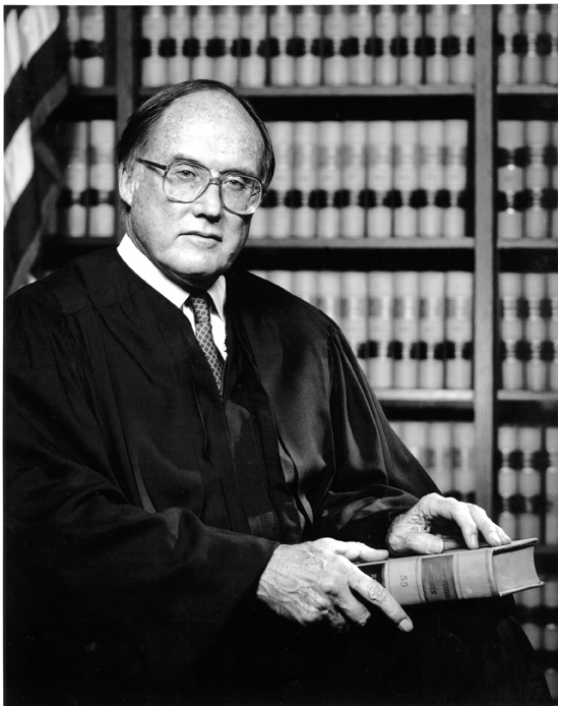
IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

VOLUME I



William H. Rehnquist
Associate Justice, January 7, 1972 – September 26, 1986
Chief Justice, September 26, 1986 –

A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

VOLUME I

covering the 1925 Term through the 1966 Term

including
Indexes for Volumes I, II and III

and
Justice Joseph P. Bradley's opinion in *In re Guiteau*

Compiled and with an Introduction by

Cynthia Rapp

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CONTENTS – VOLUME I

Preface iv
Introduction, *by Cynthia Rapp* v
In re Guiteau ix
Dexter v. *Schrunk* xvi
Opinions Index by Date xviii
Opinions Index by Title xxx
Opinions Index by Justice xl
Opinions Index by Disposition liii
Index of Cases Orally Argued lxiv
Topical Index of Opinions lxv
In Chambers Opinions 1
October Term 1925 1
October Term 1926 15
October Term 1932 18
October Term 1939 20
October Term 1941 22
October Term 1945 24
October Term 1948 30
October Term 1949 33
October Term 1950 48
October Term 1951 67
October Term 1952 78
October Term 1953 108
October Term 1954 121
October Term 1955 154
October Term 1956 192
October Term 1957 201
October Term 1958 215
October Term 1959 239
October Term 1960 253
October Term 1961 268
October Term 1962 318
October Term 1963 346
October Term 1964 356
October Term 1965 373
October Term 1966 391

PREFACE

In the November 12, 2001, issue of *Legal Times*, Tony Mauro reported on the publication of *In Chambers Opinions*, a three-volume compilation prepared by Cynthia Rapp, then a staff attorney in the Office of the Clerk of the Supreme Court of the United States. *In Chambers Opinions* sounded like a great resource, especially for people seeking emergency relief — prisoners and publishers came to mind — and for students of the Court. But the *Legal Times* article went on to note that the books had been "put out by the Court's publications unit recently for the internal use of the Court itself, though [they] may be published for practitioners as well in the future." Shortly thereafter the *Green Bag* challenged the big law publishers to produce an edition for the public, but to no avail. So we decided to do it ourselves. You are holding one third of the result.

Our goal is to enable you to see and cite the same words and punctuation as the Justices do when they turn to the *In Chambers Opinions* provided to them by Ms. Rapp. To that end we have done our best to preserve every word and mark in every opinion, including odd spelling, capitalization, typesetting, and usage (see, *e.g.*, "Seventh circuit" on page 1, or the irregular dashes on page 5, or page 35, where one "*v*" precedes a dot and one does not, or "me disturbing" on page 189), with "Publisher's notes" only where oddity might lead to confusion. This goal has also driven us to engage in some odd page layout. The original volumes prepared by Ms. Rapp are bound sets of 8½ x 11-inch photocopies, mostly of original documents. Some are typeset in pretty much the same form as the *United States Reports*. Others are not. Several are typed and a couple are handwritten. Our edition is the same size as the *United States Reports* (so that it will fit on the same shelves) but with the same pagination as the original *In Chambers Opinions* (so that a citation to a page in our edition will match up with the original). And so we have had to lay out our pages, and vary type sizes, to keep the pagination as it should be. It is a compromise that elevates substance over form with sometimes ugly results — mostly line and page breaks that occur before the end of a line or the bottom of a page — but it's the best we could do. Also: (1) brackets not accompanied by a "Publisher's note" are in the original; (2) we've preserved running heads from the few originals to sport them, and added the rest; and (3) a caption misdesignating the Term in which an opinion was issued is in the original.

A few words about comprehensiveness. Ms. Rapp discovered opinions that had escaped the notice of earlier authorities, and we hope that even more will turn up. See page v & note 2. In fact, we already have several, which we will publish in a supplement after the Court's 2003 Term. If you know or learn of an opinion that is not included here, please tell us (email editors@greenbag.org) and we will put it in the next supplement, with an appropriate salute to the discoverer.

The *Green Bag* thanks Cynthia Rapp, now Deputy Clerk of the Supreme Court, for performing such a useful public service by collecting, indexing, and explaining the Justices' solo performances, and for eyeballing this edition of her work (any remaining errors are the *Green Bag*'s); William Suter, Clerk of the Court, for his support of Ms. Rapp's work and of the *Green Bag*'s efforts to bring it to the public; the George Mason University School of Law and the George Mason Law & Economics Center for their support of the *Green Bag*; and Susan Davies, Robert Hall, Ee-Ing Ong, and Andrew Stephens.

Ross E. Davies
April 13, 2004

INTRODUCTION

In chambers opinions offer a unique opportunity to study the reasoning of an individual Justice sans input from the rest of the Court. These opinions also offer the only insight into the criteria used by the Justices to decide when to grant an application, as such guidelines are not contained in the Court's Rules. This collection attempts to gather the in chambers opinions written from February 14, 1926, to November 18, 1998, in one publication. In addition, several indices to the opinions are provided, including chronological, alphabetical, and topical lists, lists sorted by Justice, and by disposition, and a list of cases that were orally argued in front of a Circuit Justice. In the 418 opinions indexed, 235 applications were denied and 177 were granted. Since 1926, only 26 of the 45 Justices that have served have written an in chambers opinion. The current Chief Justice, William H. Rehnquist, has the distinction of having written more in chambers opinions than any other Justice, with a total of 108.

Every effort was made to locate all of the in chambers opinions written, including an extensive search of the Clerk's Office's files and the Court's archives.[1] Two existing indices were extremely helpful in getting started on this project. One was done in 1956, Weiner, *Opinions of Justices Sitting in Chambers*, 49 Law Libr. J. 2, the other in 1972, Boner, *Index to Chambers Opinions of Supreme Court Justices*, 65 Law Libr. J. 213. Nevertheless, 20 in chambers opinions that are referred to in articles, Court opinions, or other in chambers opinions, could not be located. For example, in *Hutchinson v. New York*, 86 S. Ct. 5 (Harlan, Circuit Justice, 1965), Justice Harlan refers to a memorandum opinion he issued denying a stay of remand order. That memorandum, *City-Wide Comm. for Integration v. Board of Education of New York*, March 8, 1965, could not be located. Wiener's index included the titles of several in chambers opinions for which no cite could be found. Boner, however, chose to omit the titles of those opinions. The 20 referenced opinions that could not be located are not included in the indices in this collection.[2]

I. IN CHAMBERS OPINIONS

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[1] I would like to recognize Ian Asch, a Clerk's Office intern who spent many hours at the archives combing through files trying to locate in chambers opinions, and thank interns Daniel Valente and Christine Bump for their hard work in helping me complete this project.

[2] *Hooper v. Goldstein* (Van Devanter, Circuit Justice, 1929); *Simon v. United States* (Black, Circuit Justice, 1941); *Ex Parte Seals* (Reed, Circuit Justice, 1943); *Ex Parte Seals* (Reed, Circuit Justice, 1943); *United States v. Klopp* (Reed, Circuit Justice, 1944); C*hin Gum v. United States* (Frankfurter, Circuit Justice, 1945); *Ewing v. Fill* (Stone, Circuit Justice, 1945); *Ex Parte Kathleen B. Bash Durant* (Burton, Circuit Justice, 1946); *Overfield v. Pennroad Corp.* (Burton, Circuit Justice, 1946); *Ludecke v. Watkins* (Jackson, Circuit Justice, 1947); *United States v. Gates* (Jackson, Circuit Justice, 1949); *Alabama G.S.R. Co. v. R.R. & P.U.C. of Tennessee* (Reed, Circuit Justice, 1950); *Hubbard v. Wayne County Election Comm.* (Reed, Circuit Justice, 1955); *MacKay v. Boyd* (Frankfurter, Circuit Justice, 1955); *Cooper v. United States* (Frankfurter, Circuit Justice, 1955); *Paoli v. United States* (Harlan, Circuit Justice, 1955); *Marcello v. Brownell* (Frankfurter, Circuit Justice, 1955); *Wise v. New Jersey* (Harlan, Circuit Justice, 1955); *Wise v. New Jersey* (Burton, Circuit Justice, 1955); *Wise v. New Jersey* (Frankfurter, Circuit Justice, 1955).

The Court assigns each Justice to a particular federal circuit.[3] As Circuit Justice, the Justice is responsible for handling applications arising in cases from state and federal courts within his or her circuit. In most instances, within a few days after receiving the application the Circuit Justice will simply write "denied" on the application. On occasion, however, a Circuit Justice will issue an opinion explaining the reasons for his or her action. These opinions are referred to as in chambers opinions. Neither the application nor the in chambers opinion is circulated to the full Court. Unlike opinion writing, where the Justice has time to deliberate over what is written and time to have a draft revised several times, in chambers opinions are often written in a very short time frame, often at odd hours. Justice Marshall issued an in chambers opinion in *Spenkelink v. Wainwright*, a capital case, at 12:15 a.m. 442 U.S. 1308 (1979). Hours before, at 7:35 p.m., then Justice Rehnquist had issued an in chambers opinion in the same case. *Spenkelink v. Wainwright,* 442 U.S. 1301 (1979). The majority of the opinions are just a couple of pages, although some go on for several pages. The longest is 16 pages. *Laird v. Tatum,* 409 U.S. 824 (Rehnquist, Circuit Justice, 1972). This memorandum is noteworthy for another reason: It was written in response to a motion for then Justice Rehnquist to recuse himself. [Publisher's note: After this Introduction was written, Justice Scalia set a new record with his 21-page opinion denying a motion to recuse in *Cheney v. United States District Court*, 124 S. Ct. 1391 (2004).]

The Justices have stated that a decision on an application is not a decision on the merits. *E.g., Russo v. Byrne*, 409 U.S. 1219, 1221 (Douglas, Circuit Justice, 1972) ("My authority is to grant or deny a stay, not to determine whether the Court of Appeals is right or wrong on the merits.") Applications to a Circuit Justice currently include requests for bail, certificates of appealability, extensions of time, injunctions, and stays. In the past, a Circuit Justice might have also received an application for a writ of habeas corpus or a writ of error or appeal.[4] One such opinion found in the archives is worthy of mention. A habeas application submitted by the assassin of President Garfield was denied by Justice Bradley in 1882.[5] Individual Justices no longer entertain writs of habeas corpus.[6] In 1952, Justice Douglas wrote he did not think it was appropriate for an individual Justice to rule on the merits of such applications. *United States ex rel. Norris v. Swope*, 72 S. Ct. 1020 (1952).

The system of allocating a particular Supreme Court Justice to a geographical circuit started at the inception of the Supreme Court; however, it was a much different system from the one we have today. The Judiciary Act of 1789 provided for two courts below the Supreme Court, district courts and circuit courts.[7] The circuits were arranged geographically and had no judges of their own; two Supreme Court Justices rode circuit to sit with a district judge as a panel. In 1793, Congress changed the panel to require one

[3] 28 U.S.C. § 42 (1994 ed).

[4] A letter from the Clerk's Office in 1924 to a prisoner indicates that once the District Court denied the writ of error or appeal he could then apply to the Circuit Justice.

[5] A copy of Justice Bradley's handwritten opinion and a typed version are attached.

[6] A letter from the Clerk's Office in 1944 states that although a Justice might have the power to grant a petition of habeas corpus, it was a well-established practice that such applications would be considered by the full Court.

[7] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

Supreme Court Justice and one district judge.[8] The riding of the circuit by Supreme Court Justices ended in 1891 with the passage of the Circuit Court of Appeals Act of 1891.[9] With this Act, Congress created a circuit court of appeals for each circuit, composed of two circuit judges and either one circuit justice or one district judge. However, there were still instances of a Supreme Court Justice sitting as a member of a court of appeals in 1948. See *Ross v. Commissioner*, 169 F.2d 483 (C.A. 1) (Frankfurter, Circuit Justice, 1948). According to Weiner's index, the last opinion issued by a Circuit Justice as a member of a court of appeals panel was in 1955. See *Lago Oil & Transport Co. v. United States*, 218 F.2d 631 (C.A. 2) (Frankfurter, Circuit Justice). Although many of the opinions from the circuit riding era appear to be similar to in chambers opinions — the author of the opinion is identified, for example, as "Holmes, Circuit Justice" — these are not in chambers opinions because the Justice was sitting at the circuit court level.

The filing of applications has changed as technology has improved and the practice of delivering the application to the Circuit Justice personally has ended. Currently all applications are filed with the Clerk's Office, and the Clerk is charged with ensuring that the Circuit Justice receives the application in a timely fashion. Before 1990, Supreme Court Rule 43.1 stated that an "application addressed to an individual Justice shall normally be submitted to the Clerk …." This practice was endorsed by the Clerk's Office, as evidenced by a letter from that office written to an applicant in 1924, in which the applicant was informed that applications in certain cases are presented directly to the Justices in Chambers and do not pass through the Clerk's Office. In 1970, two attorneys hiked six miles into the woods to deliver a request for a temporary injunction to Justice Douglas. After arguing the merits of their case the attorneys left the application with Justice Douglas, who told them he would make a decision and leave the result on a tree stump the following day. They found a handwritten note denying the request on the tree stump the next day.[10] The case was *Dexter v. Schrunk*, 400 U.S. 1207 (1970), and the story about the unusual filing appeared in the *Oregonian* Newspaper on September 1, 1970. In another case the response was initially received by telegram. *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303 (Brennan, Circuit Justice, 1983). Rule 43.1 was revised in 1990, the word "normally" was omitted, and its number changed to Rule 22.1.

It is difficult to determine exactly when the Justices began issuing in chambers opinions. Part of the difficulty lies in the fact that except for important decisions of the Court, the Court's opinions were not all reduced to writing until March 14, 1834, when an order required that all opinions of the Court be filed with the Clerk. And it was not until 1883 that every opinion of the Court was published. These changes, however, did not affect the publication of opinions written by an individual Justice. In chambers opinions were not reported in a routine manner until the 1969 Term, when they began appearing in the United States Reports. Prior to this time most could be found in unofficial Supreme Court reporters. Some opinions have no official citation. The most recent of these is *Tomaiolo v. United States* (Harlan, Circuit Justice, 1962). Many of these unreported

[8] Act of Mar. 2, 1793, ch. 22, 1 Stat. 333.
[9] Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.
[10] A copy of the note is attached, behind it is a typed version of the note.

opinions were found in the files of the Clerk's Office, and others were found in the Court's archives. One opinion, *United States ex rel. Knauff v. McGrath*, appears to have been published only in the Congressional Record. 96 Cong. Rec. A3750 (1950). The Weiner and Boner indices both cite *United States v. Motlow*, 10 F.2d 657 (Butler, Circuit Justice, 1926), as the earliest in chambers opinion.

Many of the in chambers opinions cover extremely interesting issues and give insight into the important issues of the time. Other cases reveal interesting facts about the Court. For example, in *Cousins v. Wigoda*, then Justice Rehnquist discussed the three instances in which the Court had held special sessions. 409 U.S. 1201 (1972). In *Pryor v. United States*, Justice Douglas wrote that when only seven Justices are sitting because two seats are vacant, it only takes three votes to grant certiorari. 404 U.S. 1242 (1971).

II. ORAL ARGUMENTS

In the past, it was possible that the Circuit Justice would either *sua sponte* ask for oral argument on an application or grant a party's request for oral argument. Oral argument before a Circuit Justice was a rare occurrence, and the last documented argument took place in 1980.[11] From 1926 to 1980, there were 40 arguments before an individual Justice on applications that ultimately resulted in in chambers opinions. Applications on which oral arguments were held but no written opinion followed are not included in this collection.[12] On at least one occasion the application itself was made orally.[13] The Court's Rules adopted on April 12, 1954, provided that any request for oral argument on an application to an individual Justice accompany the application. Rule 50.1. The Rules adopted on April 14, 1980, changed the provision to state that "if oral argument on the application is deemed imperative, request therefor shall be included in the application." Rule 43.1. When the Rules were revised in December 1989 the reference to oral argument was omitted. Rule 22.1. The argument sessions appear to have been somewhat informal proceedings held in the Justice's Chambers or, if the Justice was not in Washington, where the Justice was at the time. Justice Douglas, for example, held arguments in Yakima, Washington. There is no evidence the arguments were open to the public, and there is some evidence that they were closed to the press.[14]

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[11] See *Blum v. Caldwell*, 446 U.S. 1311 (Marshall, Circuit Justice).

[12] See Robertson, Reynolds & Kirkham, Francis, Jurisdiction of the Supreme Court of the United States, 1936, p. 845.

[13] *Ex Parte Waller*, 62 S. Ct. 1313 (Frankfurter, Circuit Justice, 1942).

[14] Interview with Dick Carelli, a reporter for the Associated Press who covered the Court from 1976 to 2000. Mr. Carelli remembers registering a complaint with Justice White, who at the time was head of the Rules and Procedures Committee, that Justice Marshall held two arguments that the press was not permitted to attend. Justice White said that since he had been at the Court he could only remember two such arguments, so Carelli should not waste his time on it. Mr. Carelli sent a letter to Justice Marshall on *New York Times* letterhead, also signed by Reporter Linda Greenhouse and other reporters. Justice Marshall saw it and said that if he did it again he would invite the press. He never had another one.

In the matter of the Application of Charles J. Guiteau for a habeas corpus.

Charles J. Guiteau, being in prison under sentence of death for the murder of President Garfield, applies for a habeas corpus to be discharged from said imprisonment, on the ground that the Criminal Court of the District of Columbia, by which he was tried and convicted, had no jurisdiction of his offence. The alleged want of jurisdiction is based on the fact that, although the mortal wound was inflicted in the District, the death of the President took place in New Jersey; whereas the act under which the indictment was found (Section 5339 of the Revised Statutes), only declares that murder committed within any fort, arsenal, dock-yard, magazine, or in any place or district of country under the exclusive jurisdiction of the United States, shall suffer death, and jurisdiction is only given to the court to try "crimes and offences committed within the District" (Rev. Stat. Dist. Col. Sect. 763 as amended). It is contended that the murder was committed only partly within the District, and partly in New Jersey, and, therefore, cannot be said to have been committed within the District.

By the strict technicality of the common law this position would probably be correct, although Lord Chief Justice Hale, the greatest criminal lawyer

and judge that ever lived, uses this language: "At common law," says he, "if a man had been stricken in one county and died in another, it was doubtful whether he were indictable, or triable in either; but the more common opinion was, that he might be indicted where the stroke was given, for the death was but a consequent, and might be found through in another county; and if the party died in another county, the body was removed into the county where the stroke was given, for the coroner to take an inquest super visum corporis." This passage shows that, in Hale's opinion, the principal crime was committed where the stroke was given, and that when the production of the dead body gave the jury ocular demonstration of the corpus delicti, the difficulty of jurisdiction was overcome. But to remove the doubt as to the power of juries to try such a case it was enacted by the statute 2 & 3 Ed. 6. c. 24 that the murderer might be tried in the county where the death occurred: and to remedy the difficulty where the stroke, or the death happened out of England, it was enacted by a subsequent statute, 2 Geo. 2. c. 21, that the trial might be in the county where the stroke was given, if the party died out of the realm; or where the death occurred, if the stroke was given out of the realm — thus, in effect, making the murder a crime in the county in which either the stroke was given, or the death occurred. These statutes, as the Supreme Court of the District held, and as their reasoning

satisfactorily shows, were in force in Maryland in 1801, when the District of Columbia was organized and, by the organic act of Congress, became laws of the District. If, therefore, the District had continued a part of the state of Maryland, with those laws in force, and if the murder in question had taken place exactly as it did, it would have been considered a murder committed within the state of Maryland, and within the county out of which the District was carved, and would have been indictable and triable in such county. When, therefore, Congress, in 1801, conferred upon the Court of the District jurisdiction to try all crimes and offences committed within the District, it gave jurisdiction to try the murder of which the prisoner has been found guilty; the present law being a more explicit statement of that enactment: and for the same reason, the Crimes act of 1790, when it came to operate upon the District, became applicable to such a murder.

It may be objected that the conferring jurisdiction to try the crime of murder in such a case, where only the stroke was given within the Territory and the death occurred elsewhere, and vice versa, did not make it a murder in the territory. But this is a purely technical objection. There is no doubt that the legislature might have enacted, in so many words, that if the mortal stroke should be given, or the consequent death should happen, within the the Territory, it should be deemed a murder committed therein. The statute

had substantially that effect and meaning: and after it went into operation, the crime became a crime within the territory.

It is unnecessary to say that such a construction of the statutes and of the acts of Congress would better subserve the purposes of justice, and is more in consonance with their object and intent than the extremely technical construction contended for on behalf of the prisoner.

This view of the subject renders it unnecessary to examine the decision of ~~Mr.~~ Mr. Justice Washington in the case of Magill, of Mr. Justice Curtis in the case of Armstrong, or of the Circuit Court of this District in the case of Bladen; since they were all cases in which no statute like that of 2 Geo. 2 could be invoked.

It seems to me, therefore, after a very careful consideration of the question, that the criminal court of the District had jurisdiction to try the case of Guiteau, and that a habeas corpus for his discharge ought not to be allowed. I should be very reluctant to interfere with the course of justice in any case in which a fair and impartial trial has been had, and the jurisdictional question has been fully considered, unless it appeared to me quite clear that a mistake had been made in assuming jurisdiction, or, at least, that it was a question of very grave doubt. The question in this case was very fully and ~~ably~~ learnedly discussed, both by the

learned judge who tried the cause and by the Supreme Court in general terms; and after a careful examination of the arguments of counsel on both sides, and of the learned opinions of the judges with such reflection as I have been able to give the subject, I have reached the conclusion at which I stated. In a case of very grave doubt and difficulty, and appellate in its character (as this case is), the right, undoubtedly, to refer the matter to the Supreme Court of the United States, as was done in Ex parte Clarke (100 U.S. 399); but such is not the usual course, and is not to be followed if it can well be avoided. Prompt action is one of the beneficial characteristics of the remedy of habeas corpus, and is due both to the prisoner and to the administration of justice. The law gives jurisdiction to, and places the responsibility upon, a single judge to grant or refuse the writ; and it is his duty to decide on application therefor if he can do so with reasonable confidence in his own conclusion: and this right to do so in every case.

The application is denied—

Joseph P. Bradley
Associate Justice of the Supreme
Court of the United States.

Washington, June 19th, 1882

In the matter of the Application)
of Charles J. Guiteau for a)
habeas corpus:)

Charles J. Guiteau, being in prison under sentence of death for the murder of President Garfield, applies for a habeas corpus to be discharged from said imprisonment, on the ground that the Criminal Court of the District of Columbia, by which he was tried and convicted, had no jurisdiction of his offence. The supposed want of jurisdiction is based on the fact that, although the mortal wound was inflicted in the District, the death of the President took place in New Jersey; whereas the act under which the indictment was found (Section 5339 of the Revised Statutes), only declares that murder committed within any fort, arsenal, dock-yard, magazine, or in any place or district of country under the exclusive jurisdiction of the United States, -shall suffer death, and jurisdiction is only given to the Court to try "crimes and offences committed within the District."(Rev. Stat. Dist. Col. Sect. 763 as amended). It is contended that the murder was committed only partly within the District, and partly in New Jersey, and, therefore, cannot be said to have been committed within the District.

By the strict technicality of the common law this position would probably be correct, although Lord Chief Justice Hale, the greatest criminal lawyer and judge that ever lived, uses this language: "At common law", says he, "if a man had been stricken in one county and died in another, it was doubtful whether he were indictable, or triable in either; but the more common opinion was, that he might be indicted where the stroke was given, for the death was but a consequent, and might be found though in another county; and if the party died in another county, the body was removed into the county where the stroke was given, for the coroner to take an inquest super visum corporis." This passage shows that, in Hale's opinion, the principal crime was committed where the stroke was given, and that when the production of the dead body gave the jury ocular demonstration by the corpus delicti, the difficulty of jurisdiction was overcome. But to remove the doubt as to the power of jurors to try such a case it was enacted by the statute 2 and 3 Ed.6. c. 24 that the murderer might be tried in the county where the death occurred: and to remedy the difficulty where the stroke, or the death happened out of England, it was enacted by a subsequent statute, 2 geo. 2.c.21, that the trial might be in the county where the stroke was given, if the party died out of the realm; or where the death occurred, if the stroke was given out of the realm-thus, in effect, making the murder a crime in the county in which either the stroke was given, or the death occurred. These statutes, as the Supreme Court of the District hold, and as their reasoning satisfactorily shows, were in force in Maryland in 1801, when the District of Columbia was organized and, by the organic act of Congress, became laws of the District. If, therefore, the District had continued a part of the state of Maryland, with those laws in force, and if the murder in question had taken place exactly as it did, it would have been considered a murder committed within the state of Maryland, and within the county out of which the District was carved, and would have been indictable and triable in such county. When, therefore, Congress, in 1801, conferred upon the court of the District jurisdiction to try all crimes and offences committed within the District, it gave jurisdiction to try the murder of which the prisoner has been found guilty; the present law being a mere codification of that

enactment. For the same reason, the Crimes Act of 1790, when it came to operate upon the District became applicable to such a murder.

It may be objected that the conferring jurisdiction to try the crime of murder in such a case, where only the stroke was given within the territory and the death occurred elsewhere, and vice versa, did not make it a murder in the territory. But this is a purely technical objection. There is no doubt that the legislature might have enacted, in so many words, that if either the mortal stroke should be given, or the consequent death should happen, within the territory, it should be deemed a murder committed therein. The statute had substantially that effect and meaning: and after it went into operation, the crime became a crime within the territory.

It is unnecessary to say that such a construction of the statutes and official acts of Congress much better serves the purposes of justice, and is more in consonance with their object and intent than the extremely technical construction contended for on behalf of the prisoner.

This view of the subject renders it unnecessary to examine the decision of Mr. Justice Washington in the case of Magill, of Mr. Justice Curtis in the case of Armstrong, or of the Circuit Court of this District in the case of Bladen; since they were all cases in which no statute like that of 2Geo.2 could be invoked.

It seems to me, therefore, after a very careful consideration of the question, that the criminal court of the District had jurisdiction to try the case of Guiteau, and that a habeas corpus for his discharge ought not to be allowed. I should be very reluctant to interfere with the course of justice in any case in which a fair and impartial trial has been had, and the jurisdictional question has been fully considered, unless it appeared to me quite clear that a mistake had been made in assuming jurisdiction, or, at least, that it was a question of very grave doubt. The question in this case was very fully and learnedly discussed, both by the learned judge who tried the cause and by the Supreme Court in general term; and after a careful examination of the arguments of counsel on both sides, and of the learned opinions of the judges, with such reflection as I have been able to give to the subject, I have reached the conclusion above stated. In a case of grave doubt and difficulty, and appellate in its character (as this case is) I have a right, undoubtedly, to refer the matter to the Supreme Court of the United States, as was done in Ex Parte Clarke (100 U.S. 399); but such is not the usual course, and is not to be followed if it can well be avoided. Prompt action is one of the beneficial characteristics of the remedy of habeas corpus, and is due both to the prisoner and to the administration of justice. The law gives jurisdiction to, and places the responsibility upon, a single judge to grant or refuse the wish; and it is his duty to decide an application therefore if he can do so with reasonable confidence in his own conclusion; and it is his right to do so in every case.

The application is denied.

Joseph P. Bradley
Associate Justice of the Supreme
Court of the United States.

Washington, June 19, 1882

Dyke v Schmidt

under Dombrowski v
Dyke 380 US. 479
petitioners make out a strong
case for federal protection of their
First Amendment rights. But
Dombrowski, a June term
decision decided in 1965, is
up for reexamination in
cases set for argument the Fall
of the present case were before the
Conference I am confident
it would be held pending the
cases to be argued. Hence, as
Circuit Justice, I do not feel
warranted in taking action
contrary to what I feel the Conference
would do. Accordingly I deny
the motion for an injunction pending

Aug 29 1970
9 AM (EDT)

Dexter v. Schrunk

Under *Dombrowski v. Pfister* 380 US. 479 petitioners make out a strong case for federal protection of their First Amendment rights. But *Dombrowski*, a five to four decision decided in 1965, is up for reexamination in cases set for argument this fall If the present case were before the Conference I am confident it would be held pending the cases to be reargued. Hence, as Circuit Justice I do not feel warranted in taking action contrary to what I feel the Conference would do. Accordingly I deny the restraining order requested.

W Douglas

Aug 29 1970
9AM (PDT)

IN CHAMBERS OPINIONS INDEX BY DATE

DATE	TITLE
2/14/26	*Motlow v. United States*
8/10/27	*Sacco v. Hendry*
8/20/27	*Sacco v. Massachusetts*
11/18/32	*Goldsmith v. Zerbst*
6/20/40	*Van Newkirk v. McLain*
6/27/42	*Waller, Ex parte*
8/6/46	*Equitable Office Bldg. Corp., In re*
9/10/49	*Pirinsky, In re*
2/6/50	*D'Aquino v. United States*
5/17/50	*United States ex rel. Knauff v. McGrath*
9/25/50	*Williamson v. United States*
4/17/51	*Land v. Dollar*
5/22/51	*Sawyer v. Dollar*
6/22/51	*Sacher v. United States*
6/22/51	*Dennis v. United States*
7/25/51	*Field v. United States*
4/25/52	*Johnson, In re*
4/29/52	*United States ex rel. Norris v. Swope*
5/3/52	*Orloff v. Willoughby*
11/20/52	*Mallonee v. Fahey*
5/16/53	*Yanish v. Barber*
6/17/53	*Rosenberg v. United States*
8/5/53	*Carlisle v. Landon*
9/24/53	*Twentieth Century Airlines Inc. v. Ryan*
12/10/53	*Clark v. United States*
3/29/54	*George F. Alger Co. v. Peck*
5/22/54	*Stanard v. Olesen*
6/18/54	*Costello v. United States*
9/3/54	*Knickerbocker Printing Corp. v. United States*
12/9/54	*Albanese v. United States*
12/20/54	*Goldman v. Fogarty*
12/23/54	*Patterson v. United States*
1/3/55	*Nukk v. Shaughnessy*

DATE	TITLE
1/12/55	*Flynn v. United States*
2/11/55	*Herzog v. United States*
7/7/55	*Cooper v. New York*
7/13/55	*Carter v. United States*
8/3/55	*Breswick & Co. v. United States*
9/27/55	*Burwell v. California*
10/31/55	*Long Beach Fed. Sav. & Loan Assn. v. Federal Home Loan Bank*
11/21/55	*Noto v. United States*
12/31/55	*Wolcher v. United States*
3/30/56	*Edwards v. New York*
5/4/56	*Sklaroff v. Skeadas*
5/28/56	*Steinberg v. United States*
6/25/56	*Edwards v. New York*
7/13/56	*United States v. Allied Stevedoring Corp.*
8/8/56	*Ward v. United States*
8/14/56	*Stickel v. United States*
9/19/56	*United States v. United Liquors Corp.*
10/8/56	*Roth v. United States*
5/7/57	*Panama Canal Co. v. Grace Lines, Inc.*
5/24/57	*Brody v. United States*
10/1/57	*Cunningham v. English*
10/29/57	*International Boxing Club v. United States*
11/6/57	*La Marca v. New York*
1/20/58	*Di Candia v. United States*
6/17/58	*Richardson v. New York*
8/29/58	*Bletterman v. United States*
9/3/58	*Valenti v. Spector*
9/8/58	*Tuscarora Nation of Indians v. Power Authority*
2/7/59	*Ellis v. United States*
4/7/59	*Eckwerth v. New York*
4/20/59	*Eckwerth v. New York*
5/11/59	*Keith v. New York*
7/7/59	*Appalachian Power Co. v. American Inst. of CPA's*
7/11/59	*Kake v. Egan*
8/4/59	*English v. Cunningham*

DATE	TITLE
11/2/59	*Reynolds v. United States*
3/2/60	*Tri-Continental Financial Corp. v. United States*
3/5/60	*O'Rourke v. Levine*
3/18/60	*Guterma v. United States*
6/23/60	*Yasa v. Esperdy*
7/7/60	*Uphaus v. Wyman*
7/19/60	*Akel v. New York*
8/31/60	*Bandy v. United States*
12/5/60	*Bandy v. United States*
2/27/61	*Fernandez v. United States*
6/28/61	*Bandy v. United States*
8/30/61	*Board of Education v. Taylor*
10/11/61	*Cohen v. United States*
11/21/61	*Tomaiolo v. United States*
12/14/61	*Commonwealth Oil Ref. Co. v. Lummus Co.*
1/17/62	*Railway Express Agency Inc. v. United States*
1/18/62	*Stickney, Ex parte*
1/30/62	*Cohen v. United States*
2/14/62	*Cohen v. United States*
3/6/62	*Jackson v. New York*
3/13/62	*Bart, In re*
3/19/62	*Bloeth v. New York*
3/19/62	*Sica v. United States*
3/19/62	*Carbo v. United States*
5/11/62	*Leigh v. United States*
8/17/62	*Arrow Transportation Co. v. Southern Railway Co.*
8/23/62	*Bidwell v. United States*
9/10/62	*Meredith v. Fair*
9/26/62	*Arrow Transportation Co. v. Southern Railway Co.*
11/29/62	*McGee v. Eyman*
4/10/63	*A.B. Chance Co. v. Atlantic City Elec. Co.*
6/26/63	*Rosoto v. Warden*
7/19/63	*Owen v. Kennedy*
8/9/63	*United States v. FMC Corp.*
8/16/63	*Board of School Comm'rs v. Davis*

DATE	TITLE
8/23/63	*Jimenez v. United States District Court*
7/24/64	*Aronson v. May*
7/25/64	*Wasmuth v. Allen*
8/10/64	*Heart of Atlanta Motel v. United States*
9/23/64	*Katzenbach v. McClung*
10/7/64	*Rehman v. California*
11/18/64	*Bowman v. United States*
7/13/65	*Rosenblatt v. American Cyanamid Co.*
7/16/65	*Travia v. Lomenzo*
8/5/65	*Seagram & Sons v. Hostetter*
9/20/65	*Hutchinson v. New York*
11/8/65	*Grinnell Corp. v. United States*
3/4/66	*Chestnut v. New York*
4/22/66	*Alcorcha v. California*
5/5/66	*Mitchell v. California*
8/1/66	*American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount*
8/8/66	*Public Service Bd. v. United States*
8/12/66	*Louisiana v. United States*
8/19/66	*Birtcher Corp. v. Diapulse Corp.*
9/21/66	*McLeod v. General Elec. Co.*
8/15/67	*Baytops v. New Jersey*
8/15/67	*Mathis v. United States*
1/29/68	*King v. Smith*
8/17/68	*Sellers v. United States*
9/10/68	*Williams v. Rhodes*
9/16/68	*Socialist Labor Party v. Rhodes*
9/23/68	*Winters v. United States*
9/23/68	*Socialist Labor Party v. Rhodes*
9/29/68	*Smith v. Ritchey*
10/12/68	*Locks v. Commanding General, Sixth Army*
10/21/68	*Winters v. United States*
12/5/68	*Drifka v. Brainard; Allen v. Brainard*
12/24/68	*Noyd v. Bond*
2/4/69	*Strickland Transportation Co. v. United States*
5/1/69	*Quinn v. Laird*

DATE	TITLE
7/16/69	*Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng.*
8/2/69	*Levy v. Parker*
8/5/69	*Scaggs v. Larsen*
8/13/69	*Oden v. Brittain*
8/20/69	*Rosado v. Wyman*
8/29/69	*Keyes v. School Dist. No. 1, Denver*
9/5/69	*Alexander v. Board of Education*
9/9/69	*Matthews v. Little*
9/10/69	*Febre v. United States*
9/15/69	*Jones v. Lemond*
10/10/69	*Brussel v. United States*
10/16/69	*United States ex rel. Cerullo v. Follette*
12/29/69	*Parisi v. Davidson*
1/30/70	*Beyer v. United States*
7/11/70	*Rockefeller v. Socialist Workers Party*
7/22/70	*Rockefeller v. Socialist Workers Party*
7/30/70	*Perez v. United States*
8/5/70	*Davis v. Adams*
8/11/70	*Fowler v. Adams*
8/29/70	*Dexter v. Schrunk*
9/18/70	*Marcello v. United States*
10/10/70	*Harris v. United States*
2/11/71	*Karr v. Schmidt*
3/1/71	*Haywood v. National Basketball Assn.*
7/27/71	*Labor Board v. Getman*
7/27/71	*Mahan v. Howell*
7/29/71	*Edgar v. United States*
8/16/71	*Russo v. United States*
8/19/71	*Corpus Christi School Dist. v. Cisernos*
8/23/71	*Lopez v. United States*
8/25/71	*Guey Heung Lee v. Johnson*
8/30/71	*Jefferson Parish School Bd. v. Dandridge*
8/31/71	*Winston-Salem/Forsyth County Bd. of Ed. v. Scott*
8/31/71	*Harris v. United States*
9/3/71	*Smith v. Yeager*

DATE	TITLE
9/10/71	*Gomperts v. Chase*
10/29/71	*Pryor v. United States*
1/31/72	*Kadans v. Collins*
2/7/72	*Graves v. Barnes*
2/14/72	*Chambers v. Mississippi*
7/1/72	*Cousins v. Wigoda*
7/19/72	*Aberdeen & Rockfish R. Co. v. SCRAP*
7/29/72	*Russo v. Byrne*
8/16/72	*Republican State Central Comm. of Ariz. v. Ripon Society Inc.*
9/1/72	*Drummond v. Acree*
9/12/72	*Tierney v. United States*
10/6/72	*Communist Party of Indiana v. Whitcomb*
10/10/72	*Laird v. Tatum*
10/20/72	*Westermann v. Nelson*
10/31/72	*Finance Comm. to Re-elect the President v. Waddy*
11/2/72	*Berg, In re*
11/6/72	*O'Brien v. Skinner*
1/11/73	*Farr v. Pitchess*
5/18/73	*Henry v. Warner*
7/19/73	*Edelman v. Jordan*
8/1/73	*Holtzman v. Schlesinger*
8/4/73	*Holtzman v. Schlesinger*
8/4/73	*Schlesinger v. Holtzman*
10/26/73	*Hayes, Ex parte*
1/25/74	*Hughes v. Thompson*
3/4/74	*Hayakawa v. Brown*
6/17/74	*Warm Springs Dam Task Force v. Gribble*
7/4/74	*Grand Jury Proceedings (Lewis, Applicant), In re*
7/29/74	*Times-Picayune Publishing Corp. v. Schulingkamp*
8/28/74	*Ehrlichman v. Sirica*
12/27/74	*Socialist Workers Party v. Attorney General*
12/31/74	*National League of Cities v. Brennan*
3/21/75	*Patterson v. Superior Court of Cal.*
8/18/75	*Hortonville Joint School Dist. v. Hortonville Ed. Assn.*
9/11/75	*Smith v. United States*

DATE	TITLE
9/29/75	*Chamber of Commerce of the U.S. v. Legal Aid Society*
10/28/75	*Whalen v. Roe*
11/13/75	*Nebraska Press Assn. v. Stuart*
11/20/75	*Nebraska Press Assn. v. Stuart*
12/22/75	*Pasadena City Bd. of Ed. v. Spangler*
2/2/76	*Coleman v. Paccar, Inc.*
2/17/76	*Bradley v. Lunding*
2/25/76	*Flamm v. Real-BLT Inc.*
7/22/76	*Gregg v. Georgia*
8/16/76	*Bateman v. Arizona*
8/19/76	*New York v. Kleppe*
9/3/76	*Gruner v. Superior Court of Cal.*
9/14/76	*McCarthy v. Briscoe*
9/30/76	*McCarthy v. Briscoe*
10/1/76	*Fishman v. Schaffer*
11/15/76	*Volvo of America Corp. v. Schwarzer*
12/9/76	*Evans v. Atlantic Richfield Co.*
1/18/77	*Meeropol v. Nizer*
2/1/77	*Houchins v. KQED Inc.*
2/3/77	*Marshall v. Barlow's, Inc.*
7/20/77	*Califano v. McRae*
7/28/77	*Divans v. California*
8/2/77	*Pacific Union Conf. of Seventh-Day Adventists v. Marshall*
8/5/77	*Beame v. Friends of the Earth*
8/8/77	*CFTC v. British Am. Commodity Options*
8/8/77	*Richmond v. Arizona*
8/26/77	*National Socialist Party of America v. Skokie*
8/30/77	*Wise v. Lipscomb*
9/16/77	*Krause v. Rhodes*
9/20/77	*Barthuli v. Board of Trustees of Jefferson School Dist.*
9/20/77	*Mecom v. United States*
10/6/77	*Mincey v. Arizona*
12/6/77	*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*
2/10/78	*National Broadcasting Co. v. Niemi*
3/29/78	*Bracy v. United States*

DATE	TITLE
4/10/78	*Vetterli v. United States District Court*
6/7/78	*Little v. Ciuros*
7/11/78	*New York Times Co. v. Jascalevich*
7/12/78	*New York Times Co. v. Jascalevich*
7/17/78	*Reproductive Services, Inc. v. Walker*
7/28/78	*Fare v. Michael C.*
8/1/78	*New York Times Co. v. Jascalevich*
8/4/78	*New York Times Co. v. Jascalevich*
8/4/78	*Truong Dinh Hung v. United States*
8/8/78	*Miroyan v. United States*
8/11/78	*Columbus Bd. of Ed. v. Penick*
8/11/78	*Brennan v. United States Postal Service*
8/21/78	*Reproductive Services, Inc. v. Walker*
8/24/78	*General Council on Fin. & Admin. v. Superior Court of Cal.*
8/28/78	*Dayton Bd. of Ed. v. Brinkman*
8/30/78	*Dayton Bd. of Ed. v. Brinkman*
9/1/78	*Divans v. California*
9/1/78	*General Council on Fin. & Admin. v. Superior Court of Cal.*
9/1/78	*Buchanan v. Evans*
9/8/78	*Bustop, Inc. v. Board of Ed. of Los Angeles*
9/8/78	*Alexis I. Du Pont School Dist. v. Evans*
9/9/78	*Bustop, Inc. v. Board of Ed. of Los Angeles*
10/20/78	*Boston v. Anderson*
10/20/78	*Kimble v. Swackhamer*
10/20/78	*Warm Springs Dam Task Force v. Gribble*
12/21/78	*Dolman v. United States*
3/20/79	*General Dynamic Convair Aerospace Div. v. Anderson*
4/5/79	*Evans v. Bennett*
4/6/79	*Haner v. United States*
5/22/79	*Spenkelink v. Wainwright*
5/23/79	*Spenkelink v. Wainwright*
5/24/79	*Williams v. Zbaraz*
8/13/79	*Pacific Tel. & Tel. Co. v. Public Utilities Comm'n of Cal.*
9/7/79	*Lenhard v. Wolff*
10/18/79	*Lenhard v. Wolff*

DATE	TITLE
11/29/79	*Peeples v. Brown*
12/28/79	*Synanon Foundation, Inc. v. California*
1/31/80	*California v. Braeseke*
2/1/80	*Portley v. Grossman*
3/24/80	*California v. Velasquez*
4/30/80	*Hanrahan v. Hampton*
5/1/80	*Pacileo v. Walker*
5/1/80	*Sumner v. Mata*
5/6/80	*Blum v. Caldwell*
5/12/80	*Barnstone v. University of Houston*
5/16/80	*Marten v. Thies*
6/28/80	*Railway Labor Executives' Assn. v. Gibbons*
7/19/80	*Rostker v. Goldberg*
7/23/80	*Roche, In re*
8/14/80	*McDaniel v. Sanchez*
8/28/80	*Willhauck v. Flanagan*
9/4/80	*Certain Named and Unnamed Children v. Texas*
9/5/80	*Moore v. Brown*
9/8/80	*Gregory-Portland Independent School Dist. v. United States*
9/12/80	*Board of Ed. of Los Angeles v. Superior Court of Cal.*
11/4/80	*O'Connor v. Board of Ed. of School Dist. 23*
2/3/81	*McCarthy v. Harper*
2/4/81	*Atiyeh v. Capps*
2/5/81	*California v. Riegler*
3/3/81	*Bureau of Economic Analysis v. Long*
4/19/81	*Los Angeles NAACP v. Los Angeles Unified School Dist.*
4/24/81	*California v. Prysock*
5/29/81	*Becker v. United States*
6/12/81	*Schweiker v. McClure*
7/21/81	*South Park Independent School Dist. v. United States*
7/25/81	*Graddick v. Newman*
8/20/81	*Metropolitan County Bd. of Ed. v. Kelley*
9/29/81	*Los Angeles v. Lyons*
10/2/81	*California v. Winson*
11/23/81	*Mori v. Boilermakers*

DATE	TITLE
12/9/81	*Clements v. Logan*
3/11/82	*Republican National Committee v. Burton*
3/15/82	*Karcher v. Dagget*
8/13/82	*White v. Florida*
8/26/82	*Beltran v. Smith*
9/1/82	*Corsetti v. Massachusetts*
10/26/82	*California v. Ramos*
12/23/82	*KPNX Broadcasting Co. v. Arizona Superior Court*
1/12/83	*Conforte v. Commissioner*
1/16/83	*Bonura v. CBS Inc.*
2/11/83	*Jaffree v. Board of School Comm'rs of Mobile County*
4/21/83	*Evans v. Alabama*
4/29/83	*Volkswagonwerk A.G. v. Falzon*
7/6/83	*Williams v. Missouri*
7/13/83	*Julian v. United States*
7/13/83	*Capital Cities Media, Inc. v. Toole*
7/21/83	*National Collegiate Athletic Assn. v. Bd. of Regents U. of Okla.*
7/27/83	*Ruckelshaus v. Monsanto Co.*
8/11/83	*Bellotti v. Latino Political Action Comm.*
8/24/83	*Kemp v. Smith*
9/2/83	*Hawaii Housing Authority v. Midkiff*
9/9/83	*Heckler v. Lopez*
9/9/83	*McGee v. Alaska*
9/13/83	*M.I.C. Ltd. v. Bedford Township*
9/17/83	*Kemp v. Smith*
10/5/83	*Autry v. Estelle*
12/20/83	*Clark v. California*
1/3/84	*McDonald v. Missouri*
1/26/84	*Heckler v. Blankenship*
2/13/84	*Liles v. Nebraska*
3/12/84	*Claiborne v. United States*
5/19/84	*Tate v. Rose*
7/6/84	*Garrison v. Hudson*
7/23/84	*California v. Harris*
8/10/84	*Heckler v. Turner*

DATE	TITLE
9/7/84	*Uhler v. AFL-CIO*
9/10/84	*National Farmers Union Ins. Co. v. Crow Tribe*
9/10/84	*Montgomery v. Jefferson*
9/27/84	*Walters v. National Assn. of Radiation Survivors*
10/10/84	*Montanans for Balanced Federal Budget Comm. v. Harper*
10/11/84	*Catholic League v. Feminist Women's Health Center, Inc.*
12/7/84	*Northern Cal. Power Agency v. Grace Geothermal Corp.*
1/17/85	*Thomas v. Sierra Club*
2/1/85	*Garcia-Mir v. Smith*
4/24/85	*National Farmers Union Ins. Co. v. Crow Tribe*
7/5/85	*Office of Personnel Management v. Government Employees*
7/24/85	*Block v. North Side Lumber Co.*
7/24/85	*Heckler v. Redbud Hospital Dist.*
8/28/85	*Riverside v. Rivera*
9/5/85	*Renaissance Arcade and Bookstore v. Cook County*
11/29/85	*Republican Party of Hawaii v. Mink*
3/27/86	*California v. Brown*
5/6/86	*California v. Hamilton*
7/19/86	*Araneta v. United States*
9/17/86	*Mikutaitis v. United States*
9/25/86	*Prudential Fed. Sav. & Loan Assn. v. Flanigan*
10/7/86	*Curry v. Baker*
10/15/86	*Kentucky v. Stincer*
10/23/86	*Hicks v. Feiock*
12/4/86	*Kleem v. INS*
12/18/86	*Ledbetter v. Baldwin*
12/31/86	*Ohio Citizens for Responsible Energy, Inc. v. Nuclear Reg. Comm'n*
4/2/87	*Western Airlines, Inc. v. Teamsters*
5/21/87	*United States Postal Service v. Letter Carriers*
7/1/87	*Deaver v. United States*
8/10/87	*Bowen v. Kendrick*
8/14/87	*American Trucking Assns., Inc. v. Gray*
5/30/88	*Lucas v. Townsend*
6/2/88	*Morison v. United States*
6/15/88	*Doe v. Smith*

DATE	TITLE
12/21/88	*Baltimore City Dept. of Social Services v. Bouknight*
1/30/89	*John Doe Agency v. John Doe Corp.*
2/1/89	*California v. Freeman*
3/14/89	*Railroad Signalmen v. Southeastern Pa. Transportation Authority*
8/22/89	*California v. American Stores Co.*
2/20/91	*Madden v. Texas*
3/2/91	*Mississippi v. Turner*
3/18/91	*Cole v. Texas*
8/2/91	*Barnes v. E-Systems, Inc.*
10/29/91	*Campos v. Houston*
6/20/92	*Reynolds v. International Amateur Athletic Federation*
10/20/92	*Grubbs v. Delo*
4/29/93	*Turner Broadcasting System, Inc. v. FCC*
5/14/93	*Blodgett v. Campbell*
7/26/93	*DeBoer v. DeBoer*
11/26/93	*INS v. Legalization Assistance Project of Los Angeles County*
12/23/93	*Capitol Square Review and Advisory Bd. v. Pinette*
2/7/94	*Planned Parenthood of Southeastern Pa. v. Casey*
2/9/94	*CBS Inc. v. Davis*
3/2/94	*Packwood v. Senate Select Comm. on Ethics*
8/17/94	*Edwards v. Hope Medical Group*
12/5/94	*Dow Jones & Co. Inc., In re*
1/28/95	*O'Connell v. Kirchner*
8/17/95	*Foster v. Gilliam*
8/28/95	*Penry v. Texas*
8/31/95	*Rodriguez v. Texas*
9/21/95	*McGraw Hill Cos., Inc. v. Proctor & Gamble Co.*
10/25/95	*FCC v. Radiofone Inc.*
5/16/96	*Netherland v. Tuggle*
12/23/96	*Netherland v. Gray*
7/17/98	*Rubin v. United States Independent Counsel*
11/18/98	*Murdaugh v. Livingston*

IN CHAMBERS OPINIONS INDEX BY TITLE

TITLE	CITATION
A.B. Chance Co. v. Atlantic City Elec. Co.	83 S. Ct. 964 (1963)
Aberdeen & Rockfish R. Co. v. SCRAP	409 U.S. 1207 (1972)
Akel v. New York	81 S. Ct. 25 (1960)
Albanese v. United States	75 S. Ct. 211 (1954)
Alcorcha v. California	86 S. Ct. 1359 (1966)
Alexander v. Board of Education	396 U.S. 1218 (1969)
Alexis I. Du Pont School Dist. v. Evans	439 U.S. 1375 (1978)
American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount	87 S. Ct. 1 (1966)
American Trucking Assns., Inc. v. Gray	483 U.S. 1306 (1987)
Appalachian Power Co. v. American Inst. of CPA's	80 S. Ct. 16 (1959)
Araneta v. United States	478 U.S. 1301 (1986)
Aronson v. May	85 S. Ct. 3 (1964)
Arrow Transportation Co. v. Southern Railway	83 S. Ct. 1 (1962)
Arrow Transportation Co. v. Southern Railway	83 S. Ct. 3 (1962)
Atiyeh v. Capps	449 U.S. 1312 (1981)
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng.	396 U.S. 1201 (1969)
Autry v. Estelle	464 U.S. 1301 (1983)
Baltimore City Dept. of Social Services v. Bouknight	488 U.S. 1301 (1988)
Bandy v. United States	81 S. Ct. 25 (1960)
Bandy v. United States	81 S. Ct. 197 (1960)
Bandy v. United States	82 S. Ct. 11 (1961)
Barnes v. E-Systems, Inc.	501 U.S. 1301 (1991)
Barnstone v. University of Houston	446 U.S. 1318 (1980)
Bart, In re	82 S. Ct. 675 (1962)
Barthuli v. Board of Trustees of Jefferson School Dist.	434 U.S. 1337 (1977)
Bateman v. Arizona	429 U.S. 1302 (1976)
Baytops v. New Jersey	88 S. Ct. 8 (1967)
Beame v. Friends of the Earth	434 U.S. 1310 (1977)
Becker v. United States	451 U.S. 1306 (1981)
Bellotti v. Latino Political Action Comm.	463 U.S. 1319 (1983)
Beltran v. Smith	458 U.S. 1303 (1982)
Berg, In re	409 U.S. 1238 (1972)
Beyer v. United States	396 U.S. 1235 (1970)
Bidwell v. United States	8/23/62
Birtcher Corp. v. Diapulse Corp.	87 S. Ct. 6 (1966)
Bletterman v. United States	8/29/58
Block v. North Side Lumber Co.	473 U.S. 1307 (1985)
Blodgett v. Campbell	508 U.S. 1301 (1993)
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TITLE **CITATION**

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Matthews v. Little ..... 396 U.S. 1223 (1969)
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McCarthy v. Briscoe ..... 429 U.S. 1317 (1976)
McCarthy v. Harper ..... 449 U.S. 1309 (1981)
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McDonald v. Missouri ..... 464 U.S. 1306 (1984)
McGee v. Alaska ..... 463 U.S. 1339 (1983)
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Westermann v. Nelson..... 409 U.S. 1236 (1972)
Western Airlines, Inc. v. Teamsters..... 480 U.S. 1301 (1987)
Whalen v. Roe..... 423 U.S. 1313 (1975)
White v. Florida..... 458 U.S. 1301 (1982)
Willhauck v. Flanagan..... 448 U.S. 1323 (1980)
Williams v. Missouri..... 463 U.S. 1301 (1983)
Williams v. Rhodes..... 89 S. Ct. 1 (1968)
Williams v. Zbaraz..... 442 U.S. 1309 (1979)
Williamson v. United States..... 184 F.2d 280 (1950)
Winston-Salem/Forsyth County Bd. of Ed. v. Scott..... 404 U.S. 1221 (1971)
Winters v. United States..... 89 S. Ct. 34 (1968)
Winters v. United States..... 89 S. Ct. 57 (1968)
Wise v. Lipscomb..... 434 U.S. 1329 (1977)
Wolcher v. United States..... 76 S. Ct. 254 (1955)
Yanish v. Barber..... 73 S. Ct. 1105 (1953)
Yasa v. Esperdy..... 80 S. Ct. 1366 (1960)

IN CHAMBERS OPINIONS INDEX BY JUSTICE

TITLE	DATE
Black, Hugo L.	
Alexander v. Board of Education	9/5/69
Arrow Transportation Co. v. Southern Railway Co.	9/26/62
Arrow Transportation Co. v. Southern Railway Co.	8/17/62
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng.	7/16/69
Board of School Comm'rs v. Davis	8/16/63
Corpus Christi School Dist. v. Cisernos	8/19/71
Davis v. Adams	8/5/70
Edgar v. United States	7/29/71
Fowler v. Adams	8/11/70
Heart of Atlanta Motel v. United States	8/10/64
Karr v. Schmidt	2/11/71
Katzenbach v. McClung	9/23/64
King v. Smith	1/29/68
Labor Board v. Getman	7/27/71
Louisiana v. United States	8/12/66
Mahan v. Howell	7/27/71
Marcello v. United States	9/18/70
Matthews v. Little	9/9/69
Meredith v. Fair	9/10/62
Oden v. Brittain	8/13/69
Owen v. Kennedy	7/19/63
Sellers v. United States	8/17/68
Blackmun, Harry A.	
American Trucking Assns., Inc. v. Gray	8/14/87
CBS Inc. v. Davis	2/9/94
Grubbs v. Delo	10/20/92
Liles v. Nebraska	2/13/84
McDonald v. Missouri	1/3/84
Nebraska Press Assn. v. Stuart	11/13/75
Nebraska Press Assn. v. Stuart	11/20/75
Ruckelshaus v. Monsanto Co.	7/27/83
Williams v. Missouri	7/6/83

TITLE **DATE**

Brennan, William J., Jr.

Appalachian Power Co. v. American Inst. of CPA's 7/7/59
Bellotti v. Latino Political Action Comm. 8/11/83
Board of Education v. Taylor 8/30/61
Boston v. Anderson 10/20/78
Buchanan v. Evans 9/1/78
Capital Cities Media, Inc. v. Toole 7/13/83
Corsetti v. Massachusetts 9/1/82
Truong Dinh Hung v. United States 8/4/78
Kake v. Egan 7/11/59
Karcher v. Dagget 3/15/82
Keyes v. School Dist. No. 1, Denver 8/29/69
M.I.C. Ltd. v. Bedford Township 9/13/83
Railroad Signalmen v. Southeastern Pa. Transportation Authority 3/14/89
Reproductive Services, Inc. v. Walker 7/17/78
Reproductive Services, Inc. v. Walker 8/21/78
Roche, In re 7/23/80
Rostker v. Goldberg 7/19/80
Smith v. Yeager 9/3/71
Willhauck v. Flanagan 8/28/80

Burger, Warren E.

Aberdeen & Rockfish R. Co. v. SCRAP 7/19/72
Araneta v. United States 7/19/86
Ehrlichman v. Sirica 8/28/74
Finance Comm. to Re-elect the President v. Waddy 10/31/72
Garrison v. Hudson 7/6/84
National League of Cities v. Brennan 12/31/74
Office of Personnel Management v. Government Employees 7/5/85
Winston-Salem/Forsyth County Bd. of Ed. v. Scott 8/31/71

Butler, Pierce

Motlow v. United States 2/14/26

Cardozo, Benjamin N.

Goldsmith v. Zerbst 11/18/32

TITLE **DATE**

Douglas, William O.

Alcorcha v. California 4/22/66
Aronson v. May 7/24/64
Bandy v. United States 8/31/60
Bandy v. United States 12/5/60
Bandy v. United States 6/28/61
Berg, In re 11/2/72
Bowman v. United States 11/18/64
Carbo v. United States 3/19/62
Carlisle v. Landon 8/5/53
Chamber of Commerce of the U.S. v. Legal Aid Society 9/29/75
Clark v. United States 12/10/53
Cohen v. United States 10/11/61
Cohen v. United States 1/30/62
Cohen v. United States 2/14/62
D'Aquino v. United States 2/6/50
Dexter v. Schrunk 8/29/70
Drifka v. Brainard; Allen v. Brainard 12/5/68
Farr v. Pitchess 1/11/73
Gomperts v. Chase 9/10/71
Grand Jury Proceedings (Lewis, Applicant), In re 7/4/74
Harris v. United States 8/31/71
Harris v. United States 10/10/70
Hayakawa v. Brown 3/4/74
Hayes, Ex parte 10/26/73
Haywood v. National Basketball Assn. 3/1/71
Henry v. Warner, Secretary of the Navy 5/18/73
Herzog v. United States 2/11/55
Holtzman v. Schlesinger 8/4/73
Hughes v. Thompson 1/25/74
Johnson, In re 4/25/52
Jones v. Lemond 9/15/69
Kadans v. Collins 1/31/72
Guey Heung Lee v. Johnson 8/25/71
Levy v. Parker 8/2/69
Locks v. Commanding General, Sixth Army 10/12/68
Long Beach Fed. Sav. & Loan Assn. v. Federal Home Loan Bank 10/31/55
Lopez v. United States 8/23/71

TITLE **DATE**

Mallonee v. Fahey 11/20/52
McGee v. Eyman 11/29/62
Mitchell v. California 5/5/66
Noyd v. Bond 12/24/68
Orloff v. Willoughby 5/3/52
Parisi v. Davidson 12/29/69
Patterson v. Superior Court of Cal. 3/21/75
Pryor v. United States 10/29/71
Quinn v. Laird 5/1/69
Rehman v. California 10/7/64
Reynolds v. United States 11/2/59
Rosenberg v. United States 6/17/53
Russo v. Byrne 7/29/72
Russo v. United States 8/16/71
Scaggs v. Larsen 8/5/69
Sica v. United States 3/19/62
Smith v. Ritchey 9/29/68
Smith v. United States 9/11/75
Stanard v. Olesen 5/22/54
Steinberg v. United States 5/28/56
Stickney, Ex parte 1/18/62
Tierney v. United States 9/12/72
United States ex rel. Norris v. Swope 4/29/52
Warm Springs Dam Task Force v. Gribble 6/17/74
Westermann v. Nelson 10/20/72
Winters v. United States 10/21/68
Wolcher v. United States 12/31/55
Yanish v. Barber 5/16/53

Fortas, Abe

Baytops v. New Jersey 8/15/67
Grinnell Corp. v. United States 11/8/65
Mathis v. United States 8/15/67

Frankfurter, Felix

Akel v. New York 7/19/60
Albanese v. United States 12/9/54

TITLE **DATE**

Brody v. United States 5/24/57
Burwell v. California 9/27/55
Carter v. United States 7/13/55
English v. Cunningham 8/4/59
Flynn v. United States 1/12/55
Goldman v. Fogarty 12/20/54
Nukk v. Shaughnessy 1/3/55
Patterson v. United States 12/23/54
Sklaroff v. Skeadas 5/4/56
United States v. Allied Stevedoring Corp 7/13/56
Uphaus v. Wyman 7/7/60
Van Newkirk v. McLain 6/20/40
Waller, Ex parte 6/27/42
Ward v. United States 8/8/56

Goldberg, Arthur J.

Jimenez v. United States District Court 8/23/63
Rosenblatt v. American Cyanamid Co. 7/13/65
United States v. FMC Corp. 8/9/63

Harlan, John M. II

A.B. Chance Co. v. Atlantic City Elec. Co. 4/10/63
American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount 8/1/66
Beyer v. United States 1/30/70
Bidwell v. United States 8/23/62
Birtcher Corp. v. Diapulse Corp. 8/19/66
Bletterman v. United States 8/29/58
Bloeth v. New York 3/19/62
Breswick & Co. v. United States 8/3/55
Chestnut v. New York 3/4/66
Commonwealth Oil Ref. Co. v. Lummus Co. 12/14/61
Cooper v. New York 7/7/55
Di Candia v. United States 1/20/58
Eckwerth v. New York 4/7/59
Eckwerth v. New York 4/20/59
Edwards v. New York 6/25/56
Edwards v. New York 3/30/56

TITLE **DATE**

Febre v. United States..... 9/10/69
Fernandez v. United States..... 2/27/61
Guterma v. United States..... 3/18/60
Hutchinson v. New York..... 9/20/65
International Boxing Club v. United States.....10/29/57
Jackson v. New York..... 3/6/62
Keith v. New York..... 5/11/59
La Marca v. New York..... 11/6/57
McLeod v. General Elec. Co...... 9/21/66
Noto v. United States.....11/21/55
O'Rourke v. Levine..... 3/5/60
Panama Canal Co. v. Grace Lines, Inc...... 5/7/57
Perez v. United States..... 7/30/70
Public Service Bd. v. United States..... 8/8/66
Railway Express Agency Inc. v. United States..... 1/17/62
Richardson v. New York..... 6/17/58
Rockefeller v. Socialist Workers Party..... 7/11/70
Rockefeller v. Socialist Workers Party..... 7/22/70
Rosado v. Wyman..... 8/20/69
Rosoto v. Warden..... 6/26/63
Roth v. United States..... 10/8/56
Seagram & Sons v. Hostetter..... 8/5/65
Stickel v. United States..... 8/14/56
Strickland Transportation Co. v. United States..... 2/4/69
Tomaiolo v. United States.....11/21/61
Travia v. Lomenzo..... 7/16/65
Tri-Continental Financial Corp. v. United States..... 3/2/60
Tuscarora Nation of Indians v. Power Authority..... 9/8/58
United States ex rel. Cerullo v. Follette.....10/16/69
Valenti v. Spector..... 9/3/58
Wasmuth v. Allen..... 7/25/64
Winters v. United States..... 9/23/68
Yasa v. Esperdy..... 6/23/60

Holmes, Oliver Wendell

Sacco v. Hendry..... 8/10/27
Sacco v. Massachusetts..... 8/20/27

TITLE **DATE**

Jackson, Robert H.

Costello v. United States....6/18/54
Dennis v. United States....6/22/51
Knickerbocker Printing Corp. v. United States....9/3/54
Pirinsky, In re....9/10/49
Sacher v. United States....6/22/51
United States ex rel. Knauff v. McGrath....5/17/50
Williamson v. United States....9/25/50

Kennedy, Anthony M.

Lucas v. Townsend....5/30/88

Marshall, Thurgood

Beame v. Friends of the Earth....8/5/77
Blum v. Caldwell....5/6/80
Brennan v. United States Postal Service....8/11/78
Brussel v. United States....10/10/69
Califano v. McRae....7/20/77
CFTC v. British Am. Commodity Options....8/8/77
Fishman v. Schaffer....10/1/76
Holtzman v. Schlesinger....8/1/73
Jefferson Parish School Bd. v. Dandridge....8/30/71
John Doe Agency v. John Doe Corp.....1/30/89
Little v. Ciuros....6/7/78
Meeropol v. Nizer....1/18/77
Montgomery v. Jefferson....9/10/84
New York Times Co. v. Jascalevich....7/12/78
New York Times Co. v. Jascalevich....8/4/78
New York v. Kleppe....8/19/76
O'Brien v. Skinner....11/6/72
Schlesinger v. Holtzman....8/4/73
Socialist Workers Party v. Attorney General....12/27/74
Spenkelink v. Wainwright....5/23/79
Whalen v. Roe....10/28/75

O'Connor, Sandra Day

Blodgett v. Campbell....5/14/93
California v. American Stores Co.....8/22/89

TITLE **DATE**

California v. Freeman 2/1/89
Heckler v. Blankenship 1/26/84
Hicks v. Feiock 10/23/86
INS v. Legalization Assistance Project of Los Angeles County 11/26/93
Tate v. Rose 5/19/84
Volkswagonwerk A.G. v. Falzon 4/29/83
Western Airlines, Inc. v. Teamsters 4/2/87

Powell, Lewis F., Jr.

Barnstone v. University of Houston 5/12/80
Bustop, Inc. v. Board of Ed. of Los Angeles 9/9/78
Certain Named and Unnamed Children v. Texas 9/4/80
Chambers v. Mississippi 2/14/72
Curry v. Baker 10/7/86
Drummond v. Acree 9/1/72
Evans v. Alabama 4/21/83
Graddick v. Newman 7/25/81
Graves v. Barnes 2/7/72
Gregg v. Georgia 7/22/76
Jaffree v. Board of School Comm'rs of Mobile County 2/11/83
Kemp v. Smith 8/24/83
Kemp v. Smith 9/17/83
Ledbetter v. Baldwin 12/18/86
McCarthy v. Briscoe 9/14/76
McCarthy v. Briscoe 9/30/76
McDaniel v. Sanchez 8/14/80
Mecom v. United States 9/20/77
Moore v. Brown 9/5/80
South Park Independent School Dist. v. United States 7/21/81
Times-Picayune Publishing Corp. v. Schulingkamp 7/29/74
White v. Florida 8/13/82
Wise v. Lipscomb 8/30/77

Reed, Stanley F.

Equitable Office Bldg. Corp., In re 8/6/46
Field v. United States 7/25/51
George F. Alger Co. v. Peck 3/29/54

TITLE **DATE**

Twentieth Century Airlines Inc. v. Ryan 9/24/53
United States v. United Liquors Corp. 9/19/56

Rehnquist, William H.
Alexis I. Du Pont School Dist. v. Evans 9/8/78
Atiyeh v. Capps 2/4/81
Baltimore City Dept. of Social Services v. Bouknight 12/21/88
Barthuli v. Board of Trustees of Jefferson School Dist. 9/20/77
Bateman v. Arizona 8/16/76
Becker v. United States 5/29/81
Beltran v. Smith 8/26/82
Block v. North Side Lumber Co. 7/24/85
Board of Ed. of Los Angeles v. Superior Court of Cal. 9/12/80
Bowen v. Kendrick 8/10/87
Bracy v. United States 3/29/78
Bureau of Economic Analysis v. Long 3/3/81
Bustop, Inc. v. Board of Ed. of Los Angeles 9/8/78
California v. Brown 3/27/86
California v. Braeseke 1/31/80
California v. Hamilton 5/6/86
California v. Harris 7/23/84
California v. Prysock 4/24/81
California v. Ramos 10/26/82
California v. Riegler 2/5/81
California v. Velasquez 3/24/80
California v. Winson 10/2/81
Catholic League v. Feminist Women's Health Center, Inc. 10/11/84
Claiborne v. United States 3/12/84
Clark v. California 12/20/83
Clements v. Logan 12/9/81
Coleman v. Paccar, Inc. 2/2/76
Columbus Bd. of Ed. v. Penick 8/11/78
Communist Party of Indiana v. Whitcomb 10/6/72
Conforte v. Commissioner 1/12/83
Cousins v. Wigoda 7/1/72
Dayton Bd. of Ed. v. Brinkman 8/30/78

TITLE **DATE**

Deaver v. United States 7/1/87
Divans v. California 7/28/77
Divans v. California 9/1/78
Dolman v. United States 12/21/78
Dow Jones & Co. Inc., In re 12/5/94
Edelman v. Jordan 7/19/73
Evans v. Atlantic Richfield Co. 12/9/76
Evans v. Bennett 4/5/79
Fare v. Michael C. 7/28/78
Flamm v. Real-BLT Inc. 2/25/76
Foster v. Gilliam 8/17/95
Garcia-Mir v. Smith 2/1/85
General Council on Fin. & Admin. v. Superior Court of Cal. 8/24/78
General Council on Fin. & Admin. v. Superior Court of Cal. 9/1/78
General Dynamic Convair Aerospace Div. v. Anderson 3/20/79
Gregory-Portland Independent School Dist. v. United States 9/8/80
Gruner v. Superior Court of Cal. 9/3/76
Haner v. United States 4/6/79
Hanrahan v. Hampton 4/30/80
Hawaii Housing Authority v. Midkiff 9/2/83
Heckler v. Lopez 9/9/83
Heckler v. Redbud Hospital Dist. 7/24/85
Heckler v. Turner 8/10/84
Hortonville Joint School Dist. v. Hortonville Ed. Assn. 8/18/75
Houchins v. KQED Inc. 2/1/77
Julian v. United States 7/13/83
Kimble v. Swackhamer 10/20/78
KPNX Broadcasting Co. v. Arizona Superior Court 12/23/82
Laird v. Tatum 10/10/72
Lenhard v. Wolff 9/7/79
Lenhard v. Wolff 10/18/79
Los Angeles NAACP v. Los Angeles Unified School 4/19/81
Los Angeles v. Lyons 9/29/81
Marshall v. Barlow's, Inc. 2/3/77
Marten v. Thies 5/16/80
McCarthy v. Harper 2/3/81
McGee v. Alaska 9/9/83
Mincey v. Arizona 10/6/77

TITLE **DATE**

Miroyan v. United States 8/8/78
Montanans for Balanced Federal Budget Comm. v. Harper 10/10/84
Mori v. Boilermakers 11/23/81
Morison v. United States 6/2/88
Murdaugh v. Livingston 11/18/98
National Broadcasting Co. v. Niemi 2/10/78
National Farmers Union Ins. Co. v. Crow Tribe 9/10/84
National Farmers Union Ins. Co. v. Crow Tribe 4/24/85
Netherland v. Gray 12/23/96
Netherland v. Tuggle 5/16/96
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co. 12/6/77
Northern Cal. Power Agency v. Grace Geothermal Corp. 12/7/84
Pacific Tel. & Tel. Co. v. Public Utilities Comm'n of Cal. 8/13/79
Pacific Union Conf. of Seventh-Day Adventists v. Marshall 8/2/77
Pacileo v. Walker 5/1/80
Packwood v. Senate Select Comm. on Ethics 3/2/94
Pasadena City Bd. of Ed. v. Spangler 12/22/75
Peeples v. Brown 11/29/79
Portley v. Grossman 2/1/80
Prudential Fed. Sav. & Loan Assn. v. Flanigan 9/25/86
Republican National Committee v. Burton 3/11/82
Republican Party of Hawaii v. Mink 11/29/85
Republican State Central Comm. of Ariz. v. Ripon 8/16/72
Richmond v. Arizona 8/8/77
Riverside v. Rivera 8/28/85
Rubin v. United States Independent Counsel 7/17/98
Schweiker v. McClure 6/12/81
Spenkelink v. Wainwright 5/22/79
Sumner v. Mata 5/1/80
Synanon Foundation, Inc. v. California 12/28/79
Thomas v. Sierra Club 1/17/85
Turner Broadcasting System, Inc. v. FCC 4/29/93
United States Postal Service v. Letter Carriers 5/21/87
Uhler v. AFL-CIO 9/7/84
Vetterli v. United States District Court 4/10/78
Volvo of America Corp. v. Schwarzer 11/15/76
Walters v. National Assn. of Radiation Survivors 9/27/84
Warm Springs Dam Task Force v. Gribble 10/20/78

TITLE **DATE**

Scalia, Antonin

Barnes v. E-Systems, Inc. 8/2/91
Campos v. Houston 10/29/91
Cole v. Texas 3/18/91
Edwards v. Hope Medical Group 8/17/94
Goodwin v. Texas 2/20/91
Kentucky v. Stincer 10/15/86
Kleem v. INS 12/4/86
Madden v. Texas 2/20/91
Mississippi v. Turner 3/2/91
Ohio Citizens for Responsible Energy Inc. v. Nuclear Reg. Comm'n 12/31/86
Penry v. Texas 8/28/95
Rodriguez v. Texas 8/31/95

Souter, David H.

Planned Parenthood of Southeastern Pa. v. Casey 2/7/94

Stevens, John Paul

Bradley v. Lunding 2/17/76
Capitol Square Review and Advisory Bd. v. Pinette 12/23/93
DeBoer v. DeBoer 7/26/93
Doe v. Smith 6/15/88
FCC v. Radiofone Inc. 10/25/95
McGraw Hill Cos., Inc. v. Proctor & Gamble Co. 9/21/95
Metropolitan County Bd. of Ed. v. Kelley 8/20/81
Mikutaitis v. United States 9/17/86
National Socialist Party of America v. Skokie 8/26/77
O'Connell v. Kirchner 1/28/95
O'Connor v. Board of Ed. of School Dist. 23 ..... 11/4/80
Railway Labor Executives' Assn. v. Gibbons 6/28/80
Renaissance Arcade and Bookstore v. Cook County 9/5/85
Reynolds v. International Amateur Athletic Federation 6/20/92
Williams v. Zbaraz 5/24/79

TITLE **DATE**

Stewart, Potter

Dayton Bd. of Ed. v. Brinkman 8/28/78
Krause v. Rhodes 9/16/77
Socialist Labor Party v. Rhodes 9/16/68
Socialist Labor Party v. Rhodes 9/23/68
Williams v. Rhodes 9/10/68

Vinson, Fred M.

Land v. Dollar 4/17/51
Sawyer v. Dollar 5/22/51

Warren, Earl

Bart, In re 3/13/62
Cunningham v. English 10/1/57
Ellis v. United States 2/7/59
Leigh v. United States 5/11/62

White, Byron R.

Autry v. Estelle 10/5/83
Bonura v. CBS Inc. 1/16/83
National Collegiate Athletic Assn. v. Bd. of Regents U. of Okla. 7/21/83
New York Times Co. v. Jascalevich 7/11/78
New York Times Co. v. Jascalevich 8/1/78

IN CHAMBERS OPINIONS INDEX BY DISPOSITION

TITLE	DATE
ABSTAIN	
Califano v. McRae	7/20/77
DENIED	
A.B. Chance Co. v. Atlantic City Elec. Co.	4/10/63
Aberdeen & Rockfish R. Co. v. SCRAP	7/19/72
Akel v. New York	7/19/60
Albanese v. United States	12/9/54
Alcorcha v. California	4/22/66
Alexander v. Board of Education	9/5/69
Alexis I. Du Pont School Dist. v. Evans	9/8/78
Appalachian Power Co. v. American Inst. of CPA's	7/7/59
Aronson v. May	7/24/64
Bandy v. United States	12/5/60
Bandy v. United States	6/28/61
Barnstone v. University of Houston	5/12/80
Barthuli v. Board of Trustees of Jefferson School Dist.	9/20/77
Bateman v. Arizona	8/16/76
Baytops v. New Jersey	8/15/67
Beame v. Friends of the Earth	8/5/77
Bellotti v. Latino Political Action Comm.	8/11/83
Beltran v. Smith	8/26/82
Bidwell v. United States	8/23/62
Birtcher Corp. v. Diapulse Corp.	8/19/66
Bletterman v. United States	8/29/58
Block v. North Side Lumber Co.	7/24/85
Blodgett v. Campbell	5/14/93
Bloeth v. New York	3/19/62
Blum v. Caldwell	5/6/80
Board of Ed. of Los Angeles v. Superior Court of Cal.	9/12/80
Board of Education v. Taylor	8/30/61
Board of School Comm'rs v. Davis	8/16/63
Bonura v. CBS Inc.	1/16/83
Bowman v. United States	11/18/64

TITLE **DATE**

Bracy v. United States 3/29/78
Bradley v. Lunding 2/17/76
Brennan v. United States Postal Service 8/11/78
Buchanan v. Evans 9/1/78
Bureau of Economic Analysis v. Long 3/3/81
Bustop, Inc. v. Board of Ed. of Los Angeles 9/8/78
Bustop, Inc. v. Board of Ed. of Los Angeles 9/9/78
California v. Freeman 2/1/89
California v. Harris 7/23/84
California v. Winson 10/2/81
Campos v. Houston 10/29/91
Capitol Square Review and Advisory Bd. v. Pinette 12/23/93
Carbo v. United States 3/19/62
Carter v. United States 7/13/55
Catholic League v. Feminist Women's Health Center, Inc. 10/11/84
CFTC v. British Am. Commodity Options 8/8/77
Chamber of Commerce of the U.S. v. Legal Aid Society 9/29/75
Chambers v. Mississippi 2/14/72
Claiborne v. United States 3/12/84
Commonwealth Oil Ref. Co. v. Lummus Co. 12/14/61
Communist Party of Indiana v. Whitcomb 10/6/72
Conforte v. Commissioner 1/12/83
Cooper v. New York 7/7/55
Corsetti v. Massachusetts 9/1/82
Cousins v. Wigoda 7/1/72
Cunningham v. English 10/1/57
Curry v. Baker 10/7/86
Dayton Bd. of Ed. v. Brinkman 8/28/78
Dayton Bd. of Ed. v. Brinkman 8/30/78
Deaver v. United States 7/1/87
DeBoer v. DeBoer 7/26/93
Dennis v. United States 6/22/51
Dexter v. Schrunk 8/29/70
Di Candia v. United States 1/20/58
Divans v. California 7/28/77
Divans v. California 9/1/78
Doe v. Smith 6/15/88
Dolman v. United States 12/21/78
Dow Jones & Co. Inc., In re 12/5/94
Drifka v. Brainard; Allen v. Brainard 12/5/68

TITLE **DATE**

Drummond v. Acree 9/1/72
Edgar v. United States 7/29/71
Edwards v. Hope Medical Group 8/17/94
Edwards v. New York 6/25/56
Ehrlichman v. Sirica 8/28/74
English v. Cunningham 8/4/59
Evans v. Alabama 4/21/83
Fernandez v. United States 2/27/61
Field v. United States 7/25/51
Finance Comm. to Re-elect the President v. Waddy 10/31/72
Fishman v. Schaffer 10/1/76
Flamm v. Real-BLT Inc 2/25/76
Garcia-Mir v. Smith 2/1/85
General Council on Fin. & Admin. v. Superior Court of Cal. 9/1/78
General Dynamic Convair Aerospace Div. v. Anderson 3/20/79
George F. Alger Co. v. Peck 3/29/54
Goldman v. Fogarty 12/20/54
Goldsmith v. Zerbst 11/18/32
Gomperts v. Chase 9/10/71
Graddick v. Newman 7/25/81
Graves v. Barnes 2/7/72
Gregory-Portland Independent School Dist. v. United States 9/8/80
Grinnell Corp. v. United States 11/8/65
Gruner v. Superior Court of Cal. 9/3/76
Guterma v. United States 3/18/60
Haner v. United States 4/6/79
Hanrahan v. Hampton 4/30/80
Hawaii Housing Authority v. Midkiff 9/2/83
Hayakawa v. Brown 3/4/74
Heart of Atlanta Motel v. United States 8/10/64
Henry v. Warner 5/18/73
Holtzman v. Schlesinger 8/1/73
Hortonville Joint School Dist. v. Hortonville Ed. Assn. 8/18/75
Hughes v. Thompson 1/25/74
Hutchinson v. New York 9/20/65
Jackson v. New York 3/6/62
Jefferson Parish School Bd. v. Dandridge 8/30/71
Jimenez v. United States District Court 8/23/63
Johnson, In re 4/25/52
Julian v. United States 7/13/83

TITLE **DATE**

Kadans v. Collins....1/31/72
Karr v. Schmidt....2/11/71
Kemp v. Smith....8/24/83
Kemp v. Smith....9/17/83
Kentucky v. Stincer....10/15/86
Kimble v. Swackhamer....10/20/78
Kleem v. INS....12/4/86
KPNX Broadcasting Co. v. Arizona Superior Court....12/23/82
Krause v. Rhodes....9/16/77
Labor Board v. Getman....7/27/71
Laird v. Tatum....10/10/72
Guey Heung Lee v. Johnson....8/25/71
Lenhard v. Wolff....10/18/79
Liles v. Nebraska....2/13/84
Little v. Ciuros....6/7/78
Locks v. Commanding General, Sixth Army....10/12/68
Long Beach Fed. Sav. & Loan Assn. v. Federal Home Loan Bank....10/31/55
Los Angeles NAACP v. Los Angeles Unified School Dist.....4/19/81
Louisiana v. United States....8/12/66
Madden v. Texas....2/20/91
Mahan v. Howell....7/27/71
Mallonee v. Fahey....11/20/52
Marten v. Thies....5/16/80
McCarthy v. Briscoe....9/14/76
McGee v. Alaska....9/9/83
McGee v. Eyman....11/29/62
McGraw Hill Cos., Inc. v. Proctor & Gamble Co.....9/21/95
Mecom v. United States....9/20/77
Meeropol v. Nizer....1/18/77
Metropolitan County Bd. of Ed. v. Kelley....8/20/81
Mincey v. Arizona....10/6/77
Miroyan v. United States....8/8/78
Mississippi v. Turner....3/2/91
Mitchell v. California....5/5/66
Montanans for Balanced Federal Budget Comm. v. Harper....10/10/84
Montgomery v. Jefferson....9/10/84
Moore v. Brown....9/5/80
Morison v. United States....6/2/88
Murdaugh v. Livingston....11/18/98
National Broadcasting Co. v. Niemi....2/10/78

TITLE **DATE**

National Farmers Union Ins. Co. v. Crow Tribe 4/24/85
National Socialist Party of America v. Skokie 8/26/77
Nebraska Press Assn. v. Stuart 11/13/75
Netherland v. Gray 12/23/96
Netherland v. Tuggle 5/16/96
New York Times Co. v. Jascalevich 7/11/78
New York Times Co. v. Jascalevich 7/12/78
New York Times Co. v. Jascalevich 8/1/78
New York Times Co. v. Jascalevich 8/4/78
New York v. Kleppe 8/19/76
Northern Cal. Power Agency v. Grace Geothermal Corp. 12/7/84
Nukk v. Shaughnessy 1/3/55
O'Brien v. Skinner 11/6/72
O'Connell v. Kirchner 1/28/95
O'Connor v. Board of Ed. of School Dist. 23 ..... 11/4/80
O'Rourke v. Levine 3/5/60
Oden v. Brittain 8/13/69
Ohio Citizens for Responsible Energy Inc. v. Nuclear Reg. Comm'n 12/31/86
Owen v. Kennedy 7/19/63
Pacific Tel. & Tel. Co. v. Public Utilities Comm'n of Cal. 8/13/79
Pacific Union Conf. of Seventh-Day Adventists v. Marshall 8/2/77
Packwood v. Senate Select Comm. on Ethics 3/2/94
Parisi v. Davidson 12/29/69
Patterson v. United States 12/23/54
Peeples v. Brown 11/29/79
Penry v. Texas 8/28/95
Perez v. United States 7/30/70
Pirinsky, In re 9/10/49
Planned Parenthood of Southeastern Pa. v. Casey 2/7/94
Portley v. Grossman 2/1/80
Prudential Fed. Sav. & Loan Assn. v. Flanigan 9/25/86
Public Service Bd. v. United States 8/8/66
Railroad Signalmen v. Southeastern Pa. Transportation Authority 3/14/89
Railway Express Agency Inc. v. United States 1/17/62
Railway Labor Executives' Assn. v. Gibbons 6/28/80
Rehman v. California 10/7/64
Renaissance Arcade and Bookstore v. Cook County 9/5/85
Reproductive Services, Inc. v. Walker 7/17/78
Republican National Committee v. Burton 3/11/82
Republican Party of Hawaii v. Mink 11/29/85

TITLE **DATE**

Richmond v. Arizona.....8/8/77
Rockefeller v. Socialist Workers Party.....7/22/70
Rodriguez v. Texas.....8/31/95
Rosenblatt v. American Cyanamid Co......7/13/65
Rosoto v. Warden.....6/26/63
Rubin v. United States Independent Counsel.....7/17/98
Ruckelshaus v. Monsanto Co......7/27/83
Russo v. United States.....8/16/71
Sacco v. Hendry.....8/10/27
Sacco v. Massachusetts.....8/20/27
Smith v. Yeager.....9/3/71
Socialist Labor Party v. Rhodes.....9/16/68
Socialist Workers Party v. Attorney General.....12/27/74
South Park Independent School Dist. v. United States.....7/21/81
Spenkelink v. Wainwright.....5/22/79
Stanard v. Olesen.....5/22/54
Stickel v. United States.....8/14/56
Synanon Foundation, Inc. v. California.....12/28/79
Thomas v. Sierra Club.....1/17/85
Tomaiolo v. United States.....11/21/61
Travia v. Lomenzo.....7/16/65
Tri-Continental Financial Corp. v. United States.....3/2/60
Turner Broadcasting System, Inc. v. FCC.....4/29/93
Twentieth Century Airlines Inc. v. Ryan.....9/24/53
Uhler v. AFL-CIO.....9/7/84
United States ex rel. Cerullo v. Follette.....10/16/69
United States ex rel. Norris v. Swope.....4/29/52
United States v. FMC Corp......8/9/63
United States v. United Liquors Corp......9/19/56
Uphaus v. Wyman.....7/7/60
Valenti v. Spector.....9/3/58
Van Newkirk v. McLain.....6/20/40
Vetterli v. United States District Court.....4/10/78
Volvo of America Corp. v. Schwarzer.....11/15/76
Waller, Ex parte.....6/27/42
Ward v. United States.....8/8/56
Warm Springs Dam Task Force v. Gribble.....10/20/78
Wasmuth v. Allen.....7/25/64
Westermann v. Nelson.....10/20/72
Whalen v. Roe.....10/28/75

TITLE **DATE**

White v. Florida 8/13/82
Willhauck v. Flanagan 8/28/80
Williams v. Zbaraz 5/24/79
Winston-Salem/Forsyth County Bd. of Ed. v. Scott 8/31/71
Winters v. United States 9/23/68

GRANTED

American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount ... 8/1/66
American Trucking Assns., Inc. v. Gray 8/14/87
Araneta v. United States 7/19/86
Arrow Transportation Co. v. Southern Railway Co. 8/17/62
Arrow Transportation Co. v. Southern Railway Co. 9/26/62
Atiyeh v. Capps 2/4/81
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng. 7/16/69
Autry v. Estelle 10/5/83
Baltimore City Dept. of Social Services v. Bouknight 12/21/88
Bandy v. United States 8/31/60
Barnes v. E-Systems, Inc. 8/2/91
Bart, In re 3/13/62
Becker v. United States 5/29/81
Berg, In re 11/2/72
Beyer v. United States 1/30/70
Boston v. Anderson 10/20/78
Bowen v. Kendrick 8/10/87
Brody v. United States 5/24/57
Brussel v. United States 10/10/69
Burwell v. California 9/27/55
California v. Brown 3/27/86
California v. American Stores Co. 8/22/89
California v. Braeseke 1/31/80
California v. Hamilton 5/6/86
California v. Prysock 4/24/81
California v. Ramos 10/26/82
California v. Riegler 2/5/81
California v. Velasquez 3/24/80
Capital Cities Media, Inc. v. Toole 7/13/83
Carlisle v. Landon 8/5/53
CBS Inc. v. Davis 2/9/94
Certain Named and Unnamed Children v. Texas 9/4/80
Chestnut v. New York 3/4/66

TITLE **DATE**

Clark v. California....12/20/83
Clark v. United States....12/10/53
Clements v. Logan....12/9/81
Cohen v. United States....10/11/61
Cohen v. United States....1/30/62
Cohen v. United States....2/14/62
Cole v. Texas....3/18/91
Coleman v. Paccar, Inc.....2/2/76
Columbus Bd. of Ed. v. Penick....8/11/78
Corpus Christi School Dist. v. Cisernos....8/19/71
Costello v. United States....6/18/54
D'Aquino v. United States....2/6/50
Davis v. Adams....8/5/70
Eckwerth v. New York....4/7/59
Eckwerth v. New York....4/20/59
Edelman v. Jordan....7/19/73
Edwards v. New York....3/30/56
Ellis v. United States....2/7/59
Equitable Office Bldg. Corp., In re....8/6/46
Evans v. Atlantic Richfield Co.....12/9/76
Evans v. Bennett....4/5/79
Fare v. Michael C.....7/28/78
Farr v. Pitchess....1/11/73
FCC v. Radiofone Inc.....10/25/95
Flynn v. United States....1/12/55
Foster v. Gilliam....8/17/95
Fowler v. Adams....8/11/70
Garrison v. Hudson....7/6/84
General Council on Fin. & Admin. v. Superior Court of Cal.....8/24/78
Grand Jury Proceedings (Lewis, Applicant), In re....7/4/74
Gregg v. Georgia....7/22/76
Grubbs v. Delo....10/20/92
Harris v. United States....10/10/70
Harris v. United States....8/31/71
Hayes, Ex parte....10/26/73
Haywood v. National Basketball Assn.....3/1/71
Heckler v. Blankenship....1/26/84
Heckler v. Lopez....9/9/83
Heckler v. Redbud Hospital Dist.....7/24/85
Heckler v. Turner....8/10/84

TITLE **DATE**

Herzog v. United States 2/11/55
Hicks v. Feiock 10/23/86
Holtzman v. Schlesinger 8/4/73
Houchins v. KQED Inc. 2/1/77
Truong Dinh Hung v. United States 8/4/78
INS v. Legalization Assistance Project of Los Angeles County 11/26/93
International Boxing Club v. United States 10/29/57
Jaffree v. Board of School Comm'rs of Mobile County 2/11/83
John Doe Agency v. John Doe Corp. 1/30/89
Jones v. Lemond 9/15/69
Kake v. Egan 7/11/59
Karcher v. Dagget 3/15/82
Katzenbach v. McClung 9/23/64
Keith v. New York 5/11/59
Keyes v. School Dist. No. 1, Denver 8/29/69
King v. Smith 1/29/68
Knickerbocker Printing Corp. v. United States 9/3/54
La Marca v. New York 11/6/57
Land v. Dollar 4/17/51
Ledbetter v. Baldwin 12/18/86
Leigh v. United States 5/11/62
Lenhard v. Wolff 9/7/79
Levy v. Parker 8/2/69
Lopez v. United States 8/23/71
Los Angeles v. Lyons 9/29/81
Lucas v. Townsend 5/30/88
M.I.C. Ltd. v. Bedford Township 9/13/83
Marshall v. Barlow's, Inc. 2/3/77
Mathis v. United States 8/15/67
Matthews v. Little 9/9/69
McCarthy v. Briscoe 9/30/76
McCarthy v. Harper 2/3/81
McDaniel v. Sanchez 8/14/80
McDonald v. Missouri 1/3/84
McLeod v. General Elec. Co. 9/21/66
Meredith v. Fair 9/10/62
Mikutaitis v. United States 9/17/86
Mori v. Boilermakers 11/23/81
Motlow v. United States 2/14/26
National Collegiate Athletic Assn. v. Bd. of Regents U. of Okla. 7/21/83

TITLE **DATE**

National Farmers Union Ins. Co. v. Crow Tribe 9/10/84
National League of Cities v. Brennan 12/31/74
Nebraska Press Assn. v. Stuart 11/13/75
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co. 12/6/77
Noto v. United States 11/21/55
Noyd v. Bond 12/24/68
Office of Personnel Management v. Government Employees 7/5/85
Orloff v. Willoughby 5/3/52
Pacileo v. Walker 5/1/80
Panama Canal Co. v. Grace Lines, Inc. 5/7/57
Pasadena City Bd. of Ed. v. Spangler 12/22/75
Patterson v. Superior Court of the State of California 3/21/75
Pryor v. United States 10/29/71
Quinn v. Laird 5/1/69
Reproductive Services, Inc. v. Walker 8/21/78
Republican State Central Comm. of Ariz. v. Ripon Society 8/16/72
Reynolds v. International Amateur Athletic Federation 6/20/92
Reynolds v. United States 11/2/59
Richardson v. New York 6/17/58
Riverside v. Rivera 8/28/85
Roche, In re 7/23/80
Rockefeller v. Socialist Workers Party 7/11/70
Rosenberg v. United States 6/17/53
Rostker v. Goldberg 7/19/80
Roth v. United States 10/8/56
Russo v. Byrne 7/29/72
Sacher v. United States 6/22/51
Sawyer v. Dollar 5/22/51
Scaggs v. Larsen 8/5/69
Schlesinger v. Holtzman 8/4/73
Schweiker v. McClure 6/12/81
Seagram & Sons v. Hostetter 8/5/65
Sellers v. United States 8/17/68
Sica v. United States 3/19/62
Sklaroff v. Skeadas 5/4/56
Smith v. Ritchey 9/29/68
Smith v. United States 9/11/75
Socialist Labor Party v. Rhodes 9/23/68
Spenkelink v. Wainwright 5/23/79
Steinberg v. United States 5/28/56

TITLE **DATE**

Stickney, Ex parte 1/18/62
Strickland Transp. Co. v. United States 2/4/69
Sumner v. Mata 5/1/80
Tate v. Rose 5/19/84
Tierney v. United States 9/12/72
Times-Picayune Publishing Corp. v. Schulingkamp 7/29/74
Tuscarora Nation of Indians v. Power Authority 9/8/58
United States Postal Service v. Letter Carriers 5/21/87
United States ex rel. Knauff v. McGrath 5/17/50
Volkswagonwerk A.G. v. Falzon 4/29/83
Walters v. National Assn. of Radiation Survivors 9/27/84
Warm Springs Dam Task Force v. Gribble 6/17/74
Western Airlines, Inc. v. Teamsters 4/2/87
Williams v. Missouri 7/6/83
Williams v. Rhodes 9/10/68
Williamson v. United States 9/25/50
Winters v. United States 10/21/68
Wise v. Lipscomb 8/30/77
Wolcher v. United States 12/31/55
Yanish v. Barber 5/16/53
Yasa v. Esperdy 6/23/60

GRANTED IN PART AND DENIED IN PART
Breswick & Co. v. United States 8/3/55

NO ACTION TAKEN
United States v. Allied Stevedoring Corp. 7/13/56

REMAND AND HOLD IN ABEYANCE
Febre v. United States 9/10/69

REFER TO COURT
Marcello v. United States 9/18/70
Rosado v. Wyman 8/20/69

INDEX OF ORALLY ARGUED IN CHAMBERS CASES

TITLE	DATE	JUSTICE
Motlow v. United States	2/3/26	Butler
Sacco v. Hendry	8/10/27	Holmes
Van Newkirk v. McLain	6/20/40	Frankfurter
Waller, Ex Parte	6/27/42	Frankfurter
Mallonee v. Fahey	11/20/52	Douglas
Yanish v. Barber	5/16/53	Douglas
Rosenberg v. United States	6/17/53	Douglas
Carlisle v. Landon	8/5/53	Douglas
Stanard v. Olesen	5/22/54	Douglas
Herzog v. United States	2/11/55	Douglas
Cooper v. New York	7/7/55	Harlan
Breswick & Co. v. United States	8/1/55	Harlan
Long Beach Fed Sav. & Loan Assn. v. Federal Home Loan Bank	10/31/55	Douglas
Noto v. United States	11/21/55	Harlan
Wolcher v. United States	12/31/55	Douglas
Edwards v. New York	6/25/56	Harlan
Panama Canal Co. v. Grace Lines, Inc.	5/7/57	Harlan
Di Candia v. United States	1/20/58	Harlan
Tuscarora Nation of Indians v. Power Authority	9/8/58	Harlan
Appalachian Power Co. v. American Inst. of CPA's	7/7/59	Brennan
Kake v. Egan	7/11/59	Brennan
English v. Cunningham	8/4/59	Frankfurter
Fernandez v. United States	2/25/61	Harlan
Board of Education v. Taylor	8/30/61	Brennan
Carbo v. United States	3/19/62	Douglas
Sica v. United States	3/19/62	Douglas
Arrow Transportation Co. v. Southern Railway	8/17/62	Black
United States v. FMC Corp.	8/9/63	Goldberg
Williams v. Rhodes	9/10/68	Stewart
Rockefeller v. Socialist Workers Party	7/22/70	Harlan
Gomperts v. Chase	9/10/71	Douglas
Cousins v. Wigoda	7/1/72	Rehnquist
Russo v. Byrne	7/29/72	Douglas
Holtzman v. Schlesinger	8/1/73	Marshall
Holtzman v. Schlesinger	8/4/73	Douglas
Smith v United States	9/11/75	Douglas
Chamber of Commerce of the U.S. v. Legal Aid Society	9/29/75	Douglas
New York v. Kleppe	8/19/76	Marshall
Beame v. Friends of the Earth	8/5/77	Marshall
Blum v. Caldwell	5/6/80	Marshall

IN CHAMBERS OPINIONS INDEX BY TOPIC

ABORTION
Califano v. McRae
Doe v. Smith
Edwards v. Hope Medical Group
Planned Parenthood of Southeastern Pa. v. Casey
Reproductive Services, Inc. v. Walker, 439 U.S. 1307 (1978)
Williams v. Zbaraz

ABUSE OF DISCRETION
Albanese v. United States
Kemp v. Smith, 463 U.S. 1344 (1983)
Kemp v. Smith, 463 U.S. 1321 (1983)
Patterson v. United States
Railway Express Agency Inc. v. United States

ACTS OF CONGRESS
Administrative Procedure Act
Stanard v. Olesen

Adolescent Family Life Act
Bowen v. Kendrick

Alaska Statehood Act
Kake v. Egan

All Writs Act
Atiyeh v. Capps
Northern Cal. Power Agency v. Grace Geothermal Corp.
Ohio Citizens for Responsible Energy Inc. v. Nuclear Reg. Comm'n

Atomic Energy Act
Rosenberg v. United States

Civil Rights Act of 1964
Heart of Atlanta Motel v. United States
Katzenbach v. McClung

Civilian Aeronautics Act of 1938
Twentieth Century Airlines Inc. v. Ryan

Clayton Act
California v. American Stores Co.
United States v. FMC Corp.

Clean Air Act
Beame v. Friends of the Earth
Thomas v. Sierra Club

Coastal Zone Management Act
Clark v. California

CFTA
CFTC v. British Am. Commodity Options

ERISA
Barnes v. E-Systems, Inc

Fair Labor Standards Act
National League of Cities v. Brennan

FOIA
Bureau of Economic Analysis v. Long
Chamber of Commerce of the U.S. v. Legal Aid Society
John Doe Agency v. John Doe Corp.
Labor Board v. Getman

Immigration Reform & Control Act of 1986
INS v. Legalization Assistance Project of Los Angeles County

Immunity Act of 1954
Bart, In re

Indian Civil Rights Act
National Farmers Union Ins. Co. v. Crow Tribe, 468 U.S. 1315 (1984)

Interstate Commerce Act
Aberdeen & Rockfish R. Co. v. SCRAP
Arrow Transportation Co. v. Southern Railway, 83 S. Ct. 3 (1962)
Arrow Transportation Co. v. Southern Railway, 83 S. Ct. 1 (1962)

Medicare Act
Schweiker v. McClure

National Labor Relations Act
McLeod v. General Elec. Co.

Presumed Constitutional
Bowen v. Kendrick
Brennan v. United States Postal Service
Marshall v. Barlow's, Inc.
Schweiker v. McClure
Walters v. National Assn. of Radiation Survivors

Railway Labor Act
Western Airlines, Inc. v. Teamsters

Ready Reserve Act
Smith v. Ritchey

Selective Service Act
Rostker v. Goldberg

Tax Injunction Act
Barnes v. E-Systems Inc.

Voting Rights Act
Campos v. Houston
Lucas v. Townsend
McDaniel v. Sanchez

ADOPTION
DeBoer v. DeBoer
Goldman v. Fogarty
Marten v. Thies
O'Connell v. Kirchner
Sklaroff v. Skeadas

APPEAL PENDING BELOW
Atiyeh v. Capps
Becker v. United States
Beltran v. Smith
Bureau of Economic Analysis v. Long
Certain Named and Unnamed Children v. Texas
Chestnut v. New York
Coleman v. Paccar, Inc.
Drifka v. Brainard
Farr v. Pitchess
Harris v. United States, 404 U.S. 1232 (1971)
Heckler v. Lopez
Heckler v. Redbud Hospital Dist.
Henry v. Warner
INS v. Legalization Assistance Project of Los Angeles County
Jaffree v. Board of School Comm'rs of Mobile County
Guey Heung Lee v. Johnson
Lopez v. United States
Mecum v. United States
Metropolitan County Bd. of Ed. v. Kelley
Montgomery v. Jefferson
Moore v. Brown
Northern Cal. Power Agency v. Grace Geothermal Corp.
O'Connor v. Board of Ed. of School Dist. 23
Packwood v. Senate Select Comm. on Ethics
Parisi v. Davidson
Pasadena City Bd. of Ed. v. Spangler
Renaissance Arcade and Bookstore v. Cook County
Ruckelshaus v. Monsanto Co.
Scaggs v. Larsen
Smith v. Ritchey
Smith v. United States
Stanard v. Olesen
Thomas v. Sierra Club
Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301 (1974)
Warm Springs Dam Task Force v. Gribble, 439 U.S. 1392 (1978)
Willhauck v. Flanagan
Winters v. United States, 89 S. Ct. 57 (1968)

ANTITRUST ISSUES
American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount
Haywood v. National Basketball Assn.
International Boxing Club v. United States
National Collegiate Athletic Assn. v. Bd. of Regents of U. of Okla.
United States v. FMC Corp.
United States v. United Liquors Corp.

ARMED FORCES
Conscientious Objector
Clark v. United States
Jones v. Lemond
Lopez v. United States
Quinn v. Laird
Parisi v. Davidson

Discharge
Peeples v. Brown

Draft
Pryor v. United States
Sellers v. United States

Exhaustion Doctrine
Noyd v. Bond

Habeas Corpus
Levy v. Parker
Locks v. Commanding General, Sixth Army
Scaggs v. Larsen

Involvement in Cambodia
Holtzman v. Schlesinger, 414 U.S. 1304 (1973)
Holtzman v. Schlesinger, 414 U.S. 1316 (1973)

Retention
Hayes, Ex parte

Shipment Overseas
Drifka v. Brainard
Orloff v. Willoughby
Parisi v. Davidson
Smith v. Ritchey
Winters v. United States, 89 S. Ct. 34 (1968)
Winters v. United States, 89 S. Ct. 57 (1968)

ATTORNEY'S FEES
Riverside v. Rivera

BAIL
Application for
Akel v. New York
Albanese v. United States
Alcorcha v. California
Aronson v. May
Bandy v. U.S., 81 S. Ct. 197 (1960)
Bandy v. U.S., 81 S. Ct. 25 (1960)
Bandy v. U.S., 82 S. Ct. 11 (1961)
Bateman v. Arizona
Baytops v. New Jersey
Beyer v. United States
Bletterman v. United States
Bowman v. United States
Brussel v. United States
Carbo v. United States
Carlisle v. Landon
Chambers v. Mississippi
Clark v. United States
Cohen v. U. S., 82 S. Ct. 8 (1961)
Cohen v. U.S., 82 S. Ct. 518 (1962)
Costello v. United States
D'Aquino v. United States
Dennis v. United States
Di Candia v. United States
Ellis v. United States
Farr v. Pitchess
Febre v. United States
Fernandez v. United States
Field v. United States
Grand Jury Proceedings (Lewis, Applicant), In re
Guterma v. United States
Harris v. United States, 404 U.S. 1232 (1971)
Herzog v. United States
Truong Dinh Hung v. United States
Johnson, In re

Julian v. United States
Leigh v. United States
Levy v. Parker
Lopez v. United States
Marcello v. United States
Mathis v. United States
McGee v. Alaska
Mecom v. United States
Morison v. United States
Motlow v. United States
Noto v. United States
Patterson v. United States
Perez v. United States
Pirinsky, In re
Rehman v. California
Reynolds v. United States
Roth v. United States
Sellers v. United States
Sica v. United States
Smith v. Yeager
Stickel v. United States
Tierney v. United States
Tomaiolo v. United States
United States ex rel. Cerullo v. Follette
United States v. Allied Stevedoring Corp.
Uphaus v. Wyman
Valenti v. Specter
Ward v. United States
Williamson v. United States
Wolcher v. United States
Yanish v. Barber

Authority to Grant
Alcorcha v. California
Bandy v. U.S., 82 S. Ct. 11 (1961)
Johnson, In re
Pirinsky, In re

Reasons/Standards for Granting
Aronson v. May
Carbo v. United States
D'Aquino v. United States
Harris v. United States, 404 U.S. 1232 (1971)
Herzog v. United States
Leigh v. United States
Motlow v. United States
Reynolds v. United States
Sellers v. United States
Sica v. United States
Ward v. United States

BOND REQUIRED
Arrow Transportation Co. v. Southern Railway, 83 S. Ct. 3 (1962)
Bart, In re
Bandy v. U.S., 81 S. Ct. 25 (1960)
Breswick & Co. v. United States
California v. American Stores Co.
Twentieth Century Airlines Inc. v. Ryan
Carlisle v. Landon
Cohen v. U.S., 82 S. Ct. 526 (1962)
Cohen v. U.S., 82 S. Ct. 518 (1962)
Costello v. United States
Herzog v. United States
Noto v. United States
Roth v. United States
Sica v. United States
Steinberg v. United States

CAPITAL CASE
Autry v. Estelle
Blodgett v. Campbell
Bloeth v. New York
Burwell v. California
California v. Brown
California v. Hamilton
California v. Harris
California v. Ramos
Cooper v. New York
Eckwerth v. New York, 79 S. Ct. 894 (1959)
Eckwerth v. New York, 79 S. Ct. 755 (1959)
Edwards v. New York, 76 S. Ct. 1058 (1956)
Edwards v. New York, 76 S. Ct. 538 (1956)
Evans v. Alabama
Gregg v. Georgia
Grubbs v. Delo
Jackson v. New York
Keith v. New York
Kemp v. Smith, 463 U.S. 1321 (1983)
Kemp v. Smith, 463 U.S. 1344 (1983)
La Marca v. New York

Madden v. Texas
McDonald v. Missouri
McGee v. Eyman
Mitchell v. California
Netherland v. Tuggle
Netherland v. Gray
Penry v. Texas
Richardson v. New York
Richmond v. Arizona
Rodriguez v. Texas
Rosenberg v. United States
Spenkelink v. Wainwright, 442 U.S. 1301 (1979)
Spenkelink v. Wainwright, 442 U.S. 1308 (1979)
Stickney v. Texas
White v. Florida

Automatic Stay Rejected
Netherland v. Gray

Direct Review
Cole v. Texas
McDonald v. Missouri
Rodriguez v. Texas
Williams v. Missouri

Next Friend Status
Evans v. Bennett
Lenhard v. Wolff, 444 U.S. 1303 (1979)
Lenhard v. Wolff, 444 U.S. 1306 (1979)

CERTIFICATE OF NECESSITY
Meeropol v. Nizer

CERTIFICATE OF PROBABLE CAUSE
Autry v. Estelle
Burwell v. California
McCarthy v. Harper
Rosoto v. Warden

CERTIORARI
Denied
Jimenez v. United States District Court
Kadans v. Collins
Pacific Tel. & Tel. Co. v. Public Utilities Comm'n of Cal.
Rosoto v. Warden

Denied in Similar Case
General Dynamic Convair Aerospace Div. v. Anderson
Drifka v. Brainard

Granted
California v. Ramos
Clark v. California
Edelman v. Jordan
Heckler v. Turner

Granted in Similar Case
Berg, In re
California v. Velasquez
Chestnut v. New York
Costello v. United States
Pasadena City Bd. of Ed. v. Spangler

Pending
Eckwerth v. New York, 79 S. Ct. 894 (1959)
Evans v. Alabama
Keith v. New York
Mincey v. Arizona
Noto v. United States
Richardson v. New York

Suspension of Order Denying
Flynn v. United States
Richmond v. Arizona

Unlikely to be Granted
Appalachian Power Co. v. American Inst. of CPA's
Curry v. Baker
Kentucky v. Stincer

CIRCUIT JUSTICE
Abstain
Califano v. McRae

Authority to Act
Blodgett v. Campbell

Breswick & Co. v. United States
CFTC v. British Am. Commodity Options
Cousins v. Wigoda
Equitable Office Bldg. Corp., In re
Grinnell Corp. v. United States
Hawaii Housing Auth. v. Midkiff
Johnson, In re
Kimble v. Swackhamer
Locks v. Commanding General, Sixth Army
Meeropol v. Nizer
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978)
New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978)
Sacco v. Massachusetts
Smith v. Yeager
Socialist Labor Party v. Rhodes, 89 S. Ct. 4 (1968)
U.S. ex rel. Norris v. Swope
Turner Broadcasting System, Inc. v. FCC
Wasmuth v. Allen

Conferred with other Justices
Barnstone v. University of Houston
Evans v. Alabama
Graves v. Barnes
Hughes v. Thompson
Katzenbach v. McClung
McCarthy v. Briscoe, 429 U.S. 1316 (1976)
McCarthy v. Briscoe, 429 U.S. 1317 (1976)
McGee v. Eyman
Meredith v. Fair
Noto v. United States
Richmond v. Arizona
Schlesinger v. Holtzman, 414 U.S. 1321 (1973)
Socialist Labor Party v. Rhodes, 89 S. Ct. 4 (1968)
Spenkelink v. Wainwright, 442 U.S. 1301 (1979)
Williams v. Rhodes

Jurisdiction of
Barthuli v. Board of Trustees of Jefferson School Dist.
M.I.C. Ltd. v. Bedford Township
Pacific Union Conf. of Seventh-Day Adventists v. Marshall
Prudential Fed. Sav. & Loan Assn. v. Flanigan
Rosado v. Wyman

Reasons for Granting Relief
Aberdeen & Rockfish R. Co. v. SCRAP
American Trucking Assns., Inc. v. Gray
Araneta v. United States
Barnes v. E-Systems, Inc.
Bellotti v. Latino Political Action Comm.
Brennan v. United States Postal Serv.
Buchanan v. Evans
California v. Riegler
Capital Cities Media, Inc. v. Toole
Boston v. Anderson
Cohen v. U.S., 82 S. Ct. 8 (1961)
Corsetti v. Massachusetts
Curry v. Baker
Edwards v. Hope Medical Group
Fare v. Michael C.
General Dynamic Convair Aerospace Div. v. Anderson
Graves v. Barnes
Heckler v. Lopez
Heckler v. Blankenship
Hicks v. Feiock
Houchins v. KQED Inc.
INS v. Legalization Assistance Project of Los Angeles County
John Doe Agency v. John Doe Corp.
Julian v. United States
Karcher v. Daggett
Ledbetter v. Baldwin
Lucas v. Townsend
Mahan v. Howell
McDaniel v. Sanchez
McGraw Hill Cos. Inc. v. Proctor & Gamble Co.
Miroyan v. United States
National Collegiate Athletic Assn. v. Bd. of Regents of U. of Okla.
Packwood v. Senate Select Comm. on Ethics
Planned Parenthood of Southeastern Pa. v. Casey

Republican State Central Comm. of Ariz. v. Ripon Society Inc.
Roche, In re
Rostker v. Goldberg
Rubin v. United States Independent Counsel
Ruckelshaus v. Monsanto Co.
United States Postal Service v. Letter Carriers
Whalen v. Roe
Williams v. Zbaraz
Wise v. Lipscomb

Role of
Alexander v. Board of Education
Board of Ed. of Los Angeles v. Superior Court of California
Corsetti v. Massachusetts
Ehrlichman v. Sirica
Evans v. Bennett
Gregory-Portland Independent School Dist. v. United States
Holtzman v. Schlesinger, 414 U.S. 1304 (1973)
Hortonville Joint School Dist. v. Hortonville Ed. Assn.
South Park Independent School Dist. v. United States

COMMERCE CLAUSE
American Trucking Assns., Inc. v. Gray

CONDITIONAL STAY
Albanese v. United States
Edwards v. New York, 76 S. Ct. 538 (1956)
La Marca v. New York
Seagram & Sons v. Hostetter
Sklaroff v. Skeadas
Tuscarora Nation of Indians v. Power Authority

CONTEMPT
Civil
Araneta v. United States
Baltimore City Dept. of Social Services v. Bouknight
Brussel v. United States
Farr v. Pitchess
Haner v. United States
Hicks v. Feiock
Mikutaitis v. United States
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978)
Patterson v. Superior Court of Cal.
Roche, In re
Russo v. United States
Sawyer v. Dollar
Tierney v. United States
Uphaus v. Wyman

Criminal
Dolman v. United States
Field v. United States
Grand Jury Proceedings (Lewis, Applicant), In re
Gruner v. Superior Court of Cal.
Patterson v. United States
Sacher v. United States

CRIMINAL PROCEEDINGS, STAY OF
Claiborne v. United States
Divans v. California, 434 U.S. 1303 (1977)
Mincey v. Arizona
O'Rourke v. Levine

DEFERENCE TO LOWER COURT
Bletterman v. United States
D'Aquino v. United States
Di Candia v. United States
Garcia-Mir v. Smith
Julian v. United States
Marten v. Thies
Mecom v. United States

DELAY
In Filing
Alexis I. Du Pont Sch. Dist. v. Evans
Beame v. Friends of the Earth
Brody v. United States
Conforte v. Commissioner

Cooper v. New York
Cunningham v. English
Evans v. Bennett
Fishman v. Schaffer
General Council of Fin. & Admin. v. Superior Court of Cal., 439 U.S. 1355 (1978)
O'Brien v. Skinner
Ruckelshaus v. Monsanto Co.
Socialist Labor Party v. Rhodes, 89 S. Ct. 3 (1968)
Westermann v. Nelson
Winston-Salem/Forsyth County Bd. of Ed. v. Scott

Unreasonable
Bureau of Econ. Analysis v. Long

DENIED WITHOUT PREJUDICE
Bandy v. U.S., 81 S. Ct. 197 (1960)
Baytops v. New Jersey
Grinnell Corp. v. United States
Hawaii Housing Auth. v. Midkiff
Krause v. Rhodes
McCarthy v. Briscoe, 429 U.S. 1316 (1976)
Murdaugh v. Livingston
Nebraska Press Assn. v. Stuart, 423 U.S. 1319 (1975)
Oden v. Brittain
New York Times Co. v. Jascalevich, 439 U.S. 1301 (1978)
Labor Board v. Getman
Rodriguez v. Texas

DEPORTATION
Garcia-Mir v. Smith
Nukk v. Shaughnessy
U.S. ex rel. Knauff v. McGrath
Yasa v. Esperdy

DESIGNATION OF CIRCUIT JUDGE
Van Newkirk v. McLain

DISSENT TO CHAMBERS OPINION
Schlesinger v. Holtzman, 414 U.S. 1321 (1973)

DOUBLE JEOPARDY CLAUSE
Cohen v. United States, 82 S. Ct. 518 (1962)
Divans v. California, 434 U.S. 1303 (1977)
Divans v. California, 439 U.S. 1367 (1978)
Julian v. United States
Willhauck v. Flanagan

EIGHTH AMENDMENT
Atiyeh v. Capps
Truong Dinh Hung v. United States
Graddick v. Newman

ELECTIONS
Campos v. Houston
Louisiana v. United States
Moore v. Brown
Owen v. Kennedy

Ballot Access
Bradley v. Lunding
Communist Party of Indiana v. Whitcomb
Davis v. Adams
Fishman v. Schaffer
Fowler v. Adams
Hayakawa v. Brown
McCarthy v. Briscoe, 439 U.S. 1317 (1976)
Montgomery v. Jefferson
Republican Party of Hawaii v. Mink
Rockefeller v. Socialist Workers Party
Socialist Labor Party v. Rhodes, 89 S. Ct. 3 (1968)
Westermann v. Nelson
Williams v. Rhodes

Ballot Initiative
Montanans for Balanced Federal Budget Comm. v. Harper
Uhler v. AFL-CIO

Election Enjoined
Bellotti v. Latino Political Action Comm.
Lucas v. Townsend
Oden v. Brittain

Filing Fees
Matthews v. Little

Reapportionment/Redistricting
Graves v. Barnes
Karcher v. Daggett
Mahan v. Howell
McDaniel v. Sanchez
Republican Nat'l Comm. v. Burton
Travia v. Lomenzo
Wise v. Lipscomb

Referendum
Boston v. Anderson
Kimble v. Swackhamer

State Laws
California v. Freeman
Curry v. Baker
Hayakawa v. Brown
Sacco v. Massachusetts

Voting Rights
O'Brien v. Skinner

ENLARGEMENT OF DEFENDANT
Foster v. Gilliam

EX POST FACTO
Portley v. Grossman

EXECUTION, STAY OF
Autry v. Estelle
Bloeth v. New York
Burwell v. California
Cole v. Texas
Cooper v. New York
Eckwerth v. New York, 79 S. Ct. 894 (1959)
Eckwerth v. New York, 79 S. Ct. 755 (1959)
Edwards v. New York, 76 S. Ct. 1058 (1956)
Edwards v. New York, 76 S. Ct. 538 (1956)
Evans v. Bennett
Evans v. Alabama
Grubbs v. Delo
Jackson v. New York
Keith v. New York
La Marca v. New York
Lenhard v. Wolff, 444 U.S. 1303 (1979)
Lenhard v. Wolff, 443 U.S. 1306 (1979)
McDonald v. Missouri
McGee v. Eyman
Mitchell v. California
Richardson v. New York
Richmond v. Arizona
Rosenberg v. United States
Spenkelink v. Wainwright, 442 U.S. 1301 (1979)
Waller, Ex parte
Williams v. Missouri

EXTENSION OF TIME
Brody v. United States
Carter v. United States
Goldman v. Fogarty
Kleem v. INS
Knickerbocker Printing Corp. v. United States
Madden v. Texas
Mississippi v. Turner
Penry v. Texas
U.S. ex rel. Cerullo v. Follette

EXTRADITION
Jimenez v. United States District Court
Little v. Ciuros
Pacileo v. Walker

EXTRAORDINARY CIRCUMSTANCES RELIEF NOT SOUGHT BELOW
Brussel v. United States
Heckler v. Turner
Nebraska Press Assn. v. Stuart, 423 U.S. 1327 (1975)
Volkswagonwerk A.G. v. Falzon
Western Airlines, Inc. v. Teamsters

FIFTH AMENDMENT
Araneta v. United States
Baltimore City Dept. of Social Services v. Bouknight
Fare v. Michael C.

Haner v. United States
Mikutaitis v. United States
Rostker v. Goldberg

FINAL DECISION REQUIRED
Bateman v. Arizona
Deaver v. United States
Doe v. Smith
General Council of Fin. & Admin. v. Superior Court of Cal., 439 U.S. 1369 (1978)
Hortonville Joint School Dist. v. Hortonville Ed. Assn.
Liles v. Nebraska
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978)
New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978)
Ohio Citizens for Responsible Energy Inc. v. Nuclear Reg. Comm'n
Pacific Union Conf. of Seventh-Day Adventists v. Marshall
Rosenblatt v. American Cyanamid Co.
Twentieth Century Airlines Inc. v. Ryan
Valenti v. Spector

FIRST AMENDMENT
Bonura v. CBS Inc.
Dexter v. Schrunk
Farr v. Pitchess
Grand Jury Proceedings (Lewis, Applicant), In re
Gruner v. Superior Court of Cal.
Houchins v. KQED Inc.
M.I.C. Ltd. v. Bedford Township
McGraw Hill Cos. Inc. v. Proctor & Gamble Co.
National Socialist Party of America v. Skokie
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978)
New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978)
Pacific Union Conf. of Seventh-Day Adventists v. Marshall
Patterson v. Superior Court of Cal.
Roche, In re
Socialist Workers Party v. Attorney General
Turner Broadcasting System, Inc. v. FCC
Williamson v. United States

Establishment Clause
Catholic League v. Feminist Women's Health Center, Inc.
Jaffree v. Board of School Comm'rs of Mobile County

Prior Restraint
Capital Cities Media, Inc. v. Toole
CBS Inc. v. Davis
KPNX Broadcasting Co. v. Arizona Superior Court
Nebraska Press Assn. v. Stuart, 423 U.S. 1319 (1975)
Nebraska Press Assn. v. Stuart, 423 U.S. 1327 (1975)
Times-Picayune Publishing Corp. v. Schulingkamp

FOURTEENTH AMENDMENT
Certain Named and Unnamed Children v. Texas
Karr v. Schmidt
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.
O'Connor v. Board of Ed. of School Dist. 23

FOURTH AMENDMENT
Berg, In re
California v. Riegler
Clements v. Logan
Harris v. United States, 400 U.S. 1211 (1970)
Miroyan v. United States
Russo v. Byrne
Steinberg v. United States
Tierney v. United States

GOOD CAUSE, EXTENSIONS OF TIME
Kleem v. INS
Madden v. Texas

Mississippi v. Turner
Penry v. Texas

INDEPENDENT COUNSEL
Deaver v. United States
Dow Jones & Co. Inc., In re
Rubin v. United States Independent Counsel

INJUNCTION
Application for
American Trucking Assns., Inc. v. Gray
Campos v. Houston
Communist Party of Indiana v. Whitcomb
Fishman v. Schaffer
George F. Alger Co. v. Peck
Gomperts v. Chase
Krause v. Rhodes
Lenhard v. Wolff, 444 U.S. 1306 (1979)
McCarthy v. Briscoe, 439 U.S. 1317 (1976)
Oden v. Brittain
Ohio Citizens for Responsible Energy Inc. v. Nuclear Reg. Comm'n
Peeples v. Brown
Railroad Signalmen v. Southeastern Pa. Transportation Authority
Renaissance Arcade and Bookstore v. Cook County
Socialist Labor Party v. Rhodes, 89 S. Ct. 3 (1968)
Turner Broadcasting System, Inc. v. FCC
Westermann v. Nelson
Williams v. Rhodes

Denied Below
Synanon Foundation, Inc. v. California

Stay of
Aberdeen & Rockfish R. Co. v. SCRAP
Atiyeh v. Capps
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng.
Breswick & Co. v. United States
Capitol Square Review & Advisory Bd. v. Pinette
CBS Inc. v. Davis
Clark v. California
Heckler v. Lopez
Heckler v. Redbud Hospital Dist.
Houchins v. KQED Inc.
Long Beach Fed. Sav. & Loan Assn. v. Federal Home Loan Bank
Los Angeles v. Lyons
Marshall v. Barlow's, Inc.
M.I.C. Ltd. v. Bedford Township
Moore v. Brown
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.
Republican State Central Comm. of Ariz. v. Ripon Society Inc.
Reynolds v. International Amateur Athletic Federation
Walters v. National Assn. of Radiation Survivors

IRREPARABLE HARM/INJURY
Breswick & Co. v. United States
California v. American Stores Co.
California v. Winson
Capitol Square Review & Advisory Bd. v. Pinette
Davis v. Adams
FCC v. Radiofone Inc.
Finance Comm. to Re-elect the President v. Waddy
Fowler v. Adams
Heckler v. Turner
Garcia-Mir v. Smith
George F. Alger Co. v. Peck
Graddick v. Newman
Kake v. Egan
Ledbetter v. Baldwin
Long Beach Fed. Sav. & Loan Assn. v. Federal Home Loan Bank
National Broadcasting Co. v. Niemi
Nebraska Press Assn. v. Stuart, 423 U.S. 1327 (1975)
New York Times Co. v. Jascalevich, 439 U.S. 1301 (1978)
Railway Labor Executives' Assn. v. Gibbons
Reynolds v. International Amateur Athletic Federation

Schweiker v. McClure
Twentieth Century Airlines Inc. v. Ryan
United States v. United Liquors Corp.
Wasmuth v. Allen
White v. Florida

JURIES
Grand Jury Proceedings
Bracy v. United States
Patterson v. Superior Court of Cal.
Russo v. United States
Smith v. United States

Grand Jury Testimony
A.B. Chance Co. v. Atlantic City Elec. Co.
Bart, In re

Instructions
California v. Brown
California v. Hamilton

Jurors
California v. Harris
Capital Cities Media, Inc. v. Toole

JURISDICTION
Final Order Required
Bateman v. Arizona
Deaver v. United States
Doe v. Smith
General Council of Fin. & Admin. v. Superior Court of Cal., 439 U.S. 1369 (1978)
Hortonville Joint School Dist. v. Hortonville Ed. Assn.
Liles v. Nebraska
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978)
New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978)
Ohio Citizens for Responsible Energy Inc. v. Nuclear Reg. Comm'n
Pacific Union Conf. of Seventh-Day Adventists v. Marshall
Rosenblatt v. American Cyanamid Co.
Twentieth Century Airlines Inc. v. Ryan
Valenti v. Spector

Lack of by Lower Court
Hawaii Housing Authority v. Midkiff
Heckler v. Redbud Hospital Dist.
McCarthy v. Harper
National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 1301 (1985)
Office of Personnel Management v. Government Employees
Public Service Bd. v. United States

Lack of by Supreme Court
Board of Ed. of Los Angeles v. Superior Court of Cal.
Harris v. United States, 400 U.S. 1211 (1970)
McCarthy v. Briscoe, 429 U.S. 1316 (1976)
Renaissance Arcade and Bookstore v. Cook County
Volvo of America Corp. v. Schwarzer

Preservation of Court's
Bart, In re
Becker v. United States
Garrison v. Hudson
National Socialist Party of America v. Skokie
Orloff v. Willoughby
Tate v. Rose
Sawyer v. Dollar
United States ex rel. Knauff v. McGrath

Relief Must be Sought Below
Dolman v. United States
Drummond v. Acree
Nebraska Press Assn. v. Stuart, 423 U.S. 1319 (1975)
Oden v. Brittain
United States ex rel. Cerullo v. Follette
United States ex rel. Norris v. Swope
Warm Springs Dam Task Force v. Gribble, 439 U.S. 1392 (1978)

Winston-Salem/Forsyth County Bd. of Ed. v. Scott

LABOR LAW
Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng.
Commonwealth Oil Ref. Co. v. Lummus Co.
Cunningham v. English
English v. Cunningham
McLeod v. General Elec. Co.
Mori v. Boilermakers
Railway Labor Executives' Assn. v. Gibbons
United States Postal Service v. Letter Carriers
Western Airlines, Inc. v. Teamsters

LOWER COURT
Application for Relief Pending Below
KPNX Broadcasting Co. v. Arizona Superior Court

Explanation for Decision not Given
Febre v. United States

Extraordinary Circumstances no Lower Court Ruling on Stay
Brussel v. United States
Heckler v. Turner
Nebraska Press Assn. v. Stuart, 423 U.S. 1327 (1975)
Volkswagonwerk A.G. v. Falzon
Western Airlines, Inc. v. Teamsters

Relief not Sought Below
Dolman v. United States
Drummond v. Acree
Nebraska Press Assn. v. Stuart, 423 U.S. 1319 (1975)
Oden v. Brittain
United States ex rel. Cerullo v. Follette
United States ex rel. Norris v. Swope
Warm Springs Dam Task Force v. Gribble, 439 U.S. 1392 (1978)
Winston-Salem/Forsyth County Bd. of Ed. v. Scott

MANDATE
Recall
Wise v. Lipscomb

Stay of
Appalachian Power Co. v. American Inst. of CPA's
Birtcher Corp. v. Diapulse Corp.
Blum v. Caldwell
Board of Education v. Taylor
California v. American Stores Co.
Curry v. Baker
Dennis v. United States
Edelman. v. Jordan
Gregg v. Georgia
McDaniel v. Sanchez
Mikutaitis v. United States
Miroyan v. United States
Montanans for Balanced Federal Budget Comm. v. Harper
National Farmers Union Ins. Co. v. Crow Tribe, 468 U.S. 1315 (1984)
Panama Canal Co. v. Grace Lines, Inc.
Pryor v. United States
Sacher v. United States
Sumner v. Mata
Tri-Continental Financial Corp. v. United States
Tuscarora Nation of Indians v. Power Authority

MIRANDA WARNINGS
California v. Braeseke
California v. Prysock
Fare v. Michael C.

PRIVACY RIGHTS
Whalen v. Roe

REAPPLICATION
Previously Denied
Alexis I. Du Pont Sch. Dist. v. Evans

Bandy v. United States, 81 S. Ct. 25 (1960)
Bustop. Inc. v. Board of Ed. of Los Angeles, 439 U.S. 1384 (1978)
Clements v. Logan
Columbus Bd. of Ed. v. Penick
Dayton Bd. of Ed. v. Brinkman, 439 U.S. 1358 (1978)
Drummond v. Acree
Waller, Ex parte
Gregory-Portland Independent School Dist. v. United States
Holtzman v. Schlesinger, 414 U.S. 1316 (1973)
Lenhard v. Wolff, 444 U.S. 1303 (1979)
Levy v. Parker
Little v. Ciuros
Nebraska Press Assn. v. Stuart, 423 U.S. 1327 (1975)
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978)
New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978)
Noyd v. Bond
Reproductive Services, Inc. v. Walker, 439 U.S. 1307 (1978)
Reproductive Services, Inc. v. Walker, 439 U.S. 1354 (1978)
Republican State Central Comm. of Ariz. v. Ripon Society Inc.
Spenkelink v. Wainwright, 442 U.S. 1308 (1979)
Stickney v. Texas
Tierney v. United States
Travia v. Lomenzo

Previously Granted
Chambers v. Mississippi

RECUSUAL
Hanrahan v. Hampton
Laird v. Tatum

REFER TO FULL COURT
Marcello v. United States

REHEARING, STAY PENDING
Dennis v. United States
Flynn v. United States
Gregg v. Georgia
Kadans v. Collins
Richmond v. Arizona
Sacher v. United States

RESTRAINING ORDER, STAY OF
Land v. Dollar

REVERSED PREVIOUS JUSTICE
Schlesinger v. Holtzman, 414 U.S. 1321 (1973)

SCHOOL DESEGREGATION/ SEGREGATION
Alexander v. Board of Education
Alexis I. Du Pont Sch. Dist. v. Evans
Board of Ed. of Los Angeles v. Superior Court of Cal.
Board of School Comm'rs v. Davis
Board of Education v. Taylor
Buchanan v. Evans
Bustop, Inc. v. Board of Ed. of Los Angeles, 439 U.S. 1380 (1978)
Columbus Bd. of Ed. v. Penick
Corpus Christi School Dist. v. Cisneros
Dayton Bd. of Ed. v. Brinkman, 439 U.S. 1358 (1978)
Dayton Bd. of Ed. v. Brinkman, 439 U.S. 1357 (1978)
Drummond v. Acree
Edgar v. United States
Gomperts v. Chase
Gregory-Portland Independent School Dist. v. United States
Jefferson Parish School Bd. v. Dandridge
Keyes v. School Dist. No. 1, Denver
Guey Heung Lee v. Johnson
Metropolitan County Bd. of Ed. v. Kelley
Pasadena City Bd. of Ed. v. Spangler
South Park Independent School Dist. v. United States
Vetterli v. United States District Court

Winston-Salem/Forsyth County Bd. of Ed. v. Scott

SIXTH AMENDMENT
Berg, In re
Kentucky v. Stincer
Russo v. Byrne
Tierney v. United States

STATE LAW QUESTION
Akel v. New York
Birtcher Corp. v. Diapulse Corp.
Bustop, Inc. v. Board of Ed. of Los Angeles, 439 U.S. 1380 (1978)
Catholic League v. Feminist Women's Health Center, Inc.
DeBoer v. DeBoer
Montanans for Balanced Federal Budget Comm. v. Harper
National Broadcasting Co. v. Niemi
Pacific Tel. & Tel. Co. v. Public Utilities Comm'n of Cal.
Republican National Committee v. Burton
Uhler v. AFL-CIO
Uphaus v. Wyman

SUBPOENA
New York Times Co. v. Jascalevich, 439 U.S. 1301 (1978)
New York Times Co. v. Jascalevich, 439 U.S. 1317 (1978)
Packwood v. Senate Select Comm. on Ethics
Rubin v. United States Independent Counsel

TEMPORARY STAY
Clements v. Logan
Cooper v. New York
Eckwerth v. New York, 79 S. Ct. 755 (1959)
Evans v. Atlantic Richfield Co.
Flynn v. United States
General Council of Fin. & Admin. v. Superior Court of Cal., 439 U.S. 1355 (1978)
National League of Cities v. Brennan
Rockefeller v. Socialist Workers Party
Russo v. United States
Strickland Transportation Co. v. United States
Yasa v. Esperdy

TIME TO ACT
Capitol Square Review & Advisory Bd. v. Pinette
Columbus Bd. of Ed. v. Penick
Grubbs v. Delo
Levy v. Parker
Los Angeles NAACP v. Los Angeles Unified School Dist.
Louisiana v. United States
Matthews v. Little
Montgomery v. Jefferson
Moore v. Brown
National League of Cities v. Brennan
Republican Party of Hawaii v. Mink

VACATE STAY, APPLICATIONS TO
Alexander v. Board of Education
Barnstone v. University of Houston
Block v. North Side Lumber Co.
Bonura v. CBS Inc.
Certain Named and Unnamed Children v. Texas
CFTC v. British Am. Commodity Options
Coleman v. Paccar, Inc.
FCC v. Radiofone Inc.
Garcia-Mir v. Smith
Haywood v. National Basketball Assn.
Henry v. Warner
Holtzman v. Schlesinger, 414 U.S. 1304 (1973)
Holtzman v. Schlesinger, 414 U.S. 1316 (1973)
Karr v. Schmidt
Keyes v. School Dist. No. 1, Denver
King v. Smith
Mallonee v. Fahey
Meredith v. Fair
Metropolitan County Bd. of Ed. v. Kelley
Murdaugh v. Livingston
National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 1301 (1985)

New York v. Kleppe
O'Connor v. Board of Ed. of School Dist. 23
Office of Personnel Management v. Government Employees
Orloff v. Willoughby

Authority to Vacate
Certain Named and Unnamed Children v. Texas
CFTC v. British Am. Commodity Options
Coleman v. Paccar, Inc.
Holtzman v. Schlesinger, 414 U.S. 1304 (1973)
Meredith v. Fair
New York v. Kleppe
O'Connor v. Board of Ed. of School Dist. 23

Remand Order
Blodgett v. Campbell

Stay Of Execution
Kemp v. Smith, 463 U.S. 1344 (1983)
Kemp v. Smith, 463 U.S. 1321 (1983)
Netherland v. Tuggle
Netherland v. Gray

WRIT OF HABEAS CORPUS
Goldsmith v. Zerbst
Locks v. Commanding General, Sixth Army
Sacco v. Hendry
United States ex rel. Norris v. Swope

Stay, Issuance of
Foster v. Gilliam
Garrison v. Hudson
O'Connell v. Kirchner
Tate v. Rose

Transfer
Hayes, Ex parte

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1925.

MOTLOW ET AL. v. UNITED STATES

[February 14, 1926.]

MR. JUSTICE BUTLER.

In the matter of the petitions of Harry Levin and nine other defendants to be admitted to bail.

February 3, 1926, there was presented to me, as Circuit Justice of the Seventh circuit, the petitions for Harry Levin, Morris Multin, Michael Whalen, Daniel O'Neil, Robert E. Walker, John Connors, Anthony Foley, Edward J. O'Hare, George R. Landon, and William Lucking, to be admitted to bail. Their respective attorneys, T.J. Rowe, Esq., Henry Rowe, Esq., William Baer, Esq., Charles A. Houts, Esq., Thomas Pogue, Esq., Moses B. Lairy, Esq., A Julius Frieberg, [Publisher's note: "A Julius Frieberg" should be "A. Julius Freiberg".] Esq., and Levi Cooke, Esq., appeared in support of the petition. Notice having been given, Albert Ward, Esq., United States attorney for the district of Indiana, and Howard T. Jones, and Mahlon D. Kiefer, Esq., special assistants to the Attorney General, appeared in opposition.

October 31, 1925, in the United States District Court for the District of Indiana, an indictment was returned against thirty-nine persons, including the petitioners. It charged that the defendants conspired with each other and with divers other persons, whose names were unknown, to violate the National Prohibition Act (Comp. St. Ann. Supp. 1923, Sec. 10138 ¼ et seq.) and particularly section 3 of title 2 thereof (section 10138 1/2aa [Publisher's note: "10138 1/2aa" should be "10138 ½ aa".], Comp. St. Ann. Supp. 1923). Overt acts were alleged to have been committed in Ohio, Indiana, and Missouri. On the return of the indictment, petitioners appeared and were admitted to bail. The trial commenced on December 14, 1925, and ended on the 18th day of that month. Petitioners were found guilty. After the verdict, they were allowed to remain at large on

bail until December 30, 1925. On that day, they made motions for a new trial and in arrest of judgment. The motions were denied, and they were sentenced to the penitentiary at Leavenworth, and to pay fines, as follows:

Name	Terms of Imprisonment	Fine
Harry Levin	2 years	$5,000
Morris Multin	2 years	5,000
Michael Whalen	2 years	5,000
Daniel O'Neil	15 months	500
Robert E. Walker	15 months	1,000
John Connors	15 months	1,000
Anthony Foley	15 months	1,500
Edward J. O'Hare	1 year & 1 day	500
George R. Landon	1 year & 1 day	2,500
William Lucking	1 year & 1 day	2,500

On the same day, in order to take the case to the Circuit Court of Appeals for review, petitioners filed assignments of errors and petitions for writs of error. The writs were allowed, and citations were issued and served. Thereupon, petitioners applied to the District Court for bail pending a determination of the case in the Circuit Court of Appeals. The application was denied. In execution of the judgment, petitioners were committed to the penitentiary, and, pursuant to the sentences imposed they are now there imprisoned.

Petitioners insist that, by the proceedings after the verdict, the judgments were superseded, and that, as a matter of legal right, each of them was entitled to an order of supersedes and also entitled to be admitted to bail. They state that their assignments of errors are made in good faith and upon assurance of counsel that they are well founded in law. Applicants challenge the jurisdiction of the trial court, the competency of certain witnesses called by the government, the admissibility of some evidence introduced against them, and a part of the court's charge to the jury; and, in behalf of Landon and Lucking, it is earnestly claimed, that, as a matter of law, the evidence was not

sufficient to justify or sustain a verdict against them. Petitioners represent that they are proceeding with diligence to secure an early review of the case, and they say that they did not delay the trial; that, being on bail, they attended the trial as required, and made no attempt to escape or to evade any order of the court after conviction; that each of them has a fixed place of abode, and has been engaged in business in St. Louis; that none of them has ever been a fugitive from justice; and that each is able to give a bond in such reasonable amount as may be required. They aver, on information and belief, that it will require approximately a year to obtain decision in the Circuit Court of Appeals, and that, if bail is denied, the petitioner O'Hare, sentenced for one year and a day- - deducting the allowance for good behavior- - will have served his term before his writ of error can be determined, that the petitioners under sentence of 15 months will have served substantially all their time, and that those under sentence of 2 years will have served two–thirds of the [Publisher's note: The "the" preceding this note is surplus.] their sentences before such determination.

At the hearing, February 3, on this application, oral objections were made on behalf of the United States; and the United States attorney stated that, after denial of bail by the District Court, the petitioners on the next day, December 31, 1925, applied to the Circuit Court of Appeals to be admitted to bail, and that the application was denied. Time not to exceed 10 days was granted to enable him to present a copy of the record and papers in that court, together with a transcript of the minutes, if any were taken, of the hearing there had.

On February 13, the United States attorneys presented written objections, in substance, as follows: (1) The granting of bail is addressed to the discretion of the trial judge; (2) the application for bail was denied by the trial judge and later by two Circuit Judges; (3) the petitioners have not shown that the District Judge or Circuit Judges abused their discretion; (4) in the absence of a transcript of bill of exceptions, the discretion of the District Judge and Circuit Judges cannot be reviewed; (5) after conviction, every presumption is against the defendants, and decisions of the District Court upon discretionary matters should not be interfered with; (6) the enforcement of the criminal law demands that bail pending appeal should be denied, where it is apparent to the trial court that conviction is proper, and

appeal is prosecuted, not with the hope of new trial, but on frivolous grounds merely for delay. The United States attorneys also presented a copy of a letter of February 6, 1926, of the United States attorney, Mr. Ward, to Circuit Judges Anderson and Page, and their answer, dated February 9, 1926. It appears that no application was ever made to the Circuit Court of Appeals, but, on the day after sentence was imposed, some of the defendants - - and while it does not clearly appear, it may be assumed all the petitioners - - did apply for bail to Circuit Judges Page and Anderson. The applications were denied. No papers were filed, no record was made, and no minutes of what was said at the hearing were taken. However, the letter of the United States attorney to the Circuit Judges and their answer gives an account of the hearing.

Where a writ of error has been issued and citation has been served in a criminal case, the Circuit Justice is authorized to fix and allow bail. See sections 119, 120, 121, Judicial Code (Comp. St. Secs. 1111, 1112, 1113). In the exercise of its power to establish rules and regulations for the conduct of the business of the court (section 122, Judicial Code (Comp. St. Sec. 1114)), the Circuit Court of Appeals of the Seventh Circuit, by its rule 32, expressly declares:

"1. Writs of error from this court to review criminal cases tried in a District or Circuit court of the United States within this circuit, may be allowed in term time or in vacation by the Circuit Justice assigned to this circuit, or by any of the Circuit Judges within the circuit, or by any District Judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error."

"2. Where such writ of error is allowed in the criminal cases the District Court before which the accused was tried, or the District Judge of the district wherein he was tried, within his district, or the Circuit Justice assigned to this circuit, or any of the Circuit Judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail and to fix amount of such bail."

The First, Second, Third, Fifth, Sixth, and Eighth circuits have similar rules. See, respectively, 150 F. p. xlvi;

285 F.p. xvi; 224 F.p. x; 159 F.p. lxxxv; 202 F.p. viii; 188 F.p. xxii. These rules, in substance, follow rule 36 promulgated by the Supreme Court in 1891. See 139 U.S. 701, and also *In re Claasen*, 140 U.S. 200, 208.

The power to grant bail is attended by the duty to hear applications therefor.

As to supersedeas and bail after sentence. It is the purpose of the law - - and many statutes, federal and state, have been enacted- - to safeguard litigants so far as possible against erroneous judgments. Review in appellate courts is favored in all cases where the grounds on which it is claimed are assigned in good faith on advice of counsel that in law they are valid and well taken; and parties properly seeking review are not to be burdened by avoidable expense, loss, sacrifice or punishment. In cases of sentence to the penitentiary or to death, an order of supersedeas may be obtained as a matter of right and without giving security. R.S. Sec. 1007 (Comp. St. Sec. 1666); *In re Claasen*, supra, 140 U.S. 208; *Hudson v. Parker*, 156 U.S. 277, 283; *McKnight v. United States*, 113 F. 451, 452, 51 C.C.A. 285. The trial court allowed petitioners' writs of error and issued citations. It was not for that court, and it certainly did not assume, to pass upon the grounds on which review of the trial and of its judgement is sought.

As to bail. The Eighth Amendment provides that "excessive bail shall not be required." This implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail. The Ordinance of 1787 (U.S. Comp. St. 1918, p. 6) declares that:

"All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." Article 2.

Chief Justice Mason of the Supreme Court of Iowa, in *Hight v. United States*, Morris 407, 409, 43 Am. Dec. 111, 112, said:

'This is no new provision, but is in express terms incorporated into the constitutions of at least one-half of the states of the Union and is the rule of action in all the rest. It is merely declaratory of the common law of the United States." See *Re Thomas*, 93 P. 980, 20 Okl. 167, 39 L.R.A. (N.S.) 751, and note; page 65, Index Digest of State Constitutions (prepared for New York Constitutional Convention Commission, 1915).

Section 1015 of the Revised Statutes (Comp. St. Sec. 1679) provided:

"Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

By the preceding section (section 1014, being Comp. St. Sec. 1674), the officers so authorized are enumerated. The number empowered upon arrests to take bail indicates a purpose that bail may conveniently be given, and that it shall not be arbitrarily denied. And see 'R.S. Sec. 1016 (Comp. St. Sec. 1680). [Publisher's note: The single quotation mark preceding "R.S." is surplus.]

Petitioners argue that, as the language of the Constitution and statutes is general, bail is a matter of right after conviction pending review, as well as before trial. But the courts have drawn a distinction.

In *Hudson v. Parker*, supra, Mr. Justice Gray, speaking for the court, said (156 U.S. 285):

"The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.... (156 U.S. 287.) But, however it may be in a capital case, it is quite clear, in view of all the legislation on the subject of bail, the Congress must have intended that under the act of 1891 (Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 826, 827), in cases of crimes not capital and therefore bailable of right before conviction, bail might be taken, upon writ of error, by order of the proper court, justice, or judge.... Having the authority to order bail to be

taken, the same justice might either himself approve the bail bond; or he might order that such a bond should be taken in an amount fixed by him, the form of the bond and the sufficiency of the sureties to be passed upon by the court whose judgment was to be reviewed, or by a judge of that court; or he might leave the whole matter of bail to be dealt with by such court or judge." *McKnight v. United States*, supra, was heard by Circuit Judges Lurton (afterwards Mr. Justice Lurton of the Supreme Court), and Severens. It was there held that a writ of error under section 1007, in a case not capital, stays execution, but that the granting of writ does not involve the question whether the convicted defendant shall be detained or go on bail. It was also held that the court has power, and that it is generally its duty, to admit to bail after conviction for a crime not capital pending a writ of error. The opinion was written by Judge Lurton. It contains the following (page 453):

"Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief."

After citing and quoting from *Hudson v. Parker*, the opinion continues:

"The fact that bail has been refused by the trial judge, though not conclusive, is a fact which would make it more seemly, in the absence of some great urgency, that further application should be made to the appellate court which, by virtue of its appellate jurisdiction, may properly be called upon to make all proper orders for the custody of the defendant pending the hearing of his writ of error. We quite agree with the counsel for the government, that all presumption of innocence is gone after conviction, and that proceedings resorted to for the mere purpose of delay should be discouraged. We do not, however, deem it wise, or in harmony with the humane principles of our law, that proceedings to review alleged error committed upon the trial of a defendant should be so far discouraged as to altogether deny the right to bail in that class of cases deemed bailable before conviction. That is [Publisher's note: "is" should be "it".] should be made the interest of defendants, after conviction, to speed the hearing in the appellate court, we quite agree, and all

unnecessary delays, due to the conduct of the defendant seeking a review, may well be discouraged by allowing bail for a time only sufficient to insure the filing of the transcript in the Court of Appeals, reserving the question of further bail until lapse of the time thus fixed, when a new bond may be taken by the trial court on application to it, or by direction of the appellate court, for such time as the latter may prescribe. The District Court denied bail upon the ground that this was the third trial and third conviction upon the same indictment. We cannot regard this fact a sufficient ground for denying bail during the pending of a third writ of error."

In *Rose v. Roberts*, 99 F. 952, 40 C.C.A. 203, it is said:

"It is the right and privilege of a person deprived of his liberty to review to the extent permitted by law the legality of his detention, even when it is pursuant to the judgment or sentence of a court; and the execution of the sentence should be stayed pending the final determination, unless very exceptional circumstances justify the court in refusing to do so."

In *Ex parte Harlan* (C.C.) 180 F. 119, the District Judge held that there is no constitutional right to bail after conviction; it being properly granted or denied as best effects justice, determined in the light of the common law as affected by acts of Congress. In [Publisher's note: In light of the uniform style of Supreme Court opinions around the time that this opinion was written, there probably ought to be a "the" here.] course of the opinion, it is said (page 135):

"It is due to social order and proper regard for the majesty of the law, that a sentence, especially when affirmed by an appellate court, should be executed without undue delay, and courts should be careful not to give countenance to factious resistance to the orderly operation of the law by lightly admitting a convicted prisoner to bail. On the other hand, it is also to be borne in mind that the law is quick to afford opportunity and means to the citizens to redress wrongs at its hands, and delighting as it does, in the liberty of the citizen, will not, except in rare instances, compel the prisoner to undergo sentence before the final court has spoken, when he is honestly pursuing legal means to avoid a conviction."

United States v. St. John, 254 F. 794, 166 C.C.A. 240, was an application by one convicted of a violation of the

Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Secs. 1051a-10514d) to Circuit Judge Evans in the Seventh Circuit for bail pending proceedings in error. It was held that, under rule 34 (now rule 32), it is discretionary for the court or judge to accept bail after conviction and sentence. It was also held that, where the granting of bail is opposed by the government and no bill of exceptions has been settled, the application should first be made to the trial judge. Applicant said that it had been impossible to prepare a bill of exceptions within three and a half months after sentence or to get it ready for settlement. In the course of the opinion, it is said (254 F. 798, 166 C.C.A. 244):

"There is danger lurking in the too liberal exercise of the power to admit to bail as well as in the arbitrary refusual [Publisher's note: "refusual" should be "refusal".] to grant bail. Too frequently, after the defendant has been admitted to bail, his interest apparently lags, the appeal drags, the bill of exceptions is not promptly settled, and the record does not reach the appellate court as promptly as it should. There are inexcusable delays in securing the printing of the transcript-- more delays in printing serving the briefs.

"The present rules of the Circuit Court of Appeals invite a very early disposition of any appeal or writ of error prosecuted in good faith and with vigor. There are three annual sessions of the court- - October, January, and April. Causes may be advanced or set down specially. Writs may be heard without the testimony being printed. The clerk is able to print transcripts of great length in less than a week, while any brief of reasonable length will be printed in a day. Orders may be obtained dispensing with the printing of exhibits. In a word, the rules and the practice of the court combine to accomplish the purpose of assisting the litigants to an early disposition of their cases. Court reporters are obtainable who will provide daily transcripts of testimony, and bills of exceptions can be presented almost on the day the verdict is received."

"Frequently the delays in these cases are due to the desire of the parties to avoid a hearing rather than to any other cause. In the present case, no application for bail has been made to the judge who tried the case since the assignment of errors has been filed. The offenses of which this defendant and others have been found guilty are

serious and menacing to the public. Defendant has been tried and presumably lawfully convicted. The interest of the public demands the execution of the sentence unless some special reasons be shown for defendant's enlargement."

In *Garvey v. United States* (C.C.A.) 292 F. 591, there was an application to a Circuit Judge for bail after conviction, pending review on writ of error. In the course of the opinion it is said (page 593):

"The theory of the purpose of bail pending appeal is not different than that given before conviction; it is to insure the presence of the accused when wanted to answer the charge, and to make amends to society by service of the imprisonment imposed. It of course insures the innocent against the injustice of any imprisonment in the event of an eventual acquittal of the charge.... What ought to be weighed for or against him is the prospect of success in prosecuting his writ of error.... No reasonable doubt exists as to the rulings of the court below, as now presented - - at least such as would at this time call for the exercise of a sound discretion to admit to bail."

The application was denied. See *Bernacco v. United States* (C.C.A.) 299 F. 787.

The United States cites and relies upon the recommendation to District Judges by the conference of the Senior Circuit Judges, held in June, 1925, upon the call of the Chief Justice of the United States, under the Act of September 14, 1922 (42 Stat. 838 (Comp. St. Ann. Supp. 1923, Sec. 1113a)):

"B. The right to bail before conviction is secured by the Constitution to those charged with violation of the criminal laws of the United States. The right to bail after conviction by a court or a judge of first instance or an intermediate court or a judge thereof is not a matter of constitutional right. The acts of Congress make provision for allowance of bail after conviction by courts and judges to release the convicted defendant upon the exercise of their judicial discretion, having in mind the purpose of the federal statutes not to subject to punishment any one until he has been finally adjudged guilty in the court of last resort. But the judicial discretion of the federal courts and judges in

granting or withholding bail after conviction should be exercised to discourage review sought, not with hope of new trial, but on frivolous grounds merely for delay. Application for bail should be made to the trial judge in the first instance."

That statement will be taken as a guide in this case. It will be observed that the character of the crime charged or probable guilt or innocence is not suggested as having any bearing. The statement shows that trial and conviction according to law should precede punishment. It reflects the purpose of the federal statutes and the rules of court above cited, that no one should be required to suffer imprisonment for crime before the determination of his case in the court of last resort. And it adopts the substance of the rule laid down by Supreme Court in *Hudson v. Parker*.

It cannot be doubted that, where one convicted seeks a review in a higher court, and is advised by reputable counsel, acting in good faith in the proper discharge of professional duties, that in law there are valid grounds on which reversal may be expected, judicial discretion should be exercised to enable him to have his case determined speedily and with out the infliction of punishment in advance of final judgment against him. The admonition of the Senior Circuit Judges applies only to cases where 'a review is sought not with the hope of a new trial, but frivolous grounds merely for delay.' And it is not suggested that, where the trial judge has denied bail, his actions should be the guide to be followed by the Circuit Judges or the Circuit Justice. Obviously, it is the duty of each judge to whom application is made to exercise his own judgment in view of all the circumstances, including the denial, if any, of earlier applications.

Every reasonable effort should be made to avoid delay, and appeals on frivolous grounds should be dealt with summarily. Courts and judges may do much to discourage them by appropriate exercise of their discretion in 'granting or withholding' bail, as suggested by the conference of Senior Circuit Judges. Lest injury to government and injustice to litigants result from rulings made with the intention of advancing order and public welfare, such discretion should be exercised within established lines. The proper exercise of judicial discretion is never arbitrary, fanciful, or capricious; it is deliberate and governed by

reason and the law applicable to the cases under consideration. Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a mater [Publisher's note: "mater" should be "matter".] of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court, then petitioners should be admitted to bail.

In order to determine whether review is sought on frivolous grounds merely for delay, consideration has been given to the character of the case, the trial, and the assignment of errors. Experience shows that such cases as this are difficult to try, and that, because of the character of the accusation and the number of defendants involved, prejudicial error is more likely to occur than in other cases. The conference of the Senior Circuit Judges, June 1925, pointed out some of the dangers attending the use of the conspiracy statute, under which these petitioners were tried, together with many others. These experienced judges said:

"We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony, [Publisher's note: The comma preceding this note should be a semicolon.] and we express our conviction that, [Publisher's note: The comma preceding this note is surplus.] both for this purpose and for the purpose, or at least with the effect, [Publisher's note: The two commas preceding this note should be dashes.] of bringing in much improper evidence, the conspiracy statute is being much abused."

"Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for co-operative law breaking. We observe so many conspiracy prosecutions, [Publisher's note: The comma preceding this note is surplus.] which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy prosecution cases [Publisher's note: "conspiracy prosecution cases" should be "conspiracy cases".] make them most difficult to try without prejudice to an innocent defendant."

"We think it proper for us to bring this matter to the attention of the District Judges, [Publisher's note: "District Judges" should be "district judges".] with the request that they present it to the district attorneys, and for us to bring it also to the attention of the Attorney General, with the suggestion that he call it to the attention of the district attorneys, as in his judgment may be proper, and all to the end that this form of indictment be hereafter not adopted hastily but only after a careful conclusion that the public interest so requires, and to the end that transformations of a misdemeanor into a felony should not be thus accomplished, [Publisher's note: The comma preceding this note is surplus.] unless the propriety thereof clearly appears. [Publisher's note: A new paragraph should begin here.] We also think proper to bring the subject-matter [Publisher's note: "subject-matter" should be "subject matter".] to the attention of Congress, that it may consider whether any change of the law in this respect is advisable."

Thirty-nine persons were defendants, three pleaded guilty, nine were absent, and twenty-seven were put on trial together. The court dismissed the case as to one of them, the jury found three not guilty, and found twenty-three including petitioners guilty. The court granted a new trial as to one of those found guilty by the jury. The sentences imposed suggest that culpability varied widely. The sentences varied all the way between 2 years in the penitentiary and $5,000 fine to 30 days in jail.

No bill of exceptions has been settled, and no transcript of the proceedings in respect of which errors are assigned has been furnished. If necessary or proper so to do, it would be quite impossible to decide whether the grounds on which review is sought are well taken. But the law does not require applicants for bail to show that they are entitled to a reversal. And it is not the duty of the judge hearing such application to pass upon the merits of the case. Here the applicants ground their petition for bail on good faith and the advice of counsel that the errors assigned are well founded in law. The attorneys for the United States earnestly contend that review is sought only for delay; but they have suggested no fact disclosed by the record or by any written submission or oral statement that tends to negative proper purpose of applicants or their counsel. It is not for the advantage of either side that there be discussed the law or the facts which are to be considered on the writs of error. The questions raised appear at least sufficiently substantial and doubtful to justify and require argument on the part of the United States. It does not appear that these

applicants seek review, not with the hope of a new trial, but on frivolous grounds merely for delay.

In opposition to the application, the attorneys for the United States earnestly emphasize the denial of bail by the trial judge and by two Circuit Judges. While these denials are to be considered thoughtfully, they do not relieve from the duty imposed by the statute to consider the applications in the light of all the circumstances, and by the just exercise of discretion to determine whether the ends of justice require that applicants should suffer imprisonment in the penitentiary pending the determination of their writs of error in the appellate court. There is nothing to indicate that their attendance cannot be secured by reasonable bail. No danger of flight is suggested. The applicants have caused no delay, and nothing appears to indicate any purpose not to proceed with diligence. Moreover, the granting of bail may be on such terms as to insure against the dangers adverted to in the opinion in the St. John Case, supra.

There seems to have been no unnecessary delay in the case. The indictment was found on the last day of October. Trial was commenced December 14, concluded December 18, and sentence was imposed December 30. A term of the Circuit Court of Appeals is held annually, beginning on the first Tuesday in October, and continues a year. During each term, there are three sessions for the hearing of causes, beginning on the first Tuesdays in October and January and the second Tuesday in April. Under the Act of February 13, 1925, c. 229 Sec. 8(c), 43 Stat. 936, 940 (Comp. St. Supp. 1925, Sec [Publisher's note: There should be a period after "Sec".] 1126b), defendants had three months within which to take out writs of error. The writs were allowed and citations issued and served on the day of the sentence. A rule of court requires the cause to be docketed on or before the return day. Calendars are prepared for the regular term and for each adjourned session. Cases in which the record has been printed and briefs filed seven days before the beginning of the term or session are placed upon the calendar. The next session will commence April 12, 1926. It would seem that petitioners might have their cases heard at that session.

The petitioners will be admitted to bail. The order granting bail, to be filed herewith, will impose conditions calculated to prevent all inexcusable delays on the part of petitioners.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1926.

NICOLA SACCO, ET AL. v. HENDRY

[August 10, 1927.]

MR. JUSTICE HOLMES.

This petition was presented to me this tenth day of August, 1927, and was argued by counsel for the petitioners. I am unable to find in the petition or affidavits as I understand them any facts that would warrant my issuing the writ. I have no authority to issue it unless it appears that the Court had not jurisdiction of the case in a real sense so that no more than the form of a court was there. But I cannot think that prejudice on the part of the presiding judge however strong would deprive the Court of jurisdiction, that is of legal power to decide the case, and in my opinion nothing short of a want of legal power to decide the case authorizes me to interfere in this summary way with the proceedings of the State Court.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1926.

NICOLA SACCO, ET AL. v. MASSACHUSETTS

[August 20, 1927.]

MR. JUSTICE HOLMES.

This is a case of a crime charged under state laws and tried by a State Court. I have absolutely no authority as a Judge of the United States to meddle with it. If the proceedings were void in a legal sense, as when the forms of a trial are gone through in a Court surrounded and invaded by an infuriated mob ready to lynch prisoner, counsel and jury if there is not a prompt conviction, in such a case no doubt I might issue a habeas corpus— not because I was a Judge of the United States, but simply as anyone having authority to issue the writ might do so, on the ground that a void proceeding was no warrant for the detention of the accused. No one who knows anything of the law would hold that the trial of Sacco and Vanzetti was a void proceeding. They might argue that it was voidable and ought to be set aside by those having power to do it, but until set aside, the proceeding must stand. That is the difference between void and voidable— and I have no power to set the proceeding aside—that, subject to the exception that I shall mention, rests wholly with the State. I have received many letters from people who seem to suppose that I have a general discretion to see that justice is done. They are written with the confidence that sometimes goes with ignorance of the law. Of course, as I have said, I have no such power. The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene. Far stronger cases than this have arisen with regard to the blacks when the Supreme Court has denied its power.

A State decision may be set aside by the Supreme Court of the United States— not by a single Justice of that court— if the record of the case shows that the Constitution has been infringed in specific ways. An application for a writ of certiorari has been filed on the ground that the record shows such an infringement; and the writ of habeas corpus having been denied, I am asked to grant a stay of execution until that application can be considered by the full Court. I assume that under the Statute my power extends to this case although I am not free from doubt. But it is a power rarely exercised and I should not be doing my duty if I exercised it unless I thought that there was a reasonable chance that the Court would entertain the application and ultimately reverse the judgment. This I can not bring myself to believe. The essential fact of record that is relied upon is that the question of Judge Thayer's prejudice, raised and it is said discovered only after the trial verdict, was left to Judge Thayer and not to another Judge. But as I put it to counsel if the Constitution of Massachusetts had provided that a trial before a single Judge should be final, without appeal, it would have been consistent with the Constitution of the United States. In such a case there would be no remedy for prejudice on the part of the Judge except Executive Clemency. Massachusetts has done more than that. I see nothing in the Constitution warranting a complaint that it has not done more still.

It is asked how it would be if the Judge were subsequently shown to have been corruptly interested or insane. I will not attempt to decide at what point a judgment might be held to be absolutely void on these grounds. It is perfectly plain that although strong language is used in the present application the judgment was not void even if I interpret the affidavits as proving all that the petitioners think they prove— which is somewhat more than I have drawn from them. I do not consider that I am at liberty to deal with this case differently from the way in which I should treat one that excited no public interest and that was less powerfully presented. I cannot say that I have a doubt and therefore I must deny the stay. But although I must act on my convictions I do so without prejudice to an application to another of the Justices which I should be very glad to see made, as I am far from saying that I think counsel was not warranted in presenting the question raised in the application by this and the previous writ.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1932.

H. ELY GOLDSMITH, v. FREDERICK ZERBST, WARDEN

[November 18, 1932.]

MR. JUSTICE CARDOZO.

Application to a Justice of the Supreme Court for a writ of habeas corpus.

After conference with the justice assigned to the tenth circuit, embracing the State of Kansas, and with his approval, I have considered this application upon the merits instead of referring it to him.

The relator was convicted on September 16, 1926, in the United States District Court for the Western District of Washington of the crime of murder in the second degree, and was sentenced to imprisonment at Leavenworth, Kansas, where he is now confined.

The indictment charged that the crime was committed on the "Eldridge", a vessel of the United States, duly registered under its laws, and belonging to the United States and to the United States Shipping Board Emergency Fleet Corporation, "at the Port of Osaka, Japan, and on waters within the admiralty jurisdiction of the United States of America, and out of the jurisdiction of any particular state of the United States of America."

The statute under which the indictment was found does not make the jurisdiction of the court dependent upon the commission of the crime on "the high seas". Jurisdiction exists in the event of the commission of the crime either "on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States [Publisher's note: There should be an "or" here.] any citizen thereof, or to any corporation created by

or under the laws of the United States, or of any State, Territory or District thereof." [18 U.S. Code, § 451]

This crime, so far as the record shows, was committed on such a vessel and in such waters. Neither on the face of the indictment nor in the petition do I find adequate grounds for denying jurisdiction. *Wynne v. U.S.*, 217 U.S. 234; *U.S. v. Rodgers*, 150 U.S. 249, 265; *U.S. v. Bowman*, 260 U.S. 94; *U.S. v. Pirates*, 5 Wheat. 184; The Case of the Lotus, Permanent Court of International Justice, September 7, 1927, Series A, No. 10, 7-11, *U.S v. Gordon*, Fed. Cas. No. 15231; 5 Blatchf. 18; *U.S. v. Stevens*, Fed Cas. No. 16394; 4 Washington, D.C. 547. Certainly the grounds, if any, are not clear enough to call for the allowance of the writ by a justice of this court.

The relator cites the case of *Mathues v. U.S.* 27 F(2d) 518, where the vessel was in a foreign harbor moored to a wharf. Whether that case was well decided, I am not required to consider. *Cf. U.S. v. Seaquist*, Fed. Cas. No. 16245, 4 Baltchf. 420; *Industrial Comm. v. Nordenholt Co.*, 259 U.S. 263, 272, 275. The record before me does not show that the "Eldridge" was tied to the mainland at the time of the commission of the crime. The writ of habeas corpus may not be made a substitute of writ of error or an appeal.

For the reasons stated the application is denied.

SUPREME COURT OF THE UNITED STATES

No. -----. OCTOBER TERM, 1939.

CHARLES VAN NEWKIRK v. CLINTON McLAIN

[June 20, 1940.]

MR. JUSTICE FRANKFURTER.

This is a petition under Sec. 18 of the Judicial Code, 28 U.S.C.A. § 22, asking me as the Circuit Justice for the First Circuit to designate a circuit judge in the proceedings, begun by a libel filed by Charles Van Newkirk against Clinton E. McLain and the M.L. Slyvia. [Publisher's note: "Slyvia" should be "Sylvia".] The suit before District Judge Sweeney is, to use non-technical language, still in an unfinished stage. The application before me is based on the claim that Judge Sweeney is biased against the libellant, who therefore asks that a circuit judge be designated to sit in the continuance of the suit.

It is precisely because the libellant is, as he correctly says, a ward of the court, being a seaman, that I deemed it important that the matter be fully explored by oral argument instead of being disposed of merely on the moving papers. I have tried to inform myself before the argument of the relevant statutory requirements and such adjudicated cases as the books disclose. Few interests of justice seem more important than the generous safeguarding of those rights of the seaman which form a part of the inherited maritime law and which Congress through various enactments has expanded and enlarged. On the other hand, few things are more important to seamen, no less than to other people, than that there be a certain orderly course of law and justice so that the confidence in the judiciary be not undermined, except for substantial reason. I am happy to put on the record that the libellant conceded without qualifications that he has no grievance against any of the circuit judges of the First Circuit, which means of course that there is no reason why he cannot secure full justice at their hands. I am fully aware that taking an appeal from a decision of the district

court may cause inconvenience and cost. But nothing has impressed itself on me more clearly in my service as a Justice than the alertness with which the Supreme Court, and therefore the whole federal judicial system, under its authority, protects those who lack financial means to prosecute litigation. During the year and a half that I have sat on the Supreme Court there have been many cases *in forma pauperis* in which review was allowed for those unable to pay the costs of litigation. And I have no reason to believe, and indeed believe the contrary to be the fact, that in this circuit any less generosity or sensitive justice would be shown for a litigant who was financially unable to carry on an appeal.

Only the most extraordinary circumstances would justify me as a Circuit Justice in reaching down into the district court, taking matters not only out of the hands of the district court but out of the appellate authority of the circuit court of appeals and the circuit judges in this circuit. Such action would not be conducive to those interests of justice which are particularly important for seamen, because confidence in a judicial system is most important for those who are most dependent on the system. On the showing made I see no justification whatever, either in the public interest or in the protection of the libellant's private interest, which in itself constitutes part of the public interest, for withdrawing such means of relief as exists in the authority and the jurisdiction of the Circuit Court of Appeals for the First Circuit or the circuit judges of the circuit if, as libellant insists, proceedings before the district judge in question justify reversal of the action taken by him. If so justified, costs as a matter of course would be part of the relief which on review the appellate court may grant. Therefore, having given the matter much thought before the argument and having listened with close attention to everything that the libellant said on his own behalf, I am compelled to deny the petition.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1941.

IN RE: EX PARTE WALLER

[June 27, 1942.]

MR. JUSTICE FRANKFURTER.

This is an oral application made before me this twenty-seventh day of June, 1942, for a stay of execution pending application for certiorari to review an order of the Circuit Court of Appeals for the Fourth Circuit and the judges thereof denying, on the sixteenth of June, *Waller v. Youell,* 130 F.2d 486, an application for a certificate of probable cause and for an appeal to review a denial of an application for habeas corpus before the District Court of the Eastern District of Virginia. 46 F. Supp. 411.

The matter was argued by counsel for the petitioner, Odell Waller, under sentence to die July 2nd for a conviction of murder before the Circuit Court of Pittsylvania County, Virginia. This conviction was affirmed by the Court of Appeals of Virginia. *Waller v. Commonwealth,* 178 Va. 294, 16 S.E.2d 808. Thereafter a petition for habeas corpus raising certain constitutional questions was made to that court and that petition was dismissed. From that dismissal review was sought before the Supreme Court of the United States by a petition for certiorari. This petition was denied on May 4, 1942. *Waller v. Youell,* 316 U.S. 679. Following that denial, Waller's counsel filed before the Supreme Court a petition for rehearing of the denial of the petition for certiorari, 316 U.S. 712, as well as a motion for leave to file a petition for an original writ of habeas corpus. *Ex Parte Waller,* 316 U.S. 648, both these applications were denied on June 1, 1942. [Publisher's note: The simplest way to make sense of this sentence is to replace "316 U.S. 648, both" with "316 U.S. 648. Both".] The present proceeding had its immediate origin in an application for habeas corpus made on June 9, 1942, before the District Court of the Eastern District of Virginia which, on June 11th, dismissed the petition and refused a certificate of probable cause. Such a certificate was

likewise denied by all the members of the Circuit Court of Appeals. Thereafter application for a stay like that now sought from me was successively made to the Chief Justice of the United States, to Mr. Justice Black, and Mr. Justice Jackson, and was by each denied.

The underlying questions now before me are precisely those which were before the Supreme Court of the United States in three separate applications—the petition for certiorari to review the dismissal by the Court of Appeals of Virginia of the applications [Publisher's note: "applications" should be "application".] for habeas corpus, a petition for rehearing of such a denial and a motion for leave to file a petition for habeas corpus. Although no opinions were filed in the dispositions of these three applications, the questions now urged were fully considered. I adhere to these dispositions made by the full Court. In doing so, it is appropriate to quote the language used by Mr. Justice Holmes in denying a petition in the Sacco-Vanzeti [Publisher's note: "Vanzeti" should be "Vanzetti".] case for a stay of proceedings not unlike these pending application for writ of certiorari: "I do not consider that I am at liberty to deal with this case differently from the way in which I should treat one that excited no public interest and that was less powerfully presented. I cannot say that I have a doubt and therefore I must deny the stay. But although I must act on my convictions, I do so without prejudice to an application" to any other judge who may have power in the premises. As a federal judge I am unable to find any justification for summary interference with the orderly process of Virginia's administration of justice.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1945.

IN RE EQUITABLE OFFICE BLDG. CORP.

[August 6, 1946.]

MR. JUSTICE REED.

On August 2, 1946 there were filed with me as an Associate Justice of the Supreme Court the above applications and petition for stay of further proceedings in reorganization of the Equitable Office Building Corporation, the debtor. The debtor is in reorganization under chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq. in the Southern District of New York. A plan of reorganization, acceptable to all classes of creditors and stockholders, including the present applicants, was approved by the District Court December 4, 1945, and confirmed May 14, 1946, after several years of effort by the court and the parties. Chapter X, § 174, 221, 11 U.S.C.A. § 574.621. On July 8, 1946, an order was entered to consummate the plan by the necessary paper steps and the execution and delivery of the securities in the proposed new corporation. Thereafter the applicants now before me obtained a refinancing offer from a company to whose ability to perform no exception is taken. This offer is deemed by the debtor and its petitioning stockholders to offer better terms to the stockholders than the confirmed or trustee's plan.

Each of them then presented the offer to the bankruptcy court and sought an opportunity to put the new financing into effect in lieu of the trustee's plan. On July 31, the court denied the debtor's prayer to vacate the orders of May 14, and July 8, 1946 and to dismiss the reorganization proceedings upon the payment of all debts of the debtor, except a first mortgage which is not affected in any plan, and all expenses of the reorganization. An appeal from this order was taken to the Circuit Court of Appeals for the Second Circuit and a stay, pending review, asked. I assume, the stay sought there by the debtor was, as it is here, to stay further proceedings under the district court orders of May 14, and July 8, 1846. [Publisher's note: "1846" should be "1946".] The stay was denied.

The common stockholders' committee sought in the district court, an order to show cause why a stay of proceedings under the orders of May 14, and July 8, 1946 should not be granted and the reorganization dismissed on conclusion of the refinancing under the new proposal. The petition was denied July 16, 1946. An appeal was taken to the Circuit Court of Appeals for the Second Circuit and a stay of further proceedings under the orders of May 14, and July 8, 1946 asked. This stay was denied July 18, 1946.

The two stockholders Knight and Doyle who petition for a stay of further proceedings sought to amend the trustee's plan by providing for payment of all debts that are affected. Their petition was denied, an appeal taken and a stay refused in the appellate court.

The debtor and the stockholders allege in their three separate applications for stay of further steps in consummation of the trustee's plan that they will expeditiously file in this court a petition for writ of certiorari to the Circuit Court of Appeals. I infer the petitions will be filed before judgment on the pending appeals and, from the present application of Knight et al. that the petition for the writs will also seek review of the orders refusing stays pending review. Judicial Code sec. 240.

Power to Stay—The orders from which certiorari will be sought—district and circuit court of appeals—may be final orders under 28 U.S.C. § 350 (now 28 U.S.C.A. § 2101). As the orders were entered in bankruptcy by the Circuit Court of Appeals or appeals are there pending from the district court orders, they are reviewable by the Supreme Court Title 28 § 347 (now 28 U.S.C.A. 1254) and therefore are probably final under sec. 350 even though similar orders might not be 'final' under sec. 344. See *Radio Station WOW v. Johnson,* 323 U.S. 705. If so, a justice should have power to stay enforcement (further proceedings) under the plan of reorganization. See *Porter v. Dicken,* 328 U.S. 252. At any rate further action under the orders of May 13, 1946, confirming the trustee's plan and that of July 8, directing its consummation may be stayed by a justice by a stay order having the effect of an injunction, 28 U.SC. [Publisher's note: "U.SC." should be "U.S.C."] 377 and 378. Compare *Virginia R. Co. v. United States*, 272 U.S. 658, 670. In reaching such conclusion, I lay aside applicant's contention of irreparable injury to the public by the issuance of securities which may be invalidated ultimately in the hands of subsequent purchasers if this new reorganization becomes effective. The public interest, as distinct from applicant's, cannot serve as a basis for applicant's stay. Appellate courts authorized to review the action of courts of bankruptcy have power to preserve the status of litigation, pending review. Bankruptcy Act, sec. 2, sub. 15 and sec. 24, 11 U.S.C.A. § 11, sub. 15, 47. So has a justice of the Supreme Court.

Posture of the Litigation. Applicants sought in the district court to vacate the orders of confirmation and consummation and substitute for the trustee's confirmed plan either an out of court reorganization or an amended plan depending in part on the approval of the district court to issue trustee's certificates in sufficient amounts to pay the outstanding debentures in full.

Applicants claim a right to take this step in the reorganization on the theory that a debtor in reorganization may, at any time before consummation of a proposed plan by delivery of the required securities or transfers of property, pay off its creditors and resume control of its own property. Notwithstanding that the time for appeal from the order of confirmation had expired, Title 11, U.S.C. § 48, 11 U.S.C.A. § 48, applicants assert a right to have a dismissal of the reorganization after completion of the newly proposed financing. Cf. *Wayne United Gas Co. v. Owens-Illinois Glass Co*., 300 U.S. 131, 136; *In re 1934 Realty Corp.*, 2 Cir., 150 F.2d 477; *In re Peyton Realty Co.*, 3 Cir., 148 F.2d 771; Bankruptcy Act Chapter X, art. XI, § 222, 226-228, 11 U.S.C.A. § 622, 626-628. As the district court denied the petitions on their face, the present debenture holders have not pleaded their defenses of fact to the stockholders' petitions in the district court. Their possible defenses do not enter into present consideration.

The debenture holders' legal defenses are (1) that the rights of the debenture holders vested on confirmation of the plan, Chapter X, § 224, 11 U.S.C.A. § 624, and (2) that the action of the district court in denying applicants' petitions was within its discretion. See *Pewabic Mining Co. v. Mason*, 145 U.S. 349.

Under Sec. 224 of Chapter X, "Upon confirmation of a plan— (1) the plan...shall be binding…upon...all creditors and stockholders...." Under Sec. 226 "The property…when transferred..., shall be free and clear of all claims and interests of the debtor, creditors, and stockholders...." Under Sec. 228 "Upon the consummation…the judge shall enter a final decree— (1)…terminating all rights and interest of stockholders...." Thus it may be held that confirmation of the plan fixes rights thereunder as between the creditors (debenture holders) and stockholders, subject to review on appeal from the order of confirmation; that the later transfer of the property frees it and the contemporaneous final order terminates stockholders' interest in the debtor. The situation after acceptance and confirmation may be determined to be analogous to that following a judicial sale and its subsequent confirmation. See *Graffam v. Burgess*, 117 U.S. 180. When no fraud or other unfair practices or acts are charged to the beneficiaries of the confirmation, as is the situation in these proceedings, rights acquired by confirmation of a plan may be secure from change unless gross injustice is shown. Holders of debentures in this

corporate reorganization, whether the debentures were acquired before or after the confirmation of the plan, may hold rights under the plan subject to subsequent orders of the reorganization court for correction of such injustices. It may be determined that present debenture holders carry the risk of profit or loss after confirmation and therefore are entitled to any increased value. Or, in view of Chapter X § 222, the stockholders' right to redeem the property before consummation without regard to possible advantages or disadvantages from such action may be the dominant factor. These are open questions.

While no gross injustice, akin to fraud, to the stockholders is set up in these proceedings, it is alleged by the debtor that the new offer to creditors is "made possible by a recent increase in the value of Applicants assets' [Publisher's note: The single closing quotation mark preceding this note should be doubled.] over the value at the time of submission of the trustee's plan.

On the other hand, confirmation may not advance the rights of the debenture holders further than a judicial sale before confirmation. Compare *First National Bank of Cincinnati v. Flershem*, 290 U.S. 504. Chapter X, § 222 provides for the alteration or modification of a plan, after confirmation, even when it adversely affects the interest of creditors. It may become necessary to decide whether the new proposals are a modification of the old plan, a new plan or an effort to dismiss the proceedings. The effect of unanticipated changes of economic conditions after confirmation on the propriety of subsequent action by the reorganization court to protect the interest of junior creditors also has not been judicially determined, finally. Compare *R.F.C. v. Denver & R.G.W.R. Co.*, 328 U.S. 495; *Ecker v. Western Pac. R. Co.*, 318 U.S. 448, at pages 506-509.

From what has been presented to me of the record from the district court, I am not sure whether the opportunity to refinance was denied in that court as a matter of discretion, because it was not a marked advantage to the stockholders or as a matter of lack of power because rights were fixed by the confirmation. As I think the matter of power is questionable and, if power exists, the facts as to present value necessary to determine discretion were not developed, the result on these applications would be the same.

On December 4, 1945, the date of approval of the trustee's plan, the present worth of the debtor's assets were found to be $22,580,761.17. The value of the land and buildings was $21,375,000. The nonrealty assets have not decreased in value. Leaving out of consideration all assets other than the land and buildings, the trustee's plan shows a first mortgage of $15,880,543.35 against the property or an equity for the stockholders of approximately $5.40 per share for the

1,017,993.8 shares which might be eventually outstanding. Debenture holders received stock and convertible income bonds. If all converted they would hold 931,784 shares of the stock. The present common stockholders received under the trustee's plan 86,209.8 shares. Worth at the book value mentioned $465,532.92. [Publisher's note: The fragment preceding this note is in the original. It is ungainly, but understandable.]

Under the stockholder's [Publisher's note: "stockholder's" should be "stockholders'".] present proposal they would receive immediately the same number of shares as under the trustee's plan. The reorganization corporation would have the same number of shares. 862,096 of the shares allotted the present debenture holders would be taken by the underwriter at $6 per share. This money and corporation cash would pay all debts and expenses. If the value of the property remains at $21,375,000 the book value per share would be the same.

The advantage the stockholders see in the new plan lies in the fact that they asset [Publisher's note: "asset" should be "assert".] that the property is worth from $3,000,000 to $6,000,000 more than the present plan's valuation. They have secured a responsible underwriter to underwrite 862,098 share at $6 per share, giving the present stockholders subscription warrants for ten shares for each share held, limited in time, for all nonstockholder stock except 69,686 shares, at $6 per share. This 69,686 shares is the underwriter's fee for underwriting. If the stockholder's [Publisher's note: "stockholder's" should be "stockholders'".] estimate of present value is correct, there is an advantage of some two to five dollars to each subscription warrant or from $20 to $50 per stockholder share under the new proposal. In other words by the new plan and an investment of $6 per share purchased, the present stockholders would obtain the increase of property value, less the underwriting cost, for themselves.

I think the stockholders are entitled to have determined the question of power in the district court to grant their petitions, and if the power exists, the propriety of its exercise under the circumstances alleged or the facts that may be developed on a hearing. Widely shifting values make the issues of general importance in pending reorganizations under Chapter X. This determination can only be obtained after decisions by the Circuit Court of Appeals.

Delay in reorganization due to uncertainty of legal rights is regrettable but inevitable in such a situation as this. Net earnings of the property will accumulate for the prevailing parties.

I do not think that the present debenture holders' objection to the early termination of the underwriting proposal is sound. It is the debenture holders' objection to accepting payment of their debts in full that delays prompt cash payment through the issue of trustee's certificates.

These appeals in reorganization present unusual situations justifying in my opinion the use of the power to stay. See Robertson & Kirkham, Jurisdiction, sec. 413—414. *Forsyth v. City of Hammond*, 166 U.S. 506; *Ex parte Republic of Peru*, 318 U.S. 578. A court of reorganization guards with equal solicitude the equity of stockholders and the priority of creditors.

Appropriate orders to maintain the existing status pending consideration of the contemplated petitions for certiorari to the Supreme Court will be signed by me.

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of the Application)
of GEORGE PIRINSKY for Bail)
Pending Appeal to the Court of)
Appeals for the Second Circuit)

This application raises issues as to the respective powers of the Attorney General, trial court judges, judges of the Court of Appeals, and Justices of the Supreme Court, whether as such or as Circuit Justices, concerning enlargement of an alien held for deportation pending review of a discharge of his writ of habeas corpus.

Pirinsky was arrested and held without bail for deportation. The United States District Court for the Southern District of New York, Judge William Bondy presiding, after hearing on prisoner's writ of habeas corpus, directed: "The writ accordingly must be sustained unless the Attorney General promptly releases the relator on bail in a reasonable amount." The Attorney General thereupon fixed bail in the amount of $25,000. The prisoner applied again to be discharged or released on bail in a smaller amount to the United States District Court for the Southern District of New York, Judge Holtzoff presiding. He contended that the $25,000 bail fixed by the Attorney General was not reasonable within the terms of Judge Bondy's opinion. This application was denied and an appeal was taken to the Court of Appeals, which is pending.

Meanwhile, application was made to Circuit Judge Clark to enlarge the prisoner on lesser bail pending the appeal. Reviewing decisions of the Court of Appeals as to his power, he concluded that the prevailing rule, although he did not agree with it, was that he was without power to order enlargement of the prisoner under reduced bail and denied the application "without prejudice to its renewal elsewhere." Application was thereupon made to me as Justice of the Supreme Court and as Circuit Justice for the Second Circuit.

I do not, and, as presently advised, would not, deny this application on the merits.

But the question of my power, raised by the Government, is an important and doubtful one. Assuming Judge Clark's reading of the decisions of the Second Circuit to be correct, as I should unless and until there is a decision to the contrary by the Court of Appeals, do I as a Circuit Justice or Justice of this Court have greater power in this matter than he?

I doubt that the Criminal Rules apply, for habeas corpus always has been regarded as a civil proceeding. Nor do I think that the "all writs provision" (28 U.S.C.A. 1651) nor the doctrine of inherent powers can be resorted to, in view of this Court's own specific Rule No. 45.

Rule 45(2), literally read, vests the power to enlarge the prisoner pending the review of a decision discharging a writ of habeas corpus in "the court or judge rendering the decision." This was the construction given Rule 45 by Circuit Judge Manton in United States, ex rel. Thomas v. Day, 29 F.2d 485 (C.A. 2d 1928) in an exclusion case. No authority was cited for this construction. This opinion was cited in York, ex rel. Davidescu v. Nicholls, 159 F.2d 147 (C.A. 1st 1947), another exclusion case, which adopted the same construction of Rule 45. See also Klopp v. Overlade, 66 Fed. Supp. 450, 456. These are the only cases which construe Rule 45(2) that I have found and they appear to regard the power in the District Court as exclusive of power in the Circuit Judges or Justice.

Petitioner places reliance on Mr. Justice Stone's order granting bail in United States, ex rel. Vatjauer v. Commissioner, 273 U.S. 103, as an indication that I have power to grant bail in the instant case. In the first place, Justice Stone's action in the Vatjauer case might be authority for a judge of the Court of Appeals to grant bail rather than a Justice of this Court, since

at the time of Vatjauer direct appeal to this Court was permissible and such an appeal was pending at the time Justice Stone granted the bail.

But of even greater importance is the fact that at the time Justice Stone granted the bail in the Vatjauer case Rule 45(2) was not in effect. His order was dated April 28, 1925. Present Rule 45(2) became effective for the first time on July 1, 1925 as Rule 42. See 266 U.S. 653, 685. Justice Stone, therefore, must have issued his order pursuant to old Rule 34 which does not contain the limiting language presently appearing in Rule 45(2).

To find the power to grant bail in Rule 45(2), then, would require that the construction placed upon the Rule by the First and Second Circuits be ignored, overruled or distinguished. It does not seem to me that these cases can be distinguished solely on the ground that they involve exclusion rather than deportation; Rule 45(2) should have the same construction in either type of case. Perhaps they should be reconsidered. But that should not be the province of a single Justice.

This application brings to me the identical questions which appeal already takes to the Court of Appeals. Whatever decision that court reaches can be reviewed by the entire Supreme Court, which can then clarify a text which has long caused confusion and perplexity.

The application accordingly is denied and the matter left to be determined upon the pending appeal.

(SIGNED) ROBERT H. JACKSON
Associate Justice of the Supreme
Court of the United States.

September 10th, 1949.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1949.

IVA IKUKO D'AQUINO v. UNITED STATES

[February 6, 1950.]

MR. JUSTICE DOUGLAS.

Appellant was convicted of treason and sentenced to imprisonment for a term of 10 years and fined $10,000. Her motion to the District Court to be released on bail pending appeal was denied. On filing her notice of appeal she applied to the Court of Appeals for bail pending appeal. After a hearing before Circuit Judges Healy, Bone, and Pope, bail was denied by the court without opinion. Application is now made to me as Circuit Justice for the same relief.

The Circuit Justice has the power to allow bail pending appeal under Rule 46(a)(2), Federal Rules of Criminal Procedure, which provides:

> "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice."

The fact that the Court of Appeals has previously denied an application for bail is a circumstance which makes a Circuit Justice hesitate to act, as Mr. Justice Black suggested in the unreported opinion of *Simon v. United States*. In that case he sat as Circuit Justice for the Fourth Circuit. Even though that Court of Appeals had denied bail, he granted it after considering the merits of the appeal. That decision was made in 1941 under the earlier rules. The new rules of Criminal Procedure likewise preserve the power of the Circuit Justice to act even where the Court of Appeals has denied the relief. But under the new rules, as

under the old, great deference is owing the adverse action of the Court of Appeals.

Accordingly I have examined the record in the case during the last few weeks. On the basis of my study of it and of the briefs submitted by appellant and by appellee, I have concluded that appellant is entitled to bail.

The question of the guilt or innocence of an appellant is not an issue on application for bail. It has long been a principle of federal law that bail after conviction and pending appeal is a remedy normally available to a prisoner. See *Hudson v. Parker*, 156 U.S. 277, 285. The existence of power to grant bail is, indeed, essential for the protection of the right to appeal. Otherwise a short sentence might be served before the appellate court could set aside the judgment of conviction for infirmities in the trial. An effective right to appeal would then be lost.

The matter has best been summarized by Mr. Justice Butler sitting as Circuit Justice for the Seventh Circuit in *United States v. Motlow*, 10 F.2d 657, 662. He wrote,

> "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court, then petitioners should be admitted to bail."

That test has been incorporated in Rule 46(a)(2) of the Federal Rules of Criminal Procedure, set out above. The question is whether "the case involves a substantial question which should be determined by the appellate court." The question may be "substantial" even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable. An appellant, though guilty

beyond question, may have been denied the kind of trial that even a traitor to our country is entitled to under the Constitution and laws. Those are situations where bail pending appeal should be granted.

This appeal is plainly not frivolous. Responsible and conscientious counsel pose some problems that on this record are not free of doubt. Thus there is the question of the applicability of the principles of *McNabb v. United States*, 318 U.S. 332, and *Upshaw v United States*, 335 U.S. 410, to confessions obtained during or immediately following a prolonged confinement of the accused by the military authorities. I do not suggest that there has been an infraction of those principles in this case. I merely conclude that the question whether or not there has been is fairly debatable (i.e. substantial) and should be resolved after full hearing on the record. The same is also true of a few other questions.

Application for bail will be granted subject to provisions safeguarding the interests of the United States against dilatory tactics.

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1949

United States of America, ex rel. Ellen Knauff, Petitioner, v. J. Howard McGrath, Attorney General and Edward J. Shaughnessy, as District Director of the Immigration and Naturalization Service for the New York District, and to whomsoever may have the custody of the body of Ellen Knauff.	On Application for Stay.

(May 17, 1950)

By Mr. Justice Jackson,

As Circuit Justice for the Second Circuit, it is my almost invariable practice to refuse stays which the Court of Appeals or its Judges have denied. This because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases. This rare departure from practice may call for a word of explanation.

The decision of the Court of Appeals denying petitioner relief on habeas corpus was handed down yesterday and, about four o'clock yesterday afternoon, stay was denied. The court suggested to counsel that he could apply "at Washington" for a stay and counsel announced a purpose to do so. Immediately, however, the Department of Justice notified petitioner to be ready to be shipped on a commercial plane leaving New York this morning at eleven o'clock. This scarcely gave counsel time to prepare an application for stay here and no time for me to hold a hearing on it. As the case comes to me, I am informed that preparations are complete at the airport to deport her in a matter of minutes.

Bundling this woman onto an airplane to get her out of this country within hours after the decision of the Court of Appeals, if accomplished, would have two consequences. First, it probably would defeat this Court's jurisdiction to consider

her petition for review. Second, it would circumvent any action by Congress -- which the Department has vigorously opposed -- to cancel her exclusion, already unanimously taken by the House of Representatives. In this connection, the Department of Justice was given hearing by a subcommittee of the Judiciary Committee of the House of Representatives. After considering the objections of the Department of Justice, the Committee nevertheless reported favorably on the bill and the House of Representatives, with rare unanimity, decided the exclusion order should be cancelled. That bill, together with a like measure introduced in the Senate, is now before the Senate Judiciary Committee for consideration. There appears also to have been an agreement by the Department with the Congress to withhold action under such circumstances, but I have been unable in the time allowed to ascertain its text.

If the Department had at any time shown even probable grounds to believe that presence of this woman a few days more in this country might jeopardize national security, even infinitesimally [Publisher's note: There is an obliterated character between the "s" and the "i" in "infinitesimally".], I should refuse the stay. But the Department of Justice has not only had opportunity, it has been importuned to show courts or Congress any reason for its exclusion order.

Not only is the petitioner unable to learn what the specific charges against her are, but neither can the courts which are asked to play at least a consenting part in her exclusion, nor the Congress, which is in the midst of an effort to stop it. It overtaxes credulity to believe that it would jeopardize the security of the United States to impart to coordinate branches of the Government some inkling of the charges against this woman.

That the purpose of this haste to rush her out of the country is to defeat any effort to have this Court review her present habeas corpus proceeding, appears from statements

apparently made to the press by the Government's counsel in the Court of Appeals. We are not ordinarily satisfied with newspaper evidence, but the speed of events has left no time for verification. The statements of several reputable newspapers are in substantial accord: After the court suggested that petitioner's counsel could apply at Washington for a stay and he said he would do so, the Government attorney answered, as quoted in an Associated Press dispatch appearing in the Baltimore Sun, "She may not be here then." The New York Herald Tribune attributes to him the statement that she may be deported by the time action is taken and that the case would then be academic. The New York Times quotes him as later stating he would advise the Department of Justice that "There are no legal impediments at this time which would prevent her immediate deportation." This leaves no doubt that the purpose is to defeat the jurisdiction of this Court as well as the determination of Congress.

It may well be that this removal eventually will be sustained. But to consummate it while the right to do so is still in litigation cannot be permitted, and to attempt to do so after a bill to forbid it has already passed one House by unanimous vote and while it is pending in the other is alleged to be a most unusual departure from administrative practice. Nothing has been produced to show why this particular petitioner should be so discriminated against. To stand between the individual and arbitrary action by the Government is the highest function of this Court.

It is not for me to now reach any conclusion as to the merits of the decision below. But to grant writs to protect the Court's jurisdiction to inquire into the matter is one of the most usual functions of an individual Justice. Because the Government's action since decision by the Court

of Appeals would have the effect of foreclosing petitioner's right to be heard in this Court, I grant the stay.

(S) ROBERT H. JACKSON

May 17, 1950 Associate Justice, Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES

John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall, Petitioners,	)	
v.	)	On Application for Bail.
The United States of America.	)	

[September 25, 1950.]

Opinion by MR. JUSTICE JACKSON, as Circuit Justice of the Second Circuit:

These Communist Party leaders were convicted of conspiring to advocate and teach the violent overthrow of the United States Government and to organize the Communist Party for that purpose.[1] They were not charged with any attempt nor with any overt act toward that end other than those incident to such organization and teaching.

Defendants appealed and, after denial of bail by the trial court, applied to the Court of Appeals for its allowance. Government counsel conceded that the appeal presented a substantial question and upon that concession defendants were enlarged upon bond.[2]

After the Court of Appeals affirmed the convictions,[3] defendants expressed an intention to petition the Su-

[1] The prosecution was under the Smith Act, 54 Stat. 670, 671; 18 U.S.C. § 2385.
[2] The November 2, 1949 order of the Court of Appeals, allowing bail, recites, "The prosecution having upon argument conceded that the appeal herein raises a 'substantial question,' (Rule 46(a)(2) of the Rules of Criminal Procedure), it is ordered . . . ."
[3] *United States* v. *Dennis et al.*, 183 F.2d 201.

preme Court to review their cases. The prosecution asked that bail be revoked and defendants remanded to jail. Two grounds were advanced: first, that no substantial question as to the validity of the conviction survived the affirmance, and second, that defendants, while at large, *have pursued* and *will continue to pursue* a course of conduct and activity dangerous to the public welfare, safety and national security of the United States. The Court of Appeals did not summarily terminate bail but a majority of the judges extended it for thirty days, expressly to enable application to the Circuit Justice for further extension. Chief Judge Hand, who had written the principal opinion affirming the convictions, said he regarded the case as "involving substantial questions and therefore entitling the defendants to remain on bail pending certiorari."

To remain at large, under bond, after conviction and until the courts complete the process of settling substantial questions which underlie the determination of guilt cannot be demanded as a matter of right. It rests in sound judicial discretion.[4] Only in a rare case will I

[4] Rule 46(a)(2) of the Federal Rules of Criminal Procedure provides: "Right to bail upon review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

Defendants contend that, where a substantial question exists, bail is a matter of right. They rely upon a decision by the Court of Appeals, Ninth Circuit, in *Bridges* v. *United States*, ___ F.2d ___, August 24, 1950, upon an opinion by MR. JUSTICE DOUGLAS allowing bail to "Tokyo Rose" convicted of treason, *D'Aquino* v. *United States*, 180 F.2d 271, and upon several older cases decided before the current rule was promulgated.

I cannot accept this view that presence of a substantial question makes bail mandatory and, in order not to mislead the judges of my

override a clear and direct decision by the Court of Appeals that bail ought to be granted or denied. But here one judge favored its allowance, and the action of his two associates in granting a thirty-day extension implied the

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Circuit, set forth my reasons for thinking the Rule permits bail only in circumstances warranted by sound judicial discretion.

The unpublished history of the rule in the files of this Court shows that the Advisory Committee submitted it to this Court with this language in the first line, "Bail *shall* be allowed . . . ." (Italics supplied.) By letter of December 21, 1944, Chief Justice Stone returned the proposed rules, stating that the word "shall" should be changed to "may." It is apparent that the language of the rule was not casual or loose and that the basis for claiming bail as a matter of right was deliberately eliminated. Although Rule 46 was a restatement of the existing law, the third sentence is new. In a note attached to an early draft, the following comment was made: "The discretionary power to admit to bail pending appeal is made explicit in the new closing sentence," citing *Rossi* v. *United States*, 11 F.2d 264 (C.A. 8th Cir., 1926).

Further, it is to be noted that "may" is used three times in the rule, once in each of the three sentences. I should hardly suspect that this Court used the word with inconsistent meanings—twice to mean "must" and once to mean "may." The only consistent meaning is that "may" means just that; the judge is empowered to use his own best judgment as to whether a defendant should be free on bail.

But the exercise of this discretion is very limited, as the cases prior to *Bridges* and *D'Aquino* point out. The existence of a substantial question is an absolute prerequisite to bail, and in the usual case that is the only issue involved. And the courts, quite understandably, have been liberal (sometimes I think too liberal) in the decision of this question because they felt that, if the conviction were to be reversed, appellant should not have been jailed in the interim.

Whatever the rule of the Circuit Justices and the Courts of Appeals of other Circuits, the rule I shall observe and presume to have been observed in the Second Circuit is that existence of a substantial question is a prerequisite to bail after conviction; the question should be substantial in the sense of fairly doubtful and in the sense also that it is not trivial or merely technical but has substantial importance to the merits; finding this, bail remains an appeal to the discretion of the court.

continuing power to grant bail, which is dependent on persistence of a substantial question and indicated that they did not regard the defendants as presenting a very immediate public danger.[5]

I cannot accept the Government's first contention that no substantial question survives for Supreme Court review. If, as the prosecution conceded, the convictions once were clouded by a substantial constitutional question, it has not completely disappeared, even though the Court of Appeals has now given its own carefully considered answer. An intermediate court, however respected its members or persuasive its opinion, makes no final answer or at least no answer of uniform authority throughout the United States to a constitutional issue. Certainly had the Court of Appeals reached a contrary conclusion, the Government would not have accepted it as final. It is one thing to maintain that the Court of Appeals has given the right answer to a substantial question, but it is another thing to contend that there is no question which merits answer by the only Court invested with ultimate and nation-wide authority in the matter. I regard the case as one in which substantial questions are open to review by the Supreme Court, and in which I am therefore empowered to grant bail, as ordinarily would be done.

The Government's alternative contention is that defendants, by misbehavior after conviction, have forfeited their claim to bail.[6] Grave public danger is said to result

[5] The majority said, "The motion of the United States to revoke bail is granted as of thirty days from the filing of this order, with leave granted to the appellants during such 30 days to apply to the Circuit Justice for bail pending certiorari." The order was filed August 28, 1950.

[6] I think the rule clearly contemplates consideration of such matters, because, as it expressly provides, "The court or the judge or the justice allowing bail may at any time revoke the order admitting the defendant to bail." Of course there are cases where, after allowance, decision of the contested question will remove it from

from what they may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes.[7] Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

Turning then to past, but post-conviction, activities said to be dangerous, I find them to consist entirely of making speeches and writing articles or editorials, chiefly for the Communist Party organ the *Daily Worker*. They do not contain any advocacy of violent overthrow of the Government and can only be said to be inciting, as all opposition speaking or writing that undermines confidence and increases discontent may be said to be incitement. These, however, are severely critical of the policy of the United States toward Korea and favorable to the Soviet position. Some are crudely intemperate, contain falsehoods obvious to the informed, and all are plainly designed to embroil different elements of our society and embarrass those who are presently conducting the Government. But the very essence of constitutional

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the category of substantial. But power to revoke is not confined to such cases. I think any changed or newly discovered circumstance that affects the justice of the confinement may be considered.

[7] There are ways of dealing with certain threats to commit crime. In these cases the law only imprisons in default of furnishing an undertaking, but the person held is released if he furnishes the required undertaking to abide the court's order and "keep the peace." New York Code of Criminal Procedure, §§ 84-99; assimilated into Federal Law, 36 Stat. 1163, 18 U.S.C. § 3043.

freedom of press and of speech is to allow more liberty than the good citizen will take. The test of its vitality is whether we will suffer and protect much that we think false, mischievous and bad, both in taste and intent.

It is not contended that these utterances, in themselves, are criminal.[8] The Communist Party has not been outlawed either by legislation, nor by these convictions, and its right to publish the *Daily Worker* is not questioned. Nor were defendants indicted under that part of the statute which prohibits publication of matter intended to cause overthrow and destruction of government. Since the paper may lawfully be issued, certainly its publishers or contributors may comment critically on the Government's conduct of foreign affairs. If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirection. I think courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free. Indirect punishment of free press or free speech is as evil as direct punishment of it. Judge Cardozo wisely warned of "the tendency of a principle to expand itself to the limit of its logic."[9] If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition which I am sure the Department itself would deplore.

It is said, however, that freedoms of speech or press cannot be invoked by defendants because their speeches and publications constitute a repetition of their offenses

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[8] The Smith Act purports to authorize prosecution of publication with intent to cause overthrow of the Government. Section 2(a)(2), 64 Stat. 671. These defendants were not indicted under this section and there has been no direct finding that the *Daily Worker* is published in violation of law.

[9] Cardozo, *Nature of the Judicial Process*, p. 51.

and a continuation of the conspiracy of which they have been convicted. If all that convicted these defendants was such utterances as have followed their conviction, there would indeed be doubt about its validity, for I am unable to find in them any word of advocacy of violence either to overthrow the Government or of forcible resistance to its policy. If that inference can be drawn from these utterances, it can equally well be drawn from many other opposition speeches by non-Communists. Another difficulty with the Government's position, pointed out by Judge Hand in the hearing below, is that while a substantial question exists as to whether they have been lawfully convicted it is equally doubtful whether repetition, if it be such, is a crime.

My task would be simple if a judge were free to order persons imprisoned because he thinks their opinions are obnoxious, their motives evil and that free society would be bettered by their absence. The plea of admitted Communist leaders for liberties and rights here, which they deny to all persons wherever they have seized power, is so hypocritical that it can fairly and dispassionately be judged only with effort.

But the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more worthy critics who may be in opposition to the government of some future day.

If, however, I were to be wrong on all of these abstract or theoretical matters of principle, there is a very practical aspect of this application which must not be overlooked or underestimated—that is the disastrous effect on the reputation of American justice if I should now send these men to jail and the full Court later decide that their conviction is invalid. All experience with litigation teaches that existence of a substantial question about a conviction implies a more than negligible risk of re-

versal. Indeed this experience lies back of our rule permitting and practice of allowing bail where such questions exist, to avoid the hazard of unjustifiably imprisoning persons with consequent reproach to our system of justice. If that is prudent judicial practice in the ordinary case, how much more important to avoid every chance of handing to the Communist world such an ideological weapon as it would have if this country should imprison this handful of Communist leaders on a conviction that our own highest Court would confess to be illegal. Risks, of course, are involved in either granting or refusing bail. I am not naive enough to underestimate the trouble-making propensities of the defendants. But, with the Department of Justice alert to the dangers, the worst they can accomplish in the short time it will take to end the litigation is preferable to the possibility of national embarrassment from a celebrated case of unjustified imprisonment of Communist leaders. Under no circumstances must we permit their symbolization of an evil force in the world to be hallowed and glorified by any semblance of martyrdom. The way to avoid that risk is not to jail these men until it is finally decided that they should stay jailed.

Their bail as fixed by the Court of Appeals is therefore continued until the Supreme Court of the United States shall deny their petition for certiorari or, if it be granted, shall render judgment upon their cause.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

Emory S. Land, et al.,	)	On Application for Stay of
v.	)	Enforcement of Restraining
R. Stanley Dollar, et al.	)	Order.

[April 17, 1951.]

Before THE CHIEF JUSTICE in Chambers.

On April 11, 1951, an application for stay of a "Restraining Order," issued by the Court of Appeals for the District of Columbia was filed with me as an individual Justice of this Court. A brief summary of the events leading to the issuance of that order would be appropriate at this point.

This action began when R. Stanley Dollar and others, hereinafter referred to as Dollar et al., brought suit in the District Court for the District of Columbia claiming that named individuals, at that time members of the Maritime Commission and hereinafter referred to as Land et al., were unlawfully in possession of certain shares of stock in a corporation now known as American President Lines, Ltd., allegedly owned by Dollar et al. The District Court had dismissed the action as an unconsented suit against the United States, but the Court of Appeals for the District of Columbia reversed, 154 F.2d 307 (1946). This Court affirmed the Court of Appeals because the suit was directed against Land et al. as individuals, so that neither the United States nor the Maritime Commission were necessary parties and any judgment in the action would not be binding upon the United States under principles of *res judicata*. *Land* v. *Dollar*, 330 U.S. 731 (1947).

Subsequent to that opinion, the case went to trial on the merits before the District Court where judgment was entered for Land et al. on all of the issues. 82 F. Supp. 919 (1948). The Court of Appeals for the District of

Columbia reversed and ordered the entry of a final judgment in favor of Dollar et al., 184 F.2d 245 (1950). We denied certiorari, 340 U.S. 884 (1950). That Court of Appeals thereafter ordered entry of a judgment designed to be effective against Charles Sawyer, who is the Secretary of Commerce, on the theory that he was an individual successor to Land et al. alleged to be in physical possession of the stock certificates involved, — F.2d — (January 31, 1951). We denied certiorari. 340 U.S. 948 (1951). This judgment, providing that Dollar et al. are entitled to "effective possession" of the shares of stock, was entered by the District Court for the District of Columbia on March 16, 1951, together with an order requiring that Charles Sawyer endorse the stock certificates to Dollar et al. On that date the physical possession of the certificates was delivered to Dollar et al.

On March 12 [Publisher's note: The "2" in "12" is written over some other character.], 1951, the United States filed suit in the United States District Court for the Northern District of California bringing in Dollar et al., the corporation and its transfer agent as parties. The complaint set forth facts intended to show that title to the shares of stock is in the United States and the prayer for relief asked that the United States be adjudged the true and lawful owner of those shares. Ancillary to that action, the United States moved for a preliminary injunction to maintain the *status quo* pending the adjudication of its claim to title. The District Court entered an order granting the preliminary injunction and Dollar et al. have indicated that they plan an appeal from that order to the Court of Appeals for the Ninth Circuit.

Meanwhile, Land et al. and Charles Sawyer had taken appeals from the March 16, 1951, judgment and order of the District Court for the District of Columbia. The Court of Appeals for the District of Columbia dismissed the appeals, but retained jurisdiction to consider the motion of Dollar et al. for sanctions to enforce the judgment. On April 10, 1951, that Court of Appeals entered the following restraining order:

> "NOW, THEREFORE, IT IS HEREBY ORDERED BY THIS COURT that Charles Sawyer, Philip B. Fleming, Philip B. Perlman, Peyton Ford, Newell A. Clapp, Edward H. Hickey, Donald B. MacGuineas, George L. Killion, Paul D. Page, Jr., and Philip H. Angell, their agents, servants, employees and attorneys, and each of them, and all persons in active concert with them, or any of them, be and they hereby are enjoined and restrained until further order of this Court from proposing, seeking or advocating any step in any proceeding, whether in said suit entitled *United States* v. *R. Stanley Dollar, et al*., or in any other proceeding, inconsistent with strict compliance with and obedience to the orders heretofore entered by this Court in this cause.
>
> "AND IT IS FURTHER ORDERED that said persons are and each of them is enjoined and restrained until further order of this Court from complying with, taking advantage of, or utilizing, or seeking to comply with, utilize or take advantage of said temporary injunction issued by the United States District Court for the Northern District of California, Southern Division, in said cause entitled *United States* v. *R. Stanley Dollar, et al*., or any order of similar tenor which may hereafter be entered by said court or any other court."

Land et al. and those named in the restraining order are, according to the application for stay, preparing a petition for certiorari to be filed with this Court on or before April 25, 1951, to seek review of the above-quoted restraining order and other matters, including the order dismissing the appeal from the District Court order requiring that Charles Sawyer endorse the stock certificates. The instant application asks for a stay of the restraining order. Since that order is "final" in both form and effect, its enforcement is subject to stay by an individual Justice of this Court to enable the party aggrieved to obtain a writ of certiorari. 28 U.S.C. (Supp. III) § 2101(f).

The fundamental controversy at this stage of the litigation concerns the efforts of Dollar et al. to obtain control of American President Lines, Ltd. before the entry of final judgment in the action filed by the United States. As matters now stand, the preliminary injunction issued by the District Court for the Northern District of California prevents Dollar et al. from gaining control, but Dollar et al. can seek reversal of that injunction on appeal, if it is erroneous. The restraining order issued by the Court of Appeals for the District of Columbia prevents those named, including attorneys of the Department of Justice, their agents and persons in active concert with them, from acting in respect to the preliminary injunction granted in the action brought by the United States in the Northern District of California. The United States had not previously been a party to an action concerning those shares and can only act through its agents and attorneys. The attorneys for the United States have reasonable cause to fear that the restraining order prevents them from defending on appeal to the Court of Appeals for the Ninth Circuit the preliminary injunction issued to protect the United States in its suit. Indeed, the breadth of the restraining order is such that those affected may be acting at their peril in filing their petition for certiorari in this Court.

In the forthcoming petition for certiorari, this Court will be asked to review the restraining order issued by the Court of Appeals for the District of Columbia. In order that the petition may be filed without fear of contempt sanctions, and in order that the United States may be represented in regard to the preliminary injunction issued in its behalf pending determination of the validity of the restraining order, I will sign an appropriate order to stay enforcement of the restraining order pending consideration of the forthcoming petition for certiorari.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 17th day of April, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

Charles Sawyer, Secretary of Commerce, et al.	)	
v.	)	On Application for Stay of
R. Stanley Dollar, et al.	)	Civil Contempt Order.
In the Matter of George L. Killion.	)	

[May 22, 1951.]

Before THE CHIEF JUSTICE in Chambers.

On May 21, 1951, applications for stay of an order issued by the Court of Appeals for the District of Columbia adjudging applicants in civil contempt were filed with me as an individual Justice of this Court. A summary description of this complex litigation, heretofore known as *Land* v. *Dollar*, may be found in my memorandum granting stay of a Restraining Order issued in this proceeding by the court below on April 10, 1951. To avoid repetition, a copy of my prior memorandum is attached.

Subsequent events pertinent to the instant applications may be summarized as follows. On April 10, 1951, the Court of Appeals for the District of Columbia entered an interlocutory order calling upon applicants to show cause why they should not be adjudged in civil and criminal contempt of that court. In an opinion read on April 12, 1951, the court below explained its reasons for the issuance of the rule to show cause. Upon filing of responses and briefs, the court below, on May 18, 1951, handed down an opinion and order adjudging applicants guilty of civil contempt, listing the actions applicants must take to purge themselves of contempt and ordering that applicants be committed to custody if

they have not purged themselves before 3 p.m., E.D.T., May 24, 1951.

On April 25, 1951, Charles Sawyer and the other applicants who are Government officials filed a petition for certiorari, No. 697, seeking review of the Restraining Order issued by the court below and the order of the District Court for the District of Columbia requiring that the stock certificates be endorsed "United States Maritime Commission, by Charles Sawyer, Secretary of Commerce." George L. Killion, President of the American President Lines, Ltd., filed his petition for certiorari, No. 702, seeking review of the Restraining Order. Dollar et al. filed responses in opposition on May 10, 1951. The Court has not acted upon these petitions.

The finding of contempt was predicated upon violation of judgments previously entered in this cause to the effect that Dollar et al. are entitled to "effective possession" of shares of stock of the American President Lines, Ltd. Two of the principal categories of activity found to constitute the contempt are as follows:

> *First*. The failure of Charles Sawyer to endorse the stock certificates in the manner prescribed and to perform other acts. Since this action was first ordered by the District Court for the District of Columbia on March 16, 1951, the legal questions raised thereby are before this Court for the first time in No. 697.
>
> *Second*. The activities of applicant Government officials and George L. Killion, President of the American President Lines, Ltd., in connection with the preliminary injunction issued in behalf of the United States in its suit in the District Court for the Northern District of California. These activities are embraced in the Restraining Order issued by the court below on April 10, 1951, stayed by my order of April 17, 1951, pending disposition of the petitions for certiorari in Nos. 697 and 702.

Applicants ask that the civil contempt order be stayed pending the filing of petitions for certiorari in this Court for review of that order. Compliance with the order of contempt, if not stayed, would render the cause moot, thus precluding review by this Court not only of the order of contempt itself, but also of the matters now before the Court in Nos. 697 and 702. Further, there is a direct conflict between orders issued by the court below and orders issued by the District Court for the Northern District of California. For example, applicant Killion will be imprisoned under the contempt order issued by the court below unless he "caus[es] American President Lines, Ltd., and its stock transfer agents to transfer the shares of record to the Dollar interests" before May 24, 1951. On the other hand, applicant Killion has been restrained by the District Court in California in an order now in effect from "in any way recognizing [Dollar et al.] as the lawful owners of such shares of stock." Only by staying the contempt order will applicant Killion be afforded appellate review of the directly conflicting federal court orders to which he is now subject.

For the foregoing reasons, stay of the contempt order is necessary to preserve the jurisdiction of this Court to review the questions presented by the pending as well as the forthcoming petitions for certiorari. Accordingly, I have signed an order staying the civil contempt order pending consideration of the forthcoming petitions for certiorari.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 22d day of May, 1951.

SUPREME COURT OF THE UNITED STATES

No. 201.—OCTOBER TERM, 1950.

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis, Petitioners, *v.* United States of America.	))))))	On Application for Stay.

[June 22, 1951.]

By MR. JUSTICE JACKSON, as Circuit Justice for the Second Circuit.

This is the case of the lawyers under sentence for contempt of court for misconduct during the trial of the *Dennis* case, 341 U.S. 494. The Court of Appeals for the Second Circuit reversed certain specifications of contempt on which they had been sentenced and affirmed others by a divided vote. On July 14, 1950, they filed a petition for writ of certiorari, but this Court did not act on it until June 4, 1951, the last day of the October, 1950, Term of Court. There were good reasons for holding the petition until consideration of the *Dennis* case was completed, but the long delay is not chargeable to the attorneys. They now seek a stay until this Court has considered their petition for rehearing of the denial of their writ of certiorari.

This case presents an unusual combination of circumstances in that denial of certiorari on the last day of the Term, together with the shortness of some of the sentences, will cause the cases of some defendants to become moot unless a stay is granted. This would deprive some of them of all opportunity to have their petitions for rehearing passed upon by the full Court—a right normally

available to litigants. Moreover, those who would be the first and most certain to lose any such opportunity would be those whose guilt has been considered the least serious by the court which sentenced them. These facts distinguish this case from the *Dennis* case, in which the right to have their petition for rehearing passed upon by the full Court is not affected by denial of a stay, because no such circumstances would render their case moot.

Some stay also is required if the petitioner-defendants in the *Dennis* case are not to be deprived of the aid of their counsel when the case reaches the District Court and they surrender to the proper authorities. A substitution of counsel, even if possible, would not be practicable at this time and could only result in further delay. I think these attorneys should be permitted to complete their service in that case, for under no circumstances should those defendants be deprived of these counsel until their case is finally closed.

In order to protect the rights of the defendants in the *Dennis* case to help of their counsel at all stages of the proceedings against them, and to avoid any claim of prejudice to these defendants because of circumstances for which they are not to be blamed, I am granting stay of mandate until the Court acts on the petition for rehearing.

SUPREME COURT OF THE UNITED STATES

No. 336.—OCTOBER TERM, 1950.

Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall, Petitioners, *v.* United States of America.	)	On Application for Continuance of Bail and Stay of Mandate

[June 22, 1951.]

By MR. JUSTICE JACKSON, as Circuit Justice for the Second Circuit.

The petitioner-defendants ask me to stay the mandate of this Court and admit them to bail until next October when the full Court can act on their petition for rehearing. Last September I stayed their commitment and continued them at large upon bail because important constitutional questions were involved in their case which it appeared this Court should decide. This Court did grant a review, except upon some questions which it weighed but considered to be finally settled by decision of the Court of Appeals. The case was argued here December 4, 1950, and was decided on June 4, 1951.

The considerations which warranted a stay and bail last September are no longer present. The petition for rehearing takes issue with the Court's decision, which is to be expected of a defeated litigant, but it offers nothing that the Court overlooked in its six months' deliberation. To grant further delay, or bail, therefore, would be justified only if I had reason to believe that the Court should, or will, revise the limitations imposed on the scope of its review and order the case reargued on an expanded basis. That it would do so is beyond belief.

The motion for continuance of bail and stay of the mandate is denied.

SUPREME COURT OF THE UNITED STATES

Frederick Vanderbilt Field,	)	
W. Alphaeus Hunton and	)	
Dashiel Hammett, Movants,	)	On Application for Bail.
v.	)	
The United States of America.	)	

[July 25, 1951.]

Opinion by MR. JUSTICE REED, as Acting Circuit Justice for the Second Circuit.

An application by the three above-named movants has been presented to me, Acting Circuit Justice of the United States Court of Appeals for the Second Circuit by designation of the Chief Justice of the United States. The application is for the enlargement of movants on bail pending their appeal to the Court of Appeals for the Second Circuit from judgments of conviction against each of them for contempt of court by the United States District Court for the Southern District of New York. Movant Field on July 5, 1951, was sentenced to ninety days. Movants Hunton and Hammett on July 9 were sentenced to six months. Each was given the privilege to purge himself of his contempt. Application is made under Rule 46(a)(2) of the Rules of Criminal Procedure for the District Courts of the United States. Bail has been refused in the respective cases by the trial judge and by a circuit judge. A single application was filed with me by the three movants and the three motions can be conveniently considered together as no differences between the parties affecting the conclusion on the application appear.

A single informal and incomplete record is before me consisting of the application for bail and an uncertified copy of the stenographer's minutes at the hearings of

July 2, 3, 5 and 6, 1951, resulting in the convictions for contempt, an attested copy of the judgment and commitment of Frederick V. Field, copies of the opinions of Chief Judge Swan and Circuit Judge Hand, copies of the required certificates under Rule 42(a), Rules of Criminal Procedure, and memoranda of argument by counsel. None of the exhibits concerning the hearing were offered by movants. The same counsel advised all three movants at the hearing, by permission of the trial judge, though the counsel were not permitted to object to the questions asked the three movants as witnesses. Counsel advised the witnesses and urged grounds against their conviction for contempt. Such a record, neither party objecting, seems adequate to dispose of the application for bail.

The convictions for contempt followed from these happenings. The three movants were trustees of the Bail Fund of the Civil Rights Congress of New York, together with two other parties, not before me. The Bail Fund was a formalized trust; a copy of the trust agreement was on file in the District Court as a part of the record in *United States* v. *Dennis, et als*., affirmed sub. nom., *Dennis* v. *United States*, 341 U.S. 494. The agreement was used in this hearing. It had officers authorized to act in a fiscal capacity—a treasurer, a secretary and an assistant treasurer. The Bail Fund received loans from several hundred or thousand individuals, according to Mr. Field's testimony, since 1946, and on December 31, 1950, had investments of "$712,000 in securities of the United States." For these loans or contributions, certificates of deposit were issued. A record of these was kept among the records of the Bail Fund. A witness, Mr. Abner Green, a trustee, and a movant, Mr. Field, testified to the recent existence of trust records, as well as an accountant.

In the absence of a full record with exhibits, I shall accept the statement of an attorney for movants appearing in movants' transcript "that the trustees of the Bail

Fund . . . have got complete authorization and power to post bonds in cases involving civil rights with funds which are given to them expressly for the purpose of posting such bonds; that the authority to post such bonds is vested solely in the trustees and that persons who lend money to the trustees have no authority or no control or no interest in the determination of that party for whom the bonds are posted." The record clearly supports this statement.

Pursuant to the purposes of the trust, the Bail Fund posted $260,000 bail in the *Dennis* case. On arrival of the mandate of the Supreme Court of the United States affirming the convictions of Dennis et als., the District Court undertook to commit the defendants to serve their sentences. Four did not appear and have not been found. Bench warrants issued for them have not been served. Their bonds of $80,000 have been forfeited.

The District Court requested the presence of the movants, trustees of the Bail Fund. Although subpoenas were issued for their appearance, they appeared in court without service and were sworn as witnesses in a hearing in the case of *United States* v. *Dennis*, to assist the court in effecting service of its process to commit the four non-appearing defendants. Their apprehension was sought to complete the judgment by confinement for the term imposed. The court stated that the non-appearance impeded "the orderly administration of justice"; that it wished to know if anyone was assisting in their evasion of process. The movants, the trustees, appeared as witnesses, not parties. During the course of their examination as witnesses in the endeavor to locate the absent defendants, the movants refused to answer certain questions and to produce the records of the Bail Fund of which they were trustees. Thereupon the court proceeded summarily to adjudge them in criminal contempt under Rule 42(a), Rules of Criminal Procedure, and certified he saw and heard the contumacious conduct.

The judgments for contempt involved in this appeal have nothing to do with any charge against movants of unlawfully harboring or concealing the four defendants in the *Dennis* case. These movants are charged with no unlawful act except contempt of court in their refusal to answer questions and submit books of the Bail Fund within their control.

Without setting out at length the testimony of the movants, I think it sufficient to say that the court sought to have brought before it by the witnesses the records of the Bail Fund, particularly the certificates of deposit issued to those who furnished money or bonds for the Fund, so that the names of the contributors would be available to the court. For example, the interrogation of the witness and movant, Mr. Field, shows the testimony set out in the margin.[1] Mr. Field also testified that the records of the Bail Fund were exclusively in the custody of the trustees. He declined to produce the list under a claim of privilege against self-incrimination.

The testimony of Mr. Field is explicit upon the issue as to whether the records of the Bail Fund were personal property of the individuals who were trustees or of the Fund. The records, he said, were held only by them as trustees and if the trustees were to change, the books and records would be surrendered. Another witness, Mr.

[1] "Q. Does this bail fund, of which you have been trustee, issue certificates of deposit?
"A. Yes, your Honor.
"Q. To those who have deposited bonds?
"A. Yes.
"Q. And is a record kept of those certificates, to whom they are issued, and the date?
"A. That's right, your Honor.
"Q. Where is such record?
"A. In view of the fact, your Honor, that that question pertains to the identity of individual lenders, I decline to answer on the ground that the reply might tend to incriminate me, and I do so under the Fifth Amendment."

Green, testified on examination as to control of the records of the Fund. Q. "And you likewise maintain absolute control and domination over the affairs of the fund in respect to maintenance of its books and records and the files, do you not?" A. "As a board of trustees we do, yes."

There was no denial of such custody of the records by any witness. Mr. Hunton declined to comply with the court's direction to produce the records on the ground that "I do not have custody or possession of any of the documents you have enumerated." That is, the records. He was not pressed further. Mr. Hammett, in reply to a direction to produce the records, answered: "Without conceding that I have the ability to or can produce such documents, I must decline to produce them."

The movants answered questions as to some matters in regard to the absent defendants in the *Dennis* case but refused many on the ground of possible self-incrimination. As the existence, character, and production of the Bail Fund records and whether the books sought were maintained under the trustees' control in their representative capacity as trustees of the Bail Fund were the principal issues, it seems unnecessary further to specify the testimony of these movants.

Two procedural objections to the convictions may first be noted and passed upon. In the conviction of Mr. Field, it is argued the order was not made in conformity with Rule 42(a) of the Rules of Criminal Procedure. The rule requires that the order of contempt "recite the facts and shall be signed by the judge and entered of record." On July 5, 1951, this certificate was not available and the appeal was taken before the certificate was signed. It is argued that the subsequent entry and certification of the certificate could not cure the defect. The Chief Judge looked upon this as a non-prejudicial error at most, as it would merely require a remand and re-sentence. I agree. Furthermore, counsel for Mr. Field on July 9 moved to set aside Mr. Field's commitment

for failure to file the certificate. The trial judge offered to resentence Mr. Field and the motion was withdrawn. This removes this technicality from the need of further consideration.

A second procedural objection is basic to all the convictions. It is movants' contention that the entire hearing is a nullity because beyond the judicial power, the jurisdiction, of the trial court. The point made by movants is that the execution of the bench warrants of the trial court on the four defendants in the *Dennis* case is an executive function of the marshal or the Federal Bureau of Investigation, that any inquiry as to the reasons for failure to execute the warrants must be by the grand jury, the investigatory body in the judicial branch of our government.

District Courts of the United States have jurisdiction of all offenses against the laws of the United States. 18 U.S.C. § 3231. They "may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law." 28 U.S.C. § 1651. "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment is satisfied." *Wayman* v. *Southard*, 10 Wheat. 1, 23. Under ancient practice bench warrants are issued on indictments to bring defendants before the court for trial, and after violation of bail, either before or after conviction, warrants issue in order that a judgment may be executed. There can be no doubt of the power of the court to direct the bench warrant for the arrest of the four fugitives from justice in the case of Dennis et als.

In the endeavor to execute the judgment of conviction, the District Court could bring before it as witnesses the trustees of the Bail Fund. They were, in truth, the jailers of the fugitives, responsible for their appearance.[2] As

[2] *Reese* v. *United States*, 9 Wall. 13; *Taylor* v. *Tainter*, 16 Wall. 366; *Cosgrove* v. *Winney*, 174 U.S. 64; *United States* v. *Lee*, 170 F. 613; *United States* v. *Ryder*, 110 U.S. 729.

such they had a relation to the court that justified the court's requirement that they give evidence as witnesses in the proceedings to carry out the imprisonment of the Dennis [Publisher's note: "Dennis" should be italicized here.] defendants.[3] Those defendants came under control of the court at their original surrender. Although on bail they were under court control. The condition of the bond is the appearance of the principal in the court on demand. The bail may arrest the principal at any time. 18 U.S.C. § 3142.

The District Court's power to protect the execution of its business from obstruction by a witness' refusal to answer inquiries is established. There is, of course, no doubt that the hearing was by the court. The witness may not take exception to the materiality of the questions (*Nelson* v. *United States*, 201 U.S. 92, 114) or as to whether the court has jurisdiction over the subject matter of the inquiry or the constitutionality of the statute under consideration. Objections as to the proceedings are for the parties thereto. It is enough if the court has a *de facto* existence and organization.[4] The interference with carrying on the court's business in the presence of the court furnishes the reason for the use of the contempt power.[5] These witnesses, movants now, were summonsed or appeared in the final proceedings of the *Dennis* case and

[3] Cases cited by movants to support their theory that the sureties on bail have no responsibility beyond their bond are not contrary to the foregoing authorities. In *Leary* v. *United States*, 224 U.S. 567, the issue was the right of a bondsman to intervene to secure adjudication of his rights as bondsman in a fund claimed by the United States. Nothing was said as to the relation of bondsman as jailer of the fugitive. Even the fact that a man may post cash bail, asserted by movants, 6 U.S.C. § 15, is not an argument against a bailsman's powers and duties.

[4] *Blair* v. *United States*, 250 U.S. 273. See *United States* v. *Shipp*, 203 U.S. 563, 573; *United States* v. *United Mine Workers*, 330 U.S. 258, 293.

[5] *Ex parte Hudgings*, 249 U.S. 378; *United States* v. *Appel*, 211 F. 495; *Clark* v. *United States*, 289 U.S. 1, 11, *et seq*. Cf. *Leman* v. *Krentler-Arnold Hinge Last Co*., 284 U.S. 448.

were asked to testify to assist the court in carrying out its judicial duty of committing the defendants to imprisonment. The court had not resolved itself into a court of inquiry to determine whether a crime had been committed or to get evidence to initiate a prosecution, such as was true in *In re Pacific T. & T. Co.*, 38 F.2d 833, or *Ketcham* v. *Com.*, 204 Ky. 168. This was a proceeding to complete the *Dennis* case. Subject to their privileges as witnesses, they were compellable to attend and testify. None are exempt. Rule 17, Rules of Criminal Procedure. Distance or occupation does not excuse witnesses in criminal cases. A witness cannot trifle with the court or make its "processes a mockery." *Clark* v. *United States*, 289 U.S. 1, 12.

We need not analyze the privilege claimed by Hunton or Hammett concerning their relations with the absent defendants. Whether Field or Hunton waived privilege by some of their testimony does not affect the principal issue in these convictions—the right of the trustees of the Bail Fund to refuse to produce its records. As shown by the testimony of Field and Green, *supra*, these records were held by the Board of Trustees as the property of the Board, not as the records of the appellants in their individual capacity. In such circumstances the fact that title to the property and records of the trust is in the trustees is immaterial. We have recently held as much in *United States* v. *White*, 322 U.S. 694, 699, where the books of a labor union were refused to the court by their custodian on the ground of self-incrimination. On the custodian's conviction for contempt, we upheld the conviction saying, as to representatives of a collective group, "And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." This is a fixed rule. See *Wilson* v. *United States*, 221 U.S. 361.

Here the recalcitrant trustees, when on the stand, although the evidence was clear as to their control of the records, declined to produce the records on a claim of privilege, a claim of lack of power or, in the case of Mr. Hammett, by a simple refusal.

I have no doubt that such refusal was contemptuous and that their conviction was proper. Consequently I must deny their applications for bail pending appeal.

STANLEY REED,
Acting Circuit Justice for the Second Circuit.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1951.

In The Matter of the Petition in Behalf of Ronald Virgil Johnson.	))	Application for Bail and Stay.

[April 25, 1952.]

Opinion of MR. JUSTICE DOUGLAS.

Petitioner was inducted into the army at Los Angeles, California, after having been classified in Class I-A. Prior to his being transferred to a training camp, a petition for habeas corpus was filed on his behalf in the United States District Court for the Southern District of California. The petition alleged that his order to report for induction was invalid, because he had been erroneously classified by his draft board and had not received a proper hearing before the board. The District Court issued an order to show cause, and after a hearing denied the petition. The Court of Appeals for the Ninth Circuit denied petitioner's application for bail and for a stay pending appeal to that court. Petitioner now asks that I release him on bail until the cause is finally determined, and that I issue a stay directing that he not be removed from the Southern District of California pending further appellate proceedings in the Court of Appeals and in this Court.

Application for bail.—Since bail is requested here pending review of a denial of habeas corpus, Rule 45 of this Court's rules is applicable.[1] That rule provides, in pertinent part (306 U.S. 671, 724):

[1] Rule 45 was originally added as Rule 34. Under the revised Rules of 1925 it was renumbered as Rule 42 (266 U.S. 685). Under the revised Rules of 1928 it was given its present designation (275 U.S. 629). The rule was established under § 765 of the Revised Statutes (2d ed. 1878), which provided that "appeals allowed . . . shall be taken on such terms, and under such regulations and or-

> 1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.
> 2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.
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> 4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard.

Under Rule 45(4) the Court might fix bail in this case, if special reasons were shown justifying an exercise of that power. The question is whether an individual Justice also has the power. In *In the Matter of Pirinsky*, 70 Sup. Ct. Rep. 232, MR. JUSTICE JACKSON answered the question in the negative. I disagree; and since the problem is a recurring one, I will set forth my views.

Habeas corpus, the traditional writ for testing the lawfulness of a person's detention (*McNally* v. *Hill*, 293 U.S. 131), is a proper means for obtaining bail by a court or

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ders, . . . for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, . . . as may be prescribed by the Supreme Court. . . ." This authorization was carried forward in § 6(d) of the Act of February 13, 1925, 43 Stat. 936, 940.

a judge not responsible for committing the prisoner, as Chief Justice Marshall said in *Ex parte Bollman*, 4 Cranch 75, 100. The power to issue the writ is given to a Justice (28 U.S.C. (Supp. IV) § 2241), who has power to grant bail as an incident to ruling on an application for the writ. The fact that no petition for the writ is before me nor before the Court does not alter the case. Rule 45(4) provides for the allowance of bail by the Court in habeas corpus cases on appeal in the Court of Appeals as well as in cases presently here. In other words it gives the Court power to act in a case such as the present one where a person detained is denied bail, pending disposition of the review of his case in the lower court.

Rule 45(4) deals only with the power of the Court, not with the power of an individual Justice. But it is argued that the grant of the power to the Court is by implication a denial of the power to an individual Justice. If that argument is correct, the Court and only the Court could grant the relief requested here. The Court, however, is not always in session. There are long periods when no quorum is available unless a Special Term be called. If only the Court could act, the rights of a person detained might be effectively lost during such periods. By the time Court reconvened, a long term of unlawful detention might have been endured. I cannot believe that such hiatus in the law was purposely designed. Yet unless it were, the power of an individual Justice should not be denied. The right to habeas corpus[2] and the right to bail[3] have roots deep in our constitutional system. The right to bail is often essential to the vitality of the writ of habeas corpus. In view of the importance in our system of jus-

[2] Article I, § 9 of the Constitution provides "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

[3] The Eighth Amendment provides: "Excessive bail shall not be required . . . ."

tice of the power to grant bail (see *Stack* v. *Boyle*, 342 U.S. 1) I cannot conclude that the power specified by the statute and by the rules is exclusive. See *Hudson* v. *Parker*, 156 U.S. 277; *Wright* v. *Henkel*, 190 U.S. 40, 63.

Examination of analogous provisions relating to bail in criminal proceedings strengthens this conclusion. From the beginning a Justice has had the power to admit to bail. See § 33 of Judiciary Act of 1789, 1 Stat. 91. This power has been carried forward and is now found in 18 U.S.C. (Supp. IV) §§ 3041, 3141 and in Rule 46 of the Federal Rules of Criminal Procedure under which a Justice may allow bail both before conviction and upon review after conviction. It would be strange indeed to grant the power to fix bail in a criminal proceeding, but to deny it in a habeas corpus proceeding which might itself collaterally involve a criminal proceeding.

I read Rule 45(4) harmoniously with the long standing power of a Justice to grant bail. I construe it to include only what it purports to define, *viz.* the manner of the exercise of the power by the Court. It leaves to other sources the power of a Justice to modify or alter the provisions made for the custody of a prisoner by another judge or court.

Nor should that power be denied because the problem is peculiarly one for the Court and hence not one by inference to leave to a Justice under the statutory scheme. Quite the contrary is true. The determinations of what bail to grant, if any, are peculiarly one [Publisher's note: The simplest way to make sense of this sentence is to delete the "one" preceding this note.] for the exercise of discretion after hearing. See *Stack* v. *Boyle*, *supra*, 5-6. Normally it is much more appropriate for a Justice to make these determinations than for the Court to do so, considering the way the Court is organized and functions.

My conclusion is that the power of an individual Justice to fix bail in cases such as the present one is not precluded by Rule 45(4), that it is implied in the law, and

that an individual Justice has the power to grant bail in situations where the Court might act under Rule 45(4).[4]

In exercising that power I take as my standard the one which Rule 45(4) prescribes for the Court. That is to say, I require an applicant to show special reasons which justify disturbing the order respecting bail. In evaluating those reasons, I show great deference to the adverse action of the lower court.

On the papers presented to me, petitioner has not shown special reasons for disregarding the action of the lower court. Therefore, I am unwilling to grant his application for bail.

Application for stay.—Even if petitioner is not released on bail, he desires that a stay be granted to keep him within the Southern District of California pending further appellate proceedings. 28 U.S.C. (Supp. IV) § 2101(f) provides that a stay of execution may be granted by a Justice "in any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari." To date there is no judgment of the Court of Appeals which would qualify under that language. But the judgment of the District Court denying the petition for the writ is final and is subject to review here prior to final judgment of the Court of Appeals by reason of 28 U.S.C. (Supp. IV) § 1254(1).[5] Hence I conclude that I have the power to stay the execution of the judgment below. See the opinion of MR. JUSTICE REED in *In re Equitable Office Building Corporation*, reprinted in Wolfson & Kurland, Jurisdiction of the

[4] A different question would be presented if an individual Justice were asked to act after the Court had refused to exercise its power under Rule 45(4).

[5] *United States ex rel. Quirin* v. *Cox*, 317 U.S. 1, 19-20; *Porter* v. *Dicken*, 328 U.S. 252, 254; *Insurance Group* v. *Denver & R.G.W. R. Co.*, 329 U.S. 607, 611; *United States* v. *United Mine Workers*, 330 U.S. 258, 269.

Supreme Court of the United States, pp. 904-905. But breadth of power does not imply liberality of exercise. The Solicitor General represents that petitioner will be within the jurisdiction of the Court of Appeals for the Ninth Circuit for the next eight weeks. Hence there is no danger at present that petitioner's appellate proceedings will be jeopardized.

Application for bail is denied. Application for stay is denied.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1951.

The United States *ex rel.* Norris *v.* Swope.	))	Application for Writ of Habeas Corpus.

[April —, 1952.]

Opinion by MR. JUSTICE DOUGLAS.

Petitioner was convicted of robbery under 18 U.S.C. § 99 (1946 ed.) in the United States District Court for the Southern District of Texas. On June 6, 1945, he was sentenced to a term of ten years imprisonment. He appealed to the Fifth Circuit Court of Appeals, which affirmed the conviction, *Norris* v. *United States*, 152 F.2d 808. The Court denied certiorari. 328 U.S. 850. During the period of the appeal petitioner remained in jail. Under the federal criminal rules applicable at the time of his sentence (Criminal Rule V, 292 U.S. 663), he had affirmatively to elect to count the time spent in jail, pending appeal, as part of the service of his sentence. He failed to do so. While his appellate proceedings were still pending, the new federal Criminal Rules became effective; and they did not require a defendant to elect in order to have time spent in jail counted on his sentence (Criminal Rule 38(a)(2), 327 U.S. 858. See also Rule 59, 327 U.S. 876).

Petitioner filed a motion pursuant to 28 U.S.C. (Supp. IV) § 2255 in the federal district court for the Southern District of Texas, seeking a correction of his sentence, so as to obtain credit for the time spent in jail pending the appellate proceedings. The district court denied relief. The Court of Appeals for the Fifth Circuit affirmed. *Norris* v. *United States*, 190 F.2d 186. It concluded that the sentence itself was correct, that the new criminal rules did not apply retroactively, that petitioner could claim no

credit on his sentence for time spent in jail while the old rules were in effect, as he had not elected to do so, and that this was no case of hardship as petitioner had been represented by counsel. It also concluded that any credit for time spent under the new rules, if such were allowable, should properly be considered in computing the expiration date of petitioner's sentence.

Petitioner thereupon applied for a writ of habeas corpus in the United States District Court for the Northern District of California (within whose jurisdiction he is presently confined). The petition was dismissed. Petitioner filed a second petition for habeas corpus, which was also dismissed after issuance of a rule to show cause. He now applies to me as Circuit Justice for a writ of habeas corpus, alleging that his commitment has expired by virtue of lawful prison service, and that he is unable to secure judicial relief elsewhere.

Petitioner neither sought certiorari from the decision of the Court of Appeals for the Fifth Circuit which affirmed the denial of his § 2255 motion, nor did he attempt to appeal to the Court of Appeals for the Ninth Circuit in the habeas corpus proceedings. He explains his failure to appeal to the Court of Appeals for the Ninth Circuit by contending that that court, under its recent decisions, denies that it has jurisdiction to review habeas corpus proceedings on the merits. See *Jones* v. *Squier* and *Winhoven* v. *Swope*, decided on February 28, 1952. Those cases involved attacks on the validity of sentences by means of habeas corpus; and the Court of Appeals held that such attacks were to be made by a § 2255 proceeding to the exclusion of habeas corpus.

Whether the Court of Appeals will apply the rule of those cases to situations such as the present, where the validity of the sentence is not challenged, is for that court to determine in a case before it on appeal. Until a peti-

tioner seeks that relief and until he exhausts his remedies by certiorari to this Court from a denial of relief both in the habeas corpus case and in the § 2255 proceeding, I do not think it would be appropriate, absent a showing of exceptional circumstances (see *Sunal* v. *Large*, 332 U.S. 174, 181-182), for an individual Justice, although he has the power to grant the writ, 28 U.S.C. (Supp. IV) § 2241(a), to entertain the petition on the merits.

Application denied.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1951.

Stanley J. Orloff, Petitioner,	)	
v.	)	Application to vacate,
Colonel Rex E. Willoughby,	)	modify or interpret
Commandant of Fort Lawton,	)	Stay Order.
Seattle, Washington.	)	

[May 3, 1952]

Opinion by MR. JUSTICE DOUGLAS.

On March 28, 1952, I issued a stay in this habeas corpus proceeding which reads as follows:

"UPON CONSIDERATION of the application of counsel for the petitioner,

"IT IS ORDERED that respondent, REX E. WILLOUGHBY, Commanding Officer of Fort Lawton, or such other person or persons as may be temporarily acting in the capacity of petitioner's commanding officer, and exercising control of and custody over petitioner, be, and he is hereby, stayed from removing or permitting the removal of petitioner from his custody or control or his ability to produce the person of petitioner, pending the timely filing and disposition of a petition for certiorari."

The United States now moves for a vacation or modification of that order which would permit the movement of Orloff to any point in the world or alternatively to any U.S. Army post in the United States.

It appeared on hearing that Orloff is presently detained at Fort Lawton in the State of Washington where, it is said, his services cannot be effectively utilized. He is now on a "detached service status" which means, according to representations of the Department of Justice, that the Commanding Officer of Fort Lawton can recall and produce Orloff in response to an order of the District

Court for the Western District of Washington (which denied his petition for a writ of habeas corpus), no matter to what army post Orloff is assigned. The problem is the protection of the jurisdiction of this Court over Orloff's petition for certiorari to the Court of Appeals. That court affirmed the District Court's order and Orloff now intends to file a petition for certiorari. In view of the control over Orloff which the Commanding Officer of Fort Lawton has by reason of Orloff's "detached service status," the jurisdiction of this Court over the appellate proceedings would not be disturbed if Orloff were moved to another army post within the United States. *Ex parte Endo*, 323 U.S. 283, 304-306. Accordingly I will modify the stay order to provide that so long as petitioner retains his "detached service status," he may be assigned anywhere within the United States.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1952.

Mallonee, et al.	)	Application for
v.	)	Order Vacating
Fahey, et al.	)	Stay of Proceedings.

[November 20, 1952.]

Opinion of MR. JUSTICE DOUGLAS.

This application arises out of litigation which started in 1946 when petitioners filed suit in the Federal District Court for the Southern District of California against the late John H. Fahey and others for the alleged wrongful seizure of the property of the Long Beach Savings and Loan Association, pursuant to § 5(d) of the Home Owners' Loan Act of 1933, as amended. The case was before this Court in *Fahey* v. *Mallonee*, 332 U.S. 245, in which we held § 5(d) to be constitutional. And see *Ex parte Fahey*, 332 U.S. 258. Following our decision, the District Court, proceeding on the basis of an amended complaint, issued a preliminary injunction against the holding of administrative hearings relating to the conditions giving rise to the seizure. The Court of Appeals for the Ninth Circuit reversed on the grounds that the District Court lacked jurisdiction of the subject matter. *Home Loan Bank Board* v. *Mallonee, et al.*, 196 F.2d 336; *Fahey et al.* v. *O'Melveny and Myers, et al.*, — F.2d — (decided November 6, 1952).

Petitioners intend to file petitions for writs of certiorari to secure review of those judgments. In order to preserve the status quo, the Court of Appeals ordered a stay of all proceedings in the District Court. One of the proceedings affected by that stay was a motion filed by peti-

tioners for the substitution of parties defendant under Rule 25(a)(1) of the Rules of Civil Procedure.[1]

Suit was brought against defendant Fahey "individually and in his representative capacity as Home Loan Bank Commissioner." In 1947, the Home Loan Bank Board succeeded to the powers of the Commissioner. Mr. Fahey remained on as a member of the Board which, together with its members, has been made a party defendant in this action. Substitutions and additions of parties have been made as changes in Board membership have occurred. Mr. Fahey died on November 19, 1950. By their motion under Rule 25(a)(1), petitioners seek to substitute the present members of the Board "individually" in the stead of Mr. Fahey in his "individual capacity."[2] The Court of Appeals refused to vacate its stay which bars the District Court from acting on the motion. Application is made to me as Circuit Justice for an order vacating the stay insofar as it precludes such action by the District Court.

[1] "*Rule 25. Substitution of Parties.*

"(a) Death.

"(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

[2] The substitution is sought on the theory that, since survival of an action is dependent on timely substitution (see *Snyder* v. *Buck*, 340 U.S. 15), the action against Fahey individually must not be allowed to abate else the suit not survive the test laid down by *Land* v. *Dollar*, 330 U.S. 731, distinguishing between suits against the sovereign and suits against public officials as tortfeasors.

If there were a substantial question presented I would grant the stay and allow the District Court to pass on the issue. But after oral argument and a consideration of the papers filed I have concluded that on the merits no substantial question is presented.

Rule 25(a) is derived in part from former 28 U.S.C. § 778, 42 Stat. 352 (see *Anderson* v. *Yungkau*, 329 U.S. 482) which provided for substitution of the executor or administrator of a party who died during the pendency of an action. It is plain, I think, that Rule 25(a)(1) applies only to the substitution of legal representatives. That is not only clear from its history;[3] it is implicit in the wording of the provision and in the cases construing it.[4] But the persons whom plaintiffs seek to substitute are successors in office of the deceased. Rule 25(d) provides for their substitution ". . . when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States."[5] No different or broader base for their substitution has been granted. They are not the legal representatives of Fahey. They might conceivably be *personally* liable if, as Board

[3] "1. The first paragraph of this rule is based upon Equity Rule 45 (Death of Party—Revivor) and U.S.C., Title 28, § 778 (Death of parties; substitution of executor or administrator). The *scire facias* procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81(b)." Notes of the Advisory Committee on Rules for Civil Procedure, March 1938, p. 25.

[4] See *Anderson* v. *Yungkau*, *supra; Winkelman* v. *General Motors*, 30 F. Supp. 112. [Publisher's note: The period preceding this note probably ought to be a semicolon.] *Feinberg* v. *United States*, 25 F. Supp. 905; *Edner* v. *Mathews*, 44 F. Supp. 873; *Swanson* v. *Northern Pacific R. Co.*, 26 F. Supp. 792; *Commercial Solvents Corp.* v. *Jasspon*, 92 F. Supp. 20; *Hofheimer* v. *McIntee*, 179 F.2d 789.

[5] The persons whom plaintiffs seek to substitute under Rule 25(a)(1) have already been substituted under Rule 25(d).

members, they pursued the same policy as Fahey and ratified his alleged wrongful acts. But they can incur no liability for acts alleged to have been committed by him for which he would have been *personally* liable, even if it is assumed that any such claim against Fahey was not extinguished by his death. On this state of facts, there does not appear to be a substantial claim to any right to substitute parties defendant under Rule 25(a)(l). Accordingly the application for an order vacating the stay of proceedings issued by the Court of Appeals is

Denied.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1952.

Nat Yanish	)	Application for Bail Pending
v.	)	Appeal.
Bruce G. Barber.	)	

[May 16, 1953.]

Opinion of MR. JUSTICE DOUGLAS.

This is an application for bail pending decision by the Court of Appeals on an appeal dismissing a petition for habeas corpus—an application which a Justice of the Supreme Court has power to entertain. See *Petition of Johnson*, 72 Sup. Ct. 1028.

The applicant is a citizen of Russia, admitted into this country in 1917. He was arrested under a deportation warrant on May 21, 1946. The charge was that he was a member of the Communist Party, advocating the overthrow of the Government of the United States by force and violence. I understand from the oral argument that the applicant is employed by the People's World, a Communist paper published in California. Since his arrest and pending the determination of his deportability, he has been out on bond, first in the amount of $1,000, then in the amount of $500, and since 1949 in the amount of $5,000. The Department of Justice makes no contention that the applicant is a person likely to flee or to go into hiding; nor that he has any criminal record or proclivity to conduct which would jeopardize the safety of the community, except his Communist Party membership which was the basis of the warrant of deportation. In fact during the seven years when applicant has been out on bond he apparently has been ready at all times to submit himself to the authority of the Immigration and Naturalization Service.

In 1952 the Assistant Commissioner found applicant to be deportable on the ground that he was a member of the Communist Party. On March 11, 1953, the Board of Immigration Appeals confirmed those findings and the order of deportation, thus making the order of deportation final. So far as the papers before me show, no review of that deportation order has been sought. The habeas corpus proceedings now pending before the Court of Appeals relate to conditions of a new bond required by the Attorney General.

Applicant refused to execute the bond containing those conditions and filed a complaint in the District Court for the Northern District of California seeking an order restraining respondents from imprisoning him for failing to provide the new bond. The court held the conditions were within the power of the Attorney General to impose and denied relief. Thereupon applicant's old bond was canceled and he was taken into custody. He immediately filed a petition for habeas corpus, in which he claimed that imprisonment for refusal to sign a bond containing those conditions was illegal. On March 25, 1953, the District Court dismissed the petition. On April 3, 1953, applicant filed a notice of appeal in the Court of Appeals. So far as I am advised that appeal has not been argued or acted upon. The District Court denied bail pending appeal. The Court of Appeals likewise denied the application for bail, being of the view that it lacked the power to grant it.

The new Immigration and Nationality Act, 66 Stat. 163, which became effective December 24, 1952, provides in § 242(c):

> "When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is

> had, then from the date of the final order of the court, within which to affect [Publisher's note: "affect" should be "effect".] the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe."

Acting pursuant to that provision the Attorney General determined that the bond should contain the following conditions:

> "(a) That said alien shall notify the Officer in Charge of the Immigration and Naturalization Service, 630 Sansome Street, San Francisco, California, of any change in residence or employment, within the immigration district, within forty-eight hours after change is made;
> "(b) That said alien shall apply to the Officer in Charge of the Immigration and Naturalization Service, 630 Sansome Street, San Francisco, California, for permission to change place of residence from one immigration district to another at least forty-eight hours prior to such change;
> "(c) That said alien shall report in person on the first Monday of each month between the hours of 10:00 a.m. and 4:00 p.m. to the Officer in Charge of the Immigration and Naturalization Service, 630 Sansome Street, San Francisco, California;
> "(d) That said alien shall terminate and remain disassociated from, membership in, if any, support or other activity, if any, in or in furtherance of the doctrines and policies of, the Communist Party of the United States, the Communist Political Association, the Communist Party of any state, or of any foreign

> state, or of any political or geographical subdivision of any state, any section, subsidiary, branch, affiliate, or subdivision of any such group or organization;
> "(e) That such alien shall refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with or is engaged in any promotion of any of the activities mentioned in subparagraph (d) above;
> "(f) That said alien shall not violate section 2385 of the 'Smith' Act of June 25, 1948 (section 2385 of Title 18, U.S. Code) and section 4 of the Internal Security Act of September 23, 1950 (Section 783 of Title 50, U.S. Code);"

Allowance of bail pending appeal depends upon a determination whether the appeal presents a substantial question. See *Hudson* v. *Parker*, 156 U.S. 277; *D'Aquino* v. *United States*, 180 F.2d 271. On the appeal in this case, applicant contends that the conditions sought to be imposed upon his enlargement pending deportation amount to an abuse of the discretion granted to the Attorney General by § 242(c) of the 1952 Act. On oral argument the Department of Justice, in support of the conditions attached to the bond, relied not only on the broad language contained in § 242(c) but also on § 242(d) which provides that if the Attorney General is unable to effect deportation within the six-month period, the alien shall be subject to a parole supervision under conditions specified in the Act.[*] Whether the conditions

[*] SECTION 242(d) provides:
"Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require

of parole contained in § 242(d) are also guides to the exercise of discretion for granting of bail is, I think, an arguable question, not free from doubt. The function of bail in situations such as the instant one is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal, on the other. See *Hudson* v. *Parker, supra*; *United States* v. *Motlow*, 10 F.2d 657. It is not apparent how at least some of the conditions attached to the bond serve those ends. Specifically, it is not obvious how the requirement that the alien give up his job with the Communist paper provides security for his appearance in case the Immigration and Naturalization Service can effect his deportation to Russia. It is of course immaterial whether those conditions are appropriate for bail, if there is no judicial review. Section 242(c) gives broad authority to the Attorney General and speaks in general terms: the alien may be "released on bond in an amount and containing such conditions as the Attorney General may prescribe." But in spite of the fact that the discretion of the Attorney General under § 242(c) is very broad, I believe there is

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any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall wilfully fail to comply with such regulations, or wilfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

judicial review of his exercise of it. The Court of Appeals for the Second Circuit so held in *United States* v. *Esperdy*, 202 F.2d 109, 112. That was the premise of *Carlson* v. *Landon*, 342 U.S. 524, decided under the predecessor statute. In the oral argument before me that position was not contested by the Department of Justice under the present Act.

Even if it is determined that the conditions appropriate for parole are appropriate for bail, there is the further question whether the conditions in the bond exceed the discretion of the Attorney General. Condition (e), which would prevent the applicant "from associating with any person, knowing or having reasonable ground to believe" that such person is a Communist, would, taken literally, prevent him from living with his Communist wife or going to a movie with his Communist son or seeing his Communist legal adviser or being treated by his Communist doctor. How that prohibition would do service in the tradition of Anglo-Saxon bail or how it would further the program of deportation which Congress has designed is not apparent. On oral argument the Department of Justice says that the language would not, as a matter of administrative practice, be construed that way. But there is a broad sweep to the language that would permit another ruling on a different day. Moreover, condition (d) would require applicant to give up his job with the Peoples [Publisher's note: "Peoples" should be "People's".] World—a job which so far as the record shows is not *itself* an illegal undertaking either under state or under federal law. Whether, pending deportation, an alien can be forced under the present law to make that choice—to give up a lawful job with a Communist paper or go to jail—certainly is not a frivolous question.

Under our system even government must operate within the law. The law presently involved finds its sources in the statute, in the decisions of the Supreme

Court, and in the Constitution. It is argued that if the broad sweeping conditions here involved are sustained, a government of men will take the place of a government of laws in this field of bail. I do not decide the merits. I go no further than to conclude that the appeal pending before the Court of Appeals presents substantial questions. Therefore the requirement of Rule 45 of the Supreme Court is met, *viz.* that before the order of the lower court respecting custody is disturbed "special reasons" must be shown. Cf. *Petition of Johnson, supra*.

This alien's appeal apparently will not be disposed of by the Court of Appeals within the six months' period specified in § 242(c) of the Act. If bail is not granted, there will be no way for the applicant to test the question of the power of the Attorney General to attach these conditions to the bond. For he will either have to suffer the conditions or remain in custody for the whole of the six months.

I will admit applicant to bail in the conventional meaning of the term, pending disposition of his appeal now before the Court of Appeals. Applicant has been out on bail for seven years, the highest bond exacted being $5,000. That amount was indeed approved by the Immigration and Naturalization Service in 1949 and by the District Court in 1950. There has been no doubt during those years that that amount was adequate to insure the alien's appearance. No reason is presented in the papers before me or on oral argument that conditions have so changed that a larger amount is now necessary.

Application granted.

SUPREME COURT OF THE UNITED STATES

Julius Rosenberg and Ethel Rosenberg,	)	
Petitioners,	)	Application for a Stay.
v.	)	
The United States of America.	)	

[June 17, 1953.]

MR. JUSTICE DOUGLAS.

These are two applications for a stay of execution made to me after adjournment of the Court on June 15, 1953. The first raises questions concerning the fairness of the trial of the Rosenbergs. I have heard oral argument on that motion and considered the papers that have been filed. This application does not present points substantially different from those which the Court has already considered in its several decisions to deny review of the case, to deny a stay of execution, and to deny a petition for a writ of *habeas corpus*. While I differed with the Court and thought the case should have been reviewed, the Court has spoken and I bow to its decision. Although I have the power to grant a stay, I could not do so responsibly on grounds the Court has already rejected.

Another motion for stay, together with a petition for writ of *habeas corpus* [Publisher's note: There should be a comma here.] challenges the power of the District Court to impose the death sentence on the Rosenbergs. The Espionage Act (50 U.S.C. § 32(a)) provides:

> "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or *to the advantage of a foreign nation*, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country,

> whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death* or by imprisonment for not more than thirty years . . . ." (Italics added.)

Section 34 provides:

> "If two or more persons conspire to violate the provisions of sections two or three of this title and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine."

The indictment, which was returned in 1951, charged a conspiracy to violate § 32(a) with an intent to communicate information that would be used to the advantage of a foreign nation, *viz.*, Soviet Russia. The conspiracy was alleged to have continued from June 6, 1944 to and including June 16, 1950. The overt acts of the Rosenbergs which were *alleged* took place in 1944 and 1945.

On August 1, 1946, the Atomic Energy Act became effective. Section 10 (b)(2) and (3) provide:

> "(2) Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with, any document, writing, sketch, photograph, plan, model, instrument, appliance, note or information involving or incorporating restricted data—[1]
>
> "(A) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by death or imprisonment for life (*but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury and only in cases where the offense was committed with intent to injure the United States*); or by a fine of not more than $20,000 or imprisonment for not more than twenty years, or both;" (italics added).
>
> "(B) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than $10,000 or imprisonment for not more than ten years, or both.

[1] It would seem that the secrets involved in this case were "restricted data" within the meaning of the Act. Section 10(b)(1) defines that term as meaning "all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power, but shall not include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security."

> "(3) Whoever, with intent to injure the United States or with intent to secure an advantage to any foreign nation, acquires, or attempts or conspires to acquire any document, writing, sketch, photograph, plan, model, instrument, appliance, note or information involving or incorporating restricted data shall, upon conviction thereof, be punished by death or imprisonment for life (*but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury and only in cases where the offense was committed with intent to injure the United States*); or by a fine or not more than $20,000 or imprisonment for not more than twenty years, or both." (Italics added.)

It is apparent from the face of this new law that the District Court is without power to impose the death penalty except

—upon recommendation of the jury
and
—where the offense was committed with an intent to injure the United States.

Neither of those conditions is satisfied in this case as the jury did not recommend the death penalty nor did the indictment charge that the offense was committed with an intent to injure the United States. If the Atomic Energy Act of 1946 is applicable to the prosecution of the Rosenbergs, the District Court unlawfully imposed the death sentence.

The Department of Justice maintains that the Espionage Act is applicable to the indictment because all of the overt acts *alleged* took place before the passage of the Atomic Energy Act of 1946. Petitioner maintains that since the indictment was returned subsequent to the Atomic Energy Act and since the conspiracy alleged,

though starting prior to that time, continued thereafter, the lighter penalties of the new Act apply.

Curiously, this point has never been raised or presented to this Court in any of the earlier petitions or applications. The first reaction is that if it was not raised previously, it must have no substance to it. But on reflection I think it presents a considerable question. One purpose of the Atomic Energy Act was to ameliorate the penalties imposed for disclosing atomic secrets. As S. Rep. No. 1211, 79th Cong., 2d Sess., p. 23, stated, the problem in drafting § 10 was to protect the "common defense and security" and yet assure "sufficient freedom of interchange between scientists to assure the Nation of continued scientific progress."

The Rosenbergs obviously were not engaged in an exchange of scientific information in the interests of science. But Congress lowered the level of penalties to protect all those who might be charged with the unlawful disclosure of atomic data. And if the Rosenbergs are the beneficiaries, it is merely the result of the application of the new law with an even hand. In any event, Congress prescribed the precise conditions under which the death penalty could be imposed. And all violators—Communists as well as non-Communists—are entitled to that protection.

This question is presented to me for the first time on the eve of the execution of the Rosenbergs without the benefit of briefs or any extended research. I cannot agree that it is a frivolous point or without substance. It may be that not every death penalty imposed for divulging atomic secrets need follow the procedure prescribed in § 10 of the Atomic Energy Act. If the crime was complete prior to the passage of that Act, possibly the old Espionage Act would apply. But this case is different in three respects: *First*, the offense charged was a conspiracy commencing before but continuing after the date

of the new Act. *Second*, although the overt acts *alleged* were committed in 1944 and in 1945, the Government's case showed acts of the Rosenbergs in pursuance of the conspiracy long after the new Act became effective.[2] *Third*, the overt acts of the co-conspirator, Sobell, were *alleged* to have taken place between January, 1946, and May, 1948. But the proof against Sobell, as against the Rosenbergs, extended well beyond the effective date of

[2] Thus the Government's brief filed July 25, 1952 in opposition to the petitions of the Rosenbergs and of Sobell for certiorari stated:

"In February 1950, when the arrest of Klaus Fuchs was publicized, Julius (Rosenberg) went to David (Greenglass) and told him that Fuch's [Publisher's note: "Fuch's" should be "Fuchs'".] contact was the man who had got data from Ruth and David in June 1945; that Fuchs' arrest meant that the Greenglasses' activities would be discovered; and that therefore they would have to leave the country (R. 523). These warnings were renewed at the time of the arrest of Harry Gold (R. 525-526, 709) in May 1950. During that month, Julius gave David $1,000, and promised him more, in order that David and Ruth might discharge their obligations and leave the country (R. 526, 710). In addition, he gave them specific and detailed instructions as to how to get to Mexico and ultimately to the Soviet Union (R. 526-530, 710).

"Julius informed the Greenglasses that he and his wife also were going to flee and that they would meet the Greenglasses in Mexico (R. 529, 713). Rosenberg did, in fact, ascertain from his physician what inoculations were needed for a trip to Mexico (R. 851), and he had passport pictures taken of himself and his family (R. 1427-1429).

"On May 30, 1950, in accordance with Julius' request, the Greenglasses had six sets of passport pictures taken, five of which they gave to Julius (R. 530-531, 712). The sixth set was retained by Greenglass and introduced in evidence at the trial (R. 531, 712; Ex. 9A, 9B). A week later, Julius visited the Greenglasses' apartment and gave David $4,000 wrapped in brown paper (R. 532, 713; Ex. 10). He asked David to repeat the flight instructions, which David did (R. 532-533). David gave the $4,000 to his brother-in-law, Louis Abel, who, after David's arrest, turned it over to the latter's lawyer (R. 536, 713, 794-795)."

the new Act.[3] In short, a substantial portion of the case against the Rosenbergs related to acts in pursuance of the conspiracy which occurred after August 1, 1946.

[3] The Government's brief dated July 25, 1952, in opposition to the petitions for certiorari filed by the Rosenbergs and by Sobell summarized some of Sobell's activities as follows:

"In June 1948, (Max) Elitcher decided to leave the Bureau of Ordnance to take a job in New York (R. 256). When he informed Sobell of his plans, the latter urged him not to do anything until he discussed the matter with Rosenberg (R. 256).* Pursuant to arrangements made by Sobell, Elitcher met Rosenberg and Sobell in midtown New York (R. 256-257). When Rosenberg was told about Elitcher's plans, he tried to persuade Elitcher to remain in Washington, stating that he needed a source of information in the Navy Department (R. 257). Rosenberg further stated that he had already made plans for Elitcher to meet a contact in Washington (R. 257). During this conversation, Sobell also attempted to persuade Elitcher to stay at the Bureau of Ordnance; he told Elitcher, 'Well, Rosenberg is right, Julie is right; you should do that' (R. 257).†

"Sobell then left and Elitcher had dinner with Rosenberg (R. 257). During the course of dinner, Rosenberg said that money could be made available for the purpose of sending Elitcher to school to improve his technical status (R. 258). Elitcher asked Rosenberg how he had got 'started in this venture' (R. 258). Rosenberg replied that a long time ago he had decided that this was what he wanted to do; that he made it a point to get close to people in the Communist Party and kept getting from one person to another until he finally succeeded in approaching a Russian 'who would listen to his proposition concerning this matter of getting information to Russia' (R. 258).

"A month later, in July 1948, Elitcher drove with his family from Washington, D.C., to New York City, preparatory to changing his job (R. 259). On the way, he noticed that he was being followed (R. 259-260). Upon his arrival in New York, he proceeded to Sobell's home, where he planned to stay overnight (R. 259). When Elitcher told Sobell of his fear that he had been followed, Sobell

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* Elitcher testified that Sobell said, 'Don't do anything before you see me. I want to talk to you about it, and Rosenberg also wants to speak to you about it' (R. 256).

† Elitcher, nonetheless, did not change his mind, and shortly afterwards changed his employment (R. 257, 255).

I do not decide that the death penalty could have been imposed on the Rosenbergs only if the provisions of § 10 of the Atomic Energy Act of 1946 were satisfied. I merely decide that the question is a substantial one which should be decided after full argument and deliberation.

It is important that the country be protected against the nefarious plans of spies who would destroy us.

It is also important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we act within the law. If we are not sure, there will be lingering doubts to plague the conscience after the event.

I have serious doubts whether this death sentence may be imposed for this offense except and unless a jury recommends it. The Rosenbergs should have an opportunity to litigate that issue.

I will not issue the writ of *habeas corpus*. But I will grant a stay effective until the question of the applicability of the penal provisions of § 10 of the Atomic Energy Act to this case can be determined by the District Court and the Court of Appeals, after which the question of a further stay will be open to the Court of Appeals or to a member of this Court in the usual order.

So ordered.

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became angry and said that Elitcher should not have come to his house; that he had some valuable information in the house that he should have given Rosenberg some time ago, information that was 'too valuable to be destroyed and yet too dangerous to keep around' (R. 260-261). Over Elitcher's protests, Sobell insisted the information be delivered to Rosenberg that night. Sobell then took a 35 millimeter film can from his house, and, accompanied by Elitcher, drove to Manhattan. While Elitcher waited in the car, Sobell left to deliver the can to Rosenberg. When Sobell returned, Elitcher asked him what Rosenberg thought about his being followed (R. 261). Sobell replied that Rosenberg said that he had 'once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and therefore everything was all right' (R. 261). The two then returned to Sobell's house (R. 261)."

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1952.

IN RE CARLISLE v. LANDON

[August 5, 1953.]

MR. JUSTICE DOUGLAS.

This is a motion for bail pending appeal made by Harry Carlisle, one of the petitioners in Carlson v. Landon, 342 U.S. 524. In that case a majority of the Court held that the Attorney General did not abuse his discretion in holding Carlisle without bail pending a determination of his deportability. So if the facts presented here are in no material respects different from what they were in the Carlson case, the motion for bail should be denied.

In the Carlson case there was evidence that Carlisle had at one time been a member of the Communist Party and years ago had advocated the use of violence to overthrow the Government. But there was no evidence of present membership or of present advocacy of the use of violence. As I read the record, the opinion of the Court, and the opinion of the Court of Appeals, 9 Cir., 187 F.2d 991, in the Carlson case, the only evidence of present, incriminating activities of Carlisle were associations with groups found by the Attorney General to be "subversive," or labeled by congressional committees as "Communist front" organizations. But there was nothing to show that Carlisle was presently advocating the overthrow of the Government by force and violence or presently teaching the Marxist creed or that he was presently a member of the Party. Past membership, past advocacy of violence plus present identification with some "subversive" groups were, in the view of the Court, sufficient grounds for denial of bail. I agree with the dissent in the Carlson case that the national security does not require the denial of bail to a person with such slight ties to those who actually are supporting the philosophy of violence of the Communist

Party. But the majority ruled otherwise; and I bow to their decision.

Our decision in the Carlson case was announced March 10, 1952. The case against Carlisle is no stronger now than then. There is no showing of present membership in the Party or of present advocacy of the Party's philosophy of violence. There is, however, a detailed showing of Carlisle's identification with "subversive" or "Communist front" organizations. It would seem therefore on that showing that if the Attorney General were free to hold Carlisle without bail in 1952 he has the same power in 1953.

There are, however, other circumstances that put the present application in a new light.

1. On October 6, 1952, the Bureau of Immigration Appeals reversed the order of the Commissioner directing Carlisle's deportation and remanded the case for further hearings. On October 7, 1952, Carlisle was released on bond in the sum of $5,000 and remained at liberty until May 18, 1953. During that time he was active in connection with certain "Communist front" and "subversive" groups. But there is no showing that he is a Party member, that during that time he advocated the Party's program of violence, or engaged in any activity that is unlawful under state or federal law. During that time he made no effort to escape or otherwise evade the lawful authority of the Attorney General.

2. In February, 1953, Carlisle was notified that he would be required to procure a new bond with conditions attached to it that were quite comparable to those involved in *Yanish v. Barber*, 73 S. Ct. 1105. I held in the *Yanish* case that the question whether the Attorney General might attach those broad conditions of parole to a bond under § 242(c) of the Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C.A. § 1252(c), was a substantial one and that an alien, not shown to be engaging in unlawful activity and having no proclivity to escape, was entitled to bail while the courts resolved the question as to the Attorney General's power. Carlisle would be entitled to like treatment if his

> bond was revoked for failure to procure the new *Yanish* type of bond. The crucial question in the case is whether that was the basis of revocation.

Carlisle, like *Yanish*, brought an action in the District Court to retrain [Publisher's note: "retrain" should be "restrain".] respondent, the District Director of the Immigration and Naturalization Service, from requiring the new bond. Respondent did not take the course of the respondent in the *Yanish* case and cancel the old bond. Rather, he stipulated that no new bond would be required pending disposition of the action. The District Court denied a motion to dismiss the action, holding that upon the facts alleged in Carlisle's complaint respondent could not demand the new bond. That action apparently is still pending in the District Court.

Thereafter on May 13, 1953, the Commissioner telegraphed respondent ordering him to revoke Carlisle's bond and take him into custody "in order to meet the responsibility imposed upon the service by § 242(a) and (c) for the conduct, associations, and activities of the aliens.' [Publisher's note: The single closing quotation mark preceding this note should be doubled.]

Petitioner was thereupon taken into custody and detained. On June 1, 1953, the Commissioner wired the respondent, "Revoke bond Harry Carlisle take into custody and detain without bond pending determination of deportability."

Carlisle filed a petition for a writ of habeas corpus in the District Court. The writ was denied, the District Court holding that Carlisle's detention was lawful. Carlisle filed a notice of appeal and then applied to the District for bail pending appeal. The District Court denied the motion. Carlisle thereupon moved in the Court of Appeals for bail pending appeal. That Court likewise denied his motion. He then applied to me for bail pending disposition of his appeal from the order denying the writ of habeas corpus. See *Petition of Johnson*, 72 S. Ct. 1028.

There is great force to the argument of the Department of Justice that if there was power to detain Carlisle without bail in 1952 (as the Carlson case held) there is power to do so in 1953. But I have concluded that the case is not so simple. After the decision in the Carlson case Carlisle was deemed sufficiently safe in terms of our national security and sufficiently law-abiding as to permit his enlargement

on bail. He was at large on bail for a period of 8 months following the Carlson decision. During that time he revealed no new traits or habits not previously known. During that time he did not develop dangerous tendencies—he did not, so far as appears, teach the Marxist creed, advocate violent means for changing our system of government, or do a single unlawful act. While Carlisle was out on bail he did however do one thing new and different—he refused to execute the Yanish type of bond. Up to then his enlargement on bail had been deemed wholly consistent with the national security. Once he refused to execute the new type of bond he was deemed sufficiently dangerous as to be taken into custody once more.

I have finally concluded that if I denied bail in the case I would be denying Carlisle the opportunity afforded Yanish, viz., the opportunity to contest the power of the Attorney General to attach broad conditions to the bail bond. In the Yanish case I thought the question of the power of the Attorney General to be a substantial one. If it was substantial for Yanish, it is substantial for Carlisle. For the reasons stated in Yanish v. Barber, I thought, and still think, the question is substantial.

There is a constitutional question that lurks in every bail case. The Eighth Amendment provides that "excessive bail" shall not be required. That means, as Mr. Justice Burton suggested in the Carlson case, 342 U.S., at page 569, that a person may not be capriciously held. Requirement of bail in an amount that staggers the imagination is obviously a denial of bail. It is the unreasoned denial of bail that the Constitution condemns. The discretion to hold without bail is not absolute. If it were, we would have our own model of the police state which looms on the international horizon as mankind's greatest modern threat. Under our constitutional system the power to hold without bail is subject to judicial review. There must be an informed reason for the detention. I do not find any such reason here. Carlisle had been granted his liberty and was on bail. I was advised on oral argument that there was nothing in his activities or conduct during that period that cause the Department of Justice to have any alarm. Only when Carlisle challenged the power of the Attorney General to attach conditions to the bond was he deemed too dangerous to be at large. But under our system

of government a challenge to the authority of an administrative officer is not a subversive or dangerous act. It is indeed proud boast that this is the land where the discretion of officials is subject to review, where there is an opportunity even for the humblest person whose liberty is restrained to have an inquiry into the case of the restraint.

I am satisfied after a study of this record and after oral argument that Carlisle is being detained solely because he is not amenable to the desires of the Attorney General. That too would be permissible if the Attorney General acted within the scope of his authority. But there is in my view a substantial doubt whether the things which the Attorney General has demanded are within his statutory and constitutional competence to exact.

I will admit Carlisle to bail in the amount of the bond under which he heretofore has been released, viz., $5,000, pending disposition of his appeal before the Court of Appeals.

Application granted.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1953.

Twentieth Century Airlines, Inc., et al., Petitioners,	)	
v.	)	On Application
Oswald Ryan, et al., as Members of the Civil Aeronautics Board, Respondents.	)	for Stay.

[September 24, 1953.]

Opinion by MR. JUSTICE REED.

Applicants, irregular air carriers and some of their individual owners, seek an order staying the effectiveness of the order of the Court of Appeals of the District of Columbia which denied applicants' motion for injunction pending an appeal. They further seek an order restraining the respondent Board members, pending action of this Court on applicants' proposed petition for certiorari to the Court of Appeals, from taking any further steps in prosecuting an administrative proceeding, same being Board Docket No. 6000.

The application for stay was assigned to me for hearing by ASSOCIATE JUSTICE BLACK, acting under the provisions of 28 U.S.C. (Supp. V) § 3.

On March 12, 1953, a petition for enforcement, now Docket No. 6000, was brought before the Civil Aeronautics Board by the acting chief of its Office of Enforcement against applicants here. The complaint set out asserted violations of certain of the Board's Economic Regulations, particularly Part 291. Paragraph 33 *et seq*. of said complaint further charged some of the respondents, applicants here, with violation of §§ 408[1] and 401(a) of the Act.[2] Those sections forbid consolidations, mergers and air

[1] 52 Stat. 1001, 49 U.S.C. § 488.
[2] 52 Stat. 987, 49 U.S.C. § 481(a).

transportation without Board approval. The complaint prayed that the Board revoke the letters of registration of certain airlines and asked that others, as well as certain individuals, be ordered to cease and desist from engaging in air transportation within the meaning of the Civil Aeronautics Act of 1938.

The Board has not entered a final order upon this complaint. Various preliminary steps short of a hearing, such as setting the complaint for a hearing before an Examiner, have been taken.

Deeming certain regulations, basic to the whole complaint, invalid, the applicants here, respondents in the enforcement proceeding, filed a complaint in the United States District Court for the District of Colombia seeking a preliminary and final injunction against the Board members from taking any further steps in Docket No. 6000. On the motion for temporary restraining order numerous affidavits were filed setting up the damages that would occur to the complainants here in case the Board proceeded to a hearing and decision on the complaint. The irreparable injury alleged may be summarized as the disadvantages that flow to air carriers from charges of a breach of Board regulations or the Act. It is said that safety is so important in air travel that the public reacts to any alleged violation, even though merely economic or administrative in character, somewhat as it would to a Board holding that safety protections were violated. It is further pointed out that financing arrangements of the carriers may be jeopardized because of provisions in loan agreements allowing withdrawals if orders deemed injurious by the lenders are entered by the Civil Aeronautics Board. It is clear from applicants' affidavits that the pendency of the Board proceeding from respondents' point of view has objectionable effect on their public relations, calls for large expenditures of time and energy, and affects em-

ployee morale. In the District Court, the Board filed a motion to dismiss for failure to exhaust administrative remedies and failure to show irreparable damage.

The District Court entered an order granting this motion on the ground that "action cannot be maintained." It said:

> ". . . The projected hearing, which plaintiffs seek to enjoin, may result in a decision favorable to them. If the decision is adverse, they will have a review before the Civil Aeronautics Board and if that is adverse then by the United States Court of Appeals for this circuit.
>
> "In the interim period, I do not see that irreparable harm will come to the plaintiffs.
>
> "The legal and factual problems can be decided by the normal administrative process and later, if necessary, adjudicated by the courts."

Thereupon an appeal was taken to the Court of Appeals and the applicants, appellants there, filed a motion for injunction pending appeal in which they prayed the Court of Appeals issue an injunction enjoining and restraining appellees there from taking any further steps in enforcing proceedings in Board Docket No. 6000. The Board filed a motion to affirm forthwith the judgment of the District Court. The Court of Appeals denied both motions and it is from the denial of their motion for injunction that applicants assert they will seek a petition for certiorari from this Court.

Under the Civil Aeronautics Act a provision for review by judicial process of the final orders of the Board is provided.[3] There may be statutory authority to challenge rules directly in the courts.[4] This has not been

[3] 52 Stat. 1024, 49 U.S.C. § 646.
[4] 52 Stat. 1024, 49 U.S.C. § 646. Cf. *Columbia System* v. *United States*, 316 U.S. 407, 416, 425.

utilized. The gist of the District Court complaint is that the Board regulations upon which its complaint is bottomed are "invalid, unconstitutional and void," that the Board's purpose in adopting them was to have a basis for revocation of the operating licenses of irregular carriers and that because of irreparable injury to applicants from the pendency of the Board proceeding, equity should protect them by determining the invalidity of the Regulations upon which the complaint is based.[5]

The order of the Court of Appeals is not a final order. Section 2101(f) of Title 28 U.S.C. (Supp. V) allowing stays does not apply. Cases involving final orders are not in point as to the authority of a justice to stay proceedings to preserve, pending review in the Court of Appeals, conditions existing at the institution of the Board proceedings. Cf. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 438 (1951 ed.). For the purpose of this application, however, the power of any justice so to act, pending appeal, is assumed. Cf. Fed. Rules Civ. Proc., 62(g); 28 U.S.C. (Supp. V) § 1651(b).

The application for a stay, however, is denied. The Board proceeds through an examiner, with opportunity for applicants to appear, object and present evidence. Next the Board will act upon the complaint of the Office of Enforcement and ultimately its order may be subjected to judicial review.

The threat of alleged irreparable injury from the proceedings themselves consists of those serious but unavoidable damages that come to any regulated enterprise because of pending complaint by administrative agencies. There is no threat alleged of suspension of licenses or permits without a hearing. The private finan-

[5] The allegations as to Board purpose are conclusions and based on "information and belief." See affidavit of Messrs. Lewin and Adelman, Manuscript Record 39. Cf. *Nortz* v. *United States*, 294 U.S. 317, 324.

cial arrangements of applicants may be affected, public and employee relations damaged, but such threatened injury does not show the irreparable injury that might justify judicial intervention to stop the Board hearings until there is a judicial determination of the validity of the Board Regulations. The administrative remedies offer ample protection to the applicants' rights and until those remedies are exhausted judicial intervention to halt the Board hearing is not justified.[6]

Applicants' argument that the Board in these cases had "exclusive jurisdiction" by statute and therefore the court was excluded is not impressive. Although the Civil Aeronautics Act of 1938 does not have that clause, its powers are obviously exclusive so far as the administration of the Act is concerned.[7]

Applicants assert that the failure of the Court of Appeals to grant respondents' motion to affirm the dismissal decree of the District Court compels the granting of applicants' motion to stay Board proceedings.[8] Such con-

[6] *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Corporation*, 303 U.S. 41, 50, and cases cited.

[7] Cf. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436.

[8] "Upon findings by the Court of Appeals that Petitioners had exhausted their administrative remedies and had shown irreparable damage, the Court of Appeals was required to deny Respondents' Motion to Affirm Forthwith the decree of the District Court and to grant Petitioners' Motion for Injunction Pending Appeal.

"The two orders entered by the Court of Appeals cannot stand. That Court has denied Respondents' Motion to Affirm Forthwith the decree of the District Court and must, therefore, if that order is valid, have found that Petitioners exhausted their administrative remedies and that Petitioners would be irreparably damaged unless the requested relief were granted. If that order is valid, therefore, the order of the Court of Appeals denying Petitioners' Motion for Injunction Pending Appeal cannot stand, and Petitioners are entitled to the entry of an order granting that motion."

clusion is a *non sequitur*. The Court has denied both motions and the case awaits hearing, submission and final order. The record does not show the Court's reason for denying the injunction *pendente lite*.

Applicants cite no case in this Court that enjoins the hearing of complaint before an administrative Board with power to enter an enforcement order that is subject to judicial review. *Civil Aeronautics Board* v. *American Air Transport*, 201 F.2d 189, and *B.F. Goodrich Company* v. *Federal Trade Commission*, No. 11644, Court of Appeals D.C., decided July 16, 1953, upon which applicants rely were suits seeking injunctions restraining the respective Boards from putting into effect a general regulation.

The application for a stay is denied.

SUPREME COURT OF THE UNITED STATES

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No. _____, October Term, 1953

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Roger Dean Clark	)	Application for Bail
v.	)	Pending Appeal.
United States of America	)	

[December 10, 1953]

Opinion of Mr. Justice Douglas.

Appellant is a member of Jehovah's Witnesses who claimed the right given by § 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. § 456(j), to be classified as a conscientious objector. According to the papers before me he indicated that he was by religious training and belief opposed to participation in war but that he was willing to use force in defense of his family or his congregation and that he would work in a defense plant if in great economic need. Nevertheless he was classified I-A and was convicted of refusing to be inducted into the armed forces under § 12(a) of the Act. He has appealed his conviction to the Court of Appeals for the Ninth Circuit and wishes to be set free on bail while his appeal is pending. The District Court and the Court of Appeals have denied bail. I am asked to exercise the power granted me as Circuit Justice by Rule 46(a)(2) of the Federal Rules of Criminal Procedure and grant bail.

Under that Rule bail may be allowed "only if it appears that the case involves a substantial question which should be determined by the appellate court." The question on the appeal is whether there was a basis in fact for appellant's I-A classification. Estep v. United States, 327 U.S. 114.

The Court of Appeals denied bail on November 13, 1953. At that time Dickinson v. United States, [Publisher's note: "Dickinson" and "United States" probably ought to be underlined.] 203 F.2d 336 (C.A. 9th Cir.),

still stood. Since that time we reversed that decision. See Dickinson v. United States, 346 U.S. ____, decided November 30, 1953. Moreover the claim of appellant that he should have been classified as a conscientious objector and the decision of the District Court against him shape up an issue that may turn on whether Annett v. United States, 205 F.2d 689, represents the law. In that case the Court of Appeals for the Tenth Circuit held, on facts closely analagous [Publisher's note: "analagous" should be "analogous".] to these, that there was no basis in fact for denial of a conscientious objector classification. The Annett decision has recently been followed by the Courts of Appeal for the Second and Eighth Circuits. United States v. Pekarski, _____ F.2d _____ (C.A.2d Cir.), decided October 23, 1953; Taffs v. United States, _____ F.2d _____ (C.A. 8th Cir.), decided December 7, 1953. These considerations lead me to conclude that in spite of the great deference I owe the previous determination of this application by the Court of Appeals, the merits of appellant's case cannot now be termed insubstantial. Bail will accordingly be granted in the amount of $2500 as approved by the District Court.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1954.

GEO. F. ALGER CO. et al. v. PECK, OHIO TAX COM'R et al.

[March 29, 1954.]

MR. JUSTICE REED.

Appellants brought this action before a statutory three-judge district court seeking an injunction against enforcement of Sec. 5728.01 through Sec. 5728.14 of the Revised Code of Ohio imposing an 'axle-mile tax' on the ground that such provisions are upon various grounds unconstitutional. The district court dismissed appellants' petition for lack of jurisdiction under 28 U.S.C. § 1341, on its determination that 'a plain, speedy and efficient remedy may be had in the courts' of Ohio [Publisher's note: There should be a period here.] D.C., 119 F. Supp. 812. Appeal from such decision has been noted and appellants seek a temporary injunction pending this Court's disposition of such appeal.

Section 5728.10 of the challenged Ohio statute provides inter alia:

> "The person against whom such assessment has been made may appeal from the assessment after it is due and payable to the board of tax appeals in the same time, manner and from [Publisher's note: "from" should be "form".] as that provided in section 5717.02, of the Revised Code."

Section 5717.02 provides for appeals from assessments of the Tax Commissioner to a Board of Tax Appeals and by Sec. 5717.04 a taxpayer challenging such assessment is given the option of appealing from such Board either to the Court of Appeals for the county of the taxpayer's residence or directly to the Supreme Court of Ohio. Under the challenged statute appellants may not be required to pay any assessment until after termination of all appeals from such assessments, and Sec. 5728.11 provides that 'no highway use permit shall be suspended while an appeal is pending.'

Appellants contend that the Ohio remedy does not conform with that required by Sec. 1341 of the Judicial Code and that they will be irreparably harmed if enforcement of the statute is not enjoined pending determination of this appeal. In particular they argue that the Ohio procedure is not speedy, that it is futile

to exhaust the administrative procedures because such bodies cannot pass on constitutional issues and that a remedy before administrative bodies is not a remedy 'in the courts' within the meaning of Sec. 1341. They contend that they will be put to great inconvenience and expense due to the statute's requirements that quarterly returns be filed by each appellant, and that appeals be perfected in accordance with statutes or waived.

The Ohio statutes accord an adequate remedy to appellants which they have not yet exhausted. The fact that such procedures cause inconvenience and expense, and that appellants may eventually prevail are not controlling. In enacting Sec. 1341 Congress merely adopted the rule that where orderly procedures for litigating issues have been provided, such procedures must prevail. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U.S. 209. I do not read that section to preclude states from prescribing resort to administrative remedies before court review. This is not a case where the state remedy is unknown or such remedy is unavailable. Cf. *Spector Motor Service* v. *O'Connor*, 340 U.S. 602; *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299.

Moreover, even assuming that no state remedy is available, appellants have demonstrated no irreparable injury. The fact that each appellant may be required to file four returns a year and to appeal resultant assessments through prescribed channels is not such injury. It is immaterial that here there are sixty parties who must take these steps since they have voluntarily joined. Their motion is to be considered as though only one movant sought an injunction. No taxes need be paid until final determination of such appeals, and appellants' use of Ohio's roads in the meantime is not impeded. Pursuant to the statute the Tax Commissioner has amended his rules to allow remission of statutory penalties if the taxpayer pays such assessment 'within thirty days after notice of final disposition of the assessment.' While it may be true that some of appellants would choose not to use Ohio's facilities if they had a determination at this time that the challenged statute is valid, issuance of an injunction will not better their knowledge nor alter their eventual liability. Nothing but a final adjudication of the issues would relieve them from the disadvantages of uncertainty as to liability. The Congress by Sec. 1341 left the burden on the taxpayer to follow the required state procedure rather than to determine the federal issues primarily in the federal courts.

Injunction denied.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1953.

V. E. Stanard, Individually and Doing Business Under the Firm Name and Style of Male Merchandise Mart, Appellant, *v.* Otto K. Olesen, Individually and as Postmaster of the City of Los Angeles, State of California; and Doe I Through Doe IV, Appellees.	Application to Mr. Justice Douglas For Relief From Post Office Department Impound Order Pending Appeal: Or In The Alternative For An Injunction Pending Appeal.

[May 22, 1954.]

Opinion of MR. JUSTICE DOUGLAS.

Petitioner operates her business in Hollywood, California, under the fictitious name "Male Merchandise Mart," which has been duly recorded with the state authorities. Her business is selling and distributing through the mails "publications, 'pin-up' pictures and novelties." On March 1, 1954, the Solicitor for the Post Office Department issued a complaint against her, charging that she was carrying on, by means of the Post Office, a scheme for obtaining money for articles of an obscene character; and further charging that she was depositing in the mails information as to where such articles could be obtained, all in violation of 39 U.S.C. §§ 255 and 259(a), 18 U.S.C. §§ 1342 and 1461.

On the same day on which the complaint issued, the Deputy Postmaster General ordered the Postmaster at Los Angeles, California, to refuse to deliver mail addressed to petitioner at her business address. The order stated that a complaint of unlawful use of the mails had

been filed, that a hearing would be held to establish whether there were any violations of the applicable statutes, and that the mail addressed to petitioner should be impounded until further order. This order is now in effect. It was issued without notice or hearing.

Petitioner answered the complaint and a hearing was held in Washington, D.C., in March, 1954. At the present time, there has been no final adjudication, administrative or otherwise, that petitioner has violated any statute.

On March 19, 1954, petitioner filed an action for declaratory relief in the District Court for the Southern District of California. She alleged that the Post Office had no power to impound her mail without a hearing, that she was suffering irreparable injury, and that her constitutional rights had been violated. She sought a decree enjoining the so-called impound order, hereinafter referred to as the interim order, and any other order which might be entered by the Post Office, pursuant to the hearing. The District Court dismissed the complaint, holding that the Post Office had power to impound petitioner's mail pending the administrative determination, and that petitioner could not question the administrative proceeding itself, because she had not exhausted her administrative remedies. Petitioner appealed to the Court of Appeals for the Ninth Circuit, where the appeal is now pending. She also made a motion for relief from the interim order, pending review. The Court of Appeals heard argument on the motion and took it under submission, but then vacated the submission and ordered the motion held in abeyance until June 15, 1954, to permit the Post Office Department to make a final and judicially reviewable order. The court stated that it was of the opinion that the motion should not be acted upon at that time.

Petitioner has now applied to me as Circuit Justice for relief from the interim order, until her appeal has been

heard or the matter has been otherwise determined. I have heard the parties and have examined the papers presented. No question has been raised as to the power of a Circuit Justice to grant the relief requested, and I will assume that such power exists. Cf. MR. JUSTICE REED'S opinion in *Twentieth Century Airlines* v. *Ryan*, 74 Sup. Ct. 8, 98 L. Ed. 29. See also 5 U.S.C. § 1009(d). I am not asked to interfere in any way with the administrative proceeding which is now being conducted. That proceeding is authorized by 39 U.S.C. §§ 255 and 259(a). If the administrative decision is adverse to petitioner, the Post Office will have statutory authority to intercept all mail addressed to her and either send it to the "dead-letter" office, or return it to the senders marked "Unlawful." Petitioner may have judicial review of any order entered under those statutes in an action brought after the administrative adjudication, if not in the case which is now pending in the Court of Appeals. In the present application petitioner complains only of the interim order under which her mail is being intercepted while the administrative proceeding is being conducted. She complains that the interim order was entered without notice, without a hearing, and without any authority in law, statutory or otherwise.

The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and the Sixth Amendments guarantee. See the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in *Leach* v. *Carlile*, 258 U.S. 138, 140, and *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407, 417, 436; cf. *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146. I mention the constitutional implications of the problem only to emphasize that the power to impound

mail should not be lightly implied. Yet if this power exists, it is an implied one. For I find no statutory authority of the Post Office Department to impound mail *without a hearing and before there has been any final determination of illegal activity*.

Nearly fifty years ago a district court held that there was no such statutory power, see *Donnell Mfg. Co.* v. *Wyman*, 156 F. 415. And see *Myers* v. *Cheeseman*, 174 F. 783. It has been held that the exercise of a like power without a hearing violated the Due Process Clause of the Fifth Amendment. *Walker* v. *Popenoe*, 80 U.S. App. D.C. 129, 131, 149 F.2d 511, 513. A manual, published by the Post Office Department in 1939, stated that there was no such power. See U.S. Post Office Department, Postal Decisions, 328. A bill now pending in Congress would give such power, with certain judicial safeguards. H. R. 569, 83d Cong., 1st Sess. The history of that bill and of related legislation does not show any awareness that the power proposed already exists. See H.R. Rep. No. 850, 83d Cong., 1st Sess.; H. R. Rep. No. 1874, 82d Cong., 2d Sess.; H. R. Rep. No 2510, 82d Cong., 2d Sess.

The Department of Justice has presented strong policy arguments (both to the Congress and to the courts) that the power is necessary. Within the past year four district courts have accepted those arguments, including the District Court which passed on this case. For the reported decisions, see *Williams* v. *Petty*, 4 Pike & Fischer Admin. Law 2d 203; *Barel* v. *Fiske*, 4 Pike & Fischer Admin. Law 2d 207. There is something to be said on the side of the law enforcement officials. For if an illicit business can continue while the administrative hearings are under way, those who operate on a fly-by-night basis may be able to stay one jump ahead of the law. Yet it is for Congress, not the courts, to write the law. Under the law, as presently written, every business, until found unlawful, has

the right to be let alone. The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001 *et seq*., gives some protection to that right. The power of the Post Office Department to restrain the illegal use of the mails is subject to that Act. *Cates* v. *Haderlein*, 342 U.S. 804; *Door* v. *Donaldson*, 90 U.S. App. D.C. 188, 195 F.2d 764. Section 9 of the Act furnishes some safeguards. It provides,

"In the exercise of any power or authority—

"(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

Impounding one's mail is plainly a "sanction," for it may as effectively close down an establishment as the sheriff himself. The power to impound at the commencement of the administrative proceedings is not expressly delegated to the Post Office, as I have said. It carries such a grave threat, it touches so close to First, Fifth, and Sixth Amendment rights, it has such serious possibilities of abuse (unless carefully restricted) that I am reluctant to read it into the statute. I, therefore, strongly incline to the view that the interim order from which petitioner seeks relief is invalid. It seems to be a final order and there is no apparent administrative remedy.

It is clear, I think, that petitioner is entitled to judicial review of the interim order. Section 10 of the Administrative Procedure Act provides:

> "(a). RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> • • • • •
>
> "(c). REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action

> for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. . . ."

The interim order should be lifted only if it is invalid. If it is lifted, the issue of its validity will become moot, see *Myers* v. *Cheeseman*, *supra*. The case is now pending in the Court of Appeals and will be decided by that court in due course. The Department of Justice advises me that a final administrative order will be made very shortly, probably in two or three weeks. If that order should be favorable to petitioner, she would, of course, receive all her mail and the case would become moot. If the order is adverse to her, its validity can be reviewed by the Court of Appeals. I was assured on oral argument that any mail intercepted under the interim order would be impounded and kept separate from the other mail that is subject to the final administrative order, until judicial review is had, so that the separate issue of the validity of the interim order will be open on review. There is thus no danger that the issue presented by this application will become moot, if the decision of the Post Office goes against petitioner.

Petitioner presents a strong case for interim relief. Litigation, however, often places a heavy burden on the citizen; and he must frequently suffer intermediate inconveniences or losses to win his point. Since petitioner will, in due course, get judicial review of the important question of law tendered and since the action I am asked to take runs counter to the requirements of orderly procedure, I will deny the relief asked.

Application denied.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1954.

Frank Costello, Petitioner,	)	
v.	)	On Application for Bail.
United States of America.	)	

[June 18, 1954.]

Memorandum by MR. JUSTICE JACKSON.

While it is my usual policy as Circuit Justice not to overrule disallowance of bail by trial and circuit judges much closer to the particular case, circumstances exist here which were unknown to those judges at the time they denied this application.

On June 7, the Supreme Court granted certiorari in four cases in which, like this case, the Government had obtained conviction of income-tax evasion by use of the so-called "net worth" theory. The Court also restored to the docket three other cases in which certiorari had previously been denied and which involved the same theory of prosecution. The applicant and the Government agree that the Court's action was not brought to the attention of the trial and circuit judges in this case.

The Government points out its inability to determine the implications of this Court's action with sufficient certainty to warrant an unqualified admission or denial that a substantial question is involved in this case. In view of the considerations which govern certiorari and without attempting to state the position of the Court or any of its Justices, I think the necessary inference for purposes of this application is that the Court deems a substantial question of general application to exist in "net worth" cases as that theory is being applied.

The applicant should be admitted to bail while the questions of law in his case are being settled. Bail is fixed at $50,000, and an order will be entered accordingly.

SUPREME COURT OF THE UNITED STATES

Knickerbocker Printing Corporation, Petitioner,	)	On Application for Extension of Time to File
v.	)	Petition for Writ of
United States of America.	)	Certiorari.

[September 3, 1954.]

Memorandum by MR. JUSTICE JACKSON, as Circuit Justice for the Second Circuit.

This application is for an extension of time to file a petition for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit.

Because delayed justice has become little less than scandalous, this Court recently reconsidered its Rules and revised the requirements for a petition for certiorari to eliminate some of the most frequent causes of unavoidable delays. Applications for extension are commonly made *ex parte*, almost on the eve of expiration of the time sought to be extended, when there is no time to hear the adversary whose cause is postponed and when denial would preclude the litigant from seeking review. After due consideration, this Court stated in Rule 22: "Such applications are not favored."

This application gives no reason for an extension other than that the applicant's attorneys "have been actively engaged in the preparation of matters previously scheduled for trial before the United States Court of Claims and the New York State and Federal Courts in New York City." One such case before the Court of Claims is specifically referred to. And it is averred, "The accumulation of matters requiring attention in a busy office such as that of counsel during the period of preparation for trial and the actual trial of the above matter delayed further attention to preparation of petitioner's writ for certiorari here."

I do not see how, consistently with our Rule, I can accept counsel's business in lower courts as a reason for extending time to file a petition in this Court. The United States has recently been denied extension in a circuit court upon a similar request. *Wolcher* v. *United States*, 213 F.2d 539. When more business becomes concentrated in one firm than it can handle, it has two obvious remedies: to put on more legal help, or let some of the business go to offices which have time to attend to it. I doubt if any court should be a party to encouraging the accumulation of more business in one law office than it can attend to in due time.

But this is especially true of the Supreme Court, whose only reason for considering this case would be its public importance. In this case, a constitutional question is said to be involved. If so, it should be reviewed promptly and not delayed because counsel find it to their advantage to turn their attention to other matters pending in lower courts. It raises doubt whether a case has that great importance if the case is not worthy of the attention of some attorney to prepare forthwith a petition for certiorari.

I should deny this application but for one consideration. The Revised Rules did not become effective until July 1, and under the old Rules I was notably lenient in granting extensions of time. Perhaps there has not been adequate warning to my Circuit that this policy will not prevail in the future. In view of this lack of warning, I am extending the time for twenty days and asking the New York Law Journal and other Second Circuit publications to give notice to the profession in the Second Circuit that business in the lower courts is not an acceptable reason for extension of time for filing a petition for certiorari in this Court.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

Philip Albanese, Petitioner,	)	On Application for
v.	)	Admission to Bail.
United States of America.	)	

[December 9, 1954.]

FRANKFURTER, Circuit Justice.

This is a petition for admission to bail pending appeal to the United States Court of Appeals for the Second Circuit from a sentence of imprisonment for five years and a fine of $5,000 for attempt and conspiracy to evade income taxes. Petitioner was so sentenced on October 5, 1954, and on the same day he noted an appeal. Since both the trial court and the Court of Appeals denied petitioner's motions for bail pending disposition of the appeal, he has begun serving his sentence. In his application petitioner sets forth at length the grounds on which he urges that the denial of bail by the two lower courts be set aside by me. The Government has countered with a memorandum in opposition, likewise on the merits, and to it petitioner has filed an extended reply. I would not be helped by oral repetition of the respective contentions.

I cannot say that the questions which petitioner proposes to raise on appeal are frivolous. But even though his grounds of appeal be not frivolous, it is not for me to overrule the discretion exercised by the Court of Appeals in denying bail unless the record reveals a clear abuse of discretion by that court. There is no basis for so finding.

Of course every safeguard of the law is to be scrupulously observed before sending people to prison. But it is also true that one of the blemishes of our administra-

tion of criminal justice is avoidable dilatoriness in disposing of a criminal charge either through acquittal or reversal of an erroneous conviction, or, on the other hand, in bringing a criminal to book. Needless delays on appeal are to be discouraged. Enlargement on bail after conviction [Publisher's note: There probably ought to be a comma here.] where an appellate court does not find solid reasons for foreseeing reversal, is a fruitful source of dilatoriness in disposition of appeals.

I see no reason why a half a year or so should elapse before disposition in the Court of Appeals of an appeal like that of the petitioner. I fail to appreciate why counsel fresh from the trial and fully conversant with the contested issues should not be ready to argue the appeal on the stenographic minutes of the trial, without more, as promptly as the Court of Appeals can hear the case.

Accordingly, I deny the application for bail subject to the following condition: if the petitioner is prepared to argue the appeal on the stenographic minutes of the trial before the end of this month, assuming that the Court of Appeals can, as I hope it can, arrange to hear the case, and the Government does not join in such early hearing of the case, I shall entertain a renewal of this application if the Court of Appeals, under the changed circumstances indicated in this paragraph, adheres to its denial of bail.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

Rouben Goldman and Sylvia Goldman, Petitioners,	)	On Application for Extension of Time Within Which to File Petition for Writ of Certiorari.
v.	)	
John M. Fogarty, Guardian ad Litem.	)	

[December 20, 1954.]

FRANKFURTER, Associate Justice.

Needless delay in determining whether a judgment of the lower court should be final or calls for review here is particularly to be avoided in a case like this where deep human feelings are involved and the course of life of two infants is at stake. The federal question to which the decree of the Supreme Judicial Court of Massachusetts may give rise is not only clear but is clearly defined in the application for extension of time for filing a petition for certiorari. Nor can I fail to be mindful of the fact that counsel for petitioners, howsoever recently retained, is especially conversant with the problems that the case raises. Indeed, the application for extension of time sets forth all that needs to be set forth adequately in the petition proposed to be filed. As for the preparation of the needed record, I find it difficult to understand why an appropriate certification of the record cannot be had without delay. In any event, I have no doubt that Chief Justice Qua would see to it that such certification is promptly forthcoming.

Feeling as strongly as I do that compassionate consideration for the feelings and interests of the various parties involved in this litigation calls for its earliest disposition here, I deem it important that steps be taken to have the petition before the Court as soon as may be, with due

regard to the Commonwealth's right to respond. Inasmuch as the time for filing the petition does not expire until December 27, there is ample time for formal filing of the petition and the Commonwealth's response, so as to bring the matter before this Court at its Conference on January 29, 1955.

Since there is no need for an extension of time, the application for it is denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

William L. Patterson, Petitioner,	)	Of Application for
v.	)	Admission to Bail.
United States of America.	)	

[Publisher's note: "Of Application for Admission to Bail" probably ought to be "On Application for Admission to Bail".]

[December 23, 1954.]

FRANKFURTER, Circuit Justice.

This application for bail pending appeal to the United States Court of Appeals for the Second Circuit [Publisher's note: There probably ought to be a comma here.] from a judgment finding the petitioner guilty of criminal contempt and resulting in commitment for 90 days, calls essentially for an evaluation of testimony. The District Court refused bail pending appeal. The Court of Appeals has likewise refused bail, finding, after argument, that the appeal presented no substantial question. I certainly am not prepared to say that the record did not warrant the careful opinion of the District Judge.

However, in a case like this the actual operation of the appellate procedure should not be allowed, through denial of bail, to render the right to appeal nugatory. The court and the Government should free themselves from the responsibility of having the petitioner serve his 90 days before the appeal can be disposed of and the validity of the sentence put to the fullest test. In refusing to find that the Court of Appeals, in denying bail, abused its discretion (for I would so have to find to grant bail) I assume that an application by petitioner to the Court of Appeals to hear the appeal on the merits as promptly as possible will receive favorable action. On this assumption, I deny this petition.

Any question that may arise after disposition of the merits by the Court of Appeals should be left for another day.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

Michael Nukk, et al., Appellants,	)	
v.	)	
Edward J. Shaughnessy, District Director of the Third District of the Immigration and Naturalization Service of the Port of New York.	)	On Application for a Stay Pending Appeal.

[January 3, 1955.]

FRANKFURTER, Associate Justice.

This is an application for an order restraining appellee from enforcing certain "Orders of Supervision" directed against appellants, aliens subject to final administrative orders of deportation, pending appeal to this Court from the decision of a three-judge district court dismissing on jurisdictional grounds appellants' constitutional challenge to these supervisory orders and Section 242(d) of the Immigration and Nationality Act under which they were issued. Having due regard to all the circumstances, including of course the restrictions on the free movement of these appellants, I do not think I would be warranted in exercising discretion to stay the action of appellee. However, since legal issues which do not appear to me to be frivolous call for adjudication, issues that concern restraints on liberty, I think appropriate steps should be taken whereby the case may reach our appellate docket for early argument. Unless obstacles of which I am not apprised are in the way, this appeal ought to be capable of being perfected here by January 15, 1955. The Government will not, I am confident, stand on its full time for

making a response, and one may assume that the case will be ripe for consideration by the Conference to be held on January 29, 1955. If this schedule is realized and the appeals are then set for argument, the case can be heard at the session of the Court beginning on February 28, 1955.

In the light of these considerations the application for a stay pending appeal is denied.

SUPREME COURT OF THE UNITED STATES

No. 442.—OCTOBER TERM, 1954.

Elizabeth Gurley Flynn, et al.,	)	On Application for
Petitioners,	)	Withholding of Order
v.	)	Denying Certiorari.
United States of America.	)	

[January 12, 1955.]

FRANKFURTER, Associate Justice.

This application invokes the provisions of Rule 25(2) of this Court authorizing a Justice thereof to direct the Clerk to withhold notification of the denial of petition for certiorari Monday last to review the decision of the Court of Appeals for the Second Circuit in *United States* v. *Flynn*, 216 F.2d 354. Representation is made of the intention to file a petition for rehearing "presenting grounds which were not raised in the petition for certiorari, but which are available to them, and which are of a substantial nature." It is sought not to have the order denying certiorari issued, pending the filing and disposition of petition for rehearing, because of the bearing of such an order on revocation of bail by the District Court.

Bail was fixed by the District Court pending the appeal by these petitioners of their convictions in the District Court. Following affirmance of the convictions by the Court of Appeals for the Second Circuit on October 14, 1954, the Government moved for revocation of the bail. After argument, the trial judge denied this on October 15. On October 25, the Government asked the Court of Appeals for recall of its mandate and its reissue forthwith with directions to the District Court that a substantial question was no longer outstanding. On November 8, 1954, the Court of Appeals denied this motion. During the pendency of the petition for certiorari here the bail

of petitioners remained unrevoked. No representation has been made to indicate any abuse by the petitioners of their enlargement on bail or a threat of such abuse.

A petition for rehearing of a denial of a petition for a writ of certiorari is part of the appellate procedure authorized by the Rules of this Court, subject to the requirements of Rule 58. The right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court, subject to all the consequences of such an interpretation. Accordingly, on an appropriate showing that a substantial matter, as required by Rule 58, is to be presented, appropriate opportunity should be given for doing so. The opportunity to make such a showing may afford the basis for the exercise of the authority vested in a Justice of the Court by Rule 25. But there is no reason for withholding notification of the denial of a petition for certiorari for the full duration afforded for the filing of a petition for rehearing. The effective administration of justice may require a much earlier *prima facie* showing for which no elaborate argumentation is needed, that a substantial issue will be tendered by the petition for rehearing.

Accordingly, I direct the withholding of the order denying the petition for certiorari in this case until noon of Monday, January 17, 1955. During the interval there will be ample time for petitioners to set forth with particularity the claim in their present application of grounds of a substantial nature as the basis of a petition for rehearing. Such a showing may be typewritten. The order of last Monday denying the petition for certiorari in this case will automatically issue at noon on Monday next, unless a positive order to the contrary will in the meantime have been made by me.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1954.

	)	Application for Admission
J.A. Herzog, Appellant,	)	to Bail Pending
v.	)	Determination of Appeal in
United States, Appellee.	)	the United States Circuit
	)	Court of Appeals for the
	)	Ninth Circuit.

[February 11, 1955.]

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for bail after judgment of conviction for federal income tax evasion that led to a sentence of one year in prison and a fine of $5,000. The District Court denied bail. After oral argument, a panel of three members of the Court of Appeals also denied bail. This application was then made to me as Circuit Justice, a procedure authorized by Rule 46(a)(2) of the Rules of Criminal Procedure, which provides:

> "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail."

The problem presented by this application is a difficult and recurring one. After the District Judge, who has tried the case, and the Court of Appeals, which will hear the case on the merits, both deny bail, the Circuit Justice should be most reluctant to grant such relief. The reason is not only the great deference owed their judgment but also the knowledge that those judges, being closer to the actual arena of the trial and its environment, are more

apt than he to have a sense of what the scales of justice indicate in the particular case. Yet a responsibility rests on the Circuit Justice which cannot in good conscience be delegated to others. And if, after giving that deference to his Brethren below which is deserved, there are still doubts, he alone must resolve them.

I heard oral argument in this case. There was no suggestion whatever that this applicant should be confined lest he escape or not respond to the judgment entered on appeal. The Court of Appeals has, indeed, granted a stay of execution to continue for seven days after I have ruled on this application. Hence, the only question presented to me is whether Herzog's case "involves a substantial question which should be determined by the appellate court" within the meaning of Rule 46(a)(2).

The construction of the words "substantial question" is itself a substantial question. It obviously does not mean a decision on the merits, for Rule 46(a)(2) defines the question as one "which should be determined" on appeal.

A question might seem "substantial" to one person and not to another. My years of experience on the Supreme Court with petitions for certiorari is enlightening in this regard. The practice is to grant those petitions on a vote of four Justices. Those who vote to deny the petition, either because they think the decision below was right or that the petition presents nothing substantial, often vote to reverse after oral argument. Further study of a problem often changes a vote. Further study may do more; it may indeed change the views of the majority of a court. It has happened over and again in the Supreme Court; and I am confident it also happens in other courts.

Only the other day, bail was denied in *Patterson* v. *United States*, 75 S. Ct. 256, by the District Court, by the Court of Appeals, and by the Circuit Justice. The appeal, however, was expedited lest the right of appeal be lost while the appellant was serving his short sentence. When the Court of Appeals reached the merits, it reversed. *United States* v. *Patterson*, 23 L.W. 2381.

When, therefore, the issue is whether a "substantial question" is presented within the meaning of Rule 46(a)(2), the first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It is not enough that I am unimpressed. I must decide whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail. If the question were one presented by a petition for certiorari to this Court and I were asked to grant a stay, I would grant it despite my own convictions on the merits, once I felt that any of my Brethren would be impressed with the argument. Though there were only one likely protagonist of that view on the Court, I would feel that the question should be saved for decision by the entire bench. The fact that one judge would be likely to see merit in the contention is likewise enough to indicate its substantiality for the purpose of Rule 46(a)(2). There is room for argument on many rules of law and on most of their applications. The shadow of a doubt across one's own conclusions is itself sufficient, at least where bail is involved. Bail is basic to our system of law. See the Eighth Amendment; *Stack* v. *Boyle*, 342 U.S. 1. Doubts whether it should be granted or denied should always be resolved in favor of the defendant. See the opinion of Mr. Justice Butler, as Circuit Justice, in *United States* v. *Motlow*, 10 F.2d 657, 663.

I do not believe, however, that there is necessarily an end to the problem under Rule 46(a)(2), even though I reach the conclusion that on the merits there is no appellate judge who would likely reverse the judgment of conviction. That does not necessarily mean that there is no substantial issue which "should be determined by the appellate court." A question may nevertheless be "substantial" within the meaning of the Rule, if it is novel, or if there is a contrariety of views concerning it in the several circuits, or if the appellate court should give

directions to its district judges on the question, or if in the interests of the administration of justice some clarification of an existing rule should be made.

In the present case, appellant's brief on the merits, recently filed in the Court of Appeals, is a printed document of 63 pages. I have read it with care and have examined portions of the record to which it refers. There is nothing apparent in the brief indicating any flagrant miscarriage of justice, though interesting points of law are presented. There is, however, one question of law that seems to me to present a "substantial question" within the meaning of Rule 46(a)(2).

The question relates to the use of the grand jury minutes for impeachment purposes. A critical witness was on the stand for cross-examination. Counsel for defendant wanted to inspect the witness' testimony before the grand jury in order to impeach him. His request was denied.[*]

[*] The record shows the following transpired:

"Mr. Avakian: I believe that . . . any testimony of a witness previously given relating to the subject matter at hand should be made available to the defense.

"And I think that is particularly appropriate here. It appears to be that in one other instance previously given testimony appears to be somewhat different from the testimony given here, and that is the reason—

"The Court: You are arguing now about a fact. If that is your reason, I can't agree. I can't agree, as a judge, that there is a basis for that statement.

"Mr. Avakian: The purpose of my request is for impeachment, your Honor.

"The Court: Yes, but the Grand Jury proceedings are not open in the federal court, not unless there is some ground for them that would vary the rule. I never heard of such a thing, not in the federal court.

"I know that in the state court, of course, the Grand Jury testimony can be used, but that is not true in federal court. No more than a fishing expedition. And I don't say that with any degree of criticism applicable to this case, but generally that is all it would amount to in

Rule 6(e) of the Rules of Criminal Procedure provides in part:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise *a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury* only when so directed by the court preliminarily to or *in connection with a judicial proceeding* . . . . No obligation of secrecy may be imposed upon any person except in accordance with this rule." (Italics added.)

There has been a conflict between the policy requiring secrecy of grand jury minutes and the policy which seeks to leave no stone unturned in seeking justice in a particular case. See *In re Bullock*, 103 F. Supp. 639. Rule 6(e) has partially resolved that conflict by allowing disclosure of the grand jury minutes "in connection with a judicial proceeding."

The Court of Appeals for the Ninth Circuit does not seem to have ruled on the question presented here beyond the statements in *Metzler* v. *United States*, 64 F.2d 203, 206, that the veil of secrecy can be lifted from the grand jury minutes when "the ends of justice can be furthered thereby." But that case was decided prior to Rule 6(e)

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any case unless there was some ground of fraud or misconduct on the part of the Grand Jury, or something like that.

"Mr. Avakian: It isn't attacking the validity of the Grand Jury proceedings, your Honor, but is for impeachment purposes.

"The Court: You have to make some showing that it would be impeaching, otherwise it is a fishing expedition and would delay every criminal proceeding in federal court. Never would have an end to these proceedings.

"Mr. Avakian: I don't believe it would take more than ten or fifteen minutes for us to read the testimony.

"The Court: Well, I will deny the application."

and I have found no subsequent Ninth Circuit case squarely in point here. Cf. *United States* v. *Smyth*, 104 F. Supp. 279, 281.

United States v. *Alper*, 156 F.2d 222, 226, decided by the Court of Appeals for the Second Circuit, is, however, in point. While a witness was being cross-examined, his testimony before the grand jury was requested by the defendant to see whether there were inconsistencies between it and the trial testimony. The trial judge refused the request. The Court of Appeals reversed on another ground. Yet in referring to the right of counsel on cross-examination to inspect the grand jury minutes to ascertain whether the witness testified differently at that time, the court said:

> ". . . as the same question may arise on the new trial it seems desirable to refer to some of the matters which the judge should take into account in exercising his discretion. These will include the timeliness of the request for the minutes, the delay in the trial which may result, and the extent of the burden which will be imposed upon the judge by a comparison of the witness's grand jury testimony with his trial testimony. If the witness's grand jury testimony is very lengthy, it would be an intolerable burden and would unduly delay the trial to require the judge to go through it on the mere chance that some inconsistency favorable to the accused might be found. The trial of an indictment is of course an inquiry into the truth of the charge; but in such trial the judge must be as little an advocate of the accused as of the prosecution. When the testimony before the grand jury is in small enough compass to make any contradictions between it and the witness's trial testimony readily discoverable it is a tolerable duty to impose upon the judge an examination of the minutes. But to demand that he peruse many pages of an examination of a witness to discover possible

> contradictions is altogether to falsify his position; for then he becomes in effect an active assistant of the defense. He would have to bear in mind all that the witness had sworn to, and pick out from a mass of what may be, and usually is, verbiage any parts that may be contradictory. That involves an active participation favorable to one side, which should not be required. A great part of the law of evidence is based upon the practical difficulties that would incidentally arise from the admission of what, strictly speaking, is logically relevant; it is founded upon the recognition that here, as elsewhere in the law, we are seeking not logical perfection but the just settlement of a controversy. The duty we are discussing is preeminently in this class and it is particularly one about which it would be unsafe to generalize."

It is obvious that, whatever the ultimate outcome, under that ruling Herzog's request for inspection of the grand jury minutes would have been treated differently in New York than it was in California. Which is the better way of handling the matter, or whether there is still another which is to be preferred, is a considerable question in the administration of justice.

I express no opinion on the merits. I only conclude that the question is a "substantial" one "which should be determined" by the Court of Appeals, within the meaning of Rule 46(a)(2).

I will accordingly admit Herzog to bail in the amount of $5,000, to be posted with and approved by the District Court.

[Publisher's note: "CORRECTED COPY" is stamped on the original.]

SUPREME COURT OF THE UNITED STATES

No. — OCTOBER TERM, 1954.

Calman Cooper, Harry A. Stein and Nathan Wissner, Petitioners, *v.* The People of the State of New York, Respondent.	)))))	On Application for a Stay of Execution.

[July 7, 1955.]

MR. JUSTICE HARLAN, Circuit Justice.

The carrying out of death sentences against these defendants, by reason of their conviction of first degree murder, has been set for the night of July 7, 1955, purusant [Publisher's note: "purusant" should be "pursuant".] to an order of the Court of Appeals of the State of New York. I am asked to stay the execution of the sentences so as to give the defendants an opportunity to apply to this Court for writs of certiorari to review New York's final denial of their motions for new trials and for the issuance of writs of error *coram nobis* based upon alleged newly-discovered evidence. These motions, made on June 30, 1955, were summarily denied by the County Court of Westchester County, New York, on July 1, 1955. On July 5, 1955, the Chief Judge of the New York Court of Appeals, after hearing counsel on July 2 and again on July 5, denied, without opinion, a certificate granting leave to appeal to the Court of Appeals.

The alleged newly-discovered evidence relates to the issue of coerced confessions by Cooper and Stein (Wissner did not confess) which was dealt with by this Court in its opinion affirming the convictions. *Stein* v. *New York*, 346 U.S. 156. It consists of the Annual Report of the New York State Police for the year 1951, issued in 1952, which describes the investigation of the State Police leading to the arrest of these defendants. The murder

was committed on April 3, 1950, and the arrests took place on June 5, 6, and 7, 1950. Among other things the Report states that for "many days" prior to his arrest in the early hours of June 6, the defendant Stein had been under "constant surveillance," and that police "action" had concentrated on him and the other defendants for some time prior to the arrest. It is claimed that had this information been known to the defendants at the time of trial it could have been utilized to rebut the testimony of the State's expert witness to the effect that bruises found on the bodies of the defendants could have existed prior to their arrest. The defendants point out that in affirming the conviction Mr. Justice Jackson, writing for a majority of this Court, stated that only "slight evidence" might have been needed to tip the scales in favor of the defendants' claim that the admitted bruises on their bodies were attributable to police action, and that absent evidence that the defendants, all of whom had substantial criminal records, had been secure from violence in the days prior to their arrest, it was "more than a possibility" that their bodily condition was the result of some occurrence prior to their arrest. 346 U.S., at p. 183.

For present purposes I shall assume that this Court's power to review the State Courts' action on these motions would be as broad as it would be upon a habeas corpus proceeding. My difficulties with the defendants' contentions are threefold:

First, I am satisfied that the defendants had ample opportunity at their original trial to explore, through the police officers who testified, their pre-arrest police surveillance.

Second, I can find no valid excuse why their present claims have not been raised until this eleventh hour.

Third, I consider it entirely unrealistic to believe that a further examination of the police officers would throw new light on the coerced confession issue, which has already been fully reviewed by this Court, 346 U.S.

156, following the New York Court of Appeals' affirmance of the convictions without opinion, 303 N.Y. 856.

These stay applications were first argued before me on July 6, 1955, but at that time counsel did not have with them the record of the trial. I requested that so much of the record as related to the testimony of the police officers on the coerced confession issue be furnished me, and that part of the record was furnished on the following day, July 7, when further oral argument was also had. I have now examined that part of the record, and I am satisfied from the scope and character of the police testimony that defense counsel must have known that the defendants had been under intensive police investigation for a considerable period of time prior to their arrest, and that in all likelihood they must also have been under personal and other surveillance. I am also satisfied that counsel were given the fullest scope in their direct and cross examination of the numerous police officers who were called as witnesses, and that they had adequate information and opportunity to examine these officers on the surveillance question, had they wished to do so.

The 1951 Annual State Police Report was admittedly published at least three years ago, yet these motions, based on that Report, were not made in the State Court until June 30, 1955, after the Court of Appeals had set the date for carrying out of the death sentences. While Mr. Maurice Edelbaum, who now represents the defendant Cooper, entered the case only very recently, this defendant has concededly been represented by other counsel throughout, and Mr. Nathan Kestnbaum, representing the defendants Stein and Wissner, has orally informed me that he first received the 1951 State Police Report on August 18, 1954. If this report was considered to have the important significance now claimed for it, I find it hard to understand why the present motions in the State Court were not made until June 30, 1955. Even accepting August 18, 1954, as the time of the first knowledge of

the Report by any of defense counsel, the motions were not made until almost a year later.

The excerpts which have been furnished from the 1951 State Police Report also lead me to the conclusion that to have permitted further examination of the police officers simply on the basis of this Report would have been tantamount to allowing a fishing expedition on matters which were threshed out at great length at the trial.

In reality, what the defendant sought from the State Court was nothing more than a further opportunity to discover new evidence. The claim that the State Court's denial of the motion presents a Federal Constitutional question seems to me much too tenuous to justify my interfering with the carrying out of the judgment which has been under review in a variety of State and Federal Court proceedings for over three years.[*]

[*] *March 6, 1952.*—The New York Court of Appeals affirmed the defendants' convictions without opinion. 303 N.Y. 856.

April 18, 1952.—The New York Court of Appeals granted a motion to amend its remittitur to indicate that federal questions were presented and passed upon. 303 N.Y. 982.

October 13, 1952.—This Court granted certiorari. 344 U.S. 815.

June 15, 1953.—This Court affirmed the convictions. 346 U.S. 156.

October 12, 1953.—This Court denied a petition for rehearing. 346 U.S. 842.

November 20, 1953.—Petitioners filed an application for a writ of *coram nobis* in the Westchester County Court.

November 30, 1953.—Petitioners moved for reargument in the New York Court of Appeals.

December 3, 1953.—The New York Court of Appeals denied petitioners' motion for reargument, without prejudice, however, to its renewal after the County Court's determination on the application for a writ of *coram nobis*. 306 N.Y. 675.

December 31, 1953.—The Westchester County Court denied the application without a hearing.

January 12, 1954.—The New York Court of Appeals granted the motion for reargument. 306 N.Y. 678.

March 12, 1954.—The New York Court of Appeals remitted the case to the Westchester County Court, directing that a hearing

I consider it my duty, therefore, to deny a further stay of the executions. However, since I was not a member of this Court when it affirmed the judgment of conviction (346 U.S. 156), which involved the coerced confession issue to which the present State Court motions relate, I consider it only fair that I should give defense counsel an opportunity to make a further application for a stay to another member of this Court, lest another view of the matter be taken by one who sat on the case. Accordingly, I have this day signed an order staying the execution of the defendants until 11 p.m., Eastern Daylight Saving time, Saturday, July 9, 1955. Except to this extent, the applications for a stay of the executions are denied.

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be held on the application for a writ of *coram nobis,* and holding off decision on reargument. 306 N.Y. 867.

March 31, 1954.—The Westchester County Court, after holding a hearing, denied the application.

June 4, l954.—The New York Court of Appeals affirmed the decision of the Westchester County Court, apparently also denying further reargument. 307 N.Y. 253.

November 8, 1954.—This Court denied certiorari. 348 U.S. 878.

December 16, 1954.—The Westchester County Court denied a motion for reargument over the disposition of the application for a writ of *coram nobis*.

January 6, 1955.—The New York Court of Appeals denied a motion for reargument, apparently also affirming the Westchester County Court's denial of reargument. 308 N.Y. 747.

January 10, 1955.—This Court denied rehearing of the denial of certiorari on November 8, 1954. 348 U.S. 922.

Petitioners applied for a writ of habeas corpus in the United States District Court for the Southern District of New York.

January 17, 1955.—The United States District Court dismissed the writ. 129 F. Supp. 123.

April 7, 1955.—The dismissal of the writ of habeas corpus was sustained by the United States Court of Appeals for the Second Circuit. 221 F.2d 626.

June 6, 1955.—This Court denied certiorari. 75 S. Ct. 906.

[Publisher's note: "[Corrected copy]" is printed on the original.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

Robert E. Carter,	)	On Application for
v.	)	Extension of Time Within
United States.	)	Which to File Petition for
	)	Writ of Certiorari.

[July 13, 1955.]

FRANKFURTER, Associate Justice.

This is a criminal case concerning which the Rules of this Court have clearly manifested a public policy of expeditious disposition. They have given thirty days for filing a petition for certiorari to review a final adjudication in the Court of Appeals, subject to the power to grant an additional thirty days where real cause is made to appear. Here no such showing is made. The point sought to be raised here was one that was unsuccessfully urged on the Court of Appeals. Decision there was handed down on May 19, 1955. A petition for rehearing was filed in that Court and denied on June 20, 1955. The issue was fully canvassed by the Court of Appeals, and was doubtless adequately briefed and argued by counsel. The nature and substantiality of the point in controversy emerge from the opinion of the Court of Appeals.

None of the considerations that are urged for an extension of time is persuasive. Counsel who urged the point below is counsel here; the addition of another counsel hardly affords ground for the desired extension. Nor is there force in the claim that both counsel are "regularly engaged in criminal practice." It may well be that if counsel are actively engaged in the trial of a cause during the period within which a petition for certiorari must be filed, an appropriate extension of time might be afforded. But, generally speaking, barring such exceptional situations, the responsibility of counsel to litigation in this

Court should take precedence, on the assumption that the issue sought to be raised here is of such significance as to call for review by this Court. And counsel may be appropriately reminded that the requirements of the Rules of this Court regarding the contents of a petition for certiorari seldom call for the kind of research which may be demanded for a brief on the merits. In a situation like the present, a showing of the required importance ought not to take more than a day or two on the part of competent counsel, particularly one previously responsible for the cause.

The application is denied.

SUPREME COURT OF THE UNITED STATES

No. —OCTOBER TERM, 1954.

Breswick & Co. and Randolph Phillips, as Common Stockholders of Alleghany Corporation, *v.* United States of America, The Interstate Commerce Commission, Alleghany Corporation, The New York Central Railroad Company, Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a Copartnership, Doing Business as Gruss & Co., and Samuel A. Mehlman, Defendants.	)	On Application for a Stay of Injunction and Supersedeas Pending Appeal.

[August 3, 1955.]

MR. JUSTICE HARLAN, Circuit Justice.

I have before me an application by the defendant Alleghany Corporation for an order (a) staying, pending an appeal to this Court under 28 U.S.C. § 1253, a preliminary injunction order of a three-judge court of the United States District Court for the Southern District of New York made on July 26, 1955, (b) granting supersedeas upon Alleghany posting an appropriate and sufficient bond, and (c) setting the appeal for argument on the first argument day of this Court in October.

At the oral argument representations were made on behalf of the Attorney General and the Interstate Com-

merce Commission as to their support of the application for the requested relief. The Securities and Exchange Commission, which was allowed to be heard orally and to file a brief as *amicus*, took a neutral position in the controversy, at the same time disclaiming any intention to acquiesce in the jurisdiction of the Interstate Commerce Commission in the premises.

The injunction sought to be stayed enjoined the defendants Interstate Commerce Commission and Alleghany Corporation, pending final judgment, "from enforcing or taking any action pursuant to (a) the orders of the Interstate Commerce Commission made March 2, 1955, and May 24, 1955, in Finance Dockets 14692 and 18656, insofar as they determine that Alleghany Corporation is in control of the New York Central Railroad and insofar as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of § 20 (1) to (10) inclusive and § 20a (2) to (11) inclusive of the Interstate Commerce Act, or (b) the orders of the Interstate Commerce Commission made May 26, 1955, and June 22, 1955, in Finance Docket 18866, authorizing issuance of 6% Convertible Preferred Stock." The order also enjoined Alleghany, its transfer agents and others acting for it "from issuing, distributing or transferring or converting into Common Stock any of the 6% Convertible Preferred Stock of Alleghany Corporation, which was the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting to do so, pending final judgment in this cause." The injunction was conditioned upon the plaintiffs posting a $1,000 cost and damage bond in favor of Alleghany.

In granting the preliminary injunction the District Court was divided, District Judges Dimock and Walsh voting for the injunction and Circuit Judge Hincks voting against its issuance. On July 26, Judges Hincks and

Dimock (Judge Walsh being abroad) again divided on Alleghany's motion for a suspension of the injunction pending appeal, and accordingly suspension was denied by an order of the two Judges on the same day. There followed the present application which was argued at length before me in New York City on August 1.

The plaintiffs concede that I have power to grant the stay and supersedeas sought. See Revised Rules of the United States Supreme Court, Rules 18 and 51; cf. F.R.C.P. 62(g). But they urge that I should deny the application in the exercise of sound discretion. They especially urge that a stay of the injunction, insofar as it relates to the preferred stock, will render moot the appeal from that part of the injunction, and that I, as a single Justice, should not take action having that result. But I do not see how I can properly escape the responsibility of weighing the competing equities and granting a stay if I find that on balance the scales are strongly tipped in that direction. Where the question is whether an injunction should be granted the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue. *Yakus* v. *United States*, 321 U.S. 414, 440 (1943). And the same considerations obtain where the issue is whether an injunction should be lifted or stayed. I think the matter is cast in no different light when one consequence of staying an injunction pending appeal may be to render the appeal moot in whole or in part. Cf. *Federal Trade Commission* v. *Thomsen-King*, 106 F.2d 517, 519 (1940). I am informed by the Clerk of this Court that such stays have in the past been granted by single Justices in unusual circumstances. It goes without saying that a single Justice's stay powers in a case such as this should be exercised most sparingly, both in fairness to the prevailing parties below and out of defer-

ence to the Court. A single Justice may also be expected to give due regard to a lower court's denial of a stay.*

I therefore turn to the competing equities in the situation before me. In granting the preliminary injunction the majority of the District Court found in its opinion that the plaintiffs, absent an injunction, might suffer irreparable damage in two respects: (1) possible dilution of the value of their common stock interest in Alleghany, in the event that the preferred stockholders should exercise their conversion rights under the new issue; and (2) possible loss of interim protection under the Investment Company Act if it were ultimately held that regulation of Alleghany's affairs is subject to the provisions of that Act rather than to those of the Interstate Commerce Act. In the temporary injunction order it is also found that the denial of an injunction "would deprive plaintiffs of findings required by Section 5(2) of the Interstate Commerce Act, that the orders reviewed are consistent with the public interest and otherwise comply with the provision of said Sections 5(2) and 5(3)." If this be damage, however, its prevention is not covered by the injunction now in force, and consequently such possible damage cannot be taken into consideration in deciding whether the injunction should be stayed.

I am not concerned here with the question whether the other findings of irreparable damage are sufficient to support the injunction, but rather with the question of whether the plaintiffs can be adequately indemnified against such damage pending appeal. I see no reason

* In *United States ex rel. Knauff* v. *McGrath*, October Term, 1949, printed at 96 Cong. Rec. A3751, the late Mr. Justice Jackson said: "As Circuit Justice for the Second Circuit, it is my *almost* invariable practice to refuse stays which the Court of Appeals or its judges have denied. This is because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases." (Emphasis supplied.) In the particular case before him Mr. Justice Jackson granted a stay.

why this cannot be accomplished by requiring Alleghany to furnish an appropriate bond. As I see it, the outside limit on the possible loss to the plaintiffs, should they ultimately succeed in their contentions, is the highest value that their stock might have attained, had Alleghany been subject to the Investment Company Act's requirements, and had no dilution of the plaintiff's [Publisher's note: "plaintiff's" should be "plaintiffs'".] equity by reason of "conversion" taken place, during the pendency of this litigation. I think a bond can be devised to cover such contingencies adequately, even though in the nature of things no precise estimate can be made of the possible future value of plaintiffs' stock.

I do not think, however, that the mere conclusion that the plaintiffs' interest is bondable would justify me in overturning the District Court's decision. Consequently I turn to the elements of prejudice to the defendants flowing from the continuance of the injunction.

As to the part of the injunction which relates to Alleghany's control of the Central and its status as a non-carrier "considered as a carrier": while it could be argued that the issuance of this order was improvident in the absence of a showing of threatened action by the Interstate Commerce Commission, nevertheless neither Alleghany nor any of the other interested parties has undertaken to show specifically how they will be prejudiced by continuance of this aspect of the injunction. In these circumstances I am disposed to let this part of the injunction stand.

As to the part of the injunction relating to the new preferred stock issue, the situation is different. The competing equities urged in support of a stay have been set forth in Judge Hincks' dissenting opinions below. In summary, they are that continuance of the injunction will (1) prejudice the position of Alleghany in renewing or refunding some $8,000,000 of bank debt maturing in September 1955; (2) make it impossible for Alleghany

to maintain its policy of equal director representation of the common and preferred stock, except on disadvantageous terms; (3) seriously prejudice Alleghany's preferred stockholders who have surrendered their old preferred stock and are either prevented from receiving the new preferred stock, or to the extent that they have received such stock, are left with a frozen asset; and (4) prevent the defendant New York Central Railroad Company from proceeding with arrangements respecting its own internal reorganization.

In weighing these equitable considerations against the plaintiffs' contentions, I am most impressed with the prejudice which continuance of this injunction will work on the preferred stockholders. Alleghany had about 136,000 shares of Class A preferred stock outstanding, all but about 24,000 of which were held by the general public. Approximately 130,000 shares of this stock have been delivered to Alleghany for exchange. 900,000 shares of the new preferred stock were issued in exchange for 90,000 of these shares before any action by the District Court. The temporary injunction bans the further transfer of those 900,000 shares by Alleghany or its agents, and also forbids the issuance of additional shares. Thus the 900,000 shares are not readily marketable or acceptable as collateral, and the holders of some 40,000 shares of the old stock are not able to receive from Alleghany the 400,000 shares of new stock to which they are entitled under the exchange offer. The value of the old preferred stock on May 1, even before the exchange was approved by the I.C.C., was in the neighborhood of $40,000,000, which is many times that of the plaintiffs' shares, presently valued at about $7,000. The plaintiffs own but 700 shares of common stock out of approximately 4,600,000 shares outstanding, of which about 4,000,000 shares are publicly held; and 97½% of the common stock voting at the stockholders' meeting at which the preferred stock plan was approved

(representing approximately 72% of the outstanding common) voted in favor of the plan.

While I would hesitate to stay the injunction on the basis of the equities asserted solely on Alleghany's behalf, the position of the preferred stockholders does, in my opinion, call for some measure of relief. I am not unmindful of the plaintiffs' contention that Alleghany proceeded with the preferred stock plan after notice of the plaintiffs' objection and proposed injunction suit, but I do not think this can be laid at the door of the preferred stockholders so as to disentitle them to consideration of their predicament.

But for the fact that staying the injunction to the full extent that it affects the preferred stock issue might render moot the whole appeal from that part of the injunction, I would be disposed to grant that relief. But it must be borne in mind that the considerations governing the situation now before me as a single Justice are quite different from those which would be involved in determining the propriety of the issuance of the injunction in the first place. Under the circumstances, I think the fair thing to do is to stay the injunction insofar as it relates to the 900,000 shares of new preferred stock which already have been issued, and let the injunction stand as regards the 400,000 unissued shares. This course may render the appeal moot to the extent that it relates to the order banning further transfer of these 900,000 shares, but it shall relieve the holders of these shares from their current situation; and it may be that these shares have already become a valid issue, even if it is assumed, as plaintiffs contend, that proper approval was not secured. See *A.C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941). The effect of this course may be said to discriminate against preferred shareholders who have tendered their old stock but have not yet received new stock in exchange. And I recognize that whether a

tendering preferred shareholder has or has not received his new preferred stock may be largely a matter of accident. Nevertheless, the equities in his favor do not seem quite so strong as those in favor of the other preferred stockholders, and appear to me to be pretty well offset by the consideration that to grant a stay of the injunction on the whole issue of new stock would probably render entirely moot an appeal from that part of the injunction.

I find no substance to the plaintiffs' contention that Alleghany's present application is premature. I am disposed to think that the signature of one judge to the injunction order, which conformed to the majority opinion of the three-judge court as to the scope of the injunction, satisfied the requirements of 28 U.S.C. § 2284. However, if I am wrong, then consummation of the preferred stock plan would not violate a valid injunction order and the stay which I am granting would be of no account. Nor do I think that the two-judge order denying supersedeas runs afoul of 28 U.S.C. § 2284 so as to be an insufficient foundation for the present application. Moreover, Rule 18(2) of the Revised Rules of this Court permits the entertaining of such an application as this without any prior application below. And the urgency of the present situation would justify relaxation of the normal procedure, if need be.

The plaintiffs' contention as to the alleged unfairness of the preferred stock plan is not open here. *Pittsburgh & West Va. R. Co.* v. *United States*, 281 U.S. 479 (1930).

I shall sign an order staying, pending appeal to this Court, the interlocutory injunction granted below, insofar as the injunction order relates to the 900,000 shares of preferred stock already issued. In all other respects the application for a stay is denied. The stay which I have granted is conditioned upon the defendant Alleghany (a) filing, simultaneously with the entry of the order to be made herein, a surety bond running to the plaintiffs

in the amount of $14,000, containing the usual conditions, and in addition indemnifying the plaintiffs against all loss and damage arising out of (i) dilution of the value of their common stock by reason of the conversion of any of the new preferred stock and (ii) the absence of Investment Company Act protection, pending final determination of the issues involved in this litigation; and (b) filing its notice of appeal to this Court from the order below, within 3 days from the date of this memorandum.

I have fixed the amount of the bond at approximately double the present market value of the plaintiffs' common stock, which seems to me a generous allowance for their greatest possible exposure to loss pending appeal.

Alleghany also asks that I set the appeal for argument on the opening argument day of the new Term. This I have no power to do, and Alleghany must address its application to the full Court. See Rule 43(4) of the Revised Rules of this Court.

I hope that the parties will be able to agree as to the form and sufficiency of the bond and order. If not, both may be submitted to me for settlement and approval at my summer home at Weston, Connecticut, on or before August 9.

SUPREME COURT OF THE UNITED STATES

October Term, 1955
No. 283 Misc.

EUGENE BURWELL, Petitioner,	)	
vs.	)	On a Motion for a Stay
THE PEOPLE OF THE STATE OF CALIFORNIA	)	of Execution.

By Mr. Justice Frankfurter.

This Court on May 23 last denied certiorari, 349 U.S. 936, to review the judgment of the Supreme Court of California affirming petitioner's conviction for murder [Publisher's note: There should be a period here.] 44 A.C. 15; 279 Pac. 2d 744. Thereafter, Burwell filed a petition for writ of habeas corpus in the District Court for the Northern District of California. It was denied on June 10, 1955, as was, on June 14, a petition for certificate of probable cause. Appealing from the judgment of denial, Burwell petitioned the Court of Appeals for the Ninth Circuit to grant him a certificate for probable cause on his appeal. The Court of Appeals, on July 7, dismissed the petition in [Publisher's note: There probably ought to be an "a" here.] per curiam opinion because "The court has no power to grant such a certificate. 28 U.S.C. 2253." To review this order of dismissal and the order of the District Court, a petition for certiorari was filed here on September 22. A motion for a stay of execution is now before me to await disposition of this petition for certiorari.

The disavowal by the Court of Appeals of that court's power to grant a certificate of probable cause as a pre-condition of an appeal to review the dismissal of the petition for habeas corpus in the District Court appears to be in direct conflict with the decision of this Court in House v. Mayo, 324 U.S. 42, 48. So clear a conflict as there appears to me to be between the view of the Court of Appeals as to its power and this Court's previous determination ought not to be resolved by me. Since the Court is convening in a few days, I deem it my duty to refer this motion for a stay of execution to the Court. Rev. Rules, Rule 50 (6). This necessitates the granting of the motion for the stay of execution, extremely loath as I am to cause such postponement, until the disposition of these proceedings, that is, both the motion for a stay of the execution and the petition for certiorari. I am authorized to say that these will come before the Court on Monday next.

September 27, 1955. (SGD) FELIX FRANKFURTER
Associate Justice

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[Publisher's note: *Rogers* v. *Teets* (76 S. Ct. 36) is reproduced here only because Justice Black's decision was recorded on the same sheet of paper as Justice Frankfurter's opinion in *Burwell*. The words "Associate Justice" at the bottom of the page are almost entirely cut off, probably because they fell outside the scanning range of a photopier.]

JAMES ALONZO ROGERS, Petitioner,	)	
vs.	)	
HARLEY O. TEETS, WARDEN, CALIFORNIA STATE PRISON, SAN QUENTIN, CALIFORNIA	)	No. 262 Misc.

Petition for stay granted pending disposition of petition for certiorari and petition for stay of execution.

September 27, 1955. (SGD) HUGO L. BLACK
Associate Justice

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1955.

Long Beach Federal Savings and Loan Association, et al, Petitioners,	)	
v.	)	
Federal Home Loan Bank of San Francisco, Federal Savings and Loan Insurance Corporation, Home Loan Bank Board, et al.	)	Application for Stay.

[Publisher's note: "et al, Petitioners" should be "et al., Petitioners".]

[October 31, 1955.]

Opinion of MR. JUSTICE DOUGLAS.

This complex litigation has been before this Court twice (*Fahey* v. *Mallonee*, 332 U.S. 245; *Ex parte Fahey*, 332 U.S. 258) and before the Court of Appeals for the Ninth Circuit on several occasions (*Home Loan Bank Board* v. *Mallonee*, 196 F.2d 336; *Fahey* v. *O'Melveny & Myers*, 200 F.2d 420; *Fahey* v. *Calverley*, 208 F.2d 197). Applicants seek a stay of a writ of mandamus and injunction issued by the Court of Appeals ordering, *inter alia*, the United States District Court for the Southern District of California to deliver to the Federal Home Loan Bank of San Francisco certain cash and securities now held in the District Court's registry. *Federal Home Loan Bank* v. *Hall*, 225 F.2d 349, 386-394. Denial of the stay will have the effect of allowing the cash and securities to remain in the possession of the San Francisco Bank, restoring the Bank's position as a secured creditor. I do not read the writ of mandamus as authorizing the San Francisco Bank to foreclose this collateral nor as precluding the petitioners from raising the defense of absence or failure of consideration. The Court of Appeals has enjoined only the suits and cross-claims relating to the appointment of the

conservator and the reorganization of respondent Bank. The Bank's right to recover on the loan and to foreclose the collateral is presently in dispute in a civil action pending before the District Court. Counsel for the Bank gave assurances at oral argument that the collateral would not be foreclosed pending the filing of a petition for a writ of certiorari by applicants and its disposition by this Court. Respondent is a responsible financial institution.

My power to grant the requested stay is clear. 28 U.S.C. § 2101(f). But even though it be assumed that petitioners have substantial questions to present in their petition for certiorari, no irreparable injury to petitioners by denial of the stay has been established to my satisfaction.

The application is therefore denied.

SUPREME COURT OF THE UNITED STATES

NO. 371 MISC.—OCTOBER TERM, 1955.

John Francis Noto, Petitioner,	)	On Application for Bail
v.	)	Pending Petition for a
United States of America, Respondent.	)	Writ of Certiorari.

[November 21, 1955.]

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

I have before me petitioner's application to fix bail pending this Court's determination of his petition for certiorari.[1] That petition seeks review of a decision of the Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Western District of New York denying petitioner's motion to reduce bail. See *Stack* v. *Boyle*, 342 U.S. 1.

The petitioner is under indictment for violation of the "membership" clause of the Smith Act, 18 U.S.C. § 2385. He is charged with having been a member of the Communist Party of the United States continuously from January 1946 to the date of the filing of the indictment (November 8, 1954), with knowledge of that Party's alleged illegal purposes, and intending himself to bring about the overthrow of the Government by force and violence. The District Court (Judge Harold P. Burke) fixed bail at $30,000, and thereafter denied petitioner's motion to reduce bail to $10,000.[2] A divided Court of Appeals affirmed, Circuit Judges Medina and Lumbard

[1] The petition, No. 371 Misc., O.T. 1955, was filed in this Court on November 16, 1955.

[2] The petitioner has been incarcerated since August 31, 1955. His allegations that he is unable himself to make the bail as fixed, or to raise more than $10,000 from his relatives and friends, are not controverted.

voting for affirmance, and Chief Judge Clark, who thought that bail should not exceed $10,000, dissenting.

The trial of the petitioner has been set for January 10, 1956, and he is clearly entitled to a prompt disposition of his present application. See *Stack* v. *Boyle*, *supra*, at p. 4. Since my disposition of the application necessarily involves prejudging the very questions with which the Court must deal should the petition for certiorari be granted, I have consulted my brethren and have their approval of my considering this interim application.

Ordinarily I would be unwilling to disturb the action of the two courts below in a matter of this kind. This application, however, presents a quite unusual situation. In holding the petitioner in what it recognized to be "high" bail, the District Court appears to have been strongly influenced by the petitioner's refusal to disclose any information as to his whereabouts or activities between September 1951 and August 1, 1955—a four-year period, most of which was included in the indictment. Upon petitioner's arraignment his then counsel gave the District Court no reason for this refusal, but upon the motion for reduction of bail his new counsel rested this refusal on petitioner's Fifth Amendment privilege against self-incrimination. The record in the District Court does not disclose any contention by the Government that the claim of privilege was in any respect either insufficient or invalid.

No doubt a defendant's past history and activities are relevant circumstances to be considered in fixing proper bail. But it would seem that in fixing bail, as in a criminal trial, an unfavorable inference should not be drawn from the mere fact that the Fifth Amendment privilege has been invoked. Assuming that a court when fixing bail can consider the absence of information concerning a defendant's history, even though the absence results from a valid claim of the privilege, that should be a permissible consideration only to the extent that it

bears upon the risk that the defendant will not be available for trial.[3] What weight should be given it depends upon all the facts and circumstances in the particular case.

In the present case I am left far from satisfied that the courts below did not unduly overemphasize this factor in applying the general standards prescribed by Rule 46, Fed. Rules Crim. Proc., for the fixing of bail. For unless this gap in the information as to petitioner's history is weighted very heavily against him, I find no special circumstances in the record, and none were given me at the oral argument, which would appear to me to justify the high bail fixed.[4] I think it not sufficient to argue that

[3] This Court has never considered the effect of a claim of the privilege on the constitutional right to non-excessive bail.

[4] The record shows the following: petitioner is a native-born American citizen, 38 years old. From 1917 to 1935 he lived with his parents in Buffalo and Rochester, N.Y. He attended the public schools at Rochester, graduating from high school in 1935. From 1935 to 1942 he pursued various normal employments in Rochester, New York City, and Buffalo. He was in the U.S. Army from 1942 to 1946, serving in both the European and Pacific Theatres, and received an honorable discharge in 1946. Thereafter he engaged in construction work in Rochester for a few months, and in October 1946 became Organizational Secretary, and subsequently Chairman, of the Communist Party of Erie County, N.Y. From 1948 until September 1951 he was Western New York Organizer of the Communist Party. At that time he alleges that his employment was terminated by the Party, and that he "has held no organizational post in the Communist Party since about September 1951." The foregoing positions with the Communist Party represented full time paid employment in Buffalo, apparently without any effort to conceal petitioner's occupation. In 1940 petitioner was arrested by the New York State Police in Perry, N.Y., "while collecting signatures for the purpose of placing the Communist Party on the New York State election ballot in 1940." He was released the next morning without charges against him. Other than this petitioner has never been arrested, and he has no prior criminal record.

The petitioner alleges that he left Buffalo with his family in September 1951, but the record contains no information as to his whereabouts or activities from then until August 1, 1955. It was

the burden of proof was on petitioner, for in the setting of this case that seems to me but another way of saying that petitioner could only escape high bail under pain of waiv-

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as to this period that petitioner claimed his privilege. Petitioner alleges that he was at a stated address in Far Rockaway, Long Island, N.Y., with his wife and daughter from August 1 to 30, 1955, at which time he and his family returned to Buffalo to live in an apartment in a house owned by his brother-in-law, to which they had shipped their household effects and belongings from Far Rockaway. Federal agents in Buffalo arrested petitioner under this indictment on August 31, 1955. He immediately identified himself when asked his name. Although the indictment against petitioner was filed on August 8, 1954, the record is barren of any evidence as to what steps were taken by the authorities to apprehend him, and petitioner alleges that he had no knowledge of his indictment until he was arrested on August 31, 1955.

Petitioner's wife and minor daughter live in Buffalo, and his wife is expecting another child in April. Petitioner professes his innocence of the charges against him and alleges that "if released on bail" he "has not the slightest intention of running away . . . or of fleeing the jurisdiction," and that "defendant firmly intends to stand trial upon the indictment, in the firm belief that a trial of the legal issues herein involved must and will show defendant's innocence of any crime."

The foregoing summary is taken from petitioner's affidavit (before the District Court), which has not been controverted in any way.

In the "first string" communist case in the Southern District of New York (*United States* v. *Dennis, et al.*), pre-conviction bail was fixed at $5,000 for each defendant. In sixteen other Smith Act "conspiracy" cases in various parts of the country, in only one has pre-conviction bail been as high as $30,000; in the others it has ranged from $2,000 to $25,000 with an average of about $9,000. Over two-thirds of the more than one hundred defendants were released before trial on bail ranging in amount between $5,000 and $10,000. The bail in the present case compares more favorably with the pre-conviction bail fixed in the four other Smith Act "membership" cases which so far have been brought. In two, the bail was $35,000, in the third $30,000, and in the fourth $20,000. However, bail was "made" by the defendants in all but one of these cases. The foregoing data comes either from the record in the present case or from the research of my Law Clerk.

ing his Fifth Amendment privilege. It is also relevant that the "membership" clause of the Smith Act has not yet been considered by this Court.

Concluding, as I do, that a substantial question exists as to whether this bail does not offend the Eighth Amendment, I think that, with his trial less than eight weeks off, petitioner is entitled to the interim relief he seeks. I shall therefore fix bail, pending this Court's determination of the petition for certiorari, in the amount of $10,000, the sufficiency of any surety or security that may be tendered to be justified before the United States District Court for the Western District of New York. I have today signed an order to this effect.

November 21, 1955.

SUPREME COURT OF THE UNITED STATES

No. — OCTOBER TERM, 1955.

Louis E. Wolcher, Appellant,	)	
v.	)	Application for Bail.
United States of America.	)	

[December 31, 1955.]

MR. JUSTICE DOUGLAS, Circuit Justice.

Wolcher has been sentenced to two years' imprisonment and fined $10,000 on a judgment of conviction of federal income tax evasion. The judgment has been affirmed by the Court of Appeals. 218 F.2d 505. A motion for a new trial based on newly discovered evidence was denied by the District Court and an appeal from that order is now pending in the Court of Appeals. The District Court and the Court of Appeals have denied bail pending that appeal. Wolcher now makes application for bail to me as Circuit Justice. Rule 46(a)(2) of the Rules of Criminal Procedure authorizes me to grant the application "only if it appears that the case involves a substantial question which should be determined by the appellate court." See *Herzog* v. *United States*, 75 S. Ct. 349.

A trial judge's order denying a motion for a new trial on an appraisal of newly discovered evidence should remain undisturbed "except for most extraordinary circumstances." *United States* v. *Johnson*, 327 U.S. 106, 111. Nevertheless, after hearing oral argument and studying the record, I feel that the appeal raises "a substantial question" within the meaning of Rule 46(a)(2), if that Rule is given the liberal construction necessary to protect the right of appeal. See *Herzog* v. *United States*, *supra*.

The motion for a new trial was accompanied by an affidavit of one Corriston. He offered testimony which appears to be probative of a crucial fact issue in the case—whether Wolcher gave large sums of cash to one Gersh as

overceiling payments for black market whiskey, thus violating one federal law but accounting for the disposition of the funds on which he failed to pay the income tax. If the district judge denied the motion because he considered the Corriston testimony to be of too little weight in the totality of the trial to justify a new trial, his judgment that a new trial was not "required in the interest of justice" within the meaning of Rule 33 of the Rules of Criminal Procedure, would be entitled to special deference. He stated that in his opinion the motion failed to set forth any "legal basis" for granting a new trial. The district judge may have meant that the result of the prosecution would hardly have been different if the newly discovered evidence were admitted since his recollection was that there were large sums still unaccounted for on that theory of the case. As I read the record, there would be no sums unaccounted for if this defense were established. The district judge may, on the other hand, have meant that the Corriston testimony was inadmissible, because it was hearsay. Counsel for Wolcher argue that the Corriston testimony would be admissible even though it was hearsay, because it relates to statements of Gersh made in furtherance of a conspiracy between Wolcher and Gersh to obtain black market whiskey—a novel suggestion since those statements would be made on behalf of the co-conspirator rather than against him. Yet it is claimed that the agency theory which admits the statement when it hurts the co-conspirator (see *Lutwak* v. *United States*, 344 U.S. 604, 617, and cases cited), likewise makes it admissible when it aids him. If, as appears to be the case, the denial of the motion for a new trial by the district judge was at least in part a ruling on a point of evidence, a "novel" question, within the meaning of *Herzog* v. *United States*, *supra*, at 351, is presented. If the evidence is admissible, it might well tip the scales in defendant's favor, as it goes to the heart of the case. I express no opinion on the merits, but I consider the question of sufficient substance to grant this application for bail.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

Ernest Lee Edwards	)	On Application for Stay
v.	)	Pending Petition for
People of the State of New York.	)	Certiorari.

[March 30, 1956.]

MR. JUSTICE HARLAN, Circuit Justice.

The petitioner's papers, and the record and briefs in the New York Court of Appeals which I have also examined, leave me in grave doubt, to say the least, as to whether petitioner's conviction presents any substantial federal question. They also satisfy me that petitioner was conscientiously and ably represented throughout by his experienced assigned counsel. Nevertheless, this being a capital case, I am constrained to give petitioner a reasonable opportunity to petition for a writ of certiorari, provided his petition is promptly filed so that it may be disposed of by the Court at the current Term. I shall therefore stay the execution of the death sentence, now scheduled for the week of April 9, pending this Court's determination of a petition for certiorari, upon condition, however, that such petition is filed not later than April 27, 1956. The petition need not be printed. The State's response may be filed on or before May 11, 1956.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1955.

SAMUEL SKLAROFF et ux. v. JAMES SKEADAS, et ux.

[Publisher's note: The inconsistent use of commas with "et ux." above is in the original.]

[May 4, 1956.]

MR. JUSTICE FRANKFURTER.

This is an application for a stay of an order, dated May 2, 1956, 122 A.2d 444, by the Supreme Court of Rhode Island, granting a writ of habeas corpus against petitioners to transfer on Saturday, May 5, an infant boy aged four and a half years, who has been in the custody and care of the petitioners almost from his very birth, to respondents, the child's natural parents.

The facts are these. Three days after his birth, on September 25, 1951, the child's mother, one of the respondents, then unmarried and living in Massachusetts, consented to the boy's adoption, and he was put into the keeping of petitioners. According to the Supreme Court of Rhode Island, the child has enjoyed appropriate care and nurture at the hands of petitioners. On April 8, 1952, petitioners brought an action in the juvenile court of Rhode Island to adopt the child. Their petition was denied and they appealed to the Superior Court. On May 1, 1953, before the trial in the Superior Court, the father and the mother of the child married and had the child's name changed on the Massachusetts records from that of the mother to that of the father. According to the law of Massachusetts, where the marriage took place, as well as the law of Rhode Island, where the child is now living with petitioners, such marriage legitimated the child. The trial in the Superior Court in 1954 resulted in a verdict for petitioners but the Supreme Court of Rhode Island, on January 17, 1956, *Sklaroff* v. *Stevens*, 120 A.2d 694, reversed on the ground that Rhode Island law requires the consent of both parents for legal adoption, and that the

respondent-father, in any event, had not given such consent.

Thereafter, on April 13, 1956, respondents brought this habeas corpus proceeding in the Supreme Court of Rhode Island for the return of the child to them, its natural and legitimate parents. The return, by petitioners here, to the petition for a writ of habeas corpus set forth lengthy factual allegations regarding the unfitness of respondents as parents and raised the following federal questions:

(1) "A change of custody... in the light of the conduct, character, and persons of said petitioners (respondents here), would shock the conscience... and would run counter to the decencies of civilized conduct, and thereby would be violative of... the due process clause of the Fourteenth Amendment..."

(2) "the subsequent legitimization under Massachusetts law of the said minor child which was physically present in, and a resident of, the State of Rhode Island, is tantamount to giving extraterritorial effect to an act of Massachusetts law to the detriment of an individual physically present in the State of Rhode Island; and that such extraterritorial effect violates the due process clause..."

(3) "such acts as marriage and legitimization under the Laws of... Massachusetts are not required to be given full faith and credit..."

(4) "for the Courts of... Rhode Island to hold that the marriage ceremony performed in... Massachusetts could affect the status of the said minor child who has always been a resident of... Rhode Island... would give extraterritorial effect to the said Massachusetts action... such... effect being prohibited by the due process clause..."

(5) '"o [Publisher's note: This mess – '"o – probably should be opening quotation marks followed by the word "to".] permit custody of a minor child in Rhode Island to such persons who have been so subsequently married under the laws of... Massachusetts would be... similarly violative of the due process clause..."

While recognizing that the interests of the child are crucial to the disposition of a controversy like this, the Rhode Island Supreme Court, accepting the factual allegations on the return at face value, found that there was nothing in them to show present unfitness of respondents, and ruled as a matter of law that the 'natural right' of the parents to the child's custody required the immediate return of the child to them.

Accordingly, the sole question before me on this motion for a stay is whether the claims put forth on behalf of the child are so frivolous that they may not commend themselves to at least four members of this Court as of sufficient substance to warrant argument to determine their merit. I cannot be confident that the claims are all so devoid of substance that four members of this Court may not wish to hear the case argued when the proposed petition for certiorari reaches the Court. Since there is this not implausible contingency, to allow the Rhode Island decree to be carried out immediately would result in a sharp break in the life of a child, with the further possibility of a subsequent rechange in its life. Disrupting the status quo forthwith, therefore, has consequences whose disadvantages, from the point of view of the child's interests, outweigh any loss to the parents that may result from a short delay in acquiring custody of the child. The return of the child decreed by the Supreme Court may well turn out to be their enforcible 'natural right.' But I cannot disregard the fact, in considering a potentially very temporary deprivation, that the custody which the child has enjoyed practically for the whole of its life was found, by the Rhode Island Supreme Court, to have been duly regardful of its interests.

The time for determining the very narrow issues which I have formulated, namely, whether a petition for certiorari in this case would commend itself to at least four members of this Court, should be as short as possible. It certainly should not extend beyond this Term of Court. I shall therefore grant a stay, for a period which will expire fourteen days from the filing of this memorandum in the Clerk's Office, unless by that time the petitioners will have filed with the Clerk of this Court a petition for certiorari. In that event the stay will continue until the disposition of such petition by the Court. (Such a petition may, if convenient, be in typewritten form.) Upon the filing of

such petition it will be for the respondents, if they so choose and for which they will have had ample time, to file a response in time sufficient for the petition to be disposed of before the usual adjournment of this Court in June.

Application granted.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1955.

IN RE SIDNEY STEINBERG v. UNITED STATES

[May 28, 1956.]

MR. JUSTICE DOUGLAS.

Petitioner was convicted on April 26, 1954, on charges of harboring a Communist who was a fugitive from justice in violation of 18 U.S.C. § 3, and conspiracy to harbor in violation of 18 U.S.C. § 371. On May 3, 1954, he was sentenced to imprisonment for a term of three years. On May 25, 1954, the Court of Appeals for the Ninth Circuit granted bail pending appeal in the amount of $75,000. Unable to make the $75,000 bail, petitioner began serving his sentence pending appeal. His sentence will expire on or about September 19, 1956.

On January 20, 1956, the judgement of conviction was affirmed by the Ninth Circuit, Chief Judge Denman dissenting. *Kreman* v. *United States*, 231 F.2d 155. A petition for rehearing was denied on April 20, 1956, Chief Judge Denman dissenting. 231 F.2d 155, 182.

On May 25, 1955, petitioner was produced before the United States District Court for the Southern District of New York on a writ of habeas corpus ad prosequendum to stand trial under a Smith Act, 18 U.S.C.A. § 2385, indictment returned against him in that court in 1951. The District Court set bail pending trial at $50,000. The Court of Appeals reduced this to $30,000 and this Court denied a petition for a writ of certiorari to review that order. *Stein* v. *United States*, 351 U.S. 943.

On April 18, 1956, I reduced, with the Government's consent, petitioner's bail in the Ninth Circuit case from $75,000 to $45,000, since there was no apparent need to put a prisoner under $105,000 bail, where $75,000 had

seemed wholly adequate up to that time. But at the time of the entry of that order I had not seen the opinions of the Court of Appeals of the Ninth Circuit dealing with the merits of Steinberg's appeal, though they were handed down January 20, 1956.

The opinion of the Court of Appeals presents one question which seems to me worthy of certiorari. A four-room house where Steinberg and his associates were in hiding was raided by federal officials. The raid was well planned and well executed. There was ample time to obtain a search warrant. But no search warrant was ever sought. Not only did the agents make a thorough search incident to the arrest made, the contents of the four-room house and two automobiles were taken 200 miles to San Francisco where the federal officials sorted out the material at their leisure. Chief Judge Denman thought that search and seizure violated the Fourth Amendment. He said in his dissent, 231 F.2d at page 182:

> "Certainly the seizure and transportation to San Francisco, the home of none of the appellants, of all their personal property other than that found to constitute evidence was beyond the authority of the federal officers. No question was asked of appellants whether they desired a caretaker to watch the house to see that such other property as the television set, etc., was not stolen. While this wrong done is not cognizable in this case it makes clear that the intent was to search their 'papers, and effects' in San Francisco and not in the place of arrest which may have been authorized by *Harris* v. *United States*, 331 U.S. 145, and other cases.
>
> In my opinion such a search of the 'papers, and effects' in San Francisco violates the Fourth Amendment.
>
> The situation is analogous to that in *United States* v. *Lefkowitz*, 285 U.S. 452, recognized as still the law in *United States* v. *Rabinowitz*, 339 U.S. 56, at page 62."
>
> [Publisher's note: The paragraphing above is not quite consistent with the original text of 231 F.2d at 182, where a new paragraph begins at "In my opinion …" but not at "The situation is analogous …".]

The question is an important one involving the construction of our decisions under the Fourth Amendment. Also involved are standards of law enforcement for federal officials. Our concern is not merely guilt or innocence. "Fastidious regard for the honor of the administration of justice" is also our concern, as we recently stated in

Communist Party v. *Subversive Activities Control Board*, 351 U.S. 115, 124.

The question is a substantial one. If the case is taken, it will not be decided until months after the sentence has been served. I have, therefore, concluded that bail should be reduced. The prisoner is, as noted, under a $30,000 bail order in the Second Circuit. A $10,000 bail order in the Ninth Circuit will make his total bail $40,000. The record of this applicant is not commendable, as he has been a fugitive from justice. But while he was waiting trial in California he was under $36,000 bail and did not default. Accordingly, I think that $40,000 bail is adequate to insure his presence for service of the few remaining months of his sentence.

I will reduce his bail in the Ninth Circuit case to $10,000 to be provided and secured in such manner as a judge of the District Court shall determine.

Bail reduced.

SUPREME COURT OF THE UNITED STATES

No. 23 Misc.—OCTOBER TERM, 1956.

Ernest Lee Edwards	)	Application for Stay
v.	)	of Execution.
People of the State of New York.	)	

[June 25, 1956.]

MR. JUSTICE HARLAN, Circuit Justice.

I am asked to stay, pending certiorari proceedings in this Court, the execution of the death sentence imposed upon petitioner by reason of his conviction in the New York state courts of first degree murder. Petitioner's conviction was unanimously affirmed by the New York Court of Appeals on February 16, 1956.

On March 30 last, upon petitioner's *pro se* application, I stayed execution of the sentence, then set to be carried out the week of April 9, upon terms which would have assured that his then contemplated petition for certiorari would be acted on by the Court before the October 1955 Term ended in June. See my Memorandum of May 30, 1956. On April 19, upon the request of petitioner's new counsel, I vacated that stay to enable counsel to make a motion for reargument of the appeal in the Court of Appeals. That motion, made on April 26, was unanimously denied by the Court of Appeals on May 31. Meanwhile, on May 16, counsel filed a timely petition for certiorari to review the original affirmance of the judgment of conviction by the Court of Appeals. Counsel state that they also intend to petition for certiorari to review the Court of Appeals' denial of reargument. On June 13 Judge Fuld of the Court of Appeals denied petitioner's application for a stay of the execution, now scheduled for the week beginning June 25, pending the determination of such proceedings in this Court. The present application to me followed.

Petitioner claims that he was denied "due process" because of a number of episodes occurring at the trial. These episodes involve: (1) the trial court's remarks as to the jury's verdict being subject to appellate review, if the jury convicted the defendant; (2) the newspaper publicity relating to the jury's inspection of the murder scene; (3) the alleged bias of the trial Judge; (4) the alleged perjury of the prosecution's principal witness, an admitted accomplice in the crime; (5) the alleged inadequate corroboration of the accomplice's testimony under New York law; and (6) alleged erroneous instructions by the trial Court as to the credibility of the accomplice.

To deny this application it is not enough for me to conclude, as I do, that none of the matters raised presents a substantial federal question. Rather, what I must determine is whether any of these matters is sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari. After studying the papers submitted, examining the record anew, and hearing counsel on oral argument, I am convinced that I would not be justified in concluding that any of the questions presented could reasonably be deemed to command such support.

As to (1): Before selection of the jury commenced the trial court addressed some general remarks to the entire panel, during the course of which he said:

> "Is there any man here who has any conscientious scruples against the death penalty? Everyone knows that in the State of New York, if this man is convicted and his conviction is upheld by the higher courts, he will be executed." (Fol. 236.)

Following objection by defense counsel, the Court then stated:

> ". . . Gentlemen, if the judgment in this case stands, the punishment will be death, as fixed by law. Everybody knows that.

> "Is there any person in the room here who has any conscientious scruples against the death penalty?" (Fol. 237.)

On the following day, the Court further told the jury:

> "I made the statement yesterday: 'Everyone knows that in the State of New York if this man is convicted and his conviction is upheld by the higher courts, he will be executed.' A motion by defense counsel was made to discharge the panel, which I denied. My intention in making the statement which I did to this panel was to emphasize the great and awesome responsibility in your hands, that in deciding this case a verdict of guilty may mean that the defendant will be executed. It was my intention to emphasize that because of the possible death penalty. Yours is the supreme responsibility as the judge of the facts.
>
> "You are the sole judges of the facts in this case, and yours is the sole responsibility to decide the guilt or innocence of this defendant. The jury has nothing to do with appeals. Your deliberation cannot be in any way affected by any tribunal other than this courtroom. You cannot share your responsibility with anyone—not even with this or any other court. Any appeal in this case, or in any other case, concerns only questions of law with which you are not concerned. Jurors have task enough to find the truth and determine it by their deliberation, without regard to ultimate consequences. Nothing can be permitted to weaken the jurors' sense of obligation in the performance of their duties. It is your duty and obligation to consider this case with a full appreciation of your responsibility to act as the sole and final judges of the facts. I emphasize the word 'final.' Any citizen who should enter this jury box as a juror in this case, who fails to whole-

> heartedly assume such full responsibility, would be recreant to the solemn oath that he shall have administered to him." (Fols. 243-246.)

This episode, in my opinion, presents no tenable due process question.

As to (2): The inspection of the scene of the murder was with the consent of defense counsel and in their presence. No objection to the taking of photographs, or otherwise as to the conduct of the inspection, was made at the time. Indeed, one of the defense counsel allowed his own picture to be taken during the inspection. However, at the next session of the trial the defense made a motion for a mistrial based on the ensuing newspaper publicity.[1] The trial Judge thereupon interrogated each juror as to whether he had seen any of the published photographs or read the newspaper stories of the inspection. Five jurors said that they had seen neither the photographs nor the stories, and the others that they had seen some of the photographs, but none of the stories. The following then ensued:

> "The Court: All of the gentlemen know that a trial is a public proceeding. As a matter of fact, a judge who excluded the newspapermen from the presence of a trial was reversed by the Court of Appeals. The Court has no right to exclude newspapermen from witnessing anything pertaining to a

[1] The petition for certiorari, pp. 7-8, sets forth excerpts from the publicity which are claimed to have been prejudicial. The two items particularly emphasized are that there would be testimony later in the trial that "the hair on the pipe [the murder weapon] came from Englander's [the victim's] head," and that "Englander was the victim of a 'Virginia-style' murder." The claim as to these items is particularly unimpressive in light of the fact that there was subsequent testimony at the trial that the strands of hair found on the murder weapon compared with Englander's hair, and that the defendant had stated to his accomplice that he would like to "get" his victim "Virginia-style," the accomplice illustrating what that meant before the jury.

> public trial, and so our highest court has held. The presence of photographers or the presence of newspapermen does not in the slightest degree indicate the guilt or the innocence of this defendant. It is normal thing for newspapermen to be present, and sometimes photographers to be present, especially where scenes are taken outside of a courtroom.
>
> "Would the picture that you saw, those that did see them, have the slightest effect upon your decision, to the prejudice of this defendant or to the prejudice of the prosecution?
>
> "(No response.)
>
> "The Court: I want you gentlemen, upon your honor, to so state.
>
> "(No response.)
>
> "The Court: I hear no statement to that effect.
>
> "All right, the trial will proceed. Call the next witness." (Fols. 616-618.)

I am satisfied that no valid claim of a denial of due process can be based on these occurrences.

As to (3): I consider the charge that the trial Judge displayed bias against the defendant to be without support in the record. The claim that the Judge did not adequately charge that a verdict of "not guilty" might be found is directly contradicted by what appears at fols. 1536, 1544, 1695-1697, 1802-1803, and 1821 of the record. Nor can I perceive any basis for the claim that the Judge's reading of Defendant's Exhibit C was prejudicial. See fols. 1813-1815. I have also read the entire charge, fols. 1528-1709, 1787-1825, and have found it objective and free from any indication of bias on the part of the trial Judge.

As to (4): The record does show a number of discrepancies between the trial and grand jury testimony of the accomplice. Some of these were specifically adverted to by the trial Judge in his charge, see fols. 1635-1638, 1644-1647, 1664-1665, and the jury was instructed that it

should consider these and all other such discrepancies in weighing the accomplice's credibility. See fol. 1665. Defense counsel especially emphasize the accomplice's testimony to the effect that he had not been told by the prosecution that he would receive consideration for his testimony, fol. 1103, whereas the Assistant District Attorney in charge of the case later testified (fol. 2010):

> ". . . At no time did I ever tell Connors what to stay [Publisher's note: "stay" should be "say".] or how to say it. I told him to tell the truth at all times and that no promise any time was ever made to him in return for his testimony. I stated that he would have to rely upon the honor of the District Attorney to see that justice would be done to him and that he would receive some consideration for testifying as a witness on behalf of the People." (Fols. 2010-2011.)

I cannot read this, as counsel for petitioner say I should, as involving any real conflict between the accomplice's testimony and that of the Assistant District Attorney. The trial Judge charged on this subject:

> "Who is Connors? Connors is accused by this indictment of being an accomplice in this murder, and, as an accomplice in the murder, he is guilty of murder in the first degree if that murder was committed during the course of a felony. So Connors appears before you as self-confessed criminal, who, if his testimony is accepted, is guilty of murder in the first degree, even if you come to the conclusion that he did not kill Englander, but Englander was killed by some one acting in concert with him in the perpetration of the felony and in the course of the commission thereof.
>
> "Secondly—and I am speaking about the things that you may consider in connection with the credibility of Connors—Connors is an ex-convict. He was convicted of being an automobile thief in Texas. Third, Connors was convicted of being a sex degenerate. He served, I think, sixty days in the Work-

> house, a case which involved some despicable practice on his part in Washington Square Park, I believe. Connors is now under indictment, and his case has been severed. Connors has told you that he hopes to gain some leniency by appearing here for the prosecution. He has testified that no promise whatever has been made to him in that regard, but that he hopes to get some leniency. And as I discourse upon the testimony, you will find that on several occasions Connors testified before the Grand Jury in a manner diametrically opposed to the testimony that he gave here before you. I am giving you the dark side, I am giving you the picture as black as I can paint it. It may be blacker if you find that to be warranted. I am not foreclosing you in your estimate of Connors, but I am giving you those items which occur to me at the moment.
>
> "You may consider all these items on the question of Connors' credibility." (Fols. 1614-1617.)

From the accomplice's own testimony and this charge the jury could not have understood otherwise than that Connors was expecting some leniency from the State in return for his testimony, and this being so, I can find no substance in the contention that the jury might have been misled on this score.

In my opinion, neither this nor any of the other testimony of the accomplice borders on the use of perjured testimony which might give rise to a valid claim of denial of due process.[2] The record shows no more than the not

[2] It is undisputed that it would be a denial of due process if the State knowingly used such testimony. See *Mooney* v. *Holohan*, 294 U.S. 103; *Pyle* v. *Kansas*, 317 U.S. 213. I am not unmindful that in the recent case of *Durley* v. *Mayo*, 351 U.S. 277, four Justices of this Court indicated that in some circumstances the innocent use of perjured testimony might involve a denial of due process. See dissenting opinion of MR. JUSTICE DOUGLAS, 351 U.S., at pp. 290-291. The circumstances in *Durley*, however, bear no resemblance to the situation presented here.

unusual discrepancies in the testimony of this kind of witness, whose unsavory character and circumstances in relation to the case were fully dealt with by the trial Judge in his charge to the jury. See fols. 1615-1617, 1687-1692. The credibility of the accomplice was for the jury, and the record discloses nothing on this score which even approaches the level of a tenable claim of denial of due process.

As to (5) and (6): It is sufficient to say that these contentions involve only matters of state law and raise no federal questions. See *Lisenba* v. *California*, 314 U.S. 219, 227.

Realizing the heavy responsibility which rests on a single Justice of this Court where life is at stake, I can only conclude that there is no substance to petitioner's effort to obtain a further review of his conviction by this Court, and that it is my duty to deny this application.

I am constrained to add that Mr. Finerty and Mr. McClane, who only recently came into the case, have done their utmost for petitioner, but nothing has been shown which would justify me in interfering with the stern course of the State's judgment.

SUPREME COURT OF THE UNITED STATES

United States of America, Appellee,)
v.)
Allied Stevedoring Corp., John Ward,)
John Potter and Michael Bowers,)
Appellants.)

Circuit Justice FRANKFURTER.

This is a petition for admissions to bail pending appeal from convictions in the United States District Court for the Southern District of New York. It appears from the moving papers that bail was denied by the trial judge in the District Court, and, after appeal was filed, that an application for bail to the United States Court of Appeals for the Second Circuit was denied by that Court. But it also appears that these denials were made under the then prevailing rule, namely, Rule 46(a) 2 of the Federal Rules of Criminal Procedure. This rule has since been greatly liberalized by an amendment which, submitted to Congress on April 9, took effect on July 9, 1956. Under this new rule "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay."

On this state of facts, I think the orderly administration of justice counsels that I do not act on this petition before the lower courts have had an opportunity to pass upon the application for bail under the standards that now govern the granting of bail. Nothing appears in the record to indicate whether the lower courts, having denied bail while the old rule was still in force, took into account, as a qualifying consideration, the rule that was to come into effect on July 9. In any event, applications for bail made now are to be determined by the new rule.

Accordingly, I shall hold this petition until the appellants in the Court of Appeals renew their application for bail in that Court, appropriately constituted for that purpose, and that Court itself disposes of the application on the merits, or remands it for disposition by the District Court.

July 13, 1956.

SUPREME COURT OF THE UNITED STATES

John Ward and Michael Bowers, Petitioners,	)	
	)	On Petition for
v.	)	Admission to Bail.
United States America.	)	

[August 8, 1956.]

MR. JUSTICE FRANKFURTER, as Circuit Justice.

This is a petition for bail pending an appeal before the Court of Appeals for the Second Circuit from a conviction for evasion of income taxes, in violation of 26 U.S.C. § 145(b). An indictment against the petitioners, together with some co-defendants, was filed on July 29, 1953. They were arraigned on July 30, 1953, but not brought to trial till February 6, 1956. After a seven-weeks trial, they were found guilty, and on April 16, 1956, Bowers was sentenced to five years' imprisonment and Ward to four years' imprisonment, with an additional fine of $10,000 for each. An application for bail was denied by the trial court. A notice of appeal was duly filed and made the basis of a motion for bail before the Court of Appeals after its denial by the District Court and by a single Circuit Judge. The motion was made on May 2, argument was heard on May 7, and after some intermediate steps the Court of Appeals denied the motion, on June 4, 1956. Thereupon, a petition for bail came before me, sitting as *ad hoc* Circuit Justice, since my brother HARLAN, the regular Circuit Justice for the Second Circuit, had recused himself.

When the Court of Appeals disposed of the motion for bail, on June 4, 1956, the Rule then in force for admission to bail after conviction was as follows:

> "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial

> question which should be determined by the appellate court. . . ." Rule 46(a)(2) of the Federal Rules of Criminal Procedure.

But on April 9, this Court had submitted to Congress a new Rule 46(a)(2), to take effect on July 9, 1956. It reads:

> "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. . . ."

Obviously, as the Government recognizes, the amendment has greatly liberalized the basis for admission to bail in the federal courts pending an appeal from a conviction. By the time the matter first came before me, the new Rule was law. Since the Court of Appeals had denied bail without giving reasons, I could not tell whether they took into account the changed situation presented by the Rule which was then in process of becoming, though it was not formally, effective. Accordingly, it seemed to me appropriate that the lower courts should have an opportunity to pass upon the petition for bail under the standards that now govern. I therefore remanded the matter to the Court of Appeals for direct disposition by it, or for further consideration by the District Court. The Court of Appeals took the latter course and on July 17 determined that the request for bail should again be passed on by the trial judge. After further hearing, the trial judge again denied bail, supporting his denial by what the Court of Appeals has characterized as "a carefully reasoned and detailed opinion." The motion for bail by Bowers and Ward was thereupon renewed before the Court of Appeals. That court, in a *per curiam* opinion, denied the renewed motion, whereupon the petitioners again asked me to allow bail.

Both the lower courts have set forth the grounds for their denial. They have expressed themselves to be duly mindful of the controlling force of Rule 46(a)(2), as amended. The issues that are raised here have been fully

canvassed in the briefs filed by the petitioners and the Government. Both sides have addressed themselves to the proper scope of the amended Rule and its appropriate application to the specific circumstances of this prosecution.

It is common ground that the amended Rule 46 has made a decided change in the outlook on granting bail after conviction. The Government, as I have already indicated, accepts the statement in my memorandum of July 13, 1956, that the old Rule 46(a)(2) has by the amendment "been greatly liberalized." Putting to one side its qualifications, I think the Government is right in saying that the granting of bail except for "frivolity" establishes a higher minimum standard than the old concept of "substantial question." It is also right in indicating that the new Rule effectuates a shift from putting the burden on the convicted defendant to establish eligibility for bail, to requiring the Government to persuade the trial judge that the minimum standards for allowing bail have not been met. The authoritative interpretation of the amendment must, of course, await a decision by the Supreme Court. In the meantime, however, one cannot escape his individual responsibility in passing on a petition like this.

The Government commendably acknowledges that the new Rule has made an important change. The Rule expresses a general attitude, the significance of which is that inasmuch as an appeal from a conviction is a matter of right, the risk of incarceration for a conviction that may be upset is normally to be guarded against by allowing bail unless the appeal is so baseless as to deserve to be condemned as "frivolous" or is sought as a device for mere delay. The Government suggests, however, that there may be considerations other than frivolity or delay, which may conscientiously move a trial judge to deny bail without disloyalty to the amended Rule. I am bound to say that the Government is rightly cautious

in suggesting the extent of the area of discretion that still remains under the amended Rule.

Elaboration of whatever occasions for discretion may remain had better be left to the specific occasions which may give rise to such claims. The present situation presents one consideration that suffices for disposition of this case. The granting of bail certainly presupposes confidence that a defendant will respond to the demands of justice. In fixing the amount of bail, Rule 46(c) explicitly adverts to the trustworthiness of a defendant. The bail must be of an amount to "insure the presence of the defendant." Impliedly, the likelihood that bail within tolerable limits will not insure this justifies denial of bail. One of the reasons that led the District Court to deny bail to Bowers and Ward was "that there is considerable motivation for these defendants to flee the Court's jurisdiction and that they have ample means to accomplish this purpose." I read this to mean that the District Judge felt that the likelihood of a flight was a danger not to be disregarded. I cannot reject this conclusion of the District Court because it was based on confidential probation reports. See *Williams* v. *New York*, 337 U.S. 241. Such a judgment is, to be sure, a prophecy but I cannot sit as the district judge and make my own. Presumably, this reason of the District Court in denying bail was one of the considerations included in the "reasons" for the action taken by the District Court which the Court of Appeals respected in not overruling "the exercise of sound judgment" by the District Court. On this ground, I must deny the petition.

Asking a Circuit Justice to grant bail pending appeal in the Court of Appeals, after denial by the two lower courts, presents a difficult dilemma. An error of principle in the denial of bail, an indisputable question of law, calls for correction, whether the matter comes before the whole Court, as in *Stack* v. *Boyle*, 342 U.S. 1, or before

an appropriate Circuit Justice. But when it is a question of the application of duly recognized standards, and such application turns on what may fairly be called "facts," or on a necessarily prophetic judgment like the trustworthiness of a convicted defendant, I do not conceive it to be the function of a Circuit Justice to exercise an independent judgment as though he were sitting in the district court. And yet, even where "facts" are involved, a standard may be recognized in principle but honored, however unconsciously, in the breach. I think the practical way out of this dilemma lies in the more effective administration of criminal justice and, more particularly, in an appropriate procedure for criminal appeals.

Nothing has disturbed me more during my years on the Court than the time span, in so many cases that come here, between the date of an indictment and the final appellate disposition of a conviction. Such untoward delays seem to me inimical to the fair and effective administration of the criminal law. I see no reason whatever why we in this country cannot be as expeditious in dealing with criminal appeals as is true of England. Applications for appeals are heard in the English Court of Criminal Appeals within eight weeks of conviction; in murder cases appeals "are generally before the Court not later than three weeks after the conviction." Lord Chief Justice Goddard, "The Working of the Court of Criminal Appeal," 2 J. Soc'y Public Teachers of Law 1, 3 (1952). An examination of the volume of reports of the Court of Criminal Appeals for the year 1954 reveals the following: Generally only two to three months elapsed between the entry of the judgment from which review was sought and the actual hearing of an appeal; the shortest period was one month, in a murder case; the longest period was five and one-half months. This is true of a court, it should be noted, that has something like 1200 applications annually coming before it, disposed of by judges who have considerable additional judicial duties. Conviction

in this case was had nearly four months ago, and probably two months more will pass, unless I am misinformed, before the case may be heard on its merits. The indictment here was found more than three years ago and the appeal is not likely to be reached in less than six months after conviction.

I do not mean to imply criticism of any person or judge or court for what is a good illustration of the general leaden-footedness of criminal prosecutions. The fault lies with the habit of acquiescence in what I deem to be a reprehensible system. I duly note that in this case it was suggested to the petitioners by the Circuit Judge in denying their applicaton for bail to apply for an order advancing the case for early argument, and on the part of the Government there was an offer toward facilitating the appeal, although its specific scope and effectiveness are controverted by the petitioners. To my mind, however, a more drastic procedure for the early disposition of a criminal appeal than agreement among the parties is required. The Government should, I believe, be the active mover for an early hearing, thus putting upon the convicted defendant the responsibility for setting forth sound reasons for postponing such a hearing. I am not able to understand why it should not become the settled practice for the Government to move, after an appeal is taken from a conviction, for the hearing of the appeal on the stenographic minutes at the earliest possible moment that a Court of Appeals can accommodate its calendar to the disposition of business that has first call, namely, a criminal appeal. This is especially desirable in a case where bail has been denied. The time to argue a case is when the various legal points, including the claim that there was not sufficient evidence to go to the jury, are fresh in the minds of counsel. I cannot but believe that it would, on the whole, also facilitate consideration by courts of appeals of criminal appeals to have the minutes of the trial before them and to be referred by counsel, fresh from

combat, to the claims in controversy as they are supported or contradicted by the stenographic minutes. I am confident that all the courts of appeals would be responsive to such a demand for as speedy a disposition of criminal appeals as the interests of justice permit, including, of course, in the interests of justice, adequate preparation and due deliberation.

Motion denied.

SUPREME COURT OF THE UNITED STATES

Francis Lester Stickel, Petitioner,	)	On Motion for Stay and
v.	)	Continuance of Bail.
United States, Respondent.	)	

[August 14, 1956.]

MR. JUSTICE HARLAN, Circuit Justice.

The only point proposed to be raised in the petition for certiorari which I consider might justify the granting of this application for continuance of bail is the contention that in denying the motion for acquittal the trial judge erroneously tested the sufficiency of the evidence by the standards applicable to civil, but not criminal, cases. However, it is clear that this point is not presented by the decision of the Court of Appeals affirming the conviction. See *United States* v. *Stickel*, No. 23917, 2d Cir., July 18, 1956. In his opinion Chief Judge Clark states: "In reaching the conclusion that the judge committed no error in sending the case to the jury, we have not cited or stressed the well-established rule here that the test for the judge to apply in determining what rational inferences of fact a jury may be permitted to draw from the testimony is the same in civil and criminal cases, [citing *United States* v. *Valenti*, 134 F.2d 362, 364, and *United States* v. *Castro*, 288 F.2d 807 in a footnote] because we view the prosecution's case as sufficiently strong to justify the result, whatever nuances of doctrines are applied." What next follows in the opinion as to the so-called "Second Circuit doctrine" is plainly dictum, presenting nothing reviewable by this Court.

I recognize that as to the sufficiency of the bulk of the evidence the Court of Appeals was divided, but even

after giving that point its utmost weight, there still remains the Hickey testimony which led Judge Frank to join his brethren both in the affirmance of the conviction and in the denial of continuance of bail. The explanation of that testimony now made in the moving papers is entirely unconvincing.

With due regard to the recent amendment of Rule 46(a)(2), I find nothing here which would justify me [Publisher's note: "me" should be "my".] disturbing the unanimous decision of the Court of Appeals denying continuance of bail pending certiorari proceedings. Accordingly I shall deny the application for a stay and continuance of bail.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1956.

UNITED STATES v. UNITED LIQUORS CORPORATION, et al.,

[September 19, 1956.]

MR. JUSTICE REED.

In the above case there has been presented to me a motion to stay the effectiveness of the final judgment entered by District Judge Boyd of the Western District of Tennessee.

The judgment was entered in a suit against defendants brought under § 1 of the Sherman Act, charging defendants with a conspiracy to fix and maintain prices.

By the finding of fact the District Court determined that the defendants had conspired with a retail association of liquor dealers to eliminate price cutting and establish uniform prices, mark-ups and profit margins on alcoholic beverages sold in the Memphis trading area. It was further found that each defendant wholesaler was fully aware of the purpose to use fair trade agreements as devices for establishing and enforcing adherence to uniform retail prices. It was further found that said conspiracy was carried out by members of the Retail Package Stores Association through organized efforts to increase the sales of the fair-traded brands against non-fair-traded brands. It was found that these efforts were successful. It was further found that defendant wholesalers participated in obtaining the institution of fair trade prices by the manufacturers.

Upon reaching the conclusion that the defendants had participated in an unlawful combination and conspiracy to restrain trade in interstate commerce in the sale of alcoholic beverages, the court entered the judgment which is sought to be stayed. In summary, the judgment enjoined the defendants, jointly and severally, from furthering any contract or program to stabilize and control prices, eliminate discounts in sales, induce or coerce any person to establish or enforce adherence to prices, or communicate

with any manufacturer in an effort to induce the establishment of minimum or suggested resale prices. The trial court overruled defendants' motion to stay this judgment pending appeal.

For purposes of this motion, here, defendants object to paragraphs V(A) and VI(A) of the judgment. Paragraph V(A) restrains them from disseminating "price lists or other price information containing minimum or suggested resale prices, mark-ups or margins of profit for alcoholic beverages to be sold or offered for sale to third persons." Under paragraph VI(A) of the judgment, defendants are enjoined for five years from entering into or adhering to any fair trade contract "which purports to fix or control the resale price of any alcoholic beverage in the Memphis trading area."

Defendants contend that these limitations on their activities must seriously affect their ability to compete with other wholesalers who have not been enjoined from such acts, that there is danger that producers of alcoholic beverages will withdraw from defendants their franchise or agency for distribution, and that they will suffer irreparable injury if compelled to abide by the terms of the judgment until such time as review may be had in this Court under the provisions of 15 U.S.C. § 29. Defendants alone file supporting affidavits.

The defendants have been found to have violated the antitrust laws and the decree has been framed by the judge of the trial court to correct the evils which resulted from the acts found unlawful. In framing a decree a judge has authority to enjoin actions otherwise lawful when such action is deemed by him necessary to correct the evil effects of unlawful conduct. *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 88-89; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 724. The decree here leaves open the opportunity to defendants to carry on their usual business of selling liquor at wholesale, prohibiting only those selling methods which it was thought would continue the conspiracy to control resale prices and the effects of that conspiracy.

Weighing the economic harm and the "fear" of future irreparable injuries flowing to defendants from the existence of the decree, during the pendency of their direct appeal to this Court, against the public detriment which would result from a continuation of unlawful price fixing, the motion for a stay is denied. Cf., *Yakus* v. *United States*, 321 U.S. 414, 440-441.

SUPREME COURT OF THE UNITED STATES

Roth	)	
v.	)	Application for Bail.
United States.	)	

[October 8, 1956.]

MR. JUSTICE HARLAN, Circuit Justice.

Petitioner asks me, as Circuit Justice, to admit him to bail pending certiorari proceedings in this Court to review his conviction in the Southern District of New York for violation of the federal obscenity statute. 18 U.S.C. § 1461. Such bail was denied by Chief Judge Clark (without opinion),[1] following the Court of Appeals' affirmance of the judgment of conviction in the District Court.

The Solicitor General opposes the application on two grounds: (1) he asserts that, except for the claim as to the unconstitutionality of § 1461, petitioner's points on the merits of his conviction are frivolous; (2) he suggests that because of his previous record in this field petitioner, if enlarged on bail, may continue to engage in disseminating obscene matter.[2] As to the constitutional point (which in the bail proceedings before the Court of Appeals the Assistant United States Attorney, with commendable candor, said he was unable to characterize as "frivolous"), the Solicitor General states: "However, constitutionality [of § 1461] has for so long been assumed as settled, at

[1] Judge Frank, whom Chief Judge Clark invited to sit with him on the application, was unable to participate, but acquiesced in the Chief Judge's determination.

[2] The Government asserts, without contradiction, that since 1928 petitioner "has been convicted in or pleaded guilty in six criminal proceedings involving the dissemination of obscene literature. He has been convicted in a Federal court of violating probation on one occasion."

least since *Rosen* v. *United States*, 161 U.S. 29, that we have no reason to believe that the Court will wish to reconsider the issue now."

I am generally reluctant to interfere with the considered view of the Court of Appeals, or a Judge thereof, on a question of bail. However, I find the circumstances of the present application somewhat unusual. The separate opinions of the three Judges of the Court of Appeals who affirmed the conviction make it clear that they considered themselves foreclosed from an independent examination of the constitutionality of § 1461 by the prior decisions of this Court. Each of the three Judges expressed the view that re-examination of the constitutional question lay solely with this Court. In light of this I am constrained to think that Chief Judge Clark may well have thought that the question of bail should likewise be left to a Justice of this Court. Moreover, I consider that the bounds of the proper exercise of my discretion are wider where, as here, admission to bail is sought pending review of a judgment of conviction by this Court than they would be in the case of an application involving an appeal to the Court of Appeals.

The Government does not assert that there is likelihood that petitioner will become a fugitive if he is enlarged on proper bail. And although I should regard it as most ill-advised were the petitioner to continue, pending the final disposition of his case, the activities for which he has been convicted, I am inclined to think that the possibility that he may do so is not a proper circumstance to be taken into account where the constitutionality of the statute itself may be at stake. Hence I consider the controlling question here to be whether it is so unlikely that the petition for certiorari will obtain the votes of at least four members of this Court that the petition should be regarded as "frivolous or taken for delay." See Fed. Rules Crim. Proc., Rule 46(a)(2), as amended. I cannot so regard it, particularly in light of the Government's viewpoint that it is not, and the pendency in this

Court of two state "obscenity" statute cases, even though the issues there are somewhat different from those involved here.[3]

I shall therefore grant the application for bail.[4] After hearing the parties, I fix the bail at $5,000, the security to be justified before a Judge of the United States District Court for the Southern District of New York.

[3] *Butler* v. *Michigan*, No. 16, Oct. Term, 1956; *Alberts* v. *California*, No. 61, Oct. Term, 1956.

[4] Petitioner's time to file his petition for certiorari will expire on October 18, 1956. Because of the illness of his counsel I have, with the consent of the Government, signed an order extending the time for filing such petition to and including November 17, 1956.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

Panama Canal Co.	)	On Application for Stay
v.	)	Pending Petition for
Grace Line, Inc., et al.	)	Certiorari.

[May 7, 1957.]

MR. JUSTICE HARLAN, Associate Justice.

This is an application by the Panama Canal Company, a government instrumentality, for a stay of the mandate of the Court of Appeals, pending determination by the Solicitor General as to whether certiorari should be sought to review the decision below and pending further proceedings in this Court, if certiorari is applied for. The Assistant Attorney General in charge of the case has advised me that he has recommended to the Solicitor General that a petition for certiorari be filed.

The controversy relates to the duties of the petitioner, Panama Canal Company, under the Act of September 26, 1950, 64 Stat. 1038, with respect to establishing tolls for the use of the Canal. The District Court dismissed the complaint, considering that the court had no jurisdiction of the subject matter of the suit, and that the respondent steamship companies had no standing to sue. The Court of Appeals reversed as to the jurisdictional question, and as to the merits, granted summary judgment in favor of the steamship companies. The effect of that decision, as both sides seem to agree, is (a) to require the Panama Canal Company to proceed with a revision of the Canal tolls, in accordance with the Court of Appeals' construction of the 1950 Act, and the accounting views of the General Accounting Office, whose correctness is disputed by the Panama Canal Company; and (b) to deny the steamship companies recovery for excessive past rates, if the

revised tolls should turn out to be lower. The Court of Appeals (Chief Judge Clark and Judge Hincks) denied petitioner's application for a stay pending review by this Court.*

After hearing the parties and considering their memoranda, I am of the opinion that a stay should issue. Without intimating any views as to the merits, I think the character of the questions involved is such that it cannot be said that it is unlikely that certiorari will be granted. While I recognize the force of the steamship companies' argument that if the decision of the Court of Appeals ultimately stands, the companies will have no recourse for alleged excessive tolls paid by them during the period of a stay, the weight of this argument is diminished by the conceded fact that the companies' present rates to shippers naturally take into account the present Canal tolls. I regard the steamship companies' contention as being outweighed by the undesirability of requiring the Panama Canal Company to go forward with revamping its entire toll structure, until its duty to do so, and the principles on which it should proceed, are finally adjudicated in this litigation. Apart from all else, the fixing of such tolls is not alone a commercial undertaking, but also one that involves this country's relations with the foreign governments whose nationals are users of the Canal.

I am constrained to accept the Government's representations that the uncertainties and confusion which

* The memorandum of the Court of Appeals is as follows: "Motion denied. In view of the heavy accumulating loss to plaintiff by defendant's failure to perform what this court holds to be its legal obligation and of the ease with which it can seek interim relief from the Supreme Court or a Justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of Justice."

might ensue from requiring the Panama Canal Company to proceed before this litigation is over might embarrass our relations with such foreign governments. And because of the peculiar position occupied by the Panama Canal Company as a political instrumentality, it seems to me that it should not be required to go forward under the Court of Appeals' decision until the issues in this controversy are settled. I think the particular interim interests of these steamship companies must yield to the broader concerns involved in having this litigation proceed to an orderly final conclusion.

I am informed by respondents that they have ascertained that the mandate of the Court of Appeals has gone to the District Court. I shall therefore stay all further proceedings under that mandate pending the filing and determination of the petitioner's petition for certiorari in this Court, upon condition, however, that the petition for certiorari is filed within the time prescribed by law. 28 U.S.C. § 2101(c).

May 7, 1957.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

Samuel C. Brody, Petitioner,	)	On Application for
v.	)	Extension of Time Within
United States of America.	)	Which to File a Petition for
	)	Writ of Certiorari.

[May 24, 1957.]

MR. JUSTICE FRANKFURTER.

Important reasons of public policy require the filing within thirty days of a petition for a writ of certiorari to review a judgment of a court of appeals in a case of criminal contempt. An extension of this time limit obviously must be granted only in those exceptional circumstances in which the policy behind the general rule is properly to be subordinated to a more compelling policy. Counsel's engagement in a litigation in another court during the thirty-day period is certainly not a ground that requires the public policy behind the thirty-day rule to yield. One of the most obdurate defects in our administration of justice is delay. Due regard for its avoidance is emphasized in a situation like the present where the extension requested would make disposition of the petition for certiorari go over into the next Term of Court.

Too frequent is the suggestion of counsel asking for extension that more time is required for "research" on the questions to be presented by the petition for certiorari. I cannot emphasize too strongly that petitions for certiorari all too frequently misconceive the true nature of such petitions—the considerations governing review on certiorari—and the manner of presenting them. It does not require heavy research to charge the understanding of this Court adequately on the gravity of the issue on which review is sought and to prove to the Court the appropri-

ateness of granting a petition for a writ of certiorari. Particularly is this so when the controlling ground on which the petition is to be based has had the consideration that it has had in this case, in the opinion of District Judge Aldrich in the first instance, 147 F. Supp. 897, and on review by Chief Judge Magruder for the Court of Appeals.

Were it not for the fact that the time for filing a petition in this case expires on Monday next, May 27, and the application for extension of time has been filed here the last minute, as it were, I would deny the application outright. I certainly feel that there is no justification for granting the request for an extension of thirty days. Under the circumstances, I will grant a few days of grace. I see not the slightest reason why a wholly adequate petition in this case—in typewritten form if necessary—cannot be prepared in time to be filed not later than Wednesday, May 29. This will give the Government an opportunity for a response and this Court an opportunity to dispose of the petition before the end of the Term.

I have heretofore acted upon the attitude expressed in this memorandum in similar applications that have been addressed to me. I have spelled out my attitude in some detail for the special attention of the bar of the First Circuit.

SUPREME COURT OF THE UNITED STATES

No. -----. OCTOBER TERM, 1957.

IN RE JOHN CUNNINGHAM v. JOHN F. ENGLISH

[October 1, 1957.]

MR. CHIEF JUSTICE WARREN.

Petitioners seek relief from an order of the Court of Appeals for the District of Columbia Circuit. That Court's order stayed, pending appeal, a preliminary injunction issued by the District Court which, among other things, enjoined the respondent union from conducting an election of officers at its national convention scheduled to begin September 29, 1957, and now in progress. The petition, filed here September 30, 1957, comes to me as Circuit Justice for the District of Columbia Circuit.

The Court of Appeals granted the stay on the ground that the injunction "goes beyond the necessities of the situation as shown by the record," and "is not required in order to prevent irreparable injury." This proceeding was instituted in the District Court only 10 days before the union's convention was scheduled to open. Many of the allegations in the papers are based on events known by petitioners to have occurred months and years ago. The relief sought at this late date would call for an extraordinary exercise of judicial power that only the most compelling considerations could warrant. To enjoin the election of officers of an international union of 891 locals and 1,500,000 members during the course of its convention proceedings, on allegations of conspiracy supported by the affidavits here, without testimony having been taken, would indeed be drastic action.

In the light of all the circumstances, there appears to be no sufficient reason for me to interfere with the conclusions of the Court of Appeals. Accordingly, the petition is denied.

SUPREME COURT OF THE UNITED STATES

No. — OCTOBER TERM, 1957.

International Boxing Club of New York, Inc., et al., Appellants,	)	On Application for a Stay of Judgment of the United States District Court for the Southern District of New York.
v.	)	
United States of America.	)	

[October 29, 1957.]

MR. JUSTICE HARLAN, Circuit Justice.

The fact that this is the first Government antitrust case involving professional sports to be reviewed by this Court after trial on the merits and the admittedly "drastic" character of some aspects of the relief granted by the District Court combine to lead me to the conclusion that the appellants' application for a stay of the judgment below, pending appeal, should be granted in substantial part. Indeed, the Government concedes, with commendable frankness, that such parts of the judgment "which would result in substantial and irreparable injury [to appellants] in the event of a reversal" and "which could substantially affect the property interests of the appellants" should not be put into effect pending review. Accepting the premises on which the Government suggests this application should be decided, cf. *Breswick & Co.* v. *United States*, 75 S. Ct. 912, I shall make the following disposition of the application for a stay, to become effective upon the expiration of the stay heretofore granted by the District Court and to continue until this Court's final determination of appellants' pending appeal:

(1) As to paragraphs "8," "9," "10," "11," "13," "14," "15," "16," "17," "18," "19," "20," "21," and "22" of the

judgment, the application for a stay is granted. To this relief the Government has no objection.

(2) As to paragraphs "3," "5," "6," and "7" of the judgment, the application for a stay is granted to the extent that such provisions relate to the exercise of subsisting contract rights acquired by any of the appellants prior to March 8, 1957, the date on which the District Court filed its opinion holding that the Sherman Act had been violated. Although the Government opposes any stay of these provisions, I consider that this limited stay is in keeping with the formula which the Government has recognized should govern the disposition of this application.

(3) In all other respects the application for a stay is denied.

An appropriate order may be submitted to me for signature on or before November 4, 1957.

SUPREME COURT OF THE UNITED STATES

No. — OCTOBER TERM, 1957.

Angelo John La Marca, Petitioner,	)	On Application for Stay
v.	)	of Execution.
The People of the State of New York.	)	

[November 6, 1957.]

Memorandum of MR. JUSTICE HARLAN.

As I cannot deem it unreasonable to think that a federal question meriting consideration may be found by this Court in the failure of the trial judge to answer, when propounded, the jury's question relating to the insanity issue, I consider it my duty to afford petitioner an opportunity to present his petition for certiorari to the Court. See *Edwards* v. *New York*, 76 S. Ct. 1058. The amended remittitur of the Court of Appeals shows that this question was passed upon by that court under the Constitution of the United States. Accordingly, I shall stay the execution of the death sentence pending the filing and determination of the petition for certiorari on condition that the petition is filed on or before December 12, 1957. I accelerate the filing date to insure that if certiorari is granted, the Court may be in a position to dispose of the case on the merits during the current Term, something which I think the sound administration of justice requires.

I am signing herewith an order to the foregoing effect.

SUPREME COURT OF THE UNITED STATES

No. — OCTOBER TERM, 1957.

Di Candia v. *United States of America*.

[January 20, 1958.]

MR. JUSTICE HARLAN, Circuit Justice.

The petitioner has applied to me for release on bail pending appeal to the Court of Appeals for the Second Circuit from a judgment of conviction, following a jury trial in the Southern District of New York, for willfully misapplying the funds of a bank, in violation of 18 U.S.C. § 656. Petitioner's application for bail has been denied by District Judge Weinfeld, the trial judge, who filed a memorandum in which he found petitioner's appeal "frivolous." A similar application was subsequently denied by the Court of Appeals, after argument but without opinion.

The Government having made no claim that petitioner is a poor bail risk, the only issue here is whether "it appears that the appeal is frivolous or taken for delay." Fed. Rules Crim. Proc. 46(a)(2). The asserted grounds of appeal to the Court of Appeals are (a) that the evidence on the issue of unlawful intent was insufficient to support the jury's verdict, and (b) that the trial judge's questioning of witnesses was excessive and prejudicial to a fair trial. As I felt unable to dispose of the application on the basis of the papers originally submitted by the parties, I set the matter for oral argument.

Giving the widest scope to the liberalizing amendment of Rule 46(a)(2), see *Ward* v. *United States*, 76 S. Ct. 1063, 1065, I nevertheless can find no justification, after consideration of the oral and written submissions of counsel, and the portions of the trial transcript to which defense

counsel has particularly called my attention, for disturbing the denial of bail by the District Court and the Court of Appeals. In making this determination I adhere to my general view that decisions of the courts below disallowing bail after conviction are entitled to the highest respect by a circuit justice, especially where, as here, review of a conviction is still pending in the Court of Appeals. Cf. *Roth* v. *United States*, 77 S. Ct. 17.

In denying this application I am assuming that the Government will cooperate in effecting a prompt dispatch of petitioner's appeal.

SUPREME COURT OF THE UNITED STATES

No. 845, Misc.—OCTOBER TERM, 1957.

Virgil Richardson, Petitioner,	)	Application for Stay of
v.	)	Execution.
The People of the State of New York.	)	

Memorandum of MR. JUSTICE HARLAN.

On June 4, 1958, I denied petitioner's application for a stay of execution of the sentence of death imposed upon him by the New York courts. I concluded that the papers submitted, which included the record and briefs of both sides in the Court of Appeals of the State of New York, presented no basis for believing that a writ of certiorari might be granted by this Court to review this conviction. A similar application for a stay had theretofore been denied by Chief Judge Conway of the New York Court of Appeals.

Petitioner has renewed his earlier application for a stay, this time in connection with a petition for certiorari which he filed with the Clerk on June 13, 1958. The Clerk informs me that this petition, in consequence of accelerated action by the parties, will be ripe for consideration and disposition by the Court prior to adjournment at the end of this Term. Execution of the sentence of death has been set for June 19. Judges Weinfeld and Edelstein of the United States District Court for the Southern District of New York have successively denied petitioner's applications for stays of execution and for writs of habeas corpus, since petitioner had not at the time exhausted his state remedies by applying to this Court for a writ of certiorari. I am informed that Judge Edelstein has ordered that his denial of a stay is without prejudice to petitioner's right to renew his application in

the event that this Court does not act on, or denies, the petition for certiorari prior to June 19, the date set for execution of sentence.

Although nothing presented in the petition for certiorari has caused me to change the views which led to my denial of petitioner's earlier application for a stay, in light of these subsequent developments I shall stay the execution of petitioner's sentence for the short period necessary to enable this Court to act upon the petition for certiorari. I am accordingly signing such an order.

June 17, 1958.

SUPREME COURT OF THE UNITED STATES

Samuel Bletterman v. *United States.*

[August 29, 1958.]

Memorandum of MR. JUSTICE HARLAN.

Being always loath, except upon the strongest showing, to disturb the determination of a Judge of the Court of Appeals on a question of bail pending appeal to that court, I would be disposed upon the papers submitted to deny this application outright, but for one circumstance. Despite his other findings, Judge Lumbard in his Memorandum of August 7, 1958, denying bail went on to state:

> "Of course, once the district court has acted on the defendant's application to proceed in forma pauperis and to supply him with the minutes, his appeal should move forward rapidly. If there is any undue delay of the defendant's appeal he may renew his application for bail."

However, it appears from the papers before me that the District Court had, on July 29, 1958, already denied petitioner's application under 28 U.S.C. § 1915 for leave to appeal *in forma pauperis* and that he be furnished with a copy of the stenographic minutes of the trial.

In consequence, it appears that in prosecuting his appeal, petitioner is relegated to the procedure discussed in *United States* v. *Sevilla*, 174 F.2d 879. In light of the last paragraph of Judge Lumbard's Memorandum, quoted above, I would not be justified in denying this application without giving petitioner an opportunity to seek clarification of the matter from Judge Lumbard. For being without a lawyer, and himself incarcerated, the *Sevilla* course would seem to face petitioner with grave difficulties in preparing the record, or at least in obtaining a prompt disposition of his appeal. In these circumstances, I am constrained to deny petitioner's application, with leave however to apply to Judge Lumbard for rehearing.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

Frank Joseph Valenti,	)	
v.	)	
The Honorable Morris E. Spector, Justice of the Supreme Court of New York, et al.	)	
Joseph Riccobono,	)	
v.	)	
The Honorable Morris E. Spector, Justice of the Supreme Court of New York, et al.	)	
Rosario Mancuso,	)	
v.	)	On Application for Stay and
The Honorable Morris E. Spector, Justice of the Supreme Court of New York, et al.	)	for Admission to Bail.
Paul Castellano,	)	
v.	)	
The Honorable Morris E. Spector, Justice of the Supreme Court of New York, et al.	)	
Michael Miranda,	)	
v.	)	
The Honorable Morris E. Spector, Justice of the Supreme Court of New York, et al.	)	

[September 3, 1958.]

MR. JUSTICE HARLAN, Associate Justice.

Each of these five petitioners applies to me (1) for a stay of execution of an order of the Supreme Court of the State of New York and of a warrant of arrest, pur-

suant to which he has been committed to jail for alleged contumacious refusal to answer certain questions propounded to him by the New York State Commission of Investigation in certain proceedings being conducted by that body under New York law, and (2) conjunctively or in the alternative, for release on bail—both pending review of such commitment by the state appellate courts.

Having considered the papers submitted by each side, and finding oral argument to be unnecessary, I deny these applications for lack of jurisdiction and, in any event, in the exercise of my discretion, for the following reasons:

1. The federal questions sought to be presented going to the validity of these commitments are prematurely raised here, since none of them has yet been passed upon by the highest court of the State in which review could be had. See 28 U.S.C. § 1257. The appeals of petitioners Valenti, Riccobono, Mancuso and Castellano are still pending undetermined in the state Appellate Division. The direct appeal of petitioner Miranda to the state Court of Appeals also stands undetermined.

2. Furthermore, the denial of this relief by the action of a single judge of a state appellate court may not in any event be reviewed by this Court under § 1257. See *McKnight* v. *James*, 155 U.S. 685.

3. Apart from the foregoing considerations, two state court judges have already successively denied on the merits each petitioner's application for admission to bail, and in the exercise of my discretion I decline to disturb those determinations.

Accordingly, each of these applications is denied in all respects.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

Tuscarora Nation of Indians, Also Known as Tuscarora Indian Nation, Petitioner, *v.* Power Authority of State of New York, et al.	)	On Application for Stay of Mandate Pending Petition for Certiorari.

[September 8, 1958.]

MR. JUSTICE HARLAN, Associate Justice.

Petitioner Tuscarora Nation of Indians asks me to stay the mandate of the Court of Appeals for the Second Circuit pending the filing and determination of Tuscarora's petition for certiorari to review the judgment of that court, filed July 24, 1958, which so far as now material (1) adjudged that respondent Power Authority of the State of New York, as licensee of the Federal Power Commission for the construction of the so-called Niagara Power Project at Niagara Falls, New York, has the right under § 21 of the Federal Power Act, 16 U.S.C. § 814, to acquire petitioner's land by condemnation proceedings, and (2) directed any federal district court in which such proceedings might be instituted to proceed with as much expedition as possible.

On August 26, 1958, the Court of Appeals, on petitions for rehearing and for clarification filed by Tuscarora and the Power Authority respectively, adhered to its judgment, directed that its mandate issue six days thereafter, and rendered inoperative, upon the issuance of the mandate, certain stay orders which had theretofore restricted in some respects the Authority from entering upon the Tuscarora lands pending the outcome of condemnation proceedings to acquire them.

On July 29 the Power Authority commenced such condemnation proceedings in the United States District Court for the Western District of New York, and on August 27 noticed for hearing before that court at 2 p.m. on Monday, September 8, a motion for summary judgment upon its complaint.

There is also pending undetermined in the Court of Appeals for the District of Columbia Circuit a proceeding instituted by Tuscarora to review the validity of the license issued by the Federal Power Commission to the Power Authority, insofar as it purports to include petitioner's lands within the Niagara Power Project. Both sides agree that the Court of Appeals' decision in this proceeding cannot be expected at the earliest before late November or December.

On August 31, in order to afford adequate opportunity for consideration of the application now before me, I temporarily stayed the issuance of the mandate of the Court of Appeals for the Second Circuit pending my decision on the application, and at the same time set the matter for oral argument on September 6.

Tuscarora concedes, as I think it must, that the validity of the Power Authority's federal license is a matter lying exclusively within the jurisdiction of the Court of Appeals for the District of Columbia Circuit. 16 U.S.C. § 8251(b); cf. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-337. That being so it is difficult for me to believe it likely that this Court would grant certiorari to review the judgment of the Court of Appeals for the Second Circuit, since the Power authority's [Publisher's note: "authority's" should be "Authority's".] right to acquire Tuscarora's lands by condemnation would ultimately seem to depend upon its federal license which is presently in force and whose validity is subject to review only by the Court of Appeals for the District of Columbia Circuit. See §§ 3(2), 4(e), and 21 of the Federal Power Act, 16 U.S.C. §§ 796(2), 797(e), 814. Nevertheless in the time at my disposal I have not been able to satisfy myself completely that in this unusual situation four

members of the Court would not be persuaded to grant certiorari, or that the Court, were certiorari to be denied, would not consider that Tuscarora was nevertheless entitled to some form of interim relief for the protection of the lands in question pending the outcome of the proceedings touching the validity of the Power Authority's federal license. I am particularly constrained not to reach such conclusions at this stage of the matter because of a number of factors which seem to me to point to a solution of this application that is fair to both sides.

The Power Authority represents that if it obtains from the District Court for the Western District of New York a decree of condemnation putting it into immediate possession of the Tuscarora lands, it will proceed forthwith to erect power lines around the site of the proposed reservoir which is part of the Niagara Power Project, and further that the Authority will be exposed to substantial financial losses if this work cannot be instituted by September 15. On the other hand the Authority states that it can defer, without serious inconvenience or financial loss, other aspects of the Project involving use of Tuscarora land at least until the middle of October.

I am advised by the Clerk of the Court that if Tuscarora's petition for certiorari and the Power Authority's response thereto are both on file by September 30 the matter may be considered by the Court at its first Conference of the new Term beginning October 6. In normal course this should enable the Court's action on the petition for certiorari to be announced on October 13.

Counsel for the Power Authority states that he will be prepared to file the Authority's response within 10 days after the filing of the petition for certiorari.

In light of the foregoing I shall make the following disposition of Tuscarora's present application: The mandate of the Court of Appeals for the Second Circuit shall be allowed to issue, but the execution and enforcement of the judgment entered pursuant thereto shall be stayed pending the filing and determination of Tuscarora's peti-

tion for certiorari, except to the extent that it bears upon the Power Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project, subject however to the following terms and conditions:

1. Tuscarora's petition for certiorari shall be filed on or before September 19, 1958;

2. The Court shall have announced its action on the petition for certiorari by October 13, 1958;

3. If the Power Authority's response to the petition for certiorari shall not have been filed on or before September 30, 1958, or if the Court for any other reason shall not have announced its action on such petition by October 13, 1958, then in either event Tuscarora shall have leave to apply for a further stay; and

4. If the petition for certiorari is denied, this stay shall expire on the third day following the Court's order to that effect.

5. In the event that petition for certiorari is granted, the stay is to continue pending the issuance of the judgment of this Court.

This disposition will enable Tuscarora to put its case to the full Court, without unduly tying the hands of the Power Authority in the interval.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1958.

	)	On Application for Bail
Robert H. Ellis, Petitioner,	)	Pending Appeal to the
v.	)	United States Court of
United States of America.	)	Appeals for the District of
	)	Columbia Circuit.

[February 7, 1959.]

Memorandum of MR. CHIEF JUSTICE WARREN, Circuit Justice.

This is an application made to me in my capacity as Circuit Justice for bail pending appeal to the Court of Appeals for the District of Columbia. The District Court and the Court of Appeals have denied bail. Petitioner was convicted on November 29, 1958, for operating a lottery in the District and was sentenced to eight months to two years and a $1,000 fine. He seeks to raise on appeal an issue concerning the validity of the affidavit which supported the issuance of a search warrant. After examining petitioner's tentative arguments, I cannot say that the appeal is frivolous. Petitioner has already served more than two months of his sentence of eight months to two years because of the refusal to admit to bail and unless he is now admitted, he might of necessity serve more than the minimum term of his sentence before there is an adjudication in the Court of Appeals. In those circumstances, his appeal would be of little benefit to him even if he should prevail. Also, so far as the petition and response show, he is a longtime resident of the District, owns property here, has responded to date to the orders of the court and there is little likelihood of his absconding. I will accordingly admit petitioner to bail in an amount of $5,000, to be posted with and approved by the District Court.

SUPREME COURT OF THE UNITED STATES

Edward Eckwerth v. *The People of the State of New York.*

[April 7, 1959.]

MR. JUSTICE HARLAN, Associate Justice.

This application for a stay of execution of the sentence of death imposed upon petitioner was made to MR. JUSTICE DOUGLAS who has referred the application to me as the Associate Justice assigned to the Second Circuit. Petitioner seeks a stay of execution pending this Court's disposition of a petition for certiorari to review the New York Court of Appeals' denial of leave to appeal from an order of the County Court, Westchester County, which denied him a writ of error *coram nobis*. Such leave to appeal was denied on April 7, 1959. The execution of the sentence of death is scheduled for April 9, 1959.

I have requested the State to submit a response to the application for a stay, and to furnish a copy of the record of the trial. In order to afford appropriate time for my consideration and disposition of this application, I shall stay the execution of the death sentence until April 20, 1959.

[Publisher's note: The missing characters in the caption appear to be the result of imperfect photoduplication of the original.]

SUPREME COURT OF THE UNITED STA

No. 769, MISC. OCTOBER TERM, 1958.

Edward Eckwerth, Petitioner, v. *People of the State of New*

[April 20, 1959.]

MR. JUSTICE HARLAN, Associate Justice.

I have now considered the papers submitted by the State which, I regret to say, included no memorandum or affidavit in opposition. Fully recognizing the shocking character of this crime, I nevertheless consider it my duty to grant petitioner's application. In light of the flat and unexplained contradiction relating to the episode of the dead woman's shoes between, on the one hand, the stenographer's minutes of the District Attorney's interrogation of petitioner on August 25, 1956, and Dr. Bradess' testimony and the District Attorney's summation, on the other hand, I cannot say that the petition for certiorari is so clearly devoid of a possible federal question that I should allow this man to go to his death before the Court has had an opportunity to consider his petition for certiorari, to which the State has not yet responded. The State's response is due May 4, 1959.

Accordingly, the petitioner's execution will be stayed pending this Court's disposition of the petition for certiorari.

SUPREME COURT OF THE UNITED STATES

No. 853, MISC.—OCTOBER TERM, 1958.

Leroy Keith, Petitioner,	)	Application for Stay of
v.	)	Execution.
The People of the State of New York.	)	

[May 11, 1959.]

MR. JUSTICE HARLAN, Associate Justice.

Petitioner has applied to me for a stay of execution of the capital sentence imposed on him by the State of New York, pending this Court's consideration of his petition for certiorari to review the judgment of the New York Court of Appeals affirming his conviction for a felony murder. The petition for certiorari was filed April 29, 1959, and the State's response on May 5, 1959, so that the matter is ripe for consideration by this Court at an early date.

One of the contentions made in the petition for certiorari is that the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, establishes a rule of constitutional law which reaches to the States under the Fourteenth Amendment. It so happens that there are now pending in this Court, and still undecided, a number of cases involving the question whether the *Jencks* rule rests on a constitutional basis. In these circumstances, I feel obliged to grant petitioner's application for a stay pending this Court's action on the petition for certiorari.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

Appalachian Power Company, Ohio Power Company and Indiana & Michigan Electric Company, Petitioners,
v.
American Institute of Certified Public Accountants, L.H. Penney, William W. Werntz and Carman G. Blough.

[July 7, 1959.]

MR. JUSTICE BRENNAN, Circuit Justice (temporarily assigned).

The petitioners apply for an order (1) staying the Mandate of the United States Court of Appeals for the Second Circuit on its judgment of June 17, 1959, affirming a summary judgment for respondents entered by the District Court for the Southern District of New York, and (2) restraining the respondents, pending the final determination of this action by this Court, from distributing to the members of the respondent American Institute of Certified Public Accountants or to any other members of the accounting profession a proposed letter dated April 15, 1959, or any other communication, to the effect that the respondent American Institute of Certified Public Accountants or its Committee on Accounting Procedure is of the opinion or recommends that a deferred tax account set up in recognition of the deferral of income taxes should not be credited to earned surplus or to any other account included in the stockholders' equity section of the balance sheet.

The petitioners, public utility companies which account for deferred taxes in the stockholders equity section of their balance sheets, brought this diversity suit in the District Court. They sought, in addition to other relief, an injunction against respondents promulgating or distributing said letter except upon compliance with certain

specified procedures. An interim restraint was granted pending hearing on a motion for preliminary injunction. Respondents made a motion to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. Affidavits were filed by both sides. The District Court heard the motions together, denied the motion for a preliminary injunction and, treating the motion to dismiss, since affidavits of both sides were filed, as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, entered summary judgment for the respondents. The District Court found that the letter of April 15 reflected the Committee's "honest opinions," that it was not "false or fraudulent" and that it could "hardly be termed wanton." The District Court held that, under such circumstances, the law of New York, which governs in this diversity case, does not provide a cause of action. The Court of Appeals unanimously affirmed.

The stay and temporary restraining order are sought by the petitioners upon allegations that respondents will distribute the letter, unless restrained, and this will cause petitioners irreparable injury and also render moot their proposed petition for certiorari, at least insofar as concerns their prayers for injunctive relief against such a distribution. Even assuming, however, the possibilities of irreparable injury and mootness, as claimed by the petitioners, I do not feel at liberty to grant their application unless in my judgment there is a prospect that the petition for certiorari which they propose to file will appear to at least four members of the Court to present questions which warrant our review.

I heard oral argument on this application and after consideration of the arguments made and the briefs filed, it is my judgment that the questions proposed to be presented in the petition for certiorari will not command four votes for review. The petitioners state that three contentions will be presented. One is that the District Court and the Court of Appeals erred in their conclusion as to

the relevant state law. But this Court ordinarily accepts the determination of state law as found by the Court of Appeals, particularly when, as here, the same finding is made by the District Court, and no showing has been made to persuade me that such would not be the case here. The second contention is that the District Court, in treating respondent's motion to dismiss as a motion for summary judgment, erred in not following the requirement of Rule 12(b) that "all parties shall be given reasonable opportunity to present all material made pertinent to such motion [for summary judgment] by Rule 56." But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts. And I do not find the conflict suggested by petitioners between the decision below and *Pacific American Fisheries* v. *Mullaney*, 191 F.2d 137. That decision simply held that the District Court was incorrect in its conclusion as to the pertinent law, and that under the Court of Appeals' view of the law certain relevant facts were in dispute, so that the grant of summary judgment was improper. Finally, the petitioners suggest they will present in their petition for certiorari the question whether federal courts, in light of the First Amendment, are empowered to enjoin tortious communications. But the holdings below are that in the circumstances of this case the distribution by respondents of the proposed letter would not constitute a tortious act under New York law; therefore no First Amendment problem is involved.

The application is denied, since, in my judgment, none of the questions proposed to be presented in the petition for certiorari has [Publisher's note: The "has" here is written above an obliterated "have".] the prospect of commanding four votes for review.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

Organized Village of Kake, Angoon Community Association and Metlakatla Indian Community, Annette Islands Reserve, a Federally Chartered Corporation, Petitioners,
v.
William A. Egan, Governor of the State of Alaska, and the State of Alaska.

[July 11, 1959.]

MR. JUSTICE BRENNAN, Circuit Justice (temporarily assigned).

The petitioners apply for an order restraining the State of Alaska and its Governor, and the agents of both, pending the final determination of this action by this Court, from interfering in any manner with petitioners' attempts to erect, moor, maintain, operate and fish floating fish traps, as authorized by the Secretary of the Interior by a regulation of March 7, 1959, 24 Fed. Reg. 2053, and particularly restraining them from enforcing against the petitioners the provisions of 17 S.L.A. 1959, as amended by 95 S.L.A. 1959, a state statute which purports to make the use of such traps a criminal offense.

Petitioners, Organized Village of Kake and Angoon Community Association, federal corporations chartered as organized Indian villages under the laws of the United States, since 1948 have been operating fish traps and canneries bought for their use by the United States. All of the inhabitants of the villages of Kake and Angoon are Indians and all are members of the respective petitioner corporations. The economic viability of the villages is solely dependent on the fishing and canning operations carried on by these corporations, and they provide the only means of support for substantially all of the

inhabitants. The United States retains title to the cannery and fishing equipment and supervises the distribution of the earnings from their operation. Part of those earnings are earmarked to repay the United States for the cost of the equipment; other parts are used as a reserve for depreciation, for social and educational purposes, public works, and other community improvements. Remaining earnings are distributed as dividends to members of the community. Petitioner Metlakatla Indian Community is a federally chartered corporation engaged in similar fishing operations. Its members occupy the Annette Islands Indian Reservation created by Congress and the President in 1891, and enlarged in 1916 to include the waters surrounding the reservation 3,000 feet seaward from the shoreline. The Indian members of this reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only means of support for substantially all of the inhabitants of the reservation. The Metlakatla Indian Community is obligated to make specific payments to the United States each year in repayment for facilities and equipment bought for its use by the Government. It relies on earnings from its fishing and canning operations to make these payments.

On November 14, 1958, the Secretary of the Interior, acting under the authority vested in him by the White Act, 43 Stat. 464, as amended, 48 U.S.C. §§ 221, 222, published in the Federal Register, 23 Fed. Reg. 8874, a notice that he intended to amend Alaska fishing regulations to prohibit the use of fish traps, except that petitioners would be specifically excluded from the prohibition. On January 3, 1959, Alaska was proclaimed a State, and on February 25, 1959, the Alaska Legislature enacted 17 S.L.A. 1959 purporting to make it a crime after that date to erect or maintain fish traps "on or over any lands or tidelands owned or hereafter acquired by the State of Alaska." Soon afterward, on March 7, 1959, the Secretary

of the Interior published amendments to Alaska fishing regulations, 24 Fed. Reg. 2053, adopting the suggested regulations of November 14 banning trap fishing in Alaska, except in the certain areas where their use by the petitioners was authorized. On March 10, 1959, the Area Director, Alaska Native Service, was notified by the Department of Interior of the Department's position that petitioners could continue their trap fishing under the Secretary's March 7 regulation despite the contrary Alaska statute. The petitioners thereupon prepared for the 1959 fishing season on the assumption that they would be able to utilize traps in the quantity and at the locations permitted by the Secretary's regulation of March 7. They expended a substantial amount of time and money in organizing their operations for the 1959 season on this basis. The season is only of approximately two months duration and it is necessary that preparations be completed in advance to permit full-scale fishing operations to begin as soon as the season opens.

Beginning about May 21, 1959, the Governor and other state officials publicly stated their intention to invoke the state statute to prevent petitioners from operating their traps, and on June 15, 1959, the President of the Council of the Kake Village and some of the workmen engaged in building a trap there were arrested by the state authorities, the trap seized, and an information filed against them. The Governor indicated that similar measures will be taken by the State to prevent petitioners from establishing any traps.

Petitioners Angoon and Kake brought suit in the District Court for the District of Alaska on June 22, 1959, seeking a permanent injunction prohibiting the enforcement of 17 S.L.A. 1959 against them and prohibiting respondent from interfering in any other manner with their trap fishing operations. Petitioner Metlakatla filed a similar suit in the same court on June 24. The two cases were consolidated, the requested relief was denied, and judgments of dismissal were entered on July 2, 1959. The

petitioners intend to seek review of that judgment by this Court. There is at present no higher court of the State to which petitioners can appeal, and the Court of Appeals for the Ninth Circuit, which formerly had appellate jurisdiction of similar cases decided in the District Court for the District of Alaska, held in *Parker* v. *McCary*, on June 16, 1959, that it lacks jurisdiction over such cases decided by the District Court after January 3, 1959.

The fishing season at the Angoon and Kake villages began on June 24, and the season begins at the Metlakatla village on July 13. Thus petitioners seek a temporary restraining order so that they will be able to use traps, as authorized by the Secretary of the Interior, during the present fishing season pending final determination of the case by this Court. Petitioners have prepared for this season in reliance on the Secretary of Interior's opinion that, despite the state statute, they would be able to use their traps as authorized by him, and it is alleged that it is now impossible for them to conduct a successful operation without the traps. It is further alleged that without a successful season this year the three communities will be unable to sustain their economy and will default on their obligations to the United States to make repayment for the fishing and cannery equipment purchased for their use by the Federal Government.

I heard oral argument on this application. The Solicitor General of the United States participated and supported the petitioners' application for the restraining order.

After consideration of the arguments made and briefs filed, it is my judgment that the questions proposed to be presented for review by this Court are of such significance and difficulty that there is a substantial prospect that they will command four votes for review. The questions involve construction of the Alaska Statehood Act, 72 Stat. 339, in relation to the powers reserved by the Federal Government concerning the administration and management of the fish and wildlife resources of Alaska until the State has made adequate provision for the administration,

management, and conservation of those resources in the broad national interest. They involve also the meaning and validity of the compact between the United States and the State of Alaska under which the State disclaims all right and title to any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos or Aleuts or which is held by the United Slates in trust for such natives. I intimate no view whatever upon the merits of these questions and state them simply in demonstration of the basis upon which I have concluded that there is a substantial prospect that this Court will desire to review them. The questions on which review will be sought include the following:

(1) Is not all authority to administer and manage the fish and wildlife resources of Alaska presently reserved to the Federal Government so as to make the Alaska criminal statute, 17 S.L.A. 1959, unenforceable at this time against the petitioners by the State and its officials? Section 6(e) of the Alaska Statehood Act, 72 Stat. 339, provides in pertinent part:

> "*Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest . . . ."

The Secretary of the Interior, on April 27, 1959, made the certification contemplated by this proviso. Thus control of the State's fishing and wildlife will not devolve on the State under the terms of § 6(e) until January 1, 1960. The petitioners therefore argue that at present 17 S.L.A. 1959 is of no force or effect as applied to petitioners since the paramount authority of the Secretary of Interior,

expressed in his contrary regulation of March 7, would be impaired or nullified, and that the regulation constitutes a proper exercise of the authority vested in the Secretary by § 6(e) and by the White Act, 43 Stat. 464, as amended, 48 U.S.C. §§ 221, 222. In opposition the State and the Governor contend that the regulation of March 7 is in violation of both § 6(e) and the White Act, and thus is void. The violation of § 6(e) is said to arise because that section requires the management of the fishing resources to be carried out "under existing laws," which, it is argued, includes Ordinance No. 3 of the Alaska Constitution, which is to the same effect as 17 S.L.A. 1959. It was held in *Ketchikan Packing Co.* v. *Seaton*, decided by the Court of Appeals for the District of Columbia on May 14, 1959, that the Secretary of Interior occupied the unique position under § 6(e) of trustee for both the Federal and State Governments in managing Alaskan fish and wildlife resources during the interim period of transition from federal to state control, and in discharging his authority under § 6(e) the Secretary might take Ordinance No. 3 into account as "existing laws." However, assuming that decision to be correct, the question remains whether the Secretary did not have authority, in balancing his responsibility to carry out state policies as expressed in Ordinance No. 3 and 17 S.L.A. 1959 with his responsibility to further national interests as expressed in § 4 of the Statehood Act and the long-standing policy of federal protection of Indian rights, to promulgate the regulation in question. Respondents' contention that the regulation of March 7 is contrary to the White Act is based on the following proviso in that Act:

> "*Provided*, That every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein nor shall any citizen of the United States be denied the right to take, prepare, cure, or

> preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior."

But even if this proviso would ordinarily be interpreted as prohibiting a regulation allowing Indians alone to use traps, there is a substantial question whether the proviso has not been impliedly amended by § 4 of the Statehood Act, which contemplates that Alaska Indians and other natives may be treated differently by the Federal Government than other citizens of the State; or whether it has been impliedly amended by § 6(e) as that section refers as "existing law" to Art. 12, § 12 of the Alaska Constitution, which is worded substantially like § 4 of the Statehood Act.

Furthermore even if the regulation of March 7 is invalid, either because it conflicts with § 6(e) or the nondiscrimination proviso of the White Act, a strong argument may be made, as suggested by the Court of Appeals in the *Ketchikan* case, that Alaska is not free to enforce its criminal statute during the interim period of the Federal Government's superintendency provided by § 6(e) and that any sanctions invokable during that superintendency are limited to federal sanctions.

If § 6(e) is interpreted as suspending the application of Alaska's statutes affecting fish and wildlife resources during the interim period of federal administration and management of those resources, then the question arises whether § 6(e) is constitutionally valid under the "equal footing" doctrine. The Solicitor General of the United States urged on the oral argument that § 6(e) is not violative of the "equal footing" doctrine on two grounds. First, that the provision for such a temporary arrangement designed to facilitate the transition of Alaska into statehood may be made within the power of Congress to admit new States in the Union and the "equal footing" doctrine does not apply. Second, assuming that the equal footing doctrine requires in this area that Congress cannot

enact as a condition to Alaska's entry into the Union any regulation that would not apply in existing States, Congress could constitutionally enact a law regulating Indian fishing rights, under the circumstances of this case, under the power to regulate commerce, or the power to regulate commerce with the Indian tribes, or the power to make all needful rules and regulations respecting property belonging to the United States.

(2) Is § 4 of the Alaska Statehood Act and Art. 12, § 12 of the Alaska Constitution a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and, if so, is § 4 of the Statehood Act an assumption of permanent jurisdiction by the Federal Government over the location and manner of Indians' fishing within the State? Section 4 provides:

> "As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Alutes [Publisher's note: "Alutes" should be "Aleuts".] (hereinafter called natives) or is held by the United States in trust for said natives [Publisher's note: There should be a semicolon here.] that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation . . . ."

Article 12, § 12 of the Alaska Constitution provides:

> "The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the Act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission . . . ."

I cannot say that the argument of the petitioners, that § 4 ought to be interpreted in this way in light of the wording and legislative history of the Statehood Act, is frivolous or even implausible. If § 4 were so interpreted, questions would be raised as to its constitutionality under the "equal footing" doctrine substantially the same as those raised in regard to § 6(e) of the Statehood Act.

Another question which will face this Court is whether it has jurisdiction to review the judgment of the District Court. Jurisdiction was not questioned by the parties or the Solicitor General of the United States on the oral argument, but the petitioners indicated that they will seek review on the theory that the judgment below is a judgment of the highest available court of the State. I am satisfied that there is a prospect that the Court will want to take the case to decide whether it has jurisdiction in this regard.

Since I am satisfied that the questions presented are substantial and difficult ones which the Court may desire to review, I must now consider whether the equities in this case justify a temporary restraining order. I recognize that ordinarily a single Justice should exercise great caution in granting a restraining order. I am especially hesitant to grant the relief requested in this case since

the District Court refused the relief, the restraint prevents the State from enforcing a criminal law and the subject matter is obviously of great importance in Alaska and has occasioned heated controversy. However, decision cannot be escaped. "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens* v. *Virginia*, 6 Wheat. 264, 404. Therefore, notwithstanding the considerations which lead me to hesitate, I think the equities so plainly support the petitioners' application that it should be granted. The restraining order is sought by the petitioners upon allegations that the State of Alaska and its Governor, unless restrained, will treat the authorization by the Secretary of Interior of trap fishing by the petitioners as a nullity and enforce the State's criminal statute to prevent the petitioners' use of the authorized traps, resulting in substantial financial loss for 1959 fishing and cannery operations, and in turn causing irreparable injury to the economy and welfare of the Indian communities. The District Court made the following supplemental finding of fact: "Although plaintiff may suffer some loss if the right to fish by means of fish traps is denied, still I find that the damages alleged are to a large extent speculative in nature because of (1) the limited predictability of the salmon runs, (2) the existence of an independent fleet of seine boats with whom plaintiffs are free to bid for their catch on the basis of the price offered therefore, and (3) the possibility of increased catches by plaintiffs' own sien [*sic*] boats resulting from the abolition of fish traps." Accepting this equivocal finding, nevertheless the State and the Governor have made no showing which persuades me that the consequences feared by petitioners will not follow from enforcement of the state statute against the petitioners. The Solicitor General advised that it is the opinion of the Interior Department that the petitioners will be injured by its enforcement against them. And, whereas petitioners will suffer substantial

and irreparable injury affecting three entire Indian communities if they are not permitted to engage in trap fishing as authorized by the Secretary for the current fishing season, for all that appears the injury to the State from a temporary restraining order will be slight, or at most will be of insufficient consequence to justify denying the petitioners a restraint against enforcement of a statute as to which there are serious doubts whether it may be validly applied to the petitioners. The regulation of March 7 permits a maximum of 21 sites for trap fishing off petitioners' villages and the Secretary of the Interior has permitted petitioners to operate only 11 traps during the 1959 season in order to ensure that the salmon runs will not be depleted. These are the only traps permitted in the State. By contrast, over 250 traps were operated in Alaska during the 1958 fishing season. Furthermore, according to the representations of the attorneys made on oral argument, the fishing season at all three villages ends on August 24, 1959. The total season consists of no more than 30 to 40 fishing days, and almost one-third of the season for Kake and Angoon has already expired. This hardly is a showing that Alaska's conservation program will be seriously impaired if respondents are enjoined from preventing petitioners [Publisher's note: There should be an apostrophe after "petitioners".] trap fishing until the case is ultimately disposed of by this Court. The Attorney General of Alaska urged on the oral argument that the grant of a restraint which would permit the petitioners to operate their fish traps would impair the State's interests in the harmonious relations between races. But the State offered nothing but mere conjecture that this might result. The Attorney General also argued that the State's interest in the maintenance of fair competition among fishermen would be impaired. But the minimal unfairness in competition that might result, in light of the small number of traps and the close regulation by the Secretary of the Interior of their use, is outweighed by the considerations favoring the petitioners' application. In the circumstances, I am constrained to grant the requested restraint

to avoid interruption in the 1959 fishing season of the practice long sanctioned by the Federal Government of trap fishing by the petitioners.

The temporary restraining order will be granted. The petitions for review shall be filed on or before August 20, 1959.

SUPREME COURT OF THE UNITED STATES

	)	On Application for a Stay of
John F. English, et al., Petitioners,	)	Judgment by the United
v.	)	States Court of Appeals for
John Cunningham, et al.	)	the District of Columbia
	)	Circuit.

[August 4, 1959.]

MR. JUSTICE FRANKFURTER, as Acting Circuit Justice.

This is an application for a stay of the decree entered on July 9, 1959, by the United States Court of Appeals for the District of Columbia Circuit against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, hereafter called the Teamsters, and certain of their officers, who, together with the Teamsters, will be called defendants. The litigation was initiated by thirteen members of locals of the Teamsters (one of whom has dissociated himself from the rest), to be called plaintiffs. This application is in effect a review of the refusal of the Court of Appeals to grant such a stay.

The basis of the application is to enable defendants to file a petition for certiorari to review the decree of the Court of Appeals, the validity of which they propose to challenge and the enforcement of which, pending potential review and potential reversal here, will, they claim, cause them irreparable damage. Since the contemplated petition for certiorari cannot be considered prior to the reconvening of this Court on October 5, 1959, the threshold question on this application is whether the issues which defendants plan to bring before the Court are not of such a legal nature that they may fairly be deemed so lacking in substantiality as to preclude a reasonable likelihood of satisfying the considerations governing review on certiorari, as guided by Rule 19 and the

practice of the Court. Informed by the illuminating opinion of Judge Fahy and having had the advantage to hear elucidation of the issues by counsel for the parties and by the Chairman of the Board of Monitors appointed by the United States District Court for the District of Columbia, as provided by a consent decree entered January 31, 1958 (the scope of which underlies the immediate litigation), I cannot say, on a balance of probabilities, that these issues may not commend themselves to at least four members of this Court as warranting review here of the decree below. I am confirmed in this view by the candid acknowledgment of the Chairman of the Board of Monitors and counsel for plaintiffs that serious legal questions are at stake.

Accordingly, the matter before me is reduced to the very narrow question whether I should overrule the discretion exercised by the Court of Appeals in refusing a stay of its mandate until October 12, which is the earliest day when this Court, in the normal course of affairs, will determine whether to grant the prospective petition for certiorari (assuming that it will have duly come before the Court) and also determine, in case the petition be granted, that the decree to be reviewed is not to be enforced pending final adjudication.

As already indicated, at the core of this litigation is the scope of a consent decree entered in the District Court on January 31, 1958, and the power of the District Court, in enforcing that decree, to order the defendants to carry out the specific directions defined by the Court of Appeals in its decree of July 9, 1959, in accordance with the procedure defined in that decree and in the opinion which gave rise to it, rendered on June 10, 1959. By the consent decree, the defendants, as officers of the Teamsters, undoubtedly assumed certain obligations judicially enforcible. Whatever may or may not have been the freedom of action of these officers prior to this consent decree, by it their freedom of action was circumscribed to the extent that the consent decree imposed upon them

enforcible obligations. The legal issue growing out of this voluntary restriction of defendants' action is the validity of specific recommendations by the Board of Monitors as judicially defined and approved. Such orders, as they have been defined by the Court of Appeals, are concededly unconsented and are challenged as unwarranted, unilateral modifications of the consent decree.

I have said that these specific commands, about half a dozen in number, restrict what is asserted to be the freedom of the power of officers of the Teamsters, claimed to be theirs under the constitution of the union. According to the Court of Appeals, these judicial commands upon the defendants are merely enforcement of the obligations which they undertook by the consent decree and are not one-sided modifications of it. This is the controversy to be raised by the petition for certiorari which the defendants plan to file. But, in any event, they claim that by denying a stay until the matter can duly come before this Court, the Court of Appeals has commanded them to take action of an irreparable nature claimed to be outside the scope of the consent decree and in derogation of the powers of the officers under the constitution of the Teamsters, before this Court has had an opportunity to pass on the petition for certiorari, with the derivative problem whether to keep matters in status quo until such a petition, if granted, could be disposed of on its merits.

If it were clear that between now and October 12, which is the earliest day for the disposition of the proposed petition for certiorari, what the Court of Appeals has directed to be done would be capable of being carried out so as to change, irrevocably and adversely, the rights and powers claimed by defendants, before this Court had an opportunity to determine the validity of what the defendants have been ordered to do, I would feel constrained to grant the stay. It may well be that the Court of Appeals, after due consideration, on July 15, 1959, denied this stay on its forecast that its decree could

not, in view of all the circumstances, be effectuated before this Court could pass on a petition for certiorari, with the ancillary question of a stay in case such petition were granted. In any event, my appreciation of the intrinsic elements in carrying out the various items of the decree still left in controversy (several of them have become either moot or taken out of contest by agreement) leads me to conclude that, in the setting of the immediate circumstances, they are not of a nature to cause irreparable harm between now and October 12. I am reinforced in this conclusion by the responsible assurances of the Chairman of the Board of Monitors regarding the course of events which will control such matters. The details of the half-dozen items in controversy are so specialized and technical that nothing would be gained by particularizing them.

One thing more does need to be said.

As is recognized by all concerned, judicial supervision of a union with a membership of 1,500,000 and some 800 locals through the agency of a mechanism like the Board of Monitors is an unusual manifestation of equity powers. Defendants seek to enlarge the significance of the immediate items in controversy by their anticipation of an expansion of the powers of the Board of Monitors and their resulting fear of disruption of forces within the Teamsters as well as a heavy drain on the Teamsters' treasury in the course of such far-flung judicial administration. These are matters not immediately involved in the decree of the Court of Appeals now before me. But I deem it appropriate to say that the Court of Appeals, in its decision of June 10, 1959, as well as on preliminary proceedings and in the procedure which it followed in formulating its decree of July 9, 1959, has manifested an alert understanding of the gravity of the litigation, and has made manifest its sense of the high importance of assuring the most protective procedure on the part of the Board of Monitors in making recommendations and of the District Court in issuing orders on the basis of such recommenda-

tions; it has been mindful of the importance of working out problems between the Monitors and the Teamsters on the basis of ample consultation, with full regard for the interests of the membership of the union of which, after all, the union is the collective expression. As to the fear of excessive drain on the Teamsters' treasury, one may safely rely on the Court of Appeals in affording a shining example in the spending of other people's money. A court should be the most sensitive of fiduciaries. In sanctioning fees and other expenditures it will be guided by frugality and not generosity.

Application for stay denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

Reynolds v. *United States of America.*

[November 2, 1959.]

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for bail or, in the alternative, an application for an order modifying the District Court's order fixing bail.

The applicant on August 28, 1959, after a second trial in the District Court for the District of Hawaii, was convicted under 42 U.S.C. § 2273 for willful violation of a regulation (23 Fed. Reg. § 2401) of the Atomic Energy Commission which barred unauthorized persons from entering the Eniwetok Proving Grounds during a nuclear test. Applicant had sailed his small yacht into the test area on his course from Hawaii to Hiroshima, the last lap of an around-the-world voyage. He entered the area as an expression of his disapproval of thermonuclear testing and to contest the right of the Atomic Energy Commission to deny to him and other American citizens access to the 390,000 square-mile area of the mid-Pacific.

Applicant was sentenced by the District Court to two years' imprisonment, 18 months of which was suspended. Notice of Appeal to the Court of Appeals for the Ninth Circuit was promptly filed. On the same day the District Court ordered that bail in the amount of $500, originally posted, be continued until disposition of the appeal which is now pending. The bail order, however, required an undertaking that applicant would not leave the jurisdiction of the United States.

Thereafter, the applicant requested the District Court to permit him to go to Japan pending disposition of the proceedings to enable him to secure employment in his specialized field of anthropological study. Prior to his

world cruise he had completed the first phase of a study of the effects of atomic radiation on the surviving children of Hiroshima and Nagasaki. According to his affidavit there is a need for resumption of the studies and a good possibility that he will be hired to undertake this task. No similar employment is available in the United States.

Referring to this request, the District Court said:

> ". . . [T]his court has no reason to doubt the honesty of Dr. Reynolds. If Dr. Reynolds told this court personally that he would be present on a certain day and do a certain thing, this Court has every reason to believe that. . . . [But] if one is going to be a crusader and a martyr, then, of course, he embarks upon those rather hazardous enterprises with the knowledge that somewhere along the line, if he is going to be a successful martyr, he must endure hardship."

The United States Attorney told the court:

> ". . . I have no reason to doubt Dr. Reynolds' word, as your honor has said."

The request was denied, the court this time saying:

> ". . . This is what Dr. Reynolds wanted. Now he has it. He couldn't be a martyr unless something like this happened to him."

The request was taken to the Court of Appeals and denied there. In its brief before that court the Government stated that the only reason it opposed the application was that the applicant did not have a definite job commitment.

This application was then made to me as Circuit Justice pursuant to Rule 46(a)(2) of the Rules of Criminal Procedure, 18 U.S.C., which provides in relevant part:

> "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous

> or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts."

In acting on an application of this kind, great deference should be accorded the views of the courts below. Yet where the reasons for the action below clearly appear, a Circuit Justice has a non-delegable responsibility to make an independent determination of the merits of the application.

No suggestion is made that the applicant's appeal is frivolous or interposed for delay. No suggestion is made that the limitation was placed on the applicant's liberty because of doubt that he would respond to the judgment of the court upon final disposition of the case. Indeed, it has been conceded that the applicant is a man of his word.

The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court. It is never denied for the purpose of punishment, since the judgment of conviction cannot be executed while the matter is stayed pending appeal. All that remains is the Government's objection that applicant lacks a firm commitment for employment. Weighed against this is the applicant's sworn statement that, due to the nature of his work, he cannot obtain a final commitment until he personally confers with the appropriate officials in Japan. Further, he has had to remain with his family in Hawaii for more than fifteen months without employment, his financial resources are dwindling, and final disposition of the case may take months or even a year.

In my view, the balance lies in favor of granting the application. I will accordingly admit Dr. Reynolds to bail in the amount of $1,000 to be filed with and approved by the District Court, with permission to travel to and remain in Japan during the pendency of the proceedings.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

Tri-Continental Financial Corp., A.C. Allyn & Co., Inc., American Transportation Enterprises, Inc., Equitable Securities Corp., Carl M. Loeb, Rhoades & Co., The Robinson-Humphrey Co., Inc., and John W. Clarke & Co., Petitioners, *v.* United States of America, and The New York, New Haven & Hartford Railroad Co.	)	On Application for Stay of the Mandate of the Court of Appeals for the Second Circuit.

[March 2, 1960.]

MR. JUSTICE HARLAN, Associate Justice.

Petitioners ask me to stay the District Court's execution of the mandate of the Court of Appeals, pending the final action of this Court on their petition for certiorari. The Court of Appeals by refusing to stay its mandate has evidently determined that the orderly and expeditious conduct of this litigation, involving both the Government's suit and the so-called *Glenmore* case, will best be served by a prompt issuance of the District Court's order in the Government's suit. Petitioners' showing in support of their stay application falls short of convincing me that I would be justified in disturbing the Court of Appeals' denial of a stay. Petitioners' application is therefore denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

John O'Rourke, Joseph De Grandis, Frank De Forte, Ernest Zundel, Herbert Jacob, Eugene Jacob, Lawrence Gallo, Joseph Gallo, Norman J. Clark, Jr., Charles De Forte, Anthony Pafumi, also known as Angelo Pafumi, Kenneth Ciazza, Pasquale Catroppa, Phillip Losquadro and Vincent Losquadro, Petitioners,	)	On Application for Stay.
v.	)	
Manuel W. Levine, Individually, and as District Attorney of Nassau County, State of New York, and John M. Beckmann, Individually, and as Commissioner of Police of Nassau County, State of New York.	)	

[March 5 [Publisher's note: The "5" is handwritten.], 1960.]

MR. JUSTICE HARLAN, Associate Justice.

Relying on *Pugach* v. *Dollinger*, — F.2d —, decided on February 11, 1960, by a divided panel of the Court of Appeals for the Second Circuit, petitioners, defendants in a state criminal jury trial which has been in progress in the County Court of Nassau County, New York, since February 1, 1960, ask me to stay the use in that trial of certain wire tap evidence allegedly procured by state officers in violation of § 605 of the Federal Communications Act, 47 U.S.C. § 605. See *Benanti* v. *United States*, 355 U.S. 96.

An action to enjoin the use of such evidence is pending in the United States District Court for the Eastern District of New York. That court on February 29, 1960,

declined to grant a preliminary injunction and dissolved a temporary restraining order which it had theretofore issued, distinguishing the *Pugach* case on the ground that there the state trial had not, as here, already begun. On March 2, the Court of Appeals unanimously denied, without opinion, a stay pending appeal from the District Court's order. A stay is now requested of me pending certiorari to review that denial, or alternatively, pending determination of the appeal by the Court of Appeals.

Petitioners' application must be denied. Apart from my general practice as Circuit Justice not to disturb, except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it, it would require the most unequivocal showing of a right to immediate federal equitable relief to persuade me to interfere with the conduct of a criminal trial in a state court. In my opinion petitioners' ultimate right to such relief is far from clear. See *Stefanelli* v. *Minard*, 342 U.S. 117; *Schwartz* v. *Texas*, 344 U.S. 199; cf. *Benanti* v. *United States*, *supra*, at 101-102.

Denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

Alexander L. Guterma, Petitioner,	)	
v.	)	On Application for Bail.
United States of America.	)	

[March 18, 1960.]

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

The Court of Appeals and the District Court, upon substantially the same showing that is now made to me, have, after deliberate consideration of the matter, both denied bail pending appeal to the Court of Appeals, finding petitioner not to be a good bail risk. I find no basis in the papers submitted for disturbing this discretionary determination unanimously reached by four judges. I further note that the Court of Appeals has taken steps to assure that petitioner's appeal will be heard promptly.

Application denied.

SUPREME COURT OF THE UNITED STATES

Filip Yasa, Petitioner,	)	
v.	)	On Application for Stay
P. A. Esperdy, District Director, Immigration and Naturalization Service.	)	of Deportation.

[June 23, 1960.]

Memorandum of MR. JUSTICE HARLAN.

It appears from the papers that the issues in this matter are similar to those involved in *Roncevich, et al.* v. *Esperdy*, No. 955, this Term, now pending on petition for certiorari, and involving three other Yugoslav seamen, in which the Court of Appeals has granted a stay pending disposition of the petition for certiorari. The Government surmises that the granting of the stay in that case may have been based on the Court of Appeals' assumption "that the matter would be determined before the end of the Court term."

As I am advised by the Clerk of this Court that the *Roncevich* petition will not be acted on this Term, I think it only fair that the petitioner in the present case should be given an opportunity to make a further application for a stay to the Court of Appeals or a judge thereof, in light of that fact. Accordingly, I shall stay the petitioner's deportation pending the making and determination of such an application, on condition that the application is made by him on or before June 28, 1960.

SUPREME COURT OF THE UNITED STATES

Willard Uphaus,	)	
v.	)	On Motion for Bail.
Louis C. Wyman, Attorney General.	)	

[July 7, 1960.]

FRANKFURTER, Circuit Justice.

This is a stage in a proceeding that has three times been before this Court. 355 U.S. 16; 360 U.S. 72; 361 U.S. 856.

On January 5, 1956, defendant below was adjudged in civil contempt by the Superior Court of Merrimack County, New Hampshire, for refusal to produce certain documents before an investigating committee authorized by New Hampshire law to make the demand and ordered committed until he should purge himself of the contempt. Pending appeal to the Supreme Court of New Hampshire, the defendant was admitted to bail. The appeal failed in the Supreme Court of New Hampshire. 100 N.H. 436. The judgment of that court was affirmed by this Court on June 8, 1959, 360 U.S. 72, as follows:

> "We have concluded that the committee's demand for the documents was a legitimate one; it follows that the judgment of contempt for refusal to produce them is valid. We do not impugn appellant's good faith in the assertion of what he believed to be his rights. But three courts have disagreed with him in interpreting those rights. If appellant chooses to abide by the result of the adjudication and obey the order of New Hampshire's courts, he need not face jail. If, however, he continues to disobey, we find on this record no constitutional objection to the exercise of the traditional remedy of contempt to secure compliance."

In order to afford opportunity for the filing and disposition of a petition for rehearing, the enforcement of our judgment was stayed on June 26, 1959. A petition for rehearing was duly filed and denied by this Court on October 12, 1959, 361 U.S. 856. The matter then came before the Superior Court of Merrimack County and after further hearing that court on December 14, 1959, made the following order:

> "The rulings and findings of January 5, 1956 are affirmed, thus ruling that Willard Uphaus is found and adjudged in contempt of this Court. Willard Uphaus is ordered committed to the Merrimack County Jail and there to remain for one year from this date or until he purges himself of contempt, or until further order of this Court."

On review by the Supreme Court of New Hampshire, this judgment and committal order were affirmed. "The chief contention of the defendant," according to its opinion, was "that the Superior Court was without jurisdiction to find him in contempt because the statute authorizing the investigation expired on June 30, 1957, by express provision of chapter 197, Laws 1955." The New Hampshire Supreme Court rejected this contention on March 31, 1960, 102 N.H. 461; 159 A.2d 160. The precise scope of its holding was thus summarized by the Supreme Court of New Hampshire in its later opinion denying a motion by defendant for suspension of the order of committal of the Superior Court pending application to this Court for appeal of the New Hampshire decision:

> "Our opinion of March 31, 1960, did not turn upon any holding that RSA 588:8a [c. 178 of the New Hampshire Laws, 1957, claimed to be the enactment by virtue of which the earlier legislation, conferring the statutory authority for the contested order of committal, had expired] provided an extension of the legislative investigation first authorized in 1953.

> The plaintiff stands committed for refusal, while Laws 1955, *c*. 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a."

The contention which the New Hampshire Supreme Court thus rejected turns of course on the construction of New Hampshire law by the New Hampshire Supreme Court. Nor is there any suggestion that in construing the law of New Hampshire as it did, the New Hampshire Supreme Court placed an inexcusable construction upon New Hampshire enactments in order to evade or defeat a federal right.

The essential contention on which review is proposed to be sought here is thus a local, nonfederal question howsoever paraphrased in intricate, subtle terms. To be sure, the defendant also proposes to ask this Court to reconsider its decision of June 8, 1959, 360 U.S. 72. But such a petition for rehearing has already been before the Court and was duly disposed of on October 12, 1959, 361 U.S. 856. On neither ground do I feel warranted to stay enforcement of the judgment of the Supreme Court of New Hampshire.

The fact of the matter is that counsel for Uphaus candidly acknowledged the legal duty of Uphaus to obey the order sustained by the decision of this Court: "Your Honor please, it is not our purpose to deny that Willard Uphaus is under legal obligation to answer the question which has been propounded to him. We have explained to him his legal obligation, and he understands it. It is our contention that this is a real matter of conscience; that he feels bound to a higher obligation even than the direction of the court . . . . We are not contending at all that he is not obligated to answer the question."

Deep as one's sympathy may be with such regard for the dictates of conscience, as a judge I am bound by law and particularly by the legal authority of a Justice of this Court when asked to interfere with the judgment of a state court not fairly raising a substantial federal

question. Since I cannot bring myself to believe that a claim under the United States Constitution is truly raised in the circumstances of the case before me, I cannot stay the process of the New Hampshire Supreme Court. It is not inappropriate for me to recall the words of Mr. Justice Holmes in a case before him where, although lives were at stake, he said:

> "The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and cannot be disposed of by a summary statement that justice requires me to cut red tape and to intervene." 5 *The Sacco Vanzetti Case*, 5516. (August 20, 1927).

[Publisher's note: This opinion, attributed to Justice Frankfurter (see 1 Rapp xliii; 81 S. Ct. 25), was typed on a plain sheet of paper.]

THOMAS AKEL, Petitioner,	)	
v.	)	On Motion for Bail.
STATE OF NEW YORK	)	

This is a motion to fix bail pending a petition for certiorari to be filed seeking review of a judgment of conviction affirmed in the Court of Appeals of New York on March 24, 1960.

When a judge as solicitous as is Judge Stanley H. Fuld to safeguard the interests of defendants in criminal cases denies an application for bail pending a proposed petition for certiorari to this Court on a claim of a substantial federal right, one naturally attributes some solid ground for such denial. To me this is found in the opposing affidavit in which it is deposed that at no time in the course of this prosecution was a claim of a federal nature made, that the New York Court of Appeals did not certify that any federal question was presented to it, and that, although affirmance of the judgment of conviction was rendered on March 24 last, the remittitur below has not been amended so as to show that in fact a federal claim was considered and rejected by the New York Court of Appeals. While the petition for admission to bail claims that a federal question is to be raised by a proposed petition for certiorari, it does not allege that such a federal question had been raised before the New York Court of Appeals and was there denied. Nor is there any claim that the remittitur was amended so as to set forth that the Court of Appeals did in fact pass on the federal claim. Nor does the memorandum of the Court of Appeals affirming the conviction, 7 N.Y.2d 998, 999, in setting forth the arguments made by defendant Akel in that court, include the claim of a federal right.

In this state of the record before me I am compelled to deny bail pending the filing of a petition for certiorari.

_____

Associate Justice, Supreme Court
of the United States

July 19, 1960

SUPREME COURT OF THE UNITED STATES

NO. 171, MISC.—OCTOBER TERM, 1960.

Roger S. Bandy, Petitioner,	)	
v.	)	On Motion for Bail.
United States.	)	

[August 31, 1960.]

MR. JUSTICE DOUGLAS.

An application for bail pending disposition of the applicant's petition for certiorari was denied by my Brother WHITTAKER on July 29, 1960. Application was then made to me. In view of my Brother WHITTAKER'S denial I was most reluctant to take contrary action. Accordingly I asked that a response from the Solicitor General be requested. In a letter to the Clerk dated August 25, 1960, the Solicitor General stated:

> "It is my opinion that the petition and the record present substantial questions of law. For that reason, and in view of the fact that the petitioner has been incarcerated since June, 1959, the Government does not oppose the granting of bail in the suggested amount of $5,000."

My study of the case leads me to the same conclusion. The issues are ones on which there may well be a division of views when the merits are reached. But that is one test of whether substantial questions are presented. See *Herzog* v. *United States*, 75 S. Ct. 349. Accordingly I fix bail in the amount of a $5,000 bond to be approved by the U.S. District Court for the District of North Dakota or a judge thereof. Upon such approval this bond is to be filed with the Clerk of that Court.

SUPREME COURT OF THE UNITED STATES

NO. 171, MISC.—OCTOBER TERM, 1960.

Roger S. Bandy	)	Application for Reduction
v.	)	of Bail.
United States.	)	

[December 5, 1960.]

MR. JUSTICE DOUGLAS.

On a previous application, bail was granted conditioned on the filing of a sufficient bond in the amount of $5,000. *Bandy* v. *United States*, 81 S. Ct. 25. Now an application is made to me under Rule 46(a)(2) of the Federal Rules of Criminal Procedure for release on "personal recognizance" pending certiorari. The application recites that the petitioner is unable to give security for the prescribed bond.

The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt. Under Rule 46 a defendant has a *right* to be released on bail before trial, save in capital cases. Pending review of a judgment of conviction, release on bail may be allowed "unless it appears that the appeal is frivolous or taken for delay." Rule 46(a)(2). See 350 U.S. 1021.

This traditional right to freedom during trial and pending judicial review has to be squared with the possibility that the defendant may flee or hide himself. Bail is the device which we have borrowed to reconcile these conflicting interests. "The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court." *Reynolds* v. *United States*, 80 S. Ct. 30, 32. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.

But this theory is based on the assumption that a defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. *Griffin* v. *Illinois*, 351 U.S. 12. Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?

It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. *Stack* v. *Boyle*, 342 U.S. 1. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. See Foote, *Foreword: Comment on the New York Bail Study*, 106 U. of Pa. L. Rev. 685; Note, 106 U. of Pa. L. Rev. 693; Note, 102 U. of Pa. L. Rev. 1031. The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.

In the light of these considerations, I approach this application with the conviction that the right to release is heavily favored and that the requirement of security for the bond may, in a proper case, be dispensed with. Rule 46(d) indeed provides that "in proper cases no security need be given."[*] For there may be other deter-

[*] Preliminary drafts of the Rule bore the following note: "It should be noted that the subdivision expressly permits the court or commissioner to release defendants upon bond without requiring sureties or the deposit of cash or bonds or notes." Federal Rules of Criminal

rents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture.

Here, the Government has admitted that petitioner's appeal is not frivolous. It had no objection to release on a $5,000 bond. But it does oppose release on an unsecured bond. It contends that there is a substantial risk that petitioner would not comply with the conditions of his release. Its showing in this respect troubles me. But I do not reach a decision on the matter. The Court today holds that the Court of Appeals should hear the appeal. Hence I deny the application without prejudice to an application to the Court of Appeals or the District Court where, at a hearing on the matter, the facts can be better explored than at this distance.

Procedure, Preliminary Draft 186; see also Federal Rules of Criminal Procedure, Second Preliminary Draft 174. Although this language did not appear in the final draft of the Advisory Committee's notes, the language of the Rule was unchanged.

SUPREME COURT OF THE UNITED STATES

Fernandez, et al. *v*. United States.) Application of Certain
) Defendants for Bail.

[February 27, 1961.]

Memorandum of MR. JUSTICE HARLAN, Associate Justice.

These are four applications for release on bail. Nineteen defendants are now on trial before Judge Levet and a jury in the Southern District of New York for conspiracy to violate the federal narcotics laws.[1] The trial began on November 21, 1960, the Government rested on February 7, 1961, and the defense opened its side of the case on February 9. The trial is estimated to continue for another three weeks or more.

Before trial 15 of these defendants were admitted to bail in varying amounts, that of Fernandez, Loiocano, Galante, and Ormento, whose applications are now before me, being fixed at $20,000, $10,000, $100,000, and $106,000 respectively.[2]

On January 31, 1961, Judge Levet, on the Government's motion, revoked bail as to all 15 defendants. This determination, as reflected in the Judge's oral announcement of his decision and in an affidavit of the prosecutor later filed in the Court of Appeals, rested on a number of trial incidents. These included alleged threats made in the courtroom by three of the defendants to a government witness while he was in the process of identifying various defendants; alleged tampering with another government witness, not connected up, however, with any of the defendants; a trial interruption of about a week occasioned by injuries

[1] A total of 29 defendants were charged in the indictment, but as to 10 a trial proved impossible or impracticable.

[2] Four of the 19 defendants are incarcerated on convictions under other indictments.

to one of the defendants resulting from what the Government suspected was a contrived automobile accident; bail jumping on the eve of trial by one of the charged defendants, requiring his severance from the case; and a number of other episodes, resulting in trial interruptions, which the Government claimed were in truth delaying tactics on the part of other defendants.[3] In granting the Government's motion Judge Levet observed:

> "I am unable to discriminate between the defendants. I realize that counsel may be to some extent inconvenienced.[4] However, in order to insure the presence of the defendants at the trial I am, I believe, after balancing the situation, constrained to grant the motion of Mr. Tendy [the prosecutor], and I so do and direct the remand of all defendants now on bail."

Thereafter a unanimous panel of the Court of Appeals,[5] after a hearing, affirmed the District Court's order, and also denied separate motions of the appealing defendants for release on bail. The Court indicated its intention to file a written opinion in due course. These four applications to me followed.[6] While in other circumstances I would of course have awaited the opinion of the Court of Appeals, I have deemed it my duty to act promptly in a matter of this nature. See *Stack* v. *Boyle*, 342 U.S. 1, 4. In addition to the papers submitted by both sides, I have had the benefit of oral arguments by counsel for the petitioners, the Assistant United States Attorney in charge of the prosecution, and the First Assistant Solicitor General.

[3] Of the defendants now before me, only one, Ormento, was shown to have been personally involved in any of these incidents, and he only as to the first of them.
[4] No counsel has been denied access to his client whenever he wished.
[5] Consisting of Chief Judge Lumbard, and Judges Waterman and Madden, the latter sitting by designation from the Court of Claims.
[6] I draw no unfavorable implication from the failure of any other defendant to apply here, it being clear that the present applications are in the nature of "test" cases.

The petitioner's principal contention is, in effect, that the District Court's order revoking bail was void because, under Rule 46(a)(1) of the Federal Rules of Criminal Procedure,[7] a defendant in a noncapital case has an absolute right to be enlarged on bail prior to conviction. I believe that proposition is untenable. The only reported decision directly in point to which either side has called my attention is *United States* v. *Rice*, 192 F. 720, a 1911 decision of the District Court for the Southern District of New York, which upholds the existence of the power in question. Although that case was decided before the promulgation of the Rules of Criminal Procedure, I think its validity remains unaffected by anything in Rule 46(a)(1), the notes to which indicate that the Rule was not intended to work any substantial change in existing law.

I agree with the reasoning of the *Rice* case, and believe that, on principle, District Courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice. Certainly judges and lawyers in the Second Circuit have long assumed that such authority exists. I conclude that Judge Levet had the power to act as he did.

What has bothered me considerably, however, is whether that which has been shown here justified exercise of the power in this instance. Accepting, as I do, the Government's premise that revocation of bail during trial does not demand of the trial judge the same degree of particularized determination as to the basis for remanding each defendant that is required as to factors bearing upon a defendant's admission to bail before trial, cf. *Stack*

[7] Rule 46(a)(1) provides that before conviction a "person arrested for a capital [Publisher's note: "a capital" should be "an offense not punishable by death". *See Carlisle* v. *United States*, 517 U.S. 416, 432-33 (1996).] offense shall be admitted to bail," and that one "arrested for an offense punishable by death may be admitted to bail."

v. *Boyle, supra*, pp. 5-6; Criminal Rule 46(c). I do not think that such a remand may be ordered on an undiscriminating wholesale basis. Where, as here, remand is not to protective custody, but is premised on the defendants' interference with the orderly conduct of the trial, I think that a particular defendant may be remanded only on the basis of his own improper conduct or in circumstances where that of others has been of such import as reasonably to support the conclusion that a proper trial cannot be had without a remand of all defendants. Less than this does not, in my view, comport with the presumptive right of each defendant to remain on bail until conviction.

On these postulates, I must say that what has been shown on these applications falls short of leaving me free from doubt as to three of the petitioners. As to Ormento, I am clear that his remand should be allowed to stand on the basis of his alleged improper conduct with respect to the Government's witness Smith. As to Fernandez, Loiocano, and Galante, however, there has been no showing of any improper conduct on their part and the sufficiency of the circumstances justifying their remand are certainly highly debatable.

Nevertheless I have come to the conclusion that I should let the remand of these three defendants stand. The affidavits and other circumstances in this case at least provide some basis for a determination by the trial judge that the action which was appropriate as to Ormento was also warranted as to the other defendants. Having regard to the fact that the trial judge may have considered the relationship of the parties among themselves as it was developed on the Government's proof and that five of the defendants originally enlarged on bail were involved in these incidents, I do not feel that I can say that the trial judge here acted arbitrarily or capriciously in determining that the expeditious conclusion of the trial required the remand of all the defendants, the only basis on which I would be warranted in

interfering with the action of the trial judge in a matter of this kind. Several considerations have persuaded me to that course. The first is the unanimous affirmance of the trial court's action by the Court of Appeals, a factor which carries great weight. The second is that I cannot possibly have the same full "feel" of the atmosphere of this more than three months trial that the trial judge possesses. The third is that it seems to be agreed that since remand the trial has proceeded with a dispatch that it lacked before, even though it must be recognized that some of its past interruptions were occasioned by events which could in no way be laid to any of the defendants.

On balance I am unable to say that the action of the trial judge in remanding all defendants was arbitrary or capricious, which alone would justify my interfering in a matter of trial management such as this.

Accordingly, I deny these applications.

SUPREME COURT OF THE UNITED STATES

Roger S. Bandy	)	Applications for Reduction
v.	)	in Bail.
United States.	)	

[June 28, 1961.]

Opinion of MR. JUSTICE DOUGLAS.

I have before me several applications for applicant Bandy's release on "personal recognizance" pending disposition of petitions for certiorari which he has filed in this Court. He is an indigent; and neither he nor his family can raise the $5,000 previously set as security for his bail bond. Last December, on a previous application by Bandy for release on "personal recognizance," I considered at length the implications of denying release from detention solely because the person charged is without the money required by his bond:

"The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt. Under Rule 46 a defendant has a *right* to be released on bail before trial, save in capital cases. Pending review of a judgment of conviction, release on bail may be allowed 'unless it appears that the appeal is frivolous or taken for delay. [Publisher's note: There should be a single closing quotation mark here.] Rule 46(a)(2). See 350 U.S. 1021.

"This traditional right to freedom during trial and pending judicial review has to be squared with the possibility that the defendant may flee or hide himself. Bail is the device which we have borrowed to reconcile these conflicting interests. 'The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court.' *Reynolds* v. *United States*, 80 S. Ct. 30, 32. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.

"But this theory is based on the assumption that a defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. *Griffin* v. *Illinois*, 351 U.S. 12. Can an indigent be denied freedom, where a wealthy man would not, because be does not happen to have enough property to pledge for his freedom?

"It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. *Stack* v. *Boyle*, 342 U.S. 1. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. See Foote, Foreword: Comment on the New York Bail Study, 106 U. of Pa. L. Rev. 685; Note, 106 U. of Pa. L. Rev. 693; Note, 102 U. of Pa. L. Rev. 1031. The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.

"In the light of these considerations, I approach this application with the conviction that the right to release is heavily favored and that the requirement of security for the bond may, in a proper case, be dispensed with. Rule 46(d) indeed provides that 'in proper cases no security need be required.' For there may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of the modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture." *Bandy* v. *United States*, 81 S. Ct. 197-198, 5 L. Ed. 2d 218, 219-220.

Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on "personal recognizance" where other relevant factors make it reasonable to believe that he will comply with the orders of the Court. Therefore, I reject the Government's argument, in opposition to these applications, that Bandy is a "poor risk." That argument was not made when release was sought on a $5,000 bond. No reason is now put forward which makes it more relevant to release without security than to release on bond. The showing in this respect does not overcome our heavy presumptions favoring freedom.

Bandy has been held in jail for more than two years during criminal proceedings in the Eighth Circuit. His judgment of conviction was affirmed by the Court of Appeals for the Eighth Circuit, and in 364 U.S. 477, we granted certiorari and remanded the case to that Court for a hearing. So far as I know, the Court of Appeals has not yet disposed of the case on the remand. During the time in which these proceedings in the Eighth Circuit have continued, Bandy has not served any part of his sentence, but has been held in the county jail. He has here a petition for certiorari to the Court of Appeals for the Eighth Circuit in which he asks review of that court's denial of a reduction of bail. The Court in *Stack* v. *Boyle*, 342 U.S. 1, 4, reserved decision as to whether or not a single Justice or Circuit Justice had the power to fix bail pending disposition of a petition for certiorari of that kind. If the relief were granted by a single Justice, it would make the petition for certiorari moot. Therefore I think I should not exercise the power (which seems to be present from a literal reading of Rule 46(a)(2)) in a case of that kind until the Court has resolved the question.

That leaves me with the two petitions for certiorari which are pending here from the Court of Appeals for the Ninth Circuit. These concern collateral matters: the

refusal of the Court of Appeals for the Ninth Circuit to grant extraordinary relief by way of writs of habeas corpus and prohibition.

While Bandy's appeal was pending in the Eighth Circuit, he was, on his own motion, removed to the Idaho court by a writ of *habeas corpus ad prosequendum*. It appears that he is presently being held under that writ; and his trial will start July 24, 1961. Bandy sought *habeas corpus* after the trial judge refused a change of venue under 18 U.S.C. § 3237(b). The writ was denied on procedural grounds; for even if he were entitled to interlocutory review of the ruling, the relief granted would not be his release from custody.

The writ of prohibition was sought on the grounds that the Idaho prosecution should have been dismissed under Rule 48, Federal Rules of Criminal Procedure, because of unnecessary delay in returning an indictment and in bringing him to trial. It was denied without opinion. The delay of which Bandy complains is the period from February 1959, when a warrant was issued in Idaho for his arrest, and March 1961, when an indictment was returned. Bandy's whereabouts were not known until June 1959, and, since then, prosecution against him for charges of crimes in North Dakota has been actively pressed. This does not seem to be a case like *Taylor* v. *United States*, 238 F.2d 259, where federal authorities failed to take any steps to prosecute solely because the defendant was serving a sentence in the New York prison.

I have concluded that neither of these petitions for certiorari presents a substantial question.

Troubled as I am that a man can be held in jail for many months solely because he is an indigent, I must work within the limitations of Rule 46(a)(2).

Applications denied.

SUPREME COURT OF THE UNITED STATES

The Board of Education of the City School District of the City of New Rochelle, et al., Petitioners,	)	
v.	)	On Application for Stay of Mandate of the Court of Appeals for the Second Circuit.
Leslie Taylor and Kevin Taylor, minors, by Wilbert Taylor and Hallie Taylor, their parents and next friends, et al.	)	

[August 30, 1961.]

Memorandum of MR. JUSTICE BRENNAN.

Petitioners, the Board of Education and the Superintendent of Schools of the New Rochelle School District, ask for a stay of the mandate of the Court of Appeals for the Second Circuit pending the filing and determination of their petition for certiorari to review the judgment of that court filed August 2, 1961. That judgment affirmed, one judge dissenting, the decree of the District Court for the Southern District of New York which, in a class action brought by eleven Negro children through their parents on behalf of all Negro children situated in the Lincoln Elementary School District in New Rochelle, enjoined the petitioners from requiring such children to be registered in the Lincoln Elementary School and required the petitioners to register them in a public elementary school that is racially desegregated. In affirming the District Court, the Court of Appeals stated: "We see no occasion to grant a stay of the decree; the Board is called upon for no new public expenditures and will suffer no loss, while the school children will be prejudiced by what will soon be necessarily a year's delay at this crucial period in their education." — F.2d —. On August

17, 1961, petitioners applied to the Court of Appeals for a stay of the mandate pending application to this Court for a writ of certiorari. This application was denied, the Court saying: "The majority of the panel which decided the appeal having stated that a stay should not be granted, and no new facts supporting a stay pending application for certiorari having been presented, the motion for such a stay is denied."

The petitioners thereupon filed the instant application on August 25, 1961. I heard oral argument on August 29, 1961. On such an application, since the Court of Appeals refused the stay ". . . this Court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari. . . . ." *Magnum Co.* v. *Coty*, 262 U.S. 159, 164. The petitioners have not, in my judgment, carried this heavy burden.

I am not persuaded that this case will bring before the Court any question presenting a reasonable likelihood of satisfying the standards governing review on certiorari as guided by Rule 19 and the practice of the Court. The petitioners argue in their formal application that there is presented a question "as to whether there is an obligation on a school district whenever the Negro attendance in a school reaches a high percentage to abandon a rule of law based on residence and to establish a racial quota system." However, the District Court found that the petitioners had deliberately created and purposely maintained the Lincoln Elementary School as a racially segregated school. 191 F. Supp. 181. Upon its own examination of the evidence the Court of Appeals concluded that "this crucial finding is . . . supported by the record." — F.2d —. Therefore, the question which the petitioners claim is presented by the case (as to which question, and its importance, I intimate no view) could be before this Court only if the Court overturned the factual findings concurred in by the two lower courts. The

petitioners have not suggested substantial reasons for believing that these findings would be held to be clearly erroneous.

Nor have the petitioners advanced any consideration not already tendered to the Court of Appeals to indicate a "decided balance of convenience," *Magnum Co.* v. *Coty*, *supra*, p. 164, in their favor requiring the suspension of the mandate pending our determination of the petition for certiorari. It is not denied that nothing of substance was advanced to me which was not advanced to the Court of Appeals.

In short, no showing is made which would justify my granting this application. ". . . It is clear that the . . . Court of Appeals gave full consideration to . . . similar motion[s], and with much more knowledge than we can have denied [them]. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter." *Magnum Co.* v. *Coty*, *supra*, p. 164.

The application is

Denied.

SUPREME COURT OF THE UNITED STATES

Meyer Harris Cohen, also known as Michael "Mickey" Cohen, *v.* United States of America.	))))	Application for Bail.

[October 11, 1961.]

MR. JUSTICE DOUGLAS, Circuit Justice.

The applicant has been convicted of income tax violations and sentenced to fifteen years in prison and a fine of $30,000. The District Court, though stating that Cohen's appeal presented questions "not free from doubt," denied him bail and the Court of Appeals did likewise, Judge Orr dissenting.[1] This application is made to me as Circuit Justice.

Prior to conviction, Cohen was out on bail and made no effort to escape. He did help secrete Candy Barr in Mexico while her case (*Phillips* v. *Texas*, 361 U.S. 839) was pending here. But, she subsequently returned to this country and is serving her sentence. That episode is emphasized here as showing applicant's proclivity for evasive conduct; and it is pointed out that one who "jumps bail" and leaves this country for Mexico is not extraditable under existing treaties.

I am of course greatly influenced by the action of the District Court and the Court of Appeals in denying bail. The rulings of two courts are highly persuasive. Yet no matter what the decision of the other courts, I have, under Rule 46(a)(2), an obligation to discharge that none

[1] Judge Orr stated:

"I am unable to agree that there is reasonable ground to apprehend that the defendant-appellant might not respond for execution of the judgment if affirmed. I would therefore admit the defendant-appellant to bail in the sum of $100,000."

other can assume for me. *Herzog* v. *United States*, 75 Sup. Ct. 349, 350, 99 L. Ed. 1299, 1300.

I am persuaded to grant bail[2] in the amount of $100,000 for the following reasons:

(1) The questions on appeal have been treated by both lower courts as substantial.

(2) The applicant has been out on bail for some months and has never failed to respond.

(3) There has been no delay in prosecuting the appeal. It will, indeed, be heard November 10, 1961.

(4) Bail is "basic to our system of law." *Herzog* v. *United States*, *supra*. Though it is not available as a matter of right in every case, and though it may at times be abused, equal justice under law requires that bail not be denied even a notorious law-violator if he has a substantial question to be resolved on appeal.

(5) An affidavit by applicant's sister says she and her husband will pledge as security their business which is their only source of income. An affidavit by applicant's mother says she will pledge as security a trust deed on her home. I cannot easily assume that an applicant, though he enjoys a poor reputation as a citizen, would cause his closest relatives to suffer vast financial loss by "skipping bail."

There are delays in the law beyond the power of the parties or the judges who hear the case to control. If the appeal is not heard and decided by December 1, 1961, this question of bail may be reconsidered on motion of the Government. If the case on appeal is decided adversely

[2] On October 21, 1960, I denied bail to this applicant because he indicated he was filing a petition for certiorari to review the action of the lower courts in denying bail. My denial was peremptory in form because, had I granted bail, the petition for certiorari would have become moot and the parties would have been denied an opportunity to obtain a ruling on the question. No such petition has been filed in connection with the present application.

to applicant, the order granting bail terminates forthwith, but without prejudice to a new application in case a petition of certiorari is sought in this Court.

Bail is granted in the sum of $100,000, the form and nature of the bond to be settled and approved by the District Court and filed with the Clerk thereof.

SUPREME COURT OF THE UNITED STATES

	)	On Application for Bail
Charles Tomaiolo, Petitioner,	)	Pending Appeal to the
v.	)	United States Court of
United States of America, Respondent.	)	Appeal for the Second
	)	Circuit.

[Publisher's note: "Court of Appeal" should be "Court of Appeals" above.]

[November 21, 1961.]

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

This application for bail in a criminal appeal pending in the Second Circuit, although addressed to the Court, has been referred to me as Circuit Justice, following normal procedure. My practice in matters of this kind, in light of the many demands upon the time of the Court, is to refer them to the Court only when they are of such general importance or difficulty as to make that course advisable. This application is not of that character.

In October 1956 petitioner was convicted in the Southern District of New York upon three counts of an indictment charging him, under 18 U.S.C. §§ 371, 2113, with conspiracy to rob a bank, with the substantive offense of robbing the same bank, and with putting in jeopardy the lives of the bank employees during the actual course of the robbery. Although finding "ample evidence" of guilt, the Court of Appeals reversed because of the cumulative effect of various trial errors. 249 F.2d 683.

Upon a second trial petitioner was again convicted of conspiracy, but the jury disagreed as to the two substantive charges. A third trial on the substantive counts resulted in petitioner again being convicted on those charges. The Court of Appeals again reversed on those counts, 280 F.2d 411, this time for error in the trial court's application of 18 U.S.C. § 3500, the so-called

Jencks statute. For the same reason, it later reversed the second conspiracy conviction. 286 F.2d 568.

After reversal on the substantive counts, but before reversal of the conspiracy count, this Court denied certiorari to review the Court of Appeals' refusal of writs of mandamus and prohibition to prevent a fourth trial of petitioner on the substantive counts (and a third trial on the conspiracy count). 365 U.S. 807. The fourth trial resulted in petitioner's conviction on both the conspiracy and substantive robbery counts, the "jeopardizing" charge being dismissed by the trial court. Petitioner was sentenced to an aggregate imprisonment of 20 years. The District Court and the Court of Appeals have both denied bail pending appeal.

Throughout the some 4½ years that intervened between the sentence on his first conviction (November 15, 1956) and the sentence on his fourth conviction (April 14, 1961), petitioner was incarcerated in New York under a 1941 25-year *state* sentence for armed robbery. He had been released on parole from that sentence in March 1950, but was reimprisoned in January 1956 for violation of the terms of the parole. In that interval, according to the Government, he committed the robbery which was the subject matter of the federal indictment.

It appears from counsel's affidavit in support of this application that petitioner's pending appeal rests basically on three claims: (1) that petitioner was denied a speedy trial in violation of the Sixth Amendment, in that his fourth trial, which began on March 14, 1961, commenced more than 5 years after the return of the indictment on February 21, 1956; (2) that it was unfair to try petitioner again after three earlier convictions had been set aside for errors in the prosecution; (3) that the fourth trial itself was unfair because of numerous alleged trial errors.

A fair assessment of these claims cannot be made on what appears in the papers before me. As to the pro-

priety of bringing petitioner to trial a fourth time, I should need to know more of the justifying circumstances relied on by the Government,[*] and of the circumstances relied on by petitioner as showing prejudice to the conduct of his defense. As to the fairness of the fourth trial itself, an examination of the trial record, which has not been furnished me, would be required.

Further inquiry on these matters is not, however, necessary to a disposition of this application. The District Court's opinion denying bail rested solely on a finding that petitioner was a poor bail risk. That sufficed to justify denial of bail under Rule 46 of the Federal Rules of Criminal Procedure, entirely apart from any question as to the frivolity or non-frivolity of petitioner's grounds for appeal. See *Ward* v. *United States*, 76 S. Ct. 1063. The Court of Appeals' affirmance, without opinion, must be taken as having gone on the same ground. These concurrent findings, not controverted or weakened by anything shown in petitioner's present papers, require my rejection of this application. *Ward* v. *United States*, *supra*, at 1066; cf., *Di Candia* v. *United States*, 78 S. Ct. 361, 362. In so concluding, I assume that petitioner will of course be afforded opportunity for a prompt disposition of his appeal.

Application denied.

[*] In his Brief in Opposition to the earlier petition for certiorari involving petitioner's right to prevent the fourth trial, the Solicitor General stated: "Of course, in any case in which a defendant has been tried three times a question arises as to the fairness and propriety of subjecting him to another trial for the same offenses. Aware of that fact, the Government will make certain, before proceeding again against petitioner, that it will be in the interest of justice to do so. In deciding whether to proceed further, many factors and circumstances beyond the bare record are to be considered, none of which is appropriate for evaluation in a mandamus proceeding such as this." In his Memorandum in Opposition to the present application, the Solicitor General states: "Following a reappraisal of all the facts and circumstances . . . it was decided to retry petitioner."

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1961.

Commonwealth Oil Refining Co., Inc., Petitioner,	)	On Application for Stay of Mandate of United States Court of Appeals for the Second Circuit.
v.	)	
The Lummus Co., Respondent.	)	

[December 14, 1961.]

Memorandum of MR. JUSTICE HARLAN, Associate Justice.

Having studied the papers of both sides, I am satisfied that the Court of Appeals' denial of a stay of its mandate should not be disturbed.

In so concluding I have taken into account the circumstance that the Court of Appeals may not have had before it the full exposition of Commonwealth's grounds for certiorari which has been furnished me on this application. However, this further factor does not persuade me to a different assessment of the equities than that made by the Court of Appeals.

As I see it, all that is presently at issue is whether Lummus should be restrained from taking appropriate steps to set in motion the machinery for arbitration and from pursuing other matters affecting the possible future conduct of the arbitration, pending this Court's action on Commonwealth's proposed petition for certiorari. I do not understand that Lummus threatens or proposes to proceed, within that interval, beyond such matters. Should Commonwealth's petition for certiorari be granted, and should Lummus nevertheless undertake to press forward with the arbitration hearings before this Court's determination of the writ, an application for a stay in such circumstances would present considerations quite different from those obtaining at this juncture.

Commonwealth's application for a stay is denied, my limited stay order of December 12, 1961, is hereby vacated, and the Court of Appeals' mandate may issue forthwith.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1961.

Railway Express Agency, Inc.	)	
v.	)	On Application for Stay
United States of America, Interstate Commerce Commission and United Parcel Service, Inc.	)	Pending Appeal.

[January 17, 1962.]

Memorandum of MR. JUSTICE HARLAN, Associate Justice.

This is an application by Railway Express Agency, Inc., for a stay of an order of the Interstate Commerce Commission, pending review in this Court of the refusal of a three-judge District Court to issue an interlocutory injunction to restrain the enforcement of the Commission's order. A similar stay application has been denied by the District Court. Since the three-judge court was duly impaneled pursuant to 28 U.S.C. § 2325, there is no doubt as to this Court's jurisdiction to entertain the applicant's appeal from the District Court's order denying interlocutory relief. 28 U.S.C. § 1253.

The Commission's order authorized United Parcel Service, Inc., to conduct certain motor common carrier operations over irregular routes in various mid-western States. Another order, issued more than three months before the United Parcel application was granted, denied a certificate to Railway Express on its application for unlimited authority to operate as an irregular route motor common carrier in the same area. Railway Express instituted this action to have both orders vacated. It claimed that the Commission had improperly refused to consolidate for hearing the Railway Express application with that of United Parcel, as is required in any instance of

"mutually exclusive" applications under this Court's decision in *Ashbacker Radio Co.* v. *Federal Communications Comm'n*, 326 U.S. 327. It also contended that United Parcel was proposing to engage in regular route carriage under its irregular route license, in violation of the standards established by the Commission and approved by the courts. See *Brady Transfer & Storage Co.*, 47 M.C.C. 23; *Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, aff'd, 335 U.S. 875.

The District Court unanimously denied the application for a preliminary injunction. It held that the procedure followed by the Commission did not deprive Railway Express of a fair hearing since, among other things, the Railway Express application involved different issues from those presented in the United Parcel proceeding, and the request for consolidation was untimely. The District Court also rejected Railway Express' alternative contention as "not . . . sufficiently impressive to warrant any temporary injunction" because other remedies were available if United Parcel were to exceed its authorization. The present stay application amounts to a request that I order the *status quo* maintained pending this Court's review of the denial of the temporary injunction.

Without passing on the applicant's two underlying claims, I consider the issues tendered on the applicant's appeal not sufficiently substantial to warrant the relief now asked of me. The central issue which will be presented on the appeal is whether the three-judge District Court abused its discretion in denying interlocutory relief. On the papers submitted to me, I think it doubtful, to say the least, whether the applicant will be able to satisfy the strong showing that must be made to justify reversal of the District Court's discretionary action. "An order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion." *United Fuel Gas Co.* v. *Public Service Comm'n*, 278 U.S. 322, 326. See also *Prendergast* v. *New York*

Tel. Co., 262 U.S. 43, 50-51; *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331, 338.

Furthermore, the application discloses no irreparable injury to Railway Express because of the Commission's order other than a possible loss of trade that might be incurred if United Parcel were permitted to proceed under its authorization. In balancing this injury against the losses that might be suffered by United Parcel were it not permitted to begin its operations as of the effective date of its filed rates, the District Court evidently held that the equities, affected as they must necessarily be by its estimate of the merits of Railway Express' claims, lay with United Parcel. Since that determination was well within the lower court's discretion, the present application must be

Denied.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1961.

Stickney	)	
v.	)	Application for Stay.
Texas.	)	

[January 18, 1962.]

MR. JUSTICE DOUGLAS.

This is an application for a stay of execution in a state criminal case, pending the disposition of a petition for certiorari. 28 U.S.C. § 2101(f). Other phases of this case have been here before. Several of my Brethren in prior instances have denied a stay; and my Brother BLACK has denied one in this instance. It is therefore with great deference that I approach the problem presented in this application.

My doubts that a federal question had been tendered in this state *habeas corpus* proceeding have been resolved. The question now tendered was not raised in petitioner's earlier petitions for certiorari. 363 U.S. 807; 365 U.S. 888. That question is a bothersome one and is a cousin to the one presented in *Mooney* v. *Holohan*, 294 U.S. 103, 112, holding that the knowing use of perjured testimony by a prosecutor made a state judgment of conviction open to collateral attack by *habeas corpus*. No such charge is made here. But it is alleged that the prosecution suppressed evidence favorable to the accused, a suppression that Judge Briggs of the Texas District Court held to be prejudicial. While the Texas Court of Criminal Appeals disagreed with Judge Briggs, my doubts remain. The Third Circuit has held that such a charge, if substantiated, makes the state judgment vulnerable to collateral attack by *habeas corpus*. *United States* v. *Baldi*, 195 F.2d 815, 820; *United States* v. *Dye*, 221 F.2d 763, 765. We have not yet decided that question. Hence, I have concluded that this prisoner should not die until this Court has an opportunity to act on his petition. Accordingly, I have granted a stay of execution in the customary form.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1961.

Cohen	)	
v.	)	Application for bail.
United States.	)	

[January 30, 1962.]

MR. JUSTICE DOUGLAS.

This is an application for bail pending certiorari. While I am reluctant to disturb the judgment of my Brethren below, my responsibility to make an independent examination of the issues to be raised in the petition for certiorari cannot be delegated.

Rule 46(a)(2) of the Rules of Criminal Procedure, as recently amended, provides:

> "Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. . . ."

In my opinion at least one of the questions to be presented is substantial. Petitioner contends, *inter alia*, that he has been twice convicted for what is in substance the same offense. Count 4 of the present indictment charges that:

> "commencing on or about the 10th day of October, 1955 . . . Cohen did wilfully [Publisher's note: This is the only place in this opinion where the word preceding this note is not spelled "willfully".] and knowingly attempt to evade and defeat the payment of income taxes then due and owing . . . for the years 1945 to 1950, inclusive, and duly assessed against him as follows: . . . ."

In 1951 petitioner was convicted on three counts of an indictment charging a willful attempt to evade the income tax for the years 1946, 1947, and 1948 by filing false returns. 201 F.2d 386. Although Cohen con-

tended that he was again being prosecuted for the evasion of the very taxes for which he was previously prosecuted and convicted, the Court of Appeals concluded that the applicable statute created two separate crimes, one being a willful and knowing attempt to evade the *payment* of the tax, the other a willful and knowing attempt to evade and defeat the *tax*. This conclusion was drawn from the disjunctive language of § 7201 of the Internal Revenue Code of 1954, 26 U.S.C. § 7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . ."

The court below concedes that the validity of its ruling on double jeopardy has never before been passed upon.

In view of the Fifth Amendment's guarantee against twice being placed in jeopardy for the same offense, and the novelty of the question to be presented, I feel this case raises a "substantial question" within the meaning of the test enunciated in my opinion in *Herzog* v. *United States*, 75 Sup. Ct. 349, decided under Rule 46(a)(2) before its recent amendment. Without expressing an opinion on the merits of this or the other questions presented by petitioner, I conclude that he has satisfied the requirements of Rule 46(a)(2) and accordingly admit him to bail in the amount of $100,000 pending disposition of his petition for certiorari, a suitable bond to be posted with and approved by the District Court.[*]

[*] See my earlier opinion in this case. *Cohen* v. *United States*, 82 Sup. Ct. 8.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1961.

Cohen	)	Application for Clarification
v.	)	of Order Admitting
United States.	)	Petitioner to Bail.

[February 14, 1962.]

MR. JUSTICE DOUGLAS.

On January 30, 1962, I signed an order admitting Meyer Harris Cohen to bail "upon the posting of a good and sufficient bail bond in the amount of one hundred thousand dollars ($100,000)"; and I accompanied that order with an opinion. — Sup. Ct. —. The order provided the bond was to be posted with and approved by the United States District Court for the Southern District of California. The purpose of the bond was to insure applicant's appearance and submission to the judgment of this Court upon disposition of his petition for certiorari. *Reynolds* v. *United States*, 80 S. Ct. 30, 32. It was not to provide security for the fine, the legality of which the applicant is seeking to have reviewed.

In rejecting the bond, however, the District Court said that "of the $100,000 bail it be provided that $30,000 thereof be applicable to the payment of the fine. . . ." Thus, it conditioned bail upon the payment of the fine, apparently in the belief that Rule 38(a)(3)[1] permitted

[1] Rule 38(a)(3) provides:

"*Fine.* A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets."

it to do so. In support of that action, the Government argues that the instant case involves two commitments—"one under the imprisonment portion of the sentence, the other under the committed fine portion of the sentence." It argues that a bail bond would be sufficient to enlarge the applicant under the first commitment, but would not operate to enlarge him under the latter, "for he is to stand committed until the $30,000 fine is paid, and the fine cannot be stayed by a bail bond."

These arguments fall short of the mark. In either case, the applicant is committed to jail pending review of his conviction. Rule 46(a)(2) of the Federal Rules of Criminal Procedure provides that "bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay." If the defendant is admitted to bail, Rule 46(c) states that the "amount thereof shall be such as in the judgment of the . . . court . . . will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." It does not say that security for a "committed fine"[2] (the type of fine imposed on this applicant) may, or must, also be required. Rule 38 applies only where an accused seeks a stay of execution pending appeal. It does not purport to specify the criteria for determining when, and on what terms, bail shall be granted.

In its prior briefs in opposition to these applications for bail, the Government did not suggest that Rule 38 was at all applicable. When raised earlier in the District Court, on October 16, 1961, Judge Yankwich noted that

[2] A "committed fine" is one where the judgment of conviction directs imprisonment until the fine or penalty imposed is paid. In such case "the issue of execution on the judgment shall not discharge the defendant from imprisonment until the amount of the judgment is paid." 18 U.S.C. § 3565.

on at least three other occasions the Court of Appeals had rejected contentions similar to those now being made. *Connley* v. *United States*, 41 F.2d 49, 51 (C.A. 9th Cir. 1930); *Cain* v. *United States*, 148 F.2d 182 (C.A. 9th Cir. 1945); *United States* v. *Bleker and Robinson*, 7 F.R.D. 271, 281-282. See also *United States* v. *Fujimoto*, 14 F.R.D. 448 (Hawaii).

I agree with the court in the *Cain* case that "a requirement . . . that the bail bond should contain a condition that the bond should also operate as a supersedeas to a judgment for the payment of a fine, made the bail required excessive." 148 F.2d, at 182. The bail fixed would become "excessive" in the sense of the Eighth Amendment because it would be used to serve a purpose for which bail was not intended. The purpose of a bail bond is to insure that the accused will reappear at a given time by requiring another to assume personal responsibility for him, on penalty of forfeiture of property. See 4 Blackstone, Commentaries 380 (Hammond ed. 1890). As stated by Mr. Justice Butler in *United States* v. *Motlow*, 10 F.2d 657, 662 (C.A. 7th Cir. 1926), the federal law reflects the purpose that "no one shall be required to suffer imprisonment for crime before the determination of his case in the court of last resort." There are exceptions, but not where the issue presented to the appellate court is not "frivolous," nor taken for delay. As Mr. Justice Butler stated:

> "Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable, in view of the decisions of the Supreme Court, then petitioners should be admitted to bail." *Id*., p. 662.

The imposition of an additional burden upon the bondsman, and upon the accused, would frustrate the purposes for which bail was historically intended, and would require an odious exception to the otherwise salutory provisions of Rule 46.

For these reasons there should be eliminated from the order of the District Court those provisions conditioning bail on the giving of security for the payment of the "committed" fines.

SUPREME COURT OF THE UNITED STATES

Nathan Jackson,	)	On Application for Stay
v.	)	of Execution.
State of New York.	)	

[March 6, 1962.]

Memorandum of MR. JUSTICE HARLAN, Associate Justice.

This application for a stay of execution of a death sentence is not made in aid of the pursuit of any remedy sought in the lower federal courts following this Court's denial, on December 18, 1961, of an earlier petition for certiorari (368 U.S. 949), but solely in order to afford petitioner an opportunity to file a further petition for certiorari to review the New York Court of Appeals' denial, on February 22, 1962, of a motion for reargument of petitioner's appeal in that court.

It is clear from the moving papers now before me that the matters proposed to be tendered in such further petition raise no federal question, and there is therefore no reasonable basis for thinking that certiorari might be granted. In these circumstances I consider it my duty to deny a stay.

SUPREME COURT OF THE UNITED STATES

In re Philip Bart	)	Application for Stay
	)	of Commitment.

[March 13, 1962.]

Mr. CHIEF JUSTICE WARREN.

On February 28, 1962, the petitioner refused to answer certain questions in a grand jury investigation after he had been ordered to do so by a United States District Court acting on an application by the United States Attorney for the District of Columbia under the provisions of the Immunity Act of 1954. 18 U.S.C. § 3486(c). The District Court ordered the petitioner committed to jail until such time as he answered questions and produced evidence before the grand jury, said term of commitment not to exceed six months. The petitioner appealed to the Court of Appeals for the District of Columbia Circuit and was granted a temporary stay of commitment until the Court acted upon the petitioner's motion for a stay pending appeal and the Government's motions to dismiss the appeal and/or to affirm the action of the District Court. On March 6, 1962, the Court of Appeals denied the Government's motions, accelerated the appeal and set the case for argument upon full briefs for the first week in April. However, the Court denied petitioner's motion for a stay of commitment pending disposition of his appeal. The petitioner filed a similar application with me, in my capacity as Circuit Justice, on March 8, 1962, and the Government has filed a memorandum in opposition.

Yesterday, March 12, 1962, in a substantially identical and associated case arising out of the same grand jury investigation, the same Court of Appeals granted an application for a stay of commitment "until further order of the court." *In re Jackson*, No. 16,917. In view of these facts and the likelihood that the normal course

of appellate review might otherwise cause the case to become moot by the petitioner serving the maximum term of commitment before he could obtain a full review of his claims, I order that the petitioner's stay application be granted pending final action by the Court of Appeals, and that the petitioner be admitted to bail in the amount of $1,500.

SUPREME COURT OF THE UNITED STATES

Francis Henry Bloeth, Petitioner,	)	On Application for Stay
v.	)	of Execution.
State of New York.	)	

[March 19, 1962.]

MR. JUSTICE HARLAN, Associate Justice.

A stay of execution of the sentence of death imposed on this petitioner is sought pending the filing and disposition of a petition for certiorari to review an order of the New York Court of Appeals denying, without opinion, a second motion for reargument of its judgment of affirmance. See 9 N.Y.2d 211; 9 N.Y.2d 823; denial of second motion for reargument not yet officially reported. An earlier petition for certiorari to review this conviction was denied by this Court on October 9, 1961. 368 U.S. 868.

It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion for reargument.[1] In such circumstances it is clear that this Court would be without jurisdiction to consider them. *E.g.*, *Herndon* v. *Georgia*, 295 U.S. 441, 443; *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128. Moreover, the first of these questions was presented and involved in the

[1] The two questions are:

1. "The confession admitted in evidence against [petitioner] was procured in violation of his right to be represented by competent counsel devoted solely to the interests of his client."

2. "The confession obtained while the [petitioner] was being illegally detained is inadmissible under the Fourth Amendment to the Constitution of the United States."

disposition of the earlier petition for certiorari, whether or not that question had been raised in the Court of Appeals.[2] In my view the second proposition does not in any event present a substantial federal question.

Application denied.

[2] In its opposition to that petition the State claimed that such question had not been raised in the Court of Appeals. In his opposing affidavit on the present application, the assistant district attorney states that the question "was initially raised on the oral argument" of the appeal.

SUPREME COURT OF THE UNITED STATES

Joseph Sica,	)	
v.	)	Application for Bail.
United States.	)	

[March 19, 1962.]

MR. JUSTICE DOUGLAS, Circuit Justice.

The applicant, Joseph Sica, was one of the four other defendants who, along with Paul John ("Frankie") Carbo, were found guilty by a jury of having violated the interstate extortion statute, 18 U.S.C. § 875(b), the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951, and the general conspiracy statute, 18 U.S.C. § 371. See *Carbo* v. *United States*, — S. Ct. —. Sica was sentenced to 20 years' imprisonment and fined $10,000.

Prior to trial he had been enlarged on bail in the amount of $25,000, later reduced to $2,500. He was committed to custody during the course of the trial, however, and denied bail on appeal for the same reasons as Carbo. He now makes application to me as Circuit Justice for bail pending appeal to the Ninth Circuit.

The applicant proposes to raise substantially the same questions on appeal as the other defendants. See *Carbo* v. *United States*, *supra*. The Government does not contend the issues on appeal are frivolous, but argues, as it did below, that there is a substantial danger of flight and of harm to witnesses should bail be granted.

Upon consideration of the briefs submitted by counsel and the oral arguments presented at a hearing held March 5, 1962, I have concluded that neither ground justifies denying this applicant bail. He has a home, a wife, a family, and a business in the Los Angeles area. There is evidence that he is suffering from a serious illness (a prolapsed ulcerated internal hemorrhoid) which may soon require hospitalization. While this applicant has a record

of violence, I have not yet seen a substantial difference between his participation in the conspiracy and that of his co-defendant "Blinky" Palermo, who was readmitted to bail pending appeal. Neither could be classified as the moving force behind the conspiracy. Nor has either as much to lose as Carbo, the alleged head of the extortion ring and an older man, facing a longer sentence. See *Carbo* v. *United States*, *supra*.

Although there is some indication that Sica participated in the threats to Leonard Blakely alias Jack Leonard, the principal government witness, the evidence tends to show that he was acting at Carbo's bidding. Moreover, the trial court seems to have recognized this difference in Sica's participation, admitting him to bail prior to trial at a much lower amount ($2,500) than that required of Carbo ($100,000). Safety of the witnesses is an important consideration in a case where they have been threatened and injured in person and property. But I cannot conclude that the present danger from Sica is such as to justify his incarceration pending appeal, while Palermo goes free.

Therefore, an order will be prepared directing that Joseph Sica be admitted to bail in the amount of $50,000, a good and sufficient bond to be approved by the District Court. Bail shall be conditioned on his remaining in the Southern District of California and personally reporting each day, excluding Sundays and holidays, to the United States Marshal (or a designated deputy) for that District. Should the applicant leave that District or fail so to report, he shall be deemed to have forfeited the bond. If his physical condition necessitates hospitalization, Sica shall give prompt notice thereof to the Marshal and shall continue to report each day in a manner satisfactory to the District Court.

SUPREME COURT OF THE UNITED STATES

Paul John Carbo,	)	
v.	)	Application for Bail.
United States.	)	

[March 19, 1962.]

MR. JUSTICE DOUGLAS, Circuit Justice.

The applicant, Paul John Carbo, seeks bail pending an appeal of his conviction to the Ninth Circuit Court of Appeals.[1] He and four others were convicted of having violated the Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951, the interstate extortion statute, 18 U.S.C. § 875(b), and the general conspiracy statute, 18 U.S.C. § 371. The applicant was sentenced to 25 years' imprisonment and fined $10,000. The others received lesser sentences.

Prior to the trial, the applicant had been granted bail in the amount of $100,000. His bail and that of the other defendants were revoked at the beginning of the trial in the interest of maintaining orderly proceedings and assuring their presence. On appeal from the revocation, the Court of Appeals reversed on the ground that the trial judge's statement of his supporting reasons did not provide a substantial foundation for denying bail. The Court of Appeals noted there was nothing to indicate that the District Court had taken alleged threats to witnesses into consideration. *Carbo* v. *United States*, 288 F.2d 282, 286.

At a subsequent hearing, evidence was introduced to show that the Government's principal witness, one Leonard Blakely, alias Jack Leonard, had received in

[1] The case was here on a procedural aspect in *Carbo* v. *United States*, 364 U.S. 611; and certiorari was denied in *Carbo* v. *United States*, 365 U.S. 861, on one phase of the bail issue.

excess of 200 threatening telephone calls, and that on one occasion he had been severely beaten while entering his garage. He did not see his assailant. Bail was again denied by the District Court. The Court of Appeals affirmed, holding there was enough evidence to show that the commitment of Carbo and the other defendants was necessary for the safety of this witness.[2] *Carbo* v. *United States*, 288 F.2d 686.

After the defendants' convictions and the denial of their motions for a new trial, they applied for bail pending appeal. The District Court again refused to grant bail to some of them, saying that as to Carbo and defendant, Joseph Sica, there was a strong likelihood of flight and of further threats and even harm to the Government's witnesses. The Court of Appeals rejected the contention that harm to witnesses was a justification for denying bail on appeal and remanded to the District

[2] The Court of Appeals said, pp. 689-690:

"As to the telephoned threats, there was no showing that appellants were personally responsible—yet the threats were plainly made in their behalf. It was not shown that any of the appellants had anything to do with the carrying of the pipe in the car. But the ominous circumstances of the proximity of the car to Blakely's home immediately before the trial and the driver's connection with at least one of the appellants fit in too nicely with the telephoned threats to be disregarded.

"Blakely's statement that he was assaulted in his garage may or may not be ultimately disproved, and in any event he was unable to identify his assailants. But for the purposes of this proceeding the trial court was entitled to conclude that such an attack may have occurred and that its nature and timing was such as to indicate a tie-in with telephoned threats Blakely had received.

"The influx of racketeers and the gathering of associates of appellants in the courtroom would not, standing alone, warrant revocation of bail. But these circumstances tend to round out a picture of tension and danger which the trial court was entitled to consider.

"Blakely's testimony concerning pre-indictment threats was not referenced to his status as a witness at this trial. But it nevertheless gave substance to the Government's view that appellants were capable of forcing their way by threats and violence. . . ."

Court for "further consideration of the question whether bail can be so fixed as to provide an effective deterrent to flight." *Carbo* v. *United States*, — F.2d —, —. The District Court held that it could not. The Court of Appeals agreed. *Carbo* v. *United States*, — F.2d —.

The present application urges that Carbo is a good bail risk and that the questions on appeal are substantial. As to the latter contention, there would seem to be little disagreement in the courts below or on the part of the Government. Carbo contends that the case against him was built upon the "underworld reputations" of the defendants, and that evidence of a bad reputation was initially put in issue by the prosecution. In *Michelson* v. *United States*, 335 U.S. 469, 475, we referred to the "common-law tradition" that disallows resort by the prosecution "to any kind of evidence of a defendant's evil character to establish a probability of his guilt." We said

> "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id*., at 475, 476.

The Government admitted below that the propriety of using reputation evidence as part of the prosecution's case appeared to be a question of "first impression."

The applicant contends on appear [Publisher's note: "appear" should be "appeal".] that, *inter alia*, evidence obtained by means of an induction coil attached to the telephone of a prospective victim, unknown to the caller, should have been suppressed as illegally obtained, either under the Fourth Amendment or under § 605 of the Federal Communications Act, 47 U.S.C. § 605, or both.

The Government does not challenge the alleged substantiality of at least some of the issues on appeal. Instead, it again urges the possibility of flight and of harm to witnesses as the considerations which should control the granting of bail in the instant case.

The right to bail is an important part of our criminal procedure (*Stack* v. *Boyle*, 342 U.S. 1), and is not to be denied merely because of the community's sentiment against the accused nor because of an evil reputation. See, *e.g.*, *Cohen* v. *United States*, — Sup. Ct. —; — Sup. Ct. —; — Sup. Ct. —. While a bond is usually required to insure the defendant's appearance, "There may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of the modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture." *Bandy* v. *United States*, 81 Sup. Ct. 197, 198.

Here the Court of Appeals denied bail pending appeal on the ground

> ". . . that there is a substantial likelihood that [Carbo] would become a fugitive from justice if admitted to bail and that no amount of bail which [Carbo] could produce would provide an effective deterrent." *Carbo* v. *United States*, — F.2d —, —.

The Court of Appeals concluded that pending trial, bail could be denied on that ground:

> "When a criminal trial is in actual progress there must be an accommodation between the right of a defendant to be free on bail and the inherent power of the court to provide for the orderly progress of the trial. Where release on bail poses no substantial threat to the orderly progress of the trial, the imperatives of the Constitution and the rule require that the right to preconviction bail be honored . . . .
>
> "If, however, there is reason to believe that a trial actually in progress may be disrupted or impeded by the flight of the defendant, or by his activities in or out of the courtroom during the trial, the fair administration of justice is itself jeopardized. In that event the court may give precedence to its inherent

> power and revoke bail if necessary for the duration of the trial." *Carbo* v. *United States*, — F.2d —, —.

This justification, it said, ceased when the trial was concluded:

> "There was from that point no proceeding pending before the district court whose orderly progress warranted protection in this manner. It was then error of law for the district judge in the present matter to deny bail pending appeal upon this ground." *Id*., at —.

The Court of Appeals may have felt that Rule 46 in referring to the nature of the questions presented and the amount of security sufficient to insure the appearance of the accused set forth the only relevant criteria for allowing bail on appeal.

Rule 46 of the Federal Rules of Criminal Procedure makes bail mandatory *only* before the conviction and when the offense charged is not a capital one. Rule 46(a)(l) provides:

> "A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

Rule 46(a)(2) provides that "Bail *may be allowed* pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay." (Italics added.)

The use of "may" in Rule 46(a)(2) and "shall" in Rule 46(a)(l) marks an important difference. It would seem that while bail normally should be granted pending review where the appeal is not "frivolous" nor "taken for delay" (see, *e.g.*, *Herzog* v. *United States*, 75 Sup. Ct. 349; *Ellis* v. *United States*, 79 Sup. Ct. 428) there still is discretion to deny it. The likelihood of the applicant fleeing the jurisdiction is a relevant consideration, no matter

how substantial the question on appeal may be. See *Cohen* v. *United States*, decided October 11, 1961, — Sup. Ct. —. Yet the risk of the applicant using release on bail as the occasion to escape does not, in my view, exhaust the conditions that may warrant denial of bail. That was intimated by my Brother FRANKFURTER in *Ward* v. *United States*, 76 Sup. Ct. 1063, 1065; and that view obtains in at least some of the Circuits.[3] *United States* v. *Williams*, 253 F.2d 144 (C.A. 7th Cir.); *Esters* v. *United States*, 255 F.2d 63 (C.A. 8th Cir.); *United States* v. *Wilson*, 257 F.2d 796 (C.A. 2d Cir.); *Rhodes* v. *United States*, 275 F.2d 78 (C.A. 4th Cir.); *Christoffel* v. *United States*, 196 F.2d 560 (C.A. D.C. Cir.).

One convicted of rape or murder is not necessarily turned loose on bail pending review, even though substantial questions were presented in the appeal. If, for example [Publisher's note: There should be a comma here.] the safety of the community would be jeopardized,[4] it would be irresponsible judicial action to grant bail. As stated in *United States* v. *Otis*, 18 F.2d 689, 690. "Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and there is danger that if he is given his freedom he will commit another of like character."

Judge Clark of the Second Circuit denied bail though the appeal was not frivolous and though there was no showing of a likelihood of escape:

> "The pattern of [the defendant's] career to date indicates that whenever released he will soon be selling heroin again and that, if he does remain available

[3] For cases antedating the present Rule 46 see *United States* v. *St. John*, 254 F. 794; *In re Williams*, 294 F. 996, 998; *United States* v. *Otis*, 18 F.2d 689.

[4] That is one factor explicitly included in Rule 33(f) of the Rules of the Circuit Court of Appeals for the District of Columbia.

The likelihood that a defendant, if released pending review, would commit another offense has frequently motivated Federal Judges in denying bail. See 25 Geo. Wash. L. Rev. 693, 700-701; 39 Marq. L. Rev. 275, 278-282; 32 N.Y.U. L. Rev. 557, 568-574.

> for apprehension at all times, he may easily develop obligations to other criminal prosecuting authorities which will conflict with his obligations herein." *United States* v. *Wilson*, *supra*, p. 797.

The likelihood of repetition of the acts charged as unlawful is at times too restrictive a standard. Where the crimes charged are of a political nature, special care is needed lest denial of bail create an inequality in the law between those despised and the rest of the community. As state [Publisher's note: "state" should be "stated".] in *Christoffel* v. *United States*, *supra*, at 567:

> ". . . even if it be assumed that Christoffel is a Communist and is actively engaged in Communist party affairs this, without more, is not a proper ground for denial of bail. The decision of a court must be without respect to persons and without respect to the political affiliations or activities of a party except as the same are shown to be relevant and material to an issue before the court."

As Mr. Justice Jackson stated in *Williamson* v. *United States*, 184 F.2d 280, 283:

> "It is not contended that these utterances, in themselves, are criminal. The Communist Party has not been outlawed either by legislation, nor by these convictions, and its right to publish the Daily Worker is not questioned. Nor were defendants indicted under that part of the statute which prohibits publication of matter intended to cause overthrow and destruction of government. Since the paper may lawfully be issued, certainly its publishers or contributors may comment critically on the Government's conduct of foreign affairs. If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirection. I think courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free. Indirect punishment of free press

> or free speech is as evil as direct punishment of it. . . . If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition which I am sure the Department itself would deplore."

And bail was allowed even in the most heinous case [Publisher's note: There should be a comma here.] *viz*., treason, where the questions are not frivolous and no problem of further public injury was involved. See *D'Aquino* v. *United States*, 180 F.2d 271.[5]

Moreover where the constitutionality of an Act is at issue, the likelihood that the applicant, if released on bail, might repeat the offense is not a proper circumstance to take into consideration, as my Brother HARLAN noted in *Roth* v. *United States*, 77 Sup. Ct. 17, 19. For it is deep-seated in our law that one may take his chances and defy a legislative act on constitutional grounds. *Thomas* v. *Collins*, 323 U.S. 516; *Staub* v. *City of Baxley*, 355 U.S. 313.

Like considerations make me hesitant to deny bail on the ground that threats to witnesses prior to the trial may be repeated, if the applicant is admitted to bail pending appeal. Denial of bail should not be used as an indirect way of making a man shoulder a sentence for unproved crimes.

Yet what Judge Boldt said at the hearing on bail pending review bothers me greatly. He concluded that there was "a strong likelihood that witnesses in this case will be further molested and threatened and perhaps even

[5] In that case no issue of the likelihood of the repetition of the treasonable conduct was in issue. The applicant was Tokyo Rose; her crime was broadcasting anti-American propaganda to American troops during World War II; and at the time of her bail application hostilities had ceased and Japan had surrendered.

actually harmed." In my view the safety of witnesses, should a new trial be ordered, has relevancy to the bail issue.[6] Cf. *United States* v. *Allied Stevedoring Corp.*, 143

[6] In an affidavit introduced at the hearing to consider the feasibility of bail pending the trial, witness Blakely stated he had received phone calls of the following nature:

(1) "Well, they got Frankie today. I hope you're satisfied. Now we'll get you."

(2) "You'll never make it through the summer. You'll never live through the summer. You're a no good doublecrosser."

(3) "You could have had a lot of dough. Now you'll get a box."

(4) "Why don't you smarten up. You've got three kids. Anything can happen."

(5) "This is your last chance. Have youse ever seen a broad's guts splattered? Well just keep spilling yours and youse will see what they look like. Remember you can run but you can't hide."

(6) "Have you ever seen a broad spread eagle. Well, if you testify you'll see it. Remember this on the stand."

(7) "You'll never make it."

(8) "Drop dead stoolie."

(9) "You know what happens to rotten stoolies."

His wife filed the following affidavit:

"That I have received well over 200 telephone calls and upon picking up the telephone the party on the other end has disconnected; that on occasions the telephone has rung throughout the night; that said telephone calls commenced on or about May 20, 1959 and continued until our telephone was disconnected in about September of 1959;

"That my husband has advised me of threats which he has received over the telephone both at our residence and at his place of business; that on occasion I have observed him on the telephone while threats were being communicated to him and have seen the color completely drain from his face to a point where he would look physically ill for hours thereafter;

"That on several occasions when I answered the telephone a voice on the other end would ask for JACKIE and when I told them he was not home, the person on the other end would simply hang up. On one occasion the caller told me to tell JACKIE to 'straighten out and he won't get hurt.'

"That I became so upset over the repeated threats and harassment of my husband and myself as a result of his cooperation with law enforcement authorities that I decided to visit relatives in the vicinity

F. Supp. 947, 952; *Fernandez* v. *United States*, 81 Sup. Ct. 642. Keeping a defendant in custody during the trial "to render fruitless" any attempt to interefere [Publisher's note: "interefere" should be "interfere".] with witnesses or jurors (*United States* v. *Rice*, 192 F. 721, 722) may, in the extreme or unusual case, justify denial of bail.

The necessity of providing for the orderly progress of a criminal prosecution does not cease with the trial, but continues until such time as the case is finally disposed of. There seems to me in this case to be a likelihood that a new trial may be ordered, and the former witnesses may be required to testify again. Danger to them on a new trial might be of great, or greater, than [Publisher's note: The simplest ways to make sense of this sentence are to either (a) delete "of great, or" and the comma after "greater", or (b) replace "of great, or greater, than" with "as great as, or greater than,".] it was on the first trial, since the accused now knows the nature and extent of the adverse testimony likely to be given at a second trial.

As Mr. Justice Jackson said in *Williamson* v. *United States*, *supra*, p. 284:

> "All experience with litigation teaches that existence of a substantial question about a conviction implies a more than negligible risk of reversal."

Here the Government's principal witness, Leonard Blakely, alias Jack Leonard, was in jeopardy while Carbo was out on bail. Should anything happen to Blakely now and a new trial be ordered, the prosecution would suffer. I have no doubt that the repeated threats of injury to him and his family have been communicated by persons with an interest in the final outcome of the case. At the oral hearing held on the present appli-

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of Philadelphia, Pennsylvania; that I attempted at that time to seek out one of the defendants and expressed my willingness to leave the country with my husband if he and his co-defendants would agree to leave us alone and to give us a sum of money sufficient to enable us to live outside the United States;

"That on June 3, 1959, I found my husband unconscious in the garage of our home. There was a broken chlorine bottle near his head and the lights which were on shortly before he returned had been turned off; that I believe and therefore allege that he was assaulted by persons unknown."

cation, government counsel stated, and it was not denied, that someone had even set fire to Blakely's house and had throw [Publisher's note: "throw" should be "thrown".] dye into his swimming pool while the case was pending in the courts below. The threats he received were of such nature as to make witnesses, already difficult to obtain, frightened and timid. The totality of the threats and past injuries to Blakely indicates something more than just a coincidence and presages real danger to the witness and his family in the future, should he be required to testify again.

The applicant, moreover, is the alleged ringleader of the conspiracy, and stands to lose the most should he be faced with a new trial. Now 57 years old, he is facing for the first time a term of imprisonment that may well approximate a life sentence. He has a criminal record (*Carbo* v. *United States*, *supra*, p. 612) extending as far back as 1924. Among other things, he was indicted for first degree murder in New York and pleaded guilty to first degree manslaughter for which he received a sentence. I was advised on oral argument that in 1942, he was tried for murder in California. The case ended with a hung jury. Carbo was not retried, due, in part, to the disappearance of one witness and the death of another.

After study of the briefs and consideration of the arguments of counsel, it is my reluctant conclusion that there is a substantial probability of danger to witnesses should the applicant be granted bail; that this danger is relevant to the propriety of granting bail on appeal, since a new trial may be ordered; and that in this case bail should be denied in the public interest.

Bail denied.

SUPREME COURT OF THE UNITED STATES

Richard E. Leigh, Applicant,	)	
v.	)	On Application for Bail.
United States.	)	

[May 11, 1962.]

MR. CHIEF JUSTICE WARREN.

This is an application for bail pending disposition of the applicant's case in the Court of Appeals for the District of Columbia Circuit. While I am reluctant to disturb the judgments of the courts below in denying such relief, I am, by Fed. Rule Crim. Proc. 46(a)(2), required to make an independent examination of the case.

On October 3, 1960, an indictment was filed in the United States District Court for the District of Columbia charging the applicant in four counts with forgery and four counts with uttering a false check. He stood trial by jury on December 15, 1960, Judge Joseph R. Jackson, a retired Judge of the United States Court of Customs and Patent Appeals, presiding by designation pursuant to 28 U.S.C. § 294(d). Applicant was found guilty on all counts, and he has been confined since the date of his conviction. On January 6, 1961, he was sentenced to concurrent prison terms of three to nine years on each count. He filed a timely motion for leave to appeal *in forma pauperis*, which motion was denied by the trial judge on January 23, 1961. However, Judge Jackson did not certify that applicant's appeal was not sought in "good faith." See 28 U.S.C. § 1915(a). Applicant then sought leave to appeal *in forma pauperis* from the Court of Appeals. That court appointed counsel to represent applicant, and ordered a transcript of the trial proceedings at the expense of the United States. Appointed counsel filed a memorandum in support of applicant's

request for leave to appeal *in forma pauperis* on July 28, 1961. That memorandum raised two questions which counsel contended were of sufficient merit to warrant allowing applicant to proceed *in forma pauperis*. The first question related to the admission into evidence at applicant's trial of a small card from the files of the District of Columbia Police. A space had been provided on the card for listing previous offenses. In the space were handwritten the words "Arrested for checks, California, Nevada, New York." These words were alleged to have been written by the applicant while in police custody. The card was introduced into evidence as an exemplar of applicant's handwriting, and was thus used to identify the handwriting on the allegedly forged checks. Applicant's trial counsel objected to the admission of the card on the ground that it was prejudicial. The objection was overruled. No instruction was given limiting the jury's consideration of this exhibit. Counsel argued that it was error to permit the jury to receive the information of applicant's unrelated prior arrests through the device of a handwriting sample. The second question challenged the validity of applicant's conviction in the light of Judge Jackson's participation. It was applicant's claim that a retired Judge of the Court of Customs and Patent Appeals could not constitutionally be assigned to preside over trials of felony indictments in the District of Columbia.

On September 1, 1961, the Court of Appeals ordered applicant's motion for leave to appeal held in abeyance pending this Court's decision in *Lurk* v. *United States*, No. 481, 1961 Term, presenting the same question as the second of applicant's contentions. No further action on applicant's motion for leave to appeal has been taken by the Court of Appeals since September.

In February 1962 applicant applied to the trial judge for bail pending appeal. Although unopposed by the United States Attorney, the application was denied. A similar application was then made to the Court of Appeals, which also denied bail, one judge dissenting.

The applicant renews his request for bail here, and asks that it be set at $170—the face amount of the four checks that underlie his present conviction. The Solicitor General concedes that the issues applicant has sought to raise on his appeal are not frivolous. Nor does he allege that applicant is appealing for purposes of delay. See Fed. Rule Crim. Proc. 46(a)(2). He opposes bail on the grounds that between 1950 and 1958 appellant has sustained four convictions for offenses comparable to the ones for which he has now been convicted, and, further, that as these convictions were returned in widely separated parts of the country, applicant appears to be a "drifter" who may well repeat his crime if released on bail.

The rule authorizing bail pending appeal establishes two criteria by which an application for such relief is to be judged: whether the appeal is not frivolous or whether it is not taken for delay. If these standards are met, bail should ordinarily be granted for, as has been pointed out, bail is "basic to our system of law." *Herzog* v. *United States*, 75 S. Ct. 349, 351. It is to be denied only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release. Compare *Cohen* v. *United States*, 82 S. Ct. 8; *Ellis* v. *United States*, 79 S. Ct. 428, with *Carbo* v. *United States*, 82 S. Ct. 662; *Ward* v. *United States*, 76 S. Ct. 1063. Cf. *Stack* v. *Boyle*, 342 U.S. 1, 5-6.

On the facts of this case, bail should be granted. The applicant has been continuously incarcerated since December 1960 on a conviction yet to be reviewed by the Court of Appeals. This Court's decision in *Lurk* v. *United States*, 366 U.S. 712, rendered prior to the date on which applicant's counsel filed his memorandum in support of the motion for leave to appeal in the Court of Appeals, was clear precedent that this applicant's motion to proceed *in forma pauperis* should have been granted on the second issue raised in counsel's memorandum. Our decisions in *Ellis* v. *United States*, 356 U.S.

674, and *Coppedge* v. *United States*, 369 U.S. —, also indicate that the applicant's motion for leave to appeal *in forma pauperis* should have been granted long ago as to the first issue. There is no adequate reason why initial appellate review of applicant's case should not have been completed by this time.

It seems clear that this appeal is not frivolous, and that such delays as have occurred can hardly be attributed to applicant. The Government does not contend that there is a likelihood that applicant will flee the jurisdiction. The crimes for which he has been convicted are nonviolent. Nevertheless, as the offenses for which he was convicted are serious felonies, bail should be more substantial than that proposed by applicant. In the light of all the circumstances of the case, bail will be set at $1,000, pending completion of review of applicant's case by the Court of Appeals, the bond to be settled by the District Court and filed with its Clerk.

SUPREME COURT OF THE UNITED STATES

Arrow Transportation Company et al., Applicants, *v.* Southern Railway Company et al.	))))	Application for Extension of Temporary Restraining Order.

[August 17, 1962.]

MR. JUSTICE BLACK.

This is an application for extension of a temporary restraining order granted by United States Circuit Judge Gewin on August 3, 1962, and temporarily continued by Circuit Judges Rives and Gewin on August 8, 1962. While applicants also ask in the alternative for "injunctive relief," this need not be considered because of my conclusion that they are entitled to have the temporary restraining order extended.

The complaint in the District Court was for an injunction to restrain the defendant railroads from putting into effect a reduction in railway rates for carrying grain in interstate commerce. The reduction was published in a tariff schedule filed with the Commission under authority of § 6(1) of the Interstate Commerce Act, 49 U.S.C. § 6(1). Under § 15(7) of that act the Commission can suspend such new rates for a maximum seven months' period pending hearings on their lawfulness, but if hearings are not completed within seven months the proposed rates "shall go into effect at the end of such period . . . ." Finding that the rates here involved might be "unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy," the Commission suspended the proposed tariffs but failed to complete its hearings and enter a final order as to the lawfulness of the rates within the seven month period.

After a brief voluntary suspension by the railroads, the plaintiffs brought this proceeding in the District Court for an injunction, invoking jurisdiction under 28 U.S.C. § 1331, the general federal question provision, § 1332, the diversity provision, and § 1337, which grants jurisdiction for cases arising under federal acts regulating commerce or protecting it against restraints and monopolies. The complaint shows diversity and federal questions and also charges the defendant railroads with conspiracy to violate the antitrust laws and with seeking to reduce rates so drastically that they would be below costs of transportation and would in some instances be below combined railroad-barge rates even if barges carried the grain substantially or wholly free. This latter consequence, it was charged, violates the policy declared by Congress and several times sustained by this Court designed to secure for barge transportation all inherent advantages it has which enable it to transport commodities cheaper than railroads. See note preceding 49 U.S.C. § 1; *Dixie Carriers, Inc.*, v. *United States*, 351 U.S. 56 (1956); *I.C.C.* v. *Mechling*, 330 U.S. 567 (1947). See also *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959).

The District Judge, after hearings and arguments, found that there was grave danger that putting the new rates into effect would inflict irreparable damages on the plaintiffs and that "the ends of justice would be best served by granting temporary injunctive relief for a limited period of time . . . ." He nevertheless refused to grant relief on the ground that he was without jurisdiction "to enjoin or suspend the effectiveness of rates published by common carriers and subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates." This lack of jurisdiction was apparently based on the court's interpretation of § 15(7) as not only depriving the Commission of jurisdiction to suspend rates longer than seven months but also as completely ousting

the jurisdiction of a federal court to grant any kind of relief from such rates, however unlawful, unreasonable, and unjust they might be and however deliberately destructive of barge competition.

The Court of Appeals refused to grant an injunction pending appeal by the plaintiffs because it believed that there was "no reasonable prospect" that the plaintiffs would "ultimately be successful" in reversing the District Court's holding that it had no jurisdiction. The Court of Appeals nevertheless continued Judge Gewin's temporary restraining order to give plaintiffs the opportunity to seek relief from this Court "or a Justice thereof."

I am not so sure as the judges of the Court of Appeals that plaintiffs are bound to fail in obtaining review by this Court of the crucial question of the District Court's jurisdiction. This Court has never decided that § 15(7) must be given an interpretation which so substantially destroys the jurisdiction of federal courts to restrain unlawful conduct which inflicts irreparable damage. The consequence is that I think the plaintiffs are entitled to have the temporary restraining order issued by the Court of Appeals extended in order to maintain the *status quo* pending final action in this Court on the question of the District Court's jurisdiction.

The railroads insist that plaintiffs should be required to give a bond of more than a half million dollars to compensate the railroads for loss of profits from anticipated grain traffic. Plaintiffs object on many grounds, one of which is that to require such a bond, which they claim they cannot make, would itself amount to a denial of relief. Both the District Court and the Court of Appeals refused to require plaintiffs to make a bond to compensate for anticipated losses in traffic. The Court of Appeals provided only that plaintiffs file a bond in the sum of $10,000.00, conditioned for the payment of such costs, expenses, and damages as might be incurred or suffered by any of the defendants in giving notice and information of its order but not including loss of revenue resulting

from the issuance of its order. I agree that this bond is sufficient. If for any reason the present bond is deemed to have expired or if it would not protect against the costs resulting from this extension, the parties are free to ask the Court of Appeals to require and approve a new bond in lieu of the old one, to be filed with the clerk of that court, containing the same conditions, stipulations, and limitations.

The temporary restraining order of the Court of Appeals is hereby extended, pending the presentation to this Court of a petition for writ of certiorari to review the decision of the Court of Appeals denying an injunction pending appeal, and pending final consideration and action by this Court on that petition. Plaintiffs are directed to file such petition within 30 days from the date of this order.

[Publisher's note: "COPY" is stamped on the original, and the opinion is typed on the Clerk's stationery.]

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D.C.

RE: J. TRUMAN BIDWELL v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Memorandum

"This matter has received an unusual amount of attention from the lower courts, the ultimate relief now sought by petitioner having been twice denied by the Court of Appeals and by two District Judges. I am unable to find in the resourceful presentation of this application any substantial ground for belief that the unanimous determination of these five Judges might be deemed vulnerable by this Court. As a basis for the issuance of mandamus or other extraordinary writ the papers before me are not convincing. And the availability of such a remedy in these circumstances is itself highly questionable. See Parr v. United States, 351 U.S. 513, 520-521; cf., e.g., Cobbledick v. United States, 309 U.S. 323. I conclude that a stay of the trial now set for September 17 in the District Court would not be warranted.

"Application Denied. J.M.H.

August 23, 1962."

SUPREME COURT OF THE UNITED STATES

James H. Meredith, Movant,	)	Motion for vacation of
v.	)	stay orders.
Charles Dickson Fair, et al.	)	

[September 10, 1962.]

MR. JUSTICE BLACK.

This is a motion asking me to vacate orders of Judge Ben F. Cameron, a judge of the Court of Appeals for the Fifth Circuit, which purport to stay the execution and enforcement of mandates of that court. The Court of Appeals held that movant Meredith, a Negro, had been denied admission to the University of Mississippi solely because of his race. The court granted injunctive relief which has the effect of requiring the admission of Meredith to the University of Mississippi at the opening of its new academic year commencing in September 1962.

Judge Cameron, however, stayed the mandate of the Court of Appeals pending action by this Court on a petition for writ of certiorari by respondents in this motion. Later the Court of Appeals vacated the stay on the grounds (1) that Judge Cameron's action came too late, and (2) that his stay had been "improvidently granted." Judge Cameron nevertheless later issued three other stays, claiming that his first stay had rendered any further proceedings of the Court of Appeals "void and beyond the jurisdiction" of that court. The Court of Appeals has treated all of Judge Cameron's stays as ineffective and void.

The respondents, trustees and officials of the University, who were enjoined by the Court of Appeals, have filed a petition for a writ of certiorari, and the movant Meredith has waived his right to file a brief in opposition to that petition. In this situation I am satisfied that the Court

has jurisdiction and power under 28 U.S.C. § 1651 to take such steps as are necessary to preserve the rights of the parties pending final determination of the cause and that 28 U.S.C. § 2101(f) and Rule 51 of the Rules of this Court give the same jurisdiction and power to me as a single Justice of this Court.

I agree with the Court of Appeals that the stays issued in this case can only work further delay and injury to movant while immediate enforcement of the judgment can do no appreciable harm to the University or the other respondents. I further agree with the Court of Appeals that there is very little likelihood that this Court will grant certiorari to review the judgment of the Court of Appeals, which essentially involves only factual issues. I am therefore of the opinion that all the stays issued by Judge Cameron should be and they are hereby vacated, that the judgment and mandate of the Court of Appeals should be obeyed, and that pending final action by this Court on the petition for certiorari the respondents should be and they are hereby enjoined from taking any steps to prevent enforcement of the Court of Appeals' judgment and mandate.

Although convinced that I have the power to act alone in this matter, I have submitted it to each of my Brethren, and I am authorized to state that each of them agrees that the case is properly before this Court, that I have power to act, and that under the circumstances I should exercise that power as I have done here.

SUPREME COURT OF THE UNITED STATES

Arrow Transportation Co. et al.,	)	Application for Stay of
Applicants,	)	Mandate or for Reduction of
v.	)	Bond.
Southern Railway Co. et al.	)	

[September 26, 1962.]

MR. JUSTICE BLACK.

This is another episode in a long fight between railroads and barge lines, a fight which has taken place in Congress, the courts, and the Interstate Commerce Commission. The railroads have been charging that barge lines receive unfair subsidies; the barge lines have been charging that railroads, by the use of cut-throat tariff rates, are attempting to deprive barge lines of their "inherent advantages" in violation of the Interstate Commerce Act and to drive them off American waters as competitors of railroads. This Court has had previous occasion to protect barges from unlawful rates, even where those rates had received approval of the Interstate Commerce Commission. See *Dixie Carriers, Inc.*, v. *United States*, 351 U.S. 56 (1956), and *I.C.C.* v. *Mechling*, 330 U.S. 567 (1947). See also *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959). In the present controversy the railroads filed with the Interstate Commerce Commission a tariff providing for a drastic reduction in rates, which the Commission found might be "unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy." Acting on these findings the Commission suspended the rates under authority of § 15(7) of the Interstate Commerce Act pending hearings on the lawfulness of the rates. Section 15(7) further

provides that if the hearings are not finished within seven months, the proposed rates "shall go into effect at the end of such period." The Commission did not complete its hearings within the seven-months' period.

The railroads threatened to put their proposed rates into effect, and the applicants filed an action in the United States District Court for the Northern District of Alabama to enjoin them from doing so. The District Judge, although finding that there was grave danger that the new rates would inflict irreparable damages and that "the ends of justice would be best served by granting temporary injunctive relief for a limited period of time . . . ," nevertheless held that he had no jurisdiction to grant relief. The Court of Appeals for the Fifth Circuit refused to grant an injunction pending the hearing of an appeal from the District Court on the sole ground that it believed there was no "reasonable prospect" that the applicants would be successful in reversing the District Court's holding of no jurisdiction. At the same time the Court of Appeals continued a previously issued temporary restraining order to afford opportunity for the barge lines to seek relief from this Court "or a Justice thereof."

On August 17, 1962, after submission of briefs and arguments, I entered an order, explained by an opinion, extending the temporary restraining order of the Court of Appeals in order to maintain the status quo of the parties pending final action in this Court on the question of the District Court's jurisdiction. In that opinion I rejected arguments of the railroads that the barge lines be required to give a bond of more than a half-million dollars to compensate the railroads for damages, including loss of profits from anticipated grain traffic. I held that the bond previously filed in the Court of Appeals was "sufficient." That bond was limited in amount to $10,000 and in coverage to "the payment of such costs, expenses, and damages as might be incurred or suffered by any of the defendants [respondents herein] in giving notice and information of

its order but not including loss of revenue resulting from the issuance of its order."

After my order was entered the Court of Appeals decided the appeal of the barge lines and affirmed the District Court's holding that it was without jurisdiction. The Court of Appeals, upon motion of the railroads, then proceeded to require that the barge lines give a bond for $150,000 pending action by this Court upon a petition for certiorari from the decision of the Court of Appeals holding that the District Court was without jurisdiction to grant relief. The court required that the bond contain not only a promise to pay costs as provided in the original bond but also to pay for loss of profits. Such lost profits are the kind of damages expressly excluded by my order of August 17. Therefore, the bond required to be filed by tomorrow, September 27, is fifteen times more in amount and far wider in coverage than the bond provided for by either my restraining order or the original Court of Appeals' restraining order.

The barge lines have filed an application to stay the issuance of the Court of Appeals' mandate of affirmance or, in the alternative, to reduce the bond required by that court. I am still of opinion that the bond I fixed is correct, under the circumstances of this case. The barge lines say that there is grave doubt whether they can make bond for $150,000 and that, if they cannot, the status quo will be destroyed. The record does not refute this contention. If anything, the need for a bond now is less than it was when my original order was entered because more than a month has passed, the parties are that much closer to a decision in this Court on the pending petition for certiorari, and they should also be closer to a final determination by the Commission as to the lawfulness of the rates. The latest decision of the Court of Appeals does not alter these considerations. Both orders of the Court of Appeals, the first denying an injunction pending appeal, and the last denying a permanent injunction, rest

on precisely the same ground, namely, that the District Court had no jurisdiction to grant relief. It was to maintain the status quo of the parties pending final determination of that question of jurisdiction that I granted the restraining order of August 17 on the terms that I did. Nothing in the record persuades me that those terms and limitations should be changed.

It is therefore ordered that the temporary restraining order of the Court of Appeals of August 3 be extended pending final disposition in this Court of all matters in all the proceedings in this case or cases and that the railroads, their officers, agents, and attorneys, be restrained during that time from attempting in any way to apply the proposed new railroad rates and tariffs. It is further ordered that any bond or bonds required of the applicants pending such final disposition shall not exceed a total amount of $10,000 and shall not include any loss of anticipated profits.

SUPREME COURT OF THE UNITED STATES

No. 765, Misc.—OCTOBER TERM, 1962.

McGee	)	
v.	)	Application for Stay.
Eyman.	)	

[November 29, 1962.]

MR. JUSTICE DOUGLAS.

This is an application for a stay of execution in a capital case. On October 8, 1962, we denied certiorari when petitioner sought review of the judgment of the Arizona Supreme Court affirming his conviction. 91 Ariz. 101, 370 P.2d 261.

Petitioner then sought relief by way of federal habeas corpus. The District Court appointed a lawyer to represent him and a hearing was held. Relief was denied. Petitioner made application to the Court of Appeals for a stay of execution. His petition or application was referred to Judge Pope who considered it both as an application for a stay and for a certificate of probable cause (— F.2d —) and denied it.

Prior to the filing of a petition for certiorari from Judge Pope's action, application for a stay was presented to me which I denied on November 23, 1962, it not appearing to me that, all questions of procedure aside,* any substan-

* Judge Pope stated in his opinion that "no question of denial of a federal constitutional right was ever raised in the state court; that no such question was presented in the application for certiorari, and no ground for relief by way of habeas corpus was stated in the petition to the court below."

Since life is involved, I have assumed that no such procedural defects are present, that the federal questions were property presented both at the trial and in the collateral proceedings, and that habeas corpus is the appropriate remedy.

tial federal question on the merits was involved. On November 26, 1962, the petition for certiorari was filed and another application for a stay of execution was made to me November 28, 1962. Since the execution has been set for tomorrow, November 30, 1962, a day when Court convenes for Conference at 10 a.m. we could not in all probability pass on the merits of the petition for certiorari prior to the execution. All questions of procedure apart, the federal questions presented—the failure to grant a change of venue and the use of a statement to Los Angeles police as a statement against interest with attendant instructions as to its voluntary character—still seemed to me to lack substance. Yet what one person deems insubstantial another at times deems substantial. Since a life is at stake and a denial of a stay of execution would render the case moot, I have followed the practice in other cases (see, *e.g., Meredith* v. *Fair*, 83 Sup. Ct. Rep. 10) and submitted the petition for certiorari to each of my Brethren. I am authorized to say that each of them would vote to deny the petition for certiorari, as would I. Accordingly I deny the application for a stay.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1962.

A.B. Chance Company et al., Petitioners,	)	
v.	)	On Application for a Stay.
Atlantic City Electric Company et al., Respondents.	)	

[April 10, 1963.]

MR. JUSTICE HARLAN, Associate Justice.

This is an application for a stay, pending certiorari, of an order of the District Court for the Southern District of New York making available to the plaintiffs in this matter (respondents here) the Grand Jury testimony of one John T. Peters, a witness in previous government criminal antitrust proceedings. The order was refused review by the Court of Appeals for the Second Circuit. The positions of both sides are fully revealed in the papers before me, and I see no need for oral argument of the application.

After due deliberation I have reached the conclusion that a stay should not issue. Putting aside the procedural issues, I am satisfied that in light of *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, and the determinations made by the District Court, there is no reasonable expectation that certiorari will be granted by this Court with respect to the underlying question. In such circumstances the granting of a stay, already unanimously denied by the Court of Appeals after obviously deliberate consideration of the matter, would not be justified. See *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163-164; *Tri-Continental Financial Corp.* v. *United States*, 80 S. Ct. 659.

Application denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

Joseph Rosoto, John Frank Vlahovich, and Donald G. Franklin, Petitioners, *v.* Warden, California State Prison, San Quentin, California.	))))))	Application for Certificate of Probable Cause and Stay of Execution.

Memorandum of MR. JUSTICE HARLAN.

This application for a certificate of probable cause in habeas corpus proceedings (28 U.S.C. § 2253) and a stay of execution[1] has been referred to me by MR. JUSTICE DOUGLAS who was unable to dispose of the matter before his departure abroad.[2] I act on the application pursuant to my Brother DOUGLAS' request and to the order of THE CHIEF JUSTICE dated June 25, 1963.

Having carefully considered the papers of both sides I am unable to conclude that any of the three episodes relied on by the petitioners gives rise to a substantial constitutional question.[3] *Schwartz* v. *Texas*, 344 U.S. 199;

[1] Petitions for certiorari seeking direct review of these convictions, which were filed on behalf of all petitioners, were denied by this Court on March 25, 1963. 372 U.S. 952, 955. In the present proceeding a writ of habeas corpus was denied without a hearing, and applications for a certificate of probable cause were subsequently denied by the District Court and a judge of the Court of Appeals.

[2] On May 3, 1963, MR. JUSTICE DOUGLAS issued a stay of execution pending this Court's decisions in *Lopez* v. *United States*, — U.S., and *Ker* v. *United States*, — U.S. —, and effective for 15 days thereafter (June 25, 1963), with leave to the parties to file further memoranda in light of those decisions.

[3] Two of such episodes relate to the use at the trial of electronic recordings of conversations between petitioner Rosoto and his half brother, who was used by police as a ruse. One of these conversa-

On Lee v. *United States*, 343 U.S. 747; see *Lopez* v. *United States*, — U.S. —; cf. *Lanza* v. *New York*, 370 U.S. 139; *Gallegos* v. *Nebraska*, 342 U.S. 55. In so concluding I have, of course, considered the effect of the *Ker* case.

I do not consider that the pendency, on certiorari or on petition for certiorari, of *Ferguson* v. *United States*, No. 198, O.T. 1963, *Massiah* v. *United States*, No. 199, O.T. 1963, or *Carbo* v. *United States*, No. 141, O.T. 1963, justifies my delaying the carrying out of this state judgment. Each of those cases involves a federal prosecution.

I note that the facts relating to these three episodes were presented in the earlier petitions for certiorari which were denied by this Court (see note 1, *supra*), and further that no coerced confession claim appears to have been made by any of the petitoners either in their petitions for certiorari or in the present habeas corpus proceedings.

The requests for the issuance of a certificate of probable cause and a stay of execution are both denied. Since the stay granted by MR. JUSTICE DOUGLAS has expired by its own terms (note 2, *supra*), no action is required of me on that score.

June 26, 1963.

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tions took place in a telephone call put in from the police station. The other took place in a motel room which was occupied by the half brother. Both conversations and their electronic recordings were prearranged between the police and the half brother. The half brother was questioned as a witness at the trial about both conversations.

The third episode involves the trial use of an electronically recorded conversation between Vlahovich and one Harrelson, taking place in Vlahovich's prison cell. Harrelson, under charges of robbery in another case, was put in Vlahovich's cell by prearrangement with the police and equipped with an electronic recording device. Harrelson was called as a state witness at the trial and was questioned about the conversation with Vlahovich.

SUPREME COURT OF THE UNITED STATES

R. Appleton Owen, Circuit Court Clerk-Registrar, Jefferson County, Mississippi, et al., Movants, *v.* Robert F. Kennedy.	)))))	On Motion for Stay of Mandate.

[July 19, 1963.]

MR. JUSTICE BLACK.

This motion, filed under 28 U.S.C. § 2101(f) and Supreme Court Rules 27, 50, and 51, asks me to stay an order of the Court of Appeals for the Fifth Circuit directing movants to make available to the Attorney General of the United States or his representative, records and papers in movants' custody "relating to any application, registration, payment of poll tax or other act requisite to voting" in any election for federal office in Mississippi. The records involved are held by each of the movants in his or her capacity as Court Clerk or Registrar, or both, under the laws of Mississippi and are therefore required to be made available to the Attorney General or his representative under the Civil Rights Act of 1960, 42 U.S.C. §§ 1974 *et seq.*

Movants contend that the provisions of the Act on which the order is based violate the Fifth Amendment's requirement of due process and its guarantee against compelled self-incrimination, as well as the Sixth Amendment's assurances that one accused of crime must be informed of the nature and cause of the accusation, must be confronted with the witnesses against him, and must enjoy the right to trial by jury. Movants intend to petition for certiorari and contend that, if they are compelled to produce the records now, the case will become moot and

they will be deprived of an adequate opportunity to have their constitutional claims authoritatively determined. The Solicitor General, opposing the stay, denies that there is a substantial basis for any of the constitutional challenges. He also points out that a statewide primary is to be held in Mississippi on August 6, 1963, and that the stay of the Court of Appeals' order might result in a wrongful state refusal, based solely on race, to permit many qualified voters to vote in the primary.

Whatever might be the case if movants were being summoned by the Attorney General, not simply to produce documents of which they are mere custodians, but to give oral testimony amounting in fact to the first step in a criminal prosecution, compare *Hannah* v. *Larche*, 363 U.S. 420, 493 (majority and dissenting opinions), I agree with the Solicitor General that, under the circumstances here, the constitutional questions raised are not so substantial as to justify my upsetting the order of the Court of Appeals. That order does not require movants to testify before any office, official, or agency, but only requires them to make available to the Attorney General or his representative, under fair and reasonable conditions, records of which movants are not the owners but are only custodians for the State or its agencies. Our Court has uniformly held that one who is a mere custodian of records cannot invoke the Fourth or Fifth Amendments to resist an order to produce such records. See *United States* v. *White*, 322 U.S. 694, and cases cited. The motion for stay is accordingly denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

United States	)	
v.	)	On Application for
FMC Corporation and American Viscose Corporation.	)	Preliminary Injunction.

[August 9, 1963.]

Before MR. JUSTICE GOLDBERG in Chambers.

The United States applies to me for an order enjoining the acquisition by respondent FMC Corporation ("FMC") of the business of American Viscose Corporation ("Avisco") pending the filing with and disposition by this Court of writs of certiorari. FMC and Avisco oppose the application. The parties have submitted memoranda and have argued before me in support of their positions. Two issues are presented: (1) Whether 28 U.S.C. § 1292(a)(l) confers jurisdiction upon a Court of Appeals to review the denial by a single district judge of an interlocutory injunction in an antitrust suit subject to § 2 of the Expediting Act of 1903, 15 U.S.C. § 29; and (2) whether in the present case, if jurisdiction is lacking under 28 U.S.C. § 1292(a)(l), this Court should issue a temporary injunction under the all-writs section of the Judicial Code, 28 U.S.C. § 1651(a), on the ground that consummation of the proposed merger might frustrate effective relief.

The application arises from a complaint filed by the United States in the District Court for the Northern District of California, Southern Division, alleging that § 7 of the Clayton Act prohibits the acquisition by FMC of the "operating assets" of Avisco. Under a contract dated January 21, 1963, FMC agreed to purchase the business assets of Avisco for $116,000,000 on June 28, 1963. That

date, however, was expressly made subject to extension in the event of a court injunction but in no case beyond September 30, 1963. On June 6, 1963, the United States filed its motion in the District Court for a preliminary injunction to restrain the acquisition pending trial on the merits. Supporting and opposing affidavits and memoranda of fact and law were filed by the parties. After argument the District Court denied the motion and also declined to issue a temporary injunction pending appeal to the Court of Appeals.[1]

The United States, relying on 28 U.S.C. § 1292(a)(l), then filed a notice of appeal to the Court of Appeals for the Ninth Circuit. That court granted a temporary injunction pending disposition of the appeal,[2] and subsequently, on July 30, entered a brief opinion and order dismissing the appeal on the ground that it lacked jurisdiction to review interlocutory orders in antitrust cases. *United States* v. *FMC Corp. and American Viscose Corp.*, No. 18753, July 30, 1963.[3] In its opinion the Ninth Circuit expressly disagreed with the decision of the Third Circuit in *United States* v. *Ingersoll-Rand Co., et al.*, No. 14405, June 5, 1963, which held that Courts of Appeals have jurisdiction under 28 U.S.C. § 1292(a)(l) to review interlocutory injunction orders in antitrust cases.

The question of appealability turns on the relationship between § 2 of the Expediting Act of 1903, 15 U.S.C. § 29, and § 1292(a)(l) of the Judicial Code, 28 U.S.C. § 1292(a)(l). The Expediting Act provides that: "In every civil action brought in any district court of the

[1] The District Court's memorandum opinion and findings are as yet unreported. *United States* v. *FMC Corp. and American Viscose Corp.*, No. 41541, June 27, 1963 (D.C. N.D. Cal.).

[2] A division, consisting of Circuit Judges Merrill, Browning and Duniway, granted the temporary relief on June 27, 1963.

[3] Circuit Judges Hamley and Duniway and District Judge Mathes participated. On that same day, July 30, 1963, Judges Hamley and Duniway extended the restraining order until August 5, 1963, to enable the United States to apply to this Court for relief.

United States under any of said [Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." Section 1292(a)(1), codified in the Judicial Code of 1948,[4] grants the Courts of Appeals "jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . modifying, refusing or dissolving injunctions . . . except where a direct review may be had in the Supreme Court." From this language, the Government and the Third Circuit in *Ingersoll-Rand*, *supra*, reason that "since the Expediting Act does not provide for 'direct review . . . in the Supreme Court' of interlocutory injunction orders—only of final judgments—such interlocutory orders are reviewable in the courts of appeals."[5] However, this Court in a series of decisions extending over many years has consistently declared that by reason of the provisions of the Expediting Act no appeal lies, either to this Court or to the Courts of Appeals, from an interlocutory order in an antitrust case tried before a single district judge.[6] This rule has been followed by Courts of Appeals[7] other than the Third

[4] Section 1292(a)(1) is, with the exception of minor changes not relevant here, identical with the codified provision adopted in 1948, 28 U.S.C. § 1292(1), 62 Stat. 929.

[5] Brief for the United States, p. 56, *United States* v. *FMC Corp. and American Viscose Corp.*, No. 18753, July 30, 1963 (C.A. 9th Cir.). The Third Circuit in *United States* v. *Ingersoll-Rand Co. et al.*, No. 14405, June 5, 1963, at 13 (slip op.), concluded that "interlocutory orders, such as the one at bar, are reviewable by a court of appeals excepting and only excepting those types of cases in which an interlocutory order is directly reviewable by the Supreme Court."

[6] *United States* v. *California Co-operative Canneries*, 279 U.S. 553, 558; *Allen Calculators, Inc.*, v. *National Cash Register Co.*, 322 U.S. 137, 142; *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 201-202; *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305.

[7] *E.g.*, *United States* v. *American Society of Composers, Authors and Publishers*, 317 F.2d 90 (C.A. 2d Cir. 1963); *National Asso-*

Circuit in *Ingersoll-Rand* and was well expressed by Mr. Justice Brandeis writing for the Court in *United States* v. *California Cooperative Canneries*, 297 U.S. 553, 558:

> "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

This interpretation accords with the recognized congressional purpose of eliminating, in antitrust cases, the delays inherent in allowing interlocutory appeals and review in two appellate courts. Neither the language of § 1292(a)(1) nor its legislative history in the 1948 codification[8] warrants any alteration in this interpretation,

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ciation of Real Estate Boards v. *United States*, 176 F.2d 631 (C.A. D.C. Cir. 1949). The Third Circuit, before its decision in *Ingersoll-Rand* and prior to the 1948 Code, in dismissing an appeal in an antitrust suit, had declared: "That the Expediting Act is only to facilitate enforcement of the final decree and that here there is no final decree, is urged by appellant, but not sustained by the Supreme Court's construction of the Act. And, whether or not these two orders are interlocutory or final, it is perfectly clear from that decision that we have no jurisdiction to hear the appeals." *Missouri-Kansas Pipe Line Co.* v. *United States et al.*, 108 F.2d 614, 615 (C.A. 3d Cir. 1939).

[8] The Court of Appeals in *Ingersoll-Rand*, *supra*, observed that: "The naked words of Section 1292(a)(1) of the current Code . . . certainly permit the construction that both the appellants and the appellee would have us put upon them here." *Id.*, at 12. (Both the Government and the defendant-companies had urged the court to take jurisdiction.) However, the court declared that: "Putting it bluntly, the legislative history is a labyrinth but certainly whether it was or was not the congressional intent to relieve the effect of the California Canneries case, the provisions of Section 1292(a)(1), by the 'excepting' clause, have done so." *Id.*, at 13, n. 12.

which the Government concedes was "commonplace"[9] until *Ingersoll-Rand*. As recently as 1962, THE CHIEF JUSTICE writing for the Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305, emphasized that under the Expediting Act only final orders are reviewable in antitrust cases such as this. In a note, THE CHIEF JUSTICE explained that: "Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree." *Id*., at 305, n. 9. Whether the rule would be different where a three-judge court has been convened[10] need not now be considered.[11]

The Government's contention and the opinion in *Ingersoll-Rand* are plausible but not persuasive. It would do violence to the plain meaning of the Expediting Act, the

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[9] Brief for the United States, p. 55, *United States* v. *FMC Corp. and American Viscose Corp*., No. 18753, July 30, 1963 (C.A. 9th Cir.).

[10] Section 1 of the Expediting Act provides that a three-judge court shall be convened in cases such as the present if the Attorney General certifies that "in his opinion, the case is of general public importance." 15 U.S.C. § 27.

[11] See 28 U.S.C. § 1253: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." The Government has argued before me that under § 1253 an appeal lies from an interlocutory order of a three-judge court convened under § 1 of the Expediting Act (see note 10, *supra*) and that *a fortiori* an appeal would lie under § 1292(a)(1) from an interlocutory order of a single judge in a case subject to the Expediting Act. Professors Hart and Wechsler, The Federal Courts and the Federal System, 1372 (1953), suggest, however, that the Expediting Act also precludes appeal to this Court from an interlocutory injunction issued by a three-judge court in an antitrust case. They reason that "even if a three-judge court has been convened, it seems clear that its order granting or denying an interlocutory injunction is not appealable under 28 U.S.C. § 1253; it is 'otherwise provided by law', to wit, the limitation of the Expediting Act to final judgments." Hart and Wechsler, *op. cit.*, 1372.

basic congressional policy there expressed, and the decisions of this Court, to invite piecemeal litigation of antitrust cases by permitting interlocutory appeals. The *Ingersoll-Rand* decision held in effect that the 1948 codification implicitly repealed a well-established construction of the Expediting Act. This Court observed in *Fourco Glass Co.* v. *Transmirra Products Corp. et al.*, 353 U.S. 222, 227, that: "Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed."[12] I cannot find the requisite intent anywhere in the legislative history of the revised § 1292(a)(1). If antitrust procedures are to be changed, the changes should derive not from a plausible construction of codified provisions but from deliberate, explicit congressional action.[13]

The Government in its application also contends that if jurisdiction is lacking under § 1292(a)(1), it may nevertheless file a petition for a common-law writ of certiorari under the all-writs section of the Judicial Code, 28 U.S.C. § 1651(a). That section authorizes this Court "and all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." A preliminary injunction, it is urged, is thus within the power of this Court as necessary to prevent an irreparable change in the economic status quo,

[12] Compare the statements, *supra*, note 8, quoted from the *Ingersoll-Rand* decision. See also *infra*, note 13.

[13] This Court recently, in *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175, n. 1, suggested the advisability of a change in the Expediting Act to permit the Courts of Appeals to review final orders in antitrust cases. Such a change was recognized to be a legislative, not a judicial, function. In my view the same considerations apply to review of interlocutory orders under the Expediting Act: If there is to be a change in the established rule of nonreviewability, it should likewise be made by Congress.

a change that allegedly would frustrate effective public relief.

Certainly the all-writs section may not be employed to evade the specific restrictions of the Expediting Act or to subvert its purposes. As the Court declared in *United States Alkali Export Assn., Inc.*, v. *United States*, 325 U.S. 196, 203:

> "The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews."

See *De Beers Consolidated Mines, Ltd.*, v. *United States*, 325 U.S. 212, 217, 223-225. Whether an extraordinary writ would ever be available to review the denial of a temporary injunction where, without such a restraint, the Government's claim for ultimate relief would be completely frustrated need not now be decided. For here the district judge has found, with ample support in the record, that if after a trial on the merits a violation of § 7 of the Clayton Act is established, he will be fully able to fashion appropriate relief.[14]

In view of the foregoing conclusions, I have no occasion to dispose of the respondents' contention that in any event the District Court's denial of an injunction was a proper exercise of its equitable discretion.[15]

Application denied.

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[14] *United States* v. *FMC Corp. and American Viscose Corp.*, No. 41541, June 27, 1963, Finding No. 11, pp. 4-5 (D.C. N.D. Cal.) (mimeo).

[15] Were I to reach this aspect of the case, the fact that the parties to the merger agreement have seen fit to insert a cut-off date, *viz.* September 30, 1963, would not affect my consideration of the issues. It is, of course, appropriate for the parties to bargain between themselves, but they cannot bargain away an orderly disposition of possible Clayton Act charges.

SUPREME COURT OF THE UNITED STATES

Board of School Commissioners of Mobile County, et al., Applicants, *v.* Birdie Mae Davis, et al.	)))))	On Application for Stay of Execution and Enforcement of Judgment Pending Final Disposition of Petition for Certiorari.

[August 16, 1963.]

MR. JUSTICE BLACK.

I am asked to stay an order of the United States Court of Appeals for the Fifth Circuit requiring the Board of School Commissioners of Mobile County, Alabama, to take action in two respects: *First:* To refrain

> "from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed, as required by the Supreme Court in *Brown* v. *Board of Education of Topeka*, 1955, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083."

Second: To submit to the District Court

> "not later than August 19, 1963, a plan under which the said defendants propose to make an immediate start in the desegregation of the schools of Mobile County, Alabama, . . . not later than the beginning of the school year commencing September 1963 . . . ."

Although a judge of the panel which entered this order refused to grant a stay, I would nevertheless stay the order if persuaded by the record that the questions presented for review in the petition for certiorari had sufficient merit to make review by this Court likely. I do not believe that the questions have such merit.

First. Under the facts in the record, the Court of Appeals' order that the Board refrain from "requiring and permitting segregation" is completely justified by our holding in *Brown* v. *Board of Education*, 347 U.S. 483 and 349 U.S. 294. And see *Cooper* v. *Aaron*, 358 U.S. 1. The injunction was carefully limited to allow "such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed . . . ." This injunction was necessary because the record showed without dispute that racial segregation was and had been the unbroken practice in the Mobile schools and that the Board had no plans to do away with that practice in the foreseeable future. Under such circumstances our prior decisions plainly impose upon courts a duty to protect against such unlawful discrimination.

Second. The Board also challenges the requirement that it submit, not later than August 19, 1963, a plan for "an immediate start in the desegration of the schools of Mobile County" not later than the beginning of the September 1963 school year. In adopting this part of its order, the Court of Appeals rejected the District Court's decree, which allowed the Board to postpone action until after the 1963 school term had begun. The Board argues that to require action for the 1963 school year gives it too little time and could disrupt the school system. But the first *Brown* decision was rendered in 1954—nine years ago. That case and others that followed have made it abundantly clear that racial segregation in public schools is unconstitutional. Yet this record fails to show that the Mobile Board has made a single move of any kind looking towards a constitutional public school system. Instead, the Board in this case has rested on its insistence that continuation of the segregated system is in the best interests of the colored people and that desegregation would "seriously delay and possibly completely stop" the Board's building program,

"particularly the improvement and completion of sufficient colored schools which are so urgently needed." In recent years, more than 50% of its building funds, the Board pointed out to the parents and guardians of its colored pupils, had been spent to "build and improve colored schools," and of eleven million dollars that would be spent in 1963, over seven million would be devoted to "colored schools." The record fails to indicate when, if ever, the Board intends to take a first step towards making its public school system conform to the constitutional guarantee of equal protection of the laws. Far from claiming that it intended to desegregate the schools, the Board asked complaining parents to believe that "it would be detrimental to 99% of the colored children in the public schools for any token integration to be attempted at this time."

It is quite apparent from these statements that Mobile County's program for the future of its public school system "lends itself to perpetuation of segregation," a consequence which the Court recently had occasion to condemn as unlawful. *Goss* v. *Board of Education*, 373 U.S. 683, 686. And while the second *Brown* decision said that elimination of racial segregation in public schools should proceed "with all deliberate speed" that term was not intended, as the Court recently emphasized in *Watson* v. *City of Memphis*, 373 U.S. 526, to excuse an indefinite withholding of constitutional rights. Indeed, in the very *Brown* case which used the term "deliberate speed," the Court also unanimously declared that "While giving weight to . . . public and private considerations, the courts will require that the defendants make a broad and reasonable start toward full compliance with our May 17, 1954, ruling." 349 U.S., at 300. It is difficult to conceive of any administrative problems which could justify the Board in failing in 1963 to make a start towards ending the racial discrimination in the public schools which is forbidden by the Equal

Protection Clause of the Fourteenth Amendment, as authoritatively determined by this Court in *Brown* nine years ago. Compare *Watson* v. *City of Memphis*, *supra*, at 529-530; *Goss* v. *Board of Education*, *supra*, at 689.

I cannot believe that this Court would seriously consider upsetting the Court of Appeals' order. The stay is denied.

[Publisher's note: In the litigation of which this opinion is a part, Justice Goldberg and the judges of the lower federal courts refer to the Venezuelan Consul General as "Aristiguieta", "Aristeguieta", and "Aristequieta". The variations within and among opinions and other sources are so inexplicably random that not even West has managed to divine an authoritative spelling (see 84 S. Ct. 14), and so the variations remain.]

SUPREME COURT OF THE UNITED STATES

Flor Chalbaud de Perez Jimenez for and on behalf of her husband, Marcos Perez Jimenez, Petitioner,	)	
v.	)	
The Honorable the United States District Court for the Southern District of Florida, Miami Division, and the Honorable William A. McRae, Jr., Judge Thereof, Respondents.	)	On Application for a Stay of Extradition.

[August 23, 1963.]

Before MR. JUSTICE GOLDBERG in Chambers.

Petitioner, the former Head of State of the Republic of Venezuela,[1] applies to me for a stay of extradition pending review. The application is opposed by the United States and by the intervenor, the Republic of Venezuela through its Consul General. Petitioner contends that he must be released pursuant to 18 U.S.C. § 3188[2] because he has not been "delivered up and conveyed out of the United

[1] The formal petitioner in this action is the wife of the accused. But since it is brought for and on behalf of the accused, he will be referred to herein as petitioner.

[2] 9 Stat. 302, as amended 62 Stat. 824. "Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered."

States within two calendar months after . . . commitment" and because there was no "sufficient cause" for the delay. He alleges, moreover, that he was entitled to have this contention adjudicated by the state judge to whom he submitted the issue rather than by the federal court to which the Government submitted the issue. A brief resumé of the litigation leading up to the present application will suffice for purposes of assessing these claims.

On August 24, 1959, following a formal request for extradition by the Venezuelian [Publisher's note: "Venezuelian" should be "Venezuelan".] Government, a complaint was filed, pursuant to 18 U.S.C. § 1384,[3] before a United States District Judge in Florida for the extradition of petitioner to stand trial in Venezuela on charges of murder, embezzlement, and related financial crimes. After a full evidentiary hearing, District Judge Whitehurst, sitting as an extraditing magistrate [Publisher's note: There should be a comma here.] certified to the Secretary of State that petitioner was extraditable under the treaty between the United States and Venezuela.[4] The judge filed detailed findings of fact and conclusions of law.[5] He found the evidence insufficient to sustain the murder charges "in that it fails to show the necessary direct connection between the defendant and the commission of such murders." He held the evidence sufficient, however, to establish probable cause that embezzlement and related financial crimes had been committed by petitioner for "private financial benefit," and that such crimes were specifically encompassed by the extradition treaty and were not of "a political character." On June 16, 1961, petitioner was committed "to the custody of the United

[3] 9 Stat. 302, as amended 62 Stat. 822.

[4] The extradition treaty between the United States and Venezuela specifically included "Embezzlement or criminal malversion [of funds exceeding a designated amount] committed . . . by public officers or depositories." 43 Stat. 1698 (1922).

[5] The Court's opinion, which is unreported, is reproduced in the petition for writ of certiorari, No. 958, Oct. Term, 1962.

States Marshal to await action by the Secretary of State."[6]

Petitioner filed for a writ of habeas corpus with the United States District Court in Florida attacking the extradition order on numerous grounds. After the submission of briefs and extensive oral argument by counsel, District Judge McRea [Publisher's note: "McRea" should be "McRae".] rejected each of the contentions.[7] Petitioner then appealed to the United States Court of Appeals for the Fifth Circuit. That court on December 12, 1962, affirmed the dismissal of habeas corpus in a carefully considered opinion, which concluded, *inter alia*, that the crimes for which petitioner was being extradited were "common crimes committed by the Chief of State . . . in violation of his position and not in pursuance of it."[8] Petitioner, who until then had been free on bail, was remanded to the custody of the Attorney General for incarceration pending extradition. Petitioner thereafter applied to this Court for a writ of certiorari, which was denied on May 13, 1963. 373 U.S. 914. At petitioner's request, and pursuant to an order of THE CHIEF JUSTICE, entry of the final judgment was delayed pending the outcome of a petition for rehearing. Rehearing was denied on June 17, 1963. 374 U.S. 858.

After this Court denied certiorari, petitioner applied to the Honorable Henry T. Balaban, a Florida state judge, for discharge from custody pursuant to 18 U.S.C. § 3188. The application, in the form of a petition for a writ of

[6] Section 3184 provides that if the extraditing magistrate "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

[7] See note 5, *supra*.

[8] *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 558 (C.A. 5th Cir. 1962).

habeas corpus, alleged that the Secretary of State of the United States did not deliver up and convey the petitioner out of the United States within two calendar months after his commitment by Judge Whitehurst on June 16, 1961, and that the circumstances for failure to do so did not constitute "sufficient cause" for the delay. Judge Balaban ordered the United States Marshal to show cause why a writ of habeas corpus should not issue under 18 U.S.C. § 3188 and to keep the petitioner within the judge's jurisdiction pending hearing and determination of the matter. A hearing was scheduled for May 27, 1963, and later postponed to June 26. On June 3, 1963, the United States appeared before Federal District Judge McRea, [Publisher's note: "McRea" should be "McRae".] who had denied petitioner's habeas corpus petition, and filed a motion in the form of a request for a clarification of an earlier order.[9] After a hearing and argument by counsel, the motion was granted on June 10, 1963, and the order was amended to provide [Publisher's note: There should be a comma here.] in effect, that commitment for purposes of the two-month limitation of 18 U.S.C. § 3188 would begin if, and when, this Court denied rehearing of the petition for a writ of certiorari. On June 11 the United States appeared before State Judge Balaban with a copy of Federal Judge McRea's [Publisher's note: "McRea's" should be "McRae's".] order for the previous day and asked dismissal of petitioner's application for discharge. Judge Balaban postponed consideration of this request until the June 26 hearing. After that hearing Judge Balaban issued a writ of habeas corpus against the United States Marshal to produce the body of petitioner at his chambers on July 11, 1963.

On July 10, Federal Judge McRea, [Publisher's note: "McRea" should be "McRae".] on application by the United States, issued an injunction staying the proceeding before State Judge Balaban. Petitioner then moved, in the Court of Appeals for the Fifth Circuit, for

[9] The order related to petitioner's custody subsequent to the decision by the Court of Appeals on December 12, 1962, affirming the dismissal of habeas corpus.

leave to file a petition for mandamus and prohibition directing the federal judge to permit the proceedings before the state judge to continue. This motion was denied on August 2, 1963. Petitioner then filed a formal notice of appeal to the Court of Appeals for the Fifth Circuit and unsuccessfully asked that court for a stay of extradition pending disposition of the appeal. On August 12, 1963, the Secretary of State executed the warrant surrendering petitioner to the Venezuelan Government.[10] Petitioner

[10] The following letter accompanied the warrant of surrender:

August 12, 1963

"Excellency:

"I have the honor to refer to note No. 320, dated August 5, 1961, in which the Government of Venezuela formally requested the extradition of Marcos Perez Jimenez for the crimes of embezzlement or criminal malversation, receiving money or valuable securities knowing the same to have been unlawfully obtained, and fraud or breach of trust, as specified in paragraphs 14, 18 and 20 of Article II of the Extradition Treaty of 1922, between our two countries.

"As you are aware, an extradition hearing was held pursuant to the provisions of Section 3184, Title 18, United States Code, at the conclusion of which the Honorable George W. Whitehurst, United States District Judge for the Southern District of Florida, sitting as extradition magistrate, found that the evidence presented by your Government showed probable cause to believe Marcos Perez Jimenez guilty of the above-mentioned crimes, but that insufficient evidence had been presented to warrant his extradition on the charges of complicity in murder with which he was also charged in Venezuela. Habeas Corpus proceedings brought to challenge the decision of the extradition magistrate resulted in his decision being upheld by the United States District Court for the Southern District of Florida and by the United States Court of Appeals for the Fifth Circuit. On June 17, 1963, the United States Supreme Court denied the petition of Marcos Perez Jimenez for a rehearing on that Court's denial of his petition for certiorari to review the decision of the Court of Appeals.

"I have taken note of your Government's assurances, contained in your note No. 1396, dated July 22, 1963, that careful security arrangements have been made by your Government to eliminate any risk of physical harm to Marcos Perez Jimenez should he be extradited, that he would be tried only for those offenses for which his extradition is granted, that he would be given all the rights accorded

thereupon applied to me for a stay pending disposition by the Court of Appeals of the appeal which he has filed, and by this Court of a petition for a writ of certiorari which he proposes to file.

In considering the application, I am mindful that this is the first time in our history a former head of state has been extradited for offenses allegedly committed during his incumbency. I am equally aware and respectful of the long tradition, reflected in our treaties and statutes,

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an accused under the laws of your country, including the right to full and effective defense, and that he would have the right to adequate legal counsel of his own choice.

"Accordingly, there is enclosed my warrant directing the United States Marshal for the Southern District of Florida or any other public officer or person having charge or custody of Marcos Perez Jimenez to surrender and deliver him up to such person or persons as may be duly authorized by your Government to receive him in order that he may he [Publisher's note: "he" should be "be".] returned to Venezuela for trial for the crimes of embezzlement or criminal malversation, receiving money or valuable securities knowing the same to have been unlawfully obtained, and fraud or breach of trust. The specific offenses which are considered, in this case, to be encompassed by the crimes and those for which extradition is granted are those charges set forth in paragraphs 15.B, 15.C and 15.D (3) of the Second Amended Complaint for Extradition filed March 8, 1960, in the District Court of the United States for the Southern District of Florida, Miami Division, by Manuel Aristequieta in case No. 9425-M-Civil entitled *Manuel Aristeguieta, Consul General of the Republic of Venezuela, Plaintiff,* v. *Marcos Perez Jimenez, Defendant.*

"Inasmuch as the extradition magistrate found sufficient evidence of criminality of Marcos Perez Jimenez only with respect to these crimes, his extradition is granted on the condition, specified in Article XIV of the Extradition Treaty of 1922, that he shall be tried only for those crimes.

"Accept, Excellency, the renewed assurances of my highest consideration.

"/s/ Dean Rusk

"His Excellency
"Dr. Enrique Tejera-Paris,
"Ambassador of Venezuela.
"Enclosure:
"Warrant of surrender."

against extradition for political offenses. The extraditing magistrate determined, however, that the crimes for which petitioner is being extradited were not of "a political character" and that a solemn treaty between the United States and Venezuela requires extradition for "Embezzlement . . . by public officers."[11] A petition for a writ of habeas corpus challenging this determination was dismissed by a district judge. A Court of Appeals painstakingly reviewed this issue and concluded that the crimes in question were not political. This Court denied certiorari and rehearing, thereby leaving the judgment of the Court of Appeals undisturbed. The alleged political nature of the crimes does not form the basis for the present application; the contention here is that 18 U.S.C. § 3188 requires petitioner's release because he was not delivered to the extraditing government within two months of his commitment.

Petitioner construes the two-month period in § 3188 to run from the time of the original commitment order of the extraditing magistrate, not from the time his legal rights were finally determined by this Court's denial of certiorari and rehearing. From this construction, one of two results must follow: If the Government were prevented from removing him during the pendency of review proceedings, then the accused could readily frustrate this country's treaty obligations simply by invoking such proceedings for two months; if, on the other hand, the Government were permitted to remove him while proceedings were pending, then the statute would effectively foreclose review of extradition orders. A construction which compels a choice between such alternatives is untenable.

Section 3188, originally enacted in 1848[12] as part of a general scheme governing extradition from this country, was intended to implement our treaty obligations "without delay and the danger of a denial of justice" to

[11] See note 4, *supra.*
[12] 9 Stat. 302.

the accused.[13] Its purpose was to ensure prompt action by the extraditing government as well as by this government so that the accused would not suffer incarceration in this country or uncertainty as to his status for long periods of time through no fault of his own.

The procedural history of this litigation leaves no doubt that the Government of Venezuela has acted with diligence to effect petitioner's extradition. The United States Government has acted with equal diligence, consistent with its duty to protect the rights of all within its jurisdiction by affording them recouse [Publisher's note: "recouse" should be "recourse".] to its courts. Petitioner having sought review of the extradition order, the Secretary of State properly deferred execution of the surrender warrant until petitioner's claims were fully adjudicated. This case is unlike *In re Dawson*, 101 F. 253 (C.C. N.Y.). There, "petitioner had interposed no captious objection to the proceeding"; the two-month delay was caused solely by "the leisurely movements" of the extraditing government which had acted without "any measure of diligence" upon being informed of this country's readiness to deliver up the accused. Here, the delays resulted from petitioner's pursuit of legal remedies, not from the dilatory actions of either party to the extradition treaty.

The common-sense reading of § 3188 is that where [Publisher's note: There should be a comma here.] as here, the accused has instituted and pursued review of his extradition order, the two-month period runs from the time his claims are finally adjudicated, not from the time of the original commitment order he has been challenging. In any event, since the delays were attributable to the proceedings prosecuted by petitioner, there certainly was "sufficient cause" for the delay, within the intended meaning of § 3188. Thus petitioner's contention regarding the two-month limitation is without merit.

It is in light of this assessment of petitioner's substantive contention that I consider his procedural argument that the § 3188 determination should have been

[13] Cong. Globe, 30 Cong., 1st Sess. 868 (1948 [Publisher's note: "1948" should be "1848".]).

made by State Judge Balaban rather than Federal Judge McRea. [Publisher's note: "McRea" should be "McRae".] Petitioner's substantive contention seems to be so lacking in merit that it could not reasonably be resolved in his favor, regardless of which judge considered it in the first instance. I cannot say, therefore, that he was prejudiced by its determination by the federal rather than state judge.[14]

Petitioner has had full hearings on the merits of his extradition before a federal district judge sitting as an extraditing magistrate, a different federal judge sitting as a habeas corpus court and a United States Court of Appeals. This Court also considered, and declined to review, the merits of his extradition. His present contention concerning delay has been passed upon by a federal district judge as well as the Court of Appeals and has now been considered by me. Throughout the proceedings, petitioner has been represented by able counsel of his own choice. He has certainly been afforded all due process of law. The only effect of granting his application for a stay would be to preserve the jurisdiction of this Court to review a procedural ruling which, however determined, could only delay but not prevent extradition.

If the record disclosed sufficient merit in petitioner's contentions to make review by this Court likely, I would, of course, grant the requested stay. But, considering the lack of merit in the substantive contention, and this Court's denial of certiorari and rehearing in the earlier phase of the litigation, it is my judgment that this Court

[14] I do not pass on whether the statute contemplates application for release under 18 U.S.C. § 3188 to a state judge in cases where extradition was commenced under 18 U.S.C. § 3184 before a federal judge, and where the accused has made application for habeas corpus to a federal judge and has been in continuous federal custody. For conflicting intimations, see, *e.g.*, 1 Moore, Extradition 537 (1891); 6 Op. Atty. Gen. 237, 270 (1853, 1854); *MacDonnell* v. *Fiske*, 45 How. Pr. 294 (N.Y. Sup. Ct. 1873); *In the Matter of Metzger*, 1 Barb. 248 (N.Y. Sup. Ct. 1847).

probably would not grant certiorari to review the present contentions. At some point all litigation must end. I see no compelling reason for further delaying this one. Petitioner's request for a stay is, therefore, denied.

In denying the stay, I assume, of course, that the Government of Venezuela will honor its commitment to our Government:

> ". . . that careful security arrangements have been made by [the Venezuelan Government] to eliminate any risk of physical harm to Marcos Perez Jimenez should he be extradited, that he would be tried only for those offenses for which his extradition is granted, that he would be given all the rights accorded an accused under the laws of your country, including the right to full and effective defense, and that he would have the right to adequate legal counsel of his own choice."[15]

Stay denied.

[15] See note 10, *supra.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

Milton Aronson, Petitioner,	)	
v.	)	On Application for Bail.
Raymond W. May, Warden.	)	

[July 24, 1964.]

Opinion by MR. JUSTICE DOUGLAS.

The applicant herein asks for bail pending decision by the Court of Appeals on his appeal from the denial of a petition for writ of habeas corpus.

Applicant was convicted in the United States District Court for the Southern District of New York on two counts of unlawful use of the mails in a scheme to defraud and on one count of conspiracy to do so; he was sentenced to three years' imprisonment on each count, the sentences to run concurrently. The Court of Appeals for the Second Circuit affirmed the conviction, and we denied certiorari. *United States* v. *Aronson*, 319 F.2d 48, cert. denied, 375 U.S. 920 (1963). After affirmance of his conviction, it appears that applicant moved the sentencing court under 28 U.S.C. § 2255 to vacate his sentence on the ground (which had been rejected on appeal) that he had a constitutional right to be tried in California rather than in New York. Applicant also moved for a reduction of sentence under Fed. Rules Crim. Proc. 35, asking in addition that the court order a "presentence" investigation under Fed. Rules Crim. Proc. 32. Both these motions were denied, and applicant took no appeal from either denial.

Subsequently, on February 25, 1964, applicant filed a petition for writ of habeas corpus, 28 U.S.C. § 2241, in the District Court for the Southern District of California where he is presently confined. This petition contained allegations previously put forward by applicant on appeal

from his conviction and by motion in the sentencing court, together with certain allegations with regard to his sentencing which had not previously been presented. On March 16, 1964, the District Court denied the petition, on the alternative grounds that the allegations presented no basis for collateral relief and that in any event "petitioner has failed to apply to the sentencing court for relief on certain of the grounds cited in his petition, and the sentencing court has denied him relief on other grounds cited (28 U.S.C. § 2255); and it does not appear that the remedy by motion is inadequate or ineffective to test the legality of petitioner's detention."

A notice of appeal having been filed, the District Court on March 17, 1964, ordered applicant to be enlarged pending appeal on $10,000 bail. The following day the District Court countermanded its order, apparently for the reason that there was present in this case no "exceptional circumstance" entitling the prisoner to release on bail. On May 12, 1964, the Court of Appeals for the Ninth Circuit denied bail without explanation. This application to me followed on June 23, 1964. So far as I am advised, applicant's appeal from the denial of his petition for habeas corpus has not been argued or acted upon by the Court of Appeals.

This Court's Rule 49(4) provides:

> "Except as elsewhere provided in this rule, the initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the court of appeals but also the further possible review in this court; and only where special reasons therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any indepedent [Publisher's note: "indepedent" should be "independent".] order made in that regard."

Thus the initial order of the District Court concerning the prisoner's custody controls unless modified or superseded by an appellate order issued for "special reasons."

First: Clearly the most important "special reason," the finding of which is a prerequisite to any modification I might make of the lower courts' refusal to grant bail, would be that the pending appeal presents substantial questions. Without in any way prejudging its merits, I must confess to serious doubt about the substantiality of those questions. On the papers which I have before me I am unable to perceive why the applicant's remedy in the sentencing court under 28 U.S.C. § 2255 is inadequate or ineffective. And unless it appears that such remedy is inadequate or ineffective, "an application for writ of habeas corpus . . . shall not be entertained . . . ." 28 U.S.C. § 2255, ¶ 7. Habeas corpus challenges the legality of the petitioner's detention: it is sought in the district "wherein the restraint complained of is had," 28 U.S.C. § 2241(a), and the writ is "directed to the person having custody of the person detained." 28 U.S.C. § 2243, ¶ 2. This detention may be thousands of miles from the place of trial, where the court officials responsible for the trial live, where the court records are kept, and where the witnesses at the trial usually are to be found. Yet the presence of these officials, records, and witnesses may be required if the application for the writ is to be disposed of "as law and justice require." 28 U.S.C. § 2243, ¶ 8. The very purpose of § 2255 was "to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *United States* v. *Hayman*, 342 U.S. 205, 219 (1952).

Second: This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. He now attacks his conviction in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in this kind of case than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt. Cf. *Yanish* v. *Barber*, 73 Sup. Ct. 1105 (1953). In this kind of case it is therefore necessary to

inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice. See *Benson* v. *California*, 328 F.2d 159 (C.A. 9th Cir. 1964). The papers before me on this application indicate the existence of no such circumstance.

Application denied.

[Publisher's note: This opinion was printed with no heading other than the date and the name of the case.]

July 25, 1964.

Henry Wasmuth et al. v. *James E. Allen, Jr., et al.*

Memorandum of MR. JUSTICE HARLAN.

In an area where the scope of state police power is as broad as in the field of public health, the authority of an individual Justice to delay enforcement of a state regulatory measure, pending review of a state court judgment sustaining its constitutionality, should be exercised only in the most demanding circumstances.

I am unable to find such circumstances in this instance. The argument that petitioners are faced with irreparable damage by reason of the likelihood of "flunking" their examinations and the possibility of substantial delay transpiring between the effective date of the state statute (October 1) and this Court's disposition of the appeal do not, in my opinion, warrant granting the relief sought. The former argument is speculative and in any event not persuasive; the latter factor is not, as I see things, of substantial dimensions. Furthermore, in light of this Court's past decisions in this field, I remain to be convinced that this appeal presents a substantial federal question.

The application for a stay is denied in all respects, with leave, however, to petitioners to apply further for appropriate interim relief if probable jurisdiction of the appeal is noted. With diligence on the part of the petitioners and reasonable cooperation from the State in accelerating the appeal, which cooperation I assume will be forthcoming, this Court should be able to consider the jurisdictional statement at its opening Conferences which will begin on October 5.

J.M.H.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

Heart of Atlanta Motel, Inc., Appellant, *v.* The United States of America and Robert F. Kennedy, as the Attorney General of the United States of America, Appellee,	)	On Applications for Stays of Permanent and Interlocutory Injunctions.
The Pickrick, a Corporation, and Lester G. Maddox, Appellants, *v.* George Willis, Jr., Woodrow T. Lewis, Albert L. Dunn, and Robert F. Kennedy, Attorney General, Appellees.	)	

[August 10, 1964.]

MR. JUSTICE BLACK.

These are applications to stay orders of a three-judge United States District Court for the Northern District of Georgia which enjoined an Atlanta, Georgia motel and a separately owned Atlanta, Georgia restaurant from refusing to accept Negroes as guests and customers solely because of their race or color.

The court found, and it is not disputed, that the motel and restaurant have refused, and unless enjoined intend to continue to refuse, to supply Negroes with food or lodging solely because of their color. This refusal plainly violates Title II of the Civil Rights Act of 1964[*] and can be enjoined unless Congress in passing that act went

[*] Pub. Law 88-352, 78 Stat. 241, approved July 2, 1964.

beyond its powers under the Constitution. There is, of course, power in this Court to hold the Civil Rights Act unconstitutional. That power has been uniformly recognized and acted upon at least since *Marbury* v. *Madison*, 1 Cranch 137, decided in 1803. And there is also judicial power to enjoin the enforcement of an act of Congress pending final determination of constitutionality where such an injunction is necessary in order to prevent irreparable damage. See 28 U.S.C. § 2282. But such a temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect. Thus judicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires.

Moreover, the constitutionally chosen policies of the Act challenged in these cases are not the result of sudden, impulsive legislative action, but represent the culmination of one of the most thorough debates in the history of Congress. In passing the act, Congress relied on as constitutional support for the legislation: (1) the Commerce Clause of Article I of the Constitution, which grants Congress power to regulate all commerce among the states—a very broad power to regulate commerce itself as well as conduct which affects that commerce; and (2) the Fourteenth Amendment, which in Section 1 forbids any State to "deny to any person within its jurisdiction the equal protection of the laws," and in Section 5 provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Without specifically addressing myself, as a single Justice, to the validity of the particular provisions of the Civil Rights law under attack here, either as written or as applied, I believe that the broad grants of power to

Congress in the Commerce Clause and the Fourteenth Amendment are enough to show that Congress does have at least general constitutional authority to control commerce among the states and to enforce the Fourteenth Amendment's policy against racial discrimination. Under these circumstances, a judicial restraint of the enforcement of one of the most important sections of the Civil Rights Act would, in my judgment, be unjustifiable. I agree with appellants, however, and with the Solicitor General as to the wisdom of having the specific constitutional issues here involved decided at as early a date as orderly procedure will permit. For that reason I would welcome motions to the Court to expedite both cases in the hope that they could be made ready for final argument the first week we meet in October.

The applications for stays are denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

Nicholas deB. Katzenbach, as Acting Attorney General of the United States of America; Macon L. Weaver, as United States Attorney for the Northern District of Alabama, Appellants, *v.* Ollie McClung, Sr., and Ollie McClung, Jr.	)	On Application for Stay of Execution of Judgment.

[September 23, 1964.]

MR. JUSTICE BLACK.

This is an application for stay of execution of a judgment of the United States District Court for the Northern District of Alabama temporarily restraining and enjoining the Acting Attorney General of the United States and all others under his authority or in concert with him from enforcing the provisions of Title II of the Civil Rights Act of 1964 on the ground that the Act is unconstitutional as applied to the operation of a restaurant by plaintiffs Ollie McClung, Sr. and Ollie McClung, Jr.

As I said recently in a memorandum on application for stay in *Heart of Atlanta Motel, Inc.* v. *Kennedy*, — Law Ed. —, — Sup. Ct. —:

> "a temporary injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect."

In recognition of this fact, it is an established rule that courts of equity will not exercise their power to enjoin

the enforcement of an act of Congress except under the most imperative or exigent circumstances. Because of this policy I grant the application to stay the execution of the temporary restraining order and injunction of the United States District Court for the Northern District of Alabama.

The issues raised in this case, like the related issues raised in the *Heart of Atlanta Motel* case now pending before this Court, are important and their final determination should not be unnecessarily delayed. For this reason I have consulted with the five other members of the Court now in Washington and am authorized to say that the Court is prepared, if the parties desire, to set this case down for argument on all questions involved, immediately following the argument in the *Heart of Atlanta Motel* case, which is already scheduled for argument on Monday, October 5, 1964. To this end the parties will be authorized to submit typewritten briefs and also will be given ample opportunity to file such additional briefs as they may deem desirable within a reasonable time after oral arguments are completed.

The application for stay of execution is granted and the injunction of the District Court is hereby stayed.

SUPREME COURT OF THE UNITED STATES

No. 485.—OCTOBER TERM, 1964.

Jerome Rehman, Petitioner,	)	
v.	)	On Application for Bail.
State of California.	)	

[October 7, 1964.]

MR. JUSTICE DOUGLAS, [Publisher's note: There is a short (about 3 cm) redaction here.]

This is an application for bail, supplementing the one in connection with which I entered an order on August 10, 1964.

Applicant has been convicted in a California court of a conspiracy that involves a variety of actions including assault and the fraudulent exaction of fees from patients whom he attended. He was allowed bail on appeal in the state courts on posting a bond in a stated amount and on surrendering his license to practice medicine. He tried to have the California courts relieve him of the latter condition, but to no avail. Thereupon he filed a petition for certiorari here to review the denial of that relief and applied to me for release on bail or for a stay of the challenged condition pending disposition of his petition for certiorari. Release on bail would probably have mooted the petition, which in my view presents a substantial question. The question looms large not only in light of the Eighth Amendment's command against "excessive" bail but more particularly in light of the due process requirements of the Fourteenth Amendment. A doctor might well go to prison for a misdeed in connection with his practice and yet not automatically lose his right to practice medicine. Deprivation of a professional license should require a hearing, since broader issues than those in the criminal case are involved, *e.g.*, whether the misdeed is of a character to make it unsafe and improvident

for the State to entrust a medical license to that person. Since that issue could not have been tried either in the criminal case or in the hearing on application for bail, it seemed to me dubious that the requirements of due process had been met. See Reich, The New Property, 73 Yale L. J. 733, 741 (1964), and cases cited. Hence my order of August 10, 1964, lifted that one condition and only that condition. It left open all other questions, such as the amount of bail, if any, and most importantly, the underlying question whether in light of all the circumstances the applicant fell within the small and exceptional category of people who are not entitled to bail on appeal.[*]

Subsequent to the entry of my order the State sought an affirmative answer to this underlying question by filing a motion with the trial judge for a revocation of bail. After a hearing on the motion the judge revoked bail. He did not persist in attaching the challenged condition to his order. Quite the contrary. He denied all bail and remanded the applicant to custody, acting on the basis that "to permit Dr. Rehman to remain on bail pending appeal constitutes an immediate, clear and present danger imperiling, jeopardizing, and threatening the health, safety, and welfare of the community." The voluminous record of the trial has been submitted which, it is said, supports that conclusion. While I have not had a chance to read all of it, the excerpts cited by the Attorney General in his brief are arguably sufficient to support that conclusion; and those grounds are quite different from the single one toward which my order of August 10, 1964, was directed. As the Attorney General says, ". . . bail of $500,000 may be excessive for an insane criminal, although denial of bail would be proper."

[*] Apart from cases where the questions on appeal are frivolous (see *United States* v. *Piper*, 227 F. Supp. 735, 740-741), bail pending appeal should be denied "only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release." *Leigh* v. *United States*, 82 Sup. Ct. 994, 996.

As I said in *Carbo* v. *United States*, 82 Sup. Ct. 662, 666, "If . . . the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail."

I am unable to say that the trial judge acted in abuse of his power and that there is no evidence to support his findings. Accordingly, the present application is

Denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

Marion C. Bowman, Petitioner,	)	
v.	)	On Application for Bail.
United States.	)	

[November 18, 1964.]

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for bail pending appeal. Rule 46(a)(2) of the Rules of Criminal Procedure states the applicable standard: "Bail may be allowed pending appeal unless it appears that the appeal is frivolous or taken for delay." Nothing in the application before me states what the questions on appeal are. It is therefore impossible for me to exercise my discretion in the matter. The case would be different if bail were automatic where there is an appeal from a judgment of conviction. But such is not the case. See, *e.g.*, *Ward* v. *United States*, 76 Sup. Ct. 1063; *Carbo* v. *United States*, 82 Sup. Ct. 662; *United States* v. *Allied Stevedoring Corp.*, 235 F.2d 909; *United States* v. *Wilson*, 257 F.2d 796; *United States* v. *Galente*, 290 F.2d 908; *United States* v. *Esters*, 161 F. Supp. 203.

Application denied.

[Publisher's note: "Cynamid" should be "Cyanamid" (see 86 S. Ct. 1) and we have corrected it — with brackets — in the caption and running heads of this opinion.]

SUPREME COURT OF THE UNITED STATES

Maurice Rosenblatt, Appellant,	)	
v.	)	On Application for a Stay
American Cy[a]namid Company,	)	Pending Appeal.
Appellee.	)	

[July 13, 1965.]

Before MR. JUSTICE GOLDBERG in Chambers.

Appellee filed a complaint against appellant in the New York courts, based upon an alleged conspiracy to convert trade secrets, and seeking injunctive relief and damages. Service was made upon appellant, a United States citizen, in Rome, Italy, under the New York "long arm" statute, which provides for *in personam* jurisdiction on the basis of commission of a "tortious act" in the State.[1] The facts as alleged by appellee, which for the purposes of this appeal, resting on the pleadings and supporting affidavits, are assumed to be true,[2] are as follows: one Fox, employed by appellee at its New York plant, stole from appellee biological cultures and confidential documents pertaining to the production of some newly developed antibiotics; Fox went to Italy, where he conspired with appellant and officials of an Italian pharmaceutical company to arrange a sale of the stolen material to the Italian company for use in the production of antibiotics in competition with those of appellee; pursuant to this conspiracy, appellant flew to New York to inspect the material for the Italian firm, and being satisfied, purchased it, paying part of the

[1] N.Y. Civ. Prac. Law & Rules 1963 (McKinney's), § 302(a)2 reads, in pertinent part: "A court may exercise jurisdiction over any nondomiciliary . . . as to a cause of action arising from any of the acts enumerated in this section . . . in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he: . . . 2. Commits a tortious act within the state. . . ."

[2] This is not to be regarded as any intimation as to the merits, which are yet to be adjudicated.

purchase price in New York, and returned with it to Italy. Appellee is a Maine corporation, but has a substantial plant in New York, and presumably is qualified to do business there.

Appellant filed a motion to dismiss the complaint for want of personal jurisdiction over him, with the immediate object of avoiding having to come to New York for pretrial deposition proceedings. In this motion appellant specifically raised the issue that the New York "long arm" statute would be unconstitutional under the Fourteenth Amendment if applied to him in the circumstances of this case. Appellant's motion to dismiss was denied by an order of the New York Supreme Court on July 31, 1964.[3] That order was unanimously affirmed by the Appellate Division of the Supreme Court, First Judicial Department, on November 19, 1964. The Court of Appeals unanimously affirmed without opinion on June 1, 1965. On June 10, 1965, the Court of Appeals granted appellant's motion to amend its remittitur, to make explicit that it had passed upon and rejected appellant's constitutional claim.[4] The Appellate Division thereafter entered an order making the amended order of the Court of Appeals the order and judgment of the Appellate Division. Judge Adrian Burke of the Court of Appeals denied an application for a stay pending appeal to this Court. On June 28, 1965, appellant noted his appeal from the decision of the Court of Appeals and the order entered in accordance therewith by the Appellate Division. The appeal is pursuant to 28 U.S.C. § 1257(2)

[3] Supreme Court, New York County, Special Term, Part I, Index No. 7222/64.

[4] "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether § 302(a)2 CPLR, as construed in this case and applied to defendant, was invalid under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, in passing upon this contention, held that § 302(a)2 CPLR, as construed and applied, was valid."

and challenges the validity under the Due Process Clause of the Fourteenth Amendment of the New York "long arm" statute as applied to appellant in the circumstances of this case. Appellant now applies to me for a stay of the judgment of the Court of Appeals pending his appeal to this Court, and appellee opposes the application.

Since it is apparent from the foregoing that there has as yet been no trial of this case on the merits, and the order appealed from was in response to a pretrial motion, an initial question arises as to whether the judgment below is a "final" one for purposes of review by this Court. 28 U.S.C. § 1257. Although neither of the parties has mooted the question, it goes to the jurisdiction of this Court and must be considered.[5] Of course, no stay should be granted pending an appeal which would not lie. I am satisfied, however, that under our decisions the judgment of the New York Court of Appeals from which this appeal is sought was a final one. There are two recent opinions of this Court which impel me to this conclusion. *Local 438 Construction Laborers' Union* v. *Curry*, 371 U.S. 542, and *Mercantile Nat'1 Bank* v. *Langdeau*, 371 U.S. 555. Here, as in *Curry*, there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts;[6] (2) a threat of serious erosion of national policy (here, the due process right against subjection to excessive state assertions of *in personam* jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case. *Langdeau* held final a preliminary determination of venue which would have led to a totally unnecessary trial, where the federal right asserted was precisely one not to stand trial at all in the state court where the complaint had

[5] *Trenies* v. *Sunshine Min. Co.*, 308 U.S. 66, 70; *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 384.

[6] As in *Curry* the jurisdictional issue here would merge with the merits, and hence would ultimately be reviewable in this Court after a trial was held. But *Curry* indicates this does not preclude finality.

been filed.[7] These cases rest upon the premise that a litigant should not be forced to take the risk of a default judgment in order to obtain the benefits which national policy—in *Curry*, federal pre-emption of unfair labor practice cases; in *Langdeau*, a special venue statute for national banks; here, if appellant is correct, due process—is designed to afford him. I therefore conclude that the judgment below is a final one.

Since the judgment appealed from is a proper subject of appeal, the application for a stay must be considered on its merits. Here the decisive question is whether plenary review by this Court of appellant's constitutional claim is likely; if so, a stay should be granted. I have concluded, however, that appellant's constitutional argument is insubstantial, and that a stay would therefore be unwarranted. The logic of this Court's decisions in *International Shoe Co.* v. *Washington*, 326 U.S. 310, and *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, supports the validity of state "long arm" statutes such as the one involved here which base *in personam* jurisdiction upon commission of a "tortious act" in the forum State. Since those decisions a large number of States have enacted statutes similar to the one here. In cases under these statutes in state and federal courts, jurisdiction on the basis of a single tort has been uniformly upheld:[8]

> "Indeed, the constitutionality of this assertion of jurisdiction, today, could only be doubted by those

[7] Here, as in *Langdeau*, the preliminary decision might prove to be mooted by a decision in favor of appellant on the merits. But since the federal right is one not to stand trial, the possible outcome of a trial is, *Langdeau* indicates, irrelevant. See generally on *Curry* and *Langdeau*, Note, The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts, 73 Yale L.J. 515 (1964).

[8] See, *e.g.*, *Smyth* v. *Twin State Improvement Corp*., 116 Vt. 569, 80 A.2d 664 (1951); *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Painter* v. *Home Fin. Co.*, 245 N.C. 576, 96 S.E.2d 731 (1957); *Hutchinson* v. *Boyd & Sons Press Sales, Inc.*, 188 F. Supp. 876 (D.C. D. Minn. 1960).

> determined to oppose the clear trend of the decisions. This situation is exactly that of the nonresident-motorist statutes, which were long ago upheld, except that the highways are not directly involved. It is now clear, if it was ever in doubt, that the nonresident-motorist cases were not really based on 'consent' but on the interest of the forum State and the fairness of trial there to the defendant." Currie, The Growth of the Long Arm, 1963 U. Ill. Law Forum 515, 540.

It seems to me that this is a very strong case for the assertion of "long arm" jurisdiction. If it is fair in a due process sense to subject a transient motorist to *in personam* jurisdiction on the basis of a single negligent tort, *Hess* v. *Pawloski*, 274 U.S. 352, surely it is equally fair to hold a person like appellant, who, it is alleged, intentionally entered a State for the purpose of committing a tort therein, personally responsible in the courts of that State. The few cases which have questioned the application of "long arm" statutes in particular situations have differed from this one in two important respects: the foreign defendant was never physically present in the forum State, and the tortious act there was unintentional.[9]

Hanson v. *Denkla*, 357 U.S. 235, does not cast any doubt upon the validity of jurisdiction obtained by a "long arm" statute, but on the contrary it clearly *supports* New York's assertion of jurisdiction here. In *Hanson* the Court observed that "The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State." 235 [Publisher's note: "235" should be "357".] U.S., at 251. What is essential in each case, the Court held, is "that there be some act by which the defendant purposefully avails

[9] See, *e.g.*, *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (C.A. 4th Cir. 1956); *Mann* v. *Equitable Gas Co.*, 209 F. Supp. 571 (D.C. N.D. W. Va. 1962); *Hellriegel* v. *Sears Roebuck & Co.*, 157 F. Supp. 718 (D.C. N.D. Ill. 1957). See generally, Currie, The Growth of the Long Arm, 1963, U. Ill. Law Forum 533, 544 ff.

itself of the privilege of conducting activities within the forum State. . . ." 235 [Publisher's note: "235" should be "357".] U.S., at 253. Currie has interpreted and generalized the *Hanson* test as a requirement "that the defendant must have taken voluntary action calculated to have an effect in the forum state." Currie, *op. cit.,* at 549. Clearly appellant's conduct here meets all of these tests.

Appellant claims special unfairness in the application of the "long arm" statute to him in the circumstances of this case. He contends that appellee is a Maine corporation, that appellant is not a corporation, that appellant is in a foreign country, that the appellee is a "half-billion" dollar corporation with access to Italian courts, that the "center of gravity" of the alleged conspiracy is in Italy, that the key witness for appellee is "completely within the control" of appellee, that appellant might be subject to a second suit in Italy, and that appellee's property had been stolen by Fox before appellant was involved in the transfer. These facts are not relevant, however, to the *jurisdiction* of New York which is plainly supportable, as far as due process is concerned, on appellant's conduct within New York. They relate only to questions of convenience and not to jurisdiction in a constitutional sense. For the purposes of this appeal it is conceded that Fox stole the material from appellee's place of business in New York, and that pursuant to a conspiracy to convert appellant flew to New York, effected the tortious transfer, and paid a substantial part of the purchase price to Fox in New York. This is more than sufficient to meet the constitutional test as enunciated in our decisions.

Appellant asserts another special circumstance which, he argues, makes unfair application of jurisdiction under the New York statute in this case. He is apparently under indictment, based on the same activities as underlie this case, in a federal court in New York, and argues that he should not have to submit to jurisdiction in the criminal proceeding in order to defend in this case.

I find this contention singularly unpersuasive. He surely has no right to avoid the criminal law of the United States. No claim is made that civil process is being used here to avoid the requisites of extradition. Compare *Frisbie* v. *Collins*, 342 U.S. 519.

Others of appellant's claims of special hardship, such as the expense of leaving his employment in Italy, and the fact that his corroborating witnesses are in Italy, should be addressed to the discretion of the trial judge, not to this Court. Article 31 of the New York Civil Practice Law & Rules 1963 (McKinney's) gives to trial judges broad discretion to protect litigants against undue hardship in connection with pretrial discovery. In sum, I do not find any of appellant's allegations of special circumstances substantial enough to warrant a conclusion that he is being denied "fair play and substantial justice." *International Shoe*, 326 U.S., at 320.

Since, for the reasons stated above, I do not believe that plenary review by this Court of appellant's constitutional claim is likely, I must deny his application for a stay.

Stay denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

Anthony J. Travia et al., Appellants, 191 *v.* John P. Lomenzo et al.	)))	On Reapplication for a Stay Pending Appeal.
Anthony J. Travia et al., Appellants, No. — *v.* John P. Lomenzo et al.	)))	On Application for a Stay Pending Appeal.

[July 16, 1965.]

Memorandum of MR. JUSTICE HARLAN.

These are two applications for stays, before me as Circuit Justice. Oral argument has been requested, but in view of the fact that the basic factors underlying these applications have earlier been argued before me, I consider this course unnecessary.

On May 24, 1965, a three-judge Federal District Court ordered New York to hold a special legislative election on November 2, 1965, over objections that the reapportionment plan under which the election was to be conducted had been held by the New York Court of Appeals to violate provisions of the New York Constitution. On June 1 this Court, over my dissent, refused to stay the District Court's order pending appeal. *Travia* v. *Lomenzo*, 381 U.S. 431. On July 9 the New York Court of Appeals, by a divided vote, enjoined the holding of the election, considering that no "final and binding" order requiring the election had yet been issued by the federal courts. *Glinski* v. *Lomenzo*, — N.Y.2d —. There ensued further proceedings before the District Court, resulting in an order dated July 13 which enjoins all persons from

in any way interfering with the holding of such election. Petitioners Travia et al. have reapplied for a stay of the order of the District Court entered on May 24, and have also, joined by certain New York City officials, applied for a stay of the order of the District Court entered on July 13. Appeals are being taken to this Court from both orders, and appeals are pending in this Court from the judgment of the New York Court of Appeals, holding unconstitutional under the State Constitution the reapportionment plan under which the District Court has ordered the election to be held. *In re Orans*, 15 N.Y.2d 339, appeal pending. *Rockefeller* v. *Orans*, No. 319, 1965 Term.

Were this Court in session I would have referred both of these applications to it for disposition, as was done with the earlier application for a stay of the District Court's order of May 24. *Travia* v. *Lomenzo*, *supra*. I consider it, however, my duty in the circumstances to act on these applications myself, deeming that I would not be justified in asking THE CHIEF JUSTICE to take steps to convene the Court in special session.[1] Given what has already transpired, I am left in no doubt as to what the decision on these applications must be.

While I have heretofore expressed my strong disagreement both with this Court's basic state reapportionment decisions (see my dissenting opinion in *Reynolds* v. *Sims*, 377 U.S. 533, 589) and with the Court's subsequent refusal, at least so far, to give plenary consideration to any of the challenges that have been made to the particular kinds of relief granted by district courts (see my opinions in *Hughes* v. *WMCA, Inc.*, 379 U.S. 694; *Fortson* v. *Toombs*, 379 U.S. 621, 623; *Travia* v. *Lomenzo*, *supra;* cf. *Parsons* v. *Buckley*, 379 U.S. 359, 364), nevertheless I can only conclude that the denial of these appli-

[1] Although the earlier stay application relating to the May 24 order was acted on by this Court, I entertain no doubt as to my power to deal with this reapplication, the Court being in summer recess.

cations is compelled by this Court's earlier summary denial of a stay, pending appeal, of the District Court's order of May 24, directing the election in question. That denial surely signified this Court's unwillingness to interfere with the District Court's direction of the election, even though the election was to be held under a plan of apportionment which violated the New York Constitution. See my dissenting opinion in *Travia* v. *Lomenzo*, *supra*, at 434-435. That being so, the Supremacy Clause of the Federal Constitution requires the state courts to give recognition to the District Court's order. See *Marbury* v. *Madison*, 1 Cranch 137; *United States* v. *Peters*, 5 Cranch 115; *Ableman* v. *Booth*, 21 How. 506; *Sterling* v. *Constantin*, 287 U.S. 378.

This is not meant to suggest that, following the District Court's order of May 24, the New York courts could take no action whatever with reference to these electoral matters. This Court has repeatedly encouraged the state courts to fashion appropriate relief in reapportionment cases, even after a federal court has itself entered an order. *Scranton* v. *Drew*, 379 U.S. 40; *Scott* v. *Germano*, 381 U.S. 407; see *Maryland Committee* v. *Tawes*, 377 U.S. 656, 674. Whether the federal court will then defer to the state court depends not on the Supremacy Clause, but on the exercise of discretion by the federal court pursuant to considerations of comity inherent in federalism. However, the solution reached by the State Court of Appeals on July 9—to hold no election this fall—had already been rejected by the District Court in its order of May 24, and, by necessary implication, had also been rejected by this Court in denying a stay of that order. It is clear in such circumstances that an exercise of discretion refusing to defer to the state courts cannot be deemed inappropriate.

The Federal District Court has entered an injunction which bars any further action in the New York courts. But for this injunction, it is conceivable that the New York courts (putting aside any questions of state law

limitations) could yet fashion a remedy which would permit an election in 1965 under a form of "Plan A" modified so as to be more compatible with the State Constitution. However, the likelihood of such action (or any other which might be appropriate) is obviously slight, and the possibility cannot be ignored that at this late date any further proceedings in the state courts might well serve simply to compound the confusion already engendered by this matter. In these circumstances I cannot say that the District Court's injunction against any further actions was improper.[2] I am accordingly constrained to leave it in full effect.

In conclusion, I think it pertinent to observe that these applications illustrate how important it is for this Court to act in a sensitive and not heavy-handed manner in this novel and delicate constitutional field. It is manifest from the majority opinion of the New York Court of Appeals that the present unfortunate situation would not have arisen had this Court explicated its reasons for refusing to stay the District Court's order of May 24.

Orders will issue denying stays of both the May 24 and July 13 orders of the District Court.

[2] The District Court possessed ample power thus to effectuate its jurisdiction. 28 U.S.C. § 1651; see 28 U.S.C. § 2283; *Riggs* v. *Johnson County*, 6 Wall. 166.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1965.

Joseph E. Seagram & Sons, Inc., et al., Appellants,	)	
v.	)	On Application for Stay Pending Appeal.
Donald S. Hostetter, Chairman of the of the State Liquor Authority, et al.	)	

[August 5, 1965.]

Memorandum of MR. JUSTICE HARLAN, as Circuit Justice.

After due deliberation, I conclude that petitioners-appellants are entitled to a stay, conditioned, however, as hereafter indicated.

In this still unsettled field of the law, I am unable to say that the federal questions involved would not be found by at least four members of this Court to be deserving of plenary consideration. On that premise, I conclude that the considerations making against additional delay in the enforcement of this state statute, whose validity under the Federal Constitution was upheld only by a closely divided vote of the New York Court of Appeals, are overcome by the factors put forward by petitioners-appellants in support of preserving the status quo pending action by this Court on their appeal. At the same time, it is due the State that this Court should be enabled to decide, with reasonable promptness, whether probable jurisdiction of this appeal should be noted.

To these ends, I shall issue an order adopting and continuing in effect the provisions of the order of stay dated July 21, 1965, issued by Chief Judge Desmond pending the termination of this appeal, conditioned, however, on appellants perfecting their appeal and filing their jurisdictional statement on or before September 10, 1965, and filing any response to any motion to dismiss or affirm that may be made by appellees within 10 days after the filing of such motion.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

David Crockett Hutchinson et al., Petitioners	)	On Motion for Stay.
v.	)	
People of the State of New York.	)	

[September 20, 1965.]

Memorandum of MR. JUSTICE HARLAN.

This is an application for a stay of a remand order pending appeal to the Court of Appeals. Circuit Judge Anderson has refused to stay, pending appeal to the Court of Appeals for the Second Circuit, an order of the District Court remanding to the New York State courts certain criminal charges against the petitioners sought to be removed to the federal courts under 28 U.S.C. § 1443. Some of such charges have been set for trial in the state court on September 21, 1965.

Assuming, but not deciding, that the state prosecutions involved in this matter may be within the purview of § 1443, see *People* v. *Galamison*, 342 F.2d 255, cert. denied, 380 U.S. 977, compare, *e.g.*, *Kentucky* v. *Powers*, 201 U.S. 1, with *Rachel* v. *Georgia*, 342 F.2d 336 (now pending in this Court on petition for certiorari, No. 147), I nonetheless conclude that the stay sought of me by these petitioners should not issue. After examining petitioners' papers and the District Court's opinion, I am satisfied that petitioners' showing that they cannot receive a fair and proper disposition of their federal claims in the New York courts is insufficient to warrant interference with Judge Anderson's determination that the state proceedings should be permitted to go forward in normal course, notwithstanding the pendency of petitioners' appeal to the Court of Appeals from the District Court's order of remand. Cf. Memorandum of MR. JUSTICE HARLAN denying a stay of remand order, *City-Wide Comm. for Integration* v. *Board of Education of New York*, March 8, 1965.

Denied.

SUPREME COURT OF THE UNITED STATES

Nos. 73, 74, 75, 76 & 77.—OCTOBER TERM, 1965.

United States, Appellant,	)	
73 *v.*	)	
Grinnell Corporation et al.	)	
	)	
Grinnell Corporation, Appellant,	)	
74 *v.*	)	
United States.	)	
	)	
American Dist. Tel. Co., Appellant,	)	On Application for a Stay
75 *v.*	)	of the Judgment Below.
United States.	)	
	)	
Holmes Elec. Protec. Co., Appellant,	)	
76 *v.*	)	
United States.	)	
	)	
Auto. Fire Alarm Co., Appellant,	)	
77 *v.*	)	
United States.	)	

[November 8, 1965.]

MR. JUSTICE FORTAS, in chambers.

Appellants Grinnell Corporation et al., defendants below, have applied to me for a stay of paragraphs 3 and 4 of the judgment below pending disposition of their appeals and for six months thereafter. The appeals are from a judgment of the United States District Court for the District of Rhode Island (Wyzanski, J., sitting by designation) entered in a civil action under §§ 1 and 2 of the Sherman Act, brought by the United States. Paragraph 3 of the judgment required Grinnell to file, not later than April 1, 1966, a plan of divestiture of all of its stock in each of the alarm company defendants.

Paragraph 4 provided that neither Grinnell nor any of the alarm company defendants shall, after April 1, 1966, employ a named individual as officer, director, employee, consultant, agent or otherwise.

The Government has filed a Memorandum consenting to a stay of four months from the date of this Court's decision. The court below, in a letter to counsel, stated that it would stay the judgment for four months from April 1, 1966, except for the doubt, in view of the pending appeal, as to its power to do so.

It appears probable, in view of the voluminous record, that this case will not be decided by this Court prior to April 1, 1966.

While I am sympathetic with the request, so presented, for a stay, I do not believe that I, as an individual Justice of this Court, should extend it beyond the date of the judgment of this Court. If and as appropriate, provision for additional time may be considered by this Court in connection with its disposition of the case, or by the District Court upon remand. In the interim, if circumstances which are not now apparent to me require consideration of additional time beyond that provided in this order, application may be made to this Court.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

Otis Chestnut et al., Petitioners,	)	
v.	)	On Motion for Stay.
People of the State of New York.	)	

[March 4, 1966.]

Memorandum of MR. JUSTICE HARLAN.

This is an application for a stay of an order of the United States District Court for the Southern District of New York remanding to the New York state courts a criminal case sought to be removed to the federal courts under 28 [Publisher's note: The "28" appears to be written over some other characters.] U.S.C. § 1443 (1964 ed.). The Court of Appeals for the Second Circuit, in which appeals from the remand order are now pending, has refused a stay, and it appears that the state proceedings will go forward on March 4, 1966.

I have on two prior occasions declined to disturb denials of similar stays by the Court of Appeals pending certiorari in this Court or appeal to the Court of Appeals. See Memorandum of MR. JUSTICE HARLAN denying a stay of remand order, *City-Wide Comm. for Integration* v. *Board of Education of New York*, March 8, 1965 [Publisher's note: See page v of the "Introduction" to this volume.]; Memorandum of MR. JUSTICE HARLAN denying a stay of remand order, *Hutchinson* v. *New York*, September 20, 1965. Since then, this Court has granted certiorari in two cases, to be argued at the April session, which encompass on a broad scale the reach and application of § 1443. *Rachel* v. *Georgia*, 342 F.2d 336, cert. granted, 382 U.S. 808; *Peacock* v. *City of Greenwood*, 347 F.2d 679, cert. granted, 86 Sup. Ct. 532.

In these circumstances I consider that these petitioners-appellants are entitled to have their appeals to the Court

of Appeals determined by that court, presumably in light of this Court's decisions in the two cases mentioned, before they are remanded to the state courts.

Accordingly, an order will issue staying the effectiveness of the District Court's remand order dated February 9, 1966, until determination of the pending appeals by the Court of Appeals. In so disposing of the application I assume that petitioners-appellants will prosecute their appeals with due diligence.

SUPREME COURT OF THE UNITED STATES

California v. *Alcorcha*.

APPLICATION FOR BAIL.

[Publisher's note: According to the *Supreme Court Reporter*, this decision was issued on April 22, 1966.]

Opinion of MR. JUSTICE DOUGLAS.

I have before me an application for bail addressed to me as Circuit Justice for the Ninth Circuit. The applicant, Rory Zamora Alcorcha, has been convicted of illegal possession of marijuana in violation of § 11530 of the California Health and Safety Code and sentenced to the term prescribed by law. His motions for bail pending appeal have been denied by the trial court, the California District Court of Appeal, the California Supreme Court, and the United States District Court. From the papers it appears that Alcorcha has an appeal pending in the California District Court of Appeal.

The State of California has filed a response opposing this application for bail. California urges that I deny the application "in the sound exercise of discretion" but concedes that I have the power to release Alcorcha on bail. That concession came as something of a surprise, for, absent unusual circumstances that I will mention, the power of a Circuit Justice to grant bail in cases such as this does not appear to be supported by any statute nor by any decision of this Court or any individual Justice sitting in chambers.

Were this a case involving an appeal from a conviction in a federal court, there would be no doubt of my power to set bail.[1] And if this were a case brought here from a state court by appeal or writ of certiorari the power of a Circuit Justice to order release on bail would be

[1] See Rule 46 of the Federal Rules of Criminal Procedure.

clear.[2] But the case before me is one in which the applicant's appeal is still pending in an appellate court of the State.

Title 18 U.S.C. § 3144 governs bail in cases coming from state courts. But that section only covers cases "brought to the Supreme Court of the United States for review." Title 28 U.S.C. § 2101(f) confers the authority to grant stays (conditioned, where appropriate, on the giving of security). But that section applies only to cases "in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari." Rule 46(a)(2) of the Federal Rules of Criminal Procedure, which deals with bail pending appeal, does not cover this case; it applies only to criminal cases arising in the federal courts.[3] Title 28 U.S.C. § 1651, the "all-writs" statute, does not suggest any pertinent source of power, since that reaches only writs which are "necessary or appropriate in aid of" the Court's jurisdiction. It has been suggested that power to order release pending appeal in a state court may be founded on 28 U.S.C. § 1651 where substantial federal issues have been raised and expiration of a short prison term would moot the case. See Stern and Gressman, Supreme Court Practice 410 (3d ed., 1962); Note, Powers of the Supreme Court Justice Acting in an Individual Capacity, 112 U. Pa. L. Rev. 981, 1000 (1964). No such situation is presented here.

Article I, § 9 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public

[2] 18 U.S.C. § 3144, 28 U.S.C. § 2101(f) (1964 ed.). See Note, The Powers of the Supreme Court Justice Acting in an Individual Capacity, 112 U. Pa. L. Rev. 981, 999-1000 and n. 127 (1964).

[3] The statutory authority for Rule 46 conferred the power to prescribe rules "with respect to any or all proceedings . . . in criminal cases in district courts of the United States . . . ." Act of June 29, 1940, 54 Stat. 688. And see Act of February 24, 1933, 47 Stat. 904.

Safety may require it." In spite of *Gasquet* v. *Lapeyre*, 242 U.S. 367, 369, I incline to the view that this prohibition applies to the States as well as to the Federal Government. It also is apparent that bail—which by reason of the Eighth Amendment may not be "excessive"—is encompassed within the broad reach of habeas corpus, for it often does service for the writ. I assume, therefore, that should a State abolish bail, it would violate Art. I, § 9. In that event the judicial power granted by Article III, though not implemented by legislation, would seem to be adequate to grant relief in all state cases even though the cases were neither in this Court nor enroute [Publisher's note: "enroute" should be "en route".] here.[4] But California has not abolished the bail system. See Witkin, California Criminal Procedure, §§ 148-166, 673-680 (1963). On appeal, the grant or denial of bail rests largely on the sound discretion of the judge. *Id.*, at §§ 673-674.

Finding no authority to grant bail in this case, I am compelled to deny this application.

[4] Perhaps an application for bail pending appeal in a state court might be treated as an application for a writ of habeas corpus, which a Circuit Justice is authorized by 28 U.S.C. § 2241(a) (1964 ed.) to issue where the applicant is in custody in violation of the Constitution. *Id.*, (c)(3). Writs of habeas corpus, even in aid of our appellate jurisdiction, are seldom issued by the full Court (see *Ex parte Abernathy*, 320 U.S. 219) and even less by an individual Justice (*United States ex rel. Norris* v. *Swope*, 72 S. Ct. 1020, 1021 (DOUGLAS, J.)), save in exceptional circumstances. See generally, Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, Supreme Court Review 153 (1962).

SUPREME COURT OF THE UNITED STATES

MITCHELL *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 1622, Misc. Decided May 5, 1966.

MR. JUSTICE DOUGLAS, Circuit Justice.

Petitioner is scheduled to be executed May 11 and asks me to stay the execution.

The question of federal law which he presents turns on a factual issue which the Supreme Court of California seems to have resolved against petitioner, although so far as I can find there has been no hearing accorded him on that point.

But in the absence of a hearing and a resolution of the factual dispute, it will be impossible to resolve the federal issue. This issue to be resolved must be done in a *habeas corpus* proceeding either in the state court or in the federal court. That is the most appropriate tribunal to issue a stay of execution.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1966.

American Manufacturers Mutual Insurance Co. et al., Petitioners, *v.* American Broadcasting-Paramount Theatres, Inc.	)))))	On Application for Stay Pending Certiorari.

[August 1, 1966.]

Memorandum of MR. JUSTICE HARLAN.

This is an application for a stay, pending certiorari, of the enforcement of a New York Supreme Court money judgment awarded against petitioners in an action for breach of a radio broadcasting sponsorship contract. The questions sought to be brought to this Court for review all relate to the state court's disallowance of a defense predicated on the alleged illegality of this contract under federal antitrust laws. Having carefully considered the papers on both sides, and mindful that what is here involved is a state judgment and state cause of action, I conclude that the requested stay should issue, conditioned, however, as hereafter indicated.

The claim that the contract in suit entailed a federally illegal "tying" arrangement cannot be regarded as lacking in substance in light of *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753, cert. denied, 382 U.S. 820, and does not appear to be precisely controlled by any decision of this Court. The posture of federal law relating to the availability of the asserted antitrust defense in this contract action is to say the least highly debatable. See *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U.S. 227; *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 731; *Kelly* v. *Kosuga*, 358 U.S. 516. And the

view of the state court that it could render judgment for the respondent without adjudicating the merits of petitioners' antitrust defense also presents a federal question which cannot be deemed devoid of substance. In these circumstances I am unable to say that the case bears no reasonable chance of review by this Court.

I have also deemed it incumbent upon me to consider two further questions, although they have been little if at all pressed in respondent's papers. The first is the failure of petitioners to show what ultimate damage they will suffer by reason of having to pay the judgment pending certiorari. The second is the ambiguity that exists as to whether petitioners sought a stay pending certiorari from the state courts before coming to me. I conclude that neither of these points prevents issuance of the requested stay.

With respect to a case arising in the federal system it seems to be accepted that a party taking an appeal from the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with Fed. R. Civ. P. 62(d) and 73(d), see *In re Federal Facilities Realty Trust*, 227 F.2d 651, 655; 7 Moore, Federal Practice ¶ 62.06 (2d ed. 1955); 3 Baron & Holtzoff, Federal Practice and Procedure § 1374 (rules ed. 1958), and I perceive no substantial countervailing reason why at the certiorari stage this federal policy should not be applied to state cases presenting arguably substantial federal questions. As to the other question, I am disposed to accept Judge Van Voorhis' stay of judgment pending the making of this application as entailing sufficient compliance on the part of petitioners with this Court's Rule 27, and respondent does not argue to the contrary.

An order will issue staying enforcement of the New York judgment pending the timely filing of the petition for certiorari. Should such petition be so timely filed,

this stay is to remain in effect pending the action of this Court on such petition. In the event the petition is denied, this stay shall terminate automatically. Should the petition for writ of certiorari be granted, this stay is to remain in effect pending the issuance of the mandate of this Court. This stay is conditioned upon the posting of a good and sufficient surety bond in the principal amount of the judgment and providing for costs, interest and damages for delay. Compare Supreme Court Rule 18. Such bond is to be posted with and approved by the Supreme Court of New York County, or a judge thereof, and when so posted and approved to be filed with the clerk of that court.

In reaching this decision I imply no view whatever upon any phase of the ultimate merits of the underlying controversy.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1966.

Public Service Board of the State of Vermont and the City of New York, Petitioners,	)	
v.	)	On Application for Stay Pending Appeal.
United States of America, Interstate Commerce Commission, and Boston and Maine Corp.	)	

[August 8, 1966.]

Memorandum of MR. JUSTICE HARLAN.

The Boston and Maine Corporation has filed notice with the Interstate Commerce Commission that it intends to discontinue the operation of four passenger services between Springfield, Massachusetts and White River Junction, Vermont. These trains are among other things one portion of two passenger routes between New York City and Washington, D.C. on the south, and Montreal, Canada on the north. Division 3 of the Commission in a comprehensive report has declined to require Boston and Maine to continue these services. In essence Division 3 found that the services could be maintained only at substantial financial loss to the Corporation, that discontinuance of these trains was compatible with public necessity and convenience, and that the services, because of their adverse impact on the Corporation's financial ability to continue efficient operation of its important freight service in northern New England, would burden interstate commerce.

Without first seeking review of the Division's decision, either by the full Commission or by an appellate division, petitioners commenced a proceeding in the United States District Court for Vermont, asking *inter alia* an inter-

locutory injunction forbidding discontinuance pending final disposition of the matter. A temporary restraining order was issued by Chief Judge Gibson, but was subsequently ordered dissolved by a three-judge District Court on the ground that petitioners had failed to show irreparable injury. Circuit Judge Waterman, although apparently not disagreeing with that finding, dissented on the ground that failure to continue the restraining order might prejudice review of the Division's order within the Commission itself. This application for a stay pending appeal to this Court from the three-judge District Court's dissolution order followed.

I have considered this application with the care that is due the asserted public interest at stake, and have concluded that no case for the relief sought has been made out. I am satisfied that oral argument would not change this conclusion, and therefore decline the request to invite it.

My reasons for denying the application are threefold. First, although I do not find it necessary to decide the points, there are substantial issues as to whether the District Court had jurisdiction to entertain the proceeding at this stage. See, *e.g.*, *State of New Hampshire* v. *Boston and Maine Corporation*, 251 F. Supp. 421, *State of Minnesota* v. *United States*, 238 F. Supp. 107, and see further 49 U.S.C. § 17(9). Second, in any event I find it impossible to say that the District Court in assessing the equities and the likelihood of irreparable injury as it did abused its discretion in refusing interlocutory relief. Third, denial of a stay does not of course moot ultimate review by this Court of the issues underlying this discontinuance, should petitioners become entitled to such review.

Application denied.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1966.

Louisiana et al., Petitioners,	)	On Application for a Stay or
v.	)	Modification of Injunction.
United States.	)	

[August 12, 1966.]

Memorandum of MR. JUSTICE BLACK.

I am here asked to modify or stay the order by a three-judge United States District Court of the Eastern District of Louisiana, dated August 10, 1966, in Civil Action No. 2866, two days ago, designed by the District Court to protect rights of Louisiana voters alleged and found by that Court to be rights protected by the United States Constitution and by the 1965 Voting Rights Act passed by Congress. The ground for the application is that the District Court's order went beyond the issues raised and that the order had created "complete confusion and utter chaos" among the States' election officers concerning their duties in an election to take place tomorrow, August 13, 1966. It seems to me that a hasty last-minute modification or stay of the District Court's order might more likely increase than clarify any confusion that might possibly have been brought about by the District Court's order. The time for hearing is now entirely too short for me to give this matter the consideration deserved as a prerequisite to my overturning the District Court's considered belief that its order is essential to protect threats against the cherished right of citizens to vote.

Application denied.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1966.

Birtcher Corp. et al., Petitioners,	)	On Application for Stay
v.	)	Pending Certiorari.
Diapulse Corp. of America et al.	)	

[August 19, 1966.]

Memorandum of MR. JUSTICE HARLAN.

This is an application for the stay of a mandate of the Court of Appeals for the Second Circuit. So far as now germane, the mandate issued upon that court's affirmance of a $125,000 judgment entered in the District Court in favor of Diapulse on a jury verdict rendered in a trade libel action. The action was originally instituted in the New York state courts but was later removed by Birtcher to the federal court on the ground of diversity.

Subsequently the Court of Appeals stayed its mandate pending certiorari proceedings in this Court, provided that Birtcher filed its petition for certiorari and posted a $145,000 supersedeas bond within a period of time expiring August 22, 1966. Birtcher's motion for rehearing seeking to reduce the bond to $50,000 (reflecting: the amount of the compensatory, but not punitive [Publisher's note: There should be a comma here.] damages awarded Diapulse) has not yet been acted upon by the Court of Appeals. Since I am of the opinion that the stay requested of me should not issue in any event, I deem it appropriate to act on this application at the present juncture, as urged by Birtcher.

The only claim specifically mentioned in the moving papers to be tendered on certiorari is that personal juris-

diction over Birtcher in the original state action was improperly sustained by the Court of Appeals. I do not understand Birtcher to question that in diversity cases such as this personal jurisdiction is to be determined by the federal courts in accordance with state law. See, *e.g.*, *Arrowsmith* v. *United Press International*, 320 F.2d 219. It seems to be contended first that the New York law as found by the Court of Appeals falls short of federal constitutional standards, and, alternatively, that the Court of Appeals misinterpreted the relevant New York law. In light of the concurrent findings of the two lower courts I am of the view that the first contention does not give rise to a substantial federal question. As to the alternative contention, I do not think it is within the realm of reasonable possibility that this Court will undertake to reassess the Court of Appeals' view of the local law. In my opinion the likelihood of certiorari being granted is thus too remote to justify my ameliorating the terms on which the Court of Appeals stayed its mandate.

Further, I find no satisfactory showing in the moving papers that Birtcher would not be able to recover from Diapulse any amount paid pending certiorari, even were review to be granted and the judgment below in favor of Diapulse reversed.

In these circumstances I conclude that a stay should be denied.

[Publisher's note: "McCleod" should be "McLeod" in the caption (see 87 S. Ct. 5), as it is everywhere else.]

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1966.

IN RE IVAN McCLEOD *v.* GENERAL ELECTRIC COMPANY

[September 21, 1966.]

MR. JUSTICE HARLAN.

This is an application by the Regional Director of the National Labor Relations Board for the Second Region for a stay, pending certiorari proceedings, of a judgement of the Court of Appeals for the Second Circuit, 366 F.2d 847, setting aside a temporary injunction issued by the District Court, 257 F. Supp. 690, against the General Electric Company under § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) (1964 ed.). Section 10(j) authorizes the Board, upon the issuance of an unfair labor practice complaint, to petition an appropriate United States district court for "such temporary relief or restraining order" as the court "deems just and proper" pending adjudication of the complaint by the Board.

In this case, an administrative complaint was issued alleging that General Electric had violated § 8(a)(1) and (5) of the Labor Act, 29 U.S.C. § 158(a)(1), (5) (1964 ed.), by refusing to bargain collectively with the International Union of Electric, Radio and Machine Workers, AFL—CIO (IUE), the certified bargaining agent for certain company employees, over the terms of an agreement to replace an existing contract between the two which expires on October 2, 1966. General Electric's refusal to bargain with IUE was caused by the presence on the Union's bargaining committee of representatives of other unions with which General Electric also has collective bargaining agreements that expire at about the time the IUE agreement terminates. The company contended that their presence at the IUE negotiations constituted an unlawful attempt to impose multiunion company-wide bargaining. Upon authorization by the Labor Board, the Regional Director filed this suit for a § 10(j) injunction.

The District Court, after an evidentiary hearing, held that on the particular facts of this case, (1) the Board had "reasonable cause to believe" that General Electric's refusal to bargain would be held to constitute an unfair labor practice, and (2) the circumstances justified the issuance of a temporary injunction, the effect of which is to require General Electric to bargain with the present IUE committee pending Labor Board resolution of the unfair labor practice charge. The Court of Appeals, filing a written opinion, set aside the injunction, refused the Regional Director's request for a stay of its mandate pending certiorari, and granted General Electric's application that the mandate issue forthwith.

Having carefully considered the papers submitted on both sides, I am of the opinion that petitioner is entitled to a stay on terms indicated below. The underlying issue in this case—the standards governing the application of § 10(j)—has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act. In light of the District Court's findings of fact, which were not disturbed by the Court of Appeals, petitioner's position as to such standards cannot be deemed insubstantial. See e.g., *Douds* v. *International Longshoremen's Assn.*, 2 Cir., 241 F.2d 278; *Brown* v. *Pacific Tel. & Tel. Co.*, 9 Cir., 218 F.2d 542; cf. *McLeod* v. *Local 25, Int'l B'h'd of Elec. Workers*, 2 Cir., 344 F.2d 634; *Schauffler* v. *Local 1291, Int'l Longshoremen's Assn.*, 3 Cir., 292 F.2d 182; see in addition *American Radiator & Standard Sanitary Corp.*, 155 N.L.R.B. No. 69, 60 L.R.R.M. 1385, appeal to the Court of Appeals for the Sixth Circuit pending; and *Standard Oil Co.* v. *NLRB*, 6 Cir., 322 F.2d 40. And the competing equities relevant to this application seem to me to tip in favor of some interim relief being granted at this stage. On the other hand I consider that the powers of a single Justice of this Court should be exercised sparingly in the context of this unusual situation.

On these premises I shall stay the execution and enforcement of the judgement of the Court of Appeals but only pending this Court's disposition of petitioner's petition for certiorari, and only on condition that such petition is filed on or before October 24, 1966. If certiorari is denied, this stay shall terminate forthwith. If certiorari is granted, I shall, pursuant to Rule 50(6) of the Rules of this Court, submit to the Court at the time it so votes the application now before me so that it may determine whether a further stay should be granted.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

Herbert W. Baytops	)	
v.	)	On Application for Bail.
State of New Jersey.	)	

[August 15, 1967.]

MR. JUSTICE FORTAS, Circuit Justice.

In order to grant an application for bail pending disposition of a petition for certiorari, it is necessary for me to consider, among other factors, whether the questions presented are frivolous. The present application merely alleges error in gross and uninformative terms, and the response filed by the State in opposition to the application does not serve to supply the application's deficiency. Accordingly, the bail application is denied without prejudice to renewal of application for bail. Cf. *Bowman* v. *United States*, 85 Sup. Ct. 232 (1964).

Application denied.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

Robert T. Mathis, Sr.	)	
v.	)	On Application for Bail.
United States.	)	

[August 15, 1967.]

MR. JUSTICE FORTAS, Circuit Justice.

This is an application for bail pending disposition of a petition for certiorari. I am not persuaded, as the United States contends, that the issue raised by the applicant is frivolous. Nor has the Government shown any other reason, under the terms of the Bail Reform Act of 1966, 18 U.S.C. § 3148, for denying bail. Accordingly, I believe this application for bail should be granted.

It is ordered that the applicant be released on bail, the amount or conditions of such bail, if any, to be fixed by a judge of the United States District Court for the Southern District of Florida, in accordance with the standards and procedures established by the Bail Reform Act of 1966.

Application granted.