C. 88, 494 F. 2d 1007, cert. denied *sub nom. Tantillo* v. *United States,* 419 U. S. 1020 (1974)]. Beyond that, *the extent to which judicial interpretations of a statute sanctioning telephone wiretaps may tolerate otherwise unconstitutional invasions of privacy is a question of exceptional and recurring importance.* For these reasons—traditional foundations for full-court consideration—I would grant rehearing *en banc* in these cases.

"The governing statute requires all judicially authorized wiretapping to 'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . .' *James* adopted a construction of this provision which was formulated originally by the Second Circuit. Under the *James* standard, the duty to minimize is satisfied 'if "on the whole the [intercepting] agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusions." ' Thus *James* demands an inquiry as to the intercepting agent's subjective intent to minimize the interception of innocent calls, as well as an objective determination that the agent could reasonably have believed that calls actually intercepted were likely to be illicit.

"The instant decision acknowledges this holding in *James,* but concludes that although the agents' attitude 'is a relevant factor to be considered, . . . the decisive factor is the second element—the objective reasonableness of the interceptions.' The first ele-

ment is relegated to a far less significant position: '[t]he subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure;' '[w]hen the monitoring agents fail to manifest "a high regard for the right of privacy," the Government will simply have a heavier burden of showing that the interceptions were reasonable.' Indeed, the court now says that 'the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable.'

"Despite the admitted fact that '[t]hroughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations,' and the further fact, found by the District Court, that there was a 'knowing and purposeful failure by the monitoring agents to comply with [its] minimization order,' the decision herein rejects the District Court's ruling 'that the failure to attempt minimization was itself proof that the interceptions were unreasonable.' The opinion does concede that '[t]he presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirements [*sic*] has been satisfied.' But the court stresses that in the final analysis 'the decision on . . . suppression . . . must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.'

"This interpretation effectively destroys the subjective criterion of *James'* two-pronged standard for minimization efforts, and fatally undermines the

force of the minimization requirement itself. *Once the decisive test of the validity of an interception becomes its 'objective reasonableness,' there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps.* This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified. Courts have repeatedly refused to validate searches and seizures in this after-the-fact manner, and any decision which implies that Fourth Amendment safeguards apply less stringently to wiretaps than to other searches deserves close scrutiny by the entire court.

"Moreover, the practical ramifications of this decision are serious. It appears to destroy any incentive for law enforcement agents conducting wiretap surveillances to respect the rights of citizens to privacy in noncriminal telephone conversations in advance of their intrusion. *It is evident that when agents endeavor in good faith to honor these rights, innocent conversations are less likely to be intercepted. But when agents completely disregard their obligations to minimize no conversation is likely to escape their ears. That in my view is a result which hardly comports with a statute explicitly requiring minimization.* The court as a whole should take a hard look at these cases, and should itself define the extent to which would-be wiretappers must maintain allegiance to the statute and the Fourth Amendment."

Moreover, in *Walker* v. *United States, ante,* p. 917, in which the Court also denies certiorari today, a unanimous panel of the Court of Appeals for the District of Colum-

bia Circuit declared that it would have found a violation of the minimization requirement had the Court of Appeals not denied rehearing en banc in *Scott:*

> "This panel is of the view that § 2518 (5) was violated. However, this court in a case indistinguishable on this point, *United States* v. *Scott* . . . held otherwise. Since a suggestion to rehear *Scott en banc* was pending at the time this case was *sub judice,* this panel moved the court to rehear *Scott* and this case *en banc.* That motion was denied. . . . Under the circumstances, on this issue this panel is bound by the decision in *Scott.*" Memo., Crim. No. 1978–69, Oct. 3, 1975, p. 1; Pet. for Cert. 2a.

In light of the general importance of the minimization provision in the conduct of electronic surveillance and the conflict between the holding in *Scott* and other formulations of the minimization requirement, and especially in light of the *Scott* opinion's denigration of the importance of the monitoring agents' good-faith attempt to comply with the statute and its retroactive validation of a Fourth Amendment search on the basis of what was uncovered by the search, there is simply no justification for failing to grant the writ of certiorari in this case. The minimization issue is not clouded by other factors, and given the District Judge's findings of total noncompliance with the statutory command, only an unyielding hostility to the statutory command of minimization and to the constitutional interest in privacy which it was fashioned to protect, can motivate the Court to continue to refuse to review decisions which condone round-the-clock interception of every conversation that transpires during the conduct of a particular surveillance. No concern with crowded dockets, at a time when we review a not insubstantial number of trivial cases, can excuse the failure to address this crucial issue of statutory construction,

fraught as it is with substantial constitutional overtones.

This refusal is not only inexcusable, but also especially anomalous in light of related actions by this Court in the electronic surveillance area. In *United States* v. *Kahn*, 415 U. S. 143 (1974), the Court, addressing the question of who must be named in an application and order authorizing surveillance, held:

> "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." *Id.*, at 155.

In response to the argument of the Court of Appeals and the dissent, see *id.*, at 158–163 (Douglas, J., joined by BRENNAN and MARSHALL, JJ.), that such a conclusion would amount to approval of a general warrant proscribed by both Title III and the Fourth Amendment, the *Kahn* Court relied on the minimization mandate as an adequate safeguard to prevent such unlimited invasions of personal privacy, *id.*, at 154–155:

> "[I]n accord with the statute the order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversations. . . . Thus, the failure of the order to specify that Mrs. Kahn's conversations might be the subject of interception hardly left the executing agents free to seize at will every communication that came over the wire—and there is no indication that such abuses took place in this case."

Yet the Court has consistently refused, and today persists in that refusal, to confront a case presenting the minimization question and the abuse that emanates from the seizure of "every communication that came over the

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wire." Indeed, the refusal is even more troubling since certiorari has been granted in *United States* v. *Donovan,* 424 U. S. 907 (1976), a case in which the Solicitor General requests that we dilute even further the standard enunciated in *Kahn* for naming the subjects of proposed surveillance. I fail to comprehend how, in light of the above passage from *Kahn,* the Court can undertake that analysis without concomitantly addressing the contours of the minimization requirement. Inaction can only continue evisceration of the statutory mandate and require that Congress take a further and clearly unnecessary step of enacting more legislation to give concrete content to § 2518 (5).

I would grant the petition for certiorari.

Rehearing Denied

No. 75-652. Caterine *v.* United States, 424 U. S. 909;

No. 75-731. Sun Oil Co. et al. *v.* Public Service Commission of New York et al., 424 U. S. 910;

No. 75-822. Thompson *v.* Kenton County Board of Election Commission et al., 423 U. S. 1083;

No. 75-5366. Fisher *v.* District Court of the Sixteenth Judicial District of Montana, in and for the County of Rosebud, 424 U. S. 382;

No. 75-5747. Zimmerman *v.* United States et al., 424 U. S. 918;

No. 75-5834. Harmon *v.* Hodge, 423 U. S. 1090;

No. 75-5902. Reed *v.* United States, 424 U. S. 956;

No. 75-6056. Bonner *v.* Circuit Court of the City of St. Louis et al., 424 U. S. 946;

No. 75-6098. Jackson *v.* Court of Appeal of California, Second Appellate District, 424 U. S. 957; and

No. 75-6107. Johnson *v.* Department of Water & Power et al., 424 U. S. 927. Petitions for rehearing denied.

No. 75-866. M. J. D. M. Truck Rentals, Inc., et al. *v.* O'Brien; and

No. 75-887. Anastos et al. *v.* M. J. D. M. Truck Rentals, Inc., et al., 424 U. S. 928. Petition for rehearing denied. Mr. Justice Stevens took no part in the consideration or decision of this petition.

April 15, 1976

Dismissal Under Rule 60

No. 75-6110. Vigil *v.* United States. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 524 F. 2d 209.

April 16, 1976

Miscellaneous Order

No. A-911 (75-1493). Moore, Governor of West Virginia *v.* McCartney, Secretary of West Virginia, et al. Application for stay of judgment of the Supreme Court of Appeals of West Virginia, presented to The Chief Justice, and by him referred to the Court, denied.

April 19, 1976

Affirmed on Appeal

No. 74-5887. Maxwell et al. *v.* Hixson, Clerk, Hamilton County General Sessions Court, et al. Affirmed on appeal from D. C. E. D. Tenn. Reported below: 383 F. Supp. 320.

No. 75-870. Ford Motor Co. *v.* Coleman, Secretary of Transportation, et al. Affirmed on appeal from D. C. D. C. Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens would note probable jurisdiction and set case for oral argument. Reported below: 402 F. Supp. 475.

No. 75–6330. Workmen et al. *v.* Duke Power Co. et al. Affirmed on appeal from D. C. W. D. N. C. Mr. Justice Brennan took no part in the consideration or decision of this case. Reported below: 425 F. Supp. 411.

Appeals Dismissed

No. 75–1118. Benschoter *v.* First National Bank of Lawrence et al. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 218 Kan. 144, 542 P. 2d 1042.

No. 75–1163. Shade *v.* Public Utilities Commission of California et al. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Mr. Justice Blackmun took no part in the consideration or decision of this appeal.

No. 75–1210. Quarles, Trustee *v.* Goodson et al. Appeal from Ct. Civ. App. Tex., 14th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75–1212. Gostout *v.* Hale. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75–6159. Masterson *v.* Ohio. Appeal from Ct. App. Ohio, Mahoning County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75–6323. Johnsrud *v.* Minnesota Department of Employment Services. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 306 Minn. 295, 237 N. W. 2d 362.

No. 75-6169. LOVELACE *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 532 S. W. 2d 912.

Vacated and Remanded on Appeal

No. 74-1622. KIRWAN, SUPERINTENDENT, NEW YORK STATE POLICE *v.* ROMANO. Appeal from D. C. W. D. N. Y. Judgment vacated and case remanded for further consideration in light of *Kelley* v. *Johnson, ante,* p. 238. MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 391 F. Supp. 643.

No. 75-1158. NATIONAL SOCIALIST WHITE PEOPLE'S PARTY ET AL. *v.* WALSH ET AL. Appeal from D. C. Conn. Judgment vacated and case remanded with directions to enter a fresh decree from which a timely appeal may be taken to the United States Court of Appeals for the Second Circuit. *Butler* v. *Dexter, ante,* p. 262. Reported below: — F. Supp. —.

No. 75-1194. SHOUSE ET AL. *v.* PIERCE COUNTY ET AL. Appeal from D. C. W. D. Wash. Judgment vacated and case remanded with directions to enter a fresh decree from which a timely appeal may be taken to the United States Court of Appeals for the Ninth Circuit. *Gonzalez* v. *Automatic Employees Credit Union,* 419 U. S. 90 (1974). Reported below: 403 F. Supp. 353.

Certiorari Granted—Vacated and Remanded

No. 75-1065. JOHN NUVEEN & CO., INC., ET AL. *v.* SANDERS. C. A. 7th Cir. Motions of Securities Industry Assn. and Lehman Commercial Paper, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ernst & Ernst* v. *Hochfelder, ante,* p. 185. MR. JUSTICE STEVENS took no part in the con-

sideration or decision of this case. Reported below: 524 F. 2d 1064.

Miscellaneous Orders

No. A–838 (75–1421). GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL. Application for stay of judgment of the United States Court of Appeals for the District of Columbia Circuit pending final disposition of the petition for writ of certiorari, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A–862. STANDARD OIL COMPANY OF CALIFORNIA *v.* FLORIDA EX REL. SHEVIN, ATTORNEY GENERAL OF FLORIDA. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit pending timely filing and disposition of a petition for writ of certiorari, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. Reported below: 526 F. 2d 266.

No. A–876. THOMPSON *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. Application for stay of judgment of the United States District Court for the Northern District of Texas and for an injunction pending final disposition of appeal by the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–892 (75–1447). BERGER, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* AITCHISON. Application for stay of judgment of the United States Court of Appeals for the Second Circuit pending final disposition of the petition for writ of certiorari, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A-867. HALVERSON *v.* UNITED STATES. Application for bail and stay of judgment of the United States Court of Appeals for the Ninth Circuit pending timely filing and disposition of petition for writ of certiorari, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A-895. KANSAS *v.* MCCORGARY. Application for stay of mandate of the Supreme Court of Kansas pending timely filing and disposition of petition for writ of certiorari, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. 54, Orig. UNITED STATES *v.* FLORIDA ET AL. Report of Special Master on motion of defendants for leave to file counterclaim received and ordered filed. Exceptions, if any, with supporting briefs to Report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier orders herein, see, *e. g.,* 423 U. S. 1011.]

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. Motion of New Hampshire Commercial Fishermen's Assn. for leave to participate in oral argument as *amicus curiae* denied. [For earlier orders herein, see, *e. g.,* 424 U. S. 903.]

No. 74-1560. UNITED STATES *v.* MARTINEZ-FUERTE ET AL. C. A. 9th Cir. [Certiorari granted, 423 U. S. 822]; and

No. 75-5387. SIFUENTES *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 423 U. S. 945.] Motion of the Solicitor General to consolidate these cases for oral argument granted and a total of 80 minutes allotted for that purpose. Counsel for petitioner in No. 75-5387 will open the argument and 20 minutes allotted for that purpose. The Solicitor General is allotted 40 minutes

for oral argument and counsel for respondent in No. 74–1560 allotted 20 minutes for oral argument.

No. 74–6632. MOODY *v.* DAGGETT, WARDEN. C. A. 10th Cir. [Certiorari granted, 424 U. S. 942.] Motion of petitioner for appointment of counsel granted, and it is ordered that Phylis Skloot Bamberger, of New York, N. Y., is appointed to serve as counsel for petitioner in this case.

No. 75–552. KLEPPE, SECRETARY OF THE INTERIOR, ET AL. *v.* SIERRA CLUB ET AL.; and

No. 75–561. AMERICAN ELECTRIC POWER SYSTEM ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 1047.] Motion of John D. Dingell, Esquire, for leave to file a brief as *amicus curiae* denied.

No. 75–777. NATIONAL LABOR RELATIONS BOARD *v.* ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE & GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638. C. A. D. C. Cir. [Certiorari granted, 424 U. S. 908.] Motion of Public Service Electric & Gas Co. et al, for leave to file a brief as *amici curiae* granted.

No. 75–929. ESTELLE, CORRECTIONS DIRECTOR, ET AL. *v.* GAMBLE. C. A. 5th Cir. [Certiorari granted, 424 U. S. 907.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Daniel K. Hedges, Esquire, of Houston, Tex., is appointed to serve as counsel for respondent in this case.

No. 75–1470. UDALL ET AL. *v.* BOWEN, GOVERNOR OF INDIANA, ET AL. Appeal from D. C. S. D. Ind. Motion to expedite consideration of appeal denied.

No. 75–6445. Goldbach *v.* McCarthy, Men's Colony Superintendent;

No. 75–6448. Fletcher *v.* Sweet, Judge; and

No. 75–6469. Lewis *v.* White, Training Center Superintendent. Motions for leave to file petitions for writs of habeas corpus denied.

No. 75–6220. Perry *v.* United States. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 75–978. E. I. du Pont de Nemours & Co. et al. *v.* Train, Administrator, Environmental Protection Agency, et al. C. A. 4th Cir. Certiorari granted. Reported below: 528 F. 2d 1136.

No. 75–1278. Mt. Healthy City School District Board of Education *v.* Doyle. C. A. 6th Cir. Certiorari granted. Reported below: 529 F. 2d 524.

No. 75–1053. Jones, Director, Department of Weights and Measures, Riverside County *v.* Rath Packing Co. et al.; and Jones, Director, Department of Weights and Measures, Riverside County *v.* General Mills, Inc., et al. Motion of California District Attorneys Assn. for leave to file a brief as *amicus curiae* granted. Application for recall and stay of mandates and stay of enforcement of judgments of the United States Court of Appeals for the Ninth Circuit, presented to Mr. Justice Rehnquist, and by him referred to the Court, denied.* Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 530 F. 2d 1295 (first case); 530 F. 2d 1317 (second case).

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*[Reporter's Note: This denial also includes No. 75–1052, *Wallace* v. *Rath Packing Co.*]

Certiorari Denied. (See also Nos. 75-1210, 75-1212, and 75-6159, *supra.*)

No. 75-774. Big Rivers Electric Corp. et al. *v.* Environmental Protection Agency et al.; and

No. 75-787. Tennessee Valley Authority *v.* Environmental Protection Agency et al. C. A. 6th Cir. Certiorari denied. Reported below: 523 F. 2d 16.

No. 75-808. Natelli *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 311.

No. 75-950. California *v.* Harris. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 3d 384, 540 P. 2d 632.

No. 75-957. Evans et al. *v.* Fromme et al. C. A. 9th Cir. Certiorari denied.

No. 75-973. United Transportation Union Lodge No. 550 et al. *v.* Rock et al.; and

No. 75-1220. Norfolk & Western Railway Co. *v.* Rock et al. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 336.

No. 75-977. Accuracy in Media, Inc. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 172 U. S. App. D. C. 188, 521 F. 2d 288.

No. 75-989. Ruyle et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1133.

No. 75-1023. Board of Education of the City School District of Cincinnati et al. *v.* Bronson et al.; and

No. 75-1054. Ohio State Board of Education et al. *v.* Bronson et al. C. A. 6th Cir. Certiorari denied. Reported below: 525 F. 2d 344.

No. 75–1029. KENNECOTT COPPER CORP. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 9th Cir. Certiorari denied. Reported below: 526 F. 2d 1149.

No. 75–1041. MT. SINAI HOSPITAL OF GREATER MIAMI, INC. *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 329 and 522 F. 2d 179.

No. 75–1048. CHEVOOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 526 F. 2d 178.

No. 75–1062. GIGLIOTTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–1070. HAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 527 F. 2d 990.

No. 75–1072. BLANTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–1074. PICKETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

No. 75–1081. AMERICAN TOBACCO CO. *v.* RUSSELL ET AL.; and

No. 75–1087. TOBACCO WORKERS INTERNATIONAL UNION, AFL–CIO, LOCAL 192 *v.* RUSSELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 528 F. 2d 357.

No. 75–1091. ROWELL *v.* UNITED STATES;

No. 75–6118. MATHEWSON *v.* UNITED STATES; and

No. 75–6136. KILLIAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1268.

No. 75-1102. Bowen, dba Suburbia News Delivery Service, et al. *v.* New York News, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 522 F. 2d 1242.

No. 75-1103. Local Union No. 2-477, Oil, Chemical & Atomic Workers International Union *v.* Continental Oil Co. C. A. 10th Cir. Certiorari denied. Reported below: 524 F. 2d 1048.

No. 75-1110. Buffa *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 1164.

No. 75-1121. United States Lines, Inc. *v.* Shellman. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 675.

No. 75-1156. Danning, Trustee, et al. *v.* Loeffler, Trustee. C. A. 9th Cir. Certiorari denied.

No. 75-1160. D'Angelo, President, Louisiana Board of Pharmacy, et al. *v.* Webb et al. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 239.

No. 75-1171. LaSalle National Bank, Trustee *v.* County Board of School Trustees of DuPage County et al. Sup. Ct. Ill. Certiorari denied. Reported below: 61 Ill. 2d 524, 337 N. E. 2d 19.

No. 75-1173. Gatto, Administrator *v.* Calumet Flexicore Corp. et al. Sup. Ct. Ill. Certiorari denied. Reported below: 61 Ill. 2d 513, 337 N. E. 2d 23.

No. 75-1178. Indelicato *v.* New York State Board of Parole. C. A. 2d Cir. Certiorari denied.

No. 75-1202. A. L. *v.* G. R. H. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 325 N. E. 2d 501.

No. 75–1180. Division of Vocational Rehabilitation, Department of Health and Rehabilitative Services of Florida, et al. *v.* Thomas et al. Sup. Ct. Fla. Certiorari denied. Reported below: 324 So. 2d 89.

No. 75–1191. DeGuiseppe *v.* Board of Fire and Police Commissioners of the Village of Bellwood et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 30 Ill. App. 3d 352, 332 N. E. 2d 405.

No. 75–1205. Agger, Trustee in Bankruptcy *v.* Seaboard Allied Milling Corp. et al. C. A. 1st Cir. Certiorari denied. Reported below: 526 F. 2d 23.

No. 75–1206. Weiner et al. *v.* Lucas, U. S. District Judge, et al. C. A. 9th Cir. Certiorari denied.

No. 75–1207. Allanson *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 584, 221 S. E. 2d 3.

No. 75–1208. Schuppenhauer *v.* Peoples Gas Light & Coke Co. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 30 Ill. App. 3d 607, 332 N. E. 2d 583.

No. 75–1214. Long *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 532 S. W. 2d 591.

No. 75–1227. Sullins *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied. Reported below: 15 Cal. 3d 609, 542 P. 2d 631.

No. 75–1228. Hairston *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 216 Va. 387, 219 S. E. 2d 668.

No. 75–1241. Mid-America Transportation Co., Inc. *v.* National Marine Service, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 629.

No. 75–1232. Smith *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 136 Ga. App. 17, 220 S. E. 2d 11.

No. 75–1257. Pearson *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 288 N. C. 733, 220 S. E. 2d 352.

No. 75–1342. Plastilite Corp. *v.* Airlite Plastics Co. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 1078.

No. 75–5895. Pritchett et al. *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 134 Ga. App. 254, 214 S. E. 2d 180.

No. 75–5922. Ferris *v.* Illinois. Sup. Ct. Ill. Certiorari denied.

No. 75–5943. Lamb *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 61 Ill. 2d 383, 336 N. E. 2d 753.

No. 75–6010. Simons *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 75–6077. Morgan *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 75–6082. Stiger *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 528.

No. 75–6093. Leland *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 522 F. 2d 1279.

No. 75–6099. Lewis *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 991.

No. 75–6101. McDougal *v.* West Virginia. Sup. Ct. App. W. Va. Certiorari denied.

No. 75-6102. Burnette *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 29.

No. 75-6104. Mathews *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 529.

No. 75-6109. Hilton *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 164.

No. 75-6111. Tyler *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75-6113. Sanchez et al. *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6117. Simms *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 173 U. S. App. D. C. 129, 522 F. 2d 1344.

No. 75-6121. Curtis *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 238.

No. 75-6126. Henry *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 239.

No. 75-6134. Vecchiarello *v.* United States. C. A. D. C. Cir. Certiorari denied.

No. 75-6141. Simmons *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75-6148. Townes *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75-6153. Cain *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1087.

No. 75-6154. Black *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75-6162. Hill *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 526 F. 2d 1019.

No. 75-6164. Moses *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 75-6173. Collier *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 978.

No. 75-6174. Hurley et al. *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6190. Lloyd *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75-6191. Stanley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75-6206. Murphy *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 527 F. 2d 645.

No. 75-6230. Cotton *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 532 S. W. 2d 912.

No. 75-6234. McCollin *v.* Britt, Penitentiary Superintendent. C. A. 9th Cir. Certiorari denied.

No. 75-6243. Brown *v.* Cowan, Penitentiary Superintendent. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1405.

No. 75-6252. Archuleta *v.* Archuleta. Ct. App. D. C. Certiorari denied. Reported below: 345 A. 2d 157.

No. 75-6255. Smith *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 31 Ill. App. 3d 423, 333 N. E. 2d 241.

No. 75-6260. Adams *v.* Hickton. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1403.

No. 75–6261. TERRY *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–6263. FLAMM *v.* REAL-BLT., INC., DBA PONDEROSA ACRES. Sup. Ct. Mont. Certiorari denied. Reported below: 168 Mont. 351, 543 P. 2d 190.

No. 75–6267. TYLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 75–6271. BROWN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 75–6274. WASHINGTON *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1231.

No. 75–6277. OMERNICK *v.* DEPARTMENT OF NATURAL RESOURCES ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 71 Wis. 2d 370, 238 N. W. 2d 114.

No. 75–6288. WEBB *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 75–6290. BAZAKAS *v.* GAYNOR ET AL. C. A. 1st Cir. Certiorari denied.

No. 75–6294. REED *v.* DEL CHEMICAL CORP. ET AL. Ct. App. Ore. Certiorari denied. Reported below: 23 Ore. App. 213, 541 P. 2d 1296.

No. 75–6299. JACKSON *v.* JACKSON. Sup. Ct. Mich. Certiorari denied.

No. 75–6304. SMITH *v.* WARNE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–6305. PORZUCZEK, GUARDIAN *v.* TOWNER ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–6308. MEIJER-OOSTERINK *v.* ESSO STANDARD EASTERN, INC. C. A. 2d Cir. Certiorari denied.

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No. 75-6312. HUNNICUTT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1230.

No. 75-6313. JONES *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 75-6316. FABRITZ *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 276 Md. 416, 348 A. 2d 275.

No. 75-6317. HARMON *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 25 Ariz. App. 137, 541 P. 2d 600.

No. 75-6322. BALAY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 49 App. Div. 2d 838, 373 N. Y. S. 2d 590.

No. 75-6324. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 590.

No. 75-6325. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 75-6384. TAYLOR *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 75-6407. RAYNER *v.* JOHN BUIST CHESTER HOSPITAL ET AL. Sup. Ct. Tex. Certiorari denied.

No. 75-1033. FAIRCHILD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 526 F. 2d 185.

No. 75-201. KAMERLING ET AL. *v.* O'HAGAN, FIRE COMMISSIONER, CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 512 F. 2d 443.

No. 74–1366. SCHAEFER ET AL. *v.* FIRST NATIONAL BANK OF LINCOLNWOOD ET AL.; and

No. 74–1407. RODMAN & RENSHAW *v.* SCHAEFER ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 509 F. 2d 1287.

No. 75–1133. EHRET CO. *v.* EATON YALE & TOWNE, INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 523 F. 2d 280.

No. 75–1154. COHEN *v.* ILLINOIS INSTITUTE OF TECHNOLOGY ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 524 F. 2d 818.

No. 75–6074. D'AMBROSIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 525 F. 2d 695.

No. 75–6314. CURL *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 517 F. 2d 212.

No. 75–118. NEW JERSEY *v.* PACE. Sup. Ct. N. J. Certiorari denied. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 67 N. J. 222, 337 A. 2d 33.

No. 75–903. ALDENS, INC. *v.* KANE, ATTORNEY GENERAL OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 524 F. 2d 38.

No. 75–1005. National Organization for Women, Inc., et al. *v.* United States et al.; and

No. 75–1008. Harris et al. *v.* Allegheny-Ludlum Industries, Inc., et al. C. A. 5th Cir. Motion of petitioners in No. 75–1008 to defer consideration denied. Certiorari denied. Reported below: 517 F. 2d 826.

No. 75–1046. Barrett et al. *v.* Zweibon et al.;

No. 75–1056. Zweibon et al. *v.* Mitchell et al.; and

No. 75–1059. Mitchell *v.* Zweibon et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Rehnquist took no part in the consideration or decision of these petitions. Reported below: 170 U. S. App. D. C. 1, 516 F. 2d 594.

No. 75–1058. Mitsui Shintaku Ginko K. K., Tokyo *v.* Dodge et al. C. A. 9th Cir. Motions of Pacific Merchant Shipping Assn. and American Institute of Merchant Shipping for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 528 F. 2d 669.

No. 75–1084. Davis et al. *v.* Board of School Commissioners of Mobile County et al.; and Parrish et al. *v.* Board of Commissioners of the Alabama State Bar et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Stewart would grant certiorari. Reported below: 517 F. 2d 1044 (first case); 524 F. 2d 98 (second case).

No. 75–1229. Hopper, Warden *v.* Allen. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 524 F. 2d 1230.

No. 75–1292. Koehler, Warden *v.* Chism. C. A. 6th Cir. Motion of respondent for leave to proceed *in*

forma pauperis granted. Certiorari denied. Reported below: 527 F. 2d 612.

Rehearing Denied

No. 75-642. KEHOE *v.* UNITED STATES, 424 U. S. 909;

No. 75-707. SANDERS *v.* GEORGIA, 424 U. S. 931;

No. 75-953. HOWELL *v.* JONES, SHERIFF, 424 U. S. 916;

No. 75-5609. HUSTON *v.* CALIFORNIA, 424 U. S. 917;

No. 75-5652. RANSOM *v.* UNITED STATES, 424 U. S. 944;

No. 75-5869. CHATMAN *v.* UNITED STATES, 424 U. S. 922;

No. 75-5923. THOMAS *v.* SAVAGE, WARDEN, 424 U. S. 924;

No. 75-6008. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL., 424 U. S. 926;

No. 75-6031. DINSIO *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 424 U. S. 964;

No. 75-6051. GIESE *v.* HOLT, RINEHART & WINSTON, INC., ET AL., 424 U. S. 946;

No. 75-6058. WILLIAMS *v.* PHILLIPS ET AL., U. S. CIRCUIT JUDGES, 424 U. S. 941; and

No. 75-6140. THRASHER *v.* CALIFORNIA ADULT AUTHORITY ET AL., 424 U. S. 957. Petitions for rehearing denied.

No. 75-899. UNIVERSITY OF DELAWARE *v.* KEEGAN ET AL., 424 U. S. 934. Petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 75-921. WILD *v.* RARIG ET AL., 424 U. S. 902. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

APRIL 22, 1976

Appeal Dismissed

No. 75–1493. MOORE, GOVERNOR OF WEST VIRGINIA *v.* McCARTNEY, SECRETARY OF WEST VIRGINIA, ET AL. Sup. Ct. App. W. Va. Appeal dismissed for want of substantial federal question. Reported below: — W. Va. —, 223 S. E. 2d 607.

APRIL 23, 1976

Miscellaneous Order

No. 75–436. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL.; and

No. 75–437. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL., 424 U. S. 1. Motions of Jimmy Carter et al. for leave to intervene, recall and modification of judgment and other equitable relief, and to advance and expedite denied. Motion of Democratic National Committee for leave to file a brief as *amicus curiae* denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these motions.

MR. JUSTICE POWELL, concurring.

I concur in the Court's denial of the petition to intervene. As these cases have been remanded to the Court of Appeals for the District of Columbia Circuit, jurisdiction with respect to relief sought by new parties at this time is vested in that court.

APRIL 26, 1976

Affirmed on Appeal

No. 75–93. TOWN OF SORRENTO MUNICIPAL DEMOCRATIC EXECUTIVE COMMITTEE ET AL. *v.* REINE ET AL. Affirmed on appeal from D. C. M. D. La. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: — F. Supp. —.

No. 75-1470. UDALL ET AL. *v.* BOWEN, GOVERNOR OF INDIANA, ET AL. Affirmed on appeal from D. C. S. D. Ind. Reported below: 419 F. Supp. 746.

Appeals Dismissed

No. 75-898. SUTHERLAND ET AL. *v.* ILLINOIS. Appeal from Ct. App. Ill., 3d Dist., dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 29 Ill. App. 3d 199, 329 N. E. 2d 820.

No. 75-1250. STANDARD OIL CO. *v.* SHARPE, MOTOR VEHICLE COMPTROLLER. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 322 So. 2d 457.

No. 75-6296. HARRIS *v.* CITY OF COLUMBUS, OHIO. 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. Reported below: 44 Ohio St. 2d 89, 338 N. E. 2d 530.

Certiorari Granted—Vacated and Remanded. (See also No. 75-1106, *ante,* p. 460.)

No. 75-35. LASH, WARDEN, ET AL. *v.* AIKENS ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Baxter* v. *Palmigiano, ante,* p. 308. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and case. Reported below: 514 F. 2d 55.

No. 75-914. WALLACE ET AL. *v.* HOUSE, REGISTRAR OF VOTERS, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636 (1976), and 89 Stat. 400, 42 U. S. C.

§ 1973 *et seq.* (1970 ed., Supp. V). Reported below: 515 F. 2d 619.

No. 75–6106. HILL *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States filed April 8, 1976, judgment vacated and case remanded for further consideration in light of position presently asserted by the Government. Reported below: 529 F. 2d 527.

*Miscellaneous Orders**

No. A–910. FRY *v.* UNITED STATES. C. A. 6th Cir. Application for pretrial bond and stay of trial, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–923. BERGER, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* KLEIN ET AL. Application for stay of judgment of the United States District Court for the Eastern District of New York, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 31, Orig. UTAH *v.* UNITED STATES. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs to Report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier orders herein, see, *e. g.,* 420 U. S. 304.]

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*For the Court's orders prescribing Bankrupty Rules and Official Bankruptcy Forms and amendments thereto; amendments to the Federal Rules of Criminal Procedure; and Rules and Forms Governing Cases and Proceedings under 28 U. S. C. §§ 2254 and 2255, see *post,* pp. 1005, 1127, 1159, and 1169.

No. 74–1023. KERR ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. [Certiorari granted, 421 U. S. 987.] Motion of petitioners for leave to file supplemental brief after argument denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 75–5952. TRIMBLE *v.* GORDON ET AL. Appeal from Sup. Ct. Ill. [Probable jurisdiction noted, 424 U. S. 964.] Motion of appellees King et al. for leave to proceed further herein *in forma pauperis* granted. THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST would deny the motion.

No. 75–6501. BORUSKI *v.* REED, SECRETARY OF THE AIR FORCE. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 75–1153. ABOOD ET AL. *v.* DETROIT BOARD OF EDUCATION ET AL. Appeal from Ct. App. Mich. Probable jurisdiction noted. Reported below: 60 Mich. App. 92, 230 N. W. 2d 322.

No. 75–1255. DOUGLAS, COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION *v.* SEACOAST PRODUCTS, INC., ET AL. Appeal from D. C. E. D. Va. Motion of Virginia Seafood Council et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: — F. Supp. —.

No. 75–6289. MOORE *v.* CITY OF EAST CLEVELAND, OHIO. Appeal from Ct. App. Ohio, Cuyahoga County. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

Certiorari Granted

No. 75-1264. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, LOCAL 790 *v.* ROBBINS & MYERS, INC., ET AL.; and

No. 75-1276. GUY *v.* ROBBINS & MYERS, INC. C. A. 6th Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 525 F. 2d 124.

Certiorari Denied. (See also No. 75-6296, *supra.*)

No. 75-875. McCLELLAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 29 Ill. App. 3d 712, 331 N. E. 2d 292.

No. 75-894. NATALE *v.* UNITED STATES; and

No. 75-1140. RUSSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 1160.

No. 75-962. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 518 F. 2d 496 and 524 F. 2d 957.

No. 75-1006. BIDDY *v.* DIAMOND, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 118.

No. 75-1108. BORDEAUX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75-1115. DEPAOLA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75-1155. BUCHANON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 1148.

No. 75-1172. FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* USAFORM HAIL POOL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 744.

No. 75–1021. Carpenters 46 County Conference Board et al. *v.* Construction Industry Stabilization Committee et al. Temp. Emerg. Ct. App. Certiorari denied. Reported below: See 522 F. 2d 637.

No. 75–1187. Selikoff *v.* Commissioner of Correction of New York. C. A. 2d Cir. Certiorari denied. Reported below: 524 F. 2d 650.

No. 75–1244. Bolkcom et al. *v.* Carborundum Co. C. A. 6th Cir. Certiorari denied. Reported below: 523 F. 2d 492.

No. 75–1245. Pauley et al., dba Ziebart Auto Truck Rustproofing *v.* Ziebart Process Corp. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 969.

No. 75–1247. Perkins *v.* Screen Extras Guild, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 526 F. 2d 67.

No. 75–1249. American Stevedores, Inc. *v.* Olaf Pedersen's Rederi A/S. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 1282.

No. 75–1254. Williams et al. *v.* American Airlines, Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 526 F. 2d 757.

No. 75–1256. Darks et al. *v.* Transok Pipe Line Co. Sup. Ct. Okla. Certiorari denied.

No. 75–1266. Harman et al. *v.* Diversified Medical Investments Corp. et al. C. A. 10th Cir. Certiorari denied. Reported below: 524 F. 2d 361.

No. 75–1269. Cali *v.* Japan Airlines Co., Ltd., et al. C. A. 2d Cir. Certiorari denied.

No. 75–1272. Georgia Power Co. *v.* Cimarron Coal Corp. C. A. 6th Cir. Certiorari denied. Reported below: 526 F. 2d 101.

No. 75–1274. Watkins Motor Lines, Inc., et al. *v.* Zero Refrigerated Lines et al. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 538.

No. 75–1291. Convalescent Care, Inc. *v.* Bates, Director, Department of Public Welfare, et al. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 75–1307. Sumpter *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 264 Ind. 117, 340 N. E. 2d 764.

No. 75–1322. Belcher *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 56 Ala. App. 688, 325 So. 2d 195.

No. 75–5916. Barnes *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1051.

No. 75–6036. Gaither, aka Kelly *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 527 F. 2d 456.

No. 75–6046. Alexander *v.* Kritzman et al. C. A. 9th Cir. Certiorari denied.

No. 75–6071. Carrillo *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–6085. Dickinson *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 75–6105. Ferretti *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1403.

No. 75-6125. Davis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 1110.

No. 75-6146. Fox *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6155. Hicks *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1001.

No. 75-6172. Soliz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 952.

No. 75-6179. Cooper *v.* United States. Ct. App. D. C. Certiorari denied.

No. 75-6187. Stead *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 528 F. 2d 257.

No. 75-6189. Lindsey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

No. 75-6195. Mitchell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75-6198. Preciado-Gomez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 529 F. 2d 935.

No. 75-6240. Howe et ux. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 521 F. 2d 1397.

No. 75-6276. Davis, aka Hartsell *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6333. Chapdelaine *v.* Torrence, President, Tennessee State University, et al. Sup. Ct. Tenn. Certiorari denied. Reported below: 532 S. W. 2d 542.

No. 75-6335. Glinton *v.* New York. Sup. Ct. N. Y., N. Y. County. Certiorari denied.

No. 75-6339. BERRY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 324 So. 2d 822.

No. 75-6344. COMBS *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 695.

No. 75-6350. MILLER *v.* BOMBARD, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75-6351. FULFORD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 327 So. 2d 301.

No. 75-6355. SIMMS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 170 Conn. 206, 365 A. 2d 821.

No. 75-6357. HURST *v.* UNION CARBIDE CORPORATION, NUCLEAR DIVISION. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 525.

No. 75-6359. DE LA CRUZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 1405.

No. 75-6361. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-6366. MAUCH *v.* FLEMMING ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75-6368. HALL *v.* BOSTIC ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 990.

No. 75-6370. HOWARD *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 319 So. 2d 219.

No. 75-6379. PHILLIPS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied. Reported below: 546 P. 2d 1027.

No. 75-6387. PATTERSON *v.* RICKETTS, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 5th Cir. Certiorari denied.

No. 75-6442. McDonald *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 534 S. W. 2d 650.

No. 75-6461. Maynard *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 232 N. W. 2d 265.

No. 75-6486. Donnelly *v.* Suffolk University. Ct. App. Mass. Certiorari denied. Reported below: — Mass. App. —, 337 N. E. 2d 920.

No. 75-1078. Flores *v.* United States. C. A. 5th Cir. Motions to substitute petition for writ of certiorari and to substitute counsel for petitioner granted. Certiorari denied. Reported below: 523 F. 2d 1054.

Rehearing Denied

No. 74-6503. Sellers *v.* United States, 424 U. S. 961. Petition for rehearing denied. Mr. Justice Stevens took no part in the consideration or decision of this petition.

April 30, 1976

Miscellaneous Orders

No. ———. Carter et al. *v.* Buckley et al. Ct. App. D. C. Motion of appellants for relief *pendente lite* and to advance and expedite denied. Mr. Justice Stevens took no part in the consideration or decision of these motions.

No. A-940. Howell et al. *v.* DeBusk et al. D. C. N. D. Tex. Application for injunction, presented to the Court at 6:30 p. m., Thursday, April 29, 1976, denied.

May 3, 1976

Affirmed on Appeal

No. 75-1165. American Trucking Assns., Inc. *v.* United States et al. Affirmed on appeal from D. C. D. C. Reported below: 425 F. Supp. 903.

No. 75–1356. DRISKELL ET AL. *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Affirmed on appeal from D. C. W. D. La. Reported below: 413 F. Supp. 974.

Appeals Dismissed

No. 75–1146. BRADLEY ET AL. *v.* LUNDING, CHAIRMAN, STATE BOARD OF ELECTIONS COMMISSIONERS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question.

No. 75–1316. CITY OF CANTON *v.* WHITMAN, DIRECTOR OF ENVIRONMENTAL PROTECTION. 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. Reported below: 44 Ohio St. 2d 62, 337 N. E. 2d 766.

Certiorari Granted—Vacated and Remanded

No. 75–5898. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States, filed April 14, 1976, judgment vacated and case remanded for further consideration in light of the position presently asserted by the Government. Reported below: 519 F. 2d 233.

No. 75–6217. RIGGINS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States, filed April 27, 1976, judgment vacated and case remanded for further consideration in light of position presently asserted by the Government. Reported below: 521 F. 2d 812.

Miscellaneous Orders

No. 67, Orig. Idaho ex rel. Andrus, Governor of Idaho, et al. *v.* Oregon et al. Motion of Izaak Walton League of America, Inc., et al. for leave to file brief as *amici curiae* granted. Motion for leave to file bill of complaint set for oral argument in due course. [For earlier order herein, see 423 U. S. 813.]

No. 74–753. United States *v.* Testan et al., 424 U. S. 392. Motion of respondents to retax costs denied. Mr. Justice Stevens took no part in the consideration or decision of this motion.

No. 75–342. Federal Power Commission *v.* Conway Corp. et al. C. A. D. C. Cir. [Certiorari granted, 423 U. S. 945.] Motion of Commonwealth Edison Co. for leave to file a brief as *amicus curiae* denied.

No. 75–1303. Qantas Airways, Ltd. *v.* Foremost International Tours, Inc. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–6394. Chilembwe *v.* United States Court of Appeals for the Eighth Circuit et al. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 75–1197. Mathews, Secretary of Health, Education, and Welfare *v.* De Castro. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. Reported below: 403 F. Supp. 23.

Certiorari Granted

No. 75–871. Manson, Correction Commissioner *v.* Brathwaite. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 527 F. 2d 363.

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Certiorari Denied. (See also No. 75–1316, *supra.*)

No. 75–1016. Leonard *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 524 F. 2d 1076.

No. 75–1075. Gonzalez *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 528 S. W. 2d 133.

No. 75–1167. McHale *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75–1177. Hoffman et al. *v.* Hoffman et vir. Sup. Ct. Ill. Certiorari denied. Reported below: 61 Ill. 2d 569, 338 N. E. 2d 862.

No. 75–1189. Moore *v.* Rumsfeld, Secretary of Defense, et al. C. A. 10th Cir. Certiorari denied.

No. 75–1192. Tucker et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 279.

No. 75–1209. United Transportation Union *v.* Harrison et al. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 558.

No. 75–1224. World Market Centers, Inc. *v.* Hardin. C. A. 10th Cir. Certiorari denied.

No. 75–1265. Najanick *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 233 Pa. Super. 708, 339 A. 2d 815.

No. 75–1268. Brown *v.* Barnett et al. Sup. Ct. Miss. Certiorari denied.

No. 75–1281. Tri Terminal Corp. *v.* Borough of Edgewater. Sup. Ct. N. J. Certiorari denied. Reported below: 68 N. J. 405, 346 A. 2d 396.

No. 75–1283. League of United Latin American Citizens *v.* Lo-Vaca Gathering Co. et al. Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 527 S. W. 2d 507.

No. 75–1284. Spector Freight System, Inc., of Illinois *v.* Schwartz. Sup. Ct. Minn. Certiorari denied. Reported below: 306 Minn. 564, 237 N. W. 2d 385.

No. 75–1287. Anchorage Office Building Co. et al. *v.* Washington Metropolitan Area Transit Authority. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 69, 527 F. 2d 852.

No. 75–1288. Nunnally *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 693, 221 S. E. 2d 547.

No. 75–1302. Mahnke *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 335 N. E. 2d 660.

No. 75–1306. Haga *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 13 Wash. App. 630, 536 P. 2d 648.

No. 75–1309. Richardson *v.* Howard University. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 77, 527 F. 2d 1386.

No. 75–1311. Pacific Coast Agricultural Export Assn. et al. *v.* Sunkist Growers, Inc., et al.; and

No. 75–1325. Sunkist Growers, Inc. *v.* Pacific Coast Agricultural Export Assn. et al. C. A. 9th Cir. Certiorari denied. Reported below: 526 F. 2d 1196.

No. 75–1321. Crawford et ux. *v.* Security National Bank. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75-1329. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America *v.* Teamsters Local 701 et al. C. A. 3d Cir. Certiorari denied. Reported below: 524 F. 2d 1404.

No. 75-1336. Rawson, aka Merrill *v.* Wilbee. C. A. 10th Cir. Certiorari denied.

No. 75-1350. Szekely *v.* Mathews, Secretary of Health, Education, and Welfare. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 345.

No. 75-1362. Olsen *v.* Territory of Guam. Petition for certiorari before judgment to C. A. 9th Cir. Certiorari denied.

No. 75-1387. Monongahela Appliance Co. *v.* Community Bank & Trust, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 751.

No. 75-5425. Riddick et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 519 F. 2d 645.

No. 75-6124. Scardino *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 517.

No. 75-6135. Reale *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 75-6137. Johnson *v.* New York. C. A. 2d Cir. Certiorari denied.

No. 75-6147. McNamara *v.* Griffith, Prisons Superintendent. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 691.

No. 75-6235. Jones et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 303.

No. 75–6171. Johnson *v.* United States;
No. 75–6177. Burgin *v.* United States; and
No. 75–6225. Bridgeman *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 173 U. S. App. D. C. 150, 523 F. 2d 1099.

No. 75–6193. Corbbins *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75–6196. Aviles *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 75–6200. Batte *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–6209. Reynolds *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 75–6210. Garrison *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 529.

No. 75–6222. Carter *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 528 F. 2d 844.

No. 75–6269. Celani *v.* Mathews, Secretary, Department of Health, Education, and Welfare. C. A. 4th Cir. Certiorari denied.

No. 75–6343. Gravina *v.* Switzerland et al. C. A. 1st Cir. Certiorari denied.

No. 75–6372. Johnson *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1253.

No. 75–6375. Smith *v.* Department of Public Works, County of Westchester. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 49 App. Div. 2d 893, 373 N. Y. S. 2d 230.

No. 75-6386. Stifel *v.* Lindhorst et al. C. A. 3d Cir. Certiorari denied. Reported below: 529 F. 2d 512.

No. 75-6388. Kizzee *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 691.

No. 75-6393. Baberson *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 322 So. 2d 758.

No. 75-6397. Lyon *v.* California. C. A. 9th Cir. Certiorari denied.

No. 75-6402. Hayes *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 324 So. 2d 421.

No. 75-6403. Mitchell *v.* Henderson, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 1030.

No. 75-6405. Smith *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 316 So. 2d 75.

No. 75-6406. Cook *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 75-6409. Manfredi *v.* Royal Insurance Co., Ltd., et al. C. A. 3d Cir. Certiorari denied.

No. 75-6414. Franklin *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 79.

No. 75-6420. Bonnell *v.* Kentucky. C. A. 6th Cir. Certiorari denied.

No. 75-6440. Clark *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 170 Conn. 273, 365 A. 2d 1167.

No. 75–917. HOSTROP *v.* BOARD OF JUNIOR COLLEGE DISTRICT NO. 515 ET AL.; and

No. 75–1035. BOARD OF JUNIOR COLLEGE DISTRICT NO. 515 ET AL. *v.* HOSTROP. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 523 F. 2d 569.

No. 75–1186. BROMBERG *v.* CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 526 F. 2d 592.

No. 75–983. LILES ET AL. *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 22 Ore. App. 132, 537 P. 2d 1182.

MR. JUSTICE STEVENS, concurring in the denial of certiorari.

The question we must first decide when acting on a petition for certiorari is whether we should set the case for full briefing and oral argument and thereafter decide the merits. Nothing in MR. JUSTICE BRENNAN's opinion dissenting from the denial of certiorari in this case persuades me that any purpose would be served by such argument.[1] For there is no reason to believe that the

[1] His quotation of the standard of obscenity applied by the trial judge in this case supports the argument made in his dissent in *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 73, that there has been a failure to define standards which will give adequate guidance to the lower state and federal courts in making obscenity determinations with any degree of predictable consistency. I do not understand him to be using the quotation as a separate argument for granting certiorari in this particular case because the Oregon Court of Appeals did not consider the constitutionality of that standard, but held instead that petitioners had not properly preserved this claim under Oregon law.

majority of the Court which decided *Miller* v. *California,* 413 U. S. 15, is any less adamant than the minority. Accordingly, regardless of how I might vote on the merits after full argument, it would be pointless to grant certiorari in case after case of this character only to have *Miller* reaffirmed time after time.

Since my dissenting Brethren have recognized the force of this reasoning in the past,[2] I believe they also could properly vote to deny certiorari in this case without acting inconsistently with their principled views on the merits. In all events, until a valid reason for voting to grant one of these petitions is put forward, I shall continue to vote to deny. In the interest of conserving scarce law library space, I shall not repeat this explanation every time I cast such a vote.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted of selling obscene motion picture films in violation of the recently enacted provisions of Oregon Laws 1973, c. 699, § 4, now codified as Ore. Rev. Stat. § 167.087 (1975). Section 4 provides in pertinent part:

> "(1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.
>
> "(2) As used in subsection (1) of this section, matter is obscene if:

[2] *Ratner* v. *United States,* 423 U. S. 898, 900 n. (BRENNAN, J., dissenting); *Sandquist* v. *California,* 423 U. S. 900, 902 n. (BRENNAN, J., dissenting).

"(a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value."

The judgments of conviction were affirmed by the Oregon Court of Appeals, 22 Ore. App. 132, 537 P. 2d 1182, and a timely petition for review was subsequently denied by the Oregon Supreme Court.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, Oregon Laws 1973, c. 699, § 4, is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari and, since the judgment of the Oregon Court of Appeals was rendered after *Miller,* reverse. In that circumstance, I have no occasion to consider whether the other question presented by petitioners merits plenary review. See *Heller* v. *New York,* 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

I note that this case particularly exemplifies the difficulty and arbitrariness inherent in any attempt to articulate a standard of obscenity. I need only quote the standard as applied by the judge before whom petitioners' case was tried:

" 'Well, what is patently offensive?

" 'And, frankly, I had to kind of apply my own standard, which, I believe, corresponds with the standards of the community. And the standard probably, simply stated and boiled down, is the same one that was taught to me by my mother from the day I was a small child. If there was something of which I would not want her to know, then don't do it. Pretty simple.

" 'Applying that standard I would think that I wouldn't get any quarrel out of anyone in this room, that they wouldn't want their mothers sitting next to them while they looked at either one of those movies. They are patently offensive.' " Pet. for Cert. 8–9.

No. 75–1242. City of Euclid *v.* Royal American Corp. et al. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Mr. Justice Stewart and Mr. Justice White would grant certiorari.

No. 75–1294. Bohack Corp. *v.* General Warehousemen's Union, Local No. 852. C. A. 2d Cir. Certiorari denied. Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Blackmun would grant certiorari.

No. 75–5986. Sedgwick *v.* United States. Ct. App. D. C. Certiorari denied. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant certiorari. Reported below: 345 A. 2d 465.

Rehearing Denied

No. 75–869. Roberts *v.* Civil Aeronautics Board, 424 U. S. 966;

No. 75–5984. Baker *v.* Rumsfeld, Secretary of Defense, 424 U. S. 972; and

No. 75–6228. Pogue *v.* Government Employees Insurance Co., *ante,* p. 915. Petitions for rehearing denied.

MAY 19, 1976

Affirmed on Appeal

No. 75-6079. CASH *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Affirmed on appeal from D. C. N. D. Ga. Reported below: 407 F. Supp. 34.

Appeals Dismissed

No. 75-926. WALTERS *v.* CALIFORNIA. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 75-1279. ESTEVA *v.* BOARDMAN. 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. Reported below: 323 So. 2d 259.

No. 75-1360. FRANCIS *v.* CHRYSLER CORP. ET AL. 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. Reported below: 44 Ohio St. 2d 229, 339 N. E. 2d 826.

Certiorari Granted—Vacated and Remanded

No. 74-5806. NEWMAN *v.* HENDERSON, WARDEN. 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 *Lefkowitz* v. *Newsome,* 420 U. S. 283, 292 n. 9, and *Francis* v. *Henderson, ante,* at 542 n. 5. MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 496 F. 2d 896.

No. 75-700. UNITED STATES ET AL. *v.* BEATTIE. C. A. 2d. Cir. Certiorari granted. Judgment vacated and case

remanded for further consideration in light of *Fisher* v. *United States* and *United States* v. *Kasmir, ante,* p. 391. Reported below: 522 F. 2d 267.

Miscellaneous Orders

No. A–847 (75–1365). WHEELER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Application for stay of mandate and of proceedings in Florida state courts, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 311 So. 2d 713.

No. A–945. MULLENAX *v.* UNITED STATES. Application for recall and stay of mandate of the United States Court of Appeals for the Second Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–58. IN RE DISBARMENT OF TARBOX. It having been reported to the Court that Robert Earl Tarbox, of San Francisco, Cal., has been disbarred from the practice of law by the Supreme Court of California, and this Court by order of October 14, 1975 [423 U. S. 888], having suspended the said Robert Earl Tarbox 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;

It is ordered that the said Robert Earl Tarbox 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. 75–915. BOUNDS, CORRECTION COMMISSIONER, ET AL. *v.* SMITH ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 910.] Motion for appointment of counsel granted, and it is ordered that Barry Nakell, Esquire, of Chapel Hill, N. C., is appointed to serve as counsel for respondents in this case.

No. 75-777. National Labor Relations Board *v.* Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local Union No. 638. C. A. D. C. Cir. [Certiorari granted, 424 U. S. 908.] Motions for Air-Conditioning & Refrigeration Institute et al. and Associated General Contractors of America, Inc., et al. for leave to file briefs as *amici curiae* granted.

No. 75-804. Hill *v.* United Brotherhood of Carpenters & Joiners of America, Local 25, et al. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 423 U. S. 1086.] Motion of respondents to vacate judgment and remand case for a determination of whether present action survives death of petitioner on January 28, 1976, denied.

No. 75-946. City of Madison, Joint School District No. 8, et al. *v.* Wisconsin Employment Relations Commission et al. Appeal from Sup. Ct. Wis. [Probable jurisdiction noted, 424 U. S. 941.] Motion of Public Service Research Council for leave to file a brief as *amicus curiae* granted.

No. 75-1181. Batterton, Secretary, Department of Human Resources of Maryland, et al. *v.* Francis et al.; and

No. 75-1182. Chamber of Commerce of the United States *v.* Francis et al. C. A. 4th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 75-1248. Cataldo *v.* United States. Motion for leave to file petition for writ for certiorari denied.

No. 75-6631. Howard *v.* Maggio, Warden. Motion for leave to file petition for writ of habeas corpus denied.

No. 75–6247. Llaca-Orbiz *v.* Halbert, U. S. District Judge, et al. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 75–1262. United States et al. *v.* County of Fresno; and United States et al. *v.* County of Tuolumne. Appeal from Ct. App. Cal., 5th App. Dist. Probable jurisdiction noted. Reported below: 50 Cal. App. 3d 633, 123 Cal. Rptr. 548 (first case).

Certiorari Granted

No. 75–1198. Nolde Bros., Inc. *v.* Local No. 358, Bakery & Confectionery Workers Union, AFL–CIO. C. A. 4th Cir. Certiorari granted. Reported below: 530 F. 2d 548.

No. 75–1267. Bayside Enterprises, Inc., et al. *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari granted. Reported below: 527 F. 2d 436.

Certiorari Denied. (See also Nos. 75–1279 and 75–1360, *supra.*)

No. 75–407. Beattie *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 522 F. 2d 267.

No. 75–873. Avrech *v.* Secretary of the Navy. C. A. D. C. Cir. Certiorari denied. Reported below: 171 U. S. App. D. C. 368, 520 F. 2d 100.

No. 75–941. Diaz-Martinez *v.* United States; and No. 75–6223. Bermudez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 89.

No. 75–1001. Hodas *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1244.

No. 75-1018. Columbia Pictures Industries, Inc. *v.* Poster Exchange, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 117.

No. 75-1020. Dallal *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 1243.

No. 75-1027. Pocono International Corp. et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 165.

No. 75-1032. Trotta *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 1096.

No. 75-1040. Steinberg *v.* United States; and

No. 75-6242. Capo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 1126.

No. 75-1066. Santiago et al. *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Reported below: 526 F. 2d 488.

No. 75-1089. Choate *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 748.

No. 75-1093. Watson *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 71, 527 F. 2d 854.

No. 75-1094. Superior Oil Co. *v.* Federal Power Commission. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 31.

No. 75-1104. Caron *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 288 N. C. 467, 219 S. E. 2d 68.

No. 75-1109. Woodruff et al. *v.* United States et al. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 504.

No. 75-1135. Paquin et ux. v. Cronk et al. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1105, and see 522 F. 2d 1270.

No. 75-1136. Sharp v. United States. C. A. 9th Cir. Certiorari denied.

No. 75-1139. Santiago v. United States. C. A. 2d Cir. Certiorari denied. Reported below: 528 F. 2d 1130.

No. 75-1141. Reese v. United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75-1145. McKitty v. United States. C. A. 3d Cir. Certiorari denied. Reported below: 527 F. 2d 645.

No. 75-1149. Quarles v. United States. Ct. App. D. C. Certiorari denied. Reported below: 349 A. 2d 690.

No. 75-1151. Nicholson v. United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1233.

No. 75-1183. Edwards v. United States. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1137.

No. 75-1185. McNulty v. United States. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 1223.

No. 75-1199. Jansen v. Dann, Commissioner of Patents and Trademarks. C. C. P. A. Certiorari denied. Reported below: 525 F. 2d 1059.

No. 75-1204. Gall et ux. v. United States. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 878.

No. 75-1211. Owensboro-Daviess County Hospital, Inc., et al. *v.* Usery, Secretary of Labor. C. A. 6th Cir. Certiorari denied. Reported below: 523 F. 2d 1013.

No. 75-1219. Sexton *v.* Simon, Secretary of the Treasury, et al. C. A. 6th Cir. Certiorari denied. Reported below: 523 F. 2d 1311.

No. 75-1222. Kraut et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 527 F. 2d 1014.

No. 75-1223. Burglin et al. *v.* Kleppe, Secretary of the Interior, et al. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 486.

No. 75-1225. Markert *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 528 F. 2d 773.

No. 75-1235. Houston *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 527.

No. 75-1236. Zammas *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 75-1237. Aetna Casualty & Surety Co. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 515, 526 F. 2d 1127.

No. 75-1239. Bastone *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 526 F. 2d 971.

No. 75-1251. Darden *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 977.

No. 75-1263. International Association of Machinists & Aerospace Workers (AFL-CIO) et al. *v.* United Aircraft Corp. Sup. Ct. Conn. Certiorari denied. Reported below: 169 Conn. 473, 363 A. 2d 1068.

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No. 75–1286. Pitt River Tribe of Indians *v.* Pacific Gas & Electric Co. et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–1319. Haddad *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 537.

No. 75–1327. Metro Bolt & Fastener Corp. *v.* Coats et ux. Ct. App. Tenn. Certiorari denied.

No. 75–1330. Mielke et al. *v.* Singara Grotto, Inc., et al. Ct. App. Ohio, Erie County. Certiorari denied.

No. 75–1334. W & W Fertilizer Corp. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 208 Ct. Cl. 443, 527 F. 2d 621.

No. 75–1337. Girard *v.* 94th Street & 5th Avenue Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 530 F. 2d 66.

No. 75–1340. Dixie Plywood Co. *v.* The Federal Lakes et al. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 691.

No. 75–1341. Fouke *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 529 S. W. 2d 772.

No. 75–1343. Quiroz *v.* Arizona. Sup. Ct. Ariz. Certiorari denied.

No. 75–1345. Kent Nursing Home *v.* Office of Special State Prosecutor for Health and Social Services et al. Ct. App. N. Y. Certiorari denied. Reported below: 38 N. Y. 2d 260, 342 N. E. 2d 518.

No. 75–1348. Gustin *v.* Stegall et al. Ct. App. D. C. Certiorari denied. Reported below: 347 A. 2d 917.

No. 75–1352. Behring Corp. *v.* Bennett et al. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1202.

No. 75–1358. Parker *v.* Motorola, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 518.

No. 75–1359. Democratic Executive Committee of Columbiana County et al. *v.* Brown, Secretary of State of Ohio. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 977.

No. 75–1361. Cella et ux. *v.* Partenreederei MS Ravenna et al. C. A. 1st Cir. Certiorari denied. Reported below: 529 F. 2d 15.

No. 75–1369. Union Planters National Bank of Memphis *v.* Aztec Properties, Inc. Sup. Ct. Tenn. Certiorari denied. Reported below: 530 S. W. 2d 756.

No. 75–1371. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America *v.* Great Coastal Express, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 839.

No. 75–1375. Federal Commerce & Navigation Co., Ltd. *v.* The Marathonian et al. C. A. 2d Cir. Certiorari denied. Reported below: 528 F. 2d 907.

No. 75–1376. Prudential Insurance Company of America *v.* National Labor Relations Board et al. C. A. 6th. Certiorari denied. Reported below: 529 F. 2d 66.

No. 75–1388. George *v.* Wake County Opportunities, Inc. Ct. App. N. C. Certiorari denied. Reported below: 26 N. C. App. 732, 217 S. E. 2d 128.

No. 75–1398. Wolfer et ux. *v.* Thaler et al. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 977.

No. 75–1417. Humane Society of Austin and Travis County *v.* Austin National Bank, Executor, et al. Sup. Ct. Tex. Certiorari denied. Reported below: 531 S. W. 2d 574.

No. 75–1422. Diamond M Drilling Co. *v.* Gueho. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 986.

No. 75–1434. Wallace Clark & Co., Inc. *v.* Acheson Industries, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 532 F. 2d 846.

No. 75–5586. Gurule *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 522 F. 2d 20.

No. 75–6116. Sanders *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 235 Ga. 425, 219 S. E. 2d 768.

No. 75–6144. Holsey *v.* Murray, U. S. District Judge. C. A. 4th Cir. Certiorari denied.

No. 75–6149. Wolfish *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 75–6152. Preston, aka Rilla *v.* Gray, Warden. Sup. Ct. Wis. Certiorari denied.

No. 75–6158. Garafola *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 530 F. 2d 961.

No. 75–6166. Williams et al. *v.* Director, Patuxent Institution. Ct. App. Md. Certiorari denied. Reported below: 276 Md. 272, 347 A. 2d 179.

No. 75–6170. Lujan *v.* United States C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 878.

No. 75–6184. Doby *v.* Texas. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1053.

No. 75-6212. Barrett *v.* Smith et al. C. A. 9th Cir. Certiorari denied. Reported below: 530 F. 2d 829.

No. 75-6216. Williams *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 322 So. 2d 676.

No. 75-6236. Moore *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 51 Cal. App. 3d 610, 124 Cal. Rptr. 290.

No. 75-6237. Burnett et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 911.

No. 75-6239. Douglas *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 529 F. 2d 1353.

No. 75-6241. Isaac *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 968.

No. 75-6245. Entrekin *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 75-6248. Morrow et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 530 F. 2d 971.

No. 75-6249. Gonzalez-Diaz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 925.

No. 75-6251. Vymetalik *v.* Secretary of Commerce. C. A. D. C. Cir. Certiorari denied. Reported below: 173 U. S. App. D. C. 129, 522 F. 2d 1344.

No. 75-6256. Rocha-Lopez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 476.

No. 75-6266. Tremarco *v.* Attorney General of the United States et al. C. A. 2d Cir. Certiorari denied.

No. 75-6268. Young *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75-6273. McCormick *v.* Farmers Home Administration et al. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1051.

No. 75-6278. Miller *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75-6279. Zitzer *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6280. Mapp *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 964.

No. 75-6282. Hughes *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 1406.

No. 75-6283. Blankenship *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75-6284. Montoya-Gonzales *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 812.

No. 75-6287. Shriver *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75-6291. Dandar *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75-6292. Dows *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6293. Falco *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6295. Eitel *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75-6302. Edwards *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75-6307. Hansen *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 529 F. 2d 530.

No. 75-6309. Estremera *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 531 F. 2d 1103.

No. 75-6310. Leal *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6319. Hurt *v.* Strickland, Correctional Superintendent. Ct. App. D. C. Certiorari denied.

No. 75-6326. Coe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75-6396. Clodfelter et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 754.

No. 75-6400. Martinez *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75-6423. Alexander *v.* Superior Court of California, County of Los Angeles. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75-6427. Tyler *v.* Swenson, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 527 F. 2d 876.

No. 75-6430. Carter *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 75-6443. Hardwick *v.* Anderson, Sheriff, et al. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 813.

No. 75-6447. Young *v.* Warden, Maryland Penitentiary. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 753.

No. 75-6450. Buras *v.* Chevron Oil Co. et al. C. A. 5th Cir. Certiorari denied.

No. 75-6455. Thompson *v.* Zahradnick, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 75-6459. Ochenkowski *v.* A. Z. Ford, Inc., et al. Super. Ct. N. J. Certiorari denied.

No. 75-6472. McReynolds *v.* Zahradnick, Penitentiary Superintendent. C. A. 4th Cir. Certiorari denied.

No. 75-6473. Bishop *v.* Wainwright, Secretary, Department of Offender Rehabilitatiqn of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 664.

No. 75-6474. Freeman *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 75-6475. Trammell *v.* Alabama. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1054.

No. 75-6476. Cook *v.* Gray, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 530 F. 2d 133.

No. 75-6482. Harrison, aka Parnell *v.* Illinois. Sup. Ct. Ill. Certiorari denied.

No. 75-6485. Sheeley *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 530 S. W. 2d 108.

No. 75-6487. Ludwin, Trustee *v.* Holyoke Mutual Fire Insurance Co. et al. Ct. App. Mass. Certiorari denied.

No. 75-6488. Carter *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 532 F. 2d 749.

No. 75-6489. Kaplan *v.* Continental Can Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 506.

No. 75-6500. Rhoten *v.* Virginia. Cir. Ct. Chesterfield County, Va. Certiorari denied.

No. 75-6502. Washington *v.* Henderson, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 522.

No. 75-6542. Bibbs *v.* Wyrick, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 226.

No. 75-6554. Whitten *v.* Anchor Motor Freight, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 1335.

No. 74-1264. Madison et vir *v.* United States. C. A. 4th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 511 F. 2d 1399.

No. 74-6643. Lewis *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 510 F. 2d 1406.

No. 75-1405. Marshall Field & Co. *v.* Shoup. C. A. 7th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 532 F. 2d 756.

No. 74-6532. GURULE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 75-5541. SANDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 525 F. 2d 694.

No. 75-490. MATHENY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 55 Ala. App. 119, 313 So. 2d 547.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Circuit Court for Montgomery County, Ala., of violating Ala. Code Tit. 14, § 374 (4) (Supp. 1973). That law provides in pertinent part:

> "(1) Every person who, with knowledge of its contents, . . . has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material . . . shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.
>
> "(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material . . . shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months,

or may be fined not more than five hundred dollars for each offense, or be both so imprisoned and fined in the discretion of the court."

Under § 374 (3):

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

The indictment filed against petitioner charged him with three counts of violating § 374. The first count charged petitioner with selling a magazine primarily containing photographs of nude women. Genitals were exposed in some of the photographs. Count 2 of the indictment charged petitioner with selling an unillustrated short novel containing descriptions of sexual acts. The third count of the indictment charged the sale of another unillustrated short novel also containing descriptions of sexual acts.

Upon inquiry to the trial court, petitioner's jury was instructed that it could "return a verdict as to either one of the counts in the indictment." Record 100. The jury subsequently returned the general verdict: "We the jury find the Defendant guilty." *Id.*, at 102. Petitioner was adjudged guilty by the trial court and ultimately sentenced to six months of imprisonment and assessed a fine of $500. The judgment and sentence were affirmed by the Alabama Court of Criminal Appeals. 55 Ala. App. 119, 313 So. 2d 547 (1975). A petition for writ of certiorari was denied by the Alabama Supreme Court. 294 Ala. 765, 313 So. 2d 552 (1975).

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the

basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 374 (4), as it incorporates the definition of obscene material in § 374 (3), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari and, since the judgment of the Alabama Court of Criminal Appeals was rendered after *Miller,* reverse, petitioner's conviction being invalid on all counts. In that circumstance, I have no occasion to consider whether the question of vagueness presented by petitioner merits plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494–495 (1973) (BRENNAN, J., dissenting).

Even accepting the Court's decision in *Miller* v. *California, supra,* and the obscenity standards there set forth, petitioner's conviction should be set aside. It is this Court's duty independently to review the fact of obscenity necessary to petitioner's conviction. See *Jenkins* v. *Georgia,* 418 U. S. 153 (1974). Under *Miller,* a work may not be obscene unless it "depicts . . . , in a patently offensive way, sexual conduct." 413 U. S., at 24. While exhibition of the genitals may constitute sexual conduct, such exhibition must be patently offensive and lewd, *id.,* at 25. "[N]udity alone is not enough to make material legally obscene under the *Miller* standards." *Jenkins* v. *Georgia, supra,* at 161. Tested by those standards, the material involved in Count 1, merely containing photographs of nude women, is clearly not obscene. This being so, a conviction of petitioner based only on Count 1 of the indictment cannot stand. Because of the general nature of the jury's verdict, in the light of the trial court's instruction to the jury, it is entirely possible that petitioner's conviction did indeed rest solely on the first

count. In accordance with the Court's decision in *Bachellar* v. *Maryland,* 397 U. S. 564 (1970), therefore, petitioner's conviction should be set aside.

No. 75–1351. Berger, Commissioner, Department of Social Services of New York *v.* Barton et al. Ct. App. N. Y. Motion of respondents Barton et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 38 N. Y. 2d 785, 345 N. E. 2d 339.

Rehearing Denied

No. 75–643. Allen *v.* United States, 423 U. S. 1072;

No. 75–792. Northside Realty Associates, Inc., et al. *v.* United States, 424 U. S. 977;

No. 75–896. Doe et al. *v.* Commonwealth's Attorney for the City of Richmond et al., *ante,* p. 901;

No. 75–897. Enslin *v.* North Carolina, *ante,* p. 903;

No. 75–911. Ward *v.* United States, 424 U. S. 966;

No. 75–912. Slingerland *v.* United States, 424 U. S. 966;

No. 75–1128. Phoenix Newspapers, Inc., et al. *v.* Church, *ante,* p. 908;

No. 75–5696. Roberson *v.* United States, *ante,* p. 917;

No. 75–6108. Hardy *v.* Ohio, 424 U. S. 960;

No. 75–6188. Lennon *v.* Clark et al., 424 U. S. 975; and

No. 75–6219. Boone *v.* Kansas, *ante,* p. 915. Petitions for rehearing denied.

No. 74–891. Paul, Chief of Police, Louisville, et al. *v.* Davis, 424 U. S. 693. Petition for rehearing denied. Mr. Justice Stevens took no part in the consideration or decision of this petition.

No. 74–1042. ERNST & ERNST *v.* HOCHFELDER ET AL., *ante,* p. 185;

No. 75-821. BUSH *v.* UNITED STATES, 424 U. S. 977; and

No. 75–5054. GRIFFIN *v.* VICTOR ET AL., 424 U. S. 976. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

MAY 24, 1976

Affirmed on Appeal

No. 75–624. JONES, DIRECTOR, DIVISION OF FAMILY SERVICES OF UTAH, ET AL. *v.* T. H. Appeal from D. C. Utah. Motion of appellee for leave to proceed *in forma pauperis* granted. Without indicating any views on whether the District Court's decision on the constitutional issue was sound, judgment affirmed insofar as it invalidated the challenged regulation of the Utah Division of Family Services as inconsistent with the Social Security Act. THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 425 F. Supp. 873.

Appeals Dismissed

No. 75–6178. FAIRCLOTH *v.* OLD NATIONAL BANK OF WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 86 Wash. 2d 1, 541 P. 2d 362.

No. 75–6543. WONG *v.* BOARD OF TRUSTEES, CALIFORNIA STATE UNIVERSITY AND COLLEGES. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and

Mr. Justice White would note probable jurisdiction and set case for oral argument.

Certiorari Granted—Vacated and Remanded

No. 74–1650. Environmental Protection Agency *v.* St. Joe Minerals Corp. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded with instructions to dismiss cause as moot. Reported below: 508 F. 2d 743.

No. 75–182. Equal Employment Opportunity Commission *v.* Jersey Central Power & Light Co. et al. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Franks* v. *Bowman Transportation Co., Inc.,* 424 U. S. 747. Mr. Justice Stevens took no part in the consideration or decision of this case. Reported below: 508 F. 2d 687.

No. 75–649. Mathews, Secretary of Health, Education, and Welfare *v.* Mattern et al. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mathews* v. *Eldridge,* 424 U. S. 319. Reported below: 519 F. 2d 150.

No. 75–1234. Mathews, Secretary of Health, Education, and Welfare *v.* Elliott et al. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mathews* v. *Eldridge,* 424 U. S. 319. Reported below: — F. 2d —.

Certiorari Granted—Affirmed in Part, Vacated in Part, and Remanded. (See Nos. 75–1097 and 75–1243, *ante,* p. 800.)

Miscellaneous Orders

No. A-864. Hills, Secretary of Housing and Urban Development, et al. *v.* Cooperative Services, Inc., et al. D. C. D. C. Motion to vacate or amend stay order heretofore entered by The Chief Justice denied.

No. A-925. Richter et al. *v.* Reece, Director, Department of Alcoholic Beverage Control of California, et al. Sup. Ct. Cal. Application for stay, presented to Mr. Justice Brennan, and by him referred to the Court, denied.

No. A-981 (75-6788). Howell *v.* Mississippi State Probation and Parole Board; and Brooks *v.* Mississippi State Probation and Parole Board. Application for stay of mandate of Supreme Court of Mississippi, presented to Mr. Justice Brennan, and by him referred to the Court, denied. Reported below: 330 So. 2d 565 (first case); 330 So. 2d 567 (second case).

No. A-985. Shapiro, Executive Director, New York State Board of Social Welfare, et al. *v.* Organization of Foster Families for Equality and Reform et al.;

No. A-986. Gandy et al. *v.* Organization of Foster Families for Equality and Reform et al.;

No. A-987. Dumpson, Administrator, New York City Human Resources Administration, et al. *v.* Organization of Foster Families for Equality and Reform et al.; and

No. A-988. Rodriguez et al. *v.* Organization of Foster Families for Equality and Reform et al. Applications for stay of judgment and order of the United States District Court for the Southern District of New York, presented to Mr. Justice Marshall, and

by him referred to the Court, granted pending timely docketing of an appeal or appeals with this Court.

No. 74–611. UNITED STATES *v.* KASMIR ET AL., *ante*, p. 391. Motion of respondents regarding assessment of costs denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 74–1589. GENERAL ELECTRIC CO. *v.* GILBERT ET AL.; and

No. 74–1590. GILBERT ET AL. *v.* GENERAL ELECTRIC CO. C. A. 4th Cir. [Certiorari granted, 423 U. S. 822.] Cases restored to calendar for reargument.

No. 75–1354. TRANS WORLD AIRLINES, INC. *v.* DAY ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–6667. SMILEY *v.* FIRTH, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of habeas corpus denied.

No. 75–6556. CARTER *v.* SEALS, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 75–6528. FOSTER *v.* GALLAWA ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Certiorari Granted

No. 75–562. ROSEBUD SIOUX TRIBE *v.* KNEIP, GOVERNOR OF SOUTH DAKOTA, ET AL. C. A. 8th Cir. Motions of Association of American Indian Affairs, Inc., et al. and Covelo Indian Community of Round Valley Reservation for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 521 F. 2d 87.

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No. 75-636. International Brotherhood of Teamsters *v.* United States et al.; and

No. 75-672. T. I. M. E.-DC, Inc. *v.* United States et al. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument. Reported below: 517 F. 2d 299.

No. 75-651. Teamsters Local Union 657 *v.* Rodriguez et al.; Teamsters Local Union 657 *v.* Herrera et al.; and Teamsters Local Union 657 *v.* Resendis et al.;

No. 75-715. Southern Conference of Teamsters *v.* Rodriguez et al.; Southern Conference of Teamsters *v.* Herrera et al.; and Southern Conference of Teamsters *v.* Resendis et al.; and

No. 75-718. East Texas Motor Freight System *v.* Rodriguez et al. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument. Reported below: Nos. 75-651 and 75-715, 505 F. 2d 40, 66, and 69; No. 75-718, 505 F. 2d 40.

No. 75-1221. United States *v.* Consumer Life Insurance Co. Ct. Cl. Reported below: 207 Ct. Cl. 638, 524 F. 2d 1167;

No. 75-1260. First Railroad & Banking Company of Georgia *v.* United States. C. A. 5th Cir. Reported below: 514 F. 2d 675; and

No. 75-1285. United States *v.* Penn Security Life Insurance Co. Ct. Cl. Reported below: 207 Ct. Cl. 594, 524 F. 2d 1155. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument.

No. 75-6527. Ingraham et al. *v.* Wright et al. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2, presented by the petition, which read as follows:

1. "Does the infliction of severe corporal punishment

upon public school students, absent notice of the charges for which punishment is to be inflicted and an opportunity to be heard, violate the due process clause of the Fourteenth Amendment?"

2. "Does the cruel and unusual punishment clause of the Eighth Amendment apply to the administration of discipline through severe corporal punishment inflicted by public school teachers and administrators upon public school children?"
Reported below: 525 F. 2d 909.

Certiorari Denied

No. 73-1287. REPUBLIC OF CUBA ET AL. *v.* SAKS & CO. et al.; and

No. 73-1289. SAKS & CO. ET AL. *v.* REPUBLIC OF CUBA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 1355.

No. 75-720. LEE WAY MOTOR FREIGHT, INC., ET AL. *v.* RESENDIS ET AL.; and YELLOW FREIGHT SYSTEM, INC. *v.* HERRERA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 69 (first case); 505 F. 2d 66 (second case).

No. 75-1122. HENNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 527 F. 2d 479.

No. 75-1132. CANON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75-1138. PROTHRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 692.

No. 75-1164. VICKERY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 239.

No. 75-1162. WINTERS BATTERY MANUFACTURING CO. *v.* USERY, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 531 F. 2d 317.

No. 75–1152. Seminara *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 75–1215. Freedman *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 529 F. 2d 543.

No. 75–1216. National Association of Radiotelephone Systems *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 173 U. S. App. D. C. 413, 525 F. 2d 630.

No. 75–1246. Star Broadcasting, Inc., et al. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 174 U. S. App. D. C. 70, 527 F. 2d 853.

No. 75–1252. Wamp et al. *v.* Chattanooga Housing Authority et al. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 595.

No. 75–1253. Perry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 518.

No. 75–1271. Atchison, Topeka & Santa Fe Railway Co. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 525 F. 2d 1184.

No. 75–1282. Lau *v.* Levi, Attorney General. C. A. 6th Cir. Certiorari denied. Reported below: 524 F. 2d 1405.

No. 75–1333. Paramount Convalescent Center, Inc. *v.* Department of Health Care Services et al. Sup. Ct. Cal. Reported below: 15 Cal. 3d 489, 542 P. 2d 1.

No. 75–1381. Paduano et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied.

No. 75–1338. Maschhoff *v.* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, et al. C. A. 6th Cir. Certiorari denied.

No. 75–1395. Head *v.* Korshak, Director, Department of Revenue, City of Chicago, et al. Sup. Ct. Ill. Certiorari denied. Reported below: 62 Ill. 2d 226, 341 N. E. 2d 706.

No. 75–1401. Sweeny *v.* Lentini et al. C. A. 4th Cir. Certiorari denied.

No. 75–1403. Dirk *v.* American President Lines, Ltd. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–1406. Eliopulos *v.* Hildyard et al. Ct. App. Colo. Certiorari denied.

No. 75–1409. St. Regis Paper Co. *v.* McMillen, U. S. District Judge, et al. C. A. 7th Cir. Certiorari denied.

No. 75–1492. Rhoades *v.* Rochez Bros., Inc. C. A. 3d Cir. Certiorari denied. Reported below: 527 F. 2d 891.

No. 75–1500. North American Company for Life & Health Insurance et al. *v.* Ann Arbor Trust Co. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 526.

No. 75–1560. Graham *v.* Wilson. C. A. D. C. Cir. Certiorari denied.

No. 75–6207. Kitchens *v.* Hopper, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1053.

No. 75-6194. Castillo *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 75-6253. Cooper *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 30 Ill. App. 3d 326, 332 N. E. 2d 453.

No. 75-6254. Etten *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 29 Ill. App. 3d 842, 331 N. E. 2d 270.

No. 75-6259. Horsted *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1230.

No. 75-6281. Quigg *v.* Crist, Warden. Sup. Ct. Mont. Certiorari denied. Reported below: 168 Mont. 512, 544 P. 2d 441.

No. 75-6286. Gibson *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 216 Va. 412, 219 S. E. 2d 845.

No. 75-6301. Smith *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6315. Wesley *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1400.

No. 75-6318. Tucker *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 75-6327. Masino *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 530 F. 2d 965.

No. 75-6329. Glenos et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 441.

No. 75–6331. Gonzalez-Rodriguez *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–6332. Raygoza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 464.

No. 75–6336. O'Donnell *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 534 F. 2d 659.

No. 75–6337. Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 814.

No. 75–6342. Crowley *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 529 F. 2d 1066.

No. 75–6347. O'Leary *v.* Ruttle, Director, Internal Revenue Service Center, et al. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 526.

No. 75–6348. Mills *v.* United States District Court et al. C. A. D. C. Cir. Certiorari denied.

No. 75–6352. Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 525 F. 2d 980.

No. 75–6353. Lopez-Lopez *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–6354. Bobo *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–6363. Clay *v.* Henderson, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 921.

No. 75–6365. Petty et ux. *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 75-6373. Thomas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 531 F. 2d 419.

No. 75-6374. Rizzo *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6381. Currie *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75-6383. Watts *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75-6390. Brown et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 517.

No. 75-6398. Beathune *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 527 F. 2d 696.

No. 75-6457. Chaparro *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 528 F. 2d 926.

No. 75-6477. Rodriguez-Camacho *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied.

No. 75-6495. Jackson *v.* Office of the United States Magistrate et al. C. A. 9th Cir. Certiorari denied.

No. 75-6520. McBride *v.* Reed, Penitentiary Superintendent. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 238.

No. 75-6529. Kirkman *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 75-6533. Wright *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75-6534. CARTER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 75-6535. SWANSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1250.

No. 75-6545. RAITPORT *v.* COMMERCIAL BANKS LOCATED WITHIN THIS DISTRICT AS A CLASS ET AL. C. A. 2d Cir. Certiorari denied.

No. 75-6551. STEWART *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 325 So. 2d 819 and 828.

No. 75-6552. IRBY *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 75-6555. DELEO *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied.

No. 75-6569. MCGEEHAN *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 526 F. 2d 397.

No. 75-6672. CASTRO *v.* REGAN, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 525 F. 2d 1157.

No. 75-6695. JOHNSON *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 531 F. 2d 169.

No. 74-1064. WATERS ET AL. *v.* WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER CO. ET AL.; and

No. 74-1350. UNITED ORDER OF AMERICAN BRICKLAYERS & STONE MASONS, LOCAL 21 *v.* WATERS ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS

took no part in the consideration or decision of these petitions. Reported below: 502 F. 2d 1309.

No. 74–1349. Local 862, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America *v.* Ford Motor Co. et al. C. A. 6th Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 510 F. 2d 939.

No. 75–465. Jersey Central Power & Light Co. *v.* Equal Employment Opportunity Commission et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 508 F. 2d 687.

No. 75–1174. Time, Inc. *v.* Virgil. C. A. 9th Cir. Certiorari denied. Mr. Justice Brennan and Mr. Justice Stewart would grant certiorari. Reported below: 527 F. 2d 1122.

No. 75–1226. Slepicoff, dba Graduate Enterprises *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 1244.

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

Petitioner was convicted after jury trial in the United States District Court for the Middle District of Florida of mailing obscene advertisements in violation of 18 U. S. C. § 1461. That section provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .
>
> . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

The Court of Appeals for the Fifth Circuit affirmed. 524 F. 2d 1244.

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.

In these circumstances, I have no occasion to consider whether the other questions presented by petitioner merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 75–1240. RODRIGUEZ ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 529 F. 2d 530.

No. 75–1270. ASSOCIATED DRY GOODS CORP. *v.* COMMISSIONER OF TAXATION OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 306 Minn. 532, 235 N. W. 2d 821.

No. 75–1427. Air Line Pilots Association, International *v.* Wells et al. C. A. 5th Cir. Motion of respondent Wells for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 517 F. 2d 132 and 522 F. 2d 707.

Rehearing Denied

No. 75–1024. Citizens for Parental Rights et al. *v.* San Mateo County Board of Education et al., *ante,* p. 908;

No. 75–1038. Diamond National Corp. *v.* State Board of Equalization of California, *ante,* p. 268;

No. 75–1061. Western Grain Co. v. Alabama, 424 U. S. 960;

No. 75–1068. Lea Associates, Inc. *v.* United States, *ante,* p. 912;

No. 75–1169. Gabriel *v.* Levin et al., *ante,* p. 913;

No. 75–5895. Pritchett et al. *v.* Georgia, *ante,* p. 938;

No. 75–6384. Taylor *v.* Alabama, *ante,* p. 942; and

No. 75–6442. McDonald *v.* Tennessee, *ante,* p. 955. Petitions for rehearing denied.

No. 75–1163. Shade *v.* Public Utilities Commission of California et al., *ante,* p. 928. Petition for rehearing denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition.

No. 75–6024. Morgan *v.* United States, *ante,* p. 905. Motion for leave to file petition for rehearing denied.

May 25, 1976

Dismissal Under Rule 60

No. 75–6620. White *v.* City of Norfolk. Sup. Ct. Va. Certiorari dismissed under this Court's Rule 60.

MAY 27, 1976

Dismissal Under Rule 60

No. 75-6454. ALLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 532 F. 2d 748.

No. 75-[illegible]. [illegible] ASSOCIATION, INTERNATIONAL v. [illegible] ET AL. C. A. [illegible] Cir. Motion of respondent [illegible] for leave to proceed in forma pauperis granted. Certiorari denied. Reported below: [illegible] F. 2d [illegible].

Rehearing Denied

No. 75-10[illegible]. CITIZENS FOR PARENTAL RIGHTS ET AL. v. SAN MATEO COUNTY BOARD OF EDUCATION ET AL., ante, p. [illegible];

No. 75-10[illegible]. DIAMOND NATIONAL CORP. v. STATE BOARD OF EQUALIZATION OF CALIFORNIA, ante, p. 268;

No. 75-10[illegible]. WESTERN CLEAN CO. v. ALABAMA, 424 U. S. 900;

No. 75-10[illegible]. LEA ASSOCIATES INC. v. UNITED STATES, ante, p. 912;

No. 75-11[illegible]. [illegible] v. [illegible] ET AL., ante, p. 912;

No. 75-[illegible]. [illegible] ET AL. v. GEORGIA, ante, p. [illegible];

No. 75-6[illegible]. TAYLOR v. ALABAMA, ante, p. 942; and

No. 75-6[illegible]. MCDONALD v. TENNESSEE, ante, p. [illegible]. Petitions for rehearing denied.

No. 75-1[illegible]. [illegible] v. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., ante, p. 9[illegible]. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 75-[illegible]. MORGAN v. UNITED STATES, ante, p. [illegible]. Motion for leave to file petition for rehearing denied.

MAY [illegible], 1976

Dismissed Under Rule 60

No. 75-[illegible]. [illegible] v. CITY OF [illegible]. Sup. Ct. Va. Certiorari dismissed under this Court's Rule 60.

BANKRUPTCY RULES AND OFFICIAL BANKRUPTCY FORMS

Effective August 1, 1976

The Bankruptcy Rules and Official Bankruptcy Forms were prescribed by the Supreme Court of the United States on April 26, 1976, pursuant to 28 U. S. C. § 2075, and were reported to the Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1004. The Judicial Conference reports referred to in that letter are not reproduced herein. These rules and forms became effective on August 1, 1976, as provided in paragraph 2 of the Court's orders, *post*, pp. 1005 and 1006.

For earlier publication of Bankruptcy Rules and Forms, see, *e. g.*, 421 U. S. 1019.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 1976

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to Congress the Amendments to the Federal Rules of Criminal Procedure prescribed pursuant to Sections 3771 and 3772 of Title 18, United States Code;

Rules and Forms governing proceedings in the United States District Courts under Sections 2254 and 2255 of Title 28, United States Code, prescribed pursuant to Section 2872 of Title 28, United States Code, and Sections 3771 and 3772 of Title 18, United States Code;

Rules and Forms governing proceedings under Chapter VIII of the Bankruptcy Act, prescribed pursuant to Section 2075 of Title 28, United States Code;

Rules and Forms governing proceedings under Chapter IX of the Bankruptcy Act, as amended, prescribed pursuant to Section 2075 of Title 28, United States Code; and

Rules and Forms amending certain rules and forms previously prescribed pursuant to Chapter I–VII, XI, and XIII of the Bankruptcy Act, prescribed pursuant to Section 2075 of Title 28, United States Code.

Accompanying these Rules and Forms are excerpts from the Reports of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER,
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 26, 1976

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States and annexed hereto, to be known as the Chapter VIII Rules and Official Chapter VIII Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings and motions and the practice and procedure under Chapter VIII of the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands.

[See *infra,* pp. 1007–1081.]

2. That the aforementioned Chapter VIII Rules and Official Chapter VIII Forms shall take effect on August 1, 1976, and shall be applicable to proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That General Order in Bankruptcy 49 heretofore prescribed by this Court be, and it hereby is, abrogated, effective August 1, 1976.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned new Chapter VIII Rules and Official Chapter VIII Forms to the Congress in accordance with the provisions of Title 28, U. S. C. § 2075.

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States and annexed hereto, to

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be known as the Chapter IX Rules and Official Chapter IX Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings and motions and the practice and procedure under Chapter IX of the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands.

[See *infra,* pp. 1083–1123.]

2. That the aforementioned Chapter IX Rules and Official Chapter IX Forms shall take effect on August 1, 1976, and shall be applicable to proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned new Chapter IX Rules and Official Chapter IX Forms to the Congress in accordance with the provisions of Title 28, U. S. C. § 2075.

RULES OF BANKRUPTCY PROCEDURE

TITLE II

CHAPTER VIII RULES

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TITLE II
CHAPTER VIII (SECTION 77) RULES

Rule 8–1. Scope of Chapter VIII (Section 77) rules and forms; short title.

The rules and forms in this Title II govern the procedure in courts of bankruptcy in cases under Chapter VIII (Section 77) of the Bankruptcy Act. These rules may be known and cited as the Chapter VIII Rules. These forms may be known and cited as the Official Chapter VIII Forms.

PART I. PETITION AND PROCEEDINGS RELATING THERETO

Rule 8–101. Commencement of Chapter VIII case.

A Chapter VIII case is commenced by the filing with the court of a petition by or against a railroad corporation seeking relief under Chapter VIII of the Act.

Rule 8–102. Voluntary petition.

A voluntary petition shall conform substantially to Official Form No. 8–1. An original and 6 copies of the petition shall be filed with the court, unless additional copies are required by local rule, and one copy shall be filed with the Interstate Commerce Commission. The clerk of the district court shall transmit one copy to the Secretary of the Department of Transportation, one copy to the district director of internal revenue for the district in which the case is filed, and one copy to the Secretary of the Treasury.

Rule 8–103. Involuntary petition.

(a) *Form and number.*—An involuntary petition shall conform substantially to Official Form No. 8–2. The number, place of filing, and distribution of copies shall be as specified in Rule 8–102.

(*b*) *Transferor or transferee of claim.*—A person who has transferred or acquired a claim for the purpose of commencing a Chapter VIII case shall not be a qualified petitioner. A petitioning creditor who is a transferor or transferee of a claim, whether transferred unconditionally, for security, or otherwise, shall annex to the original and each of the copies of the petition a copy of all documents evidencing the transfer, and a signed statement setting forth the consideration for and terms of the transfer and that the claim was not transferred for the purpose of commencing a Chapter VIII case.

(*c*) *Joinder of petitioners after filing.*—Creditors other than the original petitioner or petitioners may join in an involuntary petition at any time before its dismissal.

Rule 8–104. Caption of petition.

The caption of every petition shall comply with Bankruptcy Rule 904 (b) and conform substantially to the caption of Official Form No. 8–1. In addition the title of the case as set forth in the caption shall include the name of the debtor and such other names used by it as are necessary to assure adequate identification.

Rule 8–105. Filing fees.

Every petition shall be accompanied by the prescribed filing fees.

Rule 8–106. Lists of creditors and stockholders.

(*a*) *Lists required.*—The trustee shall, or if the trustee has not yet qualified and the court so directs, the debtor shall at the expense of the estate file with the court, within such time as the court may fix, a list of the debtor's creditors of each class, showing the amounts and character of their claims and securities and, so far as known, the name and address or place of business of each creditor and whether the claim is disputed, contingent, or unliquidated as to amount, and a list of the debtor's stockholders of each class showing the number and kind of shares registered in the name of each stockholder, and

the last known address or place of business of each stockholder.

(*b*) *List of security holders or information in possession of another person.*—If it appears that a person, other than the debtor or trustee, has in his possession or under his control a list of security holders of the debtor or information in respect to their names, addresses, or the securities held by any of them, and such list or information is necessary in order to disclose the names and addresses of the beneficial owners of such securities, or to prepare or complete the lists required by this rule, the court may direct such person, after a hearing on notice to him, to produce such list or a true copy thereof, or to permit the inspection or use thereof, or to furnish such information.

(*c*) *Impounding of lists.*—The court may, on cause shown, direct the impounding of the lists filed under this rule, in which event—

(1) the debtor, or the trustee, or any indenture trustee, creditor, or stockholder shall be permitted their inspection or use on such terms as the court may prescribe; and

(2) the court may refuse to permit such inspection by any creditor or stockholder who acquired his claim or stock within 3 months preceding the filing of a Chapter VIII petition or during the pendency of the Chapter VIII case.

Rule 8–107. Verification of petitions and lists.

All lists and amendments thereto filed by the debtor and all petitions and amendments thereto shall be verified.

Rule 8–108. Amendments of petitions and lists.

(*a*) *Petitions.*—A voluntary or an involuntary petition may be amended as a matter of course at any time before a responsive pleading is served or the petition is approved pursuant to Rule 8–111. An amendment at

any other time may be made only by leave of court. Subdivisions (b), (c), and (d) of Rule 15 of the Federal Rules of Civil Procedure apply to amendments of petitions.

(*b*) *Lists.*—A list of creditors or stockholders filed pursuant to Rule 8–106 may be amended as a matter of course at any time before expiration of the time fixed for filing claims pursuant to Rule 8–401 (b). Thereafter such a list may be amended only with leave of court on such notice as the court may direct. The court may, on application or motion of any party in interest, or on its own initiative, order any list to be amended.

(*c*) *Number of copies; notice.*—Every amendment under this rule shall be filed in the same number as required of the original paper, and the court shall give notice of the amendment to such persons as it may designate.

Rule 8–109. Service of petition and process.

On the filing of an involuntary petition, the clerk of the district court shall forthwith issue a summons for service on the debtor. The summons shall conform substantially to Official Form No. 8–3, and a copy shall be served with a copy of the petition in the manner provided for service of a summons, complaint, and notice of trial by Bankruptcy Rule 704 (b), (c), or (i). The summons and petition may be served anywhere. The provisions of Bankruptcy Rule 704 (e), (g), and (h) apply when service is made or attempted under this rule.

Rule 8–110. Responsive pleading.

(*a*) *Time for filing answer.*

(*1*) *By debtor.*—The debtor may serve and file an answer to an involuntary petition within 20 days after the issuance of the summons.

(*2*) *By other parties.*—Any creditor, stockholder, or indenture trustee may serve and file an answer to a voluntary or involuntary petition not later than the day

prior to the date set for the hearing on the appointment of a trustee provided for in Rule 8–202. A timely answer filed under this paragraph shall be deemed also to constitute a motion to vacate any prior order of approval of a petition.

(*b*) *Contents of answer.*—The answer to a petition shall contain all defenses and objections, including those which may be raised by separate motion under Rule 12 (b), (e), or (f) of the Federal Rules of Civil Procedure. Such answer may include the statement of a claim against a petitioning creditor only for the purpose of defeating the petition.

(*c*) *Other responsive pleadings.*—No other responsive pleadings shall be allowed, except that the court may order a reply to an answer and prescribe the time for it to be served and filed.

Rule 8–111. Disposition of petition; preliminary approval; hearing.

(*a*) *Voluntary petition.*—On the filing of a voluntary petition, the court shall enter an order approving the petition if satisfied that it complies with the requirements of Chapter VIII of the Act and has been filed in good faith. If not so satisfied, the court shall enter an order permitting the petition to be amended or dismissing the case.

(*b*) *Involuntary petition.*—If an answer to an involuntary petition is not filed by a debtor within the time provided by Rule 8–110 (a)(1), and if no other party in interest has filed an answer within such time, or if no valid defense or objection to the petition is set forth in any answer, the court shall enter an order approving the petition if satisfied that it complies with the requirements of Chapter VIII of the Act and has been filed in good faith. If not so satisfied, the court shall enter an order permitting the petition to be amended or dismissing the case.

(*c*) *Hearing.*

(1) If no timely answer is filed, the court may nevertheless hold a hearing on such notice as it may direct before approving or dismissing a petition pursuant to subdivision (a) or (b) of this rule.

(2) If a timely answer is filed, the court shall hold a hearing at the earliest practicable time on such notice as it may direct, and shall determine the issues and approve the petition, dismiss the case, or enter such other order as may be appropriate.

(*d*) *Award of costs.*—When a case commenced by the filing of an involuntary petition is dismissed pursuant to this rule, the court on reasonable notice to the petitioner or petitioners may award to the prevailing party the same costs that are allowed to a prevailing party in a civil action and reasonable counsel fees, and shall award any other sums required by the Act.

Rule 8–112. Venue and transfer.

(*a*) *Proper venue.*

(*1*) *Debtor.*—A petition filed pursuant to Rule 8–102 or 8–103 may be filed in the district where the debtor has had its principal executive or operating office for the preceding 6 months or for a longer portion thereof than in any other district.

(*2*) *Controlled railroad corporation or leased line.*—Notwithstanding the foregoing, a petition commencing a Chapter VIII case may be filed by or against a controlled railroad corporation or leased line in a district where a petition under Chapter VIII of the Act by or against the debtor is pending.

(*b*) *Transfer of cases: Dismissal or retention when venue improper.*

(*1*) *When venue proper.*—Although a petition is filed in accordance with subdivision (a) of this rule, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, in the interest of justice and for the convenience of the parties, transfer

the case to any other district. The transfer may be ordered at or before the date set for the hearing on the appointment of a trustee pursuant to Rule 8–202 either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

(*2*) *When venue improper.*—If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the date set for the hearing on the appointment of a trustee pursuant to Rule 8–202 either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

(*c*) *Procedure when petitions involving the same debtor or related debtors are filed in different courts.*—If petitions commencing Chapter VIII cases or a Chapter VIII case and any other case under the Act are filed in different districts by or against (1) the same debtor, (2) a debtor and a controlled railroad corporation or leased line, or (3) a debtor and an affiliate, a district judge of the court in which the first petition is filed shall, after hearing on motion and notice to the petitioners and such other persons as the court may designate, determine the court or courts in which the case or cases should proceed in the interest of justice and for the convenience of the parties. The proceedings on the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. Thereafter all the courts in which petitions have been filed shall proceed in accordance with the determination.

(*d*) *Reference of transferred cases.*

A case, other than a Chapter VIII case, transferred

under this rule shall be referred by the clerk of the district court to which it has been transferred.

Rule 8–113. Joint administration of cases pending in same court.

(*a*) *Cases involving a debtor and a controlled railroad corporation or leased line.*—If 2 or more petitions are pending in the same court by or against a debtor and a controlled railroad corporation or a leased line, the court may order a joint administration of the estates. Before making such an order, the court shall give due consideration to the protection of creditors and stockholders of the different estates against potential conflicts of interest.

(*b*) *Expediting and protective orders.*—When an order for joint administration of 2 or more cases is entered pursuant to this rule, the court, while protecting the rights of the parties under the Act, may make such orders as may tend to avoid unnecessary costs and delay.

Rule 8–114. Debtor involved in foreign proceeding.

When a proceeding for the purpose of the liquidation of rehabilitation of its estate has been commenced by or against a debtor in a court of competent jurisdiction without the United States, the court may, after hearing on notice to such persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstance, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

Rule 8–115. Applicability of Federal Rules of Civil Procedure.

Except as otherwise provided in Part I of these rules and unless the court otherwise directs, the following rules of the Federal Rules of Civil Procedure, as modified by Rule 8–602, apply in all proceedings relating to a contested petition: Rules 5, 8–10, 16, 24–26, 28–37, 52, 56, and 62. The court may direct that one or more of the other rules of the Federal Rules of Civil Procedure shall

also apply in such a proceeding. For the purposes of this rule a reference in the Federal Rules of Civil Procedure to an action or a civil action shall be read as a reference to proceedings relating to a contested petition, and a reference to the complaint shall be read as a reference to the petition.

PART II. OFFICERS FOR ADMINISTERING THE ESTATE; NOTICES; EXAMINATIONS; COMMITTEES; ATTORNEYS, ACCOUNTANTS, AND CONSULTANTS

Rule 8–201. Appointment and duties of receivers.

(*a*) *When receiver may be appointed.*—The court may appoint a receiver only before qualification of the trustee and, subject to the provisions of this rule, when necessary in the best interest of the estate (1) to take charge of the property of the debtor; (2) to conduct the business of the debtor; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter.

(*b*) *Application for appointment.*—An application for appointment of a receiver shall state the specific facts showing the necessity for the appointment.

(*c*) *Appointment.*

(1) When an involuntary petition is filed, appointment of a receiver may be made only on application. The application may be granted only after hearing on notice to the debtor and such other parties in interest as the court may designate, except that a receiver may be appointed without notice if irreparable loss to the estate may otherwise result. An application for appointment of a receiver without notice and any order of appointment made without notice shall state what loss may result and why it would be irreparable.

(2) When a voluntary petition is filed, the court may appoint a receiver on application or on its own initiative. Such appointment shall be made only after notice to such persons as the court may designate, unless it clearly appears that notice is impracticable or unnecessary.

(*d*) *Bond of applicant.*—No receiver may be appointed under subdivision (c)(1) of this rule unless the applicant furnishes a bond in such amount and with such surety as the court shall approve, conditioned to indemnify the debtor for the costs, counsel fees, expenses, and damages occasioned by the appointment and action of the receiver in the event the petition is dismissed. The property of the debtor shall be released, however, if it files a counter-bond in such amount and with such surety as the court shall approve, conditioned that the debtor account for and turn over such property or pay to the trustee or estate the value thereof in money at the time of release, in the event the petition is approved.

(*e*) *Eligibility.*—Only a person eligible to be a trustee under Bankruptcy Rule 209 (d) may be appointed a receiver.

(*f*) *Order of appointment.*—An order appointing a receiver shall state why the appointment is necessary and shall specify his duties. A copy of every order appointing a receiver shall forthwith be delivered to the debtor, or mailed to it as its last known address, and to such other persons as the court may designate.

(*g*) *Notice of appointment; qualification.*—The court shall immediately notify the receiver of his appointment, inform him of how he may qualify, and require him forthwith to notify the court of his acceptance or rejection of the office. A receiver shall qualify as provided in Rule 8–204.

(*h*) *Termination of appointment.*—The appointment of a receiver shall be terminated when the trustee qualifies or there is no further need for a receiver. On termination of his appointment and unless otherwise ordered, the receiver shall forthwith turn over to the trustee or the debtor, if a trustee has not qualified, all the records and property of the estate in his possession or subject to his control as receiver and file his final report and account within 30 days.

(*i*) *Removal.*—The court may at any time, without or on cause shown, remove a receiver.

Rule 8–202. Appointment of trustee.

(*a*) *Appointment.*—The court shall appoint one or more trustees at a hearing held not later than 30 days after approval of a petition, or as soon after the hearing as practicable.

(*b*) *Notice of hearing.*—Notice of the hearing required under subdivision (a) of this rule shall be given by publication in such newspapers and for such period as the court may direct.

(*c*) *Eligibility.*

(1) A trustee shall be disinterested and shall be competent to perform the duties of his office.

(2) A person shall not be deemed disinterested if (A) he is a creditor or stockholder of the debtor; (B) he is or was an underwriter of any of the outstanding securities of the debtor or within 5 years prior to the date of the filing of the petition was the underwriter of any securities of the debtor; (C) he is, or was within 2 years prior to the date of the filing of the petition, a director, officer, or employee of the debtor, a controlled railroad corporation, an affiliate of the debtor, or any such underwriter, or an attorney for the debtor or such underwriter; or (D) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders. Representation of a creditor or stockholder of the debtor in a matter other than one which may become involved in the Chapter VIII case need not be deemed of itself to affect the disinterestedness of an attorney.

(3) When a disinterested trustee is appointed, a person who is or was within 2 years prior to the date of the filing of the petition a director, officer, or employee

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of the debtor, a controlled railroad corporation, or an affiliate of the debtor may be appointed a co-trustee, if the court finds that the disqualifying interest will not affect the person in the discharge of his duties as a co-trustee. Only one co-trustee appointed under this paragraph may serve at any one time.

(*d*) *Ratification of appointment.*—An appointment of a trustee under this rule shall be effective on ratification by the Interstate Commerce Commission.

(*e*) *Notice of appointment; qualification.*—The court shall immediately notify the trustee of his appointment, inform him of how he may qualify, and shall require him forthwith to notify the court of his acceptance or rejection of the office. A trustee shall qualify as provided in Rule 8–204.

(*f*) *Appointment of co-trustees or substitute trustees; removal; hearing.*—Subject to subdivisions (c), (d), and (e) of this rule and after hearing on such notice as the court may direct, the court may appoint co-trustees, remove trustees, and appoint substitute trustees.

(*g*) *Majority vote.*—Whenever there are 2 or more trustees, they may act by majority vote.

Rule 8–203. Trustees for estates when joint administration ordered.

(*a*) *Appointment of trustees for estates being jointly administered.*—If the court orders a joint administration of 2 or more estates pursuant to Rule 8–113 (a), it may appoint one or more common trustees or separate trustees for the estates being jointly administered. Common trustees shall not be appointed unless the court is satisfied that parties in interest in the different estates will not be prejudiced by conflicts of interest of such trustees.

(*b*) *Separate accounts.*—The trustee or trustees of estates being jointly administered shall nevertheless keep separate accounts of the property of each estate.

Rule 8–204. Qualification by trustee and receiver.

(*a*) *Qualifying bond or security.*—Except as provided hereinafter, every receiver within 5 days after his appointment and every trustee within 5 days after ratification of his appointment by the Interstate Commerce Commission shall, before entering on the performance of his official duties, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

(*b*) *Amount of bond and sufficiency of surety.*—The court shall determine the amount of the bond and the sufficiency of the surety for each bond filed under this rule.

(*c*) *Filing of bond; proceeding on bond.*—Unless otherwise provided by local rule, a bond given under this rule shall be filed with the clerk of the district court. A proceeding on the bond of a trustee or receiver may be brought by any party in interest in the name of the United States for the use of the person injured by the breach of the condition. No proceeding shall be brought on a trustee's or receiver's bond more than 2 years after his discharge.

(*d*) *Evidence of qualification.*—A certified copy of the order approving the bond or other security given by a trustee or receiver under subdivision (a) of this rule shall constitute conclusive evidence of his appointment and qualification. Whenever evidence is required that a debtor is in possession, the court may so certify and the certificate shall constitute conclusive evidence of that fact.

Rule 8–205. Substitution of successor trustee or receiver.

When a trustee or receiver dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a Chapter VIII case, his successor is automatically

substituted as a party in any pending action, proceeding, or matter without abatement.

Rule 8–206. Employment of attorneys, accountants, and consultants.

(*a*) *Conditions of employment of attorneys and accountants.*—Bankruptcy Rule 215 applies to the employment, in Chapter VIII cases, of attorneys and accountants by a trustee, receiver, or debtor. In addition an attorney appointed to represent the trustee shall be disinterested as specified in Rule 8–202 (c)(2), except that an attorney who is, or was within 2 years prior to the date of the filing of the petition employed by the debtor, a controlled railroad corporation, or an affiliate of the debtor may be appointed to represent the trustee when such appointment is in the best interest of the estate. Notwithstanding the foregoing, the court may, when it is in the best interest of the estate, authorize the employment for special purposes to be set out in the order, other than to represent the trustee in conducting the case, of an attorney who is not disinterested, provided that such attorney represents or holds no interest adverse to the estate in the matters upon which he is to be engaged.

(*b*) *Employment of attorney not disinterested.*—Any attorney who was not disinterested as required by subdivision (a) of this rule and who failed to disclose any material fact on the question of his disinterestedness may be denied the allowance of compensation or reimbursement of expenses, or both, and any allowance to the trustee may also be denied if it shall appear that he failed to make diligent inquiry into the connections of such attorney.

(*c*) *Consultants.*—The court may authorize the trustee to engage consultants to render services not relating to the debtor's ordinary course of business if it finds that the services are necessary, the person to be engaged is competent and does not hold any interest adverse to the estate that would interfere with the performance of his

services, and his employment is in the best interest of the estate.

Rule 8–207. Trustee, receiver, or debtor to conduct business of the debtor.

Subject to the jurisdiction of the Interstate Commerce Commission, the trustee, receiver, or the debtor, if the trustee or receiver has not qualified, shall conduct the business and manage the property of the debtor for such time and on such conditions as may be in the best interest of the estate and in the interest of continuing the debtor's rail operations.

Rule 8–208. Duty of trustee to investigate, make reports, furnish information, and prepare plans.

A trustee shall (1) file the lists as required by Rule 8–106; (2) file with the court within the times fixed by the court, periodic reports and summaries of the operations of the business, and such other information as may be required by the court; (3) investigate the acts, conduct, liabilities and financial condition of the debtor, the operation of its business, and any other matter relevant to the case or to the formulation of a plan; (4) file a report with the court concerning any facts ascertained by him pertaining to fraud, misconduct, mismanagement, and irregularities, and to any causes of action available to the estate; (5) if the court so authorizes, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters; (6) as soon as practicable, file a statement of his investigations, and cause copies or a summary thereof to be mailed to such persons as the court may designate; (7) if directed by the court, notify creditors and stockholders that they may submit to him plans or suggestions for the formulation of a plan, within a time fixed by him in such notice; (8) file a plan as required by Rule 8–301; (9) within 30 days after the date of the order confirming the plan or within such other time as the court may fix, file a re-

port with the court concerning the action taken by him and the progress made in the consummation of the plan and file such further reports as the court may direct until the plan has been consummated; and (10) after consummation of a plan, file an application for a final decree showing that the plan has been consummated, and the names and addresses, if known, of the holders of claims or interests which have not been surrendered or released in accordance with the provisions of the plan and the nature and amounts of such claims or interests, and such other facts as may be necessary to enable the court to pass upon the provisions to be included in the final decree.

Rule 8–209. Notices to creditors, stockholders, and governmental bodies.

(*a*) *Notices to all creditors and parties in interest.*—Except as hereinafter provided, the trustee shall give all creditors, stockholders, and indenture trustees notice by mail of (1) the hearing pursuant to Rule 8–304 (a) on approval of the plan and the time within which objections to approval may be filed; (2) the hearing pursuant to Rule 8–307 (a) on confirmation of the plan and the time within which objections to confirmation may be filed; (3) confirmation of the plan pursuant to Rule 8–307 (d); (4) the hearing on dismissal of a case pursuant to Rule 8–310 (a); and (5) dismissal of the case pursuant to Rule 8–310.

(*b*) *Notices to governmental bodies.*—Copies of notices required to be mailed to all creditors under these rules shall be mailed to (1) the Department of Transportation and the Interstate Commerce Commission at Washington, District of Columbia, and at such additional place as each shall designate in writing filed with the court; (2) the district director of internal revenue for the district in which the case is pending; (3) the governor of each state in which the debtor operates its rail lines;

(4) the Secretary of the Treasury if the filed papers disclose a stock interest of the United States; and (5) the Attorney General of the United States, and whenever the list of creditors or any other paper filed in the case discloses a debt to the United States other than one for taxes, to the United States attorney for the district in which the case is pending and, if disclosed by the filed papers, to the department, agency, or instrumentality of the United States through which the debtor became so indebted.

(*c*) *Limitation on notices to creditors and stockholders.*—The court may direct that all notices required by subdivision (a) of this rule be mailed only to creditors, stockholders, and indenture trustees (1) who file with the court a request that all such notices be mailed to them or (2) who may be designated by the court. Notice shall be given by mail of any direction under this subdivision.

(*d*) *Addresses of notices.*—All notices to which a creditor, stockholder, or indenture trustee is entitled under these rules shall be addressed to such person as he or his authorized agent may direct in a request filed with the court; otherwise, to his address shown in the lists or, if a different address is stated in a proof of claim duly filed, then at the address so stated.

(*e*) *Notice by publication.*—If the court finds that notice to creditors and stockholders by mail as provided in this rule cannot be given or that it is desirable to supplement such notice, the court may order publication thereof. The first day of publication shall start the running of any relevant time period, unless the court directs otherwise.

(*f*) *Orders designating matter of notices.*—Except as otherwise provided by these rules, the court may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notices shall be sent.

(*g*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 8–104.

Rule 8–210. Standing to be heard; intervention.

(*a*) *Standing to be heard.*

(1) The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a Chapter VIII case.

(2) A labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees.

(*b*) *Intervention of right for governmental bodies.*—The Department of Transportation and the Interstate Commerce Commission may, or if requested by the court shall, intervene in a Chapter VIII case. One representative of any state in which the debtor operates its rail line may intervene in a Chapter VIII case. Any person intervening under this subdivision shall be deemed a party in interest with the right to be heard on all matters in the case.

(*c*) *Permissive intervention.*—The court may for cause shown permit any interested person to intervene generally or with respect to any specified matter in the Chapter VIII case.

(*d*) *Service on intervenors.*—The court may enter orders governing the service of notice and papers on intervenors.

Rule 8–211. Representation of creditors and stockholders.

(*a*) *Data required.*—Unless otherwise ordered by the court for cause shown, every person or committee representing more than one creditor or stockholder, and every indenture trustee, shall file a signed statement with the court setting forth (1) the names and addresses of such creditors or stockholders; (2) the nature and amounts of their claims or stock and the time of acquisition

thereof unless they are alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the case of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision. If the court has waived the filing of a statement required by any person or committee under this subdivision, a statement shall be filed promptly setting forth any material changes in the facts disclosed to the court at the time the waiver was granted.

(*b*) *Failure to comply; effect.*—The court on its own initiative or on application or motion of any party in interest (1) may determine whether there has been a failure to comply with the provisions of this rule or with any other applicable law regulating the activities and personnel of any person, committee, or indenture trustee, or any other impropriety in connection with any solicitation, and, if it so determines, the court may refuse to permit any such person, committee, or indenture trustee to be heard further or to intervene in the case; (2) may hold invalid any authority or acceptance

given, procured, or received by a person or committee who has not complied with subdivision (a) of this rule, and (3) may examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture or deed of trust, or committee or other authorization not approved by the Interstate Commerce Commission and any claim or stock acquired by any person or committee in contemplation or in the course of a Chapter VIII case and grant appropriate relief pursuant to the Act.

Rule 8–212. Compensation for services and reimbursement of expenses.

(*a*) *Application for compensation and reimbursement.*—A person seeking compensation from the estate for services or reimbursement of necessary expenses shall file with the court an application setting forth a detailed statement of (1) the services rendered or to be rendered and expenses incurred or to be incurred; (2) if appropriate, the amounts requested; and (3) the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the filing of the petition commencing a Chapter VIII case. When an application is filed by a person whose compensation or reimbursement of necessary expenses is required to be within the maximum limit set by the Interstate Commerce Commission, a copy of the application shall be filed with the Commission. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for

the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person.

(*b*) *Procedure for allowance.*—The court may allow compensation or reimbursement of necessary expenses (1) after hearing on notice to such persons as the court may direct, or (2) after notice to such persons as the court may direct of the time within which objections to allowance may be filed, if no timely objection is filed or, if a timely objection is filed, after hearing to consider such objection. Such allowance shall not exceed the limit set by the Commission when the Commission is authorized to set such limit.

(*c*) *Limitations on allowance.*

(*1*) *Attorney, accountant, or consultant.*—Compensation may be allowed an attorney, accountant, or consultant employed pursuant to Rule 8–206 (c) only for professional services.

(*2*) *Denial of allowance.*—No compensation or reimbursement shall be allowed to any committee, attorney, or other person acting in the case in a representative or fiduciary capacity who, at any time after assuming to act in such capacity has, without the approval of the court, purchased or sold claims against, or stock of, the debtor or beneficial interests, direct or indirect, in such claims or stock, or by whom or for whose account such claims, stock, or beneficial interests therein have been otherwise acquired or transferred.

(*d*) *Disclosure of compensation paid or promised to*

attorney for debtor.—Every attorney for a debtor, whether or not he applies for compensation, shall file with the court on or before the date set for the hearing on the appointment of a trustee held pursuant to Rule 8–202 (a), or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(*e*) *Restriction on sharing of compensation.*—Except as herein provided, a person rendering services in a Chapter VIII case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a Chapter VIII case or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as a trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney other than one employed pursuant to Rule 8–206 from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 8–213 to which he is a party, or may enter such other order as may be appropriate.

Rule 8–213. Examination of debtor's transactions with its attorney.

(*a*) *Payment or transfer to attorney in contemplation of the filing of a Chapter VIII petition.*—On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a Chapter VIII petition by or against it, to an attorney for services rendered or to be rendered.

(*b*) *Invalidation of unreasonable payment or transfer.*—Any payment or transfer examined under this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The court may enter an order in favor of the estate in the amount of any excess found to have been paid or transferred.

Rule 8–214. Examination.

(*a*) *Examination on application.*—On application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless local rules otherwise provide.

(*b*) *Examination by trustee or other persons.*—The trustee shall, if the court so directs, and any other person may, with the permission of the court, examine the directors and officers of the debtor and any other witnesses.

(*c*) *Scope of examination.*—The examination under this rule may relate to acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the case or to the formulation of a plan.

(*d*) *Compelling attendance for examination and production of documentary evidence.*—The attendance of any person for examination and the production of documentary evidence may be compelled in accordance with

the provisions of Rule 45 of the Federal Rules of Civil Procedure by the use of a subpoena for a hearing or trial.

(*e*) *Place of examination of debtor.*—Without issuing a subpoena, the court may for cause shown and on such terms as it may impose order an officer, a member of the board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor to be examined under this rule at any place it designates, whether within or without the district wherein the case is pending.

(*f*) *Mileage.*—A person other than an officer, a member of the board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor shall not be required to attend as a witness pursuant to this rule unless his lawful mileage and fee for one day's attendance shall be first tendered to him. If an officer, a member of the board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor resides over 100 miles from the place of examination when he is required to appear for an examination under this rule, he shall be tendered mileage allowed by law to a witness for any distance over 100 miles from his residence at the date of the filing of the Chapter VIII petition or his residence at the time he is required to appear for such examination, whichever is the lesser.

Rule 8–215. Apprehension and removal of debtor to compel attendance for examination.

(*a*) *Order to compel attendance for examination.*—On a verified application of any party in interest alleging (1) that the examination of an officer, member of the board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor is necessary for the proper administration of the estate and that there is reasonable

cause to believe that the person is about to leave his residence or his principal place of business to avoid examination, or (2) that he has evaded service of a subpoena or order to attend for examination, or (3) that he has willfully disobeyed a subpoena or order to attend for examination, duly served on him, the court may issue to the marshal, or some other officer authorized by law, an order directing him to bring the person forthwith before the court. If after hearing the court finds the allegations to be true, the court shall thereupon examine the person or cause him to be examined as soon as possible, but, in any event, the examination shall be commenced within 10 days after he was taken into custody. If it is necessary, the court shall fix conditions for further examination and for the person's obedience to all orders made in reference thereto.

(*b*) *Removal.*—Whenever any order to bring a person before the court is issued under this rule and the person is found in a district other than that of the court issuing the order, he may be taken into custody under such order and removed in accordance with the following rules:

(1) If taken at a place less than 100 miles from the place of issue of the order, the person shall be brought forthwith before the court that issued the order.

(2) If taken at a place 100 miles or more from the place of issue of the order, the person shall be brought without unnecessary delay before the nearest magistrate, or district judge. If, after hearing, the magistrate or district judge finds that an order has issued under this rule and that the person in custody is the subject of such order, or if the person in custody waives a hearing, the magistrate or district judge shall issue an order of removal and the person in custody shall be released on conditions assuring his prompt appearance before the court which issued the order to compel his attendance.

(*c*) *Conditions of release.*—In determining what con-

ditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of Title 18, U. S. C. § 3146 (a) and (b).

Part III. Proceedings Relating to Plan, Dismissal, and Consummation of Plan

Rule 8-301. Formulation and filing of plan.

(*a*) *First filing of plan.*

(*1*) *By trustee.*—Within one year of approval of the petition or within any lesser period fixed by the court, the trustee shall file a plan with the court unless the court, after hearing on notice to such persons as the court may direct and for cause shown, extends the time within which a plan is to be filed. An application for an extension of time shall contain (A) the reasons why a plan cannot be formulated at that time, (B) a statement of the actions taken and intended to be taken in managing the debtor's estate, and (C) a summary of the debtor's operations and financial results. An extension shall not exceed one year.

(*2*) *By others.*—If the trustee does not file a plan within the one-year period specified in paragraph (1) of this subdivision or within any lesser period fixed by the court, the court may, on application after hearing on notice to such persons as the court may direct, grant to other parties in interest leave to file a plan.

(*b*) *Filing of additional plans or modifications.*—After the first filing of a plan but before transmission of the plan to the Interstate Commerce Commission under Rule 8-303, a party in interest may file another plan or a modification of a plan.

(*c*) *Copies to Interstate Commerce Commission.*—A person filing a plan or modification of a plan shall furnish a copy thereof to the Interstate Commerce Commission.

(*d*) *Form of plan.*—Every proposed plan and any

modification thereof shall be dated and identified with the name of the person or persons submitting or filing it.

Rule 8–302. Classification of claims.

For the purposes of the plan and its acceptance, the court may fix, after hearing on such notice as it may direct, the division of creditors and stockholders into classes according to the nature of their respective claims and interests.

Rule 8–303. Transmission of plan to Interstate Commerce Commission.

Not less than 30 days after the first filing of a plan under Rule 8–301, the court shall transmit all plans and modifications which have been filed with it to the Interstate Commerce Commission for filing with and consideration by the Commission.

Rule 8–304. Approval of plan by court.

(*a*) *Hearing.*—After the certification by the Interstate Commerce Commission of a plan, the record of its proceedings, its report and order, and a summary of its report, the court shall hold a hearing to rule on approval of the plan on at least 20 days' notice to the debtor, creditors, stockholders, indenture trustees, and other parties in interest as provided in Rule 8–209.

(*b*) *Notice of the hearing.*—The notice shall state the time within which objections to approval may be filed, and shall be accompanied by a copy of the plan.

(*c*) *Objections.*—Objections to approval of a plan shall be in writing and stated with particularity.

(*d*) *Ruling on approval.*—The court shall rule on approval of the plan on the basis of the record certified to it by the Interstate Commerce Commission. Notwithstanding the foregoing, the court may receive evidence of changed circumstances and evidence relating to allowances of compensation and reimbursement of expenses. The court shall file an opinion stating the reasons for its ruling on approval.

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(*e*) *Notice by publication.*—On approval of a plan, the trustee shall give notice by publication of such approval. The notice shall include the time fixed under Rule 8–305 (a) for accepting or rejecting the plan and the time within which nonregistered security holders must file a proof of claim in order to vote on the plan.

(*f*) *Procedure if plan not approved.*—If the plan is not approved, the court may (1) remand the proceeding to the Interstate Commerce Commission for reconsideration of the plan in whole or in part, or (2) direct further proceedings pursuant to Rule 8–310.

Rule 8–305. Submission of plan and notice to creditors and stockholders.

(*a*) *Time for acceptance or rejection.*—On approval of a plan, the court shall fix a time within which creditors and stockholders may accept or reject such plan.

(*b*) *Notice and accompanying information.*—The trustee shall mail to creditors and stockholders entitled to accept or reject the plan (1) a summary of the plan approved by the court; (2) a summary of the opinion of the court approving the plan, which summary shall be approved by the court; (3) the summary of the report of the Interstate Commerce Commission; (4) notice of the time within which acceptances and rejections of the plan may be filed; (5) a form of ballot conforming substantially to Official Form No. 8–7; and (6) such other information as the court may direct. The court may direct that the plan, opinion of the court, or report of the Commission be transmitted in place of, or in addition to, the summaries thereof specified in clauses (1), (2), and (3) of this subdivision. In the event only summaries are transmitted, the plan, opinion of the court, and report of the Commission shall be provided on request to parties in interest without charge.

Rule 8–306. Acceptance or rejection of plan.

(*a*) *Persons entitled to accept or reject plan; time for*

acceptance or rejection.—Any creditor whose claim is deemed allowed pursuant to Rule 8–401 (f) or has been allowed by the court and any creditor who is a security holder of record at the date the order approving the plan is entered whose claim has not been disallowed and any stockholder of record at the date the order approving the plan is entered whose stock interest has not been disallowed may accept or reject the plan within the time fixed by the court pursuant to Rule 8–305. For cause shown and within such time, the court may permit a creditor or stockholder to change or withdraw his acceptance or rejection. Notwithstanding objection to a claim or stock interest, the court may temporarily allow it to such extent as to the court seems proper for the purpose of accepting or rejecting a plan.

(*b*) *Form of acceptance or rejection.*—An acceptance or rejection may be on Official Form No. 8–7, and shall be in writing and signed by the creditor or stockholder or his authorized agent.

(*c*) *Acceptance or rejection by partially secured creditors.*—A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject the plan in both capacities.

(*d*) *Disqualification of acceptance or rejection.*—For the purpose of determining the requisite number of acceptances, the court after hearing on notice to the creditor or stockholder may disqualify any acceptance or rejection of the plan if such acceptance or rejection was not in good faith in light of or irrespective of the time of the acquisition of the claim or stock by such creditor or stockholder.

(*e*) *Computing requisite majorities.*—The requisite majorities necessary for the acceptance of a plan shall be computed on the basis of the claims and stock interests of creditors and stockholders entitled to vote on the plan who file an acceptance or rejection of the plan within the time prescribed.

Rule 8–307. Confirmation of plan.

(*a*) *Hearing.*—The court shall hold a hearing to rule on confirmation of the plan on at least 20 days' notice to the debtor, creditors, stockholders, indenture trustees, and other parties in interest as provided in Rule 8–209.

(*b*) *Notice.*—The notice shall state the results of the submission of the plan, the time within which objections to confirmation may be filed, and, if appropriate, that the court may confirm the plan notwithstanding the failure of the requisite majorities to accept the plan.

(*c*) *Objection.*—Objections to confirmation of a plan shall be in writing and stated with particularity.

(*d*) *Opinion; order of confirmation.*—The court shall file an opinion stating the reasons for its conclusions, and if the plan is confirmed, the order of confirmation shall conform substantially to Official Form No. 8–8. Notice of entry of the order of confirmation shall be mailed promptly as provided in Rule 8–209.

(*e*) *Procedure if plan not confirmed.*—If the plan is not confirmed, the court may (1) remand the proceeding to the Interstate Commerce Commission for reconsideration of the plan in whole or in part, or (2) direct further proceedings pursuant to Rule 8–310.

Rule 8–308. Approval or confirmation of plan after remand to the Interstate Commerce Commission.

(*a*) *Hearing.*—After a remand of the proceeding to the Interstate Commerce Commission under Rule 8–307 (e) and certification by the Commission of a plan, the record of its proceedings, its report and order, and summary of its report, the court shall hold a hearing on at least 20 days' notice to the debtor, creditors, stockholders, indenture trustees, and other parties in interest as provided in Rule 8–209, to rule on approval or confirmation of the plan.

(*b*) *Notice of hearing.*—The notice shall state the time within which objections to approval or confirma-

tion may be filed, and shall be accompanied by the plan or such other information as the court may direct.

(*c*) *Objections.*—Objections to approval or confirmation of the plan shall be in writing and stated with particularity.

(*d*) *Ruling.*

(*1*) *Confirmation.*—If the court finds that any changes in the plan from the plan as previously submitted pursuant to Rule 8–305 do not materially and adversely affect the interests of creditors or stockholders, the plan shall be deemed accepted by all creditors or stockholders who have previously accepted the plan, and the court may pursuant to Rule 8–307 confirm the plan, remand the plan to the Commission, or direct further proceedings pursuant to Rule 8–310.

(*2*) *Approval.*—If the court finds that any changes in the plan from the plan as previously submitted pursuant to Rule 8–305 do materially and adversely affect the interests of creditors or stockholders, the court may pursuant to Rule 8–304 approve the plan, remand the plan to the Commission, or direct further proceedings pursuant to Rule 8–310. On approval, the requirements of Rules 8–305 and 8–306 with respect to submission of the plan and acceptance and rejection of the plan shall apply except that any creditor or stockholder who accepted the plan as previously submitted and who fails to file with the court a timely rejection shall be deemed to have accepted the plan as changed.

Rule 8–309. Consummation; final decree.

(*a*) *Orders in aid of consummation.*—The court may make such orders as may be necessary or useful in aid of consummation of a plan including fixing the time and manner for the deposit and distribution of the cash or other consideration under the plan, directing the debtor, trustee, mortgagees, indenture trustees, and other necessary parties to execute and deliver such instru-

ments as may be necessary to effect a retention or transfer of property dealt with by the confirmed plan, and to perform other acts, including the satisfaction of liens.

(*b*) *Final decree.*—On consummation of the plan, the court shall enter a final decree which shall contain provisions (1) stating the effect of confirmation and consummation on the creditors and stockholders of the debtor; (2) discharging the trustee; (3) making such provisions by way of injunction or otherwise as may be equitable; and (4) closing the estate.

Rule 8–310. Dismissal of case.

(*a*) *Dismissal.*—The court may, after hearing on at least 20 days' notice to the debtor, creditors, stockholders, and indenture trustees as provided in Rule 8–209, dismiss the case if (1) a plan certified by the Interstate Commerce Commission is not approved pursuant to Rule 8–304 or not confirmed pursuant to Rule 8–307 and there is no remand of the proceeding to the Commission; (2) in light of all existing circumstances there is undue delay in the accomplishment of a reasonably expeditious reorganization; or (3) the Commission certifies that no plan can be formulated within a reasonable time. Before dismissing a Chapter VIII case for undue delay the court shall request the Commission to submit to the court a report and recommendation concerning dismissal of the case.

(*b*) *Notice of dismissal to creditors.*—Promptly after entry of an order of dismissal under this rule, notice thereof shall be published and given to creditors, stockholders, and indenture trustees in the manner provided in Rule 8–209.

(*c*) *Revesting of title.*—A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to its property unless the order provides otherwise.

Part IV. Claims and Distribution to Creditors and Stockholders

Rule 8–401. Proof of claim or interest.

(*a*) *List of creditors and stockholders.*—The list of creditors and stockholders prepared and filed with the court pursuant to Rule 8–106 shall constitute prima facie evidence of the validity and amount of claims of creditors which are not listed as disputed, contingent, or unliquidated as to amount, and of stock interests and, except as provided in subdivision (b)(3) of this rule with respect to claims, it shall not be necessary for the holder of such claim or stock interest to file a proof of claim or interest.

(*b*) *Filing proof of claim.*

(*1*) *Time for filing.*—A proof of claim may be filed at any time prior to the approval of a plan except that the court may fix a different bar date for the filing of claims and give notice thereof as provided in subdivision (c) of this rule.

(*2*) *Who may file.*—Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (b)(1) of this rule.

(*3*) *Who must file.*

(A) Any creditor, including the United States, a state, or any subdivision thereof, whose claim is listed as disputed, contingent, or unliquidated as to amount, shall file a proof of claim within the time prescribed by subdivision (b)(1) of this rule except as provided in paragraph (3)(C) of this subdivision; any such creditor who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(B) Notwithstanding the foregoing, the court may, at any time, require the filing of a proof of claim within such time as it may fix. Except as provided in paragraph (3)(C), any person required under this paragraph

(3)(B) to file a proof of claim who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(C) On application, the court may permit the filing of a claim after the expiration of the time for filing fixed under this rule if the failure to file was the result of excusable neglect.

(*4*) *Evidentiary effect.*—A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of such claim. Such a proof of claim shall supersede any listing of that claim made pursuant to Rule 8–106.

(*5*) *Form and place of filing.*—A proof of claim shall consist of a statement in writing setting forth a creditor's claim and, except as provided in Rule 8–402 (a), shall be executed by the creditor or by his authorized agent and filed with the court, unless the court otherwise directs. Except with respect to bonds, debentures, and other debt instruments issued under a single agreement, whenever a claim is founded on a writing or secured pursuant to a writing by property of the debtor, the original or duplicate of the writing shall be filed with the proof of claim unless the writing has been lost or destroyed. If lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by satisfactory evidence that the security interest has been perfected.

(*6*) *Filing by indenture trustee.*—An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee.

(*c*) *Notice.*

(1) The trustee shall give notice by mail as to the filing of proofs of claim to all indenture trustees and creditors, except record holders of bonds, debentures,

notes, and other debt securities. The notice shall conform substantially to Official Form No. 8–5.

(2) Notice of any order entered pursuant to subdivision (b)(3)(B) shall be given by mail to persons required by the order to file a proof of claim.

(*d*) *Transfer of claim.*—If a claim other than one founded on a bond or debenture has been assigned, a statement setting forth the terms of the assignment shall be filed with the court and a copy thereof delivered to the trustee.

(*e*) *Duty to examine and object to claims.*—The trustee shall examine listed claims and proofs of claims and, unless no purpose would be served thereby, object to the allowance of improper claims.

(*f*) *Allowance when no objection made.*—Subject to the provisions of subdivision (b)(3) of this rule, a claim filed in accordance with this rule or Rule 8–402 (a), or listed in accordance with Rule 8–106, shall be deemed allowed unless objection is made by a party in interest.

(*g*) *Objection to allowance.*—An objection to the allowance of a claim shall be in writing. A copy of the objection and at least 10 days' notice or, if the claim is for taxes, at least 30 days' notice of a hearing thereon shall be mailed or delivered to the claimant, the debtor, and the trustee. If an objection is joined with a demand for relief of the kind specified in Rule 8–601, the proceeding thereby becomes an adversary proceeding.

(*h*) *Reconsideration of claims.*—A party in interest may move for reconsideration of an order allowing or disallowing a claim against the debtor. If the motion is granted, the court may after hearing on notice make such further order as may be appropriate.

(*i*) *Proof of right to record status.*—For the purposes of Rules 8–306 and 8–404 and for the purpose of receiving notices, a person who is not the record holder of a security may show that he is nevertheless entitled to be treated as such holder of record by filing with the court

proof thereof. An objection to such proof may be filed by any party in interest.

Rule 8–402. Claim by codebtor.

(*a*) *Filing of claim.*—If a creditor has not filed his proof of claim pursuant to Rule 8–401 (b), a person who is or may be liable with the debtor to that creditor, or who has secured that creditor, may, during the time for filing claims prescribed by Rule 8–401 (b), execute and file a proof of claim pursuant to this rule in the name of the creditor, if known, or, if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 8–401 (b) and it shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.

(*b*) *Filing of acceptance; substitution of creditor.*—A person who has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or, if unknown, in his own name, but if the creditor files a proof of claim within the time permitted by Rule 8–401 (b) or files a notice with the court of his intention to act in his own behalf prior to confirmation, he shall be substituted for such other person, with respect to that claim, for all purposes of the Chapter VIII case.

Rule 8–403. Withdrawal of claim.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a proof of claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, he may not withdraw the claim save on application or motion with notice to the trustee and on

order of the court containing such terms and conditions as the court deems proper.

Rule 8–404. Participation and distribution under plan.

(*a*) *Distribution.*—Subject to the provisions of subdivision (b) of this rule, after confirmation of a plan distribution shall be made, in accordance with the provisions of the plan, to holders of stock, bonds, debentures, notes, and other securities of record at the date the order confirming the plan becomes final whose claims or stock interests have not been disallowed and to other creditors whose claims have been allowed, and to indenture trustees who have filed claims pursuant to Rule 8–401 (b)(6) and which are allowed.

(*b*) *Bar date for participation in distribution.*—When a plan requires presentment or surrender of securities or the performance of any other act as a condition to participation in distribution under the plan, the court shall, on the confirmation of the plan, enter an order on such notice to all affected persons as it may direct, fixing a time not less than 5 years after the final decree closing the estate within which such action shall be taken. Persons who have not within such time presented or surrendered their securities or who have not taken such other action required by the plan shall not participate in distribution thereunder.

Rule 8–405. Distributions; unclaimed money and securities.

(*a*) *Distributions.*—Except as otherwise provided in the plan and except with respect to an indenture trustee authorized by the indenture under which he is trustee to receive distributions, Bankruptcy Rule 308 applies in Chapter VIII cases to cash distributions made under a plan. Except as otherwise provided in the plan or ordered by the court, consideration other than cash distributed under the plan shall be issued in the name of the creditor or stockholder entitled thereto, and if a

power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Rule 8–706, such consideration shall be transmitted to such other person.

(*b*) *Unclaimed money and securities.*—Unless otherwise provided in the plan, the securities or cash remaining unclaimed at the expiration of the bar date fixed pursuant to Rule 8–404 (b), or any extension thereof, shall be delivered to the new corporation acquiring the assets of the debtor under the plan, if any, otherwise to the reorganized debtor.

Part V. Property of Estate

Rule 8–501. Petition as automatic stay of actions against debtor, lien enforcement, and setoff.

(*a*) *Stay of actions and lien enforcement.*—A petition filed under Rule 8–102 or 8–103 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against it, or of any act or the commencement or continuation of any court proceeding to enforce any lien against its property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of its estate, or of the setoff of any obligation to the debtor against any claim owing by the debtor, except that this rule shall not operate (1) to stay the commencement or prosecution to judgment of any claim or action for damages caused by the operation of trains, buses, or other means of transportation, or (2) to prevent an owner, as trustee, lessor, or otherwise, from taking possession of rolling stock equipment leased or conditionally sold to the debtor when authorized under the lease or conditional sale contract.

(*b*) *Duration of stay.*—Except as it may be terminated, annulled, modified, or conditioned by the court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the case is closed or dismissed or the prop-

erty subject to the lien is, with the approval of the court, abandoned or transferred.

(*c*) *Relief from stay.*—On the filing of a complaint seeking relief from a stay provided by this rule, the court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(*d*) *Ex parte relief from stay.*—On the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or liquidation of its estate, or setoff, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee or receiver, or, if none has been appointed or qualified, to the debtor, petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(*e*) *Availability of other relief.*—Nothing in this rule precludes the issuance of, or relief from, any stay, restraining or injunction order when otherwise authorized.

Rule 8–502. Duty of trustee or receiver to give notice of Chapter VIII case.

(*a*) *Real property.*—Unless otherwise ordered by the court, as soon as possible after his qualification a receiver or, if a receiver has not done so, the trustee shall record a certified copy of the petition in the office where transfers of real property are recorded in every county where the debtor has an interest in real property not exempt from execution. The recording of a copy pursuant to this subdivision is not necessary, however, in the county in which is kept the record of the original proceedings in the case or in any office where such a copy has previously been recorded.

(*b*) *Personal property.*—Unless otherwise ordered by the court, as soon as possible after his qualification a receiver or, if a receiver has not done so, the trustee shall give notice of the case to every person known to be holding money or property subject to withdrawal or order of the debtor, including every bank, building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor. No notice need be given, however, to any of the forenamed persons who has knowledge or has previously been notified of the case, and no notice need be given with respect to property exempt from execution.

Rule 8–503. Burden of proof as to validity of postpetition transfer.

Any person asserting the validity of a transfer under § 70d of the Act shall have the burden of proof.

Rule 8–504. Accounting by prior custodian of property of the estate.

(*a*) *Accounting required.*—Any person required by the Act to deliver property in his possession or control to the trustee, receiver, or debtor shall promptly file a written report and account with the court in which the Chapter VIII case is pending with respect to the property of the estate and his administration thereof.

(*b*) *Examination of administration.*—On the filing of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, the court shall determine the propriety of such administration, including the reasonableness of all disbursements.

Rule 8–505. Money of the estate: Authorized deposits, investments, and disbursement.

(*a*) *Authorized deposits and investments.*—Except as provided in Rule 8–509 (c), the trustee, receiver, or debtor shall deposit all money received by him in a checking or interest bearing account of a banking institution whose accounts are insured under Title 12, U. S. C., § 1821, or purchase securities or obligations of the United States or an agency thereof backed by the full faith and credit of the United States maturing in not more than 6 months.

(*b*) *Other deposits and investments.*—On application of the trustee, receiver, or debtor the court may authorize the acquisition of certificates of deposit or similar debt obligations of banking institutions insured under Title 12, U. S. C., § 1821, or securities or obligations of the United States or an agency thereof backed by the full faith and credit of the United States.

(*c*) *Security.*—The court may require banking institutions which hold funds of the estate or have issued obligations to the trustee, receiver, or debtor in excess of the maximum amount insured under Title 12, U. S. C., § 1821,

to post a bond secured by the undertaking of an authorized corporate surety approved by the court, or by the deposit of securities designated in Title 6, U. S. C., § 15. Securities accepted for deposit in lieu of a surety on a depository bond shall be deposited by the banking institution in the custody of a Federal Reserve bank or branch thereof designated by the court and shall be subject to the order of the court.

(*d*) *When adequacy of security doubtful.*—A trustee, receiver, or debtor shall not deposit money received or held by him as a fiduciary under the Act in, or acquire debt obligations of, a banking institution required to post a bond or security under subdivision (c) if he has reasonable cause to believe that the bond or the security therefor is or may be inadequate in view of existing and expected deposits or holdings of certificates of deposit or similar debt obligations.

(*e*) *Conditions of bond; place of filing; proceeding on bond.*—The condition of a bond given under this rule shall be that the banking institution will well and truly account for all money deposited with it as depository and for all interest payable on savings and time deposits, will pay certificates of deposit and similar debt obligations in accordance with their terms, will pay out such money and interest only in accordance with the Act, these rules, and rules and orders of the court, and will otherwise faithfully perform all its duties as depository. A bond given under this rule shall be filed with the court and may be proceeded on in the name of the United States for the use of any person injured by a breach of the condition.

(*f*) *New bond or additional securities: When required.*—The court shall direct a banking institution required under subdivision (c) to post a bond or security to give a new bond or additional securities whenever the prior bond, together with securities deposited pursuant to subdivision (c), does not appear to constitute adequate security in view of existing and expected deposits or

holdings of certificates of deposit or similar debt obligations.

(*g*) *Failure to comply.*—If any depository fails, within the time fixed, to give a bond under this rule or to deposit adequate securities, the court shall order the depository immediately to pay over all money on deposit with it, with all interest payable thereon, and shall direct that the bank is no longer a proper depository for the Chapter VIII case.

(*h*) *Relief from liability on bond.*—A surety on the bond of a banking institution may, by an application setting forth the grounds therefor, request to be relieved from liability with respect to any subsequent default of the banking institution. If, after hearing on notice to such persons as the court may direct, the court determines that the application can be granted without injury to any party in interest, the applicant shall be relieved and a new bond or other appropriate security shall be required.

(*i*) *Withdrawals and disbursements.*—The trustee, receiver, or debtor shall withdraw and disburse money of the estate only by check or other method approved by the court.

Rule 8–506. Adoption and rejection of executory contracts.

(*a*) *Adoption or rejection after hearing.*—When a motion is made for the adoption or rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other persons as the court may direct.

(*b*) *Authority to adopt or reject within classes.*—Notwithstanding subdivision (a), on motion of the trustee and after hearing on such notice as the court may direct, the court may fix a class or classes of executory contracts, including unexpired leases other than the leases of lines of railroad, and authorize the trustee to give notice by

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mail to the parties to any contract within such class or classes of the adoption or rejection of the contract. Unless a motion for relief from the trustee's action is made by a party to the contract or other party in interest within 25 days of mailing of notice, or such other time as the court may fix, the adoption or rejection shall be deemed approved, and the trustee's notice shall so state. If a timely motion for relief is made, the court shall set a hearing on notice to the parties to the contract and such other persons as the court may direct.

(*c*) *Periodic reports.*—The trustee shall make periodic reports, as directed by the court, of the contracts adopted or rejected under this rule.

(*d*) *Motion to compel adoption or rejection by trustee.*—On motion of a party in interest after hearing on such notice as the court may direct, the court may fix a time within which an executory contract, including an unexpired lease, shall be adopted or rejected.

(*e*) *Proof of claim on rejection and notice.*—In order for his claim to be allowed a party to a rejected executory contract shall file a proof of claim in the manner provided in Rule 8–401 (b)(5) within such reasonable time after rejection as the court may fix. The trustee shall give notice by mail to the parties to rejected contracts of the time within which proofs of claim arising from rejection of contracts shall be filed. Such notice may be combined with the notice given under subdivision (b) of this rule.

Rule 8–507. Operation of leased line after rejection.

After the rejection of a lease of a line of railroad of which the debtor is lessee, the court, on its own motion or on motion of the trustee or lessor to determine whether the trustee or lessor shall operate the leased line, shall set a hearing thereon on such notice as it may direct.

Rule 8–508. Appraisal of property; compensation and eligibility of appraisers and auctioneers.

(*a*) *Appraiser: Appointment and duties.*—The court may appoint one or more competent and disinterested ap-

praisers who shall prepare and file with the court an appraisal of the property of the debtor. The court may prescribe how such appraisal shall be made.

(*b*) *Compensation and eligibility of auctioneers and appraisers.*—No auctioneer shall be employed or appraiser appointed except on an order of the court fixing the amount or rate of compensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as an auctioneer or appraiser. No residence or licensing requirement shall apply to an auctioneer employed or appraiser appointed under this rule.

Rule 8–509. Sale of property free of lien or other interest.

(*a*) *Sale after hearing.*—On motion of the trustee, receiver, or debtor and after hearing on notice to persons having an interest in the property or to the indenture trustee or other representative of such persons, if any, and to such other persons as the court may direct, the court may, if it finds that it is in the best interest of the debtor's estate and ultimate reorganization, authorize the sale of real or personal property of the debtor, on such terms and conditions as it may approve, free of a lien or any other interest for which the holder may be compelled to take a money satisfaction.

(*b*) *Authority to sell property within classes.*—Notwithstanding subdivision (a) of this rule, on motion of the trustee, receiver, or debtor and after hearing on such notice as the court may direct, the court may, if it finds that it is in the best interest of the debtor's estate and ultimate reorganization, fix a class or classes of real or personal property of the debtor, and authorize, subject to such terms and conditions as the court may approve, the sale of property within such class or classes free of liens and any other interests for which the holder may be compelled to take a money satisfaction. The trustee shall give notice by mail to persons having an interest in the property or to the indenture trustee or other representa-

tive of such persons, if any, of proposed sales under this subdivision. Unless a motion for relief is made by a person with an interest in the property or other party in interest within 25 days of the mailing of the notice, or such other time as the court may fix, the sale shall be deemed approved, and the trustee's notice shall so state. If a timely motion is made, the court shall set a hearing on notice to such persons as the court may direct.

(*c*) *Proceeds of sale.*—The proceeds received from the sale of property under this rule shall be deposited with such depository and on such terms as the court may direct.

(*d*) *Periodic reports.*—The trustee, receiver, or debtor shall make periodic reports, as directed by the court, of the sales under this rule.

Rule 8–510. Lease of property and sale other than free of lien or other interest.

(*a*) *Sale or lease after hearing.*—Except as provided in Rule 8–509, on motion of the trustee, receiver, or debtor and after hearing on such notice as the court may direct, the court may, if it finds that it is in the best interest of the debtor's estate and ultimate reorganization, authorize the sale or lease of real or personal property of the debtor, on such terms and conditions as the court may approve.

(*b*) *Authority to sell or lease property within classes.*—Except as provided in Rule 8–509 and notwithstanding subdivision (a) of this rule, on motion of the trustee, receiver, or debtor and after hearing on such notice as the court may direct, the court may, if it finds that it is in the best interest of the debtor's estate and ultimate reorganization, fix a class or classes of real or personal property of the debtor and authorize the trustee, receiver, or debtor to sell or lease property within such class or classes, on such terms and conditions as the court may approve.

(*c*) *Periodic reports.*—The trustee, receiver, or debtor

shall make periodic reports, as directed by the court, of the sales and leases under this rule.

Rule 8–511. Abandonment of property other than a line of railroad.

After hearing on such notice as the court may direct and on approval by the court, the trustee, receiver, or debtor may abandon any property other than a line of railroad or portion thereof.

Rule 8–512. Abandonment of line of railroad or portion thereof.

(*a*) *Authority to proceed before regulatory agencies.*—On application of the trustee, the court, with or without hearing, may authorize initiation of proceedings to abandon a line of railroad or portion thereof before appropriate regulatory agencies.

(*b*) *Abandonment after hearing.*—On motion of the trustee and after hearing, the court may authorize the abandonment of a line of railroad or portion thereof conditioned on the issuance of the necessary approval by appropriate regulatory agencies. The trustee shall give notice of the hearing to the Department of Transportation, the Interstate Commerce Commission, and persons having an interest in the property, or to the indenture trustee or other representative of such persons, if any, and notice shall also be given by publication to the communities which may be affected by the abandonment.

Rule 8–513. Trustee certificates.

On motion of the trustee, receiver, or debtor to authorize the trustee to issue certificates of indebtedness the court shall set a hearing on at least 15 days' notice. Notice shall be given to indenture trustees and such other persons as the court may direct, and notice shall also be given by publication. If such motion is made, the court may, with or without hearing, authorize the initiation of proceedings before the Interstate Commerce Commission to obtain any necessary approval.

Rule 8–514. Compromise and arbitration.

(*a*) *Compromise or settlement after hearing.*—On application of the trustee, receiver, or debtor and after hearing on notice to such persons as the court may direct, the court may approve a compromise or settlement. For cause shown the court may direct that notice not be given.

(*b*) *Authority to compromise or settle controversies within classes.*—After hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee, receiver, or debtor to compromise or settle controversies within such class or classes without further hearing or notice.

(*c*) *Arbitration.*—On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

Rule 8–515. Redemption of property from lien or sale.

On application by the trustee, receiver, or debtor after hearing on such notice as the court may direct, the court may authorize the redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law.

Rule 8–516. Prosecution and defense of proceedings by trustee, receiver, or debtor.

Subject to Rules 8–512 and 8–513, the trustee, receiver, or debtor may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal.

Rule 8–517. Preservation of voidable transfer.

Whenever any transfer is voidable by the trustee, the court may determine, in an adversary proceeding in which are joined persons claiming interests or rights in the property subject to the transfer, whether the transfer

shall be avoided only or shall be preserved for the benefit of the estate.

PART VI. ADVERSARY PROCEEDINGS

Rule 8–601. Adversary proceedings.

Rule 8–602 governs any proceeding instituted by a party in a Chapter VIII case to (1) recover money or property other than a proceeding under Rule 8–213 or Rule 8–504; (2) determine the validity, priority, or extent of a lien or other interest in property; (3) secure the release of funds deposited under Rule 8–509 (c); (4) obtain an injunction; or (5) obtain relief from a stay as provided in Rule 8–501. Such a proceeding shall be known as an adversary proceeding.

Rule 8–602. Applicability of Federal Rules of Civil Procedure and Bankruptcy Rules to adversary proceedings.

(*a*) *Federal Rules of Civil Procedure.*—Rules 3, 5, 7 (a), 8–10, 12–21, 22 (1), 23–26, 28–37, 41, 42, 52, 54–56, 64–65, and 67–71 of the Federal Rules of Civil Procedure apply to adversary proceedings in Chapter VIII cases, except that:

(1) The reference in Rule 5 to Rule 4 shall be read as a reference to Bankruptcy Rule 704.

(2) The reference in Rule 8 to Rule 11 shall be read as a reference to Bankruptcy Rule 911.

(3) The reference in Rule 10 to "caption" shall be read as "caption conforming substantially to the caption of Official Form 8–1."

(4) The following words shall be added at the beginning of Rule 12 (h)(3): "Subject to Bankruptcy Rule 915."

(5) The following clause shall be added at the end of the last sentence of Rule 13 (a): "(3) a party sued by a trustee or receiver need not state as a counterclaim any claim which he has against the debtor"; and the

following words shall be added at the end of the last sentence of Rule 13 (f): "or by commencing a new adversary proceeding or separate action."

(6) The following words shall be added at the beginning of Rule 17 (a): "Except as provided in Rules 8–204 (c) and 8–505 (e)."

(7) The reference in Rule 30 (a) to Rule 4 (e) shall be read as a reference to Bankruptcy Rule 704 (d)(1).

(8) The following is added at the end of paragraph one of Rule 65 (c): "The court may excuse compliance with this subdivision when the applicant is a trustee, receiver, or debtor."

(*b*) *Bankruptcy Rules.*—Bankruptcy Rules 704, 719 (b), 727, and 782 apply to adversary proceedings in a Chapter VIII case, except that:

(1) The reference in Bankruptcy Rule 704 (a) to "and shall forthwith issue a summons" shall be read as "and the district judge or clerk shall forthwith issue a summons," and the following sentence shall be added at the end of the last sentence of Rule 704 (a): "Unless the court otherwise directs, if the trustee or intervenors are not parties to the adversary proceeding, they shall be served with a copy of the complaint." The reference in Bankruptcy Rule 704 (f)(2) to Rule 220 shall be read as a reference to Rule 8–213.

(2) The reference in Bankruptcy Rule 719 (b) to "subdivision (a)" shall be read as a reference to "Rule 19 (a) of the Federal Rules of Civil Procedure."

(3) The references in Bankruptcy Rule 727 to Bankruptcy Rules 734 and 735 shall be read as references to Rules 34 and 35 of the Federal Rules of Civil Procedure.

(4) The second sentence of Bankruptcy Rule 782 is deleted.

PART VII. GENERAL PROVISIONS

Rule 8–701. General definitions.

The definitions of words and phrases in § 1 of the Act govern their use in these rules to the extent they are not

inconsistent with these rules. In addition, the following words and phrases used in these rules have the meanings herein indicated unless they are inconsistent with the context:

(1) "Accountant" includes an accounting partnership or corporation.

(2) "Act" means the Bankruptcy Act.

(3) "Affiliate" of a debtor means any person other than a railroad corporation who is (A) a corporation 25 per cent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or (B) a person who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the debtor, or (C) a corporation 25 per cent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by a person who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the debtor, or (D) a person substantially all of whose property is operated under lease or operating agreement by the debtor.

(4) "Application" includes any request to the court for relief that is not a pleading or proof of claim. An application not made in open court shall be in writing unless a writing is excused by the court. An application for an order against another party may be required to be made by motion.

(5) "Attorney" includes a law partnership or corporation.

(6) "Claims" includes debts, securities other than stock, liens, and all claims of whatever character against the debtor or its property whether or not provable under § 63 of the Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent.

(7) "Creditor" means the holder of any claim.

(8) "Controlled railroad corporation" means a railroad corporation 25 per cent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by a debtor.

(9) "Court" means the United States district court or a judge thereof.

(10) "Debtor" means a railroad corporation by or against which a Chapter VIII petition has been filed.

(11) "Leased line" means a railroad corporation substantially all of whose properties are operated by a debtor under lease or operating agreement.

(12) "Motion" means an application to the court for an order in an adversary proceeding or in a proceeding on a contested petition or to determine any other contested matter. Unless made during a hearing or trial, a motion shall be made in writing, shall conform substantially to a pleading in form, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(13) "Person" includes an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or unit thereof.

(14) "Plan" means a plan of reorganization in a Chapter VIII case.

(15) "Railroad corporation" means a corporation which is a common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment.

(16) "Securities" includes notes, bonds, and other evidences of indebtedness, either secured or unsecured, beneficial interests, and certificates of beneficial interest in property and stock.

(17) "Stock" includes membership, shares, and similar interests in the debtor, voting trust certificates, and options and warrants to receive or to subscribe for stock.

(18) "Stockholder" means the holder of any stock.

Rule 8–702. Meanings of words in the Federal Rules of Civil Procedure and Bankruptcy Rules when applicable in Chapter VIII cases.

The following words and phrases used in the Federal Rules of Civil Procedure or Bankruptcy Rules made applicable in Chapter VIII cases shall have the meanings herein indicated unless they are inconsistent with the context:

(*1*) *Federal Rules of Civil Procedure.*—"Action" or "civil action" means an adversary proceeding or, when appropriate, a Chapter VIII case, or a proceeding on a contested petition or to determine any other contested matter.

(*2*) *Bankruptcy Rules.*

(A) "Bankrupt" means debtor.

(B) "Bankruptcy" or "bankruptcy case" means Chapter VIII case.

(C) "Court," "referee," or "bankruptcy judge" means the United States district court or a judge thereof.

(D) "Receiver," "trustee," "receiver in bankruptcy," or "trustee in bankruptcy" means the receiver, trustee, or debtor in the Chapter VIII case.

Rules 8–703. Applicability of Federal Rules of Civil Procedure and Bankruptcy Rules.

(*a*) *Federal Rules of Civil Procedure.*—Rules 6, 43–46, 53, 58–63, 65.1, 77, 79, and 80 of the Federal Rules of Civil Procedure apply in Chapter VIII cases, except that:

(1) The references in Rule 6 (b) to various rules shall also include a reference to Rule 8–202 (a).

(2) The following shall be added to Rule 6: "(f) Reduction. When by these rules or by a notice given

thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may in its discretion with or without application or notice order the period shortened; but it may not reduce the time for taking any action under Rules 8–304 (a), 8–307 (a), 8–310 (a), and 8–513."

(3) The reference in Rule 43 (e) to "Evidence on Motions" shall be read as "Evidence on Motions or Applications," and the reference to "When a motion is based on facts not appearing in the record" shall be read as "When a motion or application is based on facts not appearing in the record."

(4) The reference in Rule 53 (a) to "may appoint a special master therein" shall be read as a reference to "may appoint as a special master a person designated eligible by the appropriate court of appeals." The second sentence of Rule 53 (a) is deleted.

(5) The following clause shall be added at the end of the second sentence of Rule 60 (b): "except that a motion to reopen a case or for reconsideration of an order allowing or disallowing a claim against the debtor entered without a contest is not subject to the one-year limitation."

(6) The following shall be added to Rule 62: "(i) Effect of Appeal on Unstayed Order. Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal."

(7) The sentence in Rule 65.1 "His liability may be enforced on motion without the necessity of independent action" shall be read as "His liability may be enforced in an adversary proceeding governed by the rules in Part VI." The last sentence of Rule 65.1 is deleted.

(8) The reference in Rule 79 to "civil docket" shall be read as "bankruptcy docket."

(*b*) *Bankruptcy Rules.*—Bankruptcy Rules 508, 903, 904, 907–909, 911, 912, 915, 918, 927, and 928 apply in Chapter VIII cases, except that the reference in Rule 915 to Rule 112 shall be read as a reference to Rule 8–110.

Rule 8–704. Service and Filing of Applications, Motions, and Other Papers.

(*a*) *Service on trustee and intervenors: When required.*—Except as otherwise provided in these rules or by order of the court, every order required by its terms to be served, every appearance, objection, application, motion, or paper relating to discovery, other than an application or motion which may be heard ex parte, shall be served on the trustee and intervenors.

(*b*) *Service: How made.*—Whenever under these rules service is required or permitted to be made on a person represented by an attorney the service shall be made upon the attorney unless service on the person himself is ordered by the court. Service on the attorney or on the person shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the person to be served; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete on mailing.

(*c*) *Filing.*—All papers after the petition required to be served shall be filed with the court either before service or within a reasonable time thereafter. The court may prescribe the number of copies to be filed.

(*d*) *Filing with the court.*—The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 8–705. Procedure in contested matters not otherwise provided for.

In a contested matter in a Chapter VIII case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No responsive pleading is required under this rule, but the court may order an answer to a motion. In all such matters, unless the court otherwise directs, the following Federal Rules of Civil Procedure shall apply: 21, 25, 26, 28–30 (as Rule 30 is modified by Rule 8–602 (a)(7)), 31–37, 41, 42, 52, 54–56, 62, 64, 69, and 71. The court may at any stage in a particular matter direct that one or more of the other Federal Rules of Civil Procedure, as incorporated and modified by Rule 8–602, shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending Chapter VIII case may proceed in the same manner as provided in Bankruptcy Rule 727 for the taking of a deposition before an adversary proceeding. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

Rule 8–706. Representation and appearances; power of attorney.

(*a*) *Authority to act personally or by attorney.*—Subject to the provisions of Rule 8–211, a debtor, creditor,

stockholder, indenture trustee, committee or group, or any other person may in a Chapter VIII case (1) appear and act in his own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(*b*) *Notice of appearance.*—An attorney appearing in a Chapter VIII case shall file a notice of appearance with his name, business address, and telephone number unless his appearance is otherwise noted in the record.

(*c*) *Power of attorney.*—The authority of any agent, attorney in fact, or proxy for any purpose other than the execution and filing of a proof of claim or any acceptance or rejection of a plan shall be evidenced by a written power of attorney acknowledged before an officer authorized to administer oaths in proceedings before courts of the United States or under laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country.

stockholder, indenture trustee, committee or group of any other person may in a Chapter VIII case (1) appear and act in his own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) *Notice of appearance.*—An attorney appearing in a Chapter VIII case shall file a notice of appearance with his name, business address, and telephone number unless his appearance is otherwise noted in the record.

(c) *Power of attorney.*—The authority of any agent, attorney in fact, or proxy for any purpose other than the execution and filing of a proof of claim or any acceptance or rejection of a plan shall be evidenced by a written power of attorney acknowledged before an officer authorized to administer oaths in proceedings before courts of the United States or under laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country.

OFFICIAL CHAPTER VIII FORMS

[NOTE: These official forms shall be observed and used, with such alterations as may be appropriate to suit the circumstances. See Bankruptcy Rule 909.]

FORM No. 8-1

VOLUNTARY PETITION UNDER CHAPTER VIII

United States District Court

for the .... District of ....

In re	
....,	Bankruptcy No. ....
Debtor	Chapter VIII

VOLUNTARY PETITION UNDER CHAPTER VIII

1. Petitioner's post-office address is ....
....

2. Petitioner is a railroad corporation organized and existing under the laws of .... and is qualified to file this petition and is entitled to the benefits of Chapter VIII of the Bankruptcy Act.

3. Petitioner's railroad line is operated in the state of .... [*or* in the states of .... and ....] and its principal operating office [*or* executive office] has been within this district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

4. Petitioner is insolvent [*or* unable to pay its debts as they mature].

5. Petitioner's most recent annual report and financial statements as required by the Interstate Commerce Commission to be filed with the Commission are attached.

6. The assets, liabilities, and the capital stock of the petitioner are substantially as follows:

(a) Assets.

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(i) Rail Lines: The rail lines of petitioner consist of .... track miles and .... route miles.

(ii) Equipment: The following rolling stock and equipment is owned or leased by petitioner [state the number of locomotives, general box cars, and other types of equipment]:

....

....

....

(iii) Nonrailroad: The principal nonrailroad assets of the petitioner are:

....

....

....

(b) Liabilities. The principal liabilities of petitioner consist of

....

....

....

(c) Capital Stock. The authorized, issued, and outstanding capital stock of petitioner is as follows:

Authorized:

....

....

....

Issued and outstanding:

....

....

....

(d) Other facts, if any, affecting financial condition [set forth such additional information about the petitioner's financial condition as is necessary to enable the court to make findings with respect to its preliminary approval of the petition]: ....

....

....

7. No equity receivership or similar proceeding, plan of reorganization, readjustment, or liquidation affecting the property of petitioner is pending, either in connection with or without any judicial proceeding, except as follows: ....

....

....

8. No other petition by or against the petitioner is pending under Chapter VIII of the Act; nor is any proceeding involving the petitioner pending under § 20 (b) of the Interstate Commerce Act (49 U. S. C., § 20 (b)), except as follows: ....

....

Wherefore, petitioner prays for relief in accordance with Chapter VIII of the Act.

Signed: ....,
Attorney for Petitioner.

Address: ....,
....

Telephone number: ....

State of .... }
County of .... } *ss.*

I, ..., the president [*or* other officer *or* an authorized agent] of the corporation named as petitioner in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief, and that the filing of this petition on behalf of the corporation has been authorized:

....

Subscribed and sworn to before me on ....

..............................,

....

[*Official character*]

Form No. 8–2

Involuntary Petition Under Chapter VIII

[*Caption, other than designation, as in Form No. 8–1*]

Involuntary Petition Under Chapter VIII

1. Petitioners, ..., of* ...., and .... of* ...., and .... of* ...., are creditors of ...., debtor, of* ...., having claims against the debtor, amounting in the aggregate to not less than 5 percent of all the indebtedness of the debtor as shown on the latest annual report filed by the debtor with the Interstate Commerce Commission. The nature and amount of petitioners' claims are as follows: ....

2. The debtor is a railroad corporation organized and existing under the laws of .... and is subject to an involuntary petition under Chapter VIII of the Bankruptcy Act.

3. The debtor's railroad line is operated in the state of .... [*or* in the states of .... and ....], and its principal operating office [*or* executive office] has been within this district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

4. The debtor is insolvent [*or* unable to pay its debts as they mature].

5. The debtor's most recent annual report and financial statements as required by the Interstate Commerce Commission to be filed with the Commission are attached.

6. The assets, liabilities, and the capital stock of the debtor are substantially as follows [complete the remaining portion of this paragraph to the extent possible]:

(a) Assets.

(i) Rail Lines: The rail lines of the debtor consist of .... track miles and .... route miles.

(ii) Equipment: The following rolling stock and equipment is

**State post-office address.*

owned or leased by the debtor [state the number of locomotives, general box cars, and other types of equipment]: ....
....
....

(iii) Nonrailroad: The principal nonrailroad assets of the debtor are: ....
....
....

(b) Liabilities. The principal liabilities of the debtor consist of
....
....
....

(c) Capital Stock. The authorized, issued, and outstanding capital stock of the debtor is as follows:

Authorized:
....
....
....

Issued and outstanding:
....
....
....

(d) Other facts, if any, affecting financial condition [set forth such additional information about the debtor's financial condition as is necessary to enable the court to make findings with respect to its preliminary approval of the petition]: ....
....
....

7. No equity receivership or similar proceeding, plan of reorganization, readjustment, or liquidation affecting the property of the debtor is pending, either in connection with or without any judicial proceeding, except as follows: ....
....
....

8. No other petition by or against the debtor is pending under Chapter VIII of the Act; nor is any proceeding involving the debtor pending under § 20 (b) of the Interstate Commerce Act (49 U. S. C. § 20 (b)), except as follows: ....
....
....

Wherefore petitioner[s] pray for relief in accordance with Chapter VIII of the Act.

Signed: ....,
Attorney for Petitioner(s).
Address: ....,
....
Telephone number: ....

State of .... }
County of .... } *ss.*

I, ..., the petitioner [*or* one of the petitioners] named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

..........................,
Petitioner.

Subscribed and sworn to before me on ....
..........................,
....
[*Official character*]

Form No. 8–3

Summons to Debtor

[*Caption, other than designation, as in Form No. 8–1*]

Summons

To the above-named debtor:

An involuntary petition for your reorganization under Chapter VIII of the Bankruptcy Act having been filed on .... in this court of bankruptcy,

You are hereby summoned and required to file with this court and to serve upon the petitioner's attorney, whose address is...... ...., an answer to the petition which is herewith served upon you, on or before .... If you fail to do so, the petition may be approved by default.

..........................,
Clerk of the District Court.

[Seal of the United States District Court]

Date of issuance: ....

FORM NO. 8-4

ORDER FOR AND NOTICE OF HEARING ON APPOINTMENT OF TRUSTEE, COMBINED WITH NOTICE OF PROOF OF CLAIM PROCEDURE AND OF AUTOMATIC STAY

[*Caption, other than designation, as in Form No. 8-1*]

ORDER FOR AND NOTICE OF HEARING ON APPOINTMENT OF TRUSTEE, COMBINED WITH NOTICE OF PROOF OF CLAIM PROCEDURE AND OF AUTOMATIC STAY

To the debtor, its creditors and stockholders, and other parties in interest:

A petition having been filed on .... by ...., the above-named debtor of* ...., [*or* against .... of* ....,] seeking relief under Chapter VIII of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. A hearing on the appointment of a trustee shall be held at ...., on .... at ..... o'clock ..m.

2. [*If appropriate*] On or before........................... suggestions of persons qualified to serve as trustee may be submitted to the court at ....

3. The last date for filing an answer to the petition by any creditor, indenture trustee, or stockholder is the day prior to the date of the hearing set in paragraph 1. If a timely answer is filed, the court will consider such answer at the hearing on appointment of a trustee.

4. The trustee [*or* debtor] has filed or will file a list of creditors and stockholders pursuant to Chapter VIII Rule 8-106 of the Rules of Bankruptcy Procedure. In order to vote on a plan or share in any distribution, a creditor who is not listed, and a creditor whose claim is listed as disputed, contingent, or unliquidated as to amount, must file a proof of claim on or before a date which

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**State post-office address.*

will be fixed and of which you will be notified by mail if your address is known. A creditor who desires to assert a claim different in amount or character from his claim as listed, must file a proof of claim within the time to be fixed by the court. Holders of record of stock, bonds, debentures, notes, and other securities will be entitled to vote on a plan and share in the distribution under a plan based on their ownership of the securities at the times fixed under Rules 8–306 and 8–405. Holders of nonregistered securities (securities for which no formal transfer records are maintained by or for the debtor) will be entitled to share in distribution under a plan if the filed list includes the outstanding indebtedness of the entire securities issue. The filing of a proof of claim covering the entire indebtedness by a trustee under a trust indenture will also establish the right of a holder of a security under the indenture to share in distribution under a plan. However, since the filed list or the proof of claim of a trustee under a trust indenture may not indicate who owns nonregistered securities, it may be impossible to provide voting materials to nonregistered security holders. If you are the holder of a nonregistered security and you desire to vote on a plan, you must file a timely proof of claim.

You are further notified that:

The hearing on appointment of a trustee may be continued or adjourned from time to time by order made in open court, without further notice to creditors, indenture trustees, and stockholders.

The filing of the petition by [*or* against] the above-named debtor operates as a stay of the commencement or continuation of any action against the debtor, of any setoff by a creditor, of the enforcement of any judgment against the debtor, of any act or the commencement or continuation of any court proceeding to enforce any lien on the property of the debtor, and of any court proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of its estate as provided by Rule 8–501.

[*If appropriate*] .... of
*.. has been appointed receiver of the estate of the above-named debtor.

Dated: ....

............................,
District Judge.

**State post-office address.*

Form No. 8-5

Notice of Proof of Claim Procedure

[*Caption, other than designation, as in Form No. 8-1*]

Notice of Proof of Claim Procedure

To creditors and indenture trustees:

You are hereby notified that:

The ...., debtor, is in reorganization under Chapter VIII of the Bankruptcy Act, and the undersigned, ... of* .... and .... of *.........................., has [*or* have] been appointed trustee(s) of the debtor's estate.

As required by Chapter VIII Rule 8-106 of the Rules of Bankruptcy Procedure, a list of creditors has been filed which includes the amount and character of the debtor's obligation to each creditor. You appear on this list as a creditor.

Notwithstanding the inclusion of your claim on the list, under Rule 8-401 it may be necessary for you to file a proof of claim in this case in order to protect your interest.

A creditor whose claim is shown on the list as disputed, contingent, or unliquidated as to amount must file a proof of claim within the time prescribed in this notice. If a proof of claim is not filed by such creditor, he will not be entitled to share in any distribution under a plan or to vote on a plan.

A listed claim not shown as disputed, contingent, or unliquidated as to amount is deemed allowed unless an objection to allowance is filed. Notice of an objection to a claim will be given to the creditor involved. A creditor who is not satisfied that his claim as listed accurately reflects his claim against the debtor and who desires to assert a claim different in amount or character must file a proof of claim within the time prescribed in this notice.

It is the responsibility of each creditor to ascertain how his claim

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**State post-office address.*

is shown on the list. The list is available for inspection at ....
....

Pursuant to an order entered in this case on ...., proofs of claim must be filed on or before ...., with .... at .... [*or, if appropriate,* proofs of claim must be filed prior to the approval of a plan]. A proof of claim must comply with the formalities specified in Rule 8–401 (b)(5) [*and, if appropriate,* be filed on the form prescribed by the court and appended to this notice].

Dated: ....

Signed: ....,
........................,
Trustee(s).

Address: ....,
....

Form No. 8–6

Order Approving Plan

[*Caption, other than designation, as in Form No. 8–1*]

Order Approving Plan

A plan under Chapter VIII of the Bankruptcy Act for........ .... having been certified to this court by the Interstate Commerce Commission; and

It having been determined after hearing on notice that:

1. The provisions of § 77 (b) of the Act have been complied with; and

2. The plan is fair and equitable, affords due recognition to rights of each class of creditors or stockholders with no unfair discrimination among classes of creditors and stockholders, and conforms to the law regarding participation of the various classes of creditors and stockholders; and

3. To the extent ascertainable the expenses and fees incident to this case have been disclosed, the amounts of expenses and fees provided for by the plan are within the limits set by the Interstate Commerce Commission, and such expenses and fees have been approved by this court as reasonable [*or* the reasonableness of such expenses and fees is subject to approval by this court]; and

4. The plan provides for payment of all costs of administration and all other allowances made or to be made by this court;

It is ordered and notice is hereby given that:

A. The plan certified by the Interstate Commerce Commission to this court on .... is approved.

B. .... is fixed as the last day for filing written acceptances or rejections of the plan.

C. Within ..... days after the entry of this order the trustee shall transmit by mail to creditors, stockholders, and other parties in interest as provided in Rule 8–306 who are members of the classes of creditors, stockholders, and other parties in interest entitled to accept or reject the plan, as summary of such plan approved by the court, a summary approved by the court of its opinion, dated ...., approving the plan, a summary of the report of the Interstate Commerce Commission, dated ...., prepared by the Commission, and a form of ballot conforming substantially to Official Form No. 8–7 [*or, if appropriate,* a copy of the ballot appended to this order].

Dated: ....

..............................,
District Judge.

[*If the court directs that a copy of the plan, opinion, or the report should be transmitted in lieu of or in addition to the summary thereof, the appropriate change should be made in paragraph C of this order.*]

Form No. 8-7

Ballot for Accepting or Rejecting Plan

[*Caption, other than designation, as in Form No. 8-1*]

Ballot for Accepting or Rejecting Plan

The plan referred to in this ballot has been approved by the court on .... and can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount of claims in each class and the holders of two-thirds of the stock in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm the plan if the court finds that the plan accords fair and equitable treatment to those rejecting it, and that in light of all the circumstances the rejection is not reasonably justified. To have your vote count you must complete and return this ballot.

[*If stockholder*] The undersigned, the holder of [*state number*] .... shares of [*describe type*] .... stock of the above-named debtor, represented by Certificate(s) No. ...., registered in the name of ....

[*If bondholder, debenture holder, or other debt security holder*] The undersigned, the holder of [*state unpaid principal amount*] $ .... of [*describe security*] .... of the above-named debtor, with a stated maturity date of .... [*if applicable* registered in the name of ....] [*if applicable* bearing serial number(s) ....],

[*If holder of general claim*] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $ ....,

[Check one box]

☐ Accepts

☐ Rejects

the plan for the reorganization of the above-named debtor.

Dated: ....

Print or type name: ....
Signed: ....,
[*If appropriate*] By: ....,
as: ....
Address: ....,
....

Return this ballot on or before .... to:
Name: ....,
Address: ....,
....

The trustee or other person transmitting this ballot to creditors or stockholders should complete the blanks indicating the date of the court's order approving the plan, and the person to whom the ballot should be returned.

Form No. 8–8

Order Confirming Plan

[*Caption, other than designation, as in Form No. 8–1*]

Order Confirming Plan

A plan under Chapter VIII of the Bankruptcy Act and related documents or summaries thereof having been submitted in conformity with Rule 8–305 to creditors and stockholders entitled to vote on such plan; and

It having been determined after hearing on notice:

1. That the plan has been accepted in writing by the creditors and stockholders whose acceptance is required by law; and

2. That acceptance of the plan has been procured in good faith and not by any means forbidden by law;

It is ordered that:

The plan certified by the Interstate Commerce Commission on .... and approved by an order of the court entered on ...., a copy of which plan is attached hereto, is confirmed.

Dated: ....

........................,
District Judge.

RULES OF BANKRUPTCY PROCEDURE

TITLE III

CHAPTER IX RULES

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TITLE III

CHAPTER IX RULES

Rule 9–1. Scope of Chapter IX rules and forms; short title.

The rules and forms in this Title III govern the procedure in courts of bankruptcy in cases under Chapter IX of the Bankruptcy Act. These rules may be known and cited as the Chapter IX Rules. These forms may be known and cited as the Official Chapter IX Forms.

Rule 9–2. Commencement of Chapter IX case.

A Chapter IX case is commenced by the filing with the court of a petition seeking relief under Chapter IX of the Act.

Rule 9–3. Petition.

A petition under Chapter IX of the Act shall conform substantially to Official Form No. 9–F1. An original and 4 copies of the petition shall be filed, unless additional copies are required by local rule. The clerk of the district court shall transmit one copy to the Securities and Exchange Commission and one copy to the Secretary of State of the state in which the petitioner is located.

Rule 9–4. Stay of actions against petitioner and lien enforcement.

(*a*) *Automatic stay of actions and lien enforcement.*— A petition filed under Rule 9–3 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the petitioner or any officer or inhabitant thereof, which seeks to enforce any claim against the petitioner, or of any act or the commencement or continuation of any court or other proceeding to enforce a lien on the property of the petitioner or a lien on or arising out of taxes or assessments due the

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petitioner, and shall operate as a stay of the enforcement of any setoff or counterclaim relating to a contract, debt, or obligation of the petitioner.

(*b*) *Duration of automatic stay.*—Except as it may be terminated, annulled, modified, or conditioned by the court under subdivision (c) of this rule, the stay provided by subdivision (a) of this rule shall continue until the case is closed or dismissed or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(*c*) *Relief from automatic stay.*—On the filing of a complaint seeking relief from a stay provided by subdivision (a) of this rule, the court shall set the trial for the earliest possible date. The court may, for cause shown, terminate, annul, modify or condition such stay. A party seeking continuation of the stay shall show that he is entitled thereto.

(*d*) *Other stays.*—The commencement or continuation of any other act or proceeding may be stayed, restrained, or enjoined pursuant to Rule 65 of the Federal Rules of Civil Procedure, except that a temporary restraining order or preliminary injunction may be issued without compliance with subdivision (c) of that rule.

Rule 9–5. Caption of petition.

The caption of every petition shall comply with Bankruptcy Rule 904 (b). In addition the title of the case as set forth in the caption shall include the name of the petitioner and such other names used by it as are necessary to assure adequate identification.

Rule 9–6. Filing fees.

Every petition shall be accompanied by the prescribed filing fees.

Rule 9–7. Lists of creditors and owners of real property.

(*a*) *List of creditors.*—The petitioner shall file with the court, within such time as the court may fix, a list of the petitioner's creditors of each class, showing the

amounts and character of their claims, whether secured or unsecured, the nature of any security, and, so far as known, the name and address or place of business of each creditor and whether the claim is disputed, contingent, or unliquidated as to amount. The petitioner shall supplement the list as creditors who were unknown or unidentified at the time the list was filed become known or identified to the petitioner.

(*b*) *List of owners of real property.*—If a plan proposed pursuant to Rule 9–24 (a) requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition pursuant to Rule 9–3 is filed, the petitioner shall also file with the court a list showing the names and addresses, so far as known, of the holders of record of title, legal or equitable, to such real property adversely affected.

(*c*) *Modification of requirements.*—The court, on application, may for cause shown modify the requirements of subdivisions (a) and (b) of this rule.

Rule 9–8. Verification of petitions and lists.

All petitions, lists, and amendments thereto shall be verified.

Rule 9–9. Amendments of petitions and lists.

(*a*) *Petitions.*—A petition may be amended as a matter of course at any time before a responsive pleading is served or the petition is approved pursuant to Rule 9–11. An amendment at any other time may be made only by leave of court. Subdivisions (b), (c), and (d) of Rule 15 of the Federal Rules of Civil Procedure apply to amendments of petitions.

(*b*) *Lists.*—A list of creditors or holders of record of title to real property filed pursuant to Rule 9–7 may be amended as a matter of course at any time before expiration of the time fixed for filing claims pursuant to

Rule 9–22. Thereafter such a list may be amended only with leave of court on such notice as the court may direct. The court may, on application of any party in interest, or on its own initiative, order any list to be amended.

(*c*) *Number of copies; notice.*—Every amendment under this rule shall be filed in the same number as required of the original paper, and the court shall give notice of the amendment to such persons as it may designate.

Rule 9–10. Responsive pleading.

(*a*) *Time for filing answer.*—Any party in interest may serve and file an answer to a petition not later than 15 days after the publication of notice required by Rule 9–14 (h)(1) is completed. A timely answer filed under this subdivision shall be deemed also to constitute a motion to vacate any prior order of approval of a petition.

(*b*) *Contents of answer.*—The answer to a petition shall contain all defenses and objections, including those which may be raised by separate motion under Rule 12 (b), (e), or (f) of the Federal Rules of Civil Procedure.

(*c*) *Other responsive pleading.*—No other responsive pleading shall be allowed, except that the court may order a reply to an answer and prescribe the time for it to be served and filed.

Rule 9–11. Preliminary approval; hearing; disposition of petition.

(*a*) *Preliminary approval or other disposition of petition.*—On the filing of a petition, the court, with or without a hearing, shall enter an order approving the petition if satisfied that it complies with the requirements of Chapter IX of the Act and has been filed in good faith. If not so satisfied, the court shall enter an order permitting the petition to be amended or dismissing the case.

(*b*) *Hearing and disposition of petition after answer.*—If a timely answer is filed, the court shall hold a hearing at the meeting of creditors provided for in Rule 9–17 or at such earlier time as the court may fix on such notice as it may direct, and shall determine the issues and approve the petition, dismiss the case, or enter such other order as may be appropriate.

Rule 9–12. Venue and transfer.

(*a*) *Proper venue.*—A petition filed pursuant to Rule 9–3 may be filed in the district in which the petitioner is located.

(*b*) *Transfer or retention when venue improper.*—If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner and such other persons as it may direct, transfer the case to the proper district or in the interest of justice retain the case.

Rule 9–13. Reference to a referee.

The court may refer any special issue of fact to a referee in bankruptcy for consideration, the taking of testimony, and a report on such special issue of fact, if the court finds that the condition of its docket is such that it cannot take such testimony without unduly delaying the dispatch of other business pending in the court, and if it appears that such special issue is necessary to the determination of the case. A reference to a referee in bankruptcy shall be the exception and not the rule. The court shall not make a general reference of the case, but may only request findings of specific facts.

Rule 9–14. Notices.

(*a*) *Notice of meeting of creditors.*—The petitioner shall give all creditors included on the list of creditors and any supplemental list filed pursuant to Rule 9–7 (a) and such other persons as the court may designate at least 30 days' notice by mail of the meeting held

pursuant to Rule 9–17. Such notice shall be published as provided in subdivision (h) of this rule and shall conform substantially to Official Form No. 9–F2.

(*b*) *Twenty-day notice.*—Except as provided hereinafter, the petitioner shall give all creditors included on the list of creditors and any supplemental list filed pursuant to Rule 9–7 (a) and such other persons as the court may designate at least 20 days' notice by mail of (1) the hearing on the dismissal of a case when notice is required by Rule 9–28; and (2) the time fixed for filing objections to confirmation of a plan.

(*c*) *Other notices.*—Except as provided hereinafter, the petitioner shall give notice by mail to all creditors included on the list of creditors and any supplemental list filed pursuant to Rule 9–7 (a) and such other persons as the court may designate of (1) dismissal of the case pursuant to Rule 9–28; (2) the time fixed for filing proofs of claim pursuant to Rule 9–22 (b)(1); (3) the time fixed for accepting or rejecting a plan pursuant to Rule 9–25; (4) the time fixed to reject a modification of a plan pursuant to Rule 9–26; (5) the hearing on confirmation of a plan pursuant to Rule 9–27; (6) confirmation of a plan pursuant to Rule 9–27; and (7) the order approving the deposit pursuant to Rule 9–31.

(*d*) *Notice to record owners of real property.*—Except as provided hereinafter, when a list of record owners of title to real property has been filed pursuant to Rule 9–7 (b) all notices required by this rule shall be mailed to such owners.

(*e*) *Limitation on notices to creditors.*—The court may direct that all notices required by subdivisions (b) and (c) of this rule other than clause (2) of subdivision (c) be mailed only to creditors and listed record owners of real property who file with the court a request that all notices under this rule be mailed to them, or who may be otherwise designated by the court. The notice of the

meeting mailed and published pursuant to subdivisions (a) and (h) of this rule shall state that creditors and listed record owners of real property who do not file such a request may not receive subsequent notices of proceedings in the case.

(*f*) *Addresses of notices.*—All notices to which a creditor or owner of real property is entitled under these rules shall be addressed to such person as he or his authorized agent may direct in a request filed with the court; otherwise, to his address shown in the lists or, if a different address is stated in a proof of claim duly filed, then to the address so stated.

(*g*) *Notices to the United States and state.*—Notwithstanding subdivision (e) of this rule, copies of all notices required to be mailed to creditors under these rules shall be mailed to the Secretary of the Treasury of the United States, to the Securities and Exchange Commission and to the Secretary of State of the state in which the petitioner is located.

(*h*) *Notice by publication.*

(*1*) *Notice of meeting of creditors or dismissal of the case.*—The notice of the meeting required by subdivision (a) of this rule, or the notice of the dismissal of the case pursuant to Rule 9–28, shall also be published at least once a week for 3 successive weeks in at least one newspaper of general circulation published within the district in which the case is pending, and in such other paper or papers having a general circulation among bond dealers and bondholders as may be designated by the court, and in such other publication as the court may direct. The notice of the meeting shall be first published as soon as practicable after the filing of the petition and shall be completed at least 30 days before the date fixed for the meeting.

(*2*) *Other notices.*—The court may order publication of any notice, other than notice of the meeting of cred-

itors or dismissal of the case, in such form and manner as it may direct.

(*i*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 9–5.

(*j*) *Cost of notice.*—The expense of giving a notice required by this rule shall be paid by the petitioner, unless the court, for cause shown, finds that such expense should be borne by another party.

Rule 9–15. Standing to be heard; intervention.

(*a*) *Standing to be heard.*

(1) The petitioner, any creditor, and any record owner of title to real property who is included on the lists filed pursuant to Rule 9–7 (b) shall have the right to be heard on all matters arising in a Chapter IX case.

(2) The court may permit, for cause shown, a labor union or employees' association, representative of employees of the petitioner, to be heard on the economic soundness of a plan affecting the interests of the employees.

(*b*) *Right of governmental bodies to intervene.*—The Secretary of the Treasury and the Securities and Exchange Commission may or, if requested by the court, shall intervene in a Chapter IX case. Representatives of the state in which the petitioner is located may intervene in a Chapter IX case. Any person intervening under this subdivision shall be deemed a party in interest with the right to be heard on all matters in the case except that the Securities and Exchange Commission may not appeal from any order of the court.

Rule 9–16. Representation of creditors.

(*a*) *Data required.*—Every person, organization, group, or committee representing more than one party in interest shall file a signed statement with the court setting forth (1) the names and addresses of such parties in interest; (2) the amount, class and character of their

securities, if any; and (3) a recital of the pertinent facts and circumstances in connection with the employment of such person or organization, and, in the case of a group or committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the group or the committee was organized or agreed to act. The statement shall include a copy of the instrument or instruments signed by the holders of the securities showing the authority of such holders to enter into the agreement between such person, organization, group, committee, and creditors represented by it or them and a copy of such agreement. The agreement shall disclose all compensation to be received, directly or indirectly, by such person, organization, group, or committee, and such compensation shall be subject to modification and approval by the court. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(b) *Failure to comply; effect.*—The court on its own initiative or on application or motion of any party in interest (1) may determine whether there has been a failure to comply with the provisions of this rule or with any other applicable law regulating the activities and personnel of any person, group, organization, or committee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit any such person, group, organization, or committee to be heard further or to intervene in the case or make such other orders as may be appropriate; (2) may examine any representation provisions of a deposit agreement, proxy, committee, or other authorization, and any claim acquired by such person, group, organization, or committee in contemplation or in the course of a case under the Act and make such other orders as may be appropriate; and (3) may hold invalid any authority or acceptance given, procured, or received by a person,

group, organization, or committee who has not complied with subdivision (a) of this rule.

Rule 9–17. Meeting of creditors.

(*a*) *Date and place.*—A meeting of creditors shall be held not less than 30 nor more than 90 days after the approval of a petition commencing a Chapter IX case. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(*b*) *Agenda.*—At the meeting of creditors, (1) the petitioner shall report on the status of the case, and (2) the judge may classify claims, may determine which claims are entitled to vote and which have voted for acceptance of a plan and shall preside over the transaction of such other business as is proper under Chapter IX of the Act.

Rule 9–18. Qualification by disbursing agent; bonds.

(*a*) *Qualifying bond or security.*—Every person specially appointed as disbursing agent shall, before entering on the performance of his official duties, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

(*b*) *Amount of bond and sufficiency of surety.*—The court shall determine the amount of the bond and the sufficiency of the surety for each bond filed under this rule.

(*c*) *Filing of bond; proceeding on bond.*—Unless otherwise provided by local rule, a bond given under this rule shall be filed with the court. A proceeding on the bond may be brought by any party in interest in the name of the United States for the use of the person injured by the breach of the condition. No proceeding shall be brought on a bond of a disbursing agent more than 2 years after his discharge.

Rule 9–19. Compensation for services and reimbursement of expenses.

(*a*) *Application for compensation and reimbursement.*—A person seeking compensation for services or reimbursement of necessary expenses shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred; (2) the amounts requested; and (3) the claims against the petitioner, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the filing of a petition commencing a case under Chapter IX of the Act. The application shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person.

(*b*) *Disclosure of compensation paid or promised to attorney for petitioner.*—Every attorney retained by the petitioner in connection with the Chapter IX case, whether or not he applies for compensation, shall file with the court on or before the first date set for the meeting held pursuant to Rule 9–17, or at such other

time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(*c*) *Factors in allowing compensation and reimbursement of expenses.*

(*1*) *General.*—Reasonable compensation and reimbursement of expenses may be allowed by the court to committees or other representatives of creditors, the attorneys or agents for any of them, and to the attorney for the petitioner, for services rendered and expenses incurred in connection with the case, including services and expenses in obtaining the deposit of securities or preparation of the plan. No compensation for services or reimbursement of expenses shall be assessed against the petitioner or its revenues, property, or funds except as provided in the plan.

(*2*) *Denial of allowances.*—No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the case in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has, without the approval of the court, purchased or sold claims against the petitioner, or beneficial interests direct or indirect in such claims, or by whom or for whose account such claims or beneficial interests therein have been otherwise acquired or transferred.

(*d*) *Restriction on sharing of compensation.*—Except as herein provided, a person rendering services in a Chapter IX case or in connection with such a case shall

not in any form or guise share or agree to share the compensation paid or to be paid for such services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 9–21 to which he is a party, or may enter such other order as may be appropriate.

Rule 9–20. Hearing on applications for compensation and reimbursement.

The court shall fix a time of hearing applications for allowances for services rendered or reimbursement of expenses. Notice of such hearing shall be given to the applicants, the petitioner and such other persons and in such manner as the court may direct.

Rule 9–21. Examination of petitioner's transactions with its attorney.

(*a*) *Payment to attorney in contemplation of Chapter IX case.*—On motion by any party in interest or on the court's own initiative, the court may examine any payment by the petitioner, made directly or indirectly and in contemplation of the filing of a petition under Chapter IX of the Act, to an attorney for services rendered or to be rendered.

(*b*) *Invalidation of unreasonable payment.*—Any payment examined under this rule shall be valid only to the extent of a reasonable amount as determined by the court. The court may enter an order in favor of the pe-

titioner in the amount of any excess found to have been paid.

Rule 9–22. Proof of claim.

(*a*) *List of claims.*—The list of claims prepared and filed with the court pursuant to Rule 9–7 shall constitute prima facie evidence of the validity and amount of claims which are not listed as disputed, contingent, or unliquidated as to amount and, except as provided in subdivision (b)(3) of this rule, it shall not be necessary to file a proof of such claim.

(*b*) *Filing proof of claim.*

(*1*) *Time for filing.*—A proof of claim may be filed at any time prior to the confirmation of a plan except that the court may fix a different bar date for the filing of claims on notice as provided in Rule 9–14.

(*2*) *Who may file.*—Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (b)(1) of this rule.

(*3*) *Who must file.*

(A) Any creditor, including the United States, a state, or any subdivision thereof, whose claim is listed as disputed, contingent, or unliquidated as to amount, shall file a proof of claim within the time prescribed by subdivision (b)(1) of this rule; any such creditor who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution. Within 30 days after the filing of the list pursuant to Rule 9–7, the court shall give notice by mail to all creditors required under this paragraph to file a proof of claim. The notice shall conform substantially to Official Form No. 9–F2A.

(B) Notwithstanding the foregoing, the court may, at any time, require the filing of a proof of claim within such time as it may fix. Any person required under this paragraph to file a proof of claim who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(*4*) *Evidentiary effect.*—A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of such claim. Such a proof of claim shall supersede any listing of that claim made pursuant to Rule 9–7.

(*5*) *Form and place of filing.*—A proof of claim shall consist of a statement in writing setting forth a creditor's claim and shall be executed by the creditor or by his authorized agent. Unless otherwise directed, a proof of claim shall be filed with the court.

(*6*) *Filing by indenture trustee.*—An indenture trustee may file claims of all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee.

(*c*) *Transfer of claim.*—If a claim other than one founded on a bond or debenture has been assigned, a statement setting forth the terms of the assignment shall be filed with the court and a copy thereof delivered to the petitioner.

(*d*) *Duty to examine and object to claims.*—The petitioner shall examine listed claims and proofs of claims and, unless no purpose would be served thereby, object to the allowance of improper claims.

(*e*) *Allowance when no objection made.*—Subject to the provisions of subdivision (b)(3) of this rule, a claim filed or listed in accordance with this rule or Rule 9–7, shall be deemed allowed unless objection is made by a party in interest.

(*f*) *Objection to allowance.*—An objection to the allowance of a claim shall be in writing. A copy of the objection and at least 10 days' notice of a hearing thereon shall be mailed or delivered to the claimant and the petitioner.

(*g*) *Classification of claims.*—For the purposes of the plan and its acceptance, the court, after hearing on such notice as it may direct, may designate classes of creditors whose claims are of substantially similar character and

the members of which enjoy substantially similar rights, except that, for reasons of administrative convenience, the court may create a separate class of creditors having unsecured claims of less than $250.

(*h*) *Reconsideration of claims.*—A party in interest may move for reconsideration of an order allowing or disallowing a claim. If the motion is granted, the court, after hearing on notice, may make such further order as may be appropriate.

(*i*) *Proof of right to record status.*—For the purposes of Rules 9–25 and 9–29 and for the purpose of receiving notices, a person who is not the record holder of a security may show that he is nevertheless entitled to be treated as such holder of record by filing with the court proof thereof. An objection to such proof may be filed by any party in interest.

Rule 9–23. Withdrawal of claim.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a proof of claim, an objection is filed thereto, or the creditor has accepted the plan or otherwise has participated significantly in the case, he may not withdraw the claim save on application or motion with notice to the petitioner, and on order of the court containing such terms and conditions as the court deems proper.

Rule 9–24. Filing of plan; transmission to creditors.

(*a*) *Filing of plan.*—The petitioner shall file a plan with its petition or thereafter, but not later than a time fixed by the court.

(*b*) *Transmittal of plan to creditors; adjourned meetings.*—If a plan is filed prior to mailing notice of the meeting of creditors, a copy of the plan or a summary thereof approved by the court and any analysis of such plan shall accompany the notice mailed to each creditor whose claim is affected by the plan, to each of the special

taxpayers affected by the plan, and to such other parties in interest as the court may designate. If the petitioner has not filed a plan prior to the first date set for the meeting of creditors, the court, at the meeting or thereafter, shall fix a time for filing a plan. If a plan is not filed prior to the mailing of notice of the meeting of creditors, the court, at the meeting, shall adjourn the meeting to a date certain. When a plan is filed, a copy or summary thereof approved by the court and any analysis of such plan and notice of a subsequent adjourned meeting date shall be mailed to the persons specified in this subdivision at least 10 days prior to such date. The court may adjourn a meeting of creditors from time to time to dates certain. In the event only a summary of the plan is transmitted, notice of the right to receive a copy of the plan on request without charge shall also be transmitted. For the purposes of this subdivision, creditors shall include holders of bonds, debentures, notes, and other securities of record as of the date of the transmittal of information pursuant to this subdivision.

Rule 9–25. Acceptance or rejection of plans.

(*a*) *Persons entitled to accept or reject plan; time for acceptance or rejection.*—At any time prior to the conclusion of the meeting of creditors, any creditor whose claim is deemed allowed pursuant to Rule 9–22 (e) or has been allowed by the court, and any creditor who is a security holder of record as of the date of the transmittal of information under Rule 9–24 (b) whose claim has not been disallowed, may accept or reject a plan. Acceptances may be obtained before or after the filing of the petition and may be filed with the court on behalf of the accepting or rejecting creditor. For cause shown and within the time fixed by this subdivision, the court may permit a creditor to change or withdraw his acceptance or rejection. Notwithstanding objection to a claim, the court may temporarily allow it to such extent

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as to the court seems proper for the purpose of accepting or rejecting a plan.

(*b*) *Form of acceptance or rejection.*—An acceptance or rejection of a plan shall be in writing, shall identify the plan accepted or rejected and shall be signed by the creditor or his authorized agent.

(*c*) *Computing requisite majorities.*—The requisite majorities necessary for the acceptance of a plan shall be computed on the basis of the claims of creditors affected by the plan who file an acceptance or rejection of the plan within the time prescribed.

Rule 9–26. Modification of plan before confirmation.

At any time prior to the acceptance of a plan by the requisite majority of creditors, the petitioner may file a modification thereof. After a plan has been so accepted and before its confirmation the petitioner may file a modification of the plan only with leave of court. The petitioner may also submit with the proposed modification written acceptances thereof by creditors. Subject to the provisions of this rule and with the written consent of the petitioner, any creditor may file a modification of a plan. If the court finds that a proposed modification does not materially and adversely affect the interest of any creditor who has not in writing accepted it, the modification shall be deemed accepted by all creditors who have previously accepted the plan. Otherwise, the court shall enter an order that the plan as modified shall be deemed to have been accepted by any creditor who accepted the plan and who fails to file with the court within such reasonable time as shall be fixed in the order a written rejection of the modification. Notice of such order, accompanied by a copy of the proposed modification, shall be given to creditors and other parties in interest at least 10 days before the time fixed in such order for filing rejections of the modification.

Rule 9–27. Confirmation of plan; deposit.

(*a*) *Objection to and hearing on confirmation.*

(*1*) *Objections.*—Objections to confirmation shall be filed at least 10 days before the hearing held under this subdivision, unless the court fixes a different time. A copy of any objection shall be mailed or delivered promptly to the petitioner, and to such other persons as may be designated by the court.

(*2*) *Hearing.*—The court shall hold a hearing to rule on confirmation of a plan on at least 20 days' notice to the petitioner, creditors, and other parties in interest as provided in Rule 9–14, whether or not any objections are filed.

(*b*) *Order of confirmation.*—The order of confirmation shall conform substantially to Official Form No. 9–F4 and notice of entry of the order of confirmation shall be mailed promptly to all parties in interest as provided in Rule 9–14.

(*c*) *Deposit.*—At the hearing on confirmation, the court shall (1) designate as disbursing agent the petitioner or a person specially appointed to distribute, subject to the control of the court, the consideration, if any, to be deposited by the petitioner; and (2) fix a time before final decree within which the petitioner shall deposit with the court or the disbursing agent, or in such place as shall be designated by and subject to the order of the court, the money or other consideration which under the plan is to be distributed to creditors after entry of the final decree.

Rule 9–28. Dismissal of case after approval of petition.

(*a*) *Permissive dismissal.*—The court may enter an order, after hearing on notice as provided in Rule 9–14, dismissing the case—

(1) for want of prosecution; or

(2) if no plan is proposed within the time fixed or extended by the court; or

(3) if no proposed plan is accepted within the time fixed or extended by the court; or

(4) when the court has retained jurisdiction after confirmation of a plan—

(A) if the petitioner defaults in any of the terms of the plan; or

(B) if a plan terminates by reason of the happening of a condition specified therein.

(*b*) *Mandatory dismissal.*—The court shall dismiss the case if confirmation is refused.

(*c*) *Notice to creditors.*—Promptly after entry of an order of dismissal under this rule notice thereof shall be given to creditors in the manner provided in Rule 9–14 (c).

Rule 9–29. Participation and distribution under plan.

(*a*) *Distribution.*—Subject to the provisions of subdivision (b) of this rule, and after entry of the order approving the deposit pursuant to Rule 9–31, distribution shall be made, in accordance with the provisions of the plan, to holders of bonds, debentures, notes, and other securities of record at the date the order confirming the plan becomes final whose claims have not been disallowed, to other creditors whose claims have been allowed, and to indenture trustees who have filed claims pursuant to Rule 9–22 (b)(6) which have been allowed.

(*b*) *Bar date for participation in distribution.*—When a plan requires presentment or surrender of securities or the performance of any other act as a condition to participation in distribution under the plan, such action shall be taken not later than 5 years after the entry of the order of confirmation. Persons who have not within such time presented or surrendered their securities or who have not taken such other action required by the plan shall not participate in distribution thereunder.

Rule 9–30. Distributions; unclaimed money and securities.

(*a*) *Distributions.*—Except as otherwise provided in the plan, Bankruptcy Rule 308 applies in Chapter IX cases to cash distributions made under a plan. Except as otherwise provided in the plan or ordered by the court, consideration other than cash distributed under the plan shall be issued in the name of the creditor entitled thereto and if a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Bankruptcy Rule 910, such consideration shall be transmitted to such other person.

(*b*) *Unclaimed money and securities.*—Unless otherwise provided in the plan, the securities or cash remaining unclaimed at the expiration of the bar date fixed pursuant to Rule 9–29 (b), or any extension thereof, shall be delivered to the petitioner.

Rule 9–31. Order approving deposit; final decree; title.

(*a*) *Order approving deposit.*—After confirmation of the plan, and after the making of the deposit of the money, securities, or other consideration pursuant to Rule 9–27 to be distributed to creditors, and after the court finds that deposited securities, if any, are lawfully authorized, constitute valid obligations of petitioner and the provisions therein to pay and secure payment are valid, the court shall enter an order substantially conforming to Official Form No. 9–F9 approving the deposit, which order shall be mailed promptly to all parties in interest as provided in Rule 9–14.

(*b*) *Final decree.*—On execution of the plan, the court shall enter a final decree which shall contain provisions by way of injunction or otherwise as may be equitable and closing the case.

(*c*) *Evidence of title.*—A certified copy of an order providing for the transfer of title to any property dealt

with by the plan shall constitute conclusive evidence of such transfer of title.

Rule 9–32. Issuance of certificates of indebtedness.

When a motion is made for the issuance of a certificate of indebtedness, the court shall set a hearing on notice to such parties in interest as the court may direct.

Rule 9–33. Rejection of executory contracts.

When a motion is made for the rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other parties in interest as the court may direct.

Rule 9–34. Preservation of voidable transfer.

Whenever any transfer is voidable by the petitioner, the court may determine, in an adversary proceeding in which are joined persons claiming interests or rights in the property subject to the transfer, whether the transfer shall be avoided only or shall be preserved for the benefit of the estate.

Rule 9–35. Proceeding to avoid indemnifying lien or transfer to surety.

If a lien voidable under § 67a of the Act has been dissolved by the furnishing of a bond or other obligation and the surety thereon has been indemnified by the transfer of, or the creation of a lien upon, property of the petitioner, the surety shall be joined as a defendant in any proceeding to avoid the indemnifying transfer or lien. Such proceeding is governed by Rule 9–37. If an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, on motion by any party in interest, shall ascertain the value of such property or lien; if such value is less than the amount for which such property or lien is indemnity, the surety may elect to retain the property or lien on payment of the value so ascertained to the petitioner within such time as the court may fix.

Rule 9–36. Adversary proceedings.

Rule 9–37 governs any proceeding instituted by a party in a Chapter IX case to (1) recover money or property other than a proceeding under Rule 9–21; (2) determine the validity, priority, or extent of a lien or other interest in property; (3) obtain an injunction; or (4) obtain relief from a stay as provided in Rule 9–4. Such a proceeding shall be known as an adversary proceeding.

Rule 9–37. Applicability of Federal Rules of Civil Procedure and Bankruptcy Rules to adversary proceedings.

(*a*) *Federal Rules of Civil Procedure.*—Rules 3, 5, 7 (a), 8–10, 12–21, 22 (1), 23–26, 28–37, 41, 42, 52, 54–56, 64–65, and 67–71 of the Federal Rules of Civil Procedure apply to adversary proceedings in Chapter IX cases, except that:

(1) The reference in Rule 5 to Rule 4 shall be read as a reference to Bankruptcy Rule 704.

(2) The reference in Rule 8 to Rule 11 shall be read as a reference to Bankruptcy Rule 911.

(3) The reference in Rule 10 to "caption" shall be read as "caption conforming substantially to the caption of Official Form 9–F1."

(4) The following words shall be added at the beginning of Rule 12 (h)(3): "Subject to Bankruptcy Rule 915."

(5) The following clause shall be added at the end of the last sentence of Rule 13 (a): "(3) a party sued by the petitioner need not state as a counterclaim any claim which he has against the petitioner"; and the following words shall be added at the end of the last sentence of Rule 13 (f): "or by commencing a new adversary proceeding or separate action."

(6) The reference in Rule 30 (a) to Rule 4 (e) shall be read as a reference to Bankruptcy Rule 704 (d)(1).

(7) The following is added at the end of paragraph one of Rule 65 (c): "The court may excuse compli-

ance with this subdivision when the applicant is the petitioner."

(*b*) *Bankruptcy Rules.*—Bankruptcy Rules 704, 719 (b), 727, and 782 apply to adversary proceedings in a Chapter IX case, except that:

(1) The reference in Bankruptcy Rule 704 (a) to "and shall forthwith issue a summons" shall be read as "and the district judge or clerk shall forthwith issue a summons." The reference in Bankruptcy Rule 704 (f)(2) to Rule 220 shall be read as a reference to Rule 9–21.

(2) The reference in Bankruptcy Rule 719 (b) to "subdivision (a)" shall be read as a reference to "Rule 19 (a) of the Federal Rules of Civil Procedure."

(3) The references in Bankruptcy Rule 727 to Bankruptcy Rules 734 and 735 shall be read as references to Rules 34 and 35 of the Federal Rules of Civil Procedure.

(4) The second sentence of Bankruptcy Rule 782 is deleted.

Rule 9–38. General definitions.

The definitions of words and phrases in § 81 of the Act govern their use in the Chapter IX Rules to the extent they are not inconsistent therewith. In addition, the following words used in these rules have the meanings herein indicated unless they are inconsistent with the context:

(1) "Accountant" includes an accounting partnership or corporation.

(2) "Act" means the Bankruptcy Act.

(3) "Application" includes any request to the court for relief that is not a pleading or proof of claim. An application not made in open court shall be in writing unless a writing is excused by the court. An application for an order against another party may be required to be made by motion.

(4) "Attorney" includes a law partnership or corporation.

(5) "Claims" includes all claims of whatever character against the petitioner or the property of the petitioner, whether or not such claims are provable under § 63 of the Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent.

(6) "Court" means the United States district court or a judge thereof.

(7) "Creditor" means the holder of any claim.

(8) "Judge" means the United States district court or a judge thereof.

(9) "Motion" means an application to the court for an order in an adversary proceeding or in a proceeding on a contested petition or to determine any other contested matter. Unless made during a hearing or trial, a motion shall be made in writing, shall conform substantially to a pleading in form, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(10) "Person" includes an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or unit thereof.

(11) "Special tax payer" means record owner or holder of title, legal or equitable, to real estate against which has been levied a special assessment or special tax the proceeds of which are the sole source of payment for obligations issued by the petitioner to defray the costs of local improvements.

Rule 9–39. Meanings of words in the Federal Rules of Civil Procedure and Bankruptcy Rules when applicable in Chapter IX Cases.

The following words and phrases used in the Federal Rules of Civil Procedure or Bankruptcy Rules made applicable in Chapter IX cases by these rules have the meanings herein indicated unless they are inconsistent with the context:

(*1*) *Federal Rules of Civil Procedure.*

"Action" or "civil action" means an adversary proceed-

ing or, when appropriate, a Chapter IX case, or a proceeding on a contested petition or to determine any other litigated matter.

(*2*) *Bankruptcy Rules.*

(A) "Bankrupt" means "petitioner."

(B) "Bankruptcy" or "bankruptcy case" means "Chapter IX case."

(C) "Court," "referee," or "bankruptcy judge" means the United States district court or a judge thereof.

(D) "Receiver," "trustee," "receiver in bankruptcy," or "trustee in bankruptcy" means "petitioner."

Rule 9–40. Applicability of Federal Rules of Civil Procedure and Bankruptcy Rules.

(*a*) *Federal Rules of Civil Procedure.*—Rules 6, 43–46, 58–63, 65.1, 77, 79, and 80 of the Federal Rules of Civil Procedure apply in Chapter IX cases, except that:

(1) The references in Rule 6 (b) to various rules shall also include a reference to Rule 9–17 (a).

(2) The following shall be added to Rule 6: "(f) Reduction. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may in its discretion with or without application or notice order the period shortened; but it may not reduce the time for taking any action under Rules 9–14 (a) and 9–17 (a)."

(3) The reference in Rule 43 (e) to "Evidence on Motions" shall be read as "Evidence on Motions or Applications," and the reference to "When a motion is based on facts not appearing in the record" shall be read as "When a motion or application is based on facts not appearing in the record."

(4) The following clause shall be added at the end of the second sentence of Rule 60 (b): "except that a motion to reopen a case or for reconsideration of an order allowing or disallowing a claim against the petitioner

entered without a contest is not subject to the one-year limitation."

(5) The following shall be added to Rule 62: "(i) Effect of Appeal on Unstayed Order. Unless an order approving the issuance of a certificate of indebtedness is stayed pending appeal, the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the holder knows of the pendency of the appeal."

(6) The sentence in Rule 65.1 "His liability may be enforced on motion without the necessity of independent action" shall be read as "His liability may be enforced in an adversary proceeding governed by Rule 9–37."

(7) The reference in Rule 79 to "civil docket" shall be read as "bankruptcy docket."

(*b*) *Bankruptcy Rules.*—Bankruptcy Rules 508, 903, 904, 906 (e), 907–909, 911, 912, 915, 918, 927, and 928 apply in Chapter IX cases, except that the reference in Rule 915 to Rule 112 shall be read as a reference to Rule 9–10.

Rule 9–41. Service and filing of applications, motions, and other papers.

(*a*) *Service on petitioner: When required.*—Except as otherwise provided in these rules or by order of the court, every order required by its terms to be served, every appearance, objection, application, motion, or paper relating to discovery, other than an application or motion which may be heard ex parte, shall be served on the petitioner.

(*b*) *Service: How made.*—Whenever under these rules service is required or permitted to be made on a person represented by an attorney the service shall be made upon the attorney unless service on the person himself is ordered by the court. Service on the attorney or on the person shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the

court. Delivery of a copy within this rule means: handing it to the attorney or to the person to be served; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete on mailing.

(*c*) *Filing*.—All papers after the petition required to be served shall be filed with the court either before service or within a reasonable time thereafter. The court may prescribe the number of copies to be filed.

(*d*) *Filing with the court*.—The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 9–42. Procedure in contested matters not otherwise provided for.

In a contested matter in a Chapter IX case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No responsive pleading is required under this rule, but the court may order an answer to a motion. In all such matters, unless the court otherwise directs, the following Federal Rules of Civil Procedure shall apply: 21, 25, 26, 28, 29, 30 as modified by Rule 9–37, 31–37, 41, 42, 52, 54–56, 62, 64, 69, and 71. The court may at any stage in a particular matter direct that one or more of the Federal Rules of Civil Procedure, as incorporated and modified by Rule 9–37, shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a

pending Chapter IX case may proceed in the same manner as provided in Bankruptcy Rule 727 for the taking of a deposition before an adversary proceeding. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

Rule 9–43. Representation and appearances; power of attorney.

(*a*) *Authority to act personally or by attorney.*—Subject to the provisions of Rule 9–16, the petitioner, a creditor, indenture trustee, committee or group, or other person may in a Chapter IX case (1) appear and act in his own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(*b*) *Notice of appearance.*—An attorney appearing in a Chapter IX case shall file a notice of appearance with his name, business address, and telephone number unless his appearance is otherwise noted in the record.

(*c*) *Power of attorney.*—The authority of any agent, attorney in fact, or proxy for any purpose other than the execution and filing of a proof of claim or any acceptance or rejection of a plan shall be evidenced by a written power of attorney acknowledged before an officer authorized to administer oaths in proceedings before courts of the United States or under laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country.

OFFICIAL CHAPTER IX FORMS

[NOTE: These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Bankruptcy Rule 909, made applicable by Rule 9–40.]

FORM No. 9–F1

CHAPTER IX PETITION

United States District Court
for the .... District of ....

In re
.............................., } Chapter IX Case No. ....
Petitioner.

CHAPTER IX PETITION

1. Petitioner's post-office address is ....
....
2. Petitioner is located within this district.
3. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter IX of the Bankruptcy Act.
4. Petitioner is insolvent [*or* unable to pay its debts as they mature].
5. Petitioner is authorized by State law to file this petition under Chapter IX of the Act.
6. [Petitioner has successfully negotiated a plan of adjustment of its debts with creditors holding at least a majority in amount of the claims of each class which are affected by that plan] *or*

[Petitioner has negotiated in good faith with its creditors and has failed to obtain, with respect to a plan of adjustment of its debts, the agreement of creditors holding at least a majority in amount of the claims of each class which are affected by that plan] *or*

[Negotiation of a plan of adjustment of petitioner's debts with creditors holding at least a majority in amount of the claims of each class affected by the plan is impracticable for the following reasons: ....
....
....] *or*

[Petitioner has a reasonable fear that a creditor may attempt to obtain a preference, as follows ....
....
....].

7. A copy of petitioner's proposed plan, dated ...., is attached [*or* Petitioner intends to file a plan pursuant to Chapter IX of the Act].

Wherefore petitioner prays for relief in accordance with Chapter IX of the Act.

Signed: ....,
Attorney for Petitioner.
Address: ....,
..........................,
Telephone number: ....

State of............... } ss.
County of............. }

I, ..., the .... [*state official title or an authorized agent*] of the political subdivision [or public agency *or* instrumentality] named as petitioner in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief, and that the filing of this petition on behalf of the .... has been authorized.

....

Subscribed and sworn to before me on ....

..................................,
....
[*Official character*]

Form No. 9–F2

Order for Meeting of Creditors and Related Orders, Combined with Notice Thereof and of Automatic Stay

[*Caption, other than designation, as in Form No. 9–F1*]

Order for Meeting of Creditors and Hearing on Approval of the Petition, Combined with Notice Thereof and of Automatic Stay

To the petitioner, its creditors, and other parties in interest:

A petition having been filed on .... by ...., the above-named petitioner of *..., seeking relief under Chapter IX of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. The meeting of creditors shall be held at.................. ...., on .... at ..... o'clock .... M.

2. The last date for filing an answer to the petition by any party in interest is .... If any such answer is timely filed, a hearing on the approval of the petition will be held at... on ...., at ..... o'clock .... M. [*or* at the meeting of creditors].

3. The petitioner has filed or will file a list of claims pursuant to Rule 9–7. Any creditor holding a listed claim which is not listed as disputed, contingent, or unliquidated as to amount, may, but need not, file a proof of claim in this case. Creditors whose claims are not listed or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claims on or before the date above fixed for the meeting [*or* on or before ...., which date is hereby fixed as the last day for filing a proof of claim, *or, if appropriate,* on or before a date to be later fixed of which you will be notified]. Any creditor who desires to rely on the list has the responsibility for determining that his claim is accurately listed.

4. [*If appropriate*] The hearing on confirmation of the plan, a copy of which is attached hereto, shall be held at a date to be later fixed [*or* at a date to be fixed at the meeting *or* at .... on .... at .... *or* immediately following the conclusion of the meeting].

5. Creditors may file written objections to confirmation on or before .... [*or* by a date to be later fixed].

You are further notified that:

The meeting [*if appropriate* and the hearing on confirmation] may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting creditors may transact such business as may

**State post-office address.*

properly come before the meeting [*if appropriate* and file their acceptances or rejections of the plan].

The filing of the petition by the petitioner above-named operates as a stay of the commencement or the continuation of any action against the petitioner, its property, or an officer or inhabitant of the petitioner, which seeks to enforce any claim against the petitioner, or of any act or the commencement or continuation of any court or other proceeding to enforce a lien on the property of the petitioner, or a lien on or arising out of taxes or assessments due the petitioner, and of the enforcement of any set-off or counterclaim relating to a contract, debt, or obligation of the petitioner.

As provided in Rule 9–14 the court may direct that certain notices will not be mailed to creditors who do not file a written request with the court for receipt of all notices.

Dated: ....

..............................,
District Judge.

Form No. 9–F2A

Notice to Creditors Whose Claims Are Listed as Disputed, Contingent, or Unliquidated

[*Caption, other than designation, as in Form No. 9–F1*]

Notice to Creditors Whose Claims Are Listed as Disputed, Contingent, or Unliquidated

To creditors whose claims are listed as disputed, contingent, or unliquidated as to amount:

You are hereby notified that:

The ...., petitioner, filed a petition on .... seeking relief under Chapter IX of the Bankruptcy Act.

As required by Chapter IX Rule 9–7 of the Rules of Bankruptcy Procedure, a list of creditors has been filed which includes the amount and character of the petitioner's obligation to each creditor. You appear on this list as a creditor whose claim is listed as disputed, contingent, or unliquidated as to amount.

A creditor whose claim is shown on the list as disputed, contingent, or unliquidated as to amount must file a proof of claim within the time prescribed in this notice. If a proof of claim is not

filed, you will not be entitled to share in any distribution under a plan or to vote on a plan.

Pursuant to an order entered in this case on ...., proofs of claim must be filed on or before ...., with .... at .... [*or, if appropriate,* proofs of claim must be filed prior to the confirmation of a plan]. A proof of claim must comply with the formalities specified in Rule 9–22 (b) (5).

Dated: ....

..............................,
District Judge.

FORM NO. 9–F3

ORDER PERMITTING FILING MODIFICATION OF PLAN PRIOR TO CONFIRMATION, FIXING HEARING AND TIME FOR REJECTION OF MODIFICATION, COMBINED WITH NOTICE THEREOF

[*Caption, other than designation, as in Form No. 9–F1*]

ORDER PERMITTING FILING MODIFICATION OF PLAN PRIOR TO CONFIRMATION, FIXING HEARING AND TIME FOR REJECTION OF MODIFICATION, COMBINED WITH NOTICE THEREOF

To the petitioner, its creditors, and other parties in interest:

A modification of the plan dated .... having been proposed by ...., on ...., it is ordered and notice is hereby given that:

1. The modification, a copy [*or* a summary] of which is attached hereto, may be filed.

2. The hearing for the consideration of the proposed modification shall be held at .... on .... at ..... o'clock .... M., which hearing may be continued or adjourned from time to time by order made in open court, without further notice to creditors.

3. .... is fixed as the last day for filing a written rejection of the modification. Any creditor who has accepted the plan and who fails to file a written rejection of the modification within the time above specified shall be deemed to have accepted the plan as modified.

Dated: ....

.............................,
District Judge.

Form No. 9–F4

Order Confirming Plan

[*Caption, other than designation, as in Form No. 9–F1*]

Order Confirming Plan

The petitioner's plan having been filed on ...., [*if appropriate,* as modified by a modification filed on ....,]; and

It having been determined after hearing on notice:

1. That the plan has been accepted in writing by the creditors whose acceptance is required by law; and

2. That the provisions of Chapter IX have been complied with; that the proposal of the plan and its acceptance are in good faith; that there has been no illegal agreement or practice proscribed by § 86 (b) of the Act; that the plan is fair and equitable and feasible, and does not discriminate unfairly in favor of any creditor or class of creditors; and that the petitioner is not prohibited by law from taking any action necessary to be taken by it to carry out the plan; and

3. That all amounts to be paid by petitioner or by any person not including governmental entities, for services and expenses in the case or incident to the plan have been fully disclosed and are reasonable:

It is ordered that:

A. The petitioner's plan filed on ...., [*if appropriate,* as modified by a modification filed on ....,] a copy of which is attached hereto, is confirmed.

B. On or before .... petitioner shall deposit with the court [*or* .... of *......................................, the disbursing agent, *or* in ....] the money or other consideration which is to be distributed to creditors under the plan.

Dated: ....

..........................,
District Judge.

**State post-office address and telephone number.*

Form No. 9–F5

Order Appointing Disbursing Agent and Fixing Amount of His Bond

[*Caption, other than designation, as in Form No. 9–F1*]

Order Appointing Disbursing Agent and Fixing Amount of His Bond

1. ...., of *.......................... ...., is hereby appointed disbursing agent in this case.

2. The amount of the bond of the disbursing agent is fixed at $.....................

Dated: ....

.................................,
District Judge.

Form No. 9–F6

Notice to Disbursing Agent of His Appointment

[*Caption, other than designation, as in Form No. 9–F1*]

Notice to Disbursing Agent of His Appointment

To ...., of *....................
....

You are hereby notified of your appointment as disbursing agent in this case. The amount of your bond has been fixed at $........

Dated: ....

...........................,
District Judge.

**State post-office address.*

Form No. 9–F7

Bond of Disbursing Agent

[*Caption, other than designation, as in Form No. 9–F1*]

Bond of Disbursing Agent

We, ..., of
*.., as
principal, and .... of *...................
...., as surety, bind ourselves to the United States in the sum of $............ for the faithful performance by the undersigned principal of his official duties as disbursing agent in this case.

Dated: ....

.........................,
....

Form No. 9–F8

Order Approving Disbursing Agent's Bond

[*Caption, other than designation, as in Form No. 9–F1*]

Order Approving Disbursing Agent's Bond

The bond filed by .... of
*... as disbursing agent in this case is hereby approved.

Dated: ....

.........................,
District Judge.

**State post-office address.*

Form No. 9–F9

Order Approving Deposit and Discharging Petitioner

[*Caption, other than designation, as in Form No. 9–F1*]

Order Approving Deposit and Discharging Petitioner

The petitioner having made the deposit required by the order of this court dated .... confirming petitioner's plan [*and it having been determined after hearing on notice:

1. That the deposited securities are lawfully authorized and constitute valid obligations of petitioner; and

2. That the provisions in such securities to pay and secure payment are valid]:

It is ordered that:

A. The deposit is approved.

B. The plan is binding on all creditors affected by it, whether secured or unsecured, whether or not their claims have been filed or allowed, and whether or not such creditors have accepted the plan.

C. The petitioner is discharged from all debts and liabilities dealt with in the plan except as provided therein or in § 95 (b)(2)(B) of the Act, whether secured or unsecured, whether the claims have been filed or allowed, and whether or not the creditors holding such claims have accepted the plan.

Dated: ....

..........................,
District Judge.

**The bracketed material should be included in the order if the deposit consists in whole or in part of securities.*

AMENDMENTS TO BANKRUPTCY RULES

Effective August 1, 1976

The following amendments to the Bankruptcy Rules were prescribed by the Supreme Court of the United States on April 26, 1976, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante,* p. 1004. The Judicial Conference report referred to in that letter is not reproduced herein. These amendments became effective on August 1, 1976, as provided in paragraph 1 of the Court's order, *post,* p. 1127.

For earlier publication of Bankruptcy Rules and Forms, see, *e. g.,* 421 U. S. 1019.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 26, 1976

ORDERED:

1. That Rules 112, 121, 205, 306, 404, 704, 712, 755, 801, 805, 914, 917 and Official Forms No. 6 and No. 26 implementing Chapters I–VII of the Bankruptcy Act [see *infra,* pp. 1129–1143], Rules 11–24, 11–61, and 11–62 implementing Chapter XI of the Bankruptcy Act [see *infra,* pp. 1145–1146], and Rules 13–203, 13–204, 13–206, 13–207, 13–302, 13–303, 13–304, 13–305, 13–307, 13–701, 13–901 and Official Forms No. 13–5 and No. 13–7 implementing Chapter XIII of the Bankruptcy Act as annexed hereto [see *infra,* pp. 1147–1156], are amended effective August 1, 1976.

2. That the aforementioned amendments shall be applicable to proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That Rule 744.1 of the General Rules of Bankruptcy Procedure is hereby abrogated as no longer necessary.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned amendments to rules and forms implementing Chapters I–VII, XI, and XIII of the Bankruptcy Act to the Congress in accordance with the provisions of Title 28, United States Code, Section 2075.

AMENDMENTS TO THE BANKRUPTCY RULES AND OFFICIAL BANKRUPTCY FORMS UNDER CHAPTERS I–VII OF THE BANKRUPTCY ACT

Rule 112. Responsive pleading or motion.

The alleged bankrupt in an involuntary petition, or, in the case of a petition against a partnership under subdivision (b) or (c) of Rule 105, any general partner (or alleged general partner) who is not a petitioner, may contest the petition. Rule 12 of the Federal Rules of Civil Procedure applies to the making of a defense or objection to the petition, except that an answer or a motion permitted under Rule 12 (b), (e), or (f) of the Federal Rules of Civil Procedure shall be served and filed within 20 days after the issuance of the summons, but if service is made by publication upon an alleged bankrupt or partner not an inhabitant of nor found within the state in which the district court is held, the court shall prescribe the time for such service and filing of the response. The service of a motion permitted under Rule 12 of the Federal Rules of Civil Procedure shall have the effect prescribed by Rule 712 (a) on the time allowed for serving an answer to the petition, but any motion or answer served on the petitioner must be filed with the court no later than the last day allowed for service of the motion or the answer, as the case may be. The answer to a petition may include the statement of a claim against a petitioning creditor only for the purpose of defeating the petition. No other responsive pleadings shall be allowed, except that the court may order a reply to an answer and prescribe the time for it to be served and filed.

Rule 121. Applicability of rules in Part VII.

Except as otherwise provided in Part I of these rules and unless the court otherwise directs, the following rules

in Part VII apply in all proceedings relating to a contested petition and in all proceedings to vacate an adjudication: Rules 705, 708–710, 715, 716, 724–726, 728–737, 752, 756, and 762. The court may direct that one or more of the other rules in Part VII shall also apply in such a proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to proceedings relating to a contested petition or proceedings to vacate an adjudication, and a reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

Rule 205. Examination.

(*d*) *Scope of examination.*—The examination under subdivisions (a) and (b) of this rule may relate only to the acts, conduct, or property of the bankrupt, or to any matter which may affect the administration of the bankrupt's estate, or to his right to discharge. The examination of a spouse under subdivisions (a) and (b) of this rule shall be subject to the provisos of § 21a of the Act.

Rule 306. Objections to and allowance of claims for purpose of distribution; valuation of security.

(*c*) *Objection to allowance.*—An objection to the allowance of a claim for the purpose of distribution shall be in writing. A copy of the objection and at least 10 days' notice or, if the claim is for taxes, at least 30 days' notice of a hearing thereon shall be mailed or delivered to the claimant. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 701, the proceeding thereby becomes an adversary proceeding.

Rule 404. Grant or denial of discharge.

(*h*) *Notice of discharge.*—Within 45 days after an order of discharge of an individual bankrupt becomes final, the court shall mail a copy of such order to the persons specified in subdivision (b) of this rule.

Rule 704. Process; service of summons, complaint, and notice of trial or pre-trial conference.

(*a*) *Summons and notice of trial or pre-trial conference: Issuance and form; service with complaint.*—Upon the commencement of an adversary proceeding the bankruptcy judge shall set a date either for trial or for a pre-trial conference and shall forthwith issue a summons and notice of trial or pre-trial conference. The summons and notice shall conform substantially to Official Form No. 26 and shall be served together with the complaint on the defendant in one of the modes authorized by this rule.

(*b*) *Personal service.*—Service of the summons, complaint, and notice of trial or pre-trial conference may be made as provided in Rule 4 (d) of the Federal Rules of Civil Procedure for the service of process. Personal service may be made by any person not less than 18 years of age who is not a party.

(*c*) *Service by mail.*—Service of summons, complaint, and notice of trial or pre-trial conference may also be made within the United States by first-class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons, complaint, and notice to his dwelling house or usual place of abode or to the place where he regularly conducts his business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons, complaint, and notice to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons, complaint, and notice in such case shall be addressed to the person required to be served at his dwelling house or usual place of abode or at the place where he regularly conducts his business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons, complaint, and notice directed to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons, complaint, and notice to the United States attorney for the district in which the action is brought and also to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons, complaint, and notice to such officer or agency.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons, complaint, and notice to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons, complaint, and notice to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons, complaint, and

notice is mailed to the person upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons, complaint, and notice is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at his dwelling house or usual place of abode or at the place where he regularly carries on his business or profession and, if the authorization so requires, by mailing also a copy of the summons, complaint, and notice to the defendant as provided in this subdivision.

(9) Upon the bankrupt, after a petition has been filed by him or served upon him and until the case is dismissed or closed, by mailing copies of the summons, complaint, and notice to the bankrupt at the address shown in the petition or statement of affairs filed by him or to such other address as he may designate in a writing filed with the court and, if he is represented by an attorney, to the attorney at his post-office address.

(*d*) *Service pursuant to court order.*

(*1*) *Service in accordance with Federal Rule of Civil Procedure 4* (*e*).—If a party cannot be served as provided in subdivision (b), (c), or (i) of this rule, the court may order the summons, complaint, and notice of trial or pre-trial conference to be served as provided in Rule 4 (e) of the Federal Rules of Civil Procedure for service of summons, notice, or order in lieu of summons.

(*2*) *Service by publication.*—If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in subdivision (b), (c), or (i) of this rule, the court may order the summons, complaint, and notice of trial or pre-trial conference to be served by mailing copies thereof to the party's last known address, if any,

and by at least one publication in such manner and form as the court may direct.

(*e*) *Time of service.*—Service under subdivision (b) shall be made within 10 days after the issuance of the summons. If service is made under subdivision (c), the summons, complaint, and notice of trial or pre-trial conference shall be deposited in the mail within 10 days after the issuance of the summons. Service under subdivision (d) or (i) shall be made within the time fixed by the court. If a summons is not timely served in accordance with the foregoing provisions, another summons shall be issued and served and a new date set for trial.

(*f*) *Territorial limits of effective service.*

(1) The summons, together with the complaint and notice of trial or pre-trial conference, and all other process except a subpoena may be served anywhere within the United States. "United States," as used in this subdivision, includes the Commonwealth of Puerto Rico and the territories and possessions to which the Act is or may hereafter be applicable.

(2) The summons, together with the complaint and notice of trial or pre-trial conference, and all other process except a subpoena may be served as provided in subdivision (b) or (d) in a foreign country (A) on the bankrupt, any person required to perform the duties of a bankrupt, any general partner of an adjudicated partnership, or any attorney who is a party to a transaction subject to examination under Rule 220, or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court, or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4 (d)(7) or Rule 4 (e) of the Federal Rules of Civil Procedure.

(3) A subpoena may be served within the territorial limits provided in Rule 45 of the Federal Rules of Civil Procedure.

(*g*) *Proof of service.*—Service of process under the foregoing provisions of this rule shall be proved as provided in Rule 4 (g) of the Federal Rules of Civil Procedure. When service is made by mail, the proof shall include a certification of the mailing by the person who made the service. Failure to make proof of service does not affect the validity of the service.

(*h*) *Effect of errors; amendment.*—Service of process under this rule shall be effective notwithstanding an error in the papers served or the manner or proof of service if no material prejudice resulted therefrom to the substantial rights of the party against whom the process issued. Amendment of process or proof of service thereof may be allowed as provided in Rule 4 (h) of the Federal Rules of Civil Procedure.

(*i*) *Alternative provisions for service in a foreign country.*—If service of the summons, complaint, and notice of trial or pre-trial conference or of any process is authorized to be effected upon a party in a foreign country, it may also be made and proved as provided in subdivision (i) of Rule 4 of the Federal Rules of Civil Procedure.

Rule 712. Defenses and objections.

(*a*) *When presented.*—If a complaint is duly served upon him, a defendant shall serve his answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 10 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 10 days after service of the answer or, if a reply is ordered by the court, within 10 days after service of the order, unless the order otherwise directs. The

United States or an officer or agency thereof shall serve an answer to a complaint within 35 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 5 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 5 days after the service of a more definite statement.

Rule 744.1. Determination of foreign law.

[Abrogated]

Rule 755. Default.

(*a*) *Entry and service of copy of judgment.*—When a judgment is sought against a party in adversary proceedings and such party has, without sufficient excuse, (1) failed to plead or otherwise defend or, (2) having filed a pleading or motion, is not ready to proceed with trial on the day set therefor in accordance with these rules, the court upon request therefor shall enter a judgment by default, except as provided hereinafter. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as it deems necessary and proper. No judgment by default shall be entered against an infant or incompetent person unless represented in the proceeding by a general guardian, committee, conservator, or other such representative who has appeared therein. Immediately on

the entry of judgment by default the court shall serve a copy of the judgment by mail in the manner provided by Rule 705 on the party against whom the judgment is entered. The service of such copy shall be noted in the court's docket. Lack of service of the copy does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 802.

Rule 801. Manner of taking appeal; voluntary dismissal.

(*a*) *Manner of taking appeal.*—An appeal from a judgment or order of a referee to a district court shall be taken by filing a notice of appeal with the referee within the time allowed by Rule 802. Failure of an appellant to take any step other than that specified in the first sentence does not affect the validity of the appeal, but is ground only for such action as the district court deems appropriate, which may include dismissal of appeal. The notice of appeal shall conform substantially to Official Form No. 28, shall contain the names of all parties to the judgment or order appealed from and the names and addresses of their respective attorneys, and shall be accompanied by the fee fixed by the Judicial Conference of the United States pursuant to § 40c of the Act. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the referee to comply promptly with Rule 804.

(*b*) *Voluntary dismissal.*—If an appeal has not been docketed, the appeal may be dismissed by the referee upon the filing with him of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant. If the parties to an appeal shall sign and file with the clerk of the district court an agreement that the appeal be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court.

An appeal may also be dismissed upon motion of the appellant upon terms agreed upon by the parties or fixed by the court.

Rule 805. Stay pending appeal.

A motion for a stay of the judgment or order of a referee, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be made in the first instance to the referee. Notwithstanding Rule 762 but subject to the power of the district court reserved hereinafter, the referee may suspend or order the continuation of proceedings or make any other appropriate order during the pendency of an appeal upon such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by the referee, may be made to the district court, but the motion shall show why the relief, modification, or termination was not obtained from the referee. The district court may condition the relief it grants under this rule upon the filing of a bond or other appropriate security with the referee. A trustee or receiver may be required to give a supersedeas bond or other appropriate security in order to obtain a stay when taking an appeal. Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

Rule 914. Procedure in contested matters not otherwise provided for.

In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No responsive pleading is required under this

rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons, complaint, and notice by Rule 704. In all contested matters, unless the court otherwise directs, the following rules shall also apply: 721, 725, 726, 728–737, 741, 742, 752, 754–756, 762, 764, 769, and 771. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 727 for the taking of a deposition before an adversary proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to contested matters. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

Rule 917. Evidence.

The Federal Rules of Evidence and Rules 43, 44, and 44.1 of the Federal Rules of Civil Procedure apply in bankruptcy cases subject to specific provisions in these rules governing matters of evidence.

Form No. 6

Schedules

[*Caption, other than designation, as in Form No. 1*]

Schedule A.—Statement of All Debts of Bankrupt

Schedules A-1, A-2, and A-3 must include all the claims against the bankrupt or his property as of the date of the filing of the petition by or against him.

Schedule A-1.—Creditors having priority

Nature of claim	Name of creditor and complete mailing address including zip code [if unknown, so state]	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, or subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Amount of claim

Schedule A-2.—Creditors holding security

Name of creditor and complete mailing address including zip code [if unknown so state]	Description of security and date when obtained by creditor	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Market value	Amount of claim without deduction of value of security

Schedule A-3.—Creditors having unsecured claims without priority

Name of creditor [including last known holder of any negotiable instrument] and complete mailing address including zip code [if unknown, so state]	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Amount of claim

Form No. 26

Summons and Notice of Trial of Adversary Proceedings or of Pre-trial Conference

[*Caption, other than designation, as in Form No. 25*]

Summons and Notice of Trial or Pre-trial Conference

To the above-named defendant:

You are hereby summoned and required to serve upon ...., plaintiff's attorney, whose address is ...., a motion or an answer [1] to the complaint which is herewith served upon you, on or before ...., and to file the motion or answer with this court not later than the second business day thereafter. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

You are hereby notified that trial of the proceeding commenced by this complaint [*or that a pre-trial conference with respect to this complaint*] has been set for ...., at ..... o'clock .... m., in ....

..............................,
Bankruptcy Judge.
By: ....
Address: ....,
....

Date of issuance: ....

[1] If you make a motion, as you may in accordance with Bankruptcy Rule 712, that rule governs the time within which your answer must be served.

AMENDMENTS TO THE CHAPTER XI RULES

Rule 11–24. Notices to parties in interest and the United States.

(*b*) *Other notices to parties in interest.*—Except as provided in subdivision (f) of this rule, the court shall give notice by mail to the trustee or receiver, the debtor, and all creditors, including secured creditors, of (1) dismissal of the case pursuant to Rule 11–42; (2) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c (2) of the Act as provided in Rule 11–48; and (3) entry of an order confirming a plan pursuant to Rule 11–38.

Rule 11–61. Adversary proceedings.

(*b*) *References in Bankruptcy Rules.*—As applied in Chapter XI cases, the reference in Bankruptcy Rule 725 to Rule 221 (b) shall be read as a reference to Rule 11–18 (g), and the reference in Bankruptcy Rule 741 to "a complaint objecting to the bankrupt's discharge" shall be read to include also a reference to "a complaint objecting to the confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt."

Rule 11–62. Appeal to district court.

Part VIII of the Bankruptcy Rules applies in Chapter XI cases, except that Rule 802 (c) thereof shall read as follows:

"(*c*) *Extension of time for appeal.*—The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal

must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property or the issuance of any certificate of indebtedness, or is not a judgment or order under Rule 11–38 confirming a plan, or is not a judgment or order under Rule 11–42 dismissing a Chapter XI case, or converting a Chapter XI case to bankruptcy."

AMENDMENTS TO THE CHAPTER XIII RULES AND OFFICIAL FORMS

Rule 13–203. Notices to creditors and the United States.

(*b*) *Other notices to all creditors.*—Except as provided in subdivision (e) of this rule, the court shall give notice by mail to all creditors, including creditors secured by estates in real property or chattels real, of (1) the dismissal of the case pursuant to Rule 13–112 or 13–215; (2) the time fixed, if any, for filing rejections of a modification of a plan pursuant to Rule 13–212; (3) the time fixed, if any, for filing a complaint objecting to the debtor's discharge pursuant to Rule 13–404 (b)(1); (4) the order of discharge as provided in Rule 13–404 (e); (5) the waiver, denial, or revocation of a discharge as provided in Rule 13–406; and (6) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c (2) of the Act as provided in Rule 13–407 (a)(2).

Rule 13–204. Meetings of creditors.

(*a*) *First meeting.*

(*1*) *Date and place.*—Promptly after the filing of a plan the court shall call a first meeting of creditors, but if there is an application or motion to dismiss or to convert to bankruptcy under Rule 13–112, or an appeal from or a motion to vacate an order entered under that rule, the court may delay fixing a date for such meeting. A copy or a summary of the last filed plan and a form of proof of claim containing provision for acceptance or rejection of the plan shall accompany the notice of the meeting. The notice shall state that any secured claim not filed before the conclusion of the first meeting of creditors or within such extended time as the court may fix will not be treated as a secured claim for purposes of

voting and distribution and that any creditor filing a claim who has not filed a written acceptance or rejection of the plan pursuant to Rule 13–202 prior to the conclusion of the first meeting of creditors shall be deemed to have accepted the plan. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

Rule 13–206. Examination.

(*d*) *Scope of examination.*—The examination under subdivisions (a) and (b) of this rule may relate only to the acts, conduct, or property of the debtor, or to any matter which may affect the administration of the debtor's estate, or to his right to discharge. The examination of a spouse under subdivisions (a) and (b) of this rule shall be subject to the provisos of § 21a of the Act.

Rule 13–207. Employment and compensation and reimbursement of attorneys and accountants governed by Bankruptcy Rules.

The employment of attorneys and accountants for the trustee and the authorization of the trustee to act as an attorney or accountant for the estate shall be governed by Bankruptcy Rule 215. The compensation and reimbursement of expenses of such an attorney or accountant for an estate and the compensation and reimbursement of the debtor's attorney shall be governed by Bankruptcy Rule 219, but the reference in Bankruptcy Rule 219 (d) to Rule 220 shall be read as a reference to Rule 13–210.

Rule 13–302. Filing proof of claim.

(*e*) *Time for filing.*

(*1*) *Secured claims.*—A secured claim, whether or not listed in the Chapter XIII Statement, must be filed before the conclusion of the first meeting of creditors in the Chapter XIII case unless the court, on application before the expiration of that time and for cause shown, shall grant a reasonable, fixed extension of time. Any claim

not properly filed by the creditor within such time shall not be treated as a secured claim for purposes of voting and distribution in the Chapter XIII case. Notwithstanding the foregoing, the court may permit the later filing of a secured claim for the purpose of distribution by the debtor, the trustee, or a codebtor.

Rule 13–303. Filing of claims by debtor or trustee.

If a creditor fails to file his claim before the conclusion of the first meeting of creditors in the Chapter XIII case, the debtor or the trustee may execute and file a proof of such claim as an unsecured claim on Official Form No. 13–10 in the name of the creditor. Such claim shall be treated as a filed claim only for purposes of allowance and distribution. The court shall forthwith mail notice of such filing to the creditor and to the debtor if the claim is filed by the trustee, or to the trustee if the claim is filed by the debtor. The creditor may nonetheless file a proof of claim pursuant to Rule 13–302, which proof when filed shall supersede the proof filed by the debtor or trustee.

Rule 13–304. Claim by codebtor.

A person who is or may be liable with the debtor, or who has secured a creditor of the debtor, may, if the creditor fails to file his claim before the conclusion of the first meeting of creditors, file a proof of such claim as an unsecured claim pursuant to Rule 13–302 in the name of the creditor, if known, or if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of the distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 13–302, which proof when filed shall supersede the proof of claim filed pursuant to the first sentence of this rule.

Rule 13–305. Post-petition claims.

Notwithstanding Rule 13–302 (e), the court may at

any time while a case is pending permit the filing of a proof of claim for the following:

(1) Claims for taxes owing to the United States, or to any state, or any subdivision thereof, at the time of the filing of the petition under Rule 13–103 or 13–104 which had not been assessed prior to date of confirmation of the plan, but which are assessed within one year after the date of the filing of such petition;

(2) Claims for taxes owing to the United States, or to any state, or any subdivision thereof, after the filing of the petition under Rule 13–103 or 13–104 and which are assessed while the case is pending;

(3) On such terms as the court may prescribe, claims incurred by the debtor after the filing of a petition under Rule 13–103 or 13–104 for property or services needed to assure proper performance under the plan by the debtor, provided that, when feasible, prior court approval of the incurring of the claim has been obtained; and

(4) Within such time as the court may direct, claims arising from the rejection of executory contracts of the debtor.

Notice of the filing of a claim under this rule shall be given to the debtor and the trustee.

Rule 13–307. Objections to and allowance of claims; valuation of security.

(*c*) *Objection to allowance.*—An objection to the allowance of a claim shall be in writing. A copy of the objection and at least 10 days' notice or, if the claim is for taxes, at least 30 days' notice of a hearing thereon shall be mailed or delivered to the claimant, the trustee, and the debtor. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 13–701, the proceeding thereby becomes an adversary proceeding.

Rule 13–701. Adversary proceedings.

(*b*) *References in Bankruptcy Rules.*—As applied in Chapter XIII cases, the reference in Bankruptcy Rule

704 (f)(2) to Rule 220 shall be read as a reference to Rule 13–210, the reference in Bankruptcy Rule 725 to Rule 221 (b) shall be read as a reference to Rule 13–211 (b), and the reference in Bankruptcy Rule 741 to "a complaint objecting to the bankrupt's discharge" shall be read to include also a reference to "a complaint objecting to the confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt."

Rule 13–901. General provisions.

Part IX of the Bankruptcy Rules applies in Chapter XIII cases except that:

(1) The reference in Bankruptcy Rule 901 (7) to Rule 102 shall be read as a reference to Rule 13–102.

(2) The references in Bankruptcy Rule 906 (b) to Rules 107 (b)(2) and 302 (e) shall be read as references to Rules 13–106 (b)(2) and 13–302 (e).

(3) The references in Bankruptcy Rule 906 (c) to Rules 203 (a), 302 (e), 404 (a), and 409 (a)(2) shall be read as references to Rules 13–203 (a), 13–302 (e), 13–404 (b)(1), and 13–407 (a)(2).

(4) The exception in Bankruptcy Rule 910 (c) for "the execution and filing of a proof of claim" shall be read to include also "the execution and filing of an acceptance or rejection of a plan" and the references to Official Forms No. 13 and 14 shall be read as a single reference to Official Form 13–8.

(5) The reference in Bankruptcy Rule 913 (b) to "a dischargeable debt" shall be read as a reference to "a debt which is or will be provided for by the plan."

(6) The reference in Bankruptcy Rule 919 (a) to "notice to the creditors as provided in Rule 203 (a) and to such other persons as the court may designate" shall be read as a reference to "such notice to such persons as the court may designate."

(7) The reference in Bankruptcy Rule 922 (b) to Rule 102 shall be read as a reference to Rule 13–102.

(8) The reference in Bankruptcy Rule 924 to "the time allowed by § 15 of the Act for the filing of a complaint to revoke a discharge" shall be read to include also a reference to "the time allowed by § 671 of the Act for the filing of a complaint to revoke the confirmation of a plan."

FORM NO. 13–5

CHAPTER XIII STATEMENT

11. *Debts.* (To be answered for each spouse whether single or joint petition is filed.)

a. *Secured Debts.* List all debts which are or may be secured by real or personal property. (Indicate in sixth column, if debt payable in installments, the amount of each installment, the installment period (monthly, weekly, or other) and number of installments in arrears, if any. Indicate in last column whether husband or wife solely liable, or whether you are jointly liable.)

Creditor's name and complete mailing address including zip code [if unknown, so state]	Consideration or basis for debt	Amount claimed by creditor	If disputed, amount admitted by debtor	Description of collateral [include year and make of automobile]	Installment amount, period, and number of installments in arrears	Husband or wife solely liable, or jointly liable
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....
....	....	....	....	....	....	....

b. *Unsecured Debts.* List all other debts, liquidated and unliquidated, including taxes, attorneys' fees and tort claims.

Creditor's name and complete mailing address including zip code [if unknown, so state]	Consideration or basis for debt	Amount claimed by creditor	If disputed, amount admitted by debtor	Husband or wife solely liable, or jointly liable
....	....	....	....	....
....	....	....	....	....
....	....	....	....	....
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Form No. 13-7

Order for First Meeting of Creditors and Related Orders, Combined with Notice Thereof and of Automatic Stay

[*Caption, other than designation, as in Form No. 13-1*]

Order for First Meeting of Creditors and Related Orders, Combined with Notice Thereof and of Automatic Stay

To the debtor, his creditors, and other parties in interest:

.... of *............................., having filed a petition on .... stating that he desires to effect a plan under Chapter XIII of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at ...., on ...., at .... o'clock ... m.

2. The debtor shall appear in person before the court at that time and place for the purpose of being examined.

3. The hearing on confirmation of the plan shall be held at the first meeting [*or* at ...., on .... at ..... o'clock ... m. *or* at a date to be later fixed at the first meeting].

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

Creditors may file written objections to confirmation at any time prior to confirmation.

Creditors holding secured claims must, unless an extension of time is granted, file their claims before the conclusion of the first meeting of creditors and all such creditors who fail to do so will not be treated as secured creditors for purposes of voting and distribution in the Chapter XIII case. At the meeting unsecured creditors may also file their claims, and all creditors may examine the debtor as permitted by the court, and transact such other business as may properly come before the meeting. In order to have his claim allowed for the purpose of voting and distribution, a creditor must file a claim, whether or not he is included in the list of creditors filed by the debtor. Where the Chapter XIII petition is filed in a pending bankruptcy case, claims filed in the bankruptcy case must be

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**State post-office address.*

timely amended pursuant to Rule 13–302 (f). Claims which are not filed within 6 months after the date above set for the first meeting of creditors will not be allowed except as otherwise provided by law.

Any creditor filing a claim who has not filed a written acceptance or rejection of the plan pursuant to Rule 13–202 prior to the conclusion of the first meeting of creditors, in his proof of claim or otherwise, will be deemed to have accepted the plan.

The filing of the petition by the debtor above named operates as a stay of the commencement or continuation of any action against the debtor, of the enforcement of any judgment against him, of any act or the commencement or continuation of any court proceeding to enforce any lien on the property of the debtor, and of any court proceeding for the purpose of rehabilitation of the debtor or the liquidation of his estate, as provided by Rule 13–401.

A claim and an acceptance or rejection of the plan may be filed in the office of the undersigned bankruptcy judge on an official form prescribed in a proof of claim.

Dated: ....

......................................,
Bankruptcy Judge.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

CAVEAT: While some of these amendments were approved by Congress as proposed by the Court, other amendments were modified or disapproved. See Pub. L. 94–349, § 1, 90 Stat. 822; Pub. L. 95–78, § 2, 91 Stat. 319.

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 26, 1976, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see, *ante*, p. 1004. The Judicial Conference report referred to in that letter is not reproduced herein.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 415 U. S. 1056, 416 U. S. 1001, and 419 U. S. 1136.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 26, 1976

ORDERED:

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rule 40.1 and amendments to Rules 6 (e), 6 (f), 23 (b), 23 (c), 24 (b), 41 (a), 41 (c), and 50 (b) as hereinafter set forth:[*]

[See *infra,* pp. 1161–1166.]

2. That the foregoing amendments and addition to the rules of procedure shall take effect on August 1, 1976, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and addition to the Rules of Criminal Procedure in accordance with the provisions of Title 18, United States Code, Sections 3771 and 3772.

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*[REPORTER'S NOTE: As previously noted, see Caveat, *supra,* p. 1157, Congress modified or disapproved some of these amendments. Nevertheless, publication of the amendments and the Rules set forth, *infra,* pp. 1161–1166, in the form proposed by the Court in order fully to reflect the Court's action is deemed preferable to publication of only those portions of proposed Rules or amendments thereto that Congress has adopted, as has been done on previous occasions. See 416 U. S. 1005 and 419 U. S. 1133.]

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 6. The grand jury.

* * * * *

(*e*) *Secrecy of proceedings and disclosure.*—Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54 (c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The federal magistrate to whom an indictment is returned may direct that it shall be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(*f*) *Finding and return of indictment.*—An indictment may be found only upon the concurrence of 12 or

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*[REPORTER'S NOTE: See Caveat, *supra,* p. 1157.]

more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

Rule 23. Trial by jury or by the court.

. . . . .

(*b*) *Jury of less than twelve.*—Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

(*c*) *Trial without a jury.*—In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Rule 24. Trial jurors.

. . . . .

(*b*) *Peremptory challenges.*

(*1*) *Number of challenges.*

(*A*) *Capital cases.*—If the offense charged is punishable by death, each side is entitled to 12 peremptory challenges.

(*B*) *Felony cases.*—If the offense charged is punishable by imprisonment for more than one year, each side is entitled to 5 peremptory challenges.

(*C*) *Misdemeanor cases.*—If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 2 peremptory challenges.

(*2*) *Relief from limitations.*

(*A*) *For cause.*—For good cause shown, the court may

grant such additional challenges as it, in its discretion, believes necessary and proper.

(*B*) *Multiple defendants.*—If there is more than one defendant the court may allow the parties additional challenges and permit them to be exercised separately or jointly.

(*C*) *Time for making motion.*—A motion for relief under (b)(2) shall be filed at least 1 week in advance of the first scheduled trial date or within such other time as may be provided by the rules of the district court.

Rule 40.1. Removal from state court.

(*a*) *Time for filing.*—A petition for removal of a criminal prosecution from a state court to a United States district court shall be filed in the district court for the federal judicial district in which the state prosecution is pending. Such petition shall be made not later than 10 days after the arraignment in state court except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(*b*) *Number of petitions.*—A petition for removal of a state criminal prosecution to a United States district court must include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitation of this subdivision.

(*c*) *Proceedings.*—The filing of a petition for removal shall not prevent the state court in which prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(1) The district court to which the petition is directed shall examine it promptly. If it clearly appears on the face of the petition and any exhibits annexed

thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(2) If the district court does not order the summary dismissal of the petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the district court determines that the petition shall be granted, it shall so notify the state court in which prosecution is pending, which shall proceed no further.

Rule 41. Search and seizure.

(*a*) *Authority to issue warrant.*—A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

* * * * *

(*c*) *Issuance and contents.*

(*1*) *Warrant upon affidavit.*—A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United

States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(*2*) *Warrant upon oral testimony.*—When the circumstances make it reasonable to do so in the absence of a written affidavit, a search warrant may be issued upon sworn oral testimony of a person who is not in the physical presence of a federal magistrate provided the federal magistrate is satisfied that probable cause exists for the issuance of the warrant. The sworn oral testimony may be communicated to the magistrate by telephone or other appropriate means and shall be recorded and transcribed. After transcription the statement must be certified by the magistrate and filed with the court. This statement shall be deemed to be an affidavit for purposes of this rule.

(*A*) *Method of issuance.*—The grounds for issuance and the contents of the warrant shall be those required by subdivision (c)(1) of this rule. Prior to approval of the warrant, the magistrate shall require the federal law enforcement officer or the attorney for the government who is requesting the warrant to read to him, verbatim, the contents of the warrant. The magistrate may direct that specific modifications be made in the warrant. Upon approval, the magistrate shall direct the federal law enforcement officer or the attorney for the government who is requesting the warrant to sign the magistrate's name on the warrant. This warrant shall be called a duplicate original warrant and shall be deemed a warrant for purposes of this rule. In such cases, the magistrate shall cause to be made an original warrant.

The magistrate shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant.

(*B*) *Return.*—Return of the duplicate original warrant and the original warrant shall be in conformity with subdivision (d) of this rule. Upon return, the magistrate shall require the person who gave the sworn oral testimony establishing the grounds for issuance of the warrant, to sign a copy of it.

Rule 50. Calendars; plans for prompt disposition.

* * * * *

(*b*) *Plans for achieving prompt disposition of criminal cases.*—To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.

RULES GOVERNING 28 U. S. C. § 2254 CASES AND § 2255 PROCEEDINGS

Caveat: While some of these Rules were approved by Congress as proposed by the Court, several others were modified. See Pub. L. 94–426, §§ 1, 2, 90 Stat. 1334; Pub. L. 94–577, § 2, 90 Stat. 2730.

The following Rules governing cases in the United States District Courts under 28 U. S. C. § 2254 and proceedings under § 2255 were prescribed by the Supreme Court of the United States on April 26, 1976, pursuant to 28 U. S. C. § 2072 and 18 U . S. C. §§ 3771 and 3772, and were reported to Congress by The Chief Justice on the same date. For the letter of transmittal, see *ante*, p. 1004. The Judicial Conference report referred to in that letter is not reproduced herein.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 26, 1976

ORDERED:

1. That the rules and forms governing proceedings in the United States District Courts under Section 2254 and Section 2255 of Title 28, United States Code, as approved by the Judicial Conference of the United States be, and they hereby are, prescribed pursuant to Section 2072 of Title 28, United States Code and Sections 3771 and 3772 of Title 18, United States Code.[*]

2. That the aforementioned rules and forms shall take effect August 1, 1976, and shall be applicable to all proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding would not be feasible or would work injustice.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned rules and forms governing Section 2254 and Section 2255 proceedings to the Congress in accordance with the provisions of Section 2072 of Title 28 and Sections 3771 and 3772 of Title 18, United States Code.

*[REPORTER'S NOTE: Although, as previously noted, see Caveat, *supra,* p. 1167, Congress modified several of these Rules, the Rules are published in the form proposed by the Court. See Reporter's Note, *supra,* p. 1159. However, since the forms accompanying the Rules proposed by the Court were prepared as models only, and as such have been revised and will continue to be subject to revision, they are not published herein.]

RULES GOVERNING 28 U. S. C. § 2254 CASES IN THE UNITED STATES DISTRICT COURTS*

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*[REPORTER'S NOTE: See Caveat, *supra*, p. 1167.]

RULES GOVERNING 28 U. S. C. § 2254 CASES IN THE UNITED STATES DISTRICT COURTS*

Rule 1. Scope of rules.

(*a*) *Applicable to cases involving custody pursuant to a judgment of a state court.*—These rules govern the procedure in the United States district courts on applications under 28 U. S. C. § 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(*b*) *Other situations.*—In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

Rule 2. Petition.

(*a*) *Applicants in present custody.*—If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(*b*) *Applicants subject to future custody.*—If the applicant is not presently in custody pursuant to the state

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*[Reporter's Note: See Caveat, *supra*, p. 1167.]

judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(*c*) *Form of petition.*—The petition shall be in the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. The petition shall follow the prescribed form. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed and sworn to by the petitioner.

(*d*) *Petition to be directed to judgments of one court only.*—A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(*e*) *Return of insufficient petition.*—If a petition received by the clerk of the district court does not comply with the requirements of rule 2 or rule 3, it may be returned by the clerk to the petitioner with a statement

of the reason for its return, and it shall be returned if the clerk is so directed by a judge of the court. The clerk shall retain a copy of the petition.

Rule 3. Filing petition.

(*a*) *Place of filing; copies; filing fee.*—A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U. S. C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(*b*) *Filing and service.*—Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary consideration by judge.

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court,

the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

Rule 5. Answer; contents.

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

Rule 6. Discovery.

(*a*) *Leave of court required.*—A party shall be entitled to invoke the processes of discovery available under the

Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U. S. C. § 3006A (g).

(*b*) *Requests for discovery.*—Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(*c*) *Expenses.*—If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

Rule 7. Expansion of record.

(*a*) *Direction for expansion.*—If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(*b*) *Materials to be added.*—The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(*c*) *Submission to opposing party.*—In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(*d*) *Authentication.*—The court may require the authentication of any material under subdivision (b) or (c).

Rule 8. Evidentiary hearing.

(*a*) *Determination by court.*—If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(*b*) *Function of the magistrate.*—When empowered to do so by rule of the district court, the magistrate may recommend to the district judge that an evidentiary hearing be held or, in the alternative, that the petition be dismissed. In doing so the magistrate shall give to the district judge a sufficiently detailed description of the facts to enable him to make a decision to hold or not to hold an evidentiary hearing.

(*c*) *Appointment of counsel; time for hearing.*—If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U. S. C. § 3006A (g) and shall conduct the hearing as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation.

Rule 9. Delayed or successive petitions.

(*a*) *Delayed petitions.*—A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the

validity of an action, such as revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.

(*b*) *Successive petitions.*—A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition is not excusable.

Rule 10. Powers of magistrates.

The duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a United States magistrate if and to the extent that he is so empowered by rule of the district court, except that when such duties involve the making of an order, under rule 4, dismissing the petition the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court.

Rule 11. Federal Rules of Civil Procedure; extent of applicability.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

RULES GOVERNING 28 U. S. C. § 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS*

Rule 1. Scope of rules.

These rules govern the procedure in the district court on a motion under 28 U. S. C. § 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

Rule 2. Motion.

(*a*) *Nature of application for relief.*—If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

*[Reporter's Note: See Caveat, *supra,* p. 1167.]

(*b*) *Form of motion.*—The motion shall be in the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. The motion shall follow the prescribed form. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed and sworn to by the movant.

(*c*) *Motion to be directed to one judgment only.*—A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(*d*) *Return of insufficient motion.*—If a motion received by the clerk of the district court does not comply with the requirements of rule 2 or 3, it may be returned by the clerk to the movant with a statement of the reason for its return, and it shall be returned if the clerk is so directed by a judge of the court. The clerk shall retain a copy of the motion.

Rule 3. Filing motion.

(*a*) *Place of filing; copies.*—A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(*b*) *Filing and service.*—Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court

shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary consideration by judge.

(*a*) *Reference to judge; dismissal or order to answer.*—The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(*b*) *Initial consideration by judge.*—The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 5. Answer; contents.

(*a*) *Contents of answer.*—The answer shall respond to the allegations of the motion. In addition it shall state

whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(*b*) *Supplementing the answer.*—The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

Rule 6. Discovery.

(*a*) *Leave of court required.*—A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U. S. C. § 3006A (g).

(*b*) *Requests for discovery.*—Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(*c*) *Expenses.*—If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

Rule 7. Expansion of record.

(*a*) *Direction for expansion.*—If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(*b*) *Materials to be added.*—The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(*c*) *Submission to opposing party.*—In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(*d*) *Authentication.*—The court may require the authentication of any material under subdivision (b) or (c).

Rule 8. Evidentiary hearing.

(*a*) *Determination by court.*—If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(*b*) *Function of the magistrate.*—When empowered to do so by rule of the district court, the magistrate may recommend to the district judge that an evidentiary hearing be held or, in the alternative, that the motion be dismissed. In doing so the magistrate shall give to the district judge a sufficiently detailed description of the

facts to enable him to make a decision to hold or not to hold an evidentiary hearing.

(*c*) *Appointment of counsel; time for hearing.*—If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U. S. C. § 3006A (g) and shall conduct the hearing as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation.

Rule 9. Delayed or successive motions.

(*a*) *Delayed motions.*—A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred. If the motion is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the movant, that there is prejudice to the government.

(*b*) *Successive motions.*—A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion is not excusable.

Rule 10. Powers of magistrates.

The duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a United States magistrate if and to the extent that he is so empowered by rule of the district court except that, when such duties involve the making of an order under rule 4 dismissing the motion, the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court.

Rule 11. Time for appeal.

Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

Rule 12. Federal Rules of Criminal and Civil Procedure; extent of applicability.

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

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III. Fifth Amendment.

1. *Privilege against self-incrimination—Attorney-client privilege—Taxpayers' accountants' workpapers in attorneys' hands.*—Although attorney-client privilege applies to documents in hands of an attorney which would have been privileged in hands of client by reason of Fifth Amendment, taxpayer-clients in these cases would not be protected by that Amendment from producing their accountants' workpapers which they had transferred to their attorneys, because production of such documents involves no incriminating testimony and therefore documents in hands of taxpayers' attorneys were not immune from production. Fisher v. United States, p. 391.

2. *Privilege against self-incrimination—Grand jury witness—Miranda warnings.*—In a perjury prosecution of respondent based on false statements he made to a grand jury investigating criminal activities in which he may have been personally involved, Court of Appeals' judgment affirming District Court's grant of respondent's motion to suppress his grand jury testimony because he was not given warnings called for by *Miranda* v. *Arizona*, 384 U. S. 436, he having been a "putative" or "virtual" defendant when called before grand jury, is reversed and case is remanded. United States v. Mandujano, p. 564.

3. *Privilege against self-incrimination—Taxpayers' accountants' workpapers in attorneys' hands.*—Compelled production from attorneys of taxpayer-clients' accountants' workpapers which taxpayer-clients transferred to attorneys, does not implicate whatever Fifth Amendment privilege taxpayer-clients might have enjoyed from being themselves compelled to produce documents. Fisher v. United States, p. 391.

IV. First Amendment.

1. *Freedom of speech—"Commercial speech"—Ban on prescription drug price advertisements.*—"Commercial speech" is not wholly outside protection of First and Fourteenth Amendments, and Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise prices of prescription drugs is therefore invalid. Va. Pharmacy Bd. v. Va. Consumer Council, p. 748.

CONSTITUTIONAL LAW—Continued.

2. *Freedom of speech—Ordinance regulating door-to-door soliciting and canvassing—Vagueness.*—A municipal ordinance requiring that advance written notice be given local police department by "any person [including representatives of Borough Civic Groups and Organizations] desiring to canvass, solicit or call from house to house for a recognized charitable cause, or . . . for a Federal, State, County or Municipal political campaign or cause . . . for identification only," is invalid because of vagueness. Hynes v. Mayor of Oradell, p. 610.

3. *Freedom of speech—Prescription drug price advertisements.*—Any First Amendment protection enjoyed by advertisers seeking to disseminate prescription drug price information is also enjoyed, and thus may be asserted, by appellee prescription drug consumers as recipients of such information. Va. Pharmacy Bd. v. Va. Consumer Council, p. 748.

V. Fourth Amendment.

Search and seizure—Subpoenaed bank records.—Respondent, who, having been charged with various federal offenses, made a pretrial motion to suppress microfilms of checks, deposit slips, and other records relating to his bank accounts, possessed no Fourth Amendment interest in bank records that could be vindicated by a challenge to subpoenas *duces tecum* pursuant to which records had been produced by banks, and District Court therefore did not err in denying motion to suppress. United States v. Miller, p. 435.

VI. Sixth Amendment.

1. *Right to counsel—Overnight recess.*—Trial court's order preventing petitioner, defendant in a federal criminal prosecution, from consulting his counsel "about anything" during a 17-hour overnight recess in trial between his direct and cross-examination deprived petitioner of his right to assistance of counsel guaranteed by Sixth Amendment. Geders v. United States, p. 80.

2. *Right to counsel—Summary court-martial.*—There is no Sixth Amendment right to counsel in a summary court-martial, since that proceeding is not a "criminal prosecution" as that term is used in Amendment. Middendorf v. Henry, p. 25.

CONSUMERS. See **Constitutional Law,** IV, 1, 3.

CONTRABAND PROCURED FROM GOVERNMENT INFORMER. See **Criminal Law,** 1.

CORPORATIONS. See **Constitutional Law,** I, 4.

COUNCILMANIC DISTRICTS. See **Voting Rights Act of 1965.**

COUNTY REGULATIONS AS TO POLICEMEN'S HAIR LENGTH. See **Constitutional Law, I, 2.**

COURTS-MARTIAL. See **Constitutional Law, I, 3; VI, 2.**

COURTS OF APPEALS. See **Judicial Review.**

CRIMINAL LAW. See also **Constitutional Law, I, 4; III, 2; V; VI, 1; Habeas Corpus; Jencks Act; Procedure, 1.**

1. *Sale of heroin supplied by Government informer—Entrapment—Predisposition to commit crime.*—Judgment affirming petitioner's conviction of distributing heroin arising from his sale to Government agents of heroin supplied by a Government informer, and rejecting his argument that he should have been acquitted under defense of entrapment regardless of his predisposition to commit crime, is affirmed. Hampton v. United States, p. 484.

2. *Tax fraud prosecution—Statements made in noncustodial interview—Admissibility in evidence.*—Statements made by petitioner taxpayer to Internal Revenue Agents during course of a noncustodial interview in a criminal tax investigation were admissible against him in ensuing criminal tax fraud prosecution even though he was not given warnings required by *Miranda* v. *Arizona,* 384 U. S. 436. Although "focus" of investigation may have been on petitioner when he was interviewed, in sense that his tax liability was under scrutiny, that is not equivalent of "focus" for *Miranda* purposes, which involves "questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Beckwith v. United States, p. 341.

"CRIMINAL PROSECUTIONS." See **Constitutonal Law, VI, 2.**

CRIMINAL TAX INVESTIGATIONS. See **Constitutional Law, III, 1, 3; Criminal Law, 2.**

CUBA. See **International Law.**

DAIRIES. See **Patents, 2.**

DAMAGES ACTIONS. See **Securities Exchange Act of 1934.**

DATA PROCESSING. See **Patents, 1.**

DENIAL OF RIGHT TO VOTE. See **Voting Rights Act of 1965.**

DEPOSIT SLIPS. See **Constitutional Law, V.**

DIGITAL COMPUTERS. See **Patents, 1.**

DIRECT APPEALS. See **Jurisdiction, 2.**

DISCRIMINATION. See **Civil Rights; Civil Rights Act of 1964; Constitutional Law, I, 1; II; Federal Power Commission; Habeas Corpus.**

DISCRIMINATORY EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964; Federal Power Commission.**

DISMISSAL OF CERTIORARI. See **Certiorari.**

DISTRICT COURTS. See **Abstention; Jurisdiction; Mandamus.**

DOOR-TO-DOOR SOLICITING AND CANVASSING. See **Constitutional Law, IV, 2.**

DRUG PRICE ADVERTISEMENTS. See **Constitutional Law, IV, 1, 3.**

DRUG PURCHASES BY NONPROFIT HOSPITALS. See **Antitrust Acts, 1–3.**

DRUGS. See **Criminal Law, 1.**

DUE PROCESS. See **Certiorari; Constitutional Law, I; IV, 2; VI, 2; Prisoners.**

ECONOMIC OPPORTUNITY ACT OF 1964. See **Federal Tort Claims Act.**

ELECTIONS. See **Mandamus; Voting Rights Act of 1965.**

ELECTRIC UTILITIES. See **Supreme Court, 5.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964; Federal Power Commission.**

ENTRAPMENT. See **Criminal Law, 1.**

EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972. See **Civil Rights Act of 1964.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law, II; Procedure, 2.**

EVIDENCE. See **Criminal Law, 2.**

EXCLUSIVE REMEDY FOR FEDERAL EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964, 1.**

EXEMPTIONS FROM SALES TAXES. See **National Banks.**

EXEMPTIONS 2 AND 6 OF FREEDOM OF INFORMATION ACT. See **Freedom of Information Act.**

EXPECTATION OF PRIVACY. See **Constitutional Law, V.**

EXPROPRIATION OF INDUSTRY. See **Internationl Law.**

FAILURE TO CLAIM GRAND JURY DISCRIMINATION. See **Habeas Corpus.**

FAILURE TO FILE TIMELY COMPLAINT. See **Civil Rights Act of 1964, 1.**

FAILURE TO OBJECT TO TRIAL IN PRISON CLOTHES. See **Constitutional Law,** I, 4.

FEDERAL AGENCIES OR INSTRUMENTALITIES. See **Federal Tort Claims Act.**

FEDERAL EMPLOYEES WITHIN MEANING OF FEDERAL TORT CLAIMS ACT. See **Federal Tort Claims Act.**

FEDERAL EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

FEDERALLY FUNDED PROGAMS AS COVERED BY FEDERAL TORT CLAIMS ACT. See **Federal Tort Claims Act.**

FEDERAL OR STATE CONSTITUTIONAL BASIS FOR STATE JUDGMENT. See **Procedure,** 1.

FEDERAL POWER COMMISSION.

1. *Authority to prohibit discriminatory employment practices.*—FPC is authorized to consider consequences of discriminatory employment practices on part of its regulatees only insofar as such consequences are directly related to FPC's establishment of just and reasonable rates in public interest. To extent that illegal, duplicative, or unnecessary labor costs are demonstrably product of a regulatee's discriminatory employment practices and can be or have been demonstrably quantified by judicial decree or final action of an administrative agency FPC should disallow them. NAACP v. FPC, p. 662.

2. *Authority to prohibit discriminatory employment practices—Public interest.*—FPC's asserted duty to advance public interest does not afford any basis for its prohibiting regulatees from engaging in discriminatory employment practices, as references to "public interest" in Federal Power Act and Natural Gas Act require FPC to promote orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates, and do not constitute a directive to FPC to seek to eradicate discrimination. NAACP v. FPC, p. 662.

FEDERAL-STATE RELATIONS. See **Habeas Corpus; Procedure,** 2; **Supreme Court,** 5.

FEDERAL TORT CLAIMS ACT.

Employees of federally funded programs as federal employees under FTCA.—A community action agency operating as a nonprofit corporation under state law and funded entirely by Office of

FEDERAL TORT CLAIMS ACT—Continued.

Economic Opportunity, and one of agency's centers which sponsored recreational outings for children, are not federal agencies or instrumentalities and their employees are not federal employees within meaning of FTCA. FTCA, which is a limited waiver of sovereign immunity applying to injuries caused by negligent act of any Government employee while acting within scope of his employment, but excluding from its coverage "any contractor with the United States," was never intended to reach employees or agents of all federally funded programs. United States v. Orleans, p. 807.

FIFTH AMENDMENT. See **Civil Rights; Constitutional Law,** I, 1, 3; III; VI, 2.

FIREMEN'S HAIR-STYLE REGULATIONS. See **Certiorari.**

FIRST AMENDMENT. See **Constitutional Law,** IV.

"FOCUS" OF INVESTIGATION. See **Criminal Law,** 2.

FOREIGN CORPORATIONS. See **Constitutional Law,** II.

FOSTER CARE PAYMENTS. See **Procedure,** 2.

FOURTEENTH AMENDMENT. See **Constitutional Law,** I, 2, 4; II; IV.

FOURTH AMENDMENT. See **Constitutional Law,** V.

FRAUD. See **Securities Exchange Act of 1934.**

FREEDOM OF INFORMATION ACT.

1. *Case summaries of Air Force Academy Honor Code violation hearings—Order to produce—In camera examination.*—Court of Appeals did not err in ordering Department of Air Force and Air Force Academy officers to produce case summaries of Academy Honor Code violation hearings for District Court's *in camera* examination, a procedure that represents "a workable compromise between individual rights 'and the preservation of public rights to [G]overnment information,'" which is statutory goal of Exemption 6 of FOIA. Dept. of Air Force v. Rose, p. 352.

2. *Exemption 2—Applicability to matters of public interest—Case summaries of Air Force Academy Honor Code violation hearings.*—Exemption 2 of FOIA exempting from disclosure "matters . . . related solely to the internal personnel rules and practices of an agency," does not generally apply to matters, such as case summaries of Air Force Academy Honor Code violation hearings involved here, in which there is a genuine and important public interest. Dept. of Air Force v. Rose, p. 352.

FREEDOM OF INFORMATION ACT—Continued.

3. *Exemption 6—Personnel files.*—Exemption 6 of FOIA exempting from disclosure "personnel . . . files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy," does not create a blanket exemption for personnel files. With respect to such files and "similar files" Congress enunciated a policy, to be judicially enforced, involving a balancing of public and private interests. Regardless of whether documents whose disclosure is sought are in "personnel" or "similar" files, nondisclosure is not sanctioned unless there is a showing of a clearly unwarranted invasion of personal privacy, and redaction of documents to permit disclosure of nonexempt portions is appropriate under Exemption 6. Dept. of Air Force v. Rose, p. 352.

4. *Exemption 6—Personnel files—Case summaries of Air Force Academy Honor Code violation hearings.*—Even if "personnel files" were to be considered as wholly exempt from disclosure under Exemption 6 of FOIA without regard to whether disclosure would constitute a clearly unwarranted invasion of personal privacy, case summaries of Air Force Academy Honor Code violation hearings were not in that category although they constituted "similar files" relating as they do to discipline of cadets, and their disclosure implicating similar privacy values. Dept. of Air Force v. Rose, p. 352.

5. *Legislative objective—Effect of exemptions.*—Limited statutory exemptions do not obscure basic policy that disclosure, not secrecy, is dominant legislative objective of FOIA. Dept. of Air Force v. Rose, p. 352.

FREEDOM OF SPEECH. See **Constitutional Law,** IV.

FUTURE INTERESTS IN MINERAL DEPOSITS IN INDIAN RESERVATIONS. See **Indians.**

GENERAL SERVICES ADMINISTRATION. See **Civil Rights Act of 1964,** 1.

GOVERNMENT CONTRACTORS. See **Federal Tort Claims Act.**

GOVERNMENT INFORMERS. See **Criminal Law,** 1.

GOVERNMENT WITNESSES. See **Jencks Act.**

GRAND JURIES. See **Habeas Corpus.**

GRAND JURY WITNESSES. See **Constitutional Law,** III, 2.

HABEAS CORPUS.

Unconstitutional grand jury indictment—Failure to challenge before trial—Necessity for prejudice.—Court of Appeals correctly

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HABEAS CORPUS—Continued.

held that rule of *Davis* v. *United States,* 411 U. S. 233, which requires not only a showing of "cause" for defendant's failure to challenge composition of grand jury before trial, but also a showing of actual prejudice, applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment. Louisiana time limitation on making such a challenge was designed to serve same important purposes of sound judicial administration as were stressed in *Davis, supra,* at 241, and considerations of comity and federalism require that those purposes be accorded no less recognition when a federal court is asked to overturn a state conviction than when it is asked to overturn a federal conviction because of an allegedly unconstitutional grand jury indictment. Francis v. Henderson, p. 536.

HAIR-STYLE REGULATIONS. See **Certiorari; Constitutional Law,** I, 2.

HEROIN. See **Criminal Law,** 1.

HONOR CODE OF AIR FORCE ACADEMY. See **Freedom of Information Act.**

HOSPITAL PHARMACIES. See **Antitrust Acts,** 1–3.

HOSPITALS. See **Antitrust Acts,** 4.

HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974. See **Civil Rights.**

ILLINOIS. See **Procedure,** 2.

IMPROVIDENT GRANT OF CERTIORARI. See **Certiorari.**

IN CAMERA EXAMINATIONS. See **Freedom of Information Act,** 1.

INCIDENCE OF SALES TAXES. See **National Banks.**

INCOME TAXES. See **Constitutional Law,** III, 1, 3.

INCRIMINATION. See **Constitutional Law,** III.

INDEPENDENT CONTRACTORS. See **Federal Tort Claims Act.**

INDIANS. See also **Constitutional Law,** I, 1; **Jurisdicton,** 1; **Taxes.**

Indian allottees of surface lands—Rights to mineral deposits.— Section 3 of Act reserving coal and other mineral deposits underlying lands on Northern Cheyenne Reservation for tribe's benefit, but further providing that 50 years after approval of Act such deposits "shall become the property of the respective allottees or their heirs"

INDIANS—Continued.

and that "unallotted lands" shall be "subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians," did not give allottees of surface lands vested rights in mineral deposits underlying those lands. Northern Cheyenne Tribe v. Hollowbreast, p. 649.

INDICTMENTS. See **Habeas Corpus.**

INFORMERS. See **Criminal Law, 1.**

INJUNCTIONS. See **Jurisdiction, 2.**

INTENTIONAL CONDUCT. See **Securities Exchange Act of 1934.**

INTERNAL REVENUE AGENTS. See **Criminal Law, 2.**

INTERNAL REVENUE SERVICE. See **Constitutional Law, III, 1, 3.**

INTERNATIONAL LAW.

Act of state—Expropriated Cuban cigar businesses—Right to recover purchase price of imported cigars.—In action by former owners of expropriated Cuban cigar businesses against petitioner and other importers to recover purchase price of cigars shipped to importers from seized businesses, there is nothing in record revealing an act of state with respect to obligation of respondent interventors (those named to possess and occupy seized businesses) to return sums mistakenly paid them for cigars sold to petitioner so as to preclude an affirmative judgment against respondents. Alfred Dunhill of London, Inc. v. Cuba, p. 682.

INTERSTATE COMMERCE. See **Antitrust Acts, 4.**

INTERVENING DECISIONS OR CHANGE IN LAW. See **Certiorari.**

"INTERVENTION" OF INDUSTRY. See **International Law.**

INVENTIONS. See **Patents, 1.**

INVIDIOUS DISCRIMINATION. See **Constitutional Law, I, 1; II.**

JAIL ATTIRE. See **Constitutional Law, I, 4.**

JENCKS ACT.

1. *Government lawyer's notes of witness interview—Producibility.*—Any writing prepared by a Government lawyer relating to subject matter of testimony of a Government witness that has been "signed or otherwise adopted or approved" by that witness is

JENCKS ACT—Continued.

producible under Act, and writing is not rendered nonproducible because a Government lawyer interviewed witness and wrote statement. Goldberg v. United States, p. 94.

2. *Government lawyer's notes of witness interview—Producibility.*—In circumstances of this case, Court of Appeals erred in making initial determination that Government lawyers' notes of interviews with chief prosecution witness were not producible statements under Act. Goldberg v. United States, p. 94.

JUDICIAL REVIEW. See also **Civil Rights Act of 1964**, 2.

Appropriate collective-bargaining unit—Court of Appeals' invasion of National Labor Relations Board's province.—In respondent union's unfair labor practice complaint raising question whether two employers constituted a single "employer" for purposes of a collective-bargaining agreement so that their combined employees constituted appropriate bargaining unit under § 9 of National Labor Relations Act, Court of Appeals, on respondent union's petition for review of National Labor Relations Board's dismissal of complaint on ground that two employers were separate employers, invaded NLRB's statutory province when it proceeded to decide § 9 "unit" question in first instance, instead of remanding case to NLRB so that it could make initial determination. South Prairie Constr. Co. v. Operating Engineers, p. 800.

JURISDICTION. See also **Supreme Court**, 5.

1. *District Court—Actions by Indian tribe challenging state taxes.*—Actions by Indian tribe and some of its members residing on tribal reservation in Montana challenging Montana's cigarette sales and personal property taxes as applied to reservation Indians, and also State's vendor licensing statute as applied to tribal members who sell cigarettes at "smoke shops" on reservation, were not barred by 28 U. S. C. § 1341, which prohibits district courts from enjoining assessment, levy, or collection of any state tax where a plain, speedy, and efficient remedy may be had in state courts. Moe v. Salish & Kootenai Tribes, p. 463.

2. *Supreme Court—Direct appeal—Three-judge District Court.*—This Court has no jurisdiction under 28 U. S. C. § 1253 over an appeal from a three-judge District Court's order enjoining appellants from prosecuting appellee theater operator on felony charge that his motion picture projector used to exhibit an allegedly obscene film was a "criminal instrument" under § 16.01 of Texas Penal Code. Ground for injunction was not that § 16.01 was unconstitutional but that local officials had acted in bad faith and unconstitutionally in

JURISDICTION—Continued.

using that statute (which District Court found could "by no stretch of the imagination" be read as applying) as a pretext for forcing appellee to stop exhibiting film, without any design to convict him on felony charge. Since a three-judge court was therefore not required, appeal should have been taken to Court of Appeals. Butler v. Dexter, p. 262.

JUST AND REASONABLE ELECTRIC AND GAS RATES. See **Federal Power Commission.**

LABOR. See **Judicial Review.**

LACK OF STANDING TO SUE. See **Standing to Sue.**

LAW ENFORCEMENT EMPLOYEES. See **Constitutional Law,** I, 2.

LAWYER'S WORK PRODUCT. See **Jencks Act.**

LEAVE OF ABSENCE FOR MENTALLY UNFIT CIVIL SERVICE EMPLOYEES. See **Standing to Sue.**

LEGISLATIVE REAPPORTIONMENT PLANS. See **Mandamus; Voting Rights Act of 1965.**

LENGTH OF FIREMEN'S HAIR. See **Certiorari.**

LENGTH OF POLICEMEN'S HAIR. See **Constitutional Law,** I, 2.

LESSENING OF COMPETITION. See **Antitrust Acts,** 1–3.

LIBERTY RIGHTS. See **Constitutional Law,** I, 2.

LICENSES. See **Jurisdiction,** 1; **Taxes.**

LOCAL GOVERNMENTS. See **Civil Rights.**

LOCAL SALES TAXES. See **National Banks.**

LOUISIANA. See **Habeas Corpus.**

LOWER-INCOME HOUSING ASSISTANCE PROGRAM. See **Civil Rights.**

MANDAMUS.

Legislative reapportionment plan—Mandamus to compel judgment embodying plan.—Motion for leave to file a petition for writ of mandamus to compel District Court to enter a final judgment embodying a permanent reapportionment plan for Mississippi Legislature, is granted, there being no justification for delaying further a final decision in this 10-year litigation that complies with this Court's directive to District Court that "[s]uch proceedings should go forward and be promptly concluded." Connor v. Coleman, p. 675.

MANIPULATIVE OR DEFECTIVE DEVICES OR CONTRIVANCES. See **Securities Exchange Act of 1934.**

MARITIME LAW. See **Public Vessels Act.**

MEDICAL AND SURGICAL SERVICES. See **Antitrust Acts,** 4.

METROPOLITAN AREA REMEDIES. See **Civil Rights.**

MICROFILMS OF CHECKS. See **Constitutional Law,** V.

MINERAL DEPOSITS IN INDIAN RESERVATIONS. See **Indians.**

MIRANDA WARNINGS. See **Constitutional Law,** III, 2; **Criminal Law,** 2; **Procedure,** 1.

MISSISSIPPI. See **Mandamus.**

MONOPOLIES. See **Antitrust Acts,** 4.

MONTANA. See **Constitutional Law,** I, 1; **Jurisdiction,** 1; **Taxes.**

MOTIONS TO SUPPRESS EVIDENCE. See **Constitutional Law,** III, 2; V.

MUNICIPAL ORDINANCES REGULATING DOOR-TO-DOOR SOLICITING AND CANVASSING. See **Constitutional Law,** IV, 2.

NARCOTICS. See **Criminal Law,** 1.

NATIONAL BANK ACT.

Venue—Action against national bank—Waiver.—Provision in venue section of Act, 12 U. S. C. § 94, that actions against a national banking association lie "in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases," is not permissive but mandatory. Therefore, petitioner national banking association, which has its principal place of business in New York and has no offices or agents, and does not regularly conduct business, in Utah, could not be sued by respondent in a Utah state court, unless it can be shown that petitioner waived provisions of § 94. National Bank v. Associates of Obstetrics, p. 460.

NATIONAL BANKS. See also **National Bank Act.**

Exemption from state and local sales taxes.—Incidence of state and local sales taxes falls upon appellant national bank as purchaser and not upon vendors, and therefore national bank is exempt from taxes under former 12 U. S. C. § 548 (1964 ed.), which was in effect at time here pertinent. Diamond National v. State Equalization Bd., p. 268.

NATIONALIZATION OF INDUSTRY. See **International Law.**

NATIONAL LABOR RELATIONS BOARD. See **Judicial Review.**

NATURAL GAS ACT. See **Federal Power Commission.**

NEGLIGENCE. See **Securities Exchange Act of 1934.**

NEGROES. See **Civil Rights; Civil Rights Act of 1964; Habeas Corpus; Voting Rights Act of 1965.**

NEW MEXICO ELECTRICAL ENERGY TAX. See **Supreme Court,** 5.

NEW ORLEANS. See **Voting Rights Act of 1965.**

NEW YORK. See **Abstention; Standing to Sue.**

NONCUSTODIAL INTERVIEWS. See **Criminal Law,** 2.

NONPROFIT INSTITUTIONS ACT. See **Antitrust Acts,** 1–3.

NORTHERN CHEYENNE ALLOTMENT ACT OF 1926. See **Indians.**

OBSCENE FILMS. See **Jurisdiction,** 2.

OBVIOUSNESS. See **Patents.**

OFFICE OF ECONOMIC OPPORTUNITY. See **Federal Tort Claims Act.**

ORDINANCES REGULATING DOOR-TO-DOOR SOLICITING AND CANVASSING. See **Constitutional Law,** IV, 2.

ORIGINAL JURISDICTION. See **Supreme Court,** 5.

OVERNIGHT RECESSES IN TRIAL. See **Constitutional Law,** VI, 1.

PAROLEE'S RIGHTS. See **Procedure,** 1.

PATENTS.

1. *Computer program for banks—Unpatentability—Obviousness.*—Respondent's "machine system for automatic record keeping of bank checks and deposits," under which checks and deposits are customer-labeled with code categories which are "read," and then processed by a data processor, such as a programmable electronic digital computer, having data storage files and a control system, permitting a bank to furnish a customer with an individual and categorized breakdown of his transactions during period in question, is unpatentable on grounds of obviousness. Dann v. Johnston, p. 219.

2. *Dairy barn—Water flush system—Obviousness.*—Respondent's patent covering a water flush system to remove cow manure from

PATENTS—Continued.

floor of a dairy barn is invalid for obviousness, it being a combination patent, all elements of which are old in dairy business and were well known before filing of patent application. Sakraida v. Ag Pro, Inc., p. 273.

PERJURY. See **Constitutional Law, III, 2.**

PERMITS FOR DOOR-TO-DOOR SOLICITING AND CANVASSING. See **Constitutional Law, IV, 2.**

PERSONAL-APPEARANCE REGULATIONS. See **Certiorari; Constitutional Law, I, 2.**

PERSONAL PROPERTY TAXES. See **Constitutional Law, I, 1; Jurisdiction, 1; Taxes.**

PERSONNEL FILES. See **Freedom of Information Act.**

PHARMACIES. See **Antitrust Acts, 1–3; Constitutional Law, IV, 1, 3.**

POLICEMEN'S HAIR-STYLE REGULATIONS. See **Constitutional Law, I, 2.**

POLICE POWERS. See **Constitutional Law, I, 2.**

PREDISPOSITION TO COMMIT CRIME. See **Criminal Law, 1.**

PREJUDGMENT ATTACHMENT STATUTES. See **Abstention.**

PREJUDICE. See **Habeas Corpus.**

PRESCRIPTION DRUG PRICE ADVERTISEMENTS. See **Constitutional Law, IV, 1, 3.**

PRICE DISCRIMINATION. See **Antitrust Acts, 1–3.**

PRISON CLOTHES. See **Constitutional Law, I, 4.**

PRISON DISCIPLINARY PROCEEDINGS. See **Prisoners.**

PRISONERS.

Disciplinary proceedings—Required procedures.—Various procedures required by respective Courts of Appeals with respect to prison disciplinary proceedings are either inconsistent with "reasonable accommodation" reached in *Wolff* v. *McDonnell,* 418 U. S. 539, between institutional needs and objectives and constitutional provisions of general application, or are premature on basis of case records. Baxter v. Palmigiano, p. 308.

PRIVACY. See **Constitutional Law, V.**

PRIVATE CAUSES OF ACTION. See **Securities Exchange Act of 1934.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** III.

PRIVILEGE OF CONFRONTATION IN PRISON DISCIPLINARY PROCEEDINGS. See **Prisoners.**

PROCEDURE. See also **Abstention; Habeas Corpus; Mandamus.**

1. *Federal or state constitutional basis for state-court decision—Unclear record—Remand.*—When it is not clear from whole record whether Ohio Supreme Court rested its decision as to inadmissibility of evidence at criminal trial upon Fifth and Fourteenth Amendments to United States Constitution or upon Ohio Constitution, judgment is vacated and case is remanded to permit Ohio Supreme Court to explicate whether or not its judgment relies on federal law. Ohio v. Gallagher, p. 257.

2. *Supreme Court's consideration of issue not presented below.*—Although appellants' complaint described their action challenging foster care payment scheme provided by Illinois as part of federal Aid to Families with Dependent Children Program, as an action seeking an injunction on equal protection grounds, and it does not appear that appellants relied on Supremacy Clause or that District Court, in holding that scheme did not deny appellants equal protection, addressed relationship between scheme and Social Security Act independently of equal protection issue, nevertheless this Court is justified in dealing with question of conflict between state scheme and federal Act presented in jurisdictional statement to extent of vacating judgment below and remanding case for consideration of that question. It appears that question could have been pursued under certain allegations in complaint and that District Court, based on certain language in its opinion, would have rejected Supremacy Clause claim, if made, as a separate ground for decision. Moreover, after jurisdictional statement was filed, Department of Health, Education, and Welfare issued a "Program Instruction" indicating, and Solicitor General filed a statement in this Court urging, that State scheme was inconsistent with federal Act. Youakim v. Miller, p. 231.

PROCEDURES REQUIRED IN PRISON DISCIPLINARY PROCEEDINGS. See **Prisoners.**

PRODUCTION OF WITNESSES' STATEMENTS. See **Jencks Act.**

PROPERTY RIGHTS. See **Indians.**

PROPERTY TAXES. See **Constitutional Law,** I, 1; **Jurisdiction,** 1; **Taxes.**

PROPRIETARY HOSPITALS. See **Antitrust Acts,** 4.

PUBLIC HOUSING PROJECTS. See **Civil Rights.**

PUBLIC INTEREST IN JUST AND REASONABLE ELECTRIC AND GAS RATES. See **Federal Power Commission.**

PUBLIC VESSELS ACT.

Claims within Act—Applicability of reciprocity provision—Effect of 1960 amendment to Suits in Admiralty Act.—Claims within scope of Public Vessels Act (which authorizes suit against United States in cases involving "a public vessel of the United States," but bars such a suit by a foreign national unless his government allows a United States national to sue in its courts under similar circumstances) remain subject to its terms after 1960 amendment to Suits in Admiralty Act deleting that Act's proviso requiring that United States vessel involved in suit against United States under that Act be a merchant vessel. Since respondent Philippine corporation's claim for sinking of its fishing vessel in collision with United States naval destroyer falls within Public Vessels Act, Court of Appeals erred in concluding that that Act's reciprocity provision did not apply. United States v. United Continental Tuna, p. 164.

PUTATIVE DEFENDANTS. See **Constitutional Law, III, 2.**

QUESTIONING OF ACCUSED BY PAROLE OFFICER. See **Procedure, 1.**

RACIAL DISCRIMINATION. See **Civil Rights; Civil Rights Act of 1964; Constitutional Law, I, 1; Federal Power Commission; Habeas Corpus; Voting Rights Act of 1965.**

RALEIGH, N. C. See **Antitrust Acts, 4.**

RATIONAL BASES. See **Constitutional Law, I, 2.**

REAL PROPERTY. See **Indians.**

REAPPORTIONMENT PLANS. See **Mandamus; Voting Rights Act of 1965.**

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RIGHT TO COUNSEL IN CRIMINAL TRIALS. See **Constitutional Law, VI, 1.**

RIGHT TO COUNSEL IN PRISON DISCIPLINARY PROCEEDING. See **Prisoners.**

RIGHT TO COUNSEL IN SUMMARY COURTS-MARTIAL. See **Constitutional Law, I, 3; VI, 2.**

RIGHT TO LIBERTY. See **Constitutional Law, I, 2.**

RIGHT TO SILENCE IN PRISON DISCIPLINARY PROCEEDINGS. See **Prisoners.**

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ROBINSON-PATMAN ACT. See **Antitrust Acts, 1–3.**

"RULE ON WITNESSES." See **Constitutional Law, VI, 1.**

SALE OF HEROIN. See **Criminal Law, 1.**

SALES TAXES. See **Constitutional Law, I, 1; Jurisdiction, 1; National Banks; Taxes.**

SCIENTER. See **Securities Exchange Act of 1934.**

SEARCHES AND SEIZURES. See **Constitutional Law, V.**

SECURITIES EXCHANGE ACT OF 1934.

Private cause of action—Absence of "scienter"—Negligence.—A private cause of action for damages will not lie under § 10 (b) of Act and Securities and Exchange Commission Rule 10b–5 in absence of any allegation of "scienter," *i. e.*, intent to deceive, manipulate, or defraud on defendant's part. Use of words "manipulative," "device," and "contrivance" in § 10 (b) clearly shows that it was intended to proscribe a type of conduct quite different from negligence, and more particularly use of word "manipulative," virtually a term of art used in connection with securities markets, connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting price of securities. And Act's legislative history also indicates that § 10 (b) was addressed to practices involving some element of scienter and cannot be read to impose

SECURITIES EXCHANGE ACT OF 1934—Continued.
liability for negligent conduct alone. Ernst & Ernst v. Hochfelder, p. 185.

SELF-INCRIMINATION. See **Constitutional Law,** III.

SEQUESTRATION OF WITNESSES. See **Constitutional Law,** VI, 1.

SEX DISCRIMINATION. See **Civil Rights Act of 1964,** 2.

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"SINGLE EMPLOYER." See **Judicial Review.**

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Challenge to constitutionality of state statute.—Appellee's complaint making a challenge to constitutionality of a New York statute governing leave of absence for mentally unfit Civil Service employees must be dismissed for lack of standing to assert such a challenge, where record discloses that statute was never in fact properly applied to appellee. New York Civil Service Comm'n v. Snead, p. 457.

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"SUBSTANTIAL EFFECT" ON INTERSTATE COMMERCE. See **Antitrust Acts,** 4.

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SUMMARY COURTS-MARTIAL. See **Constitutional Law,** I, 3; VI, 2.

SUMMONSES TO PRODUCE DOCUMENTS. See **Constitutional Law,** III, 1, 3.

SUPPRESSION OF EVIDENCE. See **Constitutional Law,** III, 2; V.

SUPREMACY CLAUSE. See **Procedure,** 2.

SUPREME COURT. See also **Jurisdiction,** 2; **Procedure,** 2.

1. Bankruptcy Rules and Official Bankruptcy Forms, p. 1003.

2. Amendments to Bankruptcy Rules and Official Bankruptcy Forms, p. 1125.

3. Amendments to Federal Rules of Criminal Procedure, p. 1157.

4. Rules and forms governing 28 U. S. C. §§ 2254 and 2255 cases and proceedings, p. 1167.

5. *Denial of motion to file original complaint—Pending state action raising same constitutional issues.*—Motion by Arizona, purportedly in its proprietary capacity as a consumer of, and as *parens patriae* for its citizens who consume, electrical energy generated in New Mexico, for leave to file an original complaint in this Court against New Mexico seeking declaratory and injunctive relief on constitutional grounds against New Mexico's tax on generation of electricity in that State, is denied. Pending state-court action in New Mexico by Arizona utilities involved in case raises same constitutional issues and provides an appropriate forum for litigating such issues. Arizona v. New Mexico, p. 794.

TAXES. See also **Constitutional Law,** I, 1; **Jurisdiction,** 1; **National Banks.**

1. *Personal property and sales taxes—Vendor license fee—Indian reservation.*—Montana state tax on personal property located within Indian reservation, vendor license fee, as applied to a reservation Indian conducting a cigarette business for Tribe on reservation land, and state cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with federal statutes that provide basis for decision with respect to such impositions. Moe v. Salish & Kootenai Tribes, p. 463.

TAXES—Continued.

2. *Sales taxes—"Smoke shop" on Indian reservation—Sales to non-Indians.*—To extent that on-reservation "smoke shops" sell to non-Indians upon whom State has validly imposed a sales tax with respect to article sold, State may require Indian proprietor simply to add tax to sales price and thereby aid State's collection and enforcement of tax. Moe v. Salish & Kootenai Tribes, p. 463.

TAX-EXEMPT HOSPITALS. See **Antitrust Acts**, 4.

TAX FRAUD. See **Criminal Law**, 2.

TAX INVESTIGATIONS. See **Constitutional Law**, III, 1, 3; **Criminal Law**, 2.

TESTIMONIAL COMMUNICATIONS. See **Constitutional Law**, III, 1, 3.

TEXAS. See **Constitutional Law**, II; **Jurisdiction**, 2.

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TRIALS DE NOVO. See **Civil Rights Act of 1964**, 2.

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UNIFORM CODE OF MILITARY JUSTICE. See **Constitutional Law**, I, 3; VI, 2.

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VALIDITY OF PATENTS. See **Patents**, 2.

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VENUE. See **Constitutional Law**, II; **National Bank Act.**

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VESTED RIGHTS TO MINERAL DEPOSITS IN INDIAN RESERVATIONS. See **Indians.**

VETERANS' ADMINISTRATION. See **Civil Rights Act of 1964,** 2.

VIRGINIA. See **Constitutional Law,** IV, 1, 3.

VOTING RIGHTS. See **Mandamus; Voting Rights Act of 1965.**

VOTING RIGHTS ACT OF 1965.

1. *Reapportionment plan—Councilmanic districts—Racial discrimination—Denial of right to vote.*—A legislative reapportionment that enhances position of racial minorities with respect to their effective exercise of electoral franchise cannot violate § 5 of Act unless new apportionment itself so discriminates racially as to violate Constitution. Applying this standard here where, in contrast to 1961 apportionment of councilmanic districts in New Orleans under which none of five districts had clear Negro voting majority and no Negro had been elected to council, Negroes under reapportionment plan in question will constitute a population majority in two of five districts and a clear voting majority in one, it is predictable that by bloc voting one and perhaps two Negroes will be elected to council. District Court therefore erred in concluding that plan would have effect of denying or abridging right to vote on account of race or color within meaning of § 5. Beer v. United States, p. 130.

2. *Reapportionment plan—Councilmanic districts—Unchanged at-large seats—Reviewability.*—Since language of § 5 of Act clearly provides that it applies only to proposed changes in voting procedures, and since two at-large New Orleans city council seats existed without change since 1954, those seats were not subject to review under § 5. District Court consequently erred in holding that reapportionment plan for councilmanic districts could be rejected under § 5 solely because it did not eliminate two at-large seats. Beer v. United States, p. 130.

WAIVER OF CLAIM OF GRAND JURY DISCRIMINATION. See **Habeas Corpus.**

WAIVER OF VENUE. See **National Bank Act.**

WATER FLUSH SYSTEMS FOR DAIRY BARNS. See **Patents,** 2.

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WITNESSES. See **Constitutional Law,** VI, 1; **Jencks Act.**

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WORDS AND PHRASES.

1. *"Criminal prosecution."* U. S. Const., Amdt. 6. Middendorf v. Henry, p. 25.

2. *"Own use."* 15 U. S. C. § 13c (Nonprofit Institutions Act). Abbott Labs. v. Portland Retail Druggists, p. 1.

3. *"Personnel . . . files and similar files."* 5 U. S. C. § 552 (b)(6) (Exemption 6 of Freedom of Information Act). Dept. of Air Force v. Rose, p. 352.

4. *"Public interest."* 15 U. S. C. § 717 (a) (Natural Gas Act); 16 U. S. C. § 824 (a) (Federal Power Act). NAACP v. FPC, p. 662.

WORK-PRODUCT DOCTRINE. See **Jencks Act.**

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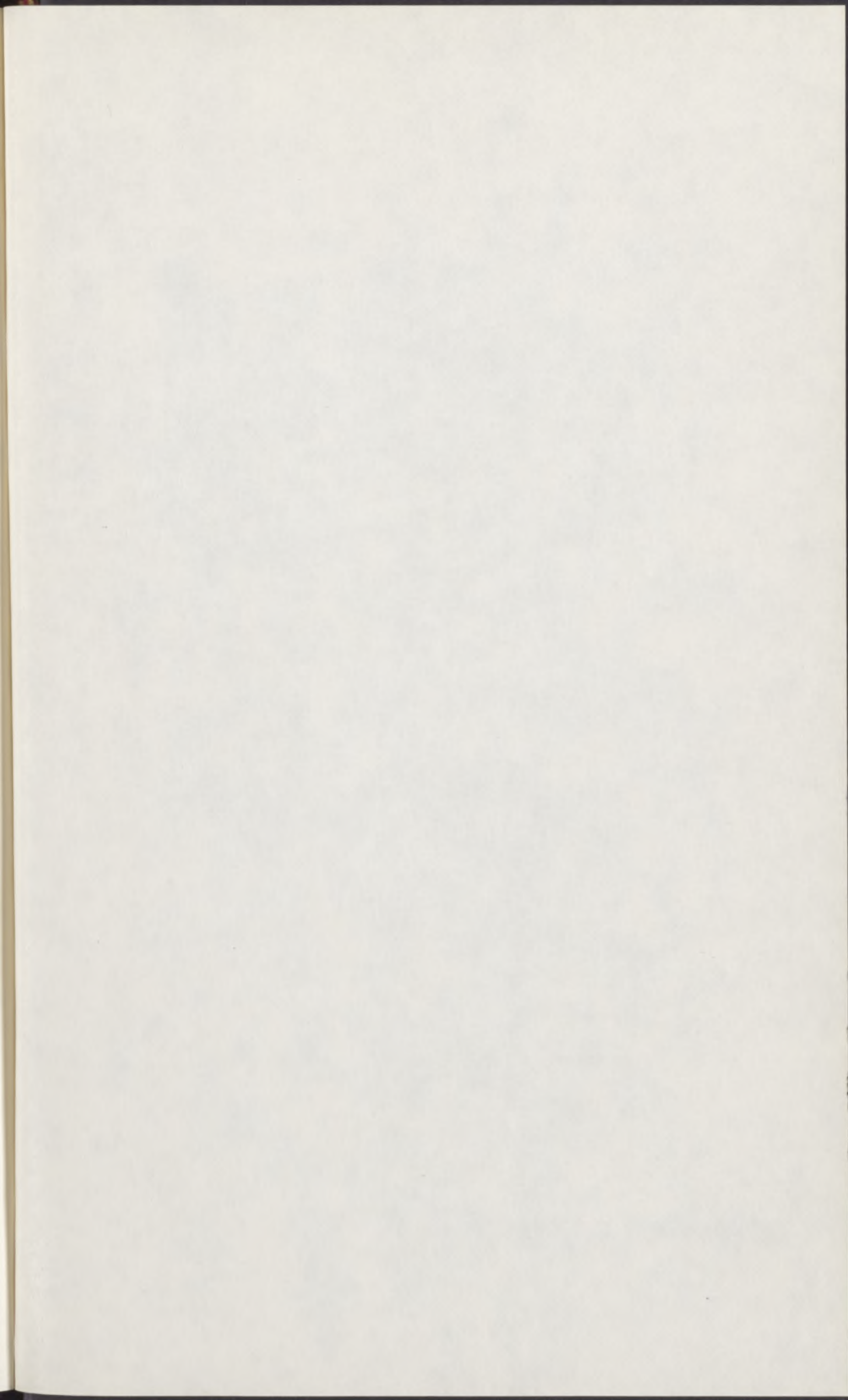

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