

ORDERS FROM JUNE 29 THROUGH
OCTOBER 2, 1981

JUNE 29, 1981

Appeal Dismissed

No. 80-336. BRUBECK ET AL. *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 384 So. 2d 1378.

Vacated and Remanded on Appeal

No. 79-1567. VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL. *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL. Appeal from D. C. W. D. Va. Judgment vacated and case remanded for further consideration in light of *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981). Reported below: 483 F. Supp. 425.

No. 80-49. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* STAR COAL Co. Appeal from D. C. S. D. Iowa. Judgment vacated and case remanded for further consideration in light of *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), and *Hodel v. Indiana*, 452 U. S. 314 (1981).

Certiorari Granted—Reversed and Remanded. (See No. 80-1846, *ante*, p. 355.)

Certiorari Granted—Vacated and Remanded

No. 80-640. JAMES ET UX. *v.* FORD MOTOR CREDIT Co. ET AL.; and HERNANDEZ ET AL. *v.* O'NEAL MOTORS, INC., ET AL. C. A. 10th Cir. Certiorari granted limited to the second question presented by the petition. Judgment of the United States Court of Appeals for the Tenth Circuit in *Hernandez v. O'Neal Motors, Inc.*, is vacated insofar as it directed the

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United States District Court for the District of New Mexico to dismiss the actions of petitioners Jackson Brown and Delores Brown, Theresa M. Shields, Nona Jackson, Nellie Pino, David Juanico and Lucy Juanico, Rita Cata, and Marie Johnson, and case is remanded to the Court of Appeals. Certiorari in all other respects denied. Reported below: 638 F. 2d 147 (first case); 638 F. 2d 153 (second case).

No. 79-5002. *WILDER v. TEXAS*;

No. 79-5007. *ARMOUR v. TEXAS*;

No. 79-5464. *GARCIA v. TEXAS*;

No. 79-6603. *SIMMONS v. TEXAS*;

No. 79-6749. *PARKER v. TEXAS*; and

No. 80-5360. *BRANDON v. TEXAS*. Ct. Crim. App. Tex. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Estelle v. Smith*, 451 U. S. 454 (1981). Reported below: Nos. 79-5002 and 79-5007, 583 S. W. 2d 349; No. 79-5464, 581 S. W. 2d 168; No. 79-6603, 594 S. W. 2d 760; No. 79-6749, 594 S. W. 2d 419; No. 80-5360, 599 S. W. 2d 567.

No. 80-1315. *HAWAII ET AL. v. MEDERIOS ET AL.* C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Howe v. Smith*, 452 U. S. 473 (1981). Reported below: 637 F. 2d 1130.

No. 80-1737. *UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS v. AIKENS*. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248 (1981). Reported below: 206 U. S. App. D. C. 109, 642 F. 2d 514.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

At the behest of the petitioner, the Court today summarily vacates a judgment of the Court of Appeals for the District of Columbia Circuit and remands the case to that

court for reconsideration in light of our decision earlier this Term in *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248 (1981). Because I regard this disposition as wholly inappropriate and unnecessary, I dissent.

Respondent Aikens is a retired Negro employee of the United States Postal Service. He filed this suit alleging that the Postal Service Board of Governors, petitioner here, had violated Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, by discriminating against him because of his race with respect to the awarding of promotions and work details. The District Court, in dismissing the action, concluded that respondent had failed to establish a *prima facie* case of discrimination because he had not shown "that he was as qualified or more qualified than the individuals who were promoted." The Court of Appeals reversed, concluding that the District Court's ruling was "[p]lainly . . . a misstatement of applicable law." 206 U. S. App. D. C. 109, 114, 642 F. 2d 514, 519 (1980). The panel noted that even the petitioner had conceded that the District Court had mischaracterized the showing necessary to establish a *prima facie* case under Title VII. *Ibid.* The court concluded that this Court's controlling decision in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), required that a Title VII plaintiff, as part of his *prima facie* case, show only that "he applied and was qualified for a job for which the employer was seeking applicants." *Id.*, at 802.¹ Accordingly, the case was remanded to

¹ As set forth in *McDonnell Douglas Corp. v. Green*, a Title VII plaintiff establishes a *prima facie* case of discrimination when he shows

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802.

There is no dispute in this case that the other elements of a Title VII *prima facie* case are satisfied. As the Court of Appeals observed:

"On the record in this case, it is clear that Aikens met the first, third

the District Court for further proceedings under the appropriate standard.

The petitioner, ignoring its earlier concession of error by the District Court, now asks this Court to vacate the judgment of the Court of Appeals on the ground that it is "inconsistent" with this Court's decision in *Texas Dept. of Community Affairs v. Burdine*, *supra*. While the majority without explanation today accepts this suggestion, I find it untenable. Simply put, our decision in *Texas Dept. of Community Affairs* has almost nothing to do with the issue raised in this case. That decision involved "[t]he narrow question . . . whether, *after the plaintiff has proved a prima facie case of discriminatory treatment*, the burden shifts to the [employer] to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U. S., at 250 (emphasis added). The exclusive focus of the case was on the sort of showing a Title VII defendant must make to rebut a *prima facie* case of discrimination. The dispute here, in contrast, involves only the threshold issue whether a Title VII plaintiff, *in order to establish a prima facie case of discrimination*, must show that he was qualified for the sought-after position or, as the District Court ruled and the petitioner now suggests, that he was as qualified as, or more qualified than, the person selected by the employer. In resolving this entirely different question, the Court of Appeals correctly turned to our decision in *McDonnell Douglas Corp. v. Green*, *supra*, and concluded that the decision of the District Court

and fourth elements of the test set forth in *McDonnell Douglas*: he is a black man; he sought promotion to higher level positions that became available; and white Post Office employees received the positions." 206 U. S. App. D. C. 109, 112, 642 F. 2d 514, 517 (1980).

Thus, the only issue raised here is the nature of the second requirement of a *prima facie* case: that the complainant "was qualified for a job for which the employer was seeking applicants." *McDonnell Douglas*, *supra*, at 802.

was "plainly at odds" with the express language of that decision.

This conclusion, in my view, is unassailable. *McDonnell Douglas* requires a Title VII plaintiff as part of his prima facie case to show that he "was qualified for a job for which the employer was seeking applicants," 411 U. S., at 802. Nothing in that decision or subsequent ones by this Court supports the District Court's view, now embraced by the petitioner, that the plaintiff at this threshold stage must also show that he was as qualified as, or more qualified than, the selected applicant. Indeed, our decision in *Texas Dept. of Community Affairs* expressly reaffirmed the *McDonnell Douglas* formulation of the prima facie case, 450 U. S., at 253-254, n. 6, and specifically noted that the respondent in that case had established this segment of the prima facie case by simply showing that she was "a qualified woman who sought an available position." *Ibid.* See also *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 575-576 (1978).

In asserting that our decision in *Texas Dept. of Community Affairs* may have altered the *McDonnell Douglas* test of a prima facie case, the petitioner relies on the statement in *Texas Dept. of Community Affairs* that a prima facie case is established when an applicant is "rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U. S., at 253. In the promotion context, the petitioner asserts, such an inference of unlawful conduct does not arise simply because a qualified applicant is rejected for a job. Other persons may have also applied for the promotion, and the rejection of the applicant may merely indicate that a *more* qualified applicant was selected. Thus, in the petitioner's view, the unsuccessful applicant for a promotion must disprove this possibility in order to establish a prima facie case of discrimination.

The petitioner's view represents one potential way to structure the burdens of proof in a Title VII case,² but it has never

² In my view, the fact that the chosen employee was *more* qualified than

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been embraced by this Court. If the Court now feels that the issue requires re-examination, it should grant the petition for certiorari and hear oral argument in the case. Instead, the Court remands without opinion to the Court of Appeals for reconsideration in light of ambiguous dictum in an opinion dealing with an entirely distinct issue. I am at a loss to understand this disposition, as I suspect the Court of Appeals will be. Perhaps it reflects the pressures of the end of the Term, or an excessive deference to the views of the Solicitor General, or a desire for an easy, temporary solution to a potentially troublesome issue. But these reasons simply cannot justify today's disposition, which rather than clarifying the law, needlessly obscures it. Such action is contrary to our judicial duty, and I therefore dissent.

No. 80-5074. *RODRIGUEZ v. TEXAS*. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Estelle v. Smith*, 451 U. S. 454 (1981), and *Adams v. Texas*, 448 U. S. 38 (1980). Reported below: 597 S. W. 2d 917.

Miscellaneous Orders

No. A-998. *MOWAD v. UNITED STATES*. C. A. 2d Cir. Application for stay and/or bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

other qualified applicants for the job is the sort of justification that the employer is entitled to use to rebut the prima facie case. An applicant who has satisfied the objective qualifications established by the employer for promotion may have no way of knowing what additional considerations the employer relied on in selecting a particular person among the pool of qualified applicants. This information is uniquely within the control of the employer, and thus it places an unfair burden on the plaintiff to require him, as part of his prima facie case, to guess what additional considerations the employer might have relied on and to prove that even under these considerations he was at least as qualified as the selected applicant.

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No. A-1016. *NORTH CAROLINA ET AL. v. UNITED STATES*. D. C. E. D. N. C. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A-1030. *EDGEWOOD SCHOOL DISTRICT ET AL. v. HOOTS ET AL.* D. C. W. D. Pa. Application for stay, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A-1042 (80-2140). *GADEK, T/A POOR BILLY'S v. TOWNSHIP OF WOODBRIDGE*. Super. Ct. N. J., App. Div. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A-1043. *RODRIGUEZ ET AL. v. POPULAR DEMOCRATIC PARTY ET AL.* Application to continue the stay entered by the Supreme Court of Puerto Rico, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D-222. *IN RE DISBARMENT OF STRICKLAND*. It is ordered that the order of this Court entered March 9, 1981 [450 U. S. 976], suspending Maurice R. Strickland from the further practice of law in this Court, is vacated and that the rule to show cause issued March 9, 1981, is discharged.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

Maurice R. Strickland was admitted to the practice of law in New Jersey in 1960, and admitted to practice before this Court in 1966. He has not practiced in this Court.

Prior to November 15, 1975, Strickland misappropriated money from two clients. As a result of his actions, complaints were filed against him with the Essex County Ethics Committee. After a plenary hearing before the Committee, the Supreme Court of New Jersey entered an order suspending Strickland from the practice for one year or until further order of the court. The suspension remained in effect until February 1981, and was not reported to this Court until then either by Strickland or that court.

Strickland continued to meet with members of the Committee, admitted his misappropriations, and arranged to repay the funds he had misappropriated. The funds were repaid by February 1978. A formal hearing was conducted by the Committee on April 30, 1980. The Committee recommended leniency. A hearing then was held by the Disciplinary Review Board of the Supreme Court of New Jersey which recommended that Strickland be suspended for five years commencing November 15, 1975. On February 3, 1981, the Supreme Court of New Jersey adopted the recommendation of the Disciplinary Review Board. Strickland immediately applied to the Supreme Court of New Jersey for reinstatement. He was reinstated on March 4, 1981.

On February 10, 1981, this Court, for the first time, learned of Strickland's suspension. On March 9, pursuant to Supreme Court Rule 8, Strickland was suspended from practice before this Court and ordered to show cause why his name should not be stricken from our rolls.

In response to the order to show cause, Strickland filed a petition for reinstatement. Strickland states that he has not practiced law since November 1975, has admitted his defalcations, and has made restitution. Since July 1977, he has been employed as an investigator and administrative analyst by the Essex County Welfare Board. Having been reinstated to the practice of law by the Supreme Court of New Jersey, Strickland intends to re-enter private practice specializing in the area of welfare law. As mitigating factors, Strickland states that he joined Alcoholics Anonymous in 1974, and has abstained from alcohol since then. He asserts he is active in his church and in the parents-teachers association.

Supreme Court Rule 8 provides that if a member of the Court's Bar is suspended from practice in any court of record, the attorney shall be suspended forthwith from practice before the Court and ordered to show cause why he should not be disbarred. The Rule's import is that absent exceptional

circumstances, an attorney suspended by a state will be disbarred by this Court.

The policy expressed in Rule 8 is consistent with the role this Court should play in monitoring professional misconduct. In light of the inadequacies that pervade this country's attorney discipline systems,* membership in the Bar of the country's highest Court should remain a privilege and a responsibility. Thus to be admitted to this Court's Bar, an applicant must show not only that he has been admitted to the practice of law for three years, but also that he "appears . . . to be of good moral and professional character." This Court's Rule 5.1.

Strickland, having admittedly violated his oath and having been suspended from the practice of law for five years, seeks to remain a member of this Bar simply because his suspension has run its course and he has been reinstated to the practice of law in New Jersey. In my opinion, a 5-year suspension is a *per se* basis for disbarment by this Court. With deference to the Supreme Court of New Jersey's decisions, this Court is not, and must never be, bound by a state court's decision as it relates to our decision based on a record such as we find in this case. A state court, when disciplining an attorney, deals directly with the attorney's livelihood. Membership in this Court's Bar is not shown to be critical to Strickland's livelihood except as he may seek to use it as "evidence" that his misconduct somehow has been excused by this Court or that he has been "vindicated" by this Court. The quality of this Court's Bar and the public's confidence in the Bar is compromised by the retention, as well as the admission, of attorneys found guilty of unethical professional conduct.

*See the Report of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, entitled Problems and Recommendations in Disciplinary Enforcement (1970, chaired by Justice Tom C. Clark).

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Retention of Strickland as a member of this Court's Bar reflects unfairly on all attorneys who are members in good standing. The procedural novelty of the New Jersey disciplinary proceedings should not excuse Strickland from proving that he is worthy of admission to this Court's Bar, which on this record he has not demonstrated.

The hard fact remains that when Strickland last practiced law in New Jersey, he violated his oath of office by embezzling clients' funds; accordingly, he should be stricken from the rolls of this Court.

No. D-241. *IN RE DISBARMENT OF PRIDE*. Disbarment entered. [For earlier order herein, see 452 U. S. 902.]

No. D-243. *IN RE DISBARMENT OF WITTE*. It is ordered that Donald M. Witte, of Clayton, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80-847. *COMMON CAUSE ET AL. v. SCHMITT ET AL.*; and

No. 80-1067. *FEDERAL ELECTION COMMISSION v. AMERICANS FOR CHANGE ET AL.* D. C. D. C. [Probable jurisdiction noted, 450 U. S. 908.] Motion of appellees Americans for Change, Americans for an Effective Presidency, Fund for a Conservative Majority, Harrison H. Schmitt, and Carl T. Curtis for divided argument denied.

No. 80-986. *NORTH HAVEN BOARD OF EDUCATION ET AL. v. BELL, SECRETARY OF EDUCATION, ET AL.* C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of the parties to dispense with printing the joint appendix granted.

No. 80-1431. *IN RE R. M. J.* Sup. Ct. Mo. [Probable jurisdiction noted, 452 U. S. 904.] Motion of the parties to dispense with printing the joint appendix granted.

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No. 80-1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motions of respondents for divided argument granted. Motions of respondents for additional time for oral argument or designation of counsel to present oral argument denied. Motion for appointment of counsel granted, and it is ordered that James R. Kingsley, Esquire, of Circleville, Ohio, be appointed to serve as counsel for respondent Isaac in this case.

No. 80-1804. LEDBETTER, SHERIFF, ET AL. *v.* JONES ET AL. C. A. 5th Cir. The order heretofore entered on June 22, 1981 [452 U. S. 959], is amended to read as follows: Certiorari granted limited to Question B presented by the petition.

No. 80-5727. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 450 U. S. 1040.] Motion of Kentucky Youth Advocates et al. for leave to file a brief as *amici curiae* granted.

Certiorari Granted

No. 80-1595. UNITED STATES *v.* FRADY. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. THE CHIEF JUSTICE and JUSTICE MARSHALL took no part in the consideration or decision of this motion and this petition. Reported below: 204 U. S. App. D. C. 234, 636 F. 2d 506.

Certiorari Denied. (See also No. 80-640, *supra*.)

No. 80-1148. CHAGNON ET AL. *v.* BELL, FORMER ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 206 U. S. App. D. C. 280, 642 F. 2d 1248.

No. 80-1247. ERRICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 152.

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No. 80-1703. *MISSISSIPPI COLLEGE v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION*. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 477.

No. 80-1748. *MORELLI v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 643 F. 2d 402.

No. 80-1970. *AIKENS v. UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS*. C. A. D. C. Cir. Certiorari denied. Reported below: 206 U. S. App. D. C. 109, 642 F. 2d 514.

No. 80-1982. *MURRAY, COMMISSIONER OF MENTAL HEALTH OF INDIANA, ET AL. v. CUA*. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 78.

No. 80-6058. *ELKINS ET AL. v. UNITED STATES*;

No. 80-6137. *HENSLEY v. UNITED STATES*;

No. 80-6141. *SUTTON ET AL. v. UNITED STATES*;

No. 80-6147. *HARRIS v. UNITED STATES*;

No. 80-6253. *HOLMES v. UNITED STATES*;

No. 80-6254. *ADAMS v. UNITED STATES*; and

No. 80-6272. *CRAVENS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 1001.

No. 80-6354. *BESHAU v. FENTON, WARDEN, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 635 F. 2d 239.

No. 80-6552. *JOHNSON v. SMITH, ATTORNEY GENERAL, ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 641 F. 2d 850.

No. 79-881. *MITCHELL v. ZWEIBON ET AL.*;

No. 79-882. *NIXON ET AL. v. SMITH ET AL.*; and

No. 79-883. *ZWEIBON ET AL. v. MITCHELL*. C. A. D. C. Cir. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of these petitions. Reported below: Nos. 79-881 and 79-883, 196 U. S. App. D. C. 265, 606 F. 2d 1172; No. 79-882, 196 U. S. App. D. C. 276, 606 F. 2d 1183.

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No. 79-721. *WOODS v. TEXAS*;No. 79-5199. *BELL v. TEXAS*;No. 79-5587. *BROOKS v. TEXAS*;No. 79-6081. *GREEN v. TEXAS*;No. 79-6608. *DEMOUCHETTE v. TEXAS*; and

No. 80-5320. *BAREFOOT v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 79-721, 569 S. W. 2d 901; No. 79-5199, 582 S. W. 2d 800; No. 79-5587, 599 S. W. 2d 312; No. 79-6081, 587 S. W. 2d 167; No. 79-6608, 591 S. W. 2d 488; No. 80-5320, 596 S. W. 2d 875.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79-1120. *MITCHELL ET AL. v. FORSYTH ET AL.* C. A. 3d Cir. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 599 F. 2d 1203.

No. 80-833. *LOCAL UNION NO. 35 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. CITY OF HARTFORD ET AL.* C. A. 2d Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 625 F. 2d 416.

No. 80-1134. *LEAD INDUSTRIES ASSN., INC., ET AL. v. DONOVAN, SECRETARY OF LABOR, ET AL.*;

No. 80-1155. *SOUTH CENTRAL BELL TELEPHONE CO. ET AL. v. DONOVAN, SECRETARY OF LABOR, ET AL.*; and

No. 80-1170. *NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL. v. SECRETARY OF LABOR ET AL.* C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 208 U. S. App. D. C. 60, 647 F. 2d 1189.

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No. 80-1112. UNITED STATES *v.* CHAMBERLIN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. CHIEF JUSTICE BURGER would grant certiorari and reverse the judgment. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 644 F. 2d 1262.

No. 80-6620. JEFFRIES *v.* BARKSDALE, SHERIFF. C. A. 6th Cir. Certiorari denied.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

If this case were properly before the Court I would have no difficulty in joining my Brethren in denying the petition for writ of certiorari. It is clear to me, however, that under the applicable statutes we have no jurisdiction to entertain the petition. Accordingly, I would dismiss for want of jurisdiction.

The facts need be only briefly stated. Petitioner was convicted in state court. He succeeded in obtaining a reversal of his conviction on appeal and a retrial was ordered. After several continuances were granted petitioner sought habeas corpus relief in Federal District Court, alleging that he was being denied his rights to a speedy trial. The District Court dismissed the action on the ground that petitioner had failed to exhaust available state remedies, see 28 U. S. C. § 2254. Petitioner appealed to the Court of Appeals for the Sixth Circuit. That court agreed that petitioner had failed to exhaust available state remedies, and issued an order specifically denying petitioner's application for a certificate of probable cause to appeal. Petitioner thereupon sought from this Court a writ of certiorari to the Court of Appeals.

Congress has enacted a specific provision governing the right to appeal in cases such as this:

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued

by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." 28 U. S. C. § 2253.

See also Fed. Rule App. Proc. 22 (b) ("In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause").

The effect of this statute, which could not have been drafted in plainer terms, is clear: A certificate of probable cause is an indispensable prerequisite to an appeal in the courts of appeals. This has long been recognized by the courts, see, *e. g.*, *Wilson v. Lanagan*, 79 F. 2d 702 (CA1 1935); *Hooks v. Fourth District Court of Appeal*, 442 F. 2d 1042 (CA5 1971), and by distinguished commentators, see, *e. g.*, Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343, 351 (1967).

When this Court was confronted with a predecessor of 28 U. S. C. § 2253 which required, in certain habeas corpus cases, a certificate of probable cause before there could be an appeal to the Supreme Court, ch. 76, 35 Stat. 40 (1908), it had no difficulty in concluding that it had no jurisdiction over appeals brought before it in the absence of such a certificate. *Bilik v. Strassheim*, 212 U. S. 551 (1908); *Ex parte Patrick*, 212 U. S. 555 (1908). The provision was amended in 1925 to provide that it "shall apply to appellate proceedings . . . as [it] heretofore [has] applied to direct appeals to the Supreme Court," 43 Stat. 940 (1925). There is therefore no jurisdiction in the courts of appeals in cases covered by 28 U. S. C. § 2253 without a certificate of probable cause.

Our certiorari jurisdiction, however, extends only to "[c]ases in the courts of appeals." 28 U. S. C. § 1254. Since there was no certificate of probable cause issued in this case, it was never "in" the Court of Appeals. In the plain words of the statute, "[a]n appeal may not be taken to the court

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of appeals." Since the case was never in the Court of Appeals we cannot review it by writ of certiorari to that court.

The legislative history of 28 U. S. C. § 2253 and its predecessors demonstrates the clear congressional purpose to impose the certificate-of-probable-cause requirement as a means of *terminating* frivolous appeals in certain habeas corpus cases. See H. R. Rep. No. 23, 60th Cong., 1st Sess. (1908); *United States ex rel. Tillery v. Cavell*, 294 F. 2d 12, 14-15 (CA3 1961). That legislative purpose is frustrated when this Court assumes jurisdiction to review cases in which both the district and appellate courts have denied a certificate. For in such a case review continues, if only eventuating in the inevitable denial of a writ of certiorari.

It is true that 28 U. S. C. § 2253 has largely been ignored by this Court, presumably because it is not too much bother simply to deny a petition for certiorari. The exercise of jurisdiction over a case which Congress has provided shall terminate before reaching this Court, however, is a serious matter. The imperative that other branches of Government obey our duly issued decrees is weakened whenever we decline, for whatever reason other than the exercise of our own constitutional duties, to adhere to the decrees of Congress and the Executive.

For the foregoing reasons, I dissent from the *denial* of the petition for writ of certiorari: the petition should be *dismissed* for want of jurisdiction.

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Affirmed on Appeal

No. 80-1597. CAMPBELL, COMMISSIONER OF TRANSPORTATION OF MAINE *v.* JOHN DONNELLY & SONS ET AL. Affirmed on appeal from C. A. 1st Cir. THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 639 F. 2d 6.

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Appeals Dismissed

No. 80-815. COUNCIL OF GREENBURGH CIVIC ASSNS. ET AL. *v.* UNITED STATES POSTAL SERVICE. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 490 F. Supp. 157.

No. 80-1740. LANCE *v.* FEDERAL ELECTION COMMISSION. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 635 F. 2d 1132.

Vacated and Remanded on Appeal

No. 80-1797. RYAN OUTDOOR ADVERTISING, INC. *v.* CITY OF SALINAS. Appeal from Ct. App. Cal., 1st App. Dist. Judgment vacated and case remanded for further consideration in light of *Metromedia, Inc. v. San Diego*, ante, p. 490.

Certiorari Granted—Vacated and Remanded

No. 79-1690. STANTON, ADMINISTRATOR, INDIANA DEPARTMENT OF PUBLIC WELFARE *v.* BROWN ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Schweiker v. Gray Panthers*, ante, p. 34. Reported below: 617 F. 2d 1224.

No. 79-1896. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. Ct. App. La., 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arkansas Louisiana Gas Co. v. Hall*, ante, p. 571. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 379 So. 2d 1142.

No. 80-126. OUTBOARD MARINE CORP. *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Milwaukee v. Illinois*, 451 U. S. 304 (1981). Reported below: 619 F. 2d 623.

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No. 80-291. *MILLER v. MILLER*. Sup. Ct. Mont. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCarty v. McCarty*, ante, p. 210. Reported below: — Mont. —, 609 P. 2d 1185.

No. 80-578. *MILHAN v. MILHAN*. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCarty v. McCarty*, ante, p. 210. Reported below: 27 Cal. 3d 765, 613 P. 2d 812.

No. 80-817. *JIMINEZ v. UNITED STATES*. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Robbins v. California*, ante, p. 420. Reported below: 626 F. 2d 39.

No. 80-1037. *CALIFORNIA v. SILVEY*. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeal to consider whether its judgment is based upon federal or state constitutional grounds, or both. *California v. Krivda*, 409 U. S. 33 (1972). Reported below: 110 Cal. App. 3d 67, 167 Cal. Rptr. 566.

No. 80-1080. *BIBLE ET AL. v. LOUISIANA*. Sup. Ct. La. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Robbins v. California*, ante, p. 420. Reported below: 389 So. 2d 42.

No. 80-1317. *UNITED STATES v. BENSON*. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *New York v. Belton*, ante, p. 454. Reported below: 631 F. 2d 1336.

No. 80-1469. *CUTTITTA v. CUTTITTA*. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *McCarty v. McCarty*, ante, p. 210.

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No. 80-1421. *CALIFORNIA v. RIEGLER*. Ct. App. Cal., 5th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *New York v. Belton*, *ante*, p. 454. Reported below: 111 Cal. App. 3d 580, 168 Cal. Rptr. 816.

No. 80-5677. *RUGGLES v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Robbins v. California*, *ante*, p. 420.

Certified Questions Answered in Part and Dismissed in Part

No. 80-2127. *IRAN NATIONAL AIRLINES CORP. ET AL. v. MARSCHALK Co., INC., ET AL.* It is the opinion of this Court that the questions certified by the United States Court of Appeals for the Second Circuit must be answered as follows:

(1). Yes. See *Dames & Moore v. Regan*, *ante*, p. 654.

(2). Yes. See *Dames & Moore v. Regan*, *ante*, p. 654.

(3). The President's action in nullifying the attachments did not constitute a taking of property for which compensation must be paid. We dismiss question (3) so far as it concerns whether the action of the President in suspending the claims constituted a taking of property for which compensation must be paid. See *Dames & Moore v. Regan*, *ante*, p. 654.

JUSTICE POWELL, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

I would dismiss the certificate, citing *Dames & Moore v. Regan*, *ante*, p. 654, announced today. The Court's opinion in that case provides the only answers that this Court should give to the questions certified to us by the United States Court of Appeals for the Second Circuit. Having rendered an opinion on the subject of those questions, we should not answer them in monosyllables nor attempt a syllabus of

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a portion of the Court's opinion. We recently have dismissed certification of questions where the Court has addressed the subject of the questions in a full opinion. *Foley v. Carter*, 449 U. S. 1073 (1981). See also *United States v. Will*, 449 U. S. 200 (1980).

Miscellaneous Orders

No. A-1006 (80-2157). *ANCHORAGE TIMES PUBLISHING Co. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 9th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A-1029. *COTA ET AL. v. LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL.* Application for injunction, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-1051. *OPTION ADVISORY SERVICE, INC. v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.* Application for stay, addressed to JUSTICE STEWART and referred to the Court, denied.

No. A-1052. *IN RE MCGEAN*. Ct. App. D. C. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D-227. *IN RE DISBARMENT OF SCHMIDT*. Disbarment entered. [For earlier order herein, see 450 U. S. 1037.]

No. D-231. *IN RE DISBARMENT OF KELLEY*. Disbarment entered. [For earlier order herein, see 451 U. S. 903.]

No. 80-11. *MERRION ET AL., DBA MERRION & BAYLESS, ET AL. v. JICARILLA APACHE TRIBE ET AL.*; and

No. 80-15. *AMOCO PRODUCTION Co. ET AL. v. JICARILLA APACHE TRIBE ET AL.* C. A. 10th Cir. [Certiorari granted, 449 U. S. 820.] Cases restored to calendar for reargument. JUSTICE STEWART took no part in the consideration or decision of this order.

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No. 80-317. UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH, 451 U. S. 390. Motion of respondent to retax costs denied.

No. 80-1240. LANE, CORRECTIONS DIRECTOR *v.* WILLIAMS ET AL. C. A. 7th Cir. [Certiorari granted *sub nom.* *Franzen v. Williams*, 452 U. S. 914.] Motion for appointment of counsel granted, and it is ordered that Martha A. Mills, of Chicago, Ill., be appointed to serve as counsel for respondents in this case.

No. 80-1350. COMMUNITY COMMUNICATIONS Co., INC. *v.* CITY OF BOULDER, COLORADO, ET AL. C. A. 10th Cir. [Certiorari granted, 450 U. S. 1039.] Motions of National Institute of Municipal Law Officers, Cable Television Information Center, National League of Cities, and City of Los Angeles for leave to file briefs as *amici curiae* granted.

No. 80-1624. LARSEN ET AL. *v.* VAN SLOOTEN. Appeal from Sup. Ct. Mich. Motion of appellants to expedite consideration of the appeal denied.

No. 80-2049. RALSTON, WARDEN *v.* ROBINSON. C. A. 7th Cir. [Certiorari granted, 452 U. S. 960.] Motion for appointment of counsel granted, and it is ordered that Jerold S. Solovy, Esquire, of Chicago, Ill., be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Postponed

No. 80-1481. BREAD POLITICAL ACTION COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Appeal from C. A. 7th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 635 F. 2d 621.

Certiorari Granted

No. 80-60. HERWEG ET VIR *v.* RAY, GOVERNOR OF IOWA, ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 619 F. 2d 1265.

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Certiorari Denied. (See also Nos. 80-815 and 80-1740, *supra*.)

No. 79-1469. *COSE v. COSE*. Sup. Ct. Alaska. *Certiorari* denied. Reported below: 592 P. 2d 1230.

No. 79-1617. *DEPARTMENT OF TRANSPORTATION OF OKLAHOMA v. PILE*. Sup. Ct. Okla. *Certiorari* denied. Reported below: 603 P. 2d 337.

No. 80-196. *CITY OF SAN DIEGO ET AL. v. METROMEDIA, INC., ET AL.* Sup. Ct. Cal. *Certiorari* denied. Reported below: 26 Cal. 3d 848, 610 P. 2d 407.

No. 80-1132. *RUSSELL v. RUSSELL*. Ct. App. Ky. *Certiorari* denied. Reported below: 605 S. W. 2d 33.

No. 80-1403. *SEAFARERS INTERNATIONAL UNION, PACIFIC DISTRICT-PACIFIC MARITIME ASSOCIATION PENSION PLAN v. STONE ET AL.*; and

No. 80-1454. *CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA v. KRONSCHNABEL*; and *CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA v. STONE ET AL.* C. A. 9th Cir. *Certiorari* denied. Reported below: Nos. 80-1403 and 80-1454 (second case), 632 F. 2d 740; No. 80-1454 (first case), 632 F. 2d 745.

No. 80-6302. *CASTILLO v. LOUISIANA*. Sup. Ct. La. *Certiorari* denied. Reported below: 389 So. 2d 1307.

No. 80-6631. *IN RE JOHN C.* Sup. Ct. R. I. *Certiorari* denied. Reported below: — R. I. —, 425 A. 2d 536.

No. 80-498. *SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES v. NORMAN ET AL.* C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. *Certiorari* denied. Reported below: 610 F. 2d 1228.

No. 80-792. *JANUSZEWSKI v. CONNECTICUT*. Sup. Ct. Conn. *Certiorari* denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant *certiorari*. Reported below: 182 Conn. 142, 438 A. 2d 679.

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No. 80-1008. *ILLINOIS v. BAYLES*. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 82 Ill. 2d 128, 411 N. E. 2d 1346.

Rehearing Denied

No. 79-1977. *RODRIGUEZ v. COMPASS SHIPPING CO., LTD., ET AL.*; *PEREZ v. ARYA NATIONAL SHIPPING LINE, LTD.*; and *BARULEC v. OVE SKOU, R. A.*, 451 U. S. 596;

No. 80-5693. *CRAWFORD v. TEXAS*, 452 U. S. 931;

No. 80-6214. *DUFFIELD v. UNITED STATES*, 451 U. S. 1019;

No. 80-6324. *MILTON v. TEXAS*, 451 U. S. 1031; and

No. 80-6542. *COLLIER v. LOS ANGELES SOUTHWEST COLLEGE*, 452 U. S. 919. Petitions for rehearing denied.

No. 80-1313. *LAMPKIN-ASAM v. FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSN.*, 451 U. S. 978. Motion of appellant to defer consideration of petition for rehearing denied. Petition for rehearing denied.

No. 80-1534. *OCHS v. UNITED STATES*, 451 U. S. 1016. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE WHITE be, and he is hereby, assigned to the Sixth Circuit as Circuit Justice, effective July 4, 1981, pending further order of the Court.

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Dismissal Under Rule 53

No. 80-2097. *POTTER INSTRUMENT CO., INC. v. STORAGE TECHNOLOGY CORP. ET AL.* C. A. 4th Cir. Certiorari dismissed as to Telex Computer Products, Inc., under this Court's Rule 53. Reported below: 641 F. 2d 190.

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Miscellaneous Orders

No. A-789 (80-1573). *GLUESENKAMP v. FLORIDA*. Application for bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-901. *VALENTINE v. UNITED STATES*. Application for bail, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-1064. *TIBBS v. UNITED STATES*. Sup. Ct. Fla. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-13. *ELCAN v. UNITED STATES*. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A-15 (81-171). *OESTERLEN SERVICES FOR YOUTH, INC. v. NATIONAL LABOR RELATIONS BOARD*. C. A. 6th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A-32. *GEDEON v. GEDEON, AKA ROSE*. Sup. Ct. Colo. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-86. *CAPITOL CITIES COMMUNICATIONS, INC., ET AL. v. FLYNN, JUSTICE, SUPREME COURT OF NEW YORK*. Sup. Ct. N. Y., Erie County. Motion for leave to file the application for stay under seal, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS would grant the motion. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE BRENNAN would grant the application.

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No. 80-203. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* CURRAN ET AL. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80-644. G. D. SEARLE & Co. *v.* COHN ET AL. C. A. 3d Cir. [Certiorari granted, 451 U. S. 905.] Motion of Brinco Mining Ltd. for leave to file a brief as *amicus curiae* granted.

No. 80-824. POLK COUNTY ET AL. *v.* DODSON. C. A. 8th Cir. [Certiorari granted, 450 U. S. 963.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80-848. PIPER AIRCRAFT Co. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.; and

No. 80-883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL. C. A. 3d Cir. [Certiorari granted, 450 U. S. 909.] Motion of Law Offices of Gerald C. Sterns for leave to file a brief as *amicus curiae* granted.

No. 80-931. CHARLES D. BONANNO LINEN SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. [Certiorari granted, 450 U. S. 979.] Motion of the Solicitor General for divided argument granted.

No. 80-951. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 450 U. S. 979.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

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No. 80-986. NORTH HAVEN BOARD OF EDUCATION ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of Hillsdale College for leave to file a brief as *amicus curiae* granted.

No. 80-1208. NEW ENGLAND POWER CO. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL.;

No. 80-1471. MASSACHUSETTS ET AL. *v.* NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL ET AL.; and

No. 80-1610. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL. Sup. Ct. N. H. [Probable jurisdiction noted, 451 U. S. 981.] Motion of New England Power Pool Executive Committee for leave to file a brief as *amicus curiae* granted.

No. 80-1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of Ohio Criminal Defense Lawyers Association for leave to participate in oral argument as *amicus curiae* denied.

No. 80-1576. PRINCETON UNIVERSITY ET AL. *v.* SCHMID. Sup. Ct. N. J. [Probable jurisdiction postponed, 451 U. S. 982.] Motion of Massachusetts Institute of Technology for leave to file a brief as *amicus curiae* granted. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 80-1681. VILLAGE OF HOFFMAN ESTATES ET AL. *v.* THE FLIPSIDE, HOFFMAN ESTATES, INC. C. A. 7th Cir. [Probable jurisdiction noted, 452 U. S. 904.] Motion of Community Action Against Drug Abuse for leave to file a brief as *amicus curiae* granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

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No. 80-1538. *PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. v. DOE, GUARDIAN, ET AL.* C. A. 5th Cir. [Probable jurisdiction noted, 451 U. S. 968]; and

No. 80-1934. *TEXAS ET AL. v. CERTAIN NAMED AND UN-NAMED UNDOCUMENTED ALIEN CHILDREN ET AL.* C. A. 5th Cir. [Probable jurisdiction noted, 452 U. S. 937.] Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 80-1781. *McNICHOLS, MAYOR OF DENVER, ET AL. v. BALDRIGE, SECRETARY OF COMMERCE, ET AL.* C. A. 10th Cir. [Certiorari granted, 452 U. S. 937.] Motion of National Lead Counsel and National Liaison Counsel for leave to participate in oral argument as *amici curiae* denied. The suggestion of the Solicitor General that this case be consolidated with No. 80-1436, *Baldrige, Secretary of Commerce, et al. v. Shapiro, Essex County Executive* [certiorari granted, 451 U. S. 936], is adopted. Cases consolidated and a total of one and one-half hours allotted for oral argument.

Rehearing Denied

No. 79-5199. *BELL v. TEXAS, ante*, p. 913;

No. 79-6081. *GREEN v. TEXAS, ante*, p. 913;

No. 79-6423. *LASSITER v. DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA*, 452 U. S. 18;

No. 79-6749. *PARKER v. TEXAS, ante*, p. 902;

No. 80-581. *COMMONWEALTH EDISON CO. ET AL. v. MONTANA ET AL., ante*, p. 609;

No. 80-1010. *CURREY ET AL., DBA CURREY & CURREY v. CORPORATION COMMISSION OF OKLAHOMA ET AL.*, 452 U. S. 938;

No. 80-1696. *HARING v. REGAN, SECRETARY OF THE TREASURY*, 452 U. S. 939; and

No. 80-1805. *BOSWORTH, DBA GULF TO BAY TITLE CO. v. COONEY, EXECUTOR*, 452 U. S. 956. Petitions for rehearing denied.

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No. 80-1940. *LONG v. DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE, PHOENIX, ARIZONA*, 452 U. S. 934;

No. 80-6322. *SKILLERN v. TEXAS*, 452 U. S. 931;

No. 80-6506. *FLEMING v. AUSTIN, WARDEN*, 452 U. S. 910;

No. 80-6510. *SMITH v. KENTUCKY*, 452 U. S. 908;

No. 80-6551. *RUCKER v. CITY OF ST. LOUIS ET AL.*, 452 U. S. 942;

No. 80-6580. *ZARRILLI v. CAPITOL BANK & TRUST CO. ET AL.*, 452 U. S. 965;

No. 80-6593. *REITER v. CITY OF KEENE*, 452 U. S. 965;

No. 80-6657. *PATTERSON v. ABERNATHY ET AL.*, 452 U. S. 956; and

No. 80-6672. *SONDERUP v. UNITED STATES*, 452 U. S. 920. Petitions for rehearing denied.

No. 79-880. *KISSINGER ET AL. v. HALPERIN ET AL.*, 452 U. S. 713;

No. 79-881. *MITCHELL v. ZWEIBON ET AL.*, *ante*, p. 912;

No. 79-882. *NIXON ET AL. v. SMITH ET AL.*, *ante*, p. 912;

No. 79-883. *ZWEIBON ET AL. v. MITCHELL*, *ante*, p. 912; and

No. 79-1120. *MITCHELL ET AL. v. FORSYTH ET AL.*, *ante*, p. 913. Petitions for rehearing denied. JUSTICE REHNQUIST took no part in the consideration or decision of these petitions.

No. 79-1314. *1776 K STREET ASSOCIATES ET AL. v. UNITED STATES*, 447 U. S. 905; and

No. 80-6426. *ODES v. NOWLAND, ACTING DIRECTOR, DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS*, 451 U. S. 991. Motions for leave to file petitions for rehearing denied.

SEPTEMBER 2, 1981

Miscellaneous Order

No. A-72. *GRADDICK, ATTORNEY GENERAL OF ALABAMA v. NEWMAN ET AL.* D. C. M. D. Ala. Application for stay,

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presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

Opinion of JUSTICE POWELL.

This case, involving an application and "reapplication" for a stay, arises in a complex and unusual procedural posture. The applicant Charles A. Graddick is the Attorney General of Alabama. Late on the afternoon of July 23 he applied to me as Circuit Justice to stay an order of the District Court for the Middle District of Alabama. The order arose from protracted litigation, commenced in 1971, involving conditions in the Alabama prison system. It directed release of some 400 inmates at midnight on July 24. In order to consider the issues presented, I entered a temporary stay and requested responses. I subsequently denied the application on July 25.

In his application to me as Circuit Justice, Attorney General Graddick did not claim standing as a party to the underlying prison litigation. On the contrary, he came to this Court complaining of the District Court's refusal to grant his motion to *intervene* in that lawsuit. He sought a stay to permit him to appeal following resolution of his claimed right of intervention.

On July 25, the order of the District Court was given effect. More than 200 prisoners were released. Despite this change in the underlying circumstances—which a "stay" would ordinarily be entered to preserve—Graddick promptly filed a "reapplication" for stay with THE CHIEF JUSTICE. THE CHIEF JUSTICE referred this "reapplication," on which we act today, to the full Court.

The "reapplication" was in fact a *new* application. In it Graddick for the first time claimed standing as the successor Attorney General to a party defendant dating back to the original action in 1971. If he is such a party, his motion to intervene was unnecessary.

Crediting Graddick's claim to status as a party, the Court decides today that he is still not entitled to a stay.

I

In view of the change in Attorney General Graddick's position and the unusual history of this case, and its resulting present posture, I write to summarize the relevant facts and to restate my reasons for concluding that Graddick is not entitled to a stay. The current controversy represents the latest chapter in protracted litigation over conditions in the Alabama prisons. The litigation involves at least three cases, consolidated by the Fifth Circuit in *Newman v. Alabama*, 559 F. 2d 283 (1977). See *Newman v. Alabama*, 349 F. Supp. 278 (MD Ala. 1972); *Pugh v. Locke*, 406 F. Supp. 318 (MD Ala. 1976) (together with *James v. Wallace*). The original lawsuits in each of the cases sought redress of alleged constitutional violations in the Alabama prisons. On more than one occasion the District Court has held specifically that the conditions in the Alabama prison system, including overcrowding, violate the rights of inmates under the Eighth and Fourteenth Amendments. See *Newman v. Alabama*, 349 F. Supp. 278; *Pugh v. Locke*, *supra*; *James v. Wallace*, *supra*.

In *Pugh* and *James*, the court awarded far-reaching injunctive relief, and enjoined the defendants from failing fully to implement it. But the status of various defendants has proved a recurring problem in the lawsuits. In *Pugh* and *James* the defendants included the State of Alabama; the Governor of Alabama, George C. Wallace; the Commissioner of Corrections; the Deputy Commissioner of Corrections; the Members of the Alabama Board of Corrections; the State Board of Corrections; and Wardens at various state institutions. In *Newman*, the original complaint also named the Attorney General of Alabama, William J. Baxley, among those from whom relief was sought. On consolidated appeal, the Court of Appeals for the Fifth Circuit upheld most of the relief prescribed in various orders of the District Court, includ-

ing those issued in *Newman v. Alabama*, *supra*; *Pugh v. Locke*, *supra*; and *James v. Wallace*, *supra*. See *Newman v. Alabama*, 559 F. 2d 283. But it also held that certain terms of the order in *Pugh* and *James* must be modified, and it ordered dissolution of the injunction entered against Governor Wallace. This Court then granted certiorari on the limited question whether suits against the State of Alabama and the Alabama Board of Corrections were barred by the Eleventh Amendment. We held that they were. *Alabama v. Pugh*, 438 U. S. 781 (1978).

As a result of the decisions by this Court and by the Court of Appeals, the State of Alabama, the Governor of Alabama, and the Alabama Board of Corrections were dismissed as parties. Nonetheless, the District Court retained jurisdiction, and it continued to enter orders and decrees affecting various areas of compliance. The active defendants appear to have been the officials responsible for the management of the State's prison system. The Attorney General appeared as a party infrequently. An exception appears to have occurred in 1977, when the then Attorney General sought to "intervene" in the District Court. The District Court denied the motion as unnecessary, noting that the Attorney General had been named as a defendant in the original complaint in *Newman*. Even after this motion, however, the Attorney General did not continue to participate as a party. Nor does he appear to have been named in any subsequent order of the District Court. When Attorney General Graddick moved to intervene on July 16, it was his first attempt to participate as a party to the action.

The State's principal representative in the recent litigation has been Fob James, elected Governor of Alabama in November 1978. In February 1979, the District Court entered an order naming him as Receiver of the Alabama Prison System. The order provided that all powers, duties, and authority of the Alabama Board of Corrections were transferred to the

Receiver. After James' appointment as Receiver, the Alabama Legislature abolished the Alabama Board of Corrections and transferred its power, duties, and authority to the Governor. See Ala. Code §§ 14-1-15, 14-1-16 (Supp. 1980). Thus, both by court order and by Alabama law, responsibility for the maintenance of Alabama prisons has now rested for more than two years in Governor James.

On October 9, 1980, the District Court found, based on the agreement of the parties, that the Alabama prison system had failed to achieve compliance with standards provided in prior judicial orders. By order of that date, the court established deadlines for the achievement of certain levels of compliance. At a hearing on May 18, 1981, it was stipulated that those deadlines had not been met. On the contrary, it was established that overcrowding had grown more severe. Although the District Court took no immediate remedial action, on May 20 it ordered the Alabama Department of Corrections and the Receiver to submit a list of prisoners "least deserving of further incarceration." Having received such a list, on July 15 it entered the order at issue here, granting a writ of habeas corpus directing the release of some 400 named inmates, all of whom normally were entitled to be released no later than January 8, 1982.

At this juncture the applicant Charles A. Graddick undertook to enter the litigation. On July 16, he filed papers in the District Court seeking to intervene as a party defendant. Purporting to represent the interests of the people of the State of Alabama, he sought a stay of the order granting the writ of habeas corpus. On July 17, Governor Fob James, in his capacity as Receiver, moved to dismiss all motions filed by Attorney General Graddick. The District Court set the Attorney General's motions for hearing on August 6. But it declined to stay its order directing release of the 400 inmates on July 24. On July 22, Attorney General Graddick filed a notice of appeal with the Court of Appeals for the Fifth Cir-

cuit. He also requested a stay pending appeal. The Court of Appeals denied the stay on July 23. Following this denial, Attorney General Graddick filed his application for a stay with me as Circuit Justice.

II

Our cases establish that an applicant for a stay bears a heavy burden of persuasion. "The judgment of the court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that court not to stay its judgment." *Wise v. Lipscomb*, 434 U. S. 1329, 1333 (1977) (POWELL, J., in chambers). The applicant's burden is especially heavy when, as in this case, both the District Court and the Court of Appeals have declined his petitions for stay without dissent. *Beame v. Friends of the Earth*, 434 U. S. 1310, 1312 (1977) (MARSHALL, J., in chambers); *Board of Education v. Taylor*, 82 S. Ct. 10, 10-11 (1961) (BRENNAN, J., in chambers).

To prevail on an application for stay, an applicant must make a showing of a threat of irreparable injury to interests that he properly represents. See *Bailey v. Patterson*, 368 U. S. 346, 346-347 (1961) (*per curiam*). This requirement has two dimensions. The first, embraced by the concept of "standing," looks to the status of the party to redress the injury of which he complains. The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant. In acting on an application for a stay, a Circuit Justice must "'balance the equities' . . . and determine on which side the risk of irreparable injury weighs most heavily." *Holtzman v. Schlesinger*, 414 U. S. 1304, 1308-1309 (1973) (MARSHALL, J., in chambers); *Beame v. Friends of the Earth*, *supra*, at 1312.

Considering that the burden is on the applicant to establish his entitlement to the extraordinary relief that he requests, on July 25 I denied Graddick's application for a stay. In his papers filed as of that date, Attorney General Graddick

had failed to establish *either* irreparable injury to any cognizable interests *or* his standing to assert the interests to which he alleged that injury had occurred. Graddick had made no allegation that he, either as an official or as a citizen of the State of Alabama, would suffer any individualized injury. His application did aver that "the people of the State of Alabama" would incur irreparable injury if a stay were not granted. But the dimensions of any such injury were cast into serious doubt by the position of the Governor of the State.

Even if Graddick's allegation of irreparable injury were accepted, he had made no showing that he was the proper official to assert that claim. Graddick's original application presented no state-law basis for his attempt to assert the rights of Alabama citizens generally. His standing to represent Alabama's interests in this matter was not self-evident in the unusual context of this case. Alabama statutes had vested responsibility for the prison system in the Governor, and the Governor, who is also the State's chief executive officer, opposed Graddick's application. The Governor averred that he, not the Attorney General, properly represented the State's interests in this case.

Finally, Graddick had failed to show that the "balance of equities" favored the grant of a stay. The District Court had issued its relief order to remedy what it perceived as possible serious violations of constitutional rights. As long ago as 1972, Judge Frank Johnson had determined that conditions in the Alabama prisons failed to satisfy the constitutional minimum. See *Newman v. Alabama*, 349 F. Supp. 278 (MD Ala. 1972). Subject to judicial orders for nearly a decade, the State had still failed to achieve compliance with standards established in *Newman*. As I have asserted previously, a Circuit Justice should show great "reluctance, in considering in-chambers stay applications, to substitute [his] view for that of other courts that are closer to the relevant factual

considerations that so often are critical to the proper resolution of these questions.” *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U. S. 1301, 1305 (1974) (in chambers); see *Graves v. Barnes*, 405 U. S. 1201, 1203 (1972) (POWELL, J., in chambers). Here there was no basis, on the record as presented, to disagree with the two courts below as to the balance of equities.

Established legal criteria thus required that the application for stay should be denied. In so concluding, I was not unaware that the application raised interesting and substantial questions on the merits. These included the propriety of the District Court’s use of the writ of habeas corpus as a class remedy for prison overcrowding. But these questions were not properly presented for decision.

III

In his “reapplication” for a stay, Attorney General Graddick claims standing as a party to the underlying controversy. He also asserts a state-law basis for his claim of authority to represent the interests of the people of the State of Alabama. As I understand them, these averments pertain only to the issue of standing. They do not speak to the other considerations governing the grant of stays by this Court. However the standing question would now be resolved—for I remain uncertain whether Graddick even now has established his standing to seek a stay in the highly unusual context of this case—those considerations continue to require a denial of Graddick’s application. He has not met the heavy burden imposed on an applicant who asks us to grant extraordinary relief denied by both the District Court and the Court of Appeals.

A

Assuming that Graddick now has established his position as a party, he still has failed to show that the “balance of equities” would support a stay. The views of the Governor,

stated above, remain entitled to great weight in assessing the competing risks of irreparable injury. The court-ordered release of prisoners occurred on July 25. Graddick alleges no specific damage that has occurred since then. Moreover, the sudden return of more than 200 former prisoners to jail would present the State with large administrative problems, as well as exacerbating the overcrowding of all prisoners within the Alabama system. A risk of new constitutional rights violations would arise.

In deciding whether to grant extraordinary equitable relief pending appeal, this Court must consider the confusion and disruption that affirmative action might occasion. See, *e. g.*, *Westerman v. Nelson*, 409 U. S. 1236 (1972) (Douglas, J., in chambers); *Gomperts v. Chase*, 404 U. S. 1237 (1971) (Douglas, J., in chambers); cf. *Mahan v. Howell*, 404 U. S. 1201 (1971) (Black, J., in chambers). This equitable concern weighs most heavily in a case, such as this one, in which the applicant has moved with unexplained tardiness. See, *e. g.*, *Westerman v. Nelson*, *supra*, at 1237 (Douglas, J., in chambers) (“[O]ne in my position cannot give relief in a responsible way when the application is as tardy as this one”); *O’Brien v. Skinner*, 409 U. S. 1240 (1972) (MARSHALL, J., in chambers).

B

Additionally, I believe that Graddick’s request for a “stay” is now moot. Ordinary linguistic usage suggests that an order, once executed, cannot be “stayed.” Affirmative action then becomes necessary to restore the status quo. See *McCarthy v. Briscoe*, 429 U. S. 1317, n. 1 (1976) (POWELL, J., in chambers) (although application is styled as seeking a “stay,” it actually requests “affirmative relief” and must therefore be considered under different standards governing affirmative relief); *Barthuli v. Board of Trustees*, 434 U. S. 1337, 1338–1339 (1977) (REHNQUIST, J., in chambers) (“stay” of state-court decision would not reinstate a discharged employee,

though "the extraordinary interim remedy of a mandatory injunction" would do so).

I do not doubt the power of this Court to enter an injunction ordering restoration of the prior status quo. See 28 U. S. C. § 1651 (a). If it were "necessary or appropriate in aid of" our jurisdiction, *ibid.*, we could order the arrest and imprisonment of all the prisoners released on July 25. But it is settled that our injunctive power "should be used sparingly and only in the most critical and exigent circumstances." *Williams v. Rhodes*, 89 S. Ct. 1, 2, 21 L. Ed. 2d 69, 70 (1968) (Stewart, J., in chambers); *Fishman v. Schaffer*, 429 U. S. 1325, 1326 (1976) (MARSHALL, J., in chambers). "In order that it be available, the applicants' right to relief must be indisputably clear." *Communist Party of Indiana v. Whitcomb*, 409 U. S. 1235 (1972) (REHNQUIST, J., in chambers).

In view of all the legal and factual circumstances of this case, Attorney General Graddick's application falls far distant from this exacting standard.

Opinion of JUSTICE REHNQUIST.

Applicant seeks to stay an order of the United States District Court for the Middle District of Alabama pending an appeal to the United States Court of Appeals for the Fifth Circuit. By that order the District Court issued a writ of habeas corpus mandating the release of some 400 inmates incarcerated in the Alabama prison system. The order also accelerated by six months the parole eligibility dates of a substantial number of other prisoners. Applicant unsuccessfully sought a stay from the District Court and from the Court of Appeals. On July 25, 1981, JUSTICE POWELL also denied a stay, largely on the ground that applicant was without standing to seek the relief requested. Also of significance was the opposition to the stay manifested by Governor Fob James, who possesses authority, under both statute and court order, for administration of the Alabama prison system.

Following JUSTICE POWELL's decision denying a stay, Alabama prison authorities effectuated the District Court's order by releasing more than 200 prisoners. Regardless of whether this event altered the nature of relief that applicant now must seek to obtain a satisfactory result, there is no question that it increased the practical difficulty of arresting the procedural momentum of the District Court's release order on reapplication for a stay. The opinion of JUSTICE POWELL accompanying the Court's denial of the reapplication reflects this fact. See *ante*, at 935-936, 937. Nevertheless, a reapplication was filed and referred to the full Court.

The Court has decided to deny a stay. Had this result been communicated without explanation, the parties might well have been left with the impression that the full Court adopted the rationale of JUSTICE POWELL's opinion accompanying his denial of the original application, *i. e.*, that applicant lacks standing to seek a stay. I write separately to emphasize my view that such an impression would be erroneous.

I

"Standing" is not a term used for its precision. As it is most commonly understood, standing embraces both constitutional and prudential limitations on a federal court's exercise of jurisdiction. So used, it normally measures the quality of the interest asserted by a private plaintiff in obtaining resolution of a particular dispute through the authority of a court. As a threshold inquiry, we have required the plaintiff to show "some threatened or actual injury resulting from the putatively illegal action." *Linda R. S. v. Richard D.*, 410 U. S. 614, 617 (1973). Further generalization is hazardous.

In this reapplication, however, the issue of standing has been raised in an unusual setting. The question is whether the chief legal officer of a State, named as a defendant in a suit asserting constitutional limitations on the State's authority and acting as counsel for other state officials, has "stand-

ing" to seek a stay of court orders that suspend the normal operation of the State's laws regarding the confinement of convicted criminals. One might well regard the answer as self-evident. On the assumption that further investigation is warranted, one still might doubt whether conventional methods of analysis are relevant. For example, to ask if the state official has suffered individualized injury from the court's order strikes me as anomalous. The "standing" of a state official to defend against judicial orders that impinge upon the sovereignty of the State derives not from his individualized interest in the suit, but from the authority delegated to the official by the State's citizens to act on their behalf in upholding the laws enacted by their representatives.

The issue of standing as it has been raised in this reapplication, therefore, involves only two questions. First, as a matter of federal law, is applicant's procedural status in the underlying litigation such that he may seek a stay? Second, as a matter of state law, is applicant acting within his statutory authority in seeking a stay?

At the time the original application was filed the first question was not free from doubt. The applicant had sought to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24 (a), but the District Court had not yet ruled on the motion. The applicant now maintains, however, that he seeks a stay in his status as a party defendant in this litigation. I am inclined to believe that this new position is the product not of a tactical change of course, but of attention to a question previously neglected due to the press of events. In any event, I am persuaded that the position is correct.

The original complaint in *Newman v. Alabama*, Civ. A. No. 3501-N (MD Ala.), filed in 1971, named as a party defendant the Attorney General of Alabama, at that time William J. Baxley. An order issued by the District Court as late as 1977 expressly recognized that the Attorney General was still a party defendant, as well as counsel of record for

the other defendant state officials. In response to Attorney General Baxley's motion for leave to appear as *amicus curiae*, the order recited:

"This Court finds no necessity for granting the motion of the Attorney General of the State of Alabama to 'intervene' in these cases since the Attorney General is not only a named defendant in *Newman*, but the records of this Court reflect that the Attorney General of the State of Alabama has been counsel of record for defendants in all these cases since their inception." App. N to Brief in Support of Applicant's Reapplication.

Governor James, in his papers opposing the original application, asserted that this Court in *Alabama v. Pugh*, 438 U. S. 781 (1978), "restricted the parties to those persons 'responsible for the administration of [Alabama] prisons.'" Objection of Fob James to the Application for Stay 3, n. (quoting *Alabama v. Pugh*, *supra*, at 781). That assertion is without foundation. The narrow question that we considered was whether the Eleventh Amendment barred the District Court's injunction against the State of Alabama and the Alabama Board of Corrections. 438 U. S., at 782, and n. 2. Our affirmative answer resulted in the dismissal of the State and the Board, but had no effect on the remaining parties defendant, whose amenability to suit was an issue not encompassed by our limited grant of certiorari.

In short, the Attorney General of Alabama was named as a party defendant in this litigation, and there is no indication he has ever been dismissed. I would have thought this simple fact conclusive of the question of procedural status, as that question bears on applicant's standing to seek a stay. Nevertheless, it has been argued that applicant's lack of active participation as a party in this litigation prior to the District Court's release order somehow weakens his claim of standing as a party. I am aware, however, of no rule that conditions party status on the appearance of activity or results in auto-

matic dismissal from the lack thereof. Certainly, Charles Graddick has lost nothing by his evident failure to request a formal substitution of parties following his replacement of William Baxley as Attorney General. Federal Rule of Civil Procedure 25 (d) provides that when a public officer ceases to hold office, his successor is *automatically* substituted as a party, regardless of whether the court enters an order of substitution.

Whether applicant's past participation in this litigation has been sufficient to demonstrate vigilance in protection of the State's interests is a question I am not in a position to answer and one that is, in any event, irrelevant to the issue of standing. I do note that applicant has represented the other defendant state officials since commencement of this litigation. There would be little reason for him to participate actively as a party so long as his interests and those of the officials he represents as counsel do not diverge. Applicant has indicated that the District Court's release order has occasioned just such a divergence. While I do not know whether other orders issued by the District Court in the course of this litigation should have called for a response by a vigilant Attorney General acting as a party, I am surely not surprised that this Attorney General has taken exception to an order opening the doors of the State's prisons.

The remaining question, therefore, is whether Alabama law provides the applicant sufficient authority to request a stay of the release order. Two statutes are relevant. The first, Ala. Code § 36-15-12 (1975), authorizes the Attorney General "to institute and prosecute, in the name of the state, all civil actions and other proceedings necessary to protect the rights and interests of the state." Although the term "other proceedings" does not appear to have been authoritatively construed, it would be incongruous for the term to exclude appeals from actions in which the Attorney General is authorized to participate. See *McDowell v. State*, 243 Ala. 87,

89, 8 So. 2d 569, 570-571 (1942) ("We can perceive of no good reason why the express statutory authority of the Attorney General to institute and prosecute suits should not carry with it the implied authority to do all things necessary and proper to their final conclusion"). With respect to the commencement of actions, the Alabama Supreme Court consistently has held that the Attorney General's authority is independent of that of the Governor. *State v. Stacks*, 264 Ala. 510, 88 So. 2d 696 (1956) (institution of suit for recovery of funds misused by public officers); *Try-Me Bottling Co. v. State*, 235 Ala. 207, 210, 178 So. 231, 232 (1938) (institution of suit to enjoin operation of lottery); *Montgomery v. Sparks*, 225 Ala. 343, 344-345, 142 So. 769, 770 (1932) (institution of suit for recovery of public funds).

The second statute, Ala. Code § 36-15-21 (1975), provides that "[a]ll litigation concerning the interest of the state, or any department thereof, shall be under the direction and control of the attorney general" The Alabama Supreme Court, construing the predecessor of this statute, held that the Attorney General was authorized to settle a suit for the liquidation of a tax claim asserted by the State Department of Revenue, despite the objections of the state official charged with collection of the tax and despite a specific statute conditioning dismissal of such suits on the approval of that official. *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So. 2d 280 (1949). The court held that in the absence of specific legislative expression to the contrary, the Attorney General "is empowered to make any disposition of the state's litigation which he deems for its best interest." *Id.*, at 484, 41 So. 2d, at 284.

These two statutes, taken together, convince me that the Attorney General possesses ample authority under Alabama law to seek a stay of the release order, with or without the consent of the Governor. But any doubts about applicant's authority could have been resolved by adopting the course

this Court pursued in *Massachusetts v. Feeney*, 429 U. S. 66 (1976), and certifying the question to the State's highest court. The Supreme Court of Alabama has provided a certification procedure in Alabama Rule of Appellate Procedure 18. I have no reason to second-guess applicant's assessment of the State's interest in ensuring both proper enforcement of duly imposed sentences and unimpeded administration of the statutes and regulations relating to parole. Coupled with the fact that applicant is a party defendant in this litigation, the foregoing conclusion establishes his standing to seek a stay of the District Court's release order.

II

As explained at the outset, I have decided to state my views on the question of standing to ensure that the Court's denial of the reapplication for a stay does not engender the erroneous impression that applicant is somehow barred from requesting extraordinary relief from orders of the District Court. My decision to so confine my remarks should not be similarly misconstrued as an expression of approval of the District Court's order. JUSTICE POWELL's decision to state his views on the merits of the reapplication, however, have prompted me to depart somewhat from my original intention. In particular, I am compelled to state my disagreement with his assertion that applicant's request for a stay is now moot.

JUSTICE POWELL initially relies on "ordinary linguistic usage" for the proposition that an order, once executed, cannot be "stayed." *Ante*, at 936. I have some doubt whether this proposition is true, even as a matter of linguistic usage. Where an order has been actually effectuated but remains subject to the issuance of temporary common-law writs, such as those authorized by 28 U. S. C. § 1651, it is frequent practice in both federal and state courts to recite that "the mandate is recalled," rather than "the order is stayed."

Linguistics aside, the proposition rests on one of two assumptions of law, both of which are erroneous. The first is

that the legal force of an order is spent once the parties to whom it is directed have complied with the decree. Discharge of a writ of habeas corpus, however, does not exhaust the force of the writ. Until vacated by reversal or a stay, the writ stands as a barrier to the lawful resumption of custody.

The second assumption is that issuance of a stay would be an empty gesture, because a stay exerts no compulsion on the parties to return to the positions they occupied before issuance of the original order. It is, of course, true that a stay does not have the legal effect of an injunction. Unlike an injunction, a stay in this case would not compel Alabama authorities to arrest and imprison those convicts freed by the District Court. It would, however, remove the federal barrier to efforts by the State itself to restore the prior status quo. This much plainly follows from the Court's decision in *Eagles v. United States ex rel. Samuels*, 329 U. S. 304 (1946). The petitioner in *Eagles* sought exemption from military service and toward that end filed a petition for a writ of habeas corpus in federal court. The District Court denied the writ, but the Court of Appeals reversed and remanded with instructions to discharge petitioner from military custody. On remand the writ issued and petitioner was unconditionally released. The post commander appealed and this Court rejected petitioner's claim that the case was moot. Noting that his release had been "obtained through the assertion of judicial power," the Court held:

"It is the propriety of the exercise of that power which is in issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. . . . Affirmance makes the prisoner's release final and unconditional. *Reversal undoes what*

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the habeas corpus court did and makes lawful a resumption of the custody." *Id.*, at 307-308 (emphasis added).

See *Michigan v. Doran*, 439 U. S. 282, 285, n. 2 (1978); *Carr v. Zaja*, 283 U. S. 52, 53 (1931).*

The only action sought by applicant from this Court is a decision "mak[ing] lawful a resumption of the custody." *Eagles v. United States ex rel. Samuels*, *supra*, at 308. A stay of the release order would achieve that result by removing the federal impediment to applicant's exercise of authority to return the prisoners to confinement. This request should not be deemed moot simply because he has not asked for more. Although applicant might have encountered further impediments in attempting to return the prisoners to confinement, he chose to confront those problems on his own. It is enough for now that issuance of a stay would amount to something considerably more than "a mere declaration in the air." *Giles v. Harris*, 189 U. S. 475, 486 (1903).

SEPTEMBER 8, 1981

Dismissal Under Rule 53

No. 90, Orig. CALIFORNIA *v.* TEXAS ET AL. Stipulation to dismiss the State of Mississippi as a party defendant was filed under Rule 53.

*The same conclusion follows from the more familiar line of cases concerning appellate review of judgments involving the payment of money or transfer of property. Since property transferred or money paid involuntarily pursuant to a judgment can be recovered, execution of the lower court's judgment pending appeal normally does not render the case moot. *E. g.*, *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183, 184 (1956); *Porter v. Lee*, 328 U. S. 246, 251 (1946); *Dakota County v. Glidden*, 113 U. S. 222, 224 (1885). These cases represent merely a particularization of the rule that issuance of a court's mandate or obedience to its judgment does not bar timely appellate review. *Bakery Drivers v. Wagshal*, 333 U. S. 437, 442 (1948); *Aetna Casualty Co. v. Flowers*, 330 U. S. 464, 467 (1947).

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SEPTEMBER 9, 1981

Miscellaneous Order

No. A-218. KOCH, MAYOR OF NEW YORK CITY, ET AL. *v.* HERRON ET AL. Application to stay enforcement of the order filed with the Clerk of the United States District Court for the Southern District of New York on September 8, 1981, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

SEPTEMBER 12, 1981

Dismissals Under Rule 53

No. 80-1946. CITY OF PENSACOLA, FLORIDA, ET AL. *v.* JENKINS ET AL. Appeal from C. A. 5th Cir.; and

No. 80-1962. JENKINS ET AL. *v.* CITY OF PENSACOLA, FLORIDA, ET AL. C. A. 5th Cir. Jurisdictional statement in No. 80-1946 and petition for writ of certiorari in No. 80-1962 dismissed under this Court's Rule 53. Reported below: No. 80-1946, 638 F. 2d 1239; No. 80-1962, 638 F. 2d 1249.

SEPTEMBER 16, 1981

Dismissal Under Rule 53

No. 80-2062. ALPHA PORTLAND INDUSTRIES, INC., ET AL. *v.* CALIFORNIA ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53.2 (c). Reported below: 649 F. 2d 387.

SEPTEMBER 21, 1981

Dismissal Under Rule 53

No. 80-2091. INDIANA *v.* CHERRY. Sup. Ct. Ind. Certiorari dismissed under this Court's Rule 53. Reported below: — Ind. —, 414 N. E. 2d 301.

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SEPTEMBER 23, 1981

Miscellaneous Orders

No. A-43 (81-247). ALABAMA *v.* RITTER. Sup. Ct. Ala. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE REHNQUIST dissents from the denial of the application for stay. He believes that upon consideration of Alabama's petition for certiorari, a majority of this Court will conclude that the case should be remanded to the Supreme Court of Alabama for such proceedings as may be appropriate under *California v. Krivda*, 409 U. S. 33, 35 (1972), and that therefore the traditional stay equities favor the applicant.

No. A-137 (81-463). BROWN, WARDEN *v.* VARGAS. C. A. 1st Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A-142. ALANDER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-144. METROPOLITAN COUNTY BOARD OF EDUCATION ET AL. *v.* KELLEY ET AL. Application to vacate the stay entered by the United States Court of Appeals for the Sixth Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A-152. MARTINS FERRY HOSPITAL ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. A-157 (81-453). LABRIOLA *v.* UNITED STATES. C. A. 2d Cir. Application for stay and/or recall of mandate, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

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No. 80-415. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 451 U. S. 936]; and

No. 80-1239. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 451 U. S. 936.] Motion of the Solicitor General for divided argument and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. The nonfederal appellees are also allotted an additional 10 minutes for oral argument.

No. 80-990. CABELL, ACTING CHIEF PROBATION OFFICER OF LOS ANGELES COUNTY, ET AL. *v.* CHAVEZ-SALIDO ET AL. D. C. C. D. Cal. [Probable jurisdiction noted, 450 U. S. 978.] Motion of Service Employees International Union, Local 535, for leave to file a brief as *amicus curiae* granted.

No. 80-1082. SMITH, CORRECTIONAL SUPERINTENDENT *v.* PHILLIPS. C. A. 2d Cir. [Certiorari granted, 450 U. S. 909.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 80-1208. NEW ENGLAND POWER CO. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL.;

No. 80-1471. MASSACHUSETTS ET AL. *v.* NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL ET AL.; and

No. 80-1610. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. *v.* NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ET AL. Sup. Ct. N. H. [Probable jurisdiction noted, 451 U. S. 981.] Motion of appellants for divided argument granted.

No. 80-1348. FLORIDA DEPARTMENT OF STATE *v.* TREASURE SALVORS, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 451 U. S. 982.] Motion of petitioner for divided argument and for additional time for oral argument denied.

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No. 80-1429. YOUNGBERG, SUPERINTENDENT, PENNHURST STATE SCHOOL AND HOSPITAL, ET AL. *v.* ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, ROMEO. C. A. 3d Cir. [Certiorari granted, 451 U. S. 982.] Motion of American Psychiatric Association for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied. Motion of respondent for divided argument to permit *amicus curiae* American Psychological Association to present oral argument denied.

No. 80-1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of Institutional Legal Services Project for leave to file a brief as *amicus curiae* granted.

No. 80-1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 451 U. S. 968]; and

No. 80-1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 452 U. S. 937.] Motion of National School Boards Association for leave to file a brief as *amicus curiae* in No. 80-1934 granted.

No. 80-1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80-1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. [Certiorari granted, 451 U. S. 1016.] Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Motion of petitioners for divided argument granted.

No. 80-1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP. C. A. 2d Cir. [Certiorari granted, 452 U. S. 937.] Motion of Legal Foundation of America for leave to file a brief as *amicus curiae* granted.

September 23, 29, October 1, 1981

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No. 80-5727. *EDDINGS v. OKLAHOMA*. Ct. Crim. App. Okla. [Certiorari granted, 450 U. S. 1040.] Motion of Washington Legal Foundation for leave to file brief as *amicus curiae* granted.

Rehearing Denied

No. 79-5587. *BROOKS v. TEXAS*, *ante*, p. 913;

No. 80-148. *ROBBINS v. CALIFORNIA*, *ante*, p. 420;

No. 80-289. *UNITED MINE WORKERS OF AMERICA, LOCAL No. 1854, ET AL. v. NATIONAL LABOR RELATIONS BOARD ET AL.*, *ante*, p. 322;

No. 80-692. *NATIONAL LABOR RELATIONS BOARD v. AMAX COAL CO., A DIVISION OF AMAX, INC., ET AL.*, *ante*, p. 322;

No. 80-328. *NEW YORK v. BELTON*, *ante*, p. 454; and

No. 80-6604. *THOMAS v. GEORGIA*, 452 U. S. 973. Petitions for rehearing denied.

No. 80-5284. *SARTO v. NEW JERSEY*, 449 U. S. 938; and

No. 80-6501. *MANLEY v. UNITED STATES*, 451 U. S. 992. Motions for leave to file petitions for rehearing denied.

SEPTEMBER 29, 1981

Dismissal Under Rule 53

No. 80-2068. *ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. v. UNITED STATES ET AL.* C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 632 F. 2d 568.

OCTOBER 1, 1981

Dismissals Under Rule 53

No. 80-2076. *STOKELY-VAN CAMP, INC. v. ESPINOZA ET AL.* C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53.1 Reported below: 641 F. 2d 535.

No. 80-1804. *LEDBETTER, SHERIFF, ET AL. v. JONES ET AL.* C. A. 5th Cir. [For order limiting grant of certiorari, see *ante*, p. 911.] Writ of certiorari dismissed under this Court's Rule 53.

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Dismissal Under Rule 53

No. 80-6946. CSAKY v. HORNBLOWER & WEEKS-HEMPHILL, NOYES, INC. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 53.

