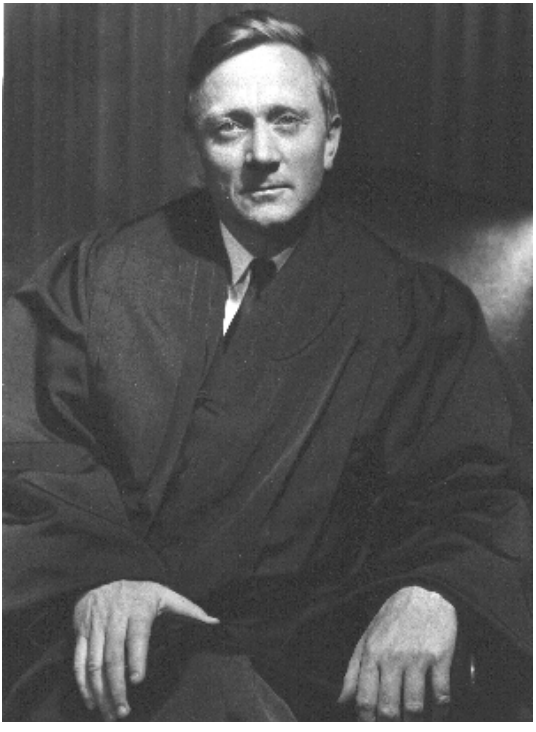
IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

VOLUME II



William O. Douglas
Associate Justice, April 17, 1939 – November 12, 1975

A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

VOLUME II

covering the 1967 Term through the 1978 Term

Compiled by

Cynthia Rapp
July 2001

with an Introduction by

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CONTENTS – VOLUME II

PREFACE

The opinions in the second and third volumes of *In Chambers Opinions* are different from those in the first volume in one important way: Most of them are superseded by opinions published in the *United States Reports*. In contrast, only one opinion in the first volume is. Compare *Rosenberg* v. *United States*, 1 Rapp 89 (1953) (Douglas), with 346 U.S. 273, 313 (1953) (Appendix to Opinion of Douglas, dissenting). As Cynthia Rapp, a Supreme Court Deputy Clerk and the compiler of *In Chambers Opinions*, explains in her introduction to the first volume, this difference is a matter of timing. The first volume of *In Chambers Opinions* contains opinions dating from the 1920s through the Court's 1966 Term (as well as one extraordinary opinion from 1882), and "[i]n 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." Cynthia Rapp, *Introduction*, 1 Rapp v, vii (2001); see also *Reporter's Note*, 396 U.S. unnumbered page preceding page 1201 ("Commencing with this volume, opinions in chambers of individual Justices are, pursuant to authorization, being published in the United States Reports. The in-chambers opinions that appear herein were issued since the end of the October Term, 1968."). The volume of *In Chambers Opinions* that you are holding — the second — covers the Supreme Court's 1967 through 1978 Terms, and the third volume covers the 1979 through 1998 Terms.

Many of the opinions collected in volumes 2 and 3 of *In Chambers Opinions* appear as they were initially drafted or issued by a Justice, rather than as they finally appeared in the *United States Reports*. In a few cases the differences are readily noticeable (compare, *e.g.*, *Fishman* v. *Schaffer*, 2 Rapp 721 (1976) (Marshall), with 429 U.S. 1325 (1976) (as amended)), but in most they range from typographical and citation-form variations to inconsistencies in quotations from statutory sources. In no case, however, do the differences reach the outcome, holding, or substantive reasoning contained in an opinion. In light of the extremely tight time constraints under which many of these decisions were reached and opinions prepared, the work of the Justices in chambers is impressively thorough, accurate, and readable. Nevertheless, it is important to bear in mind that where there is more than one version of an opinion, only one is correct as a matter of law: the one in the *United States Reports*. As a result, those who would cite for its legal authority an opinion in *In Chambers Opinions* should check for the existence of a version in the *United States Reports*, and, if there is one, read it and cite to it as the primary authority, with a parallel citation if appropriate to the *In Chambers Opinions* version. You will find the relevant *United States Reports* citation in a "Publisher's note" at the beginning of each such opinion in this volume and the next. Those citations are also listed in the "In Chambers Index by Title" at 1 Rapp xxx, and, beginning this autumn, in the cumulative set of indexes and tables to be included in the *Green Bag*'s annual supplement to *In Chambers Opinions*.

So, of what use are the many superseded opinions in the second and third volumes of *In Chambers Opinions*? First, because they contain the essentials and most or all of the details of the final versions, and because they are so neatly organized and intelligently indexed in the Rapp volumes, they remain an essential part of an excellent resource for legal research. Second, they function quite well as the basis for the indexes currently available in 1 Rapp (and soon in cumulative

form in the annual supplements) because there are no differences between the *United States Reports* and *In Chambers Opinions* versions so great that they would require different index entries. Third, the superseded opinions are useful resources for understanding the background of specific in chambers opinions and the development of in chambers opinions in general. Fourth, they are interesting artifacts of a seldom-studied aspect of the Supreme Court's work.

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Then there are the opinions collected in *In Chambers Opinions* that do not appear in final, official form in the *United States Reports*. They nearly fill the first volume — the only exception being the *Rosenberg* v. *United States* opinion mentioned above. In the second volume there are the opinions from the Court's 1967 and 1968 Terms that predate the practice of publishing official versions. See 2 Rapp 393-422. And, finally, there are a few scattered others. See, *e.g.*, *California* v. *Winson*, 3 Rapp 1069 (1981) (Rehnquist); *Finance Committee to Re-elect the President* v. *Waddy*, 2 Rapp 577 (1972) (Burger). These later anomalies are probably a product of the movement toward ever more comprehensive collections of judicial work — a trend reflected in the quite reasonable application of an exhaustive standard (including a relatively liberal definition of what counts as an "in chambers opinion") in the compilation of *In Chambers Opinions*. The bottom line is that there are roughly 150 opinions in the first three volumes of *In Chambers Opinions* for which there are no substitutes in the *United States Reports*. Thus, the prudent lawyer will supplement research in the *United States Reports* with a visit to *In Chambers Opinions*, and then return to the *United States Reports* for the last word, whenever possible.

Even where there is no official version of an opinion in the *United States Reports*, an unofficial version should still be handled with care, whether it appears in *In Chambers Opinions* or the *Supreme Court Reporter* or the *Congressional Record* or some other publication. Unofficial versions have not been subjected to the thorough editorial back-and-forth between a Justice and the Court's Reporter of Decisions, or to the fanatical flyspecking that practitioners and scholars bestow on the Court's slip opinions and preliminary prints. (Of course, no individual or collective proofreading mind is perfect. Compare, *e.g.*, *Pacific Telephone & Telegraph Co.* v. *Public Utilities Commission of California*, 2 Rapp 919, 922 (1979) (Rehnquist), with 443 U.S. 1301, 1304 (1979).) The *Green Bag* has annotated the opinions in *In Chambers Opinions* with an eye to identifying and explaining our fidelity to various odd features in the originals, but as a general matter we have not cite-checked or otherwise sought to optimize them. Instead, we have left it to the Justices to speak in their own words, and to you to make what you will of them. Nor is it necessarily a good idea to assume that a Justice who released an in chambers opinion without running it through the gantlets of official reporting expected or intended those words to apply beyond the facts of the case at hand. On that ground, an argument could be made that unofficial versions of in chambers opinions should receive the same kind of limited precedential respect that federal courts of appeals sometimes accord the unpublished opinions of their own panels. See Danny J. Boggs and Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 Green Bag 2d 17 (2000).

But whatever past judicial expectations or intentions may have been for the limited application or authority of these in chambers opinions by Justices of the Supreme Court, longstanding practice has trumped them. This should come as no surprise. In quite a few cases an unofficial version is the only (and therefore the best) authority available. In that circumstance, it would be a mistake to permit the perfect to be the enemy of the good by ignoring useful, although perhaps not fully vetted, in chambers opinions. The Justices themselves have led the way on this subject by relying in their own opinions on other Justices' in chambers opinions that have not appeared in the *United States Reports*. See, *e.g.*, *Carlisle* v. *United States*, 517 U.S. 416, 432 (1996) (quoting *Fernandez* v. *United States*, 81 S. Ct. 642, 644 (1961) (Harlan, in chambers)); *O'Connell* v. *Kirchner*, 513 U.S. 1138, 1140 (1995) (O'Connor, dissenting from denial of stay application) (quoting *Sklaroff* v. *Skeadas*, 76 S. Ct. 736, 738 (1956) (Frankfurter, in chambers)); *Packwood* v. *Senate Select Committee on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, in chambers) (citing *Fargo Women's Health Organization* v. *Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, concurring in denial of stay application) (quoting *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, in chambers))); *Weiss* v. *United States*, 510 U.S. 163, 195 (1994) (Ginsburg, concurring) (quoting *Winters* v. *United States*, 89 S. Ct. 57, 59-60 (1968) (Douglas, in chambers)); *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Commission*, 479 U.S. 1312, 1313 (1986) (Scalia, in chambers) (citing *Twentieth Century Airlines* v. *Ryan*, 74 S. Ct. 8, 10 (1953) (Reed, in chambers)); *Bonura* v. *CBS, Inc.*, 459 U.S. 1313, 1313 (1983) (White, in chambers) (citing *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, in chambers)); *Davis* v. *Jacobs*, 454 U.S. 911, 913 (1981) (Stevens, opinion respecting denial of petitions for writs of certiorari) (citing *Rosoto* v. *Warden*, 83 S. Ct. 1788 (1963) (Harlan, in chambers)); *Hung* v. *United States*, 439 U.S. 1326, 1328 (1978) (Brennan, in chambers) (citing *Reynolds* v. *United States*, 80 S. Ct. 30, 32 (1959) (Douglas, in chambers)); *Whalen* v. *Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, in chambers) (citing *Railway Express Agency* v. *United States*, 82 S. Ct. 466, 468 (1962) (Harlan, in chambers)).

Moreover, the Supreme Court's silence about this practice can reasonably be interpreted as approval. When the Court wants to rein in litigants' reliance on certain kinds of sources, it knows how to do so. See, *e.g.*, S. Ct. R. 32(3) ("non-record material . . . proposed for lodging may not be submitted until and unless requested by the Clerk"). There is no such rule — or any other kind of rule, for that matter — limiting the use of in chambers opinions of any sort. We cannot even find a record of any Justice ever commenting on a litigant's use of them. Cf. Thomas C. Goldstein, *The Supreme Court Rules*, 7 Green Bag 2d 15, 15-16 (2003) (reporting on the chilly reception he received at oral argument regarding a lodging filed in *Egelhoff* v. *Egelhoff*, 532 U.S. 141 (2001)).

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Regardless of whether an in chambers opinion appears in *In Chambers Opinions*, the *United States Reports*, or both, our goal remains the same: 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 Cynthia Rapp. To that end we have done our best to preserve every word and mark in every opinion, including odd spelling, typesetting, capitalization, and usage (see, *e.g.*,

"programing" on page 400, or page 516, where every "*v*" save one precedes a dot, or "BURGER" and "Harlan" on page 666, or the unusual "debts" on page 899), with "Publisher's notes" only where oddity merits explanation. Thus, for example: [Publisher's note: The use of small caps for "BURGER" and roman type for "Harlan" is an example of the Justices' longstanding habit of using small caps when referring to active members of the Court. See, *e.g.*, *Bartlett* v. *Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, in chambers) ("Marshall" and "KENNEDY"); *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-09, 2 Rapp 590, 594 (1973) (Marshall) ("Black" and "STEWART"); *Carbo* v. *United States*, 1 Rapp 292, 298-99 (1962) (Douglas) ("Jackson" and "HARLAN").] 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. 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, please bear in mind the following conventions as you read the opinions in this volume: (1) brackets not accompanied by a "Publisher's note" are in the original; (2) we've preserved running heads from the originals that sport them, and added the rest; (3) a caption misdesignating the Term in which an opinion was issued is in the original; and (4) party designations ("applicant", "movant", "petitioner", "plaintiff", "respondent", "defendant", etc.) are sometimes used more loosely than is the Court's wont — probably due to the time pressures under which the parties prepared their arguments and the Justices produced their opinions — but in each case the identity and posture of the parties are clear, and so we have left well enough alone.

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 *Introduction*, 1 Rapp at v & n.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 for performing such a useful public service by collecting and indexing the Justices' solo efforts, and for reviewing this edition (any remaining errors are the *Green Bag*'s); William Suter, Clerk of the Court, for his support of Ms. Rapp's work; Stephen Shapiro and Miriam Nemetz for their simultaneously scholarly and practical introduction to this volume; the George Mason University School of Law and the George Mason Law & Economics Center for their support of the *Green Bag*; and Susan Davies, Lauren Douglas, and Glen Sturtevant.

Ross E. Davies
May 26, 2004

AN INTRODUCTION TO IN-CHAMBERS OPINIONS

Stephen M. Shapiro and Miriam R. Nemetz[1]

These volumes collect for the first time the in-chambers opinions of Justices of the Supreme Court of the United States. Resolving applications addressed to the Justices individually, the opinions principally address stays, bail, injunctions, extensions, and disqualification issues. Cynthia Rapp, Deputy Clerk of the Supreme Court, has done a great service in assembling the opinions, and the *Green Bag* is making an important contribution in publishing them. This collection will be an important resource for academics, historians, journalists, and practitioners.

The opinions offer unique insights into the workings of the Court. They show the Justices handling real-world emergencies, writing their decisions at wee hours of the morning to forestall executions, deportations, elections — even military actions. There are last-minute consultations among the Justices, and sparks of disagreement among them when a stay denied by one Justice is submitted to another. For those interested in the unvarnished analysis and opinions of a particular Justice, rendered not after full briefing and argument and conferences with other Justices, but rather on the fly, these are a real "window" into the Justice's thinking.

The emergencies reflected in these in-chambers opinions involve some of the most dramatic and historically significant problems to reach the Court. The first opinion in the collection involves one of the most controversial issues of the 1920's — Prohibition. *Motlow v. United States*, 1 Rapp 1 (1926) (Butler). Many of the opinions from the 1950's arise from the criminal prosecution of Communist Party members and their associates. See, *e.g.*, *Williamson v. United States*, 1 Rapp 40 (1950) (Jackson); *Yanish v. Barber*, 1 Rapp 82 (1953) (Douglas); *In re Carlisle v. Landon*, 1 Rapp 97 (1953) (Douglas); *Noto v. United States*, 1 Rapp 156 (1955) (Harlan); *In re Steinberg v. United States*, 1 Rapp 168 (1956) (Douglas). In 1953, Justice Douglas stayed the execution of Julius and Ethel Rosenberg. *Rosenberg v. United States*, 1 Rapp 89 (1953). In the 1960's, the focus of the opinions shifts dramatically, to desegregation and the Vietnam War. See, *e.g.*, *Meredith v. Fair*, 1 Rapp 312 (1962) (Black); *In re Sellers v. United States*, 2 Rapp 395 (1968) (Black); *Winters v. United States*, 2 Rapp 410 (1968) (Douglas). In the 1970's, many stay opinions involve the long and continuing process of desegregating the public schools. See, *e.g.*, *United States v. Edgar*, 2 Rapp 484 (1971) (Black).

For practitioners, forced to file an application under severe time pressure or to respond to a request within hours, this compilation could not be more helpful. Now, for the first time, it is possible for an attorney drafting a stay application to scan the opinions looking for a case involving similar facts, or to identify quickly

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a particular Justice's approach to a request for an injunction. In this regard, the indices prepared by Ms. Rapp, which appear at the beginning of Volume I, will be invaluable. The indices list the opinions by title, by date, by Justice, and by subject matter. The indexed topics include not only the field of litigation (death penalty, civil rights, commerce clause, etc.), but also sub-issues relevant to the writing or opposition of an application (significance of lower court ruling, jurisdiction over state cases, relevance of All Writs Act, etc.). These indices will make it far easier for practitioners to find the opinions they need.

When consulting these rulings, it is important to keep in mind that they represent a very limited sample. Scores of applications are filed every year, and the vast majority of them are decided without opinion. In many Terms, only one or two in-chambers opinions have been issued. Some Justices, moreover, are more apt to write opinions than others. Chief Justice Rehnquist is the recordholder, having written 108 of the opinions in these volumes. Justice Stevens is the next most prolific Member of the current Court, with fifteen opinions here. Justice Scalia has written only twelve of the opinions — and four of them were issued solely to inform the Bar of his relatively strict approach to requests for extensions of time to file petitions for certiorari. Justice O'Connor wrote nine of the opinions in this collection; Justices Kennedy and Souter each wrote only one; and Justices Breyer, Ginsburg, and Thomas did not write any. When filing an application directed to a Circuit Justice, it may be necessary to cite opinions written by other Justices.[2]

It is not always obvious why a Justice has chosen to write an opinion in a particular case. Sometimes, the Justices appear to be influenced by their perception that counsel in their Circuits need guidance, or by the desire to nudge practice in one direction or another. Occasionally, the opinions are a vehicle for a Justice to express views on a controversial issue. For example, Justice Douglas wrote several in-chambers opinions that questioned the legality of the Vietnam War. See, *e.g.*, *Drifka v. Brainard*, 2 Rapp 416, 417 (1968) (refusing to stay shipment of 386 National Guardsmen to Vietnam, but opining that "there is a question of great importance as to whether these men can be sent abroad to fight in a war which has not been declared by the Congress"). The Justice's own reputation may be at stake: the longest opinion in this compilation, at sixteen pages, concerned a request to Justice Rehnquist that he disqualify himself from a case in which he was involved when he was at the Justice Department. *Laird v. Tatum*, 2 Rapp 560 (1972). (That record recently was surpassed by Justice Scalia, who in the October 2003 Term wrote a 21-page opinion explaining why he would not disqualify himself from a case involving Vice President Cheney, with whom he had recently gone on a duck-hunting trip.) Sometimes a Justice appears to be moved to write an opinion by the simple belief that the parties will need an explanation for the decision. How else can one account for the fact that this collection includes not one, but three, expansive opinions explaining the resolution of an application to stay the transfer of custody of a child from putative adoptive parents to the natural parents? See *Sklaroff v. Skeadas*, 1 Rapp 164

[2] Some Justices have written additional in-chambers opinions subsequent to the October 2000 Term, when this three-volume collection concludes. Those opinions, and the additional older opinions that Ms. Rapp and the *Green Bag* continue to uncover, will be included in the first annual supplement to this collection. The supplement will also include an updated set of cumulative indices.

(1956) (Frankfurter); *DeBoer v. DeBoer*, 3 Rapp 1343 (1993) (Stevens); *O'Connell v. Kirchner*, 3 Rapp 1372 (1995) (Stevens).

THE APPLICATION PROCESS

Supreme Court Rule 22 describes the process for submitting an application to an individual Justice. The application must be directed to the Justice who has been "allotted" to the Circuit from which the case arises. The current allotment of Justices to Circuits is posted on the Supreme Court's website and is reproduced at the front of every volume of the *United States Reports*. Although it is customary to address an application to the assigned Circuit Justice, the papers must be filed with the Clerk, who will transmit them to the appropriate Justice. If the assigned Circuit Justice is unavailable, the application will be distributed to the next most junior Justice then available, with the turn of the Chief Justice following that of the most junior Justice. If the assigned Circuit Justice denies an application, then the application can be re-submitted to any other Justice. As we discuss below, the reapplication process has led to some dramatic and memorable disagreements among Justices; under modern practice, renewed applications usually are submitted to the entire Court for resolution. Applications are not printed in booklet form, but are submitted on typewritten, 8½ x 11-inch paper. The rules no longer expressly provide for oral arguments on applications, and there is no record of such an argument since 1980.

As the opinions in these volumes demonstrate, applications for stays and injunctions often are submitted in situations that are true emergencies. For example, on New Year's Eve in 1974, Chief Justice Burger stayed regulations that were to go into effect on January 1, granting an application that had been submitted after business hours that same day. *National League of Cities v. Brennan*, 2 Rapp 648 (1974). In another case, Justice Rehnquist refused at 7:35 p.m. to stay an execution scheduled for early the next morning. *Spenkelink v. Wainwright*, 2 Rapp 905 (1979). After Justice Stevens denied a reapplication submitted to him, Justice Marshall granted the stay at 12:15 a.m. *Spenkelink v. Wainwright*, 2 Rapp 911 (1979). If an application needs to be decided in a few days or hours, the lawyer handling the matter should speak directly with the Clerk's Office, to let the Clerk know that the application is being submitted and to discuss the mechanics of filing it. It may be necessary to fax or e-mail a copy of the application to the Clerk. Because screening procedures instituted by the Court after the anthrax scare may delay the Clerk's receipt of the hard copy of an application, this coordination is more important than ever before. Counsel who plan to oppose an application also should inform the Clerk that the response is on its way; otherwise, the Justice is likely to act without waiting for the response.

STAYS

Stay practice is an important part of Supreme Court litigation. Under 28 U.S.C. § 2101(f), a Justice may stay the judgment of a court of appeals or state supreme court, or dissolve a stay entered by an appellate court, pending the filing of a petition for certiorari. An applicant also may ask a Justice to stay a district court order while a case is pending in the court of appeals, or to reinstate a district court order that the court of appeals has stayed pending appeal. Many practitioners try hard to avoid seeking a stay from the Supreme Court, and will do

so only as a last resort. In their view, the denial of a stay application may suggest doubt about the merits of the forthcoming petition, and therefore make it less likely that the law clerk reviewing the petition will recommend that it be granted. Although the great majority of stay applications are denied, a few of them are granted each year.

A stay application is a major undertaking, requiring a detailed statement of the case and the issues to be presented, as well as a demonstration that the case satisfies the Justice's criteria for the grant of a stay. To maximize the chances of success, stay papers should be filed as promptly as possible. Delay may lead to denial of an application, by "tend[ing] to blunt [the applicant's] claim of urgency" (*Ruckelshaus v. Monsanto Co.*, 3 Rapp 1128, 1130 (1983) (Blackmun)), or giving the Justice insufficient time to consider the issues. See *Republican Party of Hawaii v. Mink*, 3 Rapp 1234, 1235 (1985) (Rehnquist).

Before filing a stay application in the Supreme Court, the applicant must first seek relief from the lower courts. See S. Ct. Rule 23.3. An application for a stay that has bypassed the lower courts will not be entertained "except in the most extraordinary circumstances." *Id.* For example, Justice O'Connor granted a stay that had not first been presented to the Ninth Circuit after concluding that it would have been both "virtually impossible and legally futile" for the applicant to seek a stay in the lower court. *Western Airlines, Inc. v. International Bhd. of Teamsters*, 3 Rapp 1264, 1267 (1987). In the ordinary case, however, a stay request to the lower courts is mandatory. To avoid delay, it may be wise to begin preparing Supreme Court stay papers while the motion for a stay is pending in the lower courts.

In general, the Justices employ a three-part test when deciding whether to grant a stay. *First*, there must be a reasonable probability that four Justices will vote to grant certiorari. *Edwards v. Hope Med. Group for Women*, 3 Rapp 1367, 1368 (1994) (Scalia). *Second*, there must be a significant possibility that, if certiorari is granted, the applicant will prevail on the merits. *Rubin v. United States*, 3 Rapp 1389, 1390 (1998) (Rehnquist). The burden is on the applicant to "rebut the presumption that the decisions below — both on the merits and on the proper interim disposition of the case — are correct." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 3 Rapp 1354, 1355 (1994) (Souter) (internal quotation marks omitted). *Third*, there must be a likelihood of irreparable harm if the judgment is not stayed. *Edwards*, 3 Rapp at 1368. Notably for attorneys whose clients are appealing a damages award, the Justices have occasionally granted stays when the applicant seeks to avoid payment of a monetary award. See *City of Riverside v. Rivera*, 3 Rapp 1225 (1985) (Rehnquist) (granting stay of mandate requiring city to pay attorney's fees); *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters, Inc.*, 1 Rapp 381 (1966) (Harlan) (staying enforcement of money judgment in breach of contract action); cf. also *Heckler v. Turner*, 3 Rapp 1177, 1179 (1984) (Rehnquist) (staying injunction that would require the Government to pay additional AFDC benefits because "it is extremely unlikely that the Government would be able to recover funds improperly paid out"). *Finally*, in some cases the Justice will "balance[] the stay equities," comparing the harm to the applicant if the request is granted with the harm to other parties or to the public if the request is denied. See *California v. American Stores Co.*, 3 Rapp 1310, 1316 (1989) (O'Connor); *John Doe Agency v. John Doe Corp.*, 3 Rapp 1299, 1301 (1989) (Marshall); *Lucas v. Townsend*, 3

Rapp 1284, 1288 (1988) (Kennedy); *Rostker v. Goldberg*, 3 Rapp 974, 976 (1980) (Brennan).

As Justice Rehnquist put it, deciding a stay application "requires that a Justice cultivate some skill in the reading of tea leaves" to determine whether four Justices would vote to grant certiorari. *Board of Educ. of City of Los Angeles v. Superior Court*, 3 Rapp 1010, 1014 (1980). The opinions suggest that the Justices take this obligation seriously. Many opinions show the Justices engaged in explicit vote-counting when evaluating a stay request. See, *e.g.*, *Pryor v. United States*, 2 Rapp 518 (1971) (after noting that he, Justice Brennan, and Justice Stewart have expressed doubts about the constitutionality of conscription in the absence of a Congressional declaration of war, Justice Douglas grants a stay because, since "there are now two vacant seats on the Court," "three out of seven are enough to grant a petition for certiorari"). The honesty with which the Justices approach this task is self-evident: frequently, a Justice will express personal sympathy with the applicant's position, but will recognize that he is in the minority and deny relief. See, *e.g.*, *Board of Educ. of City of Los Angeles*, 3 Rapp at 1014 (Justice Rehnquist states that he "would in all probability vote to grant certiorari" but could not "in good conscience . . . say that four Justices of this Court would vote to grant certiorari in this case").

A single Justice also may stay a federal district court judgment while a case is pending in the court of appeals. Justice Rehnquist repeatedly has stated that "stay application[s] to a Circuit Justice on a matter before a court of appeals [are] rarely granted." *Heckler v. Lopez*, 3 Rapp 1139, 1141 (1993) (internal quotation marks omitted); see also *Packwood v. Senate Select Committee on Ethics*, 3 Rapp 1364 (1994) (Rehnquist) (when seeking a stay pending appeal, "the applicant has an especially heavy burden," and a stay will be granted "only upon the weightiest considerations") (internal quotation marks omitted). Nevertheless, when important interests are at stake, the Justices do occasionally grant stays that have been denied by the court of appeals. For example, Justice Blackmun stayed a district court injunction that would have prevented a television news broadcast of videotaped footage taken at a meatpacking company, concluding that "the indefinite delay of the broadcast will cause irreparable harm to the news media that is intolerable under the First Amendment." *CBS Inc. v. Davis*, 3 Rapp 1360, 1363 (1994). Justice Rehnquist stayed a district court injunction that would have required the Government to pay disability benefits on an interim basis, concluding that the Court might well find that the award of interim benefits "was beyond the competence" of the district court. *Heckler v. Lopez*, 3 Rapp at 1147. He also stayed a district court order that would have required the Secretary of Health and Human Services to promulgate sweeping new regulations. *Heckler v. Redbud Hospital District*, 3 Rapp 1218 (1985). Similarly, Justice O'Connor stayed a district court order that would have required the INS substantially to change its procedures. *Immigration & Naturalization Serv. v. Legalization Assistance Project of the Los Angeles County Fed'n of Labor*, 3 Rapp 1346 (1993) (O'Connor). She believed that the plaintiff organization lacked standing, and that the district court's order thus was "not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government." *Id.* at 1351.

The Justices also have the power to, and occasionally do, dissolve stays that a court of appeals has granted. The opinions emphasize that "this power should be exercised with the greatest of caution and should be reserved for exceptional

circumstances." *Holtzman v. Schlesinger*, 2 Rapp 590, 594 (1973) (Marshall). For example, Justice Stevens dissolved a stay granted by the court of appeals in order to reinstate a district court injunction barring interference with the applicant's participation in Olympic trials. *Reynolds v. International Amateur Athletic Fed'n*, 3 Rapp 1332 (1992). Citing the "incomparable importance of winning a gold medal in the Olympic Games," he concluded that "a pecuniary award is not an adequate substitute for the intangible values for which the world's greatest athletes compete." *Id.* at 1332. It is particularly difficult to persuade a Justice to dissolve a court of appeals' stay of its own mandate. At that point, the court of appeals is "quite familiar with the case, having rendered a thorough decision on the merits," and its "determination that [a] stay[] [is] warranted is deserving of great weight, and should be overturned only if the court can be said to have abused its discretion." *Commodity Futures Trading Comm'n v. British American Commodity Options*, 2 Rapp 758, 761 (1977) (Marshall). In an interesting and unusual example of the exercise of the Court's power to dissolve such a stay, Justice Black intervened when a Fifth Circuit judge attempted unilaterally — four times — to stay the court of appeals' order requiring the University of Mississippi to admit a black student. *Meredith v. Fair*, 1 Rapp 312 (1962).

A Circuit Justice may stay a state-court decision only when the decision is a "final judgment or decree" subject to review on a writ of certiorari. 28 U.S.C. § 2101(f). However, the Court has crafted a narrow exception "for applicants who seek stays of actions threatening a significant impairment of First Amendment interests." *The New York Times Co. v. Jascalevich*, 2 Rapp 824, 826 (1978) (Marshall). If an applicant is unable to obtain "timely substantive review by state courts of a serious First Amendment issue, prior to incurring substantial coercive penalties," a Justice may conclude that the jurisdictional requirements of Section 2101(f) have been satisfied. *Id.* Similarly, when the state's highest court has refused to stay a prior restraint on speech during the pendency of an appeal, the Justices have concluded that there is sufficient finality to empower them to grant a stay. See *M.I.C., Ltd. v. Bedford Township*, 3 Rapp 1152 (1983) (Brennan). As Justice Blackmun explained, when "a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." *Nebraska Press Ass'n v. Stuart*, 2 Rapp 675, 677 (1975). "When a reasonable time in which to review the restraint has passed, . . . we may properly regard the state court as having decided that the restraint should remain in effect during the period of delay." *Id.*

INJUNCTIONS

Under the All-Writs Act, a Justice of the Supreme Court may issue any injunction that is "necessary or appropriate in aid of" the Court's jurisdiction. 28 U.S.C. § 1651(a). The Justices have stated that the issuance of an injunction — which unlike a stay "does not simply suspend alteration of the status quo but grants judicial intervention that has been withheld by lower courts — demands a significantly higher justification than that described" in the stay cases. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 3 Rapp 1262, 1263 (1986) (Scalia). According to these opinions, a Circuit Justice's injunctive power is to be used "sparingly and only in the most critical and exigent circumstances." *Fishman v. Schaffer*, 2 Rapp 721 (1976) (Marshall) (internal quotation marks omitted). It has been stated, moreover, that an injunction should

issue only where the applicant's right to relief is "indisputably clear." *Communist Party of Indiana v. Whitcomb*, 2 Rapp 559 (1972) (Rehnquist).

That having been said, the Justices have granted rather extraordinary injunctions, applying seemingly more permissive criteria. For example, in 1987, Justice Blackman ordered Arkansas state officials to place payments of a challenged highway use tax into an escrow fund, pending the resolution of a constitutional challenge to that tax. *American Trucking Ass'n, Inc. v. Gray*, 3 Rapp 1280 (1987). The following year, Justice Kennedy enjoined a bond referendum. *Lucas v. Townsend*, 3 Rapp 1284 (1988). In each case, the Justice appeared to be applying the same standards that would govern a request for a stay, without making a distinction on the ground that the applicants sought affirmative relief rather than preservation of the status quo.

STAYS OF EXECUTION

Individual Justices frequently are called upon to rule on applications for stays of execution, often submitted at the last minute. An attorney within the Clerk's Office keeps track of the executions scheduled around the country, and is available around the clock to facilitate communication among the parties, the lower courts, the Justices, and their law clerks. Justice Blackmun's opinion in *Grubbs v. Delo*, 3 Rapp 1334 (1992), conveys the typical urgency of these matters. At approximately 11:00 p.m., he received an application to stay an execution scheduled for two hours later. A federal district court in Missouri had granted a stay in the afternoon, but a divided panel of the Eighth Circuit voted to vacate the stay in the evening, and, later in the evening, the court of appeals denied a suggestion for rehearing en banc. Justice Blackmun granted the stay because he had insufficient time to consider the merits, choosing "to err, if at all, on the side of the applicant." *Id.* Generally, an application for a stay of an imminent execution is referred to the whole Court.

Stays of execution routinely are granted when a capital case is on direct review. The Justices have admonished the states that "[i]t makes no sense to have the execution on a date within the time specified for that review." *McDonald v. Missouri*, 3 Rapp 1161, 1162 (1984) (Blackmun); see also, *e.g.*, *Cole v. Texas*, 3 Rapp 1324 (1991) (Scalia) ("I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari."). It is more difficult to obtain a stay of execution pending the filing and disposition of a petition for certiorari in a federal habeas corpus proceeding. The Court has explained that such stays "are not automatic," but are granted only if there is both a "reasonable probability" that four Justices would vote to grant certiorari and a "significant possibility of reversal of the lower court's decision." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (internal quotation marks omitted). The Court has "repeatedly and recently stated that it is not appropriate for a Court of Appeals to grant a stay of execution to permit a death-row inmate to file a petition for certiorari without first conducting the *Barefoot* inquiry." *Netherland v. Gray*, 3 Rapp 1387 (1996) (Rehnquist). As Supreme Court decisions and federal legislation have made it more difficult to succeed on the merits of a federal habeas corpus petition, it also has become harder for inmates to obtain stays of execution. See generally Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE 799-808 (8th ed. 2002).

EXTENSIONS OF TIME

Although the Clerk of the Court may grant an extension of time to file most other papers (S. Ct. Rule 30.4), only a Justice or the Court may extend the time for filing a petition for certiorari. Such an extension, for "a period not exceeding 60 days," may be granted for "good cause." S. Ct. Rule 13.5. An application for an extension of time must be filed at least ten days before the petition is due, "except in extraordinary circumstances." *Id.* Like any application, a request for an extension of time should be submitted to the appropriate Circuit Justice.

An informal review of the Supreme Court's on-line docket reveals that most Members of the current Court grant extensions of time to file cert. petitions with some frequency. The exception is Justice Scalia, who appears to deny such requests a substantial percentage of the time. Indeed, Justice Scalia has written four opinions spelling out his strict approach to extension requests. In *Mississippi v. Turner*, 3 Rapp 1323 (1991), he rejected Mississippi's request for an extension that was needed because of a reduction in the state's appellate staff. "Like any other litigant," he said, "the State of Mississippi must choose between hiring more attorneys and taking fewer appeals." *Id.* In *Madden v. Texas*, 3 Rapp 1318, 1322 (1991), Justice Scalia granted extensions to accommodate the needs of replacement appellate counsel in several death penalty cases, but indicated that he would "not grant extensions in similar circumstances again." In other cases, he has indicated that counsel's "desire for additional time to research constitutional issues" (*Kleem v. Immigration & Naturalization Serv.*, 3 Rapp 1259 (1986)), and planned absences from the office (*Penry v. Texas*, 3 Rapp 1377 (1995)), are insufficient to justify an extension.

Although less relevant to current practice, the older opinions regarding extension requests contain food for thought for the modern practitioner. Justice Frankfurter expressed the view that extensions should not often be needed because "a showing of the required importance ought not to take more than a day or two on the part of competent counsel, particularly one responsible for the cause." *Carter v. United States*, 1 Rapp 142, 143 (1955). And Justice Jackson had this to say about requests for extensions of time to accommodate other legal work:

> I do not see how, consistently with our Rule, I can accept counsel's business in the lower courts as a reason for extending time to file a petition in this Court. . . . 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.

Knickerbocker Printing Corp. v. United States, 1 Rapp 119, 120 (1954).

BAIL

Formerly, requests for bail comprised a substantial proportion of the work of the Circuit Justices, and a substantial number of the collected opinions address bail issues. However, bail requests are no longer a significant part of Supreme

Court practice. A search of the docket files published on the Supreme Court's website reveals that only a handful of bail applications were submitted to the Court during the last several Terms, and that none was successful. See also Bennett Boskey, 1A WEST'S FEDERAL FORMS, SUPREME COURT § 332, at 566 (1998) (noting that "the six Terms 1991 through 1996 saw not a single instance in which a bail application was granted by the Supreme Court or by a Justice of the Court in either a federal or a state case"). The most recent in-chambers opinion granting bail is *Hung v. United States*, 2 Rapp 831 (1978), in which Justice Brennan granted bail to a Vietnamese immigrant who had been convicted of espionage in a high-profile case.

The decline in bail applications can be attributed to the Bail Reform Act of 1984, which made it considerably more difficult to secure bail pending appeal. See 18 U.S.C. § 3143(b). Among other stringent requirements, the bail applicant now must establish that his appeal "raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment." *Id.* (quoted in *Morison v. United States*, 3 Rapp 1289 (1988) (Rehnquist) (denying bail). In older cases, bail was granted upon a much lesser showing. See, *e.g.*, *Chambers v. Mississippi*, 2 Rapp 525 (1972) (Powell) (continuing bail where applicant's petition "raises two non-frivolous constitutional questions"); *Yanish v. Barber*, 1 Rapp 82, 85 (1953) (Douglas) ("Allowance of bail pending appeal depends upon a determination whether the appeal presents a substantial question."). Although these older cases are interesting to read, the standards they apply must be viewed as obsolete.

REAPPLICATION

If a Justice denies an application, except an application for an extension of time, then the application may be submitted to any other Justice. S. Ct. Rule 22.4. One Justice can grant a stay denied by another Justice, but cannot dissolve a stay granted by another Justice; only the entire Court can do that.

The reapplication procedure is dramatically illustrated by four opinions involving a challenge to the President's power to wage war in Cambodia. The federal district court in New York had permanently enjoined the military from conducting air operations over Cambodia, but the Second Circuit had stayed that order pending appeal. Justice Marshall refused the appellees' request to vacate the stay. Although he noted that the war "may ultimately be adjudged to be not only unwise but also unlawful," he concluded that he would "exceed [his] legal authority" by granting the application, and denied relief. *Holtzman v. Schlesinger*, 2 Rapp 590, 600, 601 (1973). A few days later, after holding a hearing in Yakima, Washington, Justice Douglas vacated the stay, thus reinstating the injunction. He noted that the Court's ordinary procedure was to refer second applications to the whole Court, but explained that group action was "impossible" because it was summer and "the Justices are scattered." *Holtzman v. Schlesinger*, 2 Rapp 602 (1973). Justice Douglas felt that the relief sought was the equivalent of a stay of execution in a capital case:

> The present case involves whether Mr. X (an unknown person or persons) should die. No one knows who they are. They may be Cambodian farmers whose only "sin" is a desire for socialized medicine to alleviate the suffering of their friends and neighbors. Or Mr. X may

> be the American pilot or navigator who drops a ton of bombs on a Cambodian village. The upshot is that we know that someone is about to die.

Id. at 603. Justice Douglas wrote his opinion late on August 3, and it was released at 9:30 a.m. on August 4. But that afternoon, upon the application of the Solicitor General, and after conferring with seven other Justices, Justice Marshall again stayed the district court's order. *Schlesinger v. Holtzman*, 2 Rapp 607 (1973). Justice Douglas bitterly dissented, stating that "seriatim telephone calls" to Justices who had not even read his opinion were not "a lawful substitute" for the Special Term that in his view was necessary for the Court to overrule him. *Schlesinger v. Holtzman*, 2 Rapp 609, 610 (1973). "A Gallup Poll type of inquiry of widely scattered Justices is," he said, "a subversion of the regime under which I thought we lived." *Id.* at 611.

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We congratulate Cynthia Rapp for her scholarly efforts in collecting and organizing the in-chambers opinions of the Justices of the Supreme Court. For those practitioners who have occasion to apply for relief from individual Justices, we recommend resort to these helpful volumes and, in case of doubt, a call to the knowledgeable personnel in the Clerk's Office. Currently, Staff Attorney Troy Cahill, 202-479-3024, is responsible for applications. Useful forms appear in Chapter 15 of Bennett Boskey, 1A WEST'S FEDERAL FORMS, SUPREME COURT (1998), and a fuller discussion of procedure appears in Chapters 16 and 17 of Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE (8th ed. 2002).

SUPREME COURT OF THE UNITED STATES

KING *v.* SMITH.

No. 949.—In re Vacation of Stay Issued on November 27, 1967.

[January 29, 1968.]

MR. JUSTICE BLACK:

This case is now before me on the appellee's motion to vacate the stay of judgment which I granted on November 27, 1967. The court below held unconstitutional a regulation of the Alabama Department of Pensions and Security which makes certain children ineligible for welfare assistance whenever their mother is cohabiting with a man other than her husband, a so-called "substitute father." — F. Supp. — (D.C. M.D. Ala. 1967). The District Court's decree ordered immediate restoration to the welfare rolls of all children who had been disqualified solely because of the "substitute father" regulation. Since the State's arguments in support of the regulation were not frivolous, and since the decree would require the State to pay out substantial sums of money which could never be recovered if the judgment is ultimately reversed. I granted the State's application for a stay. Probable jurisdiction over the appeal was noted by this Court on January 22, 1968. — U.S. —.

A recent congressional amendment (81 Stat. 821, 894) to the Social Security Act (42 U.S.C. § 601 *et seq*. (1964)), effective January 2, 1968, significantly alters the considerations bearing on the desirability of a stay pending our final judgment, and I have concluded that in light of this factor, not present when I considered this case in November, the stay entered at that time should be vacated. The new amendment places a ceiling on the number of dependent children for whom federal sharing in state assistance programs is available. Although this ceiling will not go into effect until July 1, 1968, a crucial figure in determining the level of the ceiling is the average number of children for whom monthly payments are

made during the first three months of this year. In a memorandum filed at my request, the Solicitor General of the United States has stated that the Department of Health, Education, and Welfare reads the new statute to require actual payments during January, February, and March to all children who are to be included in the computation of this ceiling. If the judgment below is ultimately affirmed and if the Government's reading of the new law is not rejected in a proper lawsuit, this Court's order to restore appellees and others similarly situated to the welfare rolls could not, therefore, affect the number used to compute the ceiling.

The impact of the stay on welfare recipients in Alabama is thus considerably more serious now than it was prior to enactment of the new statute. If the judgment below is affirmed, appellees and the class they represent, a group estimated by the State to total 15,000 to 20,000 persons, will be restored to the welfare rolls for the future, but federal contributions will remain fixed in relation to the past level. The State of Alabama will then be forced either to reduce the level of payments to *all* children or to approve a great increase in the state and local funds available, so that the previous welfare allowances, ordinarily supported up to 80% or more by federal funds, could be granted to the new recipients without any federal support. Prior to enactment of the statute the stay meant only that in the event of ultimate affirmance, relief for appellees and the class they represent would have been postponed several months. Under the new statute, however, the stay now means in addition that total payments available for *all* dependent children may be reduced and that this reduction may remain in effect for an indefinite period. Under these circumstances, the possibility of injury to the State from the judgment below would appear to be more than offset by the possibility under the stay of decreased federal welfare assistance to all dependent children within the State for an indefinite period. Thus, the stay is vacated.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. -----. OCTOBER TERM, 1968.

IN RE CLEVELAND LOUIS SELLERS, Jr. *v.* UNITED STATES

[August 17, 1968.]

MR. JUSTICE BLACK.

This is an application for bail pending disposition of the applicant's appeal by the Court of Appeals for the Fifth Circuit. While the decisions of the District Judge and the Fifth Circuit denying bail are entitled to respect, I am nonetheless authorized and obliged by Fed. Rule Crim. Proc. 46(a)(2) and 18 U.S.C. §§ 3146, 1348 to make an independent determination of the applicant's request for relief.

Applicant was convicted of refusing to submit to induction into the armed services in violation of 50 U.S.C. App. § 462(a) and has been sentenced to five years in prison. Prior to his conviction applicant was free on $l,000 bond fixed by the District Court. While on bail he made a trip to Japan to attend a student peace conference, but returned to stand trial. The Government's motion to cancel his bail on account of this trip was denied by the District Court. Thereafter, with the permission of the Government, the applicant made a trip to South Carolina. While there he was involved in an incident at Orangeburg, South Carolina, which resulted in his arrest and indictment in the State for

"inciting and participating in arson, destruction of property, assault and battery, and conspiracy," which charges are still pending. He was released by South Carolina authorities on bail. Applicant was allowed thereafter to travel to New York, ostensibly to visit his physician. He returned as directed for his trial and approximately one month after his conviction appeared again for his scheduled sentencing by the Federal District Court. Applicant made a pre-sentence statement on this later occasion in which he vigorously asserted that he could only be sentenced by "black people," that the court's decision "has nothing to do with how I move and how I act from heretofore," and that "it appears that the only solution to my problem is to fight till my death or to fight until I'm liberated."

The command of the Eighth Amendment that "Excessive bail shall not be required . . . ." at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons. The Bail Reform Act of 1966, 18 U.S.C. §§ 3146, 3148, provides that a person who has been convicted of an offense and has filed an appeal shall be released on bail ". . . unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community," or unless it appears that the appeal is frivolous. The Solicitor General opposes the allowance of bail on the ground that the District Court in the exercise of its discretion "reached the conviction that the petitioner was dangerous, unreliable and contemptuous of the processes of the court." The Solicitor General's objection is apparently based on the applicant's trip to Japan, the incident and resulting indictment in South Carolina, and applicant's pre-sentence statement to the court. I cannot agree that this record shows either sufficient danger to the community or sufficient likelihood of flight to justify the complete denial of bail to this applicant.

The idea that it would be "dangerous" in general to allow the applicant to be at large must—if it is ever a justifiable ground for denying bail as distinguished from a separate proceeding for a bond to keep the peace—relate to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail. The federal crime of which he was convicted—refusal to submit to induction—is unquestionably a serious one; it

is not, however, a crime of physical violence. Conviction on this charge does not indicate that applicant will be a threat to the community if released on bail pending the disposition of his appeal. The charges brought against him by South Carolina are admittedly for crimes of a more immediately threatening nature. The State authorities there, however, who are familiar with the facts of that case, have been perfectly satisfied to release him on bail. This record thus fails to establish that serious danger would result to the community or to any individual if this applicant were released on bail.

Nor does this record establish the probability that this applicant will decline to appear to serve his sentence if his conviction is affirmed. The Solicitor General argues that the District Judge found the applicant "completely contemptuous of the processes of the court." The applicant's pre-sentence statement is cited as evidence of the likelihood that he will flee from justice. It is true that this pre-sentence statement was not one calculated to endear him to any court or judge, but this is not enough to keep him in jail if he can make a good and satisfactory bond. His statement that he can only be sentenced by "black people" must be viewed in the context of his perfect record of appearing as required before the District Court, including his appearance to be sentenced on the day of the statement in question. And it should not be forgotten that the defendant also returned from as far away as Japan to appear for his trial.

I am also required, before granting applicant bail, to determine that his appeal is not "frivolous or take [Publisher's note: "take" should be "taken".] for delay." 18 U.S.C. § 3148. Applicant contends that members of his race have been systematically and arbitrarily excluded from Selective Service boards in his State. I am unable to say that a challenge to draft boards of this kind would be dismissed by this Court as frivolous, and under these circumstances I must assume that the appeal to the court below is not a frivolous one.

It has heretofore been enough to bring this applicant to trial to require that he make a $1,000 bond. Of course a bond may appropriately be higher after conviction than before. Applicant has proposed that he be allowed to be released on a bond of $2,500 and on the condition that he be compelled to report to the United States Marshal every

two weeks pending the final disposition of this case. It may reasonably be decided that a $2,500 bond is not enough and that applicant should report once every week instead of once every two weeks. These are matters which in my judgment can be best decided by the District Court after hearing. It is my conclusion that petitioner is entitled to bail pending final disposition of his case by the Court of Appeals, and that he be required to make such reports to the Marshal as the District Court finds reasonable.

In no event do I believe at this time that bail in excess of $5,000 should be required in this case.

For the foregoing reason I direct that the District Court fix bail within the recommendations mentioned and that the District Court approve such bail when an adequate bond is presented by the petitioner.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1968.

Glen A. Williams et al., Appellants	)	
v.	)	On Motion for Temporary
Hon. James A. Rhodes et al.,	)	Injunctive Relief
Appellees	)	

[September 10, 1968.]

MR. JUSTICE STEWART.

The appellants have presented to me, as Circuit Justice for the Sixth Circuit, a motion for a temporary injunctive order to compel the responsible Ohio authorities to place the names of George C. Wallace, an appellant herein, and Marvin Griffin on the ballot in that State as Presidential and Vice Presidential candidates, respectively, at the next Presidential election, pending the Court's decision on the merits of this appeal. The appellees, *i.e.*, the Governor, the Secretary of State, and the Attorney General of Ohio, have filed a response, and I have had an open oral hearing on the matter.

The appellants insist that this application is of an extremely urgent nature, and the appellees, with admirable candor, have conceded this to be true.

The parties have not questioned my power to grant the relief sought, but I believe that such power should be used sparingly and only in the most critical and exigent circumstance. With that in mind, I have consulted with every member of the Court except MR. JUSTICE DOUGLAS, who is unavailable, and am authorized to state that all of them are of the opinion that an early hearing and a prompt and effective decision of this appeal are highly desirable.

Counsel are agreed that, in the absence of a temporary order by me at this time, difficult if not insurmountable

practical problems in the preparation of ballots would result, should the judgment of the United States District Court be reversed by this Court. They are further agreed that no insurmountable problems would arise from my now issuing a temporary order, should the judgment of the District Court be affirmed. Under these circumstances, I deem it advisable to grant interim relief until this Court can consider and decide the merits of the appeal.

Accordingly, it is hereby ordered that Ted W. Brown, Secretary of State for the State of Ohio, prepare and certify to the Board of Elections of each county an amended certification of the forms of the official Presidential ballots to be used at the November 5, 1968, general election in Ohio, together with the names of the candidates for the offices of President and Vice President of the United States, and that he instruct each such Board of Elections in regard to action to be taken by each such Board in compliance with the amended certification.

It is further ordered that this amended certification include the name of George C. Wallace as the American Independent Party candidate for the office of President of the United States, and the name of Marvin Griffin as the American Independent Party candidate for the office of Vice President of the United States.

It is further ordered that the Secretary of State for the State of Ohio instruct the Board of Elections of each county utilizing the voting machine process, in whole or in part, to include the names of George C. Wallace and Marvin Griffin as candidates for the offices of President and Vice President of the United States, respectively, in the printing of labels, programing [Publisher's note: "programing" probably should be "programming".] of machines, and all other steps necessary to prepare said voting machines for the November 5, 1968, General Election, [Publisher's note: This is the only place in this opinion or the next where "General Election" is capitalized.] and that he instruct said Boards of Elections to be prepared upon receipt of later instructions from him to block out said names and be prepared to take such other steps as would be necessary to eliminate said names from the

voting machine ballot, should the judgment of the District Court be affirmed by this Court.

It is further ordered that the Secretary of State for the State of Ohio issue instructions to the Board of Elections of each county, with respect to paper ballots and absentee voter ballots, which will enable each such Board, based upon local conditions and actions taken by each such Board prior to this date, to comply with the final judgment of this Court, and that the Secretary of State for the State of Ohio take such other action with respect to paper ballots and absentee voting as may be necessary to insure that each Board of Elections will be able to comply with any final judgment of this Court relating to ballot position for George C. Wallace and Marvin Griffin as candidates for the offices of President and Vice President of the United States, respectively, in the November 5, 1968 general election.

Counsel for both sides have agreed to expedite this entire matter, and I am authorized to state that the Court has set this case for oral argument on Monday, October 7, 1968. The appellants shall file their jurisdictional statement and docket the case on or before Thursday, September 19. The Socialist Labor Party et al., plaintiffs in a companion case covered by the District Court's opinion, shall be given notice of this order and may file any motion or brief they wish on or before the same date. The appellees shall file a motion or motions under Rule 16 by Monday, September 30. Any replies or supplemental briefs shall be filed by Friday, October 4. The briefs and motions may be typewritten, and the case will be heard on the typewritten certified record.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. —. OCTOBER TERM, 1968.

IN RE SOCIALIST LABOR PARTY et al. *v.* JAMES A. RHODES et al.

[September 16, 1968.]

MR. JUSTICE STEWART.

Counsel for the appellants have presented to me, as Circuit Justice for the Sixth Circuit, a motion for a temporary injunctive order to compel the responsible Ohio authorities to place the names of Henning A. Blomen, George S. Taylor, Peter M. Kapitz, and Maria Pirincin, as candidates of the Socialist Labor Party for the office of President, Vice-President, Senator, and Representative from the 22nd Congressional District, respectively, on the voting machine and paper ballots to be used in Ohio for the November 5, 1968, general election, pending the Court's decision on the merits of this appeal.

Counsel for the appellees oppose the motion on several grounds. They argue that the district court granted to the appellants the principal relief they requested, *i.e.*, that the ballots to be used at the November 5 general election provide a means for write-in voting for every office for which an election is to be held. They further argue that "appellants have delayed their request for temporary relief and the Secretary of State of Ohio has amended his certification [in accord with my opinion and order of September 10, 1968], pursuant to which amended ballots are being reprinted," and "that the file of this case does not indicate that appellants have more than three members, which number of membership is too unsubstantial to require another reprinting of election ballots by 88 counties."

It was the district court's opinion that "as evidenced by affidavit, the Socialist Labor Party is so small that no number of petitioning qualified voters that might be required by the legislature as a reasonable qualification for

position on the ballot could be met by it." The dissenting judge in the district court agreed with this branch of the court's opinion, stating that the Socialist Labor Party "is not presently composed of any remotely substantial group of electors . . . . [I]t appears that in 1966 this party could claim a membership of only one hundred eight (108) persons. Even under constitutionally permissible standards, this party could not demand ballot position. For this reason, I would deny the Socialist Labor Party ballot position for the forthcoming election. I concur in the relief afforded these plaintiffs as limited to write-in voting."

Upon consideration of the competing equities, including the late date on which this motion was presented, the action already taken by the Ohio authorities, the relief already granted the appellants by the district court, and the fact that the basic issues they present will be fully canvassed in the argument of the appeal in *Williams v. Rhodes* on October 7, 1968, it is my conclusion that the present motion should be denied.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 263, Misc.—OCTOBER TERM, 1968.

Paul V. Winters, Jr., Petitioner,	)	
v.	)	On Application for Stay.
United States et al.	)	

[September 23, 1968.]

Memorandum of MR. JUSTICE HARLAN.

Petitioner, a member of the United States Marine Corps Reserve who contests the legality of his call-up to active duty, has filed a petition for writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit denying him relief. Petitioner's prior applications for a stay of his activation were denied by me on March 8, 1968, and May 6, 1968, and by the Court on March 22, 1968 (390 U.S. 993) and May 20, 1968 (391 U.S. 910), MR. JUSTICE DOUGLAS dissenting in both the latter instances. Petitioner now states that he is soon to be sent to Vietnam, and seeks a stay preventing his transfer overseas pending the Court's determination of his petition for writ of certiorari and, should the writ be granted, resolution of the underlying issues.

I now again deny petitioner's application, believing that his chances of ultimately prevailing on the merits of his claim are not substantial enough to justify the interim relief sought, *Magnum Import Co.* v. *Coty*, 262 U.S. 159, particularly in light of the national interests involved.

I have also considered whether a stay should issue until the Court has disposed of three closely related stay applications, each denied in the first instance by individual Justices, but subsequently granted by MR. JUSTICE DOUGLAS on a limited basis pending his referral of the

applications to the Court for consideration at its first conference of the forthcoming Term (*Morse* v. *Boswell*, stay originally denied by THE CHIEF JUSTICE and MR. JUSTICE BLACK in turn; *Miazga* v. *MacLaughlin*, and *Berke* v. *MacLaughlin*, stays originally denied by THE CHIEF JUSTICE). After due consideration, and with deference to my Brother DOUGLAS, I conclude that even such a limited interference with the orderly workings of the military process would not be justified in the circumstances of this case.

The application for a stay is denied.

SUPREME COURT OF THE UNITED STATES

No. 544.—OCTOBER TERM, 1968.

Socialist Labor Party et al., Appellants,	)	On Motion for Leave to
v.	)	Argue Orally, and for
James A. Rhodes et al.	)	Other Relief.

[September 23, 1968.]

MR. JUSTICE STEWART.

The appellants have filed with me, as Circuit Justice, a motion to consolidate this case for oral argument with *Williams et al.* v. *Rhodes et al.*, No. 543, on October 7, 1968, or, in the alternative, to set this case for separate oral argument "at the earliest convenience of the Court but in any event prior to the Court's decision in the *Williams* case."

Believing that a single Justice is without power to act upon this motion, I have conferred with all the other members of the Court, with the exception of MR. JUSTICE DOUGLAS who is not available. I am now authorized to state that the Court sets this case for separate oral argument on the summary calendar immediately following completion of the oral argument in *Williams et al.* v. *Rhodes et al.*, No. 543, on October 7, 1968.

Counsel for the appellees shall file a motion or motions under Rule 16 on or before Wednesday, October 2, 1968. Supplemental or reply briefs may be filed on or before Saturday, October 5, 1968. Motions and briefs may be typewritten, and the case will be heard on the typewritten certified record.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No.—. OCTOBER TERM, 1968.

IN RE SMITH *v.* RITCHEY

[September 29, 1968.]

MR. JUSTICE DOUGLAS.

This cause is pending in the Ninth Circuit Court of Appeals and has not been heard. The Chief Judge has denied a stay and under Ninth Circuit procedure no other recourse seems possible. I hesitate as Circuit Justice to act. But it is a federal policy to grant stays where a substantial question is presented and denial of the stay will do irreparable harm to the applicant. Substantial and unresolved questions under the various Ready Reserve Acts are presented. Moreover, a serious First Amendment question is involved. Applicant is scheduled to be shipped out of this country to the Asian theatre tomorrow [Publisher's note: There probably should be a comma here.] Sept. 30, 1968. I have accordingly decided to grant the stay, so as to keep appellant at Hamilton Air Force Base, his present duty station, pending a decision on the merits by the Court of Appeals, on condition however that on or before Oct. 4, 1968 appellant shall file the record in the cause with the Court of Appeals and move that court for an early hearing.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

LOCKS ET AL. *v.*
COMMANDING GENERAL, SIXTH ARMY, ET AL.

[October 12, 1968.]

MR. JUSTICE DOUGLAS.

In this case petitioners sought habeas corpus relief by way of injunction, and a declaratory judgment from the District Court, alleging that the military officials under whom they serve are infringing upon their First Amendment rights. The District Court dismissed the petition. On appeal the Court of Appeals denied the relief sought. Petitioners now make a motion, asking me to direct defendants to cease and desist from various restraints concerning the exercise of their First Amendment rights.

As Circuit Justice I have no authority to revise, modify, or reverse the order of the Court of Appeals on the merits of this controversy. As Associate Justice of the Supreme Court I have no authority to grant the relief sought. If the motion were a petition for writ of certiorari, it would go to the full Court, where four out of nine Justices could put the case down for a hearing. Or five of the nine Justices could dispose of the case on the merits without oral argument. But apart from granting stays, arranging bail, and providing for other ancillary relief, an individual Justice of this Court has no power to dispose of cases on the merits.

Article I, § 9, of the Constitution provides that "privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it." It may be that in time that provision will justify the issuance of a writ of habeas corpus by an individual Justice. The point, however, has never been decided (cf. *Ex parte McCardle*, 74 U.S. 506),

and it is not briefed or argued in the papers which have been submitted to me. The shortness of time (less than one day) allowed me for consideration of the application does not permit me even to explore that aspect of the problem.

Hence, without prejudice to any future ruling on that matter and basing my present decision solely on the narrow compass of the authorities submitted, I deny the present motion for lack of authority to act.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

WINTERS *v.* UNITED STATES.

On Application for a Stay.

[October 21, 1968.]

MR. JUSTICE DOUGLAS, Circuit Justice.

The Department of Justice in opposing this motion for a stay says that this is petitioner's "sixth attempt . . . to stay his shipment to Vietnam"—a statement technically accurate but very misleading. Four prior applications were, indeed, denied last Term, two by my Brother HARLAN and two by the Court, I dissenting. 390 U.S. 993, 391 U.S. 910. The fifth attempt to obtain a stay was also denied, I feeling bound by "the law of this case" as settled by the prior rulings of the Court. 391 U.S. —.

These rulings on stays were *apropos* of proceedings in the Second Circuit raising various questions concerning Ready Reserve units discussed in my dissenting opinion in *Morse* v. *Boswell*, 393 U.S. —. Neither the District Court in New York nor the Court of Appeals in New York had before it nor decided any question concerning a "second call-up." After the Second Circuit courts had made their rulings on the merits, Winters was first released by the Marine Corps from active duty and then reactivated for a second time. His release took place April 16 and he was reactivated April 29 of this year.

He did present that as a question in his petition for a writ of certiorari filed with us on May 1, 1968, even though the point had not been raised or considered below; and we denied the petition on October 14, 1968. 393 U.S. —. Meanwhile in May 1968 we had denied

a reconsideration of his application for a stay based on the "new facts" of his second call-up. 391 U.S. 910.

In short, the courts of the Second Circuit never did decide—and had no occasion to decide—questions of the second call-up. Our Rules, indeed, provide that only the questions "set forth in the petition or fairly comprised therein shall be considered by the Court." Rule 231(c). Our rejection of a motion to reconsider the request for a stay based on that point was certainly no adjudication of its merits.

When the Marine Corps shipped Winters to California, habeas corpus proceedings were instituted there, challenging [Publisher's note: There probably should be a comma here.] *inter alia*, the validity of his second call-up. On that, the District Court for the Southern District ruled July 15, 1968, holding that the second call-up was valid. The case is now on appeal to the Ninth Circuit Court of Appeals; and that appeal raises for the first time *in an appellate court* the validity of the second call-up. That court denied a stay pending hearing and decision on the merits of the appeal.

The application for a stay is now before me as Circuit Justice. I hesitate to act contrary to the decision of my Ninth Circuit Brethren; but I have reluctantly decided to do so because of the important federal questions presented on which no appellate court has passed and as respects which there is a conflict among the District Courts in the Ninth Circuit.

At the time Winters enlisted in the Marine Corps Reserves, he agreed to participate on a satisfactory basis in 90% of the annual scheduled duties, with the proviso that if he failed to perform those training duties he could be ordered "without my consent to perform not to exceed 45 days of additional active duty for training." The latter was, indeed, provided in 10 U.S.C. § 270(b). For a year Winters' performance was satisfactory. Later the Marine Corps changed the 90% requirement to 100% and shortly thereafter Winters missed a double drill, which was within the 10% leeway contained in his enlistment

contract.[*] Thereupon Winters was recalled to active duty. He brought a habeas corpus proceeding in California and on the day scheduled for a hearing he was released from active duty and returned to civilian life, attached to his old reserve unit. That habeas corpus proceeding was then dismissed as moot.

That was April 16, 1968. On April 29, 1968, he was once again directed to report for active duty "by reason of your unsatisfactory participation in reserve training," based on the same missed double drill of last year.

It is said in the present case that Winters' dismissal on April 16, 1968, was a clerical error—a statement impossible to believe. For it took place in court when the validity of the first call-up was about to be tried. If inferences are to be drawn, it would seem that a confession of error was being tendered the District Court, perhaps stemming from fear of the precedent in the *Gion* case.

On the merits he makes several points:

(1) He has already served in excess of the 45 days he was obligated to serve in case he failed to perform his duties as a reservist.

(2) 10 U.S.C. § 277 provides that the laws shall be "administered without discrimination" among Reserves, the claim being that the Marine Corps by its *ipse dixit* has made Winters' position as a reservist more onerous as compared to reservists in the Army, Navy, and Air Force.

[*] The statute, 10 U.S.C. § 270(b), says:

"A member of the Ready Reserve . . . who fails in any year to satisfactorily perform the training duty prescribed in subsection (a), as determined by the Secretary concerned under regulations to be prescribed by the Secretary of Defense, may be ordered without his consent to perform additional active duty for training not more than 45 days."

(Subsection (a) simply prescribes training duty of participation in 48 scheduled drills.)

(3) The involuntary resubmission of Winters to active duty violated the Due Process Clause of the Fifth Amendment.

On at least one of these points, the present decision of the District Court conflicts with *Gion* v. *McNamara*, Civ. No. 67 — 1563 — E.C., decided January 9, 1968, by the District Court for the Central District of California. That court ruled in part:

> "1. Petitioner's status as Ready Reservist is based upon contract. In accordance with said contract Petitioner may not be ordered without his consent to perform more than forty-five (45) days of additional duty for training for unsatisfactory participation in the Ready Reserve.
>
> "2. The ordering of Petitioner to involuntary active duty for more than forty-five (45) days because of unsatisfactory participation in the Ready Reserve, pursuant to authority derived from Public Law 89-687, 80 Stat. 981 (Note to 10 U.S.C.A. § 263, 1966, Cumulative Pocket Part), constituted a violation of Petitioner's enlistment contract, and application of said Public Law as to Petitioner constituted violation of the due process clause of the Fifth Amendment to the Constitution of the United States."

On the basis of these findings, Gion was discharged from active duty and the Government took no appeal.

In federal law, a stay is granted, if substantial questions are presented and if denial of a stay may result in irreparable damage to the applicant. The questions presented here seem to me to be substantial and if he has raised substantial questions, it only flouts the law to require a man to enter the front lines in Vietnam while his lawsuit at home is still undecided.

These military cases are usually cloaked in secrecy and uncertainity [Publisher's note: "uncertainity" should be "uncertainty".]. The facts are exceedingly hard to ascertain. The civilian spokesman—the Department of

Justice—has difficulty in ascertaining what the true status of a case is and in reporting accurately to the Court. In the case of *Morse* v. *Boswell*, and companion cases, involving stays of shipments of Ready Reserve Units overseas, I found it virtually impossible to discover the precise form of enlistment contracts which the several hundred applicants had signed; and my search was not hindered by the Department of Justice but greatly aided by it.

As I stated, the dismissal of Winters on April 16, 1968, was certainly not a clerical error; it was done in open court when the validity of the first call-up was about to be tried. The case is a good illustration of the principle that law and military training and embarkation do not mix in the military mind. Yet the military is bound by the law which Congress provides to cover military personnel. Those laws contain rights as well as duties, privileges as well as disabilities, and the rights and privileges are frequently cognizable in courts of law.

Men and women in the Armed Forces have the protection of laws against military decisions and many often challenge these decisions in the civil courts. See, *e.g.*, *Harmon* v. *Brucker*, 355 U.S. 579 (review of statutory authority of Secretary of the Army in granting discharges); *Orloff* v. *Willoughby*, 345 U.S. 83 (classification by the Army of specially inducted professional personnel); *Estep* v. *United States*, 327 U.S. 114 (review of Selective Service classification in criminal prosecutions).

Historically, one of the most important roles of civil courts has been to protect people from military discipline or punishment who have been placed beyond its reach by the Constitution and the laws enacted by Congress. *Ex parte Milligan*, 4 Wall. 2; *Toth* v. *Quarles*, 350 U.S. 11; *Reid* v. *Covert*, 354 U.S. 1; *Kinsella* v. *Singleton*, 361 U.S. 234. If Winters is right, he is in one of those categories. There are those who in tumultuous times turn their faces the other way saying

that it is not the function of the courts to tell the Armed Forces how to run a war. Of course that is true. But it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. As stated in *Ex parte Milligan*, *supra*, civil liberty and unfettered military control are irreconcilably antagonistic. A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.

As stated by THE CHIEF JUSTICE:

> ". . . although the dangers inherent in the existence of a huge military establishment may well continue to grow, we need have no feeling of hopelessness. Our tradition of liberty has remained strong through recurring crises. We need only remain true to it." The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 197.

I granted the stay through October 21, 1968, to give the Department of Justice a chance to reply. I now continue that stay until the case has been heard and decided on the merits by the Court of Appeals.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DRIFKA v. BRAINARD; and ALLEN *v*. BRAINARD.

APPLICATIONS FOR STAYS PENDING APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS.

[December 5, 1968.]

MR. JUSTICE DOUGLAS, Circuit Justice.

These are applications to me as Circuit Justice for stays of the shipment of petitioners (some 386 National Guardsmen) out of the State of Washington to Vietnam.

Their appeal has not been decided by the Court of Appeals for the Ninth Circuit. The legal questions raised there have come to this Court in other cases, and in each the Court has refused to consider the questions on the merits.

Thus, we had in *Johnson* v. *Powell*, October 25, 1968, an application for a stay based on the grounds that members of the National Guard were restricted by the Constitution to the execution of the laws of the Union, to the suppression of insurrections, and to repelling invasions.[*] The question stands unresolved whether members of the National Guard or militia when dratfed [Publisher's note: "dratfed" should be "drafted".] into the federal service are still subject to those constitutional restrictions. That is a major question of importance affecting the lives of petitioners and the welfare of their families. I thought when *Johnson* v. *Powell* was presented that we should decide that question. The Court, however, refused; and whether it felt that the issue was not substantial or that it did not raise a justiciable question, I do not know.

[*] Article I, § 8, cl. 16 of the Constitution provides,

"The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions."

I disagree on both grounds. But in view of the ruling by the full Court I feel precluded from asserting the contrary position at this time.

I also feel that there is a question of great importance as to whether these men can be sent abroad to fight in a war which has not been declared by the Congress. This issue has been presented in numerous cases, the latest being No. 764—*Morse* v. *Boswell*. And it was on this point that I wrote a rather elaborate dissent in *Holmes* v. *United States*, 391 U.S. 936, and *Hart* v. *United States*, 391 U.S. 956. This certainly is a substantial question and one which has never been resolved by this Court.

The question of the power of the President to conduct a war without a declaration of war was raised in the *Prize Cases*, 2 Black 635, during the Civil War. That was an internal insurrection which would perhaps be analogous here if the Vietnamese were invading the United States.

It was a five-to-four decision, upholding Presidential power. Would it have been the same if Lincoln had had an expeditionary force fighting a "war" overseas?

There should not be the slightest doubt but that whenever the Chief Executive of the country takes any citizen by the neck and either puts him in prison or subjects him to some ordeal or sends him overseas to fight in a war, the question is a justiciable one. To call issues of that kind "political" would be to abdicate the judicial function which the Court honored in the midst of the Civil War in the *Prize Cases*.

But again I feel precluded from granting a stay on this ground, because, while the Court has not decided the issue, it has refused to pass on it. And the issue is not more clearly presented here than it was in the earlier cases. Nor has there, since that time, been a change in the personnel of the Court indicating that a different view of the basic constitutional questions might be taken.

The application [Publisher's note: "application" should be "applications".] for stays are denied.

SUPREME COURT OF THE UNITED STATES

No. 830.—OCTOBER TERM, 1968.

CAPT. DALE E. NOYD v.
MAJ. GEN. CHARLES R. BONDS, JR., ET AL.

APPLICATION FOR RELEASE.

(December 24, 1968.)

MR. JUSTICE DOUGLAS.

Petitioner, incarcerated as a result of a court martial, has filed a petition for writ of certiorari to the Tenth Circuit Court of Appeals denying him standing to challenge the place and manner of his incarceration[1] prior to final review of his conviction because he had not exhausted all of his military remedies. Unlike *Gusik* v. *Schilder*, 340 U.S. 128, this habeas corpus proceeding in the federal courts does not challenge purported error in a court martial trial prior to exhaustion of military remedies. Rather the question is whether the doctrine of exhaustion of military remedies applies where the question is whether the court martial authority acts outside its jurisdiction. Cf. *United States* v. *McElroy*, 258 F.2d 927, 929, aff'd 361 U.S. 281. That question seems to be one of first impression.

The question seems to me to be a substantial one on which the full Court should pass, which it will not be able to do until January 10, 1969.[2] I therefore have

[1] Art. 71(c) of the Uniform Code of Military Justice provides:

"No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

[2] My Brother WHITE denied this application December 18, 1968; and I would therefore take this present application to the full Court were the members available. But since I feel that a substantial question is presented by the petition for writ of certiorari and since

concluded that until the Court is able to pass on the petition for writ of certiorari, petitioner should be placed in a non-incarcerated status, which as the District Court said, should prevent his superiors from "assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter."

The precise terms and conditions may be settled by the District Court.

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the problem raises a further issue, also unresolved, concerning the scope of review by the court of Military Appeals and the role reserved for the regular federal courts, I feel petitioner is entitled to relief pending consideration of the petition for certiorari January 10, 1969.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

Strickland Transportation Company, Inc. v. *United States et al.*

Consolidated Copperstate Lines v. *United States et al.*

Memorandum of MR. JUSTICE HARLAN.

In the normal course of vicissitudes occurring during a recess period of the Court, these applications for a stay of an order of the Interstate Commerce Commission, initially addressed to MR. JUSTICE DOUGLAS, have been referred to me by the Clerk of the Court for disposition.

Having considered the papers submitted on both sides, I am of the view that Strickland and Copperstate have made a sufficient showing to entitle them to consideration of their Jurisdictional Statements by the full Court before the orders of the Commission, now scheduled to become effective on February 10, 1969, go into operation. I am of the further view, however, that action on the Jurisdictional Statements should be accomplished this Term, and that in the event of probable jurisdiction being noted the matter of a further stay pending determination of the appeals is one that should be decided by the full Court.

Accordingly, I shall issue a stay of the order of the Interstate Commerce Commission, dated December 12, 1968, pending this Court's action on the Jurisdictional Statements, conditioned however upon the appellants perfecting their appeals and filing their Statements on or before March 10, 1969.

February 4, 1969.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

Quinn *v.* Laird.	)	
Stringham *v.* Laird.	)	Application for Stays.
Hand *v.* Laird	)	

[May 1, 1969.]

MR. JUSTICE DOUGLAS, Circuit Justice.

Petitioners sought discharge from the Army on the ground that they are conscientious objectors. The Army denied their applications. They then sought review in the Army Board for Correction of Military Records, where the matter now rests.

They feared that they might be shipped overseas pending exhaustion of military administrative remedies. Since the Army Board for Correction of Military Records apparently has no power to issue a stay pending its administrative review, 32 CFR § 681.3(c)(4), they filed petitions for writs of habeas corpus in the District Court for the Northern District of California and asked temporary stays of their deployment. The District Court granted temporary stays through April 22, 1969, in order to give petitioners an opportunity to seek a stay from the Court of Appeals, which extended the stay through today, May 1.

I have decided to grant the stay for two reasons:

While federal courts do not intervene on the merits of these military cases pending exhaustion of military remedies (*Gusik* v. *Schilder*, 340 U.S. 128), the question is unresolved whether resort to the Court of Military Appeals for collateral relief as described in *United States* v. *Bevilacqua*, 18 U.S.C.M.A. 10, decided November 8, 1968, is part of those military remedies. More precisely it is whether the announced policy of that court to enter-

tain collateral actions where "constitutional rights" have been denied in a court-martial, *United States* v. *Bevilacqua*, *supra*, p. 12, extends to refusal of a conscientious objector classification.

If resort to that court is not available under circumstances such as the present, the District Court would clearly have jurisdiction to consider the merits of the claim after the military remedies had been exhausted. The further question is whether in the meantime it can "in aid of" its jurisdiction, 28 U.S.C. § 1651, stay deployment of the applicant so as to maintain the *status quo* while it determines the merits. This question is a recurring one, see *Schwartz* v. *Covington*, 341 F.2d 537; and it is, I think, a substantial one.

I have accordingly decided to issue a stay in each of these cases.

[Publisher's note: See 396 U.S. 1201 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM END OF OCTOBER TERM, 1968, THROUGH JANUARY 30, 1970

ATLANTIC COAST LINE RAILROAD CO. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.

ON APPLICATION FOR STAY

Decided July 16, 1969

The Federal District Court enjoined the enforcement of a state court injunction restraining union picketing in a railway labor dispute. In view of the long-standing policy embodied in 28 U.S.C. § 2283 that a federal court, with limited exceptions, may not enjoin state court proceedings, and the difficult and important question presented here, the District Court's injunction is stayed pending disposition of a petition for certiorari to be expeditiously filed in this Court.

Dennis G. Lyons, Frank X. Friedmann, Jr., David M. Foster, John W. Weldon, and *John S. Cox* on the application.

Allan Milledge and *Richard L. Horn* in opposition.

MR. JUSTICE BLACK, Circuit Justice.

This is an application presented to me by the railroad to stay enforcement of an injunction issued by the United States District Court for the Middle District of Florida against the enforcement of a state court injunction restraining the union from picketing around the Moncrief Yard in Florida, a classification yard owned by the Seaboard Coast Line, the successor company to the Atlantic Coast Line Railroad. The picketing is being carried on because of a strike against the Florida East Coast Railway by its employees; there is

no dispute between the Seaboard Coast Line or the Atlantic Coast Line and their employees. The union wishes to picket the Moncrief Yard, however, because many of the Florida East Coast cars are switched into it in order to carry on that railroad's business.

At the last Term of this Court we had before us a question involving the picketing of the Jacksonville Terminal Company at Jacksonville, Florida, owned and operated by the Florida East Coast, Seaboard, Atlantic Coast Line, and Southern railroads. There an injunction was granted in the Florida state courts to restrain the union from picketing the entire terminal. This Court in a 4-to-3 opinion decided that the picketing was protected by federal law and therefore could not be enjoined by Florida. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969). The union here substantially relies on that case, insisting that it has the same federally protected right to picket at the Moncrief Yard that this Court held it could exercise at the Jacksonville Terminal. The District Court here enjoined the railroad from utilizing a state court injunction against picketing at Moncrief and refused the railroad's request to stay the effectiveness of its injunction pending appeal. The Court of Appeals, however, did grant an application to suspend the effectiveness of the District Court injunction for ten days, which expires tomorrow—July 17. The question before me is whether I should suspend the effectiveness of that injunction pending a review of the District Court's judgment.

Since 1793 a congressional enactment, now found in 28 U.S.C. § 2283, has broadly provided that federal courts cannot, with certain limited exceptions, enjoin state court proceedings. Whether this long-standing policy is violated by the District Court's injunction here presents what appears to me to be a close, highly complex, and difficult question. Not only does it present

a difficult problem but one of widespread importance, the solution of which might broadly affect the economy of the State of Florida, the United States, and interstate commerce. Under these circumstances I do not feel justified in permitting the District Court injunction to be enforced, changing the status quo at Moncrief Yard, until this Court can act for itself on the questions that will be presented in the railroad's forthcoming petition for certiorari. For this reason an order will be issued staying the enforcement of the District Court injunction pending disposition of the petition for certiorari in this Court. To accomplish this result without undue delay it will be the duty of the railroad to expedite all actions necessary to present its petition for certiorari here.

[Publisher's note: See 396 U.S. 1204 for the authoritative official version of this opinion.]

LEVY *v.* PARKER, WARDEN, ET AL.

ON APPLICATION FOR BAIL

Decided August 2, 1969

Application by military prisoner for release on bail pending determination on merits of habeas corpus petition filed in District Court is granted. Although bail had been denied by the lower courts and the Circuit Justice, referral to the full court is not immediately possible, since the Court is in recess and the Justices are widely scattered. There are substantial problems of whether Article 134 of the Uniform Code of Military Justice, which, *inter alia*, applicant had been convicted of violating, satisfies the standards of vagueness required by due process, and of First Amendment rights. While applicant's sentence will expire shortly, a live controversy will continue and applicant should be released on bail until the full Court can pass on the application.

Charles Morgan, Jr., Reber F. Boult, Jr., Morris Brown, Henry W. Sawyer III, Anthony G. Amsterdam, Alan H. Levine, Eleanor Holmes Norton, and *Melvin L. Wulf* on the application.

Solicitor General Griswold in opposition.

MR. JUSTICE DOUGLAS.

Applicant has been sentenced to three years' imprisonment after conviction of one charge each for violating Articles 90, 133, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 890, 933, 934. He has exhausted all of his military remedies and has now filed a petition for a writ of habeas corpus in the District Court for the Middle District of Pennsylvania. He seeks release on bail pending determination of the merits. The District Court, the Court of Appeals, and the Circuit Justice, MR. JUSTICE BRENNAN, have each denied bail. This application to me therefore carries a special burden, for we very seldom grant an order that has been denied

by the Circuit Justice. Indeed the practice is to refer such renewed application to the full Conference of this Court. We are now in recess and widely scattered; hence referral to the Conference is not immediately possible.

Some of the problems tendered seem substantial to me. One charge on which applicant stands convicted rests on Article 134 which makes a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces." In *O'Callahan* v. *Parker*, 395 U.S. 258, which the lower courts did not have before them when they denied bail, we reserved decision on whether Article 134 satisfies the standards of vagueness required by due process. Apart from the question of vagueness is the question of First Amendment rights. While in the Armed Services, applicant spoke out against the war in Vietnam. The extent to which first Amendment rights available to civilians are not available to servicemen is a new and pressing problem.

It is true that applicant's sentence will expire on August 14, 1969. But in light of *Carafas* v. *LaVallee*, 391 U.S. 234, I would not think that the running of the sentence would moot the petition for habeas corpus. A live controversy will continue; and I have concluded that this applicant should be released on bail until the full Court can pass on the application. For, in my view, substantial issues are presented on the merits.

The applicant, Howard B. Levy, is hereby ordered admitted to bail pending final determination of this application by the full Court when it convenes October 6, 1969.

Bail is hereby fixed in the following amount: $1,000.

Ordered this the 2d day of August, 1969.

[Publisher's note: See 396 U.S. 1206 for the authoritative official version of this opinion.]

SCAGGS *v.* LARSEN, COMMANDING GENERAL, ET AL.

ON MOTION FOR STAY

Decided August 5, 1969

Motion by Army reservist for release from military custody pending Court of Appeals' review of District Court's denial of petition for habeas corpus is granted. Reservist's claims that the order requiring him to serve 17 months beyond his enlistment contract was without notice and opportunity to be heard, and in violation of the terms of his enlistment contract, are within the scope of the writ of habeas corpus. There is no statutory provision for a hearing, and the issue is substantial and should be resolved.

Lloyd E. McMurray on the motion.

MR. JUSTICE DOUGLAS, Circuit Justice.

This is a phase of review of the action of respondents in ordering movant to active duty in the United States Army Reserve for a period of approximately 17 months beyond the term of his enlistment contract. His enlistment expires in September 1969. He was directed in January 1969 to join a unit of the Ready Reserve and attend regular drills. If his allegations are to be believed, he made a diligent effort to comply but was rejected, since his enlistment period would expire in September 1969. Up until that time he had met all the requirements of the Army Ready Reserve. He claims that the order thereafter entered requiring him to serve about 17 months beyond the end of his enlistment contract was punitive and unauthorized.

He therefore filed a petition for habeas corpus with the District Court, complaining that the crucial step taken when he was ordered to active duty was taken without notice and an opportunity to be heard in viola-

tion of procedural due process and also was in violation of the terms of his enlistment contract. The District Court denied the petition, and that decision is presently awaiting review by the Court of Appeals. Scaggs seeks by this motion release from military custody pending that review.

He rests on 28 U.S.C. § 2241[1] to support his claim that the District Court has jurisdiction of the habeas corpus action.

It has been argued in other cases that the word "custody" indicates that § 2241 does not reach cases where military authority is being contested by civilians at a pre-induction stage[2] or by servicemen not yet convicted of an offense who entered the Armed Forces "volun-

[1] "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

• • • • •

"(c) The Writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

[2] With the apparent lone exception of *Ex parte Fabiani*, 105 F. Supp. 139, the federal courts have held that habeas corpus is not available prior to induction. See, *e.g.*, *DeRozario* v. *Commanding Officer*, 390 F.2d 532; *Lynch* v. *Hershey*, 93 U.S. App. D.C. 177, 208 F.2d 523, cert. denied, 347 U.S. 917; *Petersen* v. *Clark*, 285 F. Supp. 700. Pre-induction judicial review is more frequently sought by way of injunction, mandamus, or declaratory judgment. See *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233; *Wolff* v. *Selective Service Bd.*, 372 F.2d 817; *Townsend* v. *Zimmerman*, 237 F.2d 376.

tarily."[3] I take the opposed view, though the question has not been authoritatively decided. However that may be, § 2241 is not a measure of the constitutional scope of the guarantee in Art. I, § 9, of the Constitution that: "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."

The Great Writ was designed to protect every person from being detained, restrained, or confined by any branch or agency of government. In these days it serves no higher function than when the Selective Service Boards (*Oestereich* v. *Selective Service Bd.*, 393 U.S. 233) or the military act lawlessly. I conclude, in other words, that in spite of the prejudice that exists against review by civilian courts of military action, habeas corpus is in the tradition of *Oestereich* wherever lawless or unconstitutional action is alleged.

[3] It is settled that illegal induction is properly attacked by a petition for a writ of habeas corpus. *Oestereich* v. *Selective Service Bd.*, *supra*. The remaining debate concerns cases challenging the legality of continued military service that has been entered under a contract of enlistment. Cases denying jurisdiction to issue a writ of habeas corpus where the petitioner enlisted in the military forces include *Fox* v. *Brown*, 402 F.2d 837; *United States ex rel. McKiever* v. *Jack*, 351 F.2d 672; *McCord* v. *Page*, 124 F.2d 68; *In re Green*, 156 F. Supp. 174. Others upholding such jurisdiction are *Hammond* v. *Lenfest*, 398 F.2d 705; *Crane* v. *Hedrick*, 284 F. Supp. 250; cf. *Jones* v. *Cunningham*, 371 U.S. 236, 240; *Orloff* v. *Willoughby*, 345 U.S. 83, 94; *Tarble's Case*, 13 Wall. 397. In *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371, the petitioner, a member of the Army Reserve, sought exemption from active duty on the basis of personal hardship. Although the court held that "[a]n inquiry into the legality of this restraint would be within the traditional function of the writ," *id.*, at 373, it further held that "[w]hether or not habeas corpus is available, the district court was free to treat the petition as one for mandamus under 28 U.S.C. § 1361." *Id.*, at 374.

As stated, the gravamen of the complaint in this case is that the critical steps forcing petitioner to serve beyond his enlistment contract were taken without notice and opportunity on his part to be heard. The statute makes no provision for a hearing. Neither did the statute in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, authorizing the deportation of aliens. But the Court said that constitutional requirements made a hearing necessary.

Neither deportation nor a military order to active duty is in form penal. But the requirement that a man serve beyond his enlistment contract may be as severe in nature as expulsion from these shores. At least the issue presented is substantial and should be resolved.

It is hereby ordered that petitioner be, and he is hereby, released on his own recognizance from any and all custody of the United States Army or the United States Army Reserve, and from compliance with the orders heretofore issued, requiring that he report for active duty at Fort Ord, California, on July 27, 1969. This order shall remain in effect until a determination of the cause on the merits by the Court of Appeals.

[Publisher's note: See 396 U.S. 1210 for the authoritative official version of this opinion.]

ODEN ET AL. *v.* BRITTAIN ET AL.

ON APPLICATION FOR INJUNCTION

Decided August 13, 1969

Application for injunction to prevent City of Anniston from holding election to choose members of new city council in accordance with state statute authorizing change from commission to council-manager form of government denied. In this case, which is factually distinguishable from *Allen* v. *State Board of Election*s, 393 U.S. 544, the election will not result in the severe irreparable harm needed to justify an injunction; nor has the three-judge panel designated to hear the case as yet considered the injunction request. Since there is room for disagreement on this substantial problem, application is denied without prejudice to request relief from other Court members.

Oscar W. Adams, Jr., Jack Greenberg, James M. Nabrit III, and *Norman C. Amaker* on the application.

MR. JUSTICE BLACK, Circuit Justice.

This is an application presented to me as Circuit Justice for an injunction to prevent the City of Anniston, Alabama, from holding a local election on September 2, 1969—merely a few days from now—to select five members of a newly formed city council in accordance with a state law which authorizes Anniston to change from a commission to a council-manager form of government. See City Manager Act of 1953, Ala. Code App. § 1124 *et seq*. (1958).

The applicants, all Negro citizens of Anniston, claim that the election, if held, would violate the terms of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. § 1973c (1964 ed., Supp. I), which provides that certain Southern States or political subdivisions thereof may not make any change in the procedure of elections in effect as of November 1, 1964, unless the change is either

(1) submitted to the United States Attorney General in Washington for review and he does not object, or (2) submitted to the United States District Court for the District of Columbia and that court after a hearing permits the change to be made. This procedure is of course a highly unusual departure from the basic rights of local citizens to govern their own affairs. In this case all Anniston is preparing to do is to change from a three-member commission, elected at large, to a five-member council, also elected at large.

Last Term this Court decided, over my dissent, a case which lends considerable support to the applicants' request that no election be held until officials in Washington approve it. See *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). Even were I to accept the majority's view in that case, I do not feel that decision necessarily controls the present situation which presents many material factual differences. More importantly I remain firmly convinced that the Constitution forbids this unwarranted and discriminatory intervention by the Federal Government in state and local affairs. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 355-362 (1966) (opinion of BLACK, J.).

Intervention by the federal courts in state elections has always been a serious business. Here the city has already incurred considerable expense in preparing for an election to be held within the next three weeks. If this election were held, applicants could later bring suit to have it set aside. I thus do not see why these plans should be stopped in midstream in a case in which the legal issues are unclear, when the election cannot result in the severe irreparable harm necessary to justify the issuance of the extraordinary remedy of an injunction by an individual Justice.

In addition to the foregoing factors, the three-judge panel designated to hear this case has not yet considered

the request for an injunction. While the applicants allege that the panel cannot be convened prior to the date set for the election, they have not shown that the possibilities of obtaining an immediate hearing before some three-judge court have been exhausted. There is no indication that the assistance of the Chief Judge of the Fifth Circuit, who is statutorily required by 28 U.S.C. § 2284(1) to designate the members of the panel, has been sought. In this situation I have considerable doubt as to my authority to grant the requested relief. See Sup. Ct. Rules 18(2), 27, and 51(2). Therefore I decline to issue the requested injunction. Since, however, the problem is substantial and there is room for disagreement, I deny the application without prejudice to the rights of the applicants to request relief from other members of this Court. See Sup. Ct. Rule 50(5).

Application denied without prejudice.

[Publisher's note: See 396 U.S. 1213 for the authoritative official version of this opinion.]

ROSADO ET AL. *v.* WYMAN ET AL.

ON APPLICATION FOR STAY AND OTHER RELIEF

Decided August 20, 1969

Application for interim stay and other relief should be passed on by full Court, since factors involved in granting a stay call for the Court's collective judgment, the Court has denied a similar stay at a different stage of the case, and an individual Justice cannot order an accelerated schedule that is importantly related to the stay request.

See: 414 F.2d 170.

Lee A. Albert and *Robert B. Borsody* on the application.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, *Amy Juviler*, Assistant Attorney General, and *Philip Weinberg* in opposition.

MR. JUSTICE HARLAN, Circuit Justice.

While I am of the view that this case is not unlikely to be found a worthy candidate for certiorari, I am also of the opinion that the present application for an interim stay and other relief should be passed along to the full Court for consideration.

The latter conclusion follows from my belief that the factors involved in determining whether a stay should issue are such as to call for the collective judgment of the members of the Court and not merely that of an individual Justice; from the circumstance that the Court itself has already denied a similar stay application, albeit at a stage when the case was in a different posture; and from the fact that an individual Justice has no power to order an accelerated schedule for briefing and

hearing on the underlying merits of the case, an aspect of the present application that seems to me importantly related to the request for a stay.

If applicants' petition for certiorari is promptly filed, that should ensure its consideration and disposition by the Court at its first Conference in October. At that time, I shall, pursuant to Rule 50(6), refer this application to the Court for simultaneous consideration and action.

[Publisher's note: See 396 U.S. 1215 for the authoritative official version of this opinion.]

KEYES ET AL. *v.*
SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO, ET AL.

ON APPLICATION FOR VACATION OF STAY

Decided August 29, 1969

Application for vacation of Court of Appeals' stay of preliminary injunction entered by District Court that had the effect of requiring partial implementation of a school desegregation plan is granted, the Court of Appeals' order is vacated, and the District Court's order is directed to be reinstated. A district court's order granting a preliminary injunction should not be disturbed by a reviewing court unless the grant was an abuse of discretion, which the Court of Appeals did not find here. Nor does the desire to develop public support for the desegregation plan that the Court of Appeals manifested constitute justification for delay in the plan's implementation.

See: 303 F. Supp. 279 and 289.

Jack Greenberg and *Conrad K. Harper* on the application.

Richard C. Cockrell, Thomas E. Creighton, and Benjamin L. Craig in opposition.

MR. JUSTICE BRENNAN.

In this school desegregation case I am asked to vacate a stay by the Court of Appeals for the Tenth Circuit of a preliminary injunction entered by the District Court for the District of Colorado. The preliminary injunction has the effect of requiring partial implementation of a school desegregation plan prepared by School District No. 1, Denver, Colorado, and then rescinded by that Board after changes in membership followed a school board election.

The Court of Appeals issued the stay pending decision of an appeal taken by the School Board from the preliminary injunction. I have concluded that the stay was

improvidently granted and must be vacated. An order of a district court granting or denying a preliminary injunction should not be disturbed by a reviewing court unless it appears that the action taken on the injunction was an abuse of discretion. *Alabama* v. *United States*, 279 U.S. 229 (1929). Where a preliminary injunction has issued to vindicate constitutional rights, the presumption in favor of the District Court's action applies with particular force. The Court of Appeals did not suggest that the District Court abused its discretion. On the contrary, the Court of Appeals expressly stated that the District Court's findings of fact "represent a painstaking analysis of the evidence presented. They establish a racial imbalance in certain named schools. From the facts found, the district court either made a conclusion or drew an inference, [Publisher's note: The comma preceding this note is in the original. See also 396 U.S. at 1216.] that de jure segregation exists in named schools. Its grant of the temporary injunction is grounded on the premise that there is de jure segregation."

The Court of Appeals nevertheless stated that it "must decide whether the public interest is best served by the maintenance of the status quo or by the acceptance of the injunctive order," since the time before the Denver schools were to open on September 2 was insufficient to permit an examination of the record to determine whether the District Court correctly held that this was a case of *de jure* segregation. It may be that this inquiry was appropriate notwithstanding the presumption in favor of continuing the preliminary injunction in force. But the reasons given by the Court of Appeals for striking the balance in favor of the stay clearly supplied no support in law for its action. It was not correct to justify the stay on the ground that constitutional principles demanded only "that desegregation be accomplished with all convenient speed." "The time for mere 'deliberate speed' has run out . . . ." *Griffin* v. *County*

School Board, 377 U.S. 218, 234 (1964). "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968) [Publisher's note: The emphasis on "*now*" is in the original *Green* opinion.]. The obligation of the District Court was to assess the effectiveness of the School Board's plans in light of that standard. *Ibid*. Since the Court of Appeals not only was unable to say that the District Court's assessment was an abuse of discretion, but agreed that it "may be correct," the stay of the preliminary injunction was improvident.

The Court of Appeals also seems to have based its action on the premise that public support for the plan might be developed if any order awaited final hearing; the Court of Appeals stated that a plan of desegregation "must depend for its success on the understanding cooperation of the people of the area." But the desirability of developing public support for a plan designed to redress *de jure* segregation cannot be justification for delay in the implementation of the plan. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

I therefore grant the application, vacate the order of the Court of Appeals, and direct the reinstatement of the order of the District Court.

[Publisher's note: See 396 U.S. 1218 for the authoritative official version of this opinion.]

ALEXANDER ET AL. *v.*
HOLMES COUNTY BOARD OF EDUCATION ET AL.

ON APPLICATION TO VACATE SUSPENSION OF ORDER

Decided September 5, 1969

On July 3, 1969, the Court of Appeals entered an order requiring the submission of new plans to be effective this fall to accelerate desegregation in 33 Mississippi school districts. On August 28, on motion of the Department of Justice, that court suspended the July 3 order and postponed the date for submission of new plans to December 1, 1969. The application to vacate the suspension of the July 3 order is denied. Although MR. JUSTICE BLACK believes that the "all deliberate speed" standard is no longer relevant and that unitary school systems should be instituted without further delay, he recognizes that in certain respects his views go beyond anything the Court has held, and he reluctantly upholds the lower court's order.

See: 417 F.2d 852.

Jack Greenberg, James M. Nabrit III, and *Norman C. Amaker* on the application.

William A. Allain, Assistant Attorney General of Mississippi, and *John C. Satterfield* in opposition.

Solicitor General Griswold filed a memorandum for the United States.

MR. JUSTICE BLACK, Circuit Justice.

For a great many years Mississippi has had in effect what is called a dual system of public schools, one system for white students only and one system for Negro students only. On July 3, 1969, the Court of Appeals for the Fifth Circuit entered an order requiring the submission of new plans to be put into effect this fall to accelerate desegregation in 33 Mississippi school districts. On August 28, upon the motion of the Department of Justice and the recommendation of the Secretary of

Health, Education, and Welfare, the Court of Appeals suspended the July 3 order and postponed the date for submission of the new plans until December 1, 1969. I have been asked by Negro plaintiffs in 14 of these school districts to vacate the suspension of the July 3 order. Largely for the reasons set forth below, I feel constrained to deny that relief.

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Brown* v. *Board of Education*, 349 U.S. 294 (1955), we held that state-imposed segregation of students according to race denied Negro students the equal protection of the laws guaranteed by the Fourteenth Amendment. *Brown I* was decided 15 years ago, but in Mississippi as well as in some other States the decision has not been completely enforced, and there are many schools in those States that are still either "white" or "Negro" schools and many that are still *all*-white or *all*-Negro. This has resulted in large part from the fact that in *Brown II* the Court declared that this unconstitutional denial of equal protection should be remedied, not immediately, but only "with all deliberate speed." Federal courts have ever since struggled with the phrase "all deliberate speed." Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated. "All deliberate speed" has turned out to be only a soft euphemism for delay.

In 1964 we had before us the case of *Griffin* v. *School Board*, 377 U.S. 218, and we said the following:

> "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia." *Id.*, at 234.

That sentence means to me that there is no longer any excuse for permitting the "all deliberate speed" phrase to delay the time when Negro children and white children will sit together and learn together in the same public schools. Four years later—14 years after *Brown I*—this Court decided the case of *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). In that case MR. JUSTICE BRENNAN, speaking for a unanimous Court, said:

> "'The time for mere "deliberate speed" has run out . . . .' The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now" *Id.*, at 438-439.
>
> "The Board must be required to formulate a new plan . . . which promise[s] realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Id.*, at 442.

These cases, along with others, are the foundation of my belief that there is no longer the slightest excuse, reason, or justification for further postponement of the time when every public school system in the United States will be a unitary one, receiving and teaching students without discrimination on the basis of their race or color. In my opinion the phrase "with all deliberate speed" should no longer have any relevancy whatsoever in enforcing the constitutional rights of Negro students. The Fifth Circuit found that the Negro students in these school districts are being denied equal protection of the laws, and in my view they are entitled to have their constitutional rights vindicated now without postponement for any reason.

Although the foregoing indicates my belief as to what should ultimately be done in this case, when an indi-

vidual Justice is asked to grant special relief, such as a stay, he must consider in light of past decisions and other factors what action the entire Court might possibly take. I recognize that, in certain respects, my views as stated above go beyond anything this Court has expressly held to date. Although *Green* reiterated that the time for all deliberate speed had passed, there is language in that opinion which might be interpreted as approving a "transition period" during which federal courts would continue to supervise the passage of the Southern schools from dual to unitary systems.[*] Although I feel there is a strong possibility that the full Court would agree with my views, I cannot say definitely that it would, and therefore I am compelled to consider the factors relied upon in the courts below for postponing the effective date of the original desegregation order.

On August 21 the Department of Justice requested the Court of Appeals to delay its original desegregation timetable, and the case was sent to the District Court for hearings on the Government's motion. At those

[*] "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation." *Green* v. *County School Board*, *supra*, at 439.

"Where [freedom of choice] offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. . . .

"The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system. . . ." *Id.*, at 440-441.

hearings both the Department of Justice and the Department of Health, Education, and Welfare took the position that time was too short and the administrative problems too difficult to accomplish a complete and orderly implementation of the desegregation plans before the beginning of the 1969-1970 school year. The District Court found as a matter of fact that the time was too short, and the Court of Appeals held that these findings were supported by the evidence. I am unable to say that these findings are not supported. Therefore, deplorable as it is to me, I must uphold the court's order which both sides indicate could have the effect of delaying total desegregation of these schools for as long as a year.

This conclusion does not comport with my ideas of what ought to be done in this case when it comes before the entire Court. I hope these applicants will present the issue to the full Court at the earliest possible opportunity. I would then hold that there are no longer any justiciable issues in the question of making effective not only promptly but at once—*now*—orders sufficient to vindicate the rights of any pupil in the United States who is effectively excluded from a public school on account of his race or color.

It has been 15 years since we declared in *Brown I* that a law which prevents a child from going to a public school because of his color violates the Equal Protection Clause. As this record conclusively shows, there are many places still in this country where the schools are either "white" or "Negro" and not just schools for all children as the Constitution requires. In my opinion there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute. I fear that this long denial of constitutional rights is due in large part to the phrase "with all deliberate speed." I would do away with that phrase completely.

Application to vacate suspension of order denied.

[Publisher's note: See 396 U.S. 1223 for the authoritative official version of this opinion.]

MATTHEWS ET AL. *v.* LITTLE, CITY CLERK OF ATLANTA

ON APPLICATION FOR INJUNCTION

Decided September 9, 1969

Applicants claim that a recent Atlanta ordinance will exclude political candidates who cannot afford the filing fees it fixes, and apply to enjoin an election on the ground that the ordinance violates § 5 of the Voting Rights Act of 1965, and on the ground (upheld by the District Court) that it violates the Equal Protection Clause. Since the proximity of the election practicably forecloses this Court's pre-election decision on the substantial constitutional issue involved, and a court-ordered election postponement could be disruptive, an injunction is denied, but the applicants are temporarily relieved from paying the fee, and the candidates' filing time is extended.

Frederic S. LeClercq on the application.

MR. JUSTICE BLACK, Circuit Justice.

Applicant Ethel Mae Matthews is a prospective candidate for alderman in an Atlanta, Georgia, municipal election now scheduled for October 7. Applicant Julia Shields is a duly qualified Atlanta voter. Both applicants claim that their constitutional and statutory rights are abridged by the exclusion of potential candidates for local offices who cannot afford the filing fees fixed by an Atlanta municipal ordinance of August 26, 1969. They challenge the ordinance on the ground that fees sought to be exacted violate the Equal Protection Clause of the Fourteenth Amendment and § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. § 1973c (1964 ed., Supp. I). The constitutional question appears to me to be a substantial one which calls for decision by the full Court. This question is all the more serious because a three-judge district court decided in this case that the collection of the filing fees fixed by the ordinance

does unconstitutionally deny equal protection of the laws. The city election is presently set for October 7, and, although this Court meets October 6, it will not have time to consider and decide the merits of the constitutional claim before the election is to be held. The result is that applicants cannot have their case decided unless some provision is made to take care of the problem. A court-ordered postponement of the election could have a serious disruptive effect. On the other hand, the refusal or inability to pay fees deemed unconstitutional might keep serious candidates from running, thus depriving Atlanta voters of an opportunity to select candidates of their choice. Both of these undesirable consequences should be avoided if possible, and to some extent they can be. This can be done by temporarily relieving applicants from payment of the challenged fees until the entire Court has had an opportunity to pass on all the questions raised. Should the applicants' claims be accepted by the Court, they would then never be required to pay the challenged fees. Should their claims be rejected, they would then be subject to the fees. Because the time for candidates to file notice of their candidacy is scheduled to expire on September 10, 1969, a necessary element of this order is that the city should extend the date for candidates to file notice of their candidacy at least until Tuesday, September 16, 1969. This disposition permits Atlanta to proceed with the election as now scheduled. In the alternative, Atlanta officials could decide of their own accord to postpone the municipal election until after this Court has had an opportunity to hear and decide the issues involved.

It is so ordered.

[Publisher's note: See 396 U.S. 1225 for the authoritative official version of this opinion.]

FEBRE *v.* UNITED STATES

ON APPLICATION FOR BAIL PENDING APPEAL

Decided September 10, 1969

Application for bail pending appeal from conviction held in abeyance and matter remanded to Circuit Court Judge. The District Court denied bail without making the written explanation mandated by Fed. Rule App. Proc. 9(b), and it does not appear why the Court of Appeals did not remand the matter to the District Court for compliance with the Rule as it had done in case of a codefendant's similar bail application.

Solicitor General Griswold for the United States.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

This is an application for bail pending applicant's appeal to the Court of Appeals from a narcotics conviction.

The Government, while not contending that the appeal is frivolous or taken for purposes of delay, seeks to support the lower court's denial of bail on the score that it was found that applicant, if released on bail, would present a danger to the community, and further that he was a poor bail risk. See 18 U.S.C. § 3148; Fed. Rule Crim. Proc. 46(a)(2).

My difficulty with this position is twofold: First, so far as the papers reveal, the District Court in denying bail did not "state in writing the reasons" for its action, as required by Fed. Rule App. Proc. 9(b). Second, it does not appear why the matter was not remanded to the District Court for compliance with Rule 9(b), as the Court of Appeals had done in the case of an earlier similar bail application by a codefendant; and neither Judge Smith, nor Judge Anderson on reapplication, otherwise explained his refusal to disturb the District Court's determination. With no record of the proceed-

ings below before me, I cannot assume, as the Government would have me do, that either Judge Smith or Judge Anderson regarded the District Court's findings on remand respecting the codefendant as equally applicable to this applicant.

While I have always been particularly reluctant to interfere with a denial of bail below pending appeal to the Court of Appeals, I do not think that I should act in this instance without more light from the lower courts. I shall therefore remand the matter to Judge Smith or Judge Anderson, as the case may be, for appropriate explication, meanwhile holding this application in abeyance.

[Publisher's note: See 396 U.S. 1227 for the authoritative official version of this opinion.]

JONES *v.* LEMOND, COMMANDING OFFICER, ET AL.

ON APPLICATION FOR STAY

Decided September 15, 1969

Applicant, who had been court-martialed for unauthorized absence, and having exhausted all military administrative remedies, sought release by habeas corpus in the District Court, claiming that the improper processing of his application for discharge from military service should have barred his conviction. A broad and sweeping stay was denied by the Court of Appeals. Pending disposition of applicant's appeal on the merits of this case, which involves the contention that the matter of conscientious objection is one of First Amendment proportions, a stay is granted directing that applicant be confined in "open restricted barracks" and not in the brig where, if his allegations are true, his life may be endangered.

See: 18 U.S.C.M.A. 513, 40 C.M.R. 225.

Donald A. Jelinek on the application.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant, who has been convicted by the military authorities for unauthorized absence, brought suit in the District Court for release by habeas corpus and for other ancillary relief. He apparently has exhausted all military administrative remedies, the Court of Military Appeals having denied him any relief.

His conflict with the Navy arose out of his desire to be discharged as a conscientious objector, a status he claims to have acquired some five months after his enlistment. Department of Defense Directive 1300.6, August 21, 1962, revised May 10, 1968, provides for processing such applications and states that pending decision on the application and "to the extent practicable," the applicant "will be employed in duties which involve the minimum conflict with his asserted beliefs."

According to the allegations, applicant made repeated attempts for 37 days to file and process his application

for discharge as a conscientious objector and, if the allegations are sustained, was unable either to make a filing or obtain a hearing. He thereupon left his place of duty without authorization, thereafter surrendering himself. Once again, if his allegations are believed, he was unable to make a filing or obtain a hearing on his request for discharge as a conscientious objector. He thereupon escaped from Navy custody to obtain legal counsel who surrendered him to Navy authorities while the conscientious objector application is pending.

The basic question of law is whether improper processing of an application for discharge as a conscientious objector is a defense to court-martial proceedings.

The question will in time be decided by the Court of Appeals or by the Supreme Court as applicant has appealed from the dismissal of his petition by the District Court.

The issue tendered in this case—and in others before the Supreme Court—is that the matter of conscientious objection is of First Amendment dimensions whether based on religion, philosophy, or one's views of a particular "war" or armed conflict. Whether that view will obtain, no one as yet knows. But if it does, the question now tendered will be of great constitutional gravity.

I express no views on the merits. But I think a substantial question is presented. A stay of a broad and sweeping character has been denied by the Court of Appeals and I would concur but for one circumstance. Confinement of applicant to the brig is apparently contemplated; and, again, if his allegations are believed, sending him there may endanger his life in view of the cruel regime which obtains in that prison.

Accordingly I have decided to grant a stay directing respondents to confine applicant in the so-called "open restricted barracks" and restraining them from confining applicant in the brig, pending disposition of this appeal on the merits.

[Publisher's note: See 396 U.S. 1229 for the authoritative official version of this opinion.]

BRUSSEL *v.* UNITED STATES

ON APPLICATION FOR BAIL OR OTHER RELIEF

Decided October 10, 1969

Applicant was held in civil contempt, despite his claim of Fifth Amendment privilege, apparently on the ground of the corporate-records doctrine, for his refusal following denial of immunity from prosecution to answer questions before a grand jury and produce corporate records. He made emergency application for bail to the Court of Appeals and applied to the Circuit Justice for the same relief. Applicant is released on his own recognizance pending disposition of his appeal by the Court of Appeals. The circumstances here warrant departure from the usual practice of denying relief where a request for the same relief has not been ruled on by the court below, viz., the corporate-records doctrine can be invoked only against a custodian of the records but no evidence appears here that applicant was the custodian or connected with the corporations; no substantial risk was shown that applicant would not appear at further proceedings; and applicant assertedly has no criminal record.

Ephraim London on the application.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicant was held in civil contempt by the United States District Court for the Northern District of Illinois on October 7, 1969, and was immediately confined to the Cook County jail. On the same day, the District Court denied him bail pending appeal. On October 8, applicant filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit from the contempt order, and made an emergency application for bail. The Court of Appeals ordered the United States Attorney to respond to that application by October 13, next Monday. On October 9, the present application was made to me in my capacity as Circuit Justice. Though it is our usual practice to deny such requests

when the courts of appeals have not yet ruled on an application for the same relief, I am constrained by the unusual circumstances of this case to depart from that practice.

Applicant was subpoenaed to appear before a federal grand jury in Chicago and to bring with him certain corporate records. Prior to his appearance before the grand jury, applicant requested, but was denied, immunity from prosecution. Before the grand jury he was asked if he was an officer of the corporations involved. To this and other questions applicant declined to answer, invoking his privilege against self-incrimination. He was taken before the District Judge, who overruled his claim of Fifth Amendment privilege, apparently on the ground of the corporate-records doctrine, *Wilson* v. *United States*, 221 U.S. 361 (1911). When applicant persisted in refusing to answer, the court ordered him jailed for civil contempt.

Curcio v. *United States*, 354 U.S. 118 (1957), raises serious questions concerning the validity of the contempt order. In that case, a union official, admittedly the custodian of the union's records, refused on Fifth Amendment grounds to reveal their whereabouts to the grand jury. This Court upheld the assertion of the privilege, holding that the corporate-records exception applied only to the records themselves, not to testimony concerning them, and reiterating the established principle that "all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." *Id.*, at 124, citing *Shapiro* v. *United States*, 335 U.S. 1, 27 (1948).

It is true that applicant here, unlike Curcio, was cited for failure to produce the subpoenaed records, as well as for failure to testify. But the rule permitting compelled production of corporate records by their custodian may be invoked only against a party who is in fact the

custodian of the records in question. Yet there appears no evidence in the record of this case that applicant is the custodian of the documents subpoenaed, or indeed that he has any connection with the corporations. Applicant thus argues that he has been jailed in the absence of *any evidence* supporting an essential element of the finding that he is in contempt. Cf. *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

Nothing in the record suggests any substantial risk that applicant will not appear at further proceedings in his case. As far as appears, he has complied with previous orders to appear; indeed, he interrupted his honeymoon in Mexico to be present at the grand jury hearing. According to his affidavit, he has no criminal record. Given the imposition of a contempt order for an explicit assertion of the Fifth Amendment privilege, and the other circumstances of the case, I am ordering applicant released on his own recognizance pending disposition of his appeal to the Court of Appeals.

[Publisher's note: See 396 U.S. 1232 for the authoritative official version of this opinion.]

UNITED STATES EX REL. CERULLO *v.* FOLLETTE, WARDEN

ON APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR CERTIORARI; MOTION FOR STAY; AND APPLICATION FOR BAIL PENDING PETITION FOR CERTIORARI

Decided October 16, 1969

Time extension for filing petition for certiorari denied since sufficient time remains for that purpose. Stay of Court of Appeals mandate denied as that mandate has already issued. Application for bail pending action on petition for certiorari is denied since initial ruling on such an application should be made by Court of Appeals, to which request may be made under Fed. Rule App. Proc. 23(b).

See: 393 F.2d 879 and 294 F. Supp. 1283.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

Applicant requests an extension of time to file a petition for certiorari. Since, in the posture of this case, his time for filing will not expire until December 31, 1969, I perceive no necessity for an extension at this stage. No reason appears why the time remaining will not be sufficient for the preparation and filing of a petition for certiorari.

Applicant also requests a stay of the mandate of the Court of Appeals for the Second Circuit and continuance of bail pending determination of his petition for certiorari. Pursuant to the opinion of the Court of Appeals, the mandate has already issued. Treating the papers as an application for bail pending action on the petition, I note that there is no sign that applicant has made a request to the Court of Appeals, as he may under Fed. Rule App. Proc. 23(b). In my view that court should have an opportunity to consider applicant's request before it is entertained by a Justice of this Court. Cf. U.S. Sup. Ct. Rule 27.

[Publisher's note: See 396 U.S. 1233 for the authoritative official version of this opinion.]

PARISI *v.* DAVIDSON, COMMANDING GENERAL, ET AL.

ON APPLICATION FOR STAY

Decided December 29, 1969

Application by member of Armed Forces claiming he is entitled to a conscientious-objector classification for stay of deployment outside the Northern District of California denied where (1) District Court, though refusing to issue a writ of habeas corpus or to restrain respondents from transferring applicant outside that district, issued protective order against his having to engage in combat activities greater than his present duties required, pending Army board's review of his classification and further court order; (2) the Court of Appeals, though denying a deployment stay, specified that applicant will be produced in the Northern District if he wins his habeas corpus case; and (3) the fact that the Secretary of the Army is party to the action precludes mooting of the case by applicant's deployment. *Quinn* v. *Laird*, 89 S. Ct. 1491, and companion cases distinguished.

Solicitor General Griswold in opposition.

Mr. JUSTICE DOUGLAS, Circuit Justice.

Applicant claims he is a conscientious objector entitled to classification as such. The Army did not approve that classification and his appeal is now pending before the Army Board for Correction of Military Records.

Meanwhile he applied to the District Court for the Northern District of California for a writ of habeas corpus, and for an order restraining respondents from transferring him out of the Northern District of California. The District Court denied that relief but it did restrain respondents from assigning applicant "to any duties which require materially greater participation in combat activities or combat training than is required in

his present duties." The District Court retained jurisdiction of the case.

Applicant appealed to the Court of Appeals and asked for an order staying his deployment pending disposition of his appeal. That court denied his motion for a stay "on condition that Respondents produce the Appellant in this district if the appeal results in his favor." He now seeks a stay from me, as Circuit Justice; and he represents that he is under orders to report for deployment to Vietnam the day after tomorrow, December 31, 1969.

Applicant is at present assigned to duties of "psychological counseling." It would seem offhand that "psychological counseling" in Vietnam would be no different from "psychological counseling" in army posts here. He would, of course, be closer to the combat zones than he is at home; and he says that he could end up carrying combat weapons.

I heretofore granted like stays in cases involving deployment of alleged conscientious objectors to Vietnam. See *Quinn* v. *Laird*, 89 S. Ct. 1491. But this case is different because of the protective order issued by the District Court and the assurance given the Court of Appeals that the applicant will be delivered in the Northern District if he wins his habeas corpus case. Moreover, as the Solicitor General points out, the Secretary of the Army is a party to this action; hence the case will not become moot by the deployment.

If it were clear that applicant would win on the merits, a further protective order at this time would be appropriate. But the merits are in the hands of a competent tribunal and as yet unresolved. And I cannot assume that the Army will risk contempt by flouting the protective order of the District Court.

Application denied.

[Publisher's note: See 396 U.S. 1235 for the authoritative official version of this opinion.]

BEYER *v.* UNITED STATES

ON APPLICATION FOR RESTORATION OF BAIL PENDING APPEAL

Decided January 30, 1970

Application for restoration of bail pending appeal granted.

Solicitor General Griswold for the United States.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

While I am always reluctant to interfere with the action of the Court of Appeals on matters of bail pending appeal to that court, I feel constrained under all the circumstances revealed by the papers before me[*] to grant

[*] The applicant was convicted in the District Court for the Western District of New York of assaulting a federal officer in the performance of his duties, the jury being unable to reach a verdict with respect to three codefendants. After sentencing the applicant to prison, the District Court admitted him to bail in the amount of $5,000 pending appeal to the Court of Appeals. His counsel filed a notice of appeal and docketed the record in the Court of Appeals. However, no brief was filed on the applicant's behalf at the time it was due.

On January 5, 1970, when the applicant's brief was seven months overdue, the United States moved to dismiss the appeal for want of prosecution. The applicant's counsel responded, attempting to explain his failure to file a brief or to request any extension of time from either the United States Attorney or the Court of Appeals on the grounds that it resulted from an oversight and that counsel had been engaged in preparations for the retrial of the codefendants who had not been convicted at the first trial.

Before action on the motion to dismiss the appeal, the United States also moved in the District Court for the Western District of New York for revocation of applicant's bail pending appeal, on the ground that petitioner had been indicted in state court for burglary, criminal mischief, riot, and criminal tampering, arising out of an incident subsequent to the applicant's conviction in this case. The

this application. Cf. Fed. Rule App. Proc. 9(b); *Febre* v. *United States*, *ante*, p. 1225. [Publisher's note: See 2 Rapp 447.] This is of course without prejudice to any application by the United States for a further revocation of bail upon an appropriate showing.

District Court delayed action on that motion pending decision by the Court of Appeals on the motion to dismiss.

On January 19, 1970, the Court of Appeals declined to dismiss the appeal, but rather granted applicant until February 9, 1970, to file his brief and appendix and revoked the order admitting him to bail. The Court of Appeals did not give a reason for the revocation of bail, and the United States does not dispute the applicant's statement that the pending state indictment was not called to the attention of the Court of Appeals on the motion to dismiss.

[Publisher's note: See 400 U.S. 1201 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM END OF OCTOBER TERM, 1969, THROUGH OCTOBER 10, 1970

ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* SOCIALIST WORKERS PARTY ET AL.

ON APPLICATION FOR STAY AND ON MOTION FOR VACATION THEREOF

Decided July 11 and 22, 1970

Stay granted to preserve *status quo ante* to enable Court, at its first Conference in October, to determine disposition of appeal. Motion for reconsideration and vacation of stay denied on basis of appellants' representation that appellee parties' candidates can be placed on ballot for November 1970 election.

See: 314 F. Supp. 984.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

I consider the issues in this case are such as to entitle the State of New York to have them put to the Court itself before the judgment of the three-judge District Court is implemented. To that end I shall issue an order preserving the *status quo ante* upon terms which will enable the Court to determine, at its first Conference in October, what disposition should be made of the State's appeal, and whether the stay, which I am now granting, should be continued.

Supplemental Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

The day following the announcement of the order of July 11, 1970, the appellees moved by telegram for reconsideration and vacation of that order. Among other things, they suggested that the Court might not, under

the course envisioned by my order, be able to take action relating to the State's appeal and the limited stay granted by me in time to enable the appellee parties' candidates to appear on the ballot for the November 1970 election in compliance with the judgment of the three-judge District Court, if this Court should determine that the operative effect of that judgment should be left undisturbed.

Considering that this suggestion, if it proved to be true, might require me to reconsider my order of July 11, I called on the parties to file memoranda and also set the matter for a hearing before me at the Federal Courthouse in Bridgeport, Connecticut, on July 20, 1970.

At the hearing it developed that these fears of the appellees were unfounded, so far as the State was concerned, and I have today received from the New York State Attorney General's Office the following telegram:

> "Re Rockefeller v. Socialist Workers Party, confirming representations made at July 20 hearing, in event stay not continued by full Court not later than October 27 appellees will be placed on ballot provided they have complied with election law as modified by District Court decree. Appellees will appear on absentee ballots subject to their votes being voided if full Court continues stay. Respectfully, Louis J. Lefkowitz, Attorney General of New York, attorney for appellants."

In light of the foregoing, the motion for reconsideration is denied, with leave to renew if the course of events contemplated by this memorandum turns out to be impossible of realization. In short, my purpose is to afford both sides an opportunity to have the District Court's decision considered by this Court before final preparation for the November 1970 election.

Motion to vacate stay denied.

SUPREME COURT OF THE UNITED STATES

[July 30, 1970]

Perez v. *United States*

APPLICATION FOR BAIL

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

Were I satisfied that the denial of bail below reflected the view that applicant's contention—that *Leary* v. *United States*, 395 U.S. 6 (1969), should be given retroactive effect—is insubstantial, I would be constrained to allow bail. The scope and application of the doctrine of retroactivity in criminal cases is still subject to differences of opinion in this Court, *e.g.*, see the opinions in *Desist* v. *United States*, 394 U.S. 244 (1969), and are due for reexamination early next Term. See [Publisher's note: There should be a comma here.] *e.g.*, *United States* v. *White*; *United States* v. *Coin and Currency*. In these circumstances it could not, in my view, be said that applicant's contention is without substance.

In denying bail the District Court simply noted the pendency of applicant's appeal to the Court of Appeals from the order granting *habeas corpus* on the ground that *Leary* precluded this conviction, and stated that bail was denied "in the exercise of its discretion." The Court of Appeals denied bail without opinion. While these dispositions of the two courts below are wholly unrevealing, I find myself unable to say, quite apart from the retroactivity issue, that their actions in denying bail constituted an abuse of discretion, in light of the Government's assertion that applicant is a second offender and that the amount of narcotics involved in the transaction of which he has been convicted is substantial.

I take this occasion to say that I have more than once found myself uncomfortably handicapped in acting on bail applications by the opaqueness, as here, of the actions taken below. It would be of much assistance to me as Circuit Justice if the courts in the Second Circuit would indicate, however briefly, their reasons for denying bail.

Bail denied.

[Publisher's note: See 400 U.S. 1203 for the authoritative official version of this opinion.]

DAVIS *v.* ADAMS, SECRETARY OF STATE OF FLORIDA

ON APPLICATION FOR STAY

Decided August 5, 1970[*]

Applicants, would-be candidates for Congress, seek to stay a judgment of the Florida Supreme Court upholding a state law that requires state officials to resign before becoming candidates for another office. Since the constitutional issues cannot be finally resolved before the September 8, 1970, primary election, and the risk of injury to the applicants outweighs that to Florida, the applications for stays are granted.

See: 238 So. 2d 415.

MR. JUSTICE BLACK, Circuit Justice.

The State of Florida has enacted a law that requires the incumbent of a state elective office to resign before he can become a candidate for another office. Fla. Laws 1970, c. 70-80. The validity of this enactment is challenged because the Florida Secretary of State has applied it to bar the candidacies for the United States House of Representatives of William E. Davis, currently Sheriff of Escambia County, Florida, and James J. Ward, Jr., currently mayor of the city of Plantation, Florida. The Supreme Court of Florida has upheld the actions of the Secretary of State.[1] On the other hand, a three-judge federal district court in the Northern District of Florida has invalidated Florida's law as applied to another sheriff seeking to qualify as a candidate for Congress.[2] Ulti-

[*] Together with *Ward* v. *Adams, Secretary of State of Florida*, also on application for stay.
[1] *Florida ex rel. Davis* v. *Adams*, 238 So. 2d 415 (Fla. 1970), aff'd on rehearing, *id.*, at 418.
[2] *Stack* v. *Adams*, 315 F. Supp. 1295 (ND Fla. 1970).

mately, the question presented by these disputes is whether Florida can constitutionally add to or subtract from the qualifications established by federal law for candidates for federal office. Because the primary election in these cases will be held on September 8, 1970, however, time will not permit a final resolution of these constitutional controversies before the votes go to the polls.

I must decide, then, whether these two candidates must be permitted to run for the United States House of Representatives. The decision necessarily requires a forecast of this Court's decision on the constitutionality of the Florida statute, should the Court decide to hear these cases. On balance, I am inclined to think the Court would hold that Florida has exceeded its constitutional powers. Beyond that judgment, these applications require me to consider the possibility of injury to one of the parties should my forecast on the merits be wrong. If I were to deny these applications and the Court were later to invalidate the Florida statutes, these men would have been unconstitutionally deprived of their right to run for office. If, on the other hand, I grant relief and the Court should later sustain the Florida statute, little damage would have been done. The applicants might lose at the polls, and even if they were to be elected, Florida could challenge them as having failed to qualify. The risk of injury to the applicants from striking their names from the ballot outweighs the risk of injury to Florida from permitting them to run.

The applications for stays are granted.

[Publisher's note: See 400 U.S. 1205 for the authoritative official version of this opinion.]

FOWLER *v.* ADAMS, SECRETARY OF STATE OF FLORIDA

ON APPLICATION FOR INJUNCTIVE RELIEF

Decided August 11, 1970

Applicant, who was denied a ballot place as a congressional candidate in the September 8, 1970, primary election in Florida because of his refusal to pay the filing fee required by state law, has applied for injunctive relief against a three-judge Federal District Court judgment rejecting his contentions that the law is unconstitutional. Since the equities of granting the requested relief favor the applicant, Florida is directed to have his name placed on the ballot without payment of the filing fee.

See: 315 F. Supp. 592.

MR. JUSTICE BLACK, Circuit Justice.

Mr. William V. Fowler made a timely application to the Florida Secretary of State to become a candidate for the United States House of Representatives and was denied a place on the ballot because he refused to pay the $2,125 filing fee required by state statutes, Florida Stat. Ann. §§ 99.021 and 99.092. The applicant challenged the constitutionality of these Florida laws on the ground that since a Congressman is a federal officer a State cannot impose such a fee as a condition for candidacy. The applicant also asserted that the fee requirement was a denial of equal protection of the laws. A three-judge Federal District Court in the Middle District of Florida rejected these contentions.[1] The State claims the right to impose such a fee under Art. 1 [Publisher's note: The original reads "Art. 1", not "Art. I". See also 400 U.S. at 1205.], § 4, cl. 1, of the United States Constitution, which provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

[1] 315 F. Supp. 592 (MD Fla. 1970).

> prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Florida asserts that since Congress has not exercised its power to "make or alter" filing regulations for conducting congressional elections, the State retains the power to impose the fee in question.

The case raises questions which make it impossible for me to predict with certainty what the majority of this Court would decide.[2] The full Court in all likelihood will not meet until October, after the primary on September 8, 1970. Under these circumstances my decision on this application could settle this controversy on a basis which the Court might not later accept. The record presents no facts that would show an imposition of irreparable damage upon the State should it be required to place the applicant's name on the ballot, and should the law later be upheld by this Court, the State might then collect the fee from the candidate. Furthermore, even if the law is held valid after the applicant's name has been submitted to the voters, neither he nor the public would have suffered irreparable damage. If, on the other hand, the applicant is denied an opportunity to run for office and the Florida law is later invalidated, this candidate would have been unconstitutionally barred from the ballot. In this situation, I think the equities are with the applicant.[3]

The State is therefore directed to take the steps necessary to place the applicant's name on the ballot without the payment of the filing fee.

It is so ordered.

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[2] Compare *Fowler* v. *Adams, supra*, with *Georgia Socialist Workers Party* v. *Fortson*, 315 F. Supp. 1035 (ND Ga. 1970). See also my opinion in *Matthews* v. *Little*, 396 U.S. 1223 (1969).

[3] See my opinion in *Davis* v. *Adams*, *ante*, p. 1203. [Publisher's note: See 2 Rapp 463.]

[Publisher's note: See 400 U.S. 1207 for the authoritative official version of this opinion.]

DEXTER ET AL. *v.* SCHRUNK ET AL.

ON APPLICATION FOR RESTRAINING ORDER

Decided August 29, 1970

Restraining order requested by applicants, who rely on *Dombrowski* v. *Pfister*, 380 U.S. 479, denied since re-examination of holding in that case is involved in cases to be argued in fall.

MR. JUSTICE DOUGLAS, Circuit Justice.

Under *Dombrowski* v. *Pfister*, 380 U.S. 479, applicants make out a strong case for federal protection of their First Amendment rights. But *Dombrowski*, a five-to-two decision rendered in 1965, is up for re-examination in cases set for reargument this fall. If the present case were before the Conference of this Court, I am confident it would be held pending the cases to be re-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 restraining order requested.

[Publisher's note: See 400 U.S. 1208 for the authoritative official version of this opinion.]

MARCELLO *v.* UNITED STATES

ON APPLICATION FOR BAIL PENDING APPEAL

Decided September 18, 1970

Since MR. JUSTICE BLACK is not sure that three of his Brethren will agree with his view that the Government's conduct in this case raises questions worthy of review, he will take no action on the application for bail but will refer it to the full Court at its first meeting in October.

MR. JUSTICE BLACK, Circuit Justice.

This bail application by Carlos Marcello is the latest event in a long series of prosecutions of Marcello by federal authorities. See, *e.g.*, *Marcello* v. *United States*, 196 F.2d 437 (CA5 1952). All these prosecutions ended in dismissal of charges by the Government or acquittal except a conviction of illegal transfer of marihuana in 1938 and the present case in which Marcello was convicted in 1968 of assaulting an FBI agent in violation of 18 U.S.C. § 111. This conviction was affirmed on appeal, 423 F.2d 993 (CA5 1970), and this Court denied certiorari. 398 U.S. 959. In June 1970, Marcello filed a motion for a new trial, alleging that the Government suppressed evidence which he was entitled to present to the jury that convicted him. In August 1970, Marcello sought a hearing under 28 U.S.C. § 2255 alleging that the chief Government witness had perjured himself. Both motions were denied, and Marcello's appeals from these orders are now pending in the Court of Appeals for the Fifth Circuit. The Court of Appeals declined to continue Marcello on bail pending a final disposition of his appeals. Marcello's claims rest on the following facts summarized from the record.

Shortly before the alleged assault in 1966 Marcello was in New York preparing to return to his home in New Orleans. FBI agents in New York advised agents in New Orleans that Marcello was scheduled to arrive at the New Orleans airport on Delta Airlines at 8:30 p.m. on September 30.[1] After the receipt of this message, a New Orleans FBI agent telephoned the Associated Press, the local newspapers, and a local television station and inquired whether they intended to cover the arrival of a "prominent person" at the airport that evening.[2] When the Delta plane arrived, the press swarmed around Marcello. With them were FBI Agent Collins, who according to the Government's brief and the Court of Appeals was "posing as a passenger," and FBI Agent Avignone, carrying a camera. According to the Court of Appeals:

> "This crowd followed Marcello through the airport and onto the upper ramp outside where Marcello, angrily and with some profanity, inquired whether the photographers had taken enough pictures. Collins, with arms folded, answered in the negative, and Marcello retorted: 'Are you looking for trouble?' which elicited the not unexpected reply from Collins that 'I can handle trouble.'" *United States* v. *Marcello*, 423 F.2d 993, 997.

Marcello's version was that Collins said "I'm always looking for trouble."[3] The Court of Appeals continued: "This exchange had an unsettling effect on Marcello who took a couple of short jabs at Collins and attempted to mow him down with a haymaker, which never really got off the ground because of his brother Joseph's re-

[1] *United States* v. *Marcello*, Trial Transcript 1126.
[2] *United States* v. *Marcello*, Transcript of Motion for New Trial and for Reduction of Sentence 206, 213, 221.
[3] *United States* v. *Marcello*, Trial Transcript 1209.

straint." Collins himself testified that if Marcello touched his body at all, "it was so slight, I did not feel it."[4] For this "technical assault," which Collins swore he did not feel, Marcello was fined $5,000 and sentenced to two years in prison.

The entire case and circumstance shown by the record are highly disturbing. At Marcello's trial in 1968 his counsel suggested that Government agents were themselves responsible for the crowd of newsmen surrounding Marcello and photographing him at the airport.[5] Counsel prosecuting Marcello expressed resentment at the suggestion that the Government had entrapped or provoked him. The Government then denied that it had any evidence favorable to Marcello. This denial seems incredible to me in view of the now admitted facts that an agent called the press telling them of the arrival of a "prominent person" and that prosecuting counsel were informed before trial of these FBI contacts with the press.[6] I have no doubt of the relevancy of this evidence in the eyes of the jury considering Marcello's defense that the FBI was after him and had provoked the incident. I have no doubt that the Government's conduct in this case raises questions worthy of review. I am not sure, however, that three of my Brethren will agree. Under these circumstances, I shall take no action at all on this application but shall refer it to the full Court at its first meeting October 5.

So ordered.

[4] *Id.*, at 941.
[5] *Id.*, at 345.
[6] *United States* v. *Marcello*, Transcript of Motion for New Trial and for Reduction of Sentence 220.

[Publisher's note: See 400 U.S. 1211 for the authoritative official version of this opinion.]

HARRIS ET AL. *v.* UNITED STATES

ON APPLICATION FOR STAY

No. 780. Decided October 10, 1970

Stay of Court of Appeals' judgment pending disposition of a petition for certiorari granted in view of substantial nature of questions presented, not previously decided by this Court, concerning (1) the propriety of the Government's appeal under 18 U.S.C. § 1404, and the petitioners' right to appeal from an adverse Court of Appeals' ruling, and (2) the validity of the Court of Appeals' rule that "probable cause" is not necessary for an extended border search.

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for a stay of a judgment of the Court of Appeals pending disposition of a petition for certiorari which has been filed here. The United States has filed its opposition. The stay has been denied by the Court of Appeals and I am reluctant to take action contrary to what it has done. There are, however, two questions in the case not heretofore decided by this Court which are of considerable importance.

First is a question of the propriety of petitioners seeking relief here. The District Court suppressed evidence seized on a so-called "border" search and the United States appealed. Its appeal apparently was under 18 U.S.C. § 1404 which creates an exception to the ban against appeals which are not "final" within the meaning of 28 U.S.C. § 1291, a ban to which we gave full enforcement in *DiBella* v. *United States*, 369 U.S. 121. Under that decision petitioners could not appeal to the Court of Appeals from an adverse decision in the District Court. Whether they could appeal from an adverse ruling of the Court of Appeals is a question we have not adjudicated.

Beyond that may be a question concerning the propriety of the Government's appeal, though the question does not seem to be raised by petitioners. Title 18 U.S.C. § 1404 provides in part:

> "[T]he United States shall have the right to appeal from an order granting a motion for the return of seized property *and* to suppress evidence made before the trial of a person charged with a violation of—
>
> • • • • •
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174) . . . ." (Emphasis supplied.)

The order of the District Court apparently did not provide for the return of the property. The statute does not *in haec verba* grant an appeal if there was "suppression" alone. In light of *DiBella*, the question is whether the statute will be strictly construed against appealability.[*]

Second is a question under the Fourth Amendment. The Court of Appeals has adopted the rule that "probable cause" is not necessary for "a lawful border search." *Castillo-Garcia* v. *United States*, 424 F.2d 482, 484. In that case the "border search" took place 105 miles from the border and seven hours after the entry of the car from Mexico, the vehicle having been followed and kept under constant surveillance by Customs agents. In the present case the truck entered this country from Mexico at San Ysidro, California, and was seized and searched

[*] While § 1404(2) refers to a section dealing with marihuana, § 174 is also cited in § 1404(2) and § 174 covers narcotics rather than marihuana. So a related question is whether that ambiguity will be resolved in favor of the rather strict policy reflected in *DiBella*.

when it was parked in Los Angeles, some 150 miles distant. The statute, 19 U.S.C. § 482, allows searches by Customs agents where they have "a reasonable cause to suspect" that there is merchandise being imported contrary to law. While the test in the Ninth Circuit of the legality of the extended border search is constant surveillance of the vehicle or person after entry, the Fifth Circuit rests on "reasonable cause to suspect." See *Stassi* v. *United States*, 410 F.2d 946, 951. The difference between these two approaches has been noted in the Second Circuit. *United States* v. *Glaziou*, 402 F.2d 8, 13-14, n. 3; *United States* v. *Pedersen*, 300 F. Supp. 669. The rather old dictum of this Court in *Carroll* v. *United States*, 267 U.S. 132, 154, hardly meets the refinements of these new distinctions.

I indicate no view of the merits on either of the two questions but have said only enough to illustrate the substantial nature of the questions presented. For these reasons I have concluded to grant the stay requested.

[Publisher's note: See 401 U.S. 1201 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

October Term, 1970

Chesley Karr, a minor, individually, and John R. Karr, Individually and as next friend and Guardian ad litem on behalf of themselves and all others similarly situated, *v.* Clifford Schmidt, Principal of Coronado High School, et al.	)	On a Motion to Vacate a Stay of Injunction Pending Appeal.

[February 11, 1971]

MR. JUSTICE BLACK, Circuit Justice.

This "Emergency Motion to Vacate a Stay of Injunction Pending Appeal" has been presented to me as the Supreme Court Justice assigned to the Court of Appeals for the Fifth Circuit. The motion concerns rules adopted by the school authorities of El Paso, Texas, providing that school boys' hair must not "hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision." The rules also provide that boys will not be admitted to or allowed to remain in school unless their hair meets this standard. The United States District Court for the Western District of Texas, El Paso Division, held after hearings that this local student hair length rule violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and enjoined its enforcement, declining to suspend its injunction pending appeal. On motion of the school authorities, the Court of Appeals for the Fifth Circuit stayed and suspended the District Court's injunction and the student appellees have asked me to vacate the Court of Appeals' stay of the injunction.

Should I vacate the stay the El Paso school authorities would remain subject to the District Court's injunction and would thereby be forbidden to enforce their local rule requiring public school students not to wear hair hanging over their collars or obstructing their visions. [Publisher's note: "visions" should be "vision".]

I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. It is true that we have held that this Court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which, like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the States. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run their school system in accordance with their own best judgment as to the appropriate length of hair for students.

The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as "Emergency Motion" and "harassment" and "irreparable damages" are calculated to leave the impression that this case over the length of hair has created or is about to create a great national "crisis." I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records

of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

Application denied.

[Publisher's note: See 401 U.S. 1204 for the authoritative official version of this opinion.]

HAYWOOD *v.* NATIONAL BASKETBALL ASSN.

ON APPLICATION FOR STAY

Decided March 1, 1971

Applicant, a former Olympic star who had signed with the Seattle team of the National Basketball Association (NBA), brought an action against the NBA, claiming that its threatened sanctions against him and the Seattle team for alleged noncompliance with the NBA's player draft rules violated the antitrust laws. The District Court's grant of an injunction *pendente lite* permitting applicant to play for the Seattle team was stayed by the Court of Appeals. Applicant seeks a stay of the Court of Appeals' action. Held: The equities as between the parties favor reinstatement of the District Court's preliminary injunction, 28 U.S.C. § 1651(a), which will enable applicant to play and thus further Seattle's efforts to qualify for the imminent playoffs, and should it be necessary that court can fashion appropriate relief in light of the outcome of the litigation and the athletic competition.

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for a stay of an order issued by the Court of Appeals for the Ninth Circuit. It raises questions under the Sherman Act concerning the legality of the professional basketball college player draft. The hearing on the merits will be heard by the District Court for the Central District of California.

The Seattle club for which the applicant now plays basketball has joined in the request for the stay, while the NBA opposes.

Under the rules of the NBA a college player cannot be drafted until four years after he has graduated from high school. Players are drafted by teams in the inverse order of their finish during the previous season. No team may negotiate with a player drafted by another team.

Applicant played with the 1968 Olympic team and then went to college. Prior to graduation he signed with

the rival American Basketball Association, but upon turning 21 he repudiated the contract, charging fraud. He then signed with Seattle of the NBA. This signing was less than four years after his high school class had graduated (thus leaving him ineligible to be drafted under the NBA rules). The NBA threatened to disallow the contract and also threatened Seattle's team with various sanctions.

Applicant then commenced an antitrust action against the NBA. He alleges the conduct of the NBA is a group boycott of himself and that under *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, and *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, it is a *per se* violation of the Sherman Act. He was granted an injunction *pendente lite* which allowed him to play for Seattle and forbade [Publisher's note: There should be a "the" here. But see 401 U.S. at 1205.] NBA to take sanctions against the Seattle team. The District Court ruled:

> "If Haywood is unable to continue to play professional basketball for Seattle, he will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him."

The college player draft binds the player to the team selected. Basketball, however, does not enjoy exemption from the antitrust laws. Thus the decision in this suit would be similar to the one on baseball's reserve clause which our decisions exempting baseball from the antitrust laws have foreclosed. See *Federal Baseball Club* v. *National League*, 259 U.S. 200; *Toolson* v. *New York*

Yankees, 346 U.S. 356. This group boycott issue in professional sports is a significant one.

The NBA appealed the granting of the preliminary injunction to the Court of Appeals for the Ninth Circuit. That court stayed the injunction, stating:

> "We have considered the status quo existing prior to the District Court's action and the disturbance of that status resulting from the injunction; the nature and extent of injury which continuation of the injunction or its stay would cause to the respective parties; and the public interest in the institution of professional basketball and the orderly regulation of its affairs."

The matter is of some urgency because the athletic contests are under way and the playoffs between the various clubs will begin on March 23. Should applicant prevail at the trial his team will probably not be in the playoffs, because under the stay order issued by the Court of Appeals he is unable to play. Should he be allowed to play and his team not make the playoffs then no one, of course, will have been injured. Should he be allowed to play and his team does make the playoffs but the District Court decision goes in favor of the NBA, then it would be for the District Court to determine whether the NBA could disregard the Seattle victories in all games in which he participated and recompute who should be in the playoffs.

To dissolve the stay would preserve the interest and integrity of the playoff system, as I have indicated. Should there not be a decision prior to [Publisher's note: There should be a "the" here. But see 401 U.S. at 1206.] beginning of the playoffs and should Seattle make the playoffs then the District Court could fashion whatever relief it deems equitable.

In view of the equities between the parties, 28 U.S.C. § 1651(a), I have decided to allow the preliminary in-

junction of the District Court to be reinstated. The status quo provided by the Court of Appeals is the status quo before applicant signed with Seattle. The District Court preserved the status quo prior to the NBA's action against Seattle and Haywood. That is the course I deem most worthy of this interim protection. The stay will issue.

[Publisher's note: See 404 U.S. 1204 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

NLRB *v.* GETMAN AND GOLDBERG

APPLICATION FOR STAY OF THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[July 27, 1971]

MR. JUSTICE BLACK, Acting Circuit Justice.

Respondents, two law professors who are undertaking a study of labor representation elections, applied for and obtained an order from the United States District Court for the District of Columbia requiring the National Labor Relations Board to provide respondents "with names and addresses of employees eligible to vote in approximately 35 elections to be designated by (respondents)." Respondents base their claim to the information on the language of the Freedom of Information Act, 5 U.S.C. 552(a)(3), which requires that a government agency "on request for identifiable records . . . shall make the records promptly available to any person." The Government has filed an application seeking a stay of the order of the district court. This application was assigned to me in the absence of THE CHIEF JUSTICE.

The Government applies for a stay on the ground that the district court order requiring the Board to comply with the Freedom of Information Act and deliver the records in question to respondents would interfere with the representation election procedures under the National Labor Relations Act. The Board was created by Congress and Congress has seen fit to make identifiable records of the Board and other government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the Board to refuse promptly to turn over the requested records. I deny the application for stay without prejudice to the Government to present its application to another Member of this Court.

It is so ordered.

[Publisher's note: See 404 U.S. 1201 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

October Term, 1970

JOAN S. MAHAN ET AL. *v.* HENRY E. HOWELL, JR., ET AL.;
EDGAR A. PRICHARD ET AL. *v.* CLIVE L. DUVAL, II, ET AL.; and
EDGAR A. PRICHARD ET AL. *v.* STANFORD E. PARRIS ET AL.

APPLICATIONS FOR STAY OF THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

[July 27, 1971]

MR. JUSTICE BLACK, Acting Circuit Justice.

These cases, presented to THE CHIEF JUSTICE and assigned to me for action in his absence, challenge the judgment of a federal three-judge court holding unconstitutional in part an Act of the General Assembly of the State of Virginia providing for reapportionment of its State Senate and House of Delegates. The cases were filed in different three-judge district courts and were consolidated for trial. In an opinion written by Circuit Judge Bryan, the consolidated court held parts of the legislative Act unconstitutional and invalid and proceeded to write a reapportionment measure changing the boundaries of approximately half of the House districts and staying the effectiveness of the Act insofar as the court's opinion had altered it. As written by the court the redistricting order decreases representational disparity between the several House districts from 16.4% to 7.2%. In its consideration of the General Assembly's Senate districting formula, the court found it necessary to effect only one change to make allowances for the residences of naval personnel stationed in the Norfolk-Virginia Beach area.

The motion here is for a stay of the district court's order pending appeal. In considering questions of this

kind an individual Member of the Court to whom the matter is presented should give due consideration to the fact that the four district judges' order was substantially unanimous[1] and that the two judges who were subsequently requested to stay their order refused to do so. A single Justice, of course, must also weigh the substantiality of the questions presented in light of this Court's prior decisions. *E.g.*, *Whitcomb* v. *Chavis*, 39 U.S.L.W. 4666 (June 7, 1971); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969). Moreover, it is settled that unless a judge considering the application believes it reasonably probable that four Members of the Court will vote to hear such an appeal the requested stay should not be granted.[2] Here, therefore, the basic thing for me to consider is whether four Members of the Court are likely to vote in favor of granting this appeal when the matter is given consideration.

On due consideration, I am unable to say that four Members would so vote. The case is difficult; the facts are complicated; the four district court judges deciding the case had no difficulty in reaching their conclusion on the constitutional questions or in devising a plan to correct the deficiencies they found; the delay incident to review might further postpone important elections to be held in the State of Virginia should the stay be granted. These and other considerations which need not be stated lead me to believe that four Members of the Court are not likely to grant an appeal and therefore I decline to enter an order which would in effect stay the judgment of the consolidated three-judge court.

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[1] Judge Lewis filed a separate concurring and dissenting opinion. He fully agreed with all aspects of the ruling with the exception of the court's refusal to create a 10-member multi-member district in Fairfax County.

[2] *Board of School Comm'rs* v. *Davis*, 84 S. Ct. 10, 11 L. Ed. 2d 26 (1963); *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 4 L. Ed. 2d 34 (1959); *Edwards* v. *New York*, 76 S. Ct. 1058, 1 L. Ed. 2d 17 (1956).

[Publisher's note: See 404 U.S. 1206 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* DR. J.W. EDGAR, COMMISSIONER OF EDUCATION, AND THE TEXAS EDUCATION AGENCY

APPLICATION FOR STAY OF ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[July 29, 1971]

MR. JUSTICE BLACK, Circuit Justice.

The Commissioner of Education of the State of Texas and the Texas Education Agency make application for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Eastern District of Texas, which directed the applicants to take certain affirmative action to eliminate all vestiges of discrimination from the public schools within the State. The State of Texas provides for the supervision of state education and the distribution of state educational funds through the Texas Education Agency under the direction of the Commissioner of Education. The United States brought this action against applicants on March 6, 1970, to enforce Title VI of the Civil Rights Act and the Fourteenth Amendment of the United States Constitution. The District Court, on April 20, 1971, issued its order directing the Commissioner and the Texas Education Agency to take certain specified steps to withhold funds and accreditation from school districts which failed to meet their constitutional obligation to eliminate remaining vestiges of the dual school system. The District Court order dealt with the areas of student transfers, changes in school district boundaries, school transportation, extracurricular activities, faculty and staff practices, student assignment, curricula and compensatory education. The United States Court of Appeals for the Fifth Circuit, with certain minor alterations,

unanimously affirmed the order of the District Court. The Commissioner and the Texas Education Agency then applied to the Fifth Circuit for a stay of its order pending action by this Court on the applicants' petition for certiorari yet to be filed. The circuit court refused the stay. The application for stay has now been presented to me as the Circuit Justice for the Fifth Circuit.

It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch. *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437-438 (1968); see *Swann* v. *Charlotte-Mecklenburg Board of Education*, — U.S. — (1971); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). I cannot say that four Members of this Court are likely to vote to hear this case and undo what has been ordered by the District Court and Court of Appeals below.

My views need not be expressed at length. The question of granting certiorari will have to be decided by this Court when the petition properly reaches us. For me, as one Member of this Court, to grant a stay now would mean inordinate delay and would unjustifiably further postpone the termination of the dual school system that the order below was intended to accomplish. The District Court's opinion and order are comprehensive and well reasoned. In my judgment the facts found by the District Court, which do not appear to be materially disputed by the applicants, fully justify the order.

Under these circumstances I deny the stay and let the matter await final decision before the full Court when the petition for certiorari is properly presented for consideration. The stay is denied.

It is so ordered.

[Publisher's note: See 404 U.S. 1209 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–159.—OCTOBER TERM, 1971

Anthony Russo, Jr.	)	
v.	)	Application for Stay.
United States	)	

[August 16, 1971]

MR. JUSTICE DOUGLAS, Circuit Justice.

Petitioner has been sentenced in a civil contempt proceeding for refusal to answer questions before a grand jury. Judge Barnes issued a stay until August 9, 1971, to permit an application for a further stay to this Court. MR. JUSTICE BLACK continued the stay until August 16, 1971, so that I would have time to consider the matter at my home in Goose Prairie, Washington.

I have gone over the petition and the opposition filed by the United States, and I deny the stay.

The principal question sought to be raised concerns the standing of grand jury witnesses, under the Omnibus Crime Control and Safe Streets Act of 1968, to raise the question whether the appearance and examination of a witness before a grand jury resulted from illegal electronic surveillance.[*]

[*] 18 U.S.C. § 2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. § 2518(10)(a) provides, in part:

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or

The question is an important one on which there seems to be conflict among the Circuits. Compare *In re Evans*, No. 71-1499 (CADC July 23, 1971), and *In re Egan*, No. 71-1088 (CA3 May 28, 1971) (both holding that a grand jury witness has standing to object to illegal wiretaps), with *In re Bacon*, No. 71-1825 (CA9 June 25, 1971), and *In re Parnas*, No. 71-1264 (CA9 June 8, 1971) (to the contrary). But in this case, the United States represented to the District Court that "no wiretaps of any kind were used in this case." Petitioner, so far as I can ascertain, did not present any evidence of or indicate probable cause for believing (or even a suspicion) that his wires had been tapped or that wires of others had been tapped with the result that his privacy had been implicated. There must be some credible evidence that the prosecution violated the law before ponderous judicial machinery is invoked to delay grand jury proceedings.

Denied.

It is so ordered.

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other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted was insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

[Publisher's note: See 404 U.S. 1211 for the authoritative official version of this opinion.]

CORPUS CHRISTI SCHOOL DISTRICT ET AL. *v.* CISNEROS ET AL.

ON APPLICATION FOR REINSTATEMENT OF STAY

No. A–192. Decided August 19, 1971

Stay of District Court's order to stop alleged school discrimination practices, vacated by Court of Appeals, is reinstated to permit action on the merits since case presents questions that should be considered by the full Court.

MR. JUSTICE BLACK, Circuit Justice.

The District Judge in this case ordered the Corpus Christi Independent School District to stop alleged historical practices of discrimination against school children on the basis of race or color. He directed how this was to be accomplished, saying at the same time that he would grant no stays of his order. The school district asked the court to stay its order and a stay was granted by a different district judge who had been assigned to hear the application. The plaintiffs, parents of the students allegedly discriminated against, then asked the United States Court of Appeals for the Fifth Circuit to vacate the stay. A panel of two Circuit Court judges did vacate the stay. The school district then applied to me as a single Justice to reinstate the stay issued by the District Court for the Southern District of Texas. The Solicitor General of the United States has joined in requesting me as a single Justice to reinstate that stay. If I reinstate the stay, the District Court's order will not go into effect until the Fifth Circuit or this Court has had an opportunity to pass on it.

It is apparent that this case is in an undesirable state of confusion and presents questions not heretofore passed on by the full Court, but which should be. Under these circumstances, which present a very anomalous, new, and

confusing situation, I decline as a single Justice to upset the District Court's stay and, therefore, I reinstate it without expressing any view as to the wisdom or propriety of the Solicitor General's position. The stay will be reinstated pending action on the merits in the Fifth Circuit or action by the full Court.

[Publisher's note: See 404 U.S. 1213 for the authoritative official version of this opinion.]

LOPEZ *v.* UNITED STATES

ON APPLICATION FOR BAIL PENDING APPEAL

No. A–132. Decided August 23, 1971

Applicant, whose conscientious objector claim matured after receipt of his induction notice, was convicted for refusing to submit to induction. He thereafter sought modification of his sentence to enable him to submit to induction and obtain from the Army a ruling on his claim. He asserts Army regulations in force at the time of his induction did not permit such in-service review, and that the relief he seeks is implicitly authorized by *Ehlert* v. *United States*, 402 U.S. 99. His appeal now pending in the Court of Appeals concerns the propriety of such a procedure. *Held*: Applicant should be released on his own recognizance pending disposition of his appeal.

See: 322 F. Supp. 852.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant Lopez was indicted and convicted for refusing to submit to induction. He claimed at trial that he was entitled to a hearing before his local board on his conscientious objector claim which had matured after receipt of the induction notice. At the time applicant received his order to report for induction, however, the law in the Ninth Circuit did not allow the filing of an application for exemption as a conscientious objector after an induction notice had been issued.[1] We noted in *Ehlert* v. *United States*, 402 U.S. 99 (1971), decided after applicant's conviction, that the Army agreed a draftee could have a hearing on such a claim after induction; and we held that such a hearing, though post-induction, satisfied the requirements of the Military

[1] *Ehlert* v. *United States*, 422 F.2d 332 (CA9 1970), aff'd, 402 U.S. 99 (1971), which set forth the Ninth Circuit rule, was decided Feb. 2, 1970. Applicant received his notice of induction Mar. 3, 1970, and failed to submit Mar. 17, 1970.

Selective Service Act of 1967. Relying on this opinion, the Court of Appeals affirmed Lopez' [Publisher's note: There is no "s" after "Lopez'" in the original.] conviction.

Applicant claims, however, that Army regulations in force at the time of his induction date did not permit him the post-induction hearing to which we held Ehlert was entitled,[2] and he now seeks a modification of his sentence which will enable him to submit to induction and to obtain thereafter the Army's ruling on his conscientious objector claim. The appeal now waiting argument in the Court of Appeals concerns the propriety of such a procedure. The question seems to me a substantial one, and applicant has proved himself to be bail worthy, as he has twice before been ordered released on his personal recognizance in connection with this litigation. Pending disposition of the appeal, applicant Lopez should be released on his personal recognizance in the form and manner provided at an earlier stage of this litigation.

It is so ordered.

[2] From Nov. 9, 1962, until Aug. 15, 1970, Army Regulation AR 635-20, ¶ 3(b), provided that requests for discharge after entering military service would not be favorably considered when based "solely on conscientious objection which existed, but which was not claimed *prior to induction*, enlistment, or entry on active duty or active duty for training." (Emphasis supplied.)

[Publisher's note: See 404 U.S. 1215 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–203.—OCTOBER TERM, 1971

	)	Application for a Stay
Guey Heung Lee et al.	)	Pending Appeal to the
v.	)	United States
David Johnson et al.	)	Court of Appeals for the
	)	Ninth Circuit

[August 25, 1971]

MR. JUSTICE DOUGLAS, Circuit Justice.

Petitioners are Americans of Chinese ancestry, who seek a stay of a Federal District Court's order reassigning pupils of Chinese ancestry to elementary public schools in San Francisco. The order was made in a school desegregation case, the San Francisco Unified School District having submitted a comprehensive plan for desegregation which the District Court approved.

There are many minorities in the elementary schools of San Francisco; and while the opinion of the District Court mentions mostly the Blacks, there are in addition to whites, Chinese, Japanese, Filipinos, and Americans both of African and Spanish ancestry. The schools attended by the class here represented are filled predominantly with children of Chinese ancestry—in one 456 out of 482, in another 230 out of 289, and in a third, 1,074 out of 1,111.

Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry.[*] That was the classic case of *de jure* segrega-

[*] Until 1947, the California Education Code provided:

"§ 8003. *Schools for Indian children, and children of Chinese, Japanese, or Mongolian parentage: Establishment.* The governing board of any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians

tion involved in *Brown* v. *Board of Education*, 347 U.S. 483, relief ordered, 349 U.S. 294. Schools once segregated by state action must be desegregated by state action, at least until the force of the earlier segregation policy has been dissipated. "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15. The District Court in the present case made findings that plainly indicate the force of the old policy has persisted: "[T]he school board . . . has drawn school attendance lines, year after year, knowing that the lines maintain or heighten racial imbalance . . . ." And further, that no evidence has been tendered to show that since *Brown I* "the San Francisco school authorities had ever changed any school attendance line for the purpose of reducing or eliminating racial imbalance." *Johnson* v. *San Francisco Unified School District*, — F. Supp. —, — (ND Cal. 1971).

Brown v. *Board of Education* was not written for Blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. See *Yick Wo* v. *Hopkins*, 118 U.S. 356. The theme of our school desegregation cases extends to all racial minorities treated invidiously by a State or any of its agencies.

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who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage.

"§ 8004. Same: *Admission of children into other schools*. When separate schools are established for Indian children or [Publisher's note: "children of" should appear here.] Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school."

These provisions were eventually repealed. 1947 Cal. Stats. c. 737, § 1.

It is not for me to approve or disapprove the plan; that is a matter that goes to the merits and the appeal has not been heard. The plan, however, has earmarks of a thoughtful plan, at least measured by some of the thoughtful concerns of the Chinese community. The District Court ruled:

> "Bi-lingual classes are not proscribed. They may be provided in any manner which does not create, maintain or foster segregation.
>
> "There is no prohibition of courses teaching the cultural background and heritages of various racial and ethnic groups. While such courses may have particular appeal to members of the particular racial or ethnic group whose background and heritage is being studied, it would seem to be highly desirable that this understanding be shared with those of other racial and ethnic backgrounds." — F. Supp., at —.

And the District Court concluded:

> "The Judgment and Decree now to be entered is of less consequence than the spirit of community response. In the end, that response may well be decisive in determining whether San Francisco is to be divided into hostile racial camps, breeding greater violence in the streets, or is to become a more unified city demonstrating its historic capacity for diversity with [Publisher's note: "with" should be "without".] disunity.
>
> "The school children of San Francisco can be counted upon to lead the way to unity. In this and in their capacity to accept change without anger, they deserve no less than the whole-hearted support of all their elders." — F. Supp., at —.

The decree has been strenuously opposed. Upon application by petitioners, the Court of Appeals entered a temporary stay pending a hearing in the District Court. Four days later, however, the Court of Appeals vacated

that stay *sua sponte*. The District Court then denied the stay. Thereupon a different three-judge panel of the Court of Appeals heard oral argument on the motions for a stay and denied those motions.

I see no reason to take contrary action. So far as the overriding questions of law are concerned the decision of the District Court seems well within bounds. See *Keyes* v. *Denver School District*, 396 U.S. 1215 (MR. JUSTICE BRENNAN). It takes some intervening event or some novel question of law to induce me as Circuit Justice to overrule the considered action of my Brethren of the Ninth Circuit.

Petition for Stay Denied.

[Publisher's note: See 404 U.S. 1219 for the authoritative official version of this opinion.]

JEFFERSON PARISH SCHOOL BOARD ET AL. *v.*
DANDRIDGE ET AL.

ON APPLICATION FOR STAY

No. A–231. Decided August 30, 1971

There being no more than the normal difficulties incident to the transition from a dual to a unitary school system, there is no basis for staying the District Court's order to desegregate the Jefferson Parish, Louisiana, public schools, which have been involved in litigation for seven years.

MR. JUSTICE MARSHALL, Circuit Justice.

On August 10, 1971, the Federal District Court for the Eastern District of Louisiana ordered the Jefferson Parish School Board to implement, beginning on August 31, 1971, the plan for desegregation of the public schools of said parish which had been submitted to the court eight days earlier. Having been denied stays of that order by the District Court and the United States Court of Appeals for the Fifth Circuit, the Board seeks a stay here.

Hearing was had in the District Court on the feasibility of beginning the desegregation process without delay. The evidence there adduced demonstrated that the parish would undoubtedly experience those difficulties normally incident to the transition from a dual to a unitary school system. Recognizing the existence of these difficulties, the District Court nonetheless correctly applied the law as developed by this Court in concluding:

> "The fact that a temporary, albeit difficult, burden may be placed on the School Board in the initial administration of the plan or the fact that some schools may not begin the school year in a routinely smooth fashion does not justify in these circumstances the continuation of a less than unitary school system and the resulting denial of an equal educa-

> tional opportunity to a certain segment of the Parish school children."

The devastating, often irreparable, injury to those children who experience segregation and isolation was noted 17 years ago in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). This Court has repeatedly made it clear beyond any possible doubt that, absent some extraordinary circumstances, delay in achieving desegregation will not be tolerated. See, *e.g.*, *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 226 (1969); *Keyes* v. *Denver School District*, 396 U.S. 1215 (1969) (BRENNAN, J., in chambers).

There are no unusual circumstances in this case. The schools involved have been mired in litigation for seven years. Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. The rights of children to equal educational opportunities are not to be denied, even for a brief time, simply because a school board situates itself so as to make desegregation difficult.

The stay is accordingly denied.

[Publisher's note: See 404 U.S. 1221 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. 71–274.—OCTOBER TERM, 1971

Winston-Salem/Forsyth County Board of Education	)	Application to Stay Order of Court of Appeals Pending
v.	)	Writ of Certiorari
Catherine Scott et al.	)	

[August 31, 1971]

THE CHIEF JUSTICE, Circuit Justice.

The Board of Education of the Forsyth County, North Carolina, school system has applied for a stay of a decision of the United States Court of Appeals for the Fourth Circuit dated June 10, 1971, and subsequent orders of the United States District Court for the Middle District of North Carolina entered pursuant thereto, pending disposition of the Board's petition for writ of certiorari to review the decision of the Court of Appeals. The operative order of the District Court is dated July 26, 1971; it adopts a plan for pupil assignment designed to desegregate the public schools of Forsyth County. The affected schools were already scheduled to open Monday, August 30.

The application for a stay was filed August 23, 1971, and the response thereto on August 26, 1971, making that date the earliest possible date for this Court or a Justice to act on the stay.

The background is of some importance.

Respondents, who are Negro pupils and parents in the school system, commenced action alleging that the School Board was operating a dual school system and seeking appropriate relief. The school system embraces both rural and urban areas in a county school system. The District Court found that in December 1969 there were 67 schools in the system with approximately 50,000 stu-

dents. The total student population was 72.5% white and 27.5% Negro. Of the schools, 15 were all Negro and seven were all white. Of the remaining schools, 31 had less than 5% of the minority race. The school system was operated under a geographical attendance zone system, with freedom of choice transfer provisions for all students regardless of race.

Prior to this Court's holding in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the plaintiffs submitted a plan devised by their consultant Dr. Larsen; it was designed to achieve as closely as possible a mathematical racial balance in all of the schools of the system equal to that in the system as a whole. It employed satellite zoning and extensive cross-bussing. The District Court rejected the plan as not constitutionally required and unduly burdensome.

The School Board then submitted its plan for the 1970-1971 school year to the court for approval. It retained geographic zoning and freedom of choice transfer provisions, but with certain modifications allowing priority to majority-to-minority transfers and increasing the racial "balance" of several schools. The District Court in 1970 approved the Board's plan, subject to alterations which prevented minority-to-majority transfers, made changes affecting three attendance zones, and added a requirement that the Board create "innovative" programs designed to increase racial contact of students.

In rejecting the Larsen plan and approving the modified Board plan, the District Court found that the boundaries of the attendance zones had been drawn in good faith and without regard to racial considerations, and to ensure that, so far as possible, pupils attended the schools nearest their home, taking into account physical barriers, boundaries, and obstacles that might endanger children in the course of reaching their schools. The District Court at that time was of the view that the "neighborhood" school concept could not be the basis

of assignment if residence in a neighborhood was denied or compelled because of race, but went on to find that the racial concentration of Negroes was not caused by public or private discrimination or state action but by economic factors and the desire of Negroes to live in their own neighborhoods rather than in predominately white neighborhoods. That finding has not been reviewed. Finally, the District Court found that the School Board had acted consistently in good faith, and was of the view that good faith "is a vital element in properly evaluating local judgment in devising compliance plans."

The District Court's order was rendered in the summer of 1970 and all parties appealed to the Court of Appeals, Fourth Circuit. While that appeal was pending, this Court decided *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and related cases. See *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971).

In light of the *Swann* holding, the Court of Appeals by *per curiam* opinion en banc remanded this and several other cases to their respective district courts with instructions to receive from the school boards new plans "which will give effect to *Swann* and *Davis*." In its remand, the Court of Appeals stated in part:

> "It is now clear, we think, that in school systems that have previously been operated separately as to the races by reason of state action, 'the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.' *Davis*, *supra*.
>
> * * * * *
>
> "If the district court approves a plan achieving less actual desegregation than would be achieved under

> an alternate proposed plan it shall find facts that are thought to make impracticable the achieving of a greater degree of integration, especially if there remain any schools all or predominately of one race.
>
> * * * * *
>
> "In *Winston-Salem/Forsyth County*, the school board may fashion its plan on the Larson [*sic*] plan with necessary modifications and refinements or adopt a plan of its choice which will meet the requirements of *Swann* and *Davis*."

On remand, the District Court interpreted the order of the Court of Appeals to mean that because the State of North Carolina formerly had state enforced dual school systems, declared unconstitutional in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the pupil assignment plan in Forsyth County had to be substantially revised to "achieve the greatest possible degree of desegregation." It concluded that:

> "Despite the substantial difference between the findings of this Court, which formed the predicate for this Court's June 25, 1970 opinion in this case, and the findings which form the predicate of the decision of the District Court in *Swann*, it is apparent that it is as 'practicable' to desegregate all the public schools in the Winston-Salem/Forsyth County system as in the Charlotte-Mecklenburg system and that the appellate courts will accept no less. Consequently, this Court can approve no less. . . ."

The District Court then ordered the School Board to comply with the time schedule set by the Court of Appeals in submitting the required plan. Just why the District Judge undertook an independent, subjective analysis of how his case compared factually with the *Swann* case—something he could not do adequately without an examination of a comprehensive record not before him—is not clear.

The school authorities, declaring that they considered themselves "required" to do so, adopted a revised pupil assignment plan which was expressly designed "*to achieve a racial balance* throughout the system which will be acceptable to the Court." (Emphasis added.) Prior to the adoption of the revised plan, the school system transported about 18,000 pupils per day in about 216 buses. The drafters of the revised plan estimated that it would require at a minimum, with use of staggered school openings, 157 additional buses to transport approximately 16,000 additional pupils.

The Board submitted the plan to the District Court under protest and voiced strong objections to its adoption. A Board resolution submitted with the plan stated in conclusion that it was submitted to "accomplish *the required objective* of achieving a racial balance in the public schools . . . [but it] is not a sound or desirable plan, and should not be required. . . ." (Emphasis added.) On July 26, 1971, the District Court accepted the plan, noting that it was "strikingly similar" to the Larsen plan which it had previously refused to implement as not constitutionally required.

On August 23, the School Board applied to me, as Circuit Justice, for a stay pending disposition by the Court of its petition for writ of certiorari, filed the same day, seeking review of the remand order of the Court of Appeals; the response was received, as previously noted, August 26, 1971. The Board states that it has not applied previously to either the District Court or the Court of Appeals for a stay because the language of the decisions and orders of those courts makes it clear that neither would grant a stay and because there was not time to do so prior to the opening of the new school year.

In its present posture this stay application, like that presented to MR. JUSTICE BLACK and acted on by him August 19, 1971, in *Corpus Christi Independent School District* v. *Cisneros*, "is in an undesirable state of confusion . . . ."

To begin with, no reasons appear why this application was not presented to me at an earlier date, assuming we accept the explanation tendered for failure to present it to the Court of Appeals. The time available between receipt of the application and response and the opening of the school term August 30 was not sufficient to deal adequately with the complex issues presented. The application for stay is further weakened by the absence of specific allegations as to the time of travel or other alleged hardships involved in the added bus transportation program. Specific reference to the travel time in relation to the age and grade of particular categories of students is not disclosed. To assert, as the applicants do, that the "average time" of travel is one hour conveys very little enlightenment to support an application to stay the order of a District Court, however reluctantly entered by that court, especially an order dealing with a school term opening so soon after the motion was first presented. The "average" travel time may be generally relevant but whether a given plan trespasses the limits on school bus transportation indicated in *Swann*, 402 U.S., at 29, 30, 31, cannot be determined from a recital of a "one hour average" travel time.[1]

The Board's resolution reciting that it was adopting the revised plan under protest, on an understanding that it was *required* to achieve a fixed "racial balance" that reflected the total composition of the school district

[1] By way of illustration, if the record showed—to take an extreme example of a patent violation of *Swann*—that the average time was *three* hours daily or that some were compelled to travel three hours daily when school facilities were available at a lesser distance, I would not hesitate to stay such an order forthwith until the Court could act, at least as to students so imposed on. The burdens and hardships of travel do not relate to race: excessive travel is as much a hardship on one race as another. The feasibility of a transfer program to give relief from such a patently offensive transportation order as the one hypothesized, would also be relevant.

is disturbing. It suggests the possibility that there may be some misreading of the opinion of the Court in the *Swann* case. If the Court of Appeals or the District Court read this Court's opinions as requiring a fixed racial balance or quota, they would appear to have overlooked specific language of the opinion in the *Swann* case to the contrary. Rather than trying to interpret or characterize a holding of the Court, a function of the Court itself, I set forth verbatim the issues seen by the Court in *Swann* and the essence of the Court's disposition of those issues:

> "The central issue in this case is that of student assignment, and there are essentially four problem areas:
> "(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;
> "(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
> "(3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and
> "(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation." 402 U.S., at 22.

After discussing the problem the opinion concluded:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, *that approach would be disapproved and we would be obliged to reverse.* The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S., at 24. (Emphasis added.)

Nothing could be plainer, or so I had thought, than *Swann*'s disapproval of the 71%-29% racial composition found in the *Swann* case as the controlling factor in assignment of pupils, simply because that was the racial composition of the whole school system. Elsewhere in the *Swann* opinion we had noted the necessity for a district court to determine what in fact was the racial balance as an obvious and necessary starting point to decide whether in fact any violation existed; we concluded, however, that "the very limited use made of the mathematical ratios was within the equitable remedial discretion of the District Court."

Since the second aspect of this case falls within the fourth question postulated by the Court in *Swann* it may be useful to refer to the Court's response to that question. After noting that 18 million students were transported to schools by bus in this country in 1969-1970 the Court concluded:

> "The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, *Davis*, *supra*. The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.
>
> * * * * *
>
> ". . . In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.
>
> "An objection to transportation of students may have validity when the time or distance of travel is so

> great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed." 402 U.S. 29-31.

No prior case had dealt directly with bus transportation of students in this context or the limits on the use of transportation as part of a remedial plan, or with racial balancing.

This case is further complicated by what seems to me some confusion respecting the standards employed and the findings made by the District Court and the terms of the remand order of the Court of Appeals. Under *Swann* and related cases of April 20, 1971, as in earlier cases, judicial power can be invoked only on a showing of discrimination violative of the constitutional standards declared in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In findings dated June 25, 1970, the District Court sent the case back to the School Board for changes to eliminate the dual school system; it approved the plan submitted subject to several modifications. The modified plan was before the Court of Appeals when this Court decided the *Swann* case. The Court of Appeals in its remand following the decision in *Swann* did not reverse the District Court's findings, but rather directed reconsideration in light of *Swann*. In the circumstances that was an appropriate step. The present status of the findings is not clear to me, but the District Court on reconsideration following the remand seems to have

thought that it was compelled to achieve a fixed racial balance reflecting the composition of the total county system. The explicit language of the Court's opinion in *Swann* suggests a possible confusion on this point. I do not attempt to construe that language, but simply recite it verbatim: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S., at 24.

On the record now before me it is not possible to conclude with any assurance that the District Court in its order dated July 26, 1971, and the Court of Appeals in its remand dated June 10, 1971, did or did not correctly read this Court's holding in *Swann* and particularly the explicit language as to a requirement of fixed mathematical ratios or racial quotas and the limits suggested as to transportation of students. The record being inadequate to evaluate these issues, even preliminarily for the limited purposes of a stay order, and the heavy burden for making out a case for such extraordinary relief being on the moving parties, I am unwilling to disturb the order of the District Court dated July 26, 1971, made pursuant to the remand order of the Court of Appeals which is sought to be reviewed here.[2]

[2] In their petition for a writ of certiorari in this Court, the petitioners have elected to seek review here of the remand order of the Court of Appeals of June 10, 1971, rather than having the substantive order of the District Court dated July 26, 1971, first reviewed in the Court of Appeals.

[Publisher's note: See 404 U.S. 1232 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–145.—OCTOBER TERM, 1971

Lee Marshall Harris, Appellant,	)	Application for Bail Pending
v.	)	Appeal to the United States
United States.	)	Court of Appeals for the
	)	Ninth Circuit

[August 31, 1971]

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for bail pending appeal to the Ninth Circuit Court of Appeals. Both the District Court and the Court of Appeals have previously denied similar applications, and their action is entitled to great deference. *Reynolds* v. *United States*, 80 S. Ct. 30 (1959). Nevertheless, "where the reasons for the action below clearly appear, a Circuit Justice has a nondelegable responsibility to make an independent determination of the merits of the application." *Reynolds*, *supra*, at 32. Fed. Rule Crim. Proc. 46(a)(2); 18 U.S.C. §§ 3146, 3148. Accord, *Sellers* v. *United States*, 89 S. Ct. 36 (1968). While there is no automatic right to bail after convictions, *Bowman* v. *United States*, 85 S. Ct. 232 (1964), "The command of the Eighth Amendment that 'Excessive bail shall not be required . . .' *at the very least* obligates judges passing on the right to bail to deny such relief only for the strongest of reasons." *Sellers*, *supra*, at 38. [Publisher's note: It is not clear whether "*at the very least*" was emphasized in the original version of the *Sellers* opinion issued by Justice Black, or whether the emphasis was added later. Compare *Sellers* v. *United States*, 2 Rapp 395, 396 (1968) (without emphasis), with *Sellers* v. *United States*, 89 S. Ct. 36, 38 (1968) (with emphasis).] The Bail Reform Act of 1966, 18 U.S.C. §§ 3146, 3148, further limits the discretion of a court or judge to deny bail, as it provides that a person *shall* be entitled to bail pending appeal, if that appeal is not frivolous or taken for delay, or "unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not

flee or pose a danger to any other person or to the community."

Applying these principles, my examination of the papers submitted by applicant and by the Solicitor General in opposition persuade me that the Government has not met its burden of showing that bail should be denied.

The primary ground upon which the Solicitor General opposes bail is that "[t]here are no substantial questions raised" by the appeal. It is true that the questions raised relate primarily to evidentiary matters. It is settled, however, that these are within the purview of review of an application of this kind and that they may raise nonfrivolous—indeed, even "substantial"—questions. See, *e.g.*, *Wolcher* v. *United States*, 76 S. Ct. 254 (1955).

Applicant principally argues that there was no evidence in the record from which an inference is permissible that he knew that a truck guided by him and a codefendant, in a separate vehicle, from one location in Los Angeles to another location in that city contained unlawfully imported narcotics. It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process. See *Adderley* v. *Florida*, 385 U.S. 39, 44 (1966). See also *Johnson* v. *Florida*, 391 U.S. 596 (1968); *Thompson* v. *Louisville*, 362 U.S. 199 (1960). The quantum and nature of proof constitutionally required to support an inference of knowledge in narcotics offenses is not always an easy question. Cf. *Turner* v. *United States*, 396 U.S. 398 (1970); *Leary* v. *United States*, 395 U.S. 6 (1969). Applicant cites a case from the Ninth Circuit as a factually similar example in which a conviction for a narcotics offense was reversed for lack of proof of knowledge that another possessed the contraband. While I express no opinion on the merits of the analogy, Circuit Justices have granted bail pending appeal based in

part on similar claims of failure of proof. See, *e.g.*, *Brussel* v. *United States*, 396 U.S. 1229 (1969).

Applicant also challenges the hearsay testimony of an informer as to a Tijuana phone number given to him by a reputed Mexican narcotics trafficker. Other evidence demonstrated that applicant's codefendant called this number several times prior to the importation of the contraband in July 1969. The implication, presumably, is that the prior calls were made to arrange the shipment. The hearsay declaration, however, was made over a year after the codefendant's phone calls occurred, and the common scheme sought to be proven had been terminated. Under these circumstances, the admissibility of this declaration as a hearsay exception is not free from doubt. Cf. *Fiswick* v. *United States*, 329 U.S. 211 (1947).

Assuming this testimony is otherwise admissible, applicant argues it is not the "best evidence" of the registration of the phone number. While it is true that Mexican phone company records were beyond the subpoena power of the court, and that courts have held that secondary evidence may be used without further ado in such a case, see, *e.g.*, *Hartzell* v. *United States*, 72 F.2d 569 (CA8 1934), applicant's argument is nevertheless not without merit:

> "The policy of the original document requirement, and probably the weight of reason, supports the view of those courts equally numerous who demand . . . that before secondary evidence is used, the proponent must show either that he has made reasonable efforts without avail to secure the original from its possessor, or circumstances which persuade the court that such efforts would have been fruitless."

McCormick, Evidence, § 203, p. 415, and cases cited. It is noteworthy in this regard that the District Court

rejected evidence offered by applicant tending to show that the phone number in question was not registered to the purported narcotics trafficker before December 1970.

I cannot say that these contentions are all frivolous. The District Judge stated in his opinion denying bail that "no objections were interposed to the telephone calls to Tiajuana [sic] made by co-defendant." He made no mention, however, of applicant's challenge to the hearsay declaration of the Mexican narcotics trafficker. If this challenge should prevail, "it might well tip the scales in defendant's favor, as it goes to the heart of the case." *Wolcher*, *supra*, at 255.[*]

Where an appeal is not frivolous or taken for delay, bail "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." *Leigh* v. *United States*, 82 S. Ct. 994, 996 (1962); accord, *Rehman* v. *California*, 85 S. Ct. 8 (1964). According to the Solicitor General,

[*] Applicant also renewed at trial, and raises here, a question of substantial nature which was before this Court last Term. The District Court in this case entered a pre-trial order suppressing the contraband found in the truck. However, the Ninth Circuit reversed, on an interlocutory appeal by the Government. It felt that the actions of the customs agents constituted an "extended border search," justified by the fact that the truck had been under continuous surveillance from the time it crossed the Mexican border. I granted a stay of the Court of Appeal's [Publisher's note: "Appeal's" should be "Appeals'".] interlocutory judgment pending disposition of the petition for certiorari; partly because of questions concerning the propriety of the interlocutory procedure, but also because of the differing approaches used by the Ninth and the Fifth Circuits to justify extended border searches. *Harris* v. *United States*, 400 U.S. 1211 (1970). The full Court, however, denied certiorari. *Harris* v. *United States*. 400 U.S. 1000 (1971). This action does not necessarily indicate a view as to the merits of either of the questions above. Possibly the interlocutory posture of the case was the determining factor. Nevertheless, applicant's Fourth Amendment claims have not been considered in the decision to grant this application. Cf. *Drifka* v. *Brainard*, 89 S. Ct. 434 (1968).

the District Judge denied bail in part because "there was reason to believe that defendant, who had no employment, would not respond to required future appearances and would be a danger to the community." Applicant's Bail Reform Act form indicates, however, that he is a self-employed auto mechanic making $150 per week, that he has lived in Los Angeles for the past eight years, that he has several relatives, including his mother and a sister, living there, and that he has never failed to make a required court appearance while on bail. The moving papers further indicate that applicant was at liberty after sentencing, pursuant to a stay of execution granted by the Court of Appeals, and that he voluntarily submitted to the authorities upon the expiration of the stay. There is not such "substantial evidence" in this record to justify denying bail on the ground that applicant is a flight risk.

Furthermore, a far stronger showing of danger to the community must be made than is apparent from this record to justify a denial of bail on that ground. See, *e.g.*, *United States* v. *Erwing*, 280 F. Supp. 814 (ND Cal. 1968). Accordingly, bail should be granted pending disposition of the appeal in this case, pursuant to the standards set forth in the Bail Reform Act.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. A–200.—OCTOBER TERM, 1971

Edgar Smith, Jr.	)	
v.	)	Application for Bail.
Howard Yeager, Warden.	)	

[September 3, 1971]

Memorandum of MR. JUSTICE BRENNAN.

The District Court, in ordering Respondent Smith's release unless the State of New Jersey granted him a new trial within 60 days of the final disposition of the State's appeal, admitted him to bail in the amount of $5,000. The Court of Appeals of the Third Circuit vacated the provisions admitting respondent to bail, and in all other respects affirmed the District Court's order; issuance of the Court of Appeals mandate was stayed until September 8, 1971.

The State represents that a petition for certiorari will be promptly filed, and respondent has applied to me, as Circuit Justice, for admission to bail pending the Court's disposition of that petition. The application is filed alternatively: (l) as an original application under SCR 49(3), and (2) as an application under SCR 49(4) for review of so much of the Court of Appeals order as vacated the District Court's order granting bail. [Publisher's note: Each court should possess its order, or neither one should.]

I am referring the application to the Court for consideration at the Court Conference scheduled following the opening of the October, 1971, Term on October 4, 1971. The application presents two questions which have not been but should be decided by the Court: (1) Is the District Court's "conditional release" order an order within SCR 49(3) "ordering the release of a prisoner," cf. *O'Brien* v. *Lindsey*, 202 F.2d 418? (2) May an application under SCR 49 (4) be entertained by the Circuit Justice or is action by the full Court required?

The parties may file further memoranda directed to these questions on or before September 27, 1971.

[Publisher's note: See 404 U.S. 1237 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–245.—OCTOBER TERM, 1971

	)	Application for Injunction
Robert Gomperts et al.	)	Pending Filing of a Petition
v.	)	for Writ of Certiorari to the
Charles E. Chase et al.	)	United States Court of Ap-
	)	peals for the Ninth Circuit.

[September 10, 1971]

MR. JUSTICE DOUGLAS.

This case—before me on a motion for a preliminary injunction which both the District Court and the Court of Appeals have denied—presents novel and unresolved issues of constitutional law, which have been argued at the hearing this day at Yakima, Washington. The Board of Trustees of Sequoia Union High School District in San Mateo County, California, designed and approved a high school integration plan dated June 24, 1970, to become effective September 13, 1971, when the school year opens. It was designed to effect the substantial integration of Blacks, Chicanos, and Whites. The county was divided in opinion on the matter, and as the result of an election in the Spring [Publisher's note: "Spring" is capitalized in the original. But see 404 U.S. at 1238.] of 1971, new school trustees were chosen who helped make up a new majority which modified the Board's earlier action. That is the plan of the Board dated July 7, 1971. It is argued that the modifications will substantially restore the prior existing segregated high school regime. It is said in reply that the modified plan is based on voluntary transfers which it is hoped will mean that some 600 Whites will move into Black schools and some 400 Blacks will move into White schools. The mandatory aspect of the June 24, 1970, plan was suspended for the school year 1971-1972. This action was brought by Blacks and Whites under 42 U.S.C.

§ 1983 and 28 U.S.C. § 1343 to end the racially segregated school regime. The case has not been heard on the merits and, as I have indicated, the new school year starts in less than a week.

If this were the classical *de jure* school segregation, the injunction plainly should be granted. But the precise contours of *de jure* segregation have not been drawn by the Court. Historically, it meant the existence of state-created dual school systems. That is to say, *de jure* segregation was a mandate by the legislature, carried into effect by a school board, whereby students were assigned to schools solely by race. *E.g.*, *Gong Lum* v. *Rice*, 275 U.S. 78; *Cumming* v. *County Board of Education*, 175 U.S. 528. As I indicated the other day in my opinion in *Guey Heung Lee* v. *Johnson*, — U.S. —, California had such a dual system until recent years. In the *Guey Heung Lee* case it was apparent that the force of that custom had not been spent even though the statute providing for the establishment of separate schools had been repealed, because the San Francisco school board continued meticulously to draw racial lines in spite of the repeal of the statute.

So far as I can tell, a different history has prevailed in San Mateo County, or at least it is not apparent from this record that California's earlier dual school system shaped the existing San Mateo school system. The main argument now is that other state action created *de jure* segregation in San Mateo County:

> (1) California's Bayshore Freeway effectively isolated the Blacks and resulted in a separate and predominantly Black high school.
>
> (2) State planning groups fashioned and built the Black community around that school.
>
> (3) Realtors—licensed by the State—kept "White property" White and "Black property" Black.
>
> (4) Banks chartered by the State shaped the policies that handicapped Blacks in financing homes other than in Black ghettoes.

(5) Residential segregation, fostered by state enforced restrictive covenants, resulted in segregated schools.

Whether any of these factors add up to *de jure* segregation in the sense of that state action we condemned in *Brown* v. *Board of Education*, 347 U.S. 483, is a question not yet decided.

If I assume, *arguendo*, that they do not establish *de jure* segregation, another troublesome question remains. There can be *de facto* segregation without the State being implicated in the actual creation of the dual system. But even when there is *de facto* segregation, the problem is not necessarily resolved.

Plessy v. *Ferguson*, 163 U.S. 539, decided in 1896, held that public facilities could be separate for the races provided they were equal. If San Mateo County maintains a public school for Blacks that is not equal to the one it maintains for Whites, is there a remedy? There is a showing here that the State is maintaining a segregated school system for the Blacks and Chicanos that is inferior to the schools it maintains for the Whites.

Prior to *Brown* v. *Board of Education*, we held over and again that a Black offered inferior public education to that which the State gave the Whites must be admitted to the White school. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637; *Sweat* [Publisher's note: "*Sweat*" should be "*Sweatt*".] v. *Painter*, 339 U.S. 629; *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U.S. 631; *Missouri ex rel. Gaines* v [Publisher's note: The "v" preceding this note should be followed by a period.] *Canada*, 305 U.S. 337.

Must not a school board fashion a plan that makes the majority race, and not the minority races alone, share in the unequal facilities designed by the State for part of its educational regime and make sure that the minorities, to the extent feasible, have the opportunity to share the superior facilities with the majority?

There is evidence in this case that Ravenswood High School—the one that is predominantly Black—is an inferior school. In fact, the Department of Health,

Education, and Welfare reported in 1969 that "The quality of educational services and opportunities provided at Ravenswood High School does not meet the level of that provided in the other schools in the District." The California Association of School Administrators, the California School Boards Association, and the California Teachers Association in May 1969 made a similar report entitled *Sequoia Union High School District*. The plan of June 24, 1970, was designed to rectify that situation. The plan of July 7, 1971, however, modified the earlier plan and takes, at most, only minimal steps towards equalizing the educational opportunities at the district's high schools.

The remedies, if any, that are available where school segregation is *de facto* and not *de jure* are not yet clear. But *Plessy* v. *Ferguson* has not yet been overruled on its mandate that separate facilities be equal. Where public schools for Blacks or Chicanos are not equal to schools for Whites, I see no answer to the argument that school boards can rectify the situation among the races by designing a system whereby the educational inequalities are shared by the several races. That seems to me to be an acceptable alternative to removing the inequalities through an upgrading of the subnormal school.

As I understand this case, the July 7, 1971, plan presumptively collides with the basic principle of equal protection expressed in *Plessy* v. *Ferguson*. Under normal circumstances the injunction should therefore issue. The difficulty is that this is September 10 and the San Mateo school opens on September 13. No one knows what plan would be substituted by the school board for the July 7, 1971, plan should I issue the stay. The June 24, 1970, plan is no longer a plan of the school board. The time is so short that further delay may indeed imperil the new school year. I have, therefore, reluctantly concluded that the lateness of the hour makes it inappropriate for me to grant the interim relief.

It is so ordered.

[Publisher's note: See 404 U.S. 1242 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

JACK JOSEPH PRYOR *v.* UNITED STATES

APPLICATION FOR STAY OF MANDATE OR, IN THE ALTERNATIVE, FOR CONTINUATION OF BAIL PENDING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. A–403. Decided October 29, 1971

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant is a Jehovah's Witness who was convicted for failing to report for civilian work in lieu of induction. The Court of Appeals affirmed his conviction, rejecting, *inter alia*, applicant's argument that forced alternate service in the absence of a congressional declaration of war violated his rights under the First Amendment. He seeks a stay of the mandate of the Court of Appeals or, in the alternative, a continuation of bail pending disposition of his petition for certiorari.

I have expressed at length my view that the constitutional questions raised by conscription for a presidential war are justiciable, substantial and should be reviewed by this Court. *Hart* v. *United States*, cert. denied, 391 U.S. 956 (DOUGLAS, J., dissenting); *Holmes* v. *United States*, cert. denied, 391 U.S. 936 (DOUGLAS, J., dissenting). MR. JUSTICE BRENNAN, this term, has also dissented from the denial of certiorari in cases raising this issue. See, *e.g.*, *Thompson* v. *United States*, No. 71-5132, cert. denied, Oct. 26, 1971; *Gidmark* v. *United States*, No. 70-5297, cert. denied, Oct. 12, 1971. MR. JUSTICE STEWART has in the past indicated a willingness to consider aspects of the problem. *Holmes* v. *United States*, *supra* (Memorandum of MR. JUSTICE STEWART). There are now two vacant seats on the Court. Moreover, three out of seven are enough to grant a petition for certiorari.

In light of the foregoing, I no longer feel precluded, *Drifka* v. *Brainard*, 89 S. Ct. 434, from granting such relief as is requested here. Bail will therefore be continued in the same amount and under the same conditions as presently in effect, pending disposition of the petition for certiorari.

It is so ordered.

[Publisher's note: See 404 U.S. 1244 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Application No. A–784
(*In re* Case No. 71–463)

Joseph M. Kadans, Appellant,	)	On Application for
v.	)	Temporary Relief.
Jon R. Collins et al.	)	

[January 31, 1972]

MR. JUSTICE DOUGLAS.

The petition for certiorari in this case was denied by the Court on January 10, 1972, MR. JUSTICE BRENNAN and I noting that we voted to grant. 404 U.S. —.

Petitioner now asks me for temporary relief allowing him to practice law pending consideration by the Court on a petition for rehearing. The difficulty is that the grant of that relief would in effect be a partial grant of relief sought in the petition for certiorari. I, one of the dissenting Justices, am barred by our Rule 58(1) from voting on a petition for rehearing, those petitions being considered only by "those who concur in the judgment or decision." Unless one of the majority who voted to deny, votes to reopen the case, the dissenters take no part. If one who voted to deny changes his mind and votes to grant the petition, then of course the entire Court participates. But in light of this rule and in light of our practice and in consideration of the nature of the relief that is being asked of me, I herewith deny the application.

[Publisher's note: See 405 U.S. 1201 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–795

Curtis Graves et al.	)	
v.	)	
Ben Barnes et al.	)	
	)	
Diana Regester et al.	)	
v.	)	Application for a Stay of a
Bob Bullock et al.	)	Judgment of a Three-Judge
	)	District Court for the
Johnny Mariott et al.	)	Western District of Texas.
v.	)	
Preston Smith et al.	)	
	)	
Van Henry Archer, Jr.,	)	
v.	)	
Preston Smith et al.	)	

[February 7, 1972]

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of a three-judge court sitting in the Western District of Texas. The court's decision covers issues raised in four consolidated actions. The principal issues were as follows:

1. In *Graves* v. *Barnes*, plaintiffs challenged the State's reapportionment plan for the senatorial districts in Harris County (Houston) on the ground that they were racially gerrymandered.

2. In *Regester* v. *Bullock*, the State's reapportionment plan for the Texas House of Representatives was challenged on the grounds of population deviations from the one-man, one-vote requirement, and on the impermissibility of use of multi-member districts in the metropolitan communities.

3. In *Mariott* v. *Smith*, the House plan provision calling for a multi-member district for Dallas County was challenged.

4. In *Archer* v. *Smith*, a generally similar attack was levelled against the use of multi-member districting in Bexar County (San Antonio).

The four cases were consolidated and tried by a single three-judge panel. After full pretrial discovery, during which over 2,000 pages of depositions were taken, the District Court heard testimony at a three-and-one-half day hearing. The extensive *per curiam* opinion, and the concurring and dissenting opinions, which were handed down after some three weeks of deliberation, reflect a careful and exhaustive consideration of the issues in light of the facts as developed. The court's conclusions, in substance, were as follows:

(a) The Senate redistricting plan, as promulgated by the Texas Legislative Redistricting Board, was approved.

(b) The House redistricting plan was held violative of the Equal Protection Clause because of population deviations from equality of representation. But, in an exercise of judicial restraint, the court suspended its decision in this respect for the purpose of affording the Legislature of Texas an opportunity to adopt a new and constitutional plan. Meanwhile, the forthcoming election may be held under the plan found to be deficient.

(c) The multi-member district plans for Dallas and Bexar Counties were found to be unconstitutional under the standard prescribed by this Court in *Fortson* v. *Dorsey*, 370 U.S. 433, 438-39 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); and *Whitcomb* v. *Chavis*, 403 U.S. 124, 143 (1971). The three-judge court found from the evidence that these multi-member district plans would operate to minimize or cancel out the voting strength of racial minority elements of the voting population, and ordered the implementation of a plan calling for single-member districts for Dallas and Bexar Counties. The State offered no plan for single-member districts for these

counties, and the court was compelled to draft its own plan. To minimize the disruptive impact of its ruling, the court ordered that the State's requirement that candidates run from the district of their residence be abated for the forthcoming election. A candidate residing anywhere within the county, therefore, may run for election from any district in the county.

(d) The evidence with respect to nine other metropolitan multi-member districts was found insufficient to warrant treatment similar to that required for Dallas and Bexar Counties.

(e) Finally, the court's order stated that its judgment was final and that no stays would be granted. In view of the foregoing holdings, the only present necessity to consider a stay relates to the District Court's decision with respect to multi-member districts in Dallas and Bexar Counties. A number of principles have been recognized to govern a Circuit Justice's in-chambers review of stay applications. Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm.

As a threshold consideration, Justices of this Court have consistently required there be a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *Mahon* v. *Howell*, 404 U.S. 1201, 1202 (1971); *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 4 L. ed. [Publisher's note: "ed." should be "Ed.".] 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erroneously decided below. Jus-

tices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim.

In applying these considerations to the present case, I conclude that a stay should not be granted. The case received careful attention by the three-judge court, the members of which were "on the scene" and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court. Moreover, the order of the court was narrowly drawn to effectuate its decision with a minimum of interference with the State's legislative processes, and with a minimum of administrative confusion in the short run.

Following a practice utilized by other Justices in passing on applications raising serious constitutional questions (see *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. ed. [Publisher's note: "ed." should be "Ed."] 2d 43 (1962); *McGee* v. *Eyman*, 83 S. Ct. 230, 9 L. ed. [Publisher's note: "ed." should be "Ed."] 2d 267 (1963)), I have consulted informally with each of my Brethren who was available[*] at this time during the recess. Although no other Justice has participated in the drafting of this opinion, I am authorized to say that each of them would vote to deny this application. My denial of a stay at this point, of course, may not be taken either as a statement of my own position on the merits of the difficult questions raised in this case, or as an indication of what may, in fact, ultimately be the view of my Colleagues on the Court.

The application is denied.

[*] All Justices, save two who were not available, have been consulted.

[Publisher's note: See 405 U.S. 1205 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–785

Leon Chambers,	)	Application for Reconsid-
v.	)	eration of Order Admitting
State of Mississippi.	)	Petitioner to Bail.

[February 14, 1972]

MR. JUSTICE POWELL, Circuit Justice.

On January 31, 1972, counsel for Leon Chambers, petitioner in No. 71-5908, filed with me, as Circuit Justice for the States constituting the Fifth Circuit, an application for bail pending consideration of his petition for writ of certiorari. Petitioner's counsel detailed the reasons making it appropriate for me to exercise my discretion, under 18 U.S.C. § 3144, to admit this petitioner to bail. A copy of his certiorari petition, which raises two non-frivolous constitutional questions, was also attached to his application. The Attorney General of Mississippi declined to file a response objecting to the application.

On February 1, 1972, after careful review of petitioner's application, I entered an order admitting him to bail. In order to assure that petitioner would not flee or pose a danger to any other person, I imposed a number of conditions on his release. He was required to post bail bond in the sum of $15,000; to live at home with his family in his hometown of Woodville, Mississippi; to find employment; and to report, immediately upon release and periodically thereafter, to the local sheriff.

Ten days later, on February 11, 1972, the Attorney General of Mississippi filed an application for reconsideration of my order admitting petitioner to bail. Although the Rules of this Court do not provide for such an application, I have carefully re-examined all papers submitted including a response from petitioner's counsel.

The Attorney General, in addition to contending that petitioner's case is frivolous, asserts that petitioner's "return to the community will create a dangerous situation to citizens of that community." In support of this latter allegation, he proffers the affidavits of the County Sheriff, the local Police Commissioner, and the Chief of Police of Woodville. In conclusory terms, these documents state that petitioner's presence will create a tense and explosive situation in the community, which might result in bloodshed. No specific facts are stated in support of the opinions expressed. On the contrary, it appears that this petitioner's roots in the community and record of good behavior merit his release pending final determination of his case. Petitioner is a lifelong resident of Woodville; he owns a home, subject to a mortgage; he has a wife and nine children there; he served for a period on the Woodville police force; he is a deacon in the local Baptist Church; and he has no prior criminal record. Before his trial he was released on bail for approximately 14 months, apparently without incident. During his period of incarceration after his conviction it appears that petitioner was a model prisoner.

On this record, I am unable to conclude that petitioner's mere presence in the community poses such a threat to the public "that the only way to protect against it would be to keep [him] in jail." *Sellers* v. *United States*, 39 S. Ct. 36, 38, 21 L. Ed. 2d 64, 67 (1968) (Black, J.).

The order admitting petitioner to bail is hereby reaffirmed.

It is so ordered.

[Publisher's note: See 409 U.S. 1201 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1

William Cousins, et al.,	)	
v.	)	Application for Stay.
Paul T. Wigoda.	)	

[July 1, 1972]

Memorandum of MR. JUSTICE REHNQUIST.

Petitioners have applied to me as Circuit Justice to stay an order entered by the Court of Appeals for the Seventh Circuit on Thursday, June 29. A divided panel of that court vacated an injunction issued at petitioners' behest by the District Court for the Northern District of Illinois and further ordered that its mandate issue immediately. Because petitioners' application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.

In April 1972, following the Illinois primary election, respondent Wigoda brought an action in the circuit court of Cook County, Illinois, requesting a declaratory judgment that he and others had been duly elected as delegates to the Democratic National Convention in accordance with Illinois law, and seeking an injunction against petitioners to prohibit them from interfering with or impeding the functioning of respondent as a duly elected delegate.

Petitioners removed this action to the United States District Court, from which it was then remanded to the state court. Petitioners then brought a separate action in the District Court, alleging that the pendency of the state court action infringed their associational rights guaranteed by the First and Fourteenth Amendments to

the United States Constitution. In reliance on 28 U.S.C. § 1983, they sought an injunction against further prosecution of the state court action. The District Court heard evidence and enjoined the prosecution of so much of the state court action as sought injunctive relief against the petitioners, leaving the state court free to proceed with the declaratory judgment aspect of respondent's action. Respondent appealed from the order of the District Court granting injunctive relief, and the Court of Appeals then entered the order described above vacating the injunction of the District Court.

Both the state and federal court actions arise out of disputes between the parties as to what group of delegates from Illinois shall be seated at the Democratic National Convention to be held in Miami Beach, Florida, beginning July 10. Respondent contends that he and the others whom he seeks to represent were delegates elected to the convention in accordance with Illinois law at the Illinois primary election. Petitioners contend that the Illinois delegate selection process does not conform to standards established by the national Democratic Party, and that therefore they and others associated with them, rather than respondents, should be seated by the Democratic National Convention.

Since the Court of Appeals entered its order of June 29, two additional events have supervened. On June 30, the circuit court of Cook County in which respondent's original action was pending entered a temporary restraining order enjoining petitioners from "submitting or causing to be submitted to the national Democratic Party, the Democratic National Committee or the credentials committee thereof, the name or names of any person, or persons, as prospective delegates to the 1972 Democratic National Convention" from various Illinois districts. That order also provided that "except as hereinbefore ordered" nothing in the order should prevent the petitioners from "speaking on behalf of their challenge before the credentials committee, holding meetings or engaging

in other activities commensurate with their rights of free speech and association under the First and Fourteenth Amendments to the United States Constitution." The circuit court further ordered that the matter be set for hearing on the motion of respondent for a preliminary injunction at 11:00 a.m. on Wednesday, July 5, in that court.

On June 30, the credentials committee of the Democratic National Convention voted to sustain the challenge made by petitioners and others to respondent and the delegates associated with him, and to recommend to the convention that petitioners and other delegates associated with them be seated by the Democratic National Convention. It is my understanding that this action on the part of the credentials committee is subject to review by the full convention at its meeting in Miami Beach.

At the outset I am faced with a problem which, if not technically one of authority, is at the very least one of the scope of my discretion in acting on petitioners' application. The authority of a Circuit Justice to grant a stay in cases such as this stems from the provisions of 28 U.S.C. § 2101(f), which reads in pertinent part as follows:

> "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, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a Justice of the Supreme Court . . . ."

While this case is one in which the judgment of the Court of Appeals is undoubtedly "subject to review by the Supreme Court on writ of certiorari," as a practical matter it will become moot upon the adjournment of the Democratic National Convention, which customarily

takes place in the latter part of the week in which the convention opened. On June 29, this Court adjourned until the first Monday in October, as has been its annual custom. There will therefore be no possibility of this Court's convening and granting a writ of certiorari to review the judgment below unless THE CHIEF JUSTICE should determine that the Court ought to be called into special session in order to hear this case. Such special sessions have, to my knowledge, been held only three times in the recent history of the Court: In 1942 the Court was convened to consider whether the President had authority in time of war to exclude enemy aliens from access to civilian courts, and to order them tried before military tribunals for acts of sabotage. *Ex parte Quirin*, 317 U.S. 1 (1942). A special Term was convened in 1953 to hear the Government's motion to vacate a stay of execution of a death sentence against the Rosenbergs for espionage, after exhaustive appellate review of their conviction. *Rosenberg* v. *United States*, 346 U.S. 273 (1953). In 1958 a special Term was held to review the Little Rock school desegregation case in time for implementation in the fall school term. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Without in any way disparaging the importance of this case not only to the parties involved in it, but to the political processes of the country, I simply do not believe that it is the same type of case which has caused the Court to convene in special session on previous occasions. Both the presumptive availability of the Illinois courts to redress any deprivation of petitioners' constitutional rights, which I discuss in more detail below, and the necessarily highly speculative nature of any connection between the outstanding order of the state court and the choice of a presidential candidate by the Democratice [Publisher's note: "Democratice" should be "Democratic".] National Convention, lead me to conclude that this case is not comparable to those. I therefore conclude that this is not a case in which I would be warranted in requesting THE CHIEF JUSTICE to convene a special session of this

Court. See the opinion of Mr. Justice Harlan in chambers in *Travia* v. *Lorenzo*, 86 S. Ct. 7 (1965).

Having so concluded, I must recognize the fact that were I to grant the stay requested by petitioners, the result would be a determination on the merits of the federal litigation in their favor without any prospect of review of my action by the full membership of this Court. While I think that the provisions of 28 U.S.C. § 2101(f) confer upon me the technical authority to grant a stay in these circumstances, I would be moved to use that authority only if I were satisfied that the judgment under review represented the most egregious departure from wholly settled principles of law established by the decisions of this Court.

The majority of the panel of the Court of Appeals, in its opinion released yesterday, relied on the principles of comity between federal and state courts as enunciated by this Court's decisions in *Younger* v. *Harris*, 401 U.S. 37 (1970), and *Mitchum* v. *Foster*, O.T. 1972, decided June 19, 1972. While *Younger* and its companion cases involved state criminal prosecutions, the principles of federal comity upon which it was based are enunciated in earlier decisions of this Court dealing with civil as well as criminal matters. See the cases cited at p. 18 of this Court's slip opinion in *Mitchum*, *supra*. The Court in *Mitchum*, after holding that 28 U.S.C. § 1983, under which petitioners brought this action in the District Court, was an exception to the provisions of the Anti-Injunction Act, 28 U.S.C. § 2283, went on to say:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain the federal court when asked to enjoin a state court proceeding." *Mitchum*, slip opinion, p. 18.

While the test to be applied may be less stringent in civil cases than in criminal, the cases cited in *Mitchum* make clear that the federal courts will not casually enjoin the

conduct of pending state court proceedings of either type. Petitioners make out what must be described as at least a plausible case that a portion of the decree issued by the circuit court of Cook County does abridge their associational rights guaranteed by the First and Fourteenth Amendments. But the teaching of *Younger*, *supra*, and *Mitchum*, *supra*, as I understand them, is that a plausible claim of constitutional infringement does not automatically entitle one to avail himself of the injunctive processes of the federal courts in order to prevent the conduct of pending litigation in the state courts. The opinion issued by the Court of Appeals majority specifically alluded to petitioners' failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to petitioners for this purpose.

Mindful, therefore, of the principles of comity enjoined by our federal system, of the deference due to the judgment of the Court of Appeals (see Harlan, J., in *Breswick & Co.* v. *United States*, 75 S. Ct. 912 (1955)), and of the extraordinary burden which falls upon petitioners when they seek a stay from a single Justice which would in effect dispose of the litigation on its merits, I conclude that they have failed to meet that burden. An order will therefore be entered denying petitioners' application for a stay of the order and mandate of the Court of Appeals.

[Publisher's note: See 409 U.S. 1207 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A–72 AND A–73

Aberdeen & Rockfish R. Co. et al., Applicants, A–72 *v.* Students Challenging Regulatory Agency Procedures (SCRAP) et al.	)	Applications for Stay.
Interstate Commerce Commission, Applicant, A–73 *v.* Students Challenging Regulatory Agency Procedures (SCRAP) et al.	)	

[July 19, 1972]

MR. CHIEF JUSTICE BURGER, Circuit Justice.

These applications request me, as Circuit Justice for the District of Columbia Circuit, to stay a preliminary injunction entered by a three-judge United States District Court for the District of Columbia. The applicants are the Interstate Commerce Commission and a long list of railroad companies comprising most of the rail transport in the Nation. Opposing the applications are the plaintiffs below, Students Challenging Regulatory Agency Procedures, who describe themselves as "SCRAP"[1] and a coalition of organizations dedicated to the protection of environmental resources. The applicants say that they intend to seek prompt review in this Court on the merits of the preliminary injunction entered below.

[1] SCRAP's complaint alleged that it is "an unincorporated association formed by five law students from the [George Washington University] National Law Center . . . in September 1971" whose "primary purpose is to enhance the quality of the human environment for its members, and for all citizens . . . ."

The Interstate Commerce Act, 49 U.S.C. § 1 *et seq.*, permits increases in railroad freight rates to become effective without prior approval of the Interstate Commerce Commission. A carrier may file a proposed tariff and, after 30 days unless the Commission shortens the period, the new rate becomes effective as a carrier-made rate. 49 U.S.C. § 6(3). The Commission may, however, choose to suspend the effectiveness of newly filed rates for as much as seven months, in order to investigate the lawfulness of the rate. 49 U.S.C. § 15(7). At the end of seven months, the carrier-proposed rates go into effect by operation of law unless the Commission has completed its investigation and affirmatively disapproved the new rates. *Ibid*. Prior decisions of this Court confirm the Commission's broad discretion in the exercise of its power of suspension; judicial review of suspension action or inaction is most severely limited, if not foreclosed. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963); *Board of Railroad Comm'rs* v. *Great Northern R. Co.*, 281 U.S. 412, 429 (1930).

Against this legal background and prodded by [Publisher's note: There should be an "an" here.] increasingly precarious financial condition, the railroads, on December 13, 1971, asked the Commission for leave to file on short notice a 2.5% surcharge on nearly all freight rates. The railroads asked that the surcharge be effective as of January 1, 1972. The surcharge was conceived as an interim emergency means of increasing railroad revenues by some $246 million per year, a sum the railroads describe as slightly less than one-sixth of the increased expenses incurred annually since the last general ratemaking proceedings. Selective increases on a more permanent basis would follow.

By order dated December 21, 1971, the Commision [Publisher's note: "Commision" should be "Commission". But see 409 U.S. at 1209.] denied the railroads' request to make the 2.5% surcharge effective as of January 1, 1972. The Commission stated that it was aware of the carriers' need for additional revenues, but concluded that publication

of the interim surcharge on short notice "would preclude the public from effective participation" in proceedings to evaluate the surcharge. 340 I.C.C., at 361. The Commission did, however, rule that the railroads might refile their proposed surcharge on January 5, 1972, to be effective no earlier than February 5, 1972.

On January 5, 1972, the railroads filed tariffs to put the 2.5% surcharge into effect on February 5. SCRAP and other environmental groups asked the Commission to suspend the surcharge for the statutory seven-month period. They opposed the across-the-board surcharge on the ground that the present railroad rate structure discourages the movement of "recyclable"[2] goods in commerce and that every across-the-board increase would further increase disincentives to recycling. The environmental groups contended that added disincentives to recycling would result in the increased degradation of the natural environment by discarded, unrecycled goods and in the increased exploitation of scarce natural resources. At a minimum, SCRAP objected to the Commision's [Publisher's note: "Commision's" should be "Commission's".] failure to issue an "impact statement" evaluating the effect of the 2.5% surcharge on the shipment and use of recyclable materials. SCRAP contended that such a statement was required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. Section 102(c) of NEPA requires an impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . ." 42 U.S.C. § 4332(c).[3]

[2] At the time of filing this stay application, there was disagreement between the parties over the meaning of the term "recyclable," as it pertains to this lawsuit. The railroads apparently understood the term "in the sense of processing of goods to obtain either a product of the same kind or a previous state of the product." SCRAP's list of recyclable products, the railroads say, includes products that are "not recyclable in any sense that the railroads understand that term, but merely involve the familiar circumstances by which one usable product is derived from another." See p. 9, *infra*. [Publisher's note: See 2 Rapp at 541.]

[3] Section 102(c) of NEPA provides, in pertinent part:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United

The railroads took the position that interim application of the across-the-board surcharge would not "significantly affect the quality of the human environment" within the meaning of NEPA. The railroads pointed out that the 2.5% surcharge would apply equally to all products; that past experience indicated little likelihood of reduced shipments of recyclable materials as a result of the across-the-board rate revision; that the increase was small relative to the normal increase approved in general freight rate revision cases; and that the increase would be short-lived.

By order dated February 1, 1972, the Commission announced that it would not suspend the 2.5% surcharge. It would, in effect, allow the surcharge to go

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States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

• • • • •

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

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

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

"(iii) alternatives to the proposed action,

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

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

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . ."

into effect on February 5 and terminate on June 5, 1972. The order specifically stated the Commission's view that the surcharge would "have no significant adverse effect on the movement of traffic by railway or on the quality of the human environment within the meaning of the Environmental Policy Act of 1969." The Commission's order of February 1 further provided that the Commission would not resume the investigation begun by its December 21 order until the railroads asked to file the promised selective 4.1% rate increase. After that tariff was filed, on April 24, the Commission suspended the 4.1% selective increase for the statutory seven-month period until November 30, 1972. Since the original June 5 expiration date for the surcharge had assumed that selective increases would become effective by that time, the Commission's order suspending the 4.1% selective increase eliminated the June 5 surcharge expiration date. The railroads then modified the temporary surcharge tariffs so that the 2.5% surcharge will expire on November 30, 1972, unless the 4.1% selective increase is approved prior to that time. The Commission's study of the proposed selective rate increase is still in progress and will include an environmental impact statement.

(2)

SCRAP filed suit on May 12, 1972, in the United States District Court for the District of Columbia, seeking, among other relief requested, a preliminary injunction to require the Commision [Publisher's note: "Commision" should be "Commission".] to prevent the railroads from further collecting the 2.5% surcharged.[4] Other environmental groups and the railroads were allowed to intervene as a matter of right. The primary thrust of SCRAP's suit was that the Commission's orders, permitting and then extending the 2.5% surcharge, constituted "major Federal action significantly affecting the

[4] A three-judge court was convened to hear the case. See 28 U.S.C. §§ 2325, 2284.

quality of the human environment." The plaintiffs argued that the Commission's action was unlawful because the Commision [Publisher's note: "Commision" should be "Commission".] had not issued an environmental impact statement as required by NEPA. On July 10, 1972, the District Court issued a preliminary injunction enjoining the railroads from collecting the 2.5% surcharge on shipments originating after July 15, 1972, "insofar as that surcharge relates to goods being transported for purposes of recycling, pending further order of this court." In its opinion, the District Court rejected the Government's contention that SCRAP and its fellow plaintiffs lacked standing under this Court's decision in *Sierra Club* v. *Morton*, — U.S. — (1972). The Court's opinion noted that the SCRAP plaintiffs had alleged "that its members use the forests, streams, mountains, and other resources in the Washington [D.C.] area for camping, hiking, fishing, and sightseeing, and that this use is disturbed by the adverse environmental impact cause [*sic*] by nonuse of recyclable goods." Op., at 8. This allegation, said the District Court, removed this case from the ambit of *Sierra Club*, "where the Sierra Club failed to allege 'that its members use Mineral King for any purpose, much less that they use it any way that would be significantly affected by the proposed actions of the respondents.'" *Id.*, quoting from — U.S., at —.

Having thus dealt with our decision in *Sierra Club*, the District Court focused on *Arrow Transportation*, *supra*, and related cases[5] drastically curtailing the juris-

[5] *E.g.*, *Albama* [Publisher's note: "*Albama*" should be "*Alabama*".] *Power Co.* v. *United States*, 316 F. Supp. 337 (D.C. 1969), and *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (SDNY 1969), both aff'd by an equally divided court, 400 U.S. 73 (1970); *Electronics Industries Assn.* v. *United States*, 310 F. Supp. 1286 (D.C. 1970), aff'd mem., 401 U.S. 967 (1971); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (MD Fla. 1956); aff'd mem., 352 U.S. 1021 (1957); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (ED Va. 1935).

diction of the federal courts to review the suspension power of the Interstate Commerce Commission. "The thrust of the doctrine," reasoned the District Court, "seems to be that judicial review is available only when the rates in question are Commission-made rather than carrier made." Op., at 10. The District Court noted that the present case was not one "where the Commission merely stands silently by and allows carrier-made rates to take effect without suspension." The Commission had found the surcharge rates just and reasonable, and it had authored a detailed set of conditions on approval of the rates without suspension. The District Court concluded that "[a] suspension decision which effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates. . . . [S]uch orders are, of course, judicially reviewable." Op., at 11.

Yet the District Court found it unnecessary to decide the degree of Commission involvement in effectuating the 2.5% surcharge. The court held that "NEPA implicitly confers authority on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements, even if jurisdiction to review this action is otherwise lacking." The federal courts would have jurisdiction to review, and to enjoin, "even a mere failure to suspend rates which are wholly carrier-made so long as the review is confined to a determination as to whether the procedural requisites of NEPA have been followed." Op., at 11 n. 11. Recognition of this jurisdiction would not undermine the *Arrow* decision, because "judicial insistence on compliance with the nondiscretionary procedural requirements of NEPA in no way interferes with the Commission's substantive discretion" to suspend rates pending investigation and final action.

Turning to the merits, the court held that the Commission's decision not to suspend was a "major federal

action" within the meaning of NEPA. An impact statement would be required whenever an action "*arguably* will have an adverse environmental impact." (Emphasis in original.) The Commission could not escape preparation of a statement by "so transparent a ruse" as its "single sentence" affirmation that the 2.5% surcharge would have no significant adverse environmental effect. This finding is "no more than glorified boilerplate," and the Commission "has failed to prove [its] truth."

Finally, the District Court concluded that the balance of equities in this case tipped in favor of preliminary relief. Any damage to the environment would likely be irreparable. But "the damage done to the railroads by granting the injunction, while clearly non-frivolous, is not overwhelming." Without opinion, the District Court declined to stay its preliminary injunction pending appeal.

(3)

It is likely that the questions to be presented by this appeal "are of such significance and difficulty that there is a substantial prospect that they will command four votes for review" when the full Court reconvenes for the October 1972 Term. *Kake* v. *Egan*, 80 S. Ct. 33, 4 L. Ed. 2d 34 (1959) (opinion of MR. JUSTICE BRENNAN as Circuit Justice). The decision below may present a serious question of standing to sue for the protection of environmental interests. *Sierra Club.* [Publisher's note: The period preceding this note is surplus. But see 409 U.S. at 1215.] v. *Morton*, *supra*. The decision may be read as undermining our *Arrow* decision and in that respect may conflict with the reasoning of the Second Circuit in *The Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir., 1971). Most important, the decision may have the practical effect of requiring the Commission to file an impact statement whenever it exercises its statutory suspension powers. This requirement is significant because it would likely apply to each of the cluster of

federal agencies presently exercising suspension powers comparable to that of the Interstate Commerce Commission.[6]

For these reasons, I would not be prepared to conclude that the Court would dispose summarily of the dispute underlying this stay application. I must, therefore, consider whether allowing or staying the preliminary injunction is most likely to insure fair treatment for the interests of the parties and the public until the full Court acts. On the allegations of the parties some injury will occur whichever course is taken. Those opposing the stay naturally point to the large weight to be given to the District Court's evaluation or "balancing" of the equities.

The harm to the railroads, and to the overall public interest in maintaining an efficient transportation network, is immediate and direct. Badly needed revenues will be lost at once, and there is little likelihood that they can be recouped. The railroads originally estimated the loss at $500,000 per month, but they have revised that estimate upwards by several times since advised by SCRAP that it attaches an unexpectedly broad interpretation to the District Court's injunction. Unlike the District Court, I find it difficult to dismiss this certain loss of at least one and perhaps several millions of dollars simply because it is "not overwhelming" relative to the total revenues to be derived from the surcharge. Nor is it sufficient to discount the lost revenues because they might have to be disgorged if found unreasonable by the Commission at a later date. The chances of such a ruling are, again, only speculative. As a general premise for evaluation, the possibility of rebate suggests equally

[6] Among suspension provisions enacted by Congress since § 15(7) are 49 U.S.C. §§ 316(g), 318(c) (Motor Carrier Act); 49 U.S.C. §§ 907(g), (i) (Water Carrier Act); 49 U.S.C. § 1006(e) (Freight Forwarders Act); 47 U.S.C. § 204 (Federal Communications Act); 16 U.S.C. § 834d(e) (Federal Power Act); 15 U.S.C. § 717c(e) (Natural Gas Act); and 49 U.S.C. § 1482(g) (Federal Aviation Act). *See Arrow Transportation Co.* v. *Southern R. Co.*, *supra*, at 666 n. 13.

that economic decision makers would not regard the surcharge as significant.

On the other hand, the District Court was convinced that harm to the environment might result from allowing the railroads to collect the 2.5% surcharge on recyclable goods pending disposition of their appeal in this Court. The District Court concluded that any such harm would likely be irreparable, since, as the court explained, "once raw materials are unnecessarily extracted from the ground and used they cannot be returned from whence they came."[7] This eventuality is premised on the following projected chain of events:

> (a) The railroads will collect the 2.5 percent surcharge on recyclable, as well as all other materials.
>
> (b) Because recyclable materials are already discriminated against in freight rates, the surcharge further increases rate disparities and, in any event, raises the absolute cost of transporting recyclable materials, often a high proportion of their total cost.
>
> (c) This increase in cost will result in decreased demand for recyclable materials.
>
> (d) This decrease in demand will be counterbalanced by an increased demand for new or unrecycled materials.
>
> (e) This increased demand for new materials will result in extraction of natural resources not otherwise planned.

There is evidence in the record arguably supporting this forecast of the consequences of increasing freight rates on recyclable goods in common with others.

[7] In evaluating the possibility of irreparable harm to the environment, the District Court did not mention the danger of increased disposal of recyclable materials. The District Court had adverted to this problem earlier in its opinion. Since the lower court did not premise its action on this possibility, it apparently concluded that any short-range harm to the environment caused by increased disposal would not be irreparable.

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.

A district court of three judges has considered this application for a stay pending appeal and has concluded that the stay should be denied. The criteria for granting a stay of the judgment of such a district court are stringent. "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 (1929); *Railway Express Agency* v. *United States*, 82 S. Ct. 466, 7 L. Ed. 2d 432 (1962) (opinion of Mr. Justice Harlan as Circuit Justice). I cannot say the District Court's action can be equated with an abuse of discretion because it decided that there was danger to the environment outweighing the loss of income and consequent financial threat to the railroads. Notwithstanding my doubts of the correctness of the action of the three-judge District Court, as Circuit Justice, acting alone, I incline toward deferring to their collective evaluation and balancing of the equities.

Reluctantly, I conclude that the applications for stay pending appeal should be denied.

[Publisher's note: See 409 U.S. 1219 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–150

Anthony Joseph Russo, Jr., and Daniel Ellsberg, Applicants,	)	
v.	)	Application for Stay.
William Matthew Byrne, Jr., Judge of the United States District Court for the Central District of California	)	

[July 29, 1972]

MR. JUSTICE DOUGLAS, Circuit Justice.

The question raised by this application for stay presents a profoundly important constitutional question not squarely decided by the Supreme Court but ruled upon by the District Court and by the Court of Appeals in a way that is seemingly out of harmony with the import of our decisions.

The electronic surveillance used by the government was represented to me on oral argument as being in the "foreign" field. No warrant, as required by the Fourth Amendment and by our decisions, was obtained, only the authorization by the Attorney General. Such authorization was held insufficient in our recent decision in *United States* v. *United States District Court for the Eastern District of Michigan*, — U.S. — (1972). It is argued that that case involved "domestic" surveillance but the Fourth Amendment and our prior decisions, to date at least, draw no distinction between "foreign" and "domestic" surveillance. Whether such a distinction will eventually be made is for the Court, not for me, to make. Moreover, in light of the casual way in which "foreign" as distinguished from "domestic" surveillance was used on oral argument it may be that

we are dealing only with a question of semantics. Defendants' telephonic communications, it seems, were not tapped, nor were those of their attorney or consultants. But a conversation or several conversations of counsel for defendants were intercepted.

The District Court in an *in camera* proceeding ruled that those conversations were not relevant to any issues in the present trial. The Court of Appeals, as I read its opinion, ruled that the defendants—*i.e.*, petitioners who make this application—have no "standing" to raise the question. If, however, the interceptions were "relevant" to the trial, it would seem they would have "standing."

Therefore it would seem to follow from the reasoning of the Court of Appeals that whether or not there was "standing" would turn on the merits. The case, viewed in that posture, would seem to require an adversary hearing on the issue of relevancy. We held, in *Alderman* v. *United States*, 394 U.S. 165, 182 (1968), that the issue of relevancy should not be resolved *in camera*, but in an adversary proceeding. *Alderman* would be greatly undercut if the issue of relevancy could be resolved *in camera*, and if the trial court ruled against the defendants on the merits and then determined they had no "standing" to complain.

I seriously doubt if the ruling of the Court of Appeals on "standing" accurately states the law. In modern times the "standing" of persons or parties to raise issues has been greatly liberalized. Our Court has not squarely ruled on the precise issue here involved. But it did rule in *Flast* v. *Cohen*, 392 U.S. 83, 103 (1967), that one who complains of a violation of a First Amendment right has "standing." On oral argument *Flast* was distinguished from the present one on the ground that under the Fourth Amendment only those whose premises have been invaded or whose conversations have been intercepted have standing to complain of unconstitutional searches and

seizures. That contention, however, does not dispose off this case.

The constitutional right earnestly pressed here is the right to counsel guaranteed by the Sixth Amendment. That guarantee obviously involves the right to keep the confidences of the client from the ear of the government, which these days seeks to learn more and more of the affairs of men. The constitutional right of the client of course extends only to his case, not to the other concerns of his attorney. But unless he can be granted "standing" to determine whether his confidences have been disclosed to the powerful electronic ear of the government, the constitutional fences protective of privacy are broken down.

My authority is to grant or deny a stay, not to determine whether the Court of Appeals is right or wrong on the merits. If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions or questions or transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted.

I am exceedingly reluctant to grant a stay where the case in a federal court is barely underway. But conscientious regard for basic constitutional rights guaranteed by the Fourth and Sixth Amendments makes it my duty to do so.

If the law under which we live and which controls every federal trial in the land is the Constitution and the Bill of Rights, the prosecution, as well as the accused, must submit to that law.

[Publisher's note: See 409 U.S. 1222 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–179

The Republican State Central Committee of Arizona et al.	)	Application for Stay.
v.	)	
The Ripon Society Inc. et al.	)	

[August 16, 1972]

MR. JUSTICE REHNQUIST, Circuit Justice.

I am asked to stay the effect of an injunction entered by the United States District Court for the District of Columbia, which prohibited the Republican National Party's 1972 convention from adopting a certain mode of allocating delegates to that party's convention in 1976. On August 11 JUSTICE DOUGLAS denied a stay, and that application has been renewed to me.

Since 1948 the Republican National Party has adopted at each presidential nominating convention a formula for allocating among the States delegates to the next convention. This formula has included a "bonus" of six delegates awarded to each State that cast its electoral college votes for the Republican presidential nominee in the previous presidential election, or has elected a Republican senator, governor, or Republican majority of its congressional delegation at any election within the previous four years. Respondents filed suit in the United States District Court for the District of Columbia, asking for a declaratory judgment that such a "bonus" system of allocating delegates was unconstitutional, and asking that the Republican National Party be enjoined from adopting such a formula at its 1972 nominating convention. The District Court, in reliance upon *Georgia* v. *National Democratic Party*, — U.S.

App. D.C. —, 447 F.2d 1271 (1971), cert. denied, 404 U.S. 858 (1971), and *Bode* v. *National Democratic Party*, 452 F.2d 1302, — U.S. App. D.C. — (1971), cert. denied, 404 U.S. 1019 (1972), held that allocation of delegates was state action, and that the complaint before it was justiciable. Agreeing with the Republican Party that, for a system that elects Presidents by casting a State's electoral votes in a bloc, a bonus system of delegate allocation is reasonable to encourage Republican victories within each State, the District Court nonetheless held the allocation of six delegates without regard to the size of the State or its electoral college vote, to be a denial of equal protection. It therefore entered the following injunction:

> "That Defendants are hereby enjoined from adopting at the 1972 Republican National Convention a formula for apportionment of delegates to the 1976 Convention which would allocate a uniform number of bonus delegates to states qualifying for them, with no relation to the state's electoral college votes. Republican votes cast in certain specified elections, or some combination of these factors."

After an appeal was perfected these applicants moved the United States Court of Appeals for the District of Columbia Circuit for leave to intervene and for a stay of the District Court's injunction. Intervention was granted, but a divided panel of the District of Columbia Circuit, on August 3, denied a stay without opinion. Respondents do not now challenge the right of the petitioners, state central committees of the Republican Party, to seek a stay from this Court. With the Republican National Convention scheduled to commence August 21, prompt action is requested on the ground that an unreviewed court injunction threatens direct intervention with the conduct of the convention, in a manner similar to that confronting this Court in *O'Brien* v. *Brown*, — U.S. — (1972).

As we said in *O'Brien*, *supra*, an application for a stay calls "for a weighing of three basic factors: (a) whether

irreparable injury may occur absent a stay; (b) the probability that the [District Court] was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the [injunction]." Petitioners contend that to leave the injunction in effect will work irreparable injury because the Republican Party has always allocated delegates to its next convention at the current convention, and has no machinery for amending that formula. Therefore, they say, the injunction will permanently preclude the adoption of a "bonus" formula, regardless of whether the District Court is reversed. Respondents allege that no irreparable injury will occur, because the convention can either provide amendatory procedures for use in the event that the bonus formula is vindicated on appeal, or they can adopt a contingent delegate allocation plan, to take into account the pending federal court proceedings. But to allow the injunction to stand would have at least some impact on the deliberations and decisions of the Republican National Convention akin if not identical to that we found in *O'Brien*, *supra:*

> "Absent a stay, the mandate of the Court of Appeals denies to the Democratic National Convention its traditional power to pass on the credentials of the California delegates in question. The grant of a stay, on the other hand, will not foreclose the Convention's giving the respective litigants in both cases the relief they sought in federal courts." — U.S., at —.

In the case at bar, of course, we deal with a delegate allocation dispute that retains importance until 1976, rather than a credentials dispute such as was involved in *O'Brien* v. *Brown*, which would mean nothing after the close of the 1972 Democratic Convention. If the injunction of the District Court were to compel the 1972 Republican Convention to eschew a bonus allocation

formula which it would otherwise have chosen, this case will be moot. There will be no controversy left to review. On the other hand, to stay the injunction pending review will permit the respondents to make their case before the convention, and assuming the bonus formula is adopted, will preserve to petitioners judicial review of the District Court's order declaring the bonus formula unconstitutional. If that order should be affirmed, I have no doubt that appropriate remedies are available to insure that the Republican National Party delegate allocation is in conformity with the order, or that the party would take whatever steps are necessary to bring its allocation formula into conformity with the order. The fact that a stay here, instead of precluding any judicial review of the final action of the Republican National Convention, as could have been the result of the action taken in *O'Brien*, *supra*, preserves these issues for review in a manner conducive to careful study and consideration is itself a reason to stay the injunction which was not present in *O'Brien*.

A second reason for staying the effect of the District Court's injunction is drawn from the probability of error in the result below. The District Court did not have the benefit of this Court's writing in *O'Brien*, *supra*, at the time it entered its order and injunction [Publisher's note: There should be a period here. But see 409 U.S. at 1226.] There we said:

> "No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, [Publisher's note: The comma preceding this note is surplus. But see 409 U.S. at 1226.] relationships of great delicacy and [Publisher's note: The "and" preceding this note should be "that are".] essentially political in nature. Cf. Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See Irish v. Democratic-Farmer-Labor

> Party of Minnesota, 399 F.2d 119 (CA8 1968), affirming, 287 F. Supp. 794 (D.C. [Publisher's note: The "D.C." preceding this note is surplus.] Minn. 1968), and cases cited; Lynch v. Torquato, 343 F.2d 370 (CA3 1965); Smith v. State Exec. Comm. of Dem. Party of Ga., 288 F. Supp. 371 (N.D. Ga. 1968). Cf. Ray v. Blair, 343 U.S. 214, 72 S. Ct. 654, 96 L. Ed. 894 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this unique context. [Publisher's note: The simplest way to make sense of the sentence preceding this note is to delete "if so". But see 409 U.S. at 1226.] Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals." — U.S. —. [Publisher's note: The case names in this paragraph are not italicized here, but they are italicized in *O'Brien* v. *Brown*, 409 U.S. 1, 4-5 (1972).]

While I have authority to grant a stay in this case, 28 U.S.C. § 1651(a), *Johnson* v. *Stevenson*, 335 U.S. 801 (1948), the fact that such relief has been successively denied by the District Court, the Court of Appeals, and MR. JUSTICE DOUGLAS counsels circumspection not withstanding the foregoing observations. See, *e.g.*, *Stickney* v. *Texas*, 82 S. Ct. 465, 7 L. Ed. 2d 435 (1962) (DOUGLAS, J.). Weighing these competing and frequently imponderable factors as best I can, I have concluded that this case follows so closely on the heels of *O'Brien* and resembles it in so many relevant particulars that the injunctive aspect of the District Court order should be

stayed. Accordingly, I have this day entered an order staying that portion of the order of the District Court which enjoins the 1972 Republican National Convention from adopting a "bonus" formula for allocating delegates to the 1976 convention.

[Publisher's note: See 409 U.S. 1228 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–250
(In re Case No. 72–167)

Ann Gunter Drummond et al.	)	
v.	)	Reapplication for Stay.
Robert L. Acree et al.	)	

[September 1, 1972]

MR. JUSTICE POWELL, Circuit Justice.

This application, filed by parent-intervenors in this school desegregation case from Richmond County (Augusta), Georgia, seeks a stay of a judgment of the Court of Appeals for the Fifth Circuit. That court, on March 31, 1972, affirmed an order of the United States District Court for the Southern District of Georgia adopting a plan for the desegregation of 29 elementary schools in Augusta. *Acree* v. *County Board of Education of Richmond County*, 458 F.2d 486 (1972). After the Fifth Circuit's affirmance, I denied a stay because that relief had not been requested from the appropriate Court of Appeals as required by Rule 27 of the Supreme Court Rules. Applicants immediately sought a stay from the Fifth Circuit, which was denied.[1] Applicants have now reapplied to me.

This reapplication is premised solely on the contention that a stay is required under § 803 of the Education Amendments of 1972. That section reads in pertinent part as follows:

> "in the case of any order on the part of any United States District Court which requires the transfer or transportation of any student . . . *for the purpose of achieving a balance among students with respect to race* . . . , the effectiveness of such order shall

[1] A stay was also denied by the United States District Court for the Southern District of Georgia on August 18, 1972.

> be postponed until all appeals . . . have been exhausted . . . ." Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972) (emphasis added).

By its terms, the statute requires that the effectiveness of a district court order be postponed pending appeal only if the order requires the "transfer or transportation" of students "for the purpose of achieving a balance among students with respect to race." It does not purport to block all desegregation orders which require the transportation of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result.

In § 802(a), which precedes § 803, Congress prohibited the use of federal funds to aid in any program for the transportation of students if the design of the program is to "overcome racial imbalance" or to "*carry out a plan of desegregation*." Education Amendments of 1972, Pub. L. 92-318, § 802(a) (June 23, 1972) (emphasis added). It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of federal funds for the transportation of students under *any* desegregation plan but limited the stay provisions of § 803 to desegregation plans that seek to achieve racial balance.

In light of this Court's holding in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it could hardly be contended that Congress was unaware of the legal significance of its "racial balance" language. In that case the school authorities argued that § 407(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, restricted the power of federal courts in prescribing a method for correcting state-imposed segregation. THE CHIEF JUSTICE'S interpretation of § 407(a), which applies only to orders "seeking to achieve a racial balance," is controlling here:

> "The proviso in [§ 407(a)] is in terms designed to foreclose any interpretation of the Act as expanding

> the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from the courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." 402 U.S., at 17-18 (emphasis in original).

In short, as employed in § 407(a), the phrase "achieve a racial balance" was used in the context of eliminating "de facto segregation." The Court went on to caution lower federal courts that, in the exercise of their broad remedial powers, their focus must be on dismantling dual school systems rather than on achieving perfect racial balance: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U.S., at 24. This was said not in condemnation of existing techniques but in disapproval of the wooden resort to racial quotas or racial balance. Nothing in the instant statute or in the legislative history suggests that Congress used these words in a new and broader sense. At most, Congress may have intended to postpone the effectiveness of transportation orders in "de facto" cases and in cases in which district court judges have misused their remedial powers.

The question, therefore, must be whether the lower court order in this case was for the purpose of achieving a racial balance as that phrase was used in *Swann*. This question was resolved in the negative by the Court of Appeals. Applicants claimed on their appeal that the District Court order called for "'forced busing' to achieve racial balance." 458 F.2d, at 487. The court rejected that contention, citing the holding in *Swann* that bus

transportation is one of the permissible techniques in effecting school desegregation.[2]

For the purpose of acting on this application, I accept the holdings of the courts below that the order was entered to accomplish desegregation of a school system in accordance with the mandate of *Swann* and not for the purpose of achieving a racial balance. The stay application must, therefore, be denied.

It is so ordered.

[2] For a complete history of this litigation see the most recent opinion of the District Court. *Acree* v. *Drummond*, 336 F. Supp. 1275 (1972).

[Publisher's note: See 409 U.S. 1232 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A–49 AND A–80

Kenneth Tierney	)	
A–49 *v.*	)	
United States.	)	
	)	Applications for Bail.
Mathias Reilly et al.	)	
A–80 *v.*	)	
United States.	)	

[September 12, 1972]

MR. JUSTICE DOUGLAS, Associate Justice.

These are applications for bail which raise the questions comparable to those presented in *In re Beverly*, A–31, in which I granted bail.

In the present cases there was electronic surveillance of a telephone which a court had approved pursuant to 18 U.S.C. § 2518. During that surveillance a conversation of petitioners' attorney was intercepted.

Petitioners were testifying before a grand jury having been granted immunity under 18 U.S.C. § 6002 and § 6003. On refusing to answer certain questions propounded, they were committed for civil contempt.

The standard for bail in civil contempt proceedings is set forth in 28 U.S.C. § 1826(b) which specifies that bail shall be granted if the issues are not frivolous and if the appeal is not taken for delay. Here the immunity granted the petitioners was a so-called "use" immunity as distinguished from the "transactional" immunity which some of us thought was required when the issue was before us last Term in *Kastigar et al.* v. *United States*, 406 U.S. 441.

It is now argued that petitioners have obtained all the immunity to which they were constitutionally entitled

and that there is no longer an attorney-client privilege to be protected. Hence it is argued that the Sixth Amendment right to counsel which weighed heavily with me in *Russo and Ellsberg* v. *Byrne* (in which I granted a stay on July 29, 1972) is not relevant here.

I accept of course the Court decision that only "use" immunity, not "transactional" immunity, is the constitutional standard under the Fifth Amendment. The fact remains, however, that the "leads" obtained from testimony given after the "use" immunity has been granted can be used to indict and convict the petitioners. It seems to me therefore that the attorney-client privilege does continue and indeed may be much more vital to the petitioners than it would have been had the "transactional" immunity been the one adopted by the Court.

The question remains whether a search warrant issued for electronic surveillance under the Fourth Amendment can invade the domain of the Sixth Amendment and destroy the attorney-client relation. That is an exceedingly serious question on which this Court has not spoken.

Beyond those two questions there is a further one—whether on the issue of relevance an *in camera* proceedings [Publisher's note: "proceedings" should be "proceeding".] is adequate or whether an adversary hearing is required. That is the question central to both [Publisher's note: The "both" preceding this note is surplus. But see 409 U.S. at 1233.] *Russo and Ellsberg*, to *In re Beverly*, and to the present two cases.

Hence in spite of the fact that my Brother POWELL has heretofore denied bail in these cases, I have reluctantly concluded that the requisite for bail in civil contempt cases, 28 U.S.C. § 1826(b), has been satisfied here.

[Publisher's note: See 409 U.S. 1235 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–378

Communist Party of Indiana et al., Petitioners,	)	
v.	)	Application for Stay.
Edgar D. Whitcomb, Governor of Indiana, et al.	)	

[October 6, 1972]

MR. JUSTICE REHNQUIST, Associate Justice.

Petitioners have filed a motion denominated as an "Application for Stay of Order of United States District Court of the Northern District of Indiana, Hammond Division," which order was entered following a hearing on their complaint alleging that the oath required by Indiana law in order for a party to be placed on the ballot was unconstitutional. An examination of petitioners' application, however, shows that they do not seek a stay of that order, but instead a partial summary reversal of the District Court order entered on October 4, 1972. While a Circuit Justice of this Court apparently has authority under Supreme Court Rule 51 to grant such relief in the form of a mandatory injunction, usage and practice suggest that this extraordinary remedy be employed only in the most unusual case. In order that it be available, the applicants' right to relief must be indisputably clear. Petitioners do not present such a case, and their application is therefore denied.

[Publisher's note: See 409 U.S. 824 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. 71–288

[Publisher's note: In the original, the line below the case number is half the length of the line above the case number.]

Melvin R. Laird, Secretary of Defense, et al., Petitioners, *v.* Arlo Tatum et al.

[October 10, 1972]

Memorandum of MR. JUSTICE REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.[1]

Respondents contend that because of testimony which I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its

[1] In a motion of this kind, there is not apt to be anything akin to the "record" which supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters which form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

hearings on "Federal Data Banks, Computers and the Bill of Rights," and because of other statements I made in speeches related to this general subject, I should have disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U.S.C. § 455 which provides:

> "Any Justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, or appeal, or other proceeding therein."

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration.[2]

Respondents in their motions summarize their factual contentions as follows:

> "Under the circumstances of the instant case, MR. JUSTICE REHNQUIST'S impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department and [Publisher's note: "and" should be "in".] Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."

[2] See Executive Report No. 91-92, 91st Cong., 1st Sess., Nomination of Clement F. Haynsworth, Jr., pp. 10-11.

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my "intimate knowledge of the evidence underlying the respondents' allegations" seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the Department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the Department, but with those in other areas of the Department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

> "As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understandings . . . ." Hearings, p. 619.

There is one reference to the case of *Tatum* v. *Laird* in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin. The former appears as follows in the reported hearings:

> "However, in connection with the case of *Tatum* v. *Laird*, now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed."

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of *Laird* v. *Tatum*, other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement which I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in *Laird* v. *Tatum*, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the government's conduct of the case of *Laird* v. *Tatum*.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U.S.C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, [or] is a material witness . . . ."

Since I have neither been of counsel nor have I been a material witness in *Laird* v. *Tatum*, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of MR. JUSTICE WHITE shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both *United States* v. *District Court*, — U.S. — (1972), for which I was not officially responsible in the Department but with respect

to which I assisted in drafting the brief, and in *S & E Contractors* v. *United States*, — U.S. — (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of *Laird* v. *Tatum*, the application of such a rule would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale Law Journal 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law and Contemporary Problems 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

> "Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various departmental divisions, there is almost no connection." Frank, *supra*, 35 Law & Contemporary Problems, at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very similar situations differently. In *Schneiderman* v. *United States*, 320 U.S. 118 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U.S., at 207.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of *Laird* v. *Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be, should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Chief Justice Stone, testifying before the Judicial Committee in 1943, stated:

> "And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court

> of appeals judge, it was our manifest duty to take the same position." Hearings Before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess. (1943), quoted in Frank, *supra*, 56 Yale Law Journal, at 612.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S. Rep. No. 884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, *United States* v. *Darby*, 312 U.S. 100 (1941), and in later cases construing it, including *Jewel Ridge Coal Corp.* v. *Local 6167, UMW*, 325 U.S. 161 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. "The Labor

[3] See denial of petition for rehearing in *Jewel Ridge Coal Corp.* v. *Local 6167, UMW*, 325 U.S. 897 (1945) (Jackson, J., concurring).

Injunction" which he and Nathan Green co-authored was considered a classical [Publisher's note: "classical" should be "classic".] critique of the abuses by the federal courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, *United States* v. *Hutcheson*, 312 U.S. 219 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in *McGrath* v. *Christensen*, 340 U.S. 162 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U.S., at 176. Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled "Liberty, Property, and Social Justice" he discussed at some length

the doctrine expounded in the case of *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1922). I think that one would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209-211. Nine years later, Chief Justice Hughes authored the Court's opinion in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), in which a closely divided Court overruled *Adkins*. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." Frank, *supra*, 35 Law & Contemporary Problems, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Christensen would have preferred not to argue before Mr. Justice Jackson;[4] that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

MR. JUSTICE DOUGLAS' statement about federal district judges in his dissenting opinion in *Chandler* v. *Judicial Council*, 398 U.S. 74, 137 (1970), strikes me as being equally true of the Justices of this Court:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the profferred [Publisher's note: "profferred" should be "proffered".] defense, and the like. Lawyers recognize this when they talk about

[4] The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in *Christensen* does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

> 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, *e.g.*, the opinion of Mr. Jus-

tice Harlan, joining in *Lewis* v. *Manufacturers National Bank*, 364 U.S. 603, 10 (1961). Indeed, there is weighty authority for this proposition even when the cases are the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See *Worcester* v. *Street R. Co.*, 196 U.S. 539 (1905), reviewing, 182 Mass. 49 (1902); *Dunbar* v. *Dunbar*, 190 U.S. 340 (1903), reviewing, 180 Mass. 170 (1901); *Glidden* v. *Harrington*, 189 U.S. 255 (1903), reviewing, 179 Mass. 486 (1901); and *Williams* v. *Parker*, 188 U.S. 491 (1903), reviewing, 174 Mass. 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." Frank, *supra*, 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.[5]

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualifi-

[5] In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

cation in this case. Having so said, I would certainly concede that fair minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*. *Edwards* v. *United States*, 334 F.2d 360, 362 (CA5 1964); *Tynan* v. *United States*, 376 F.2d 761 (CADC 1967); *In re Union Leader Corporation*, 292 F.2d 381 (CA1 1961); *Wolfson* v. *Palmieri*, 396 F.2d 121 (CA2 1968); *Simmons* v. *United States*, 302 F.2d 71 (CA3 1962); *United States* v. *Hoffa*, 382 F.2d 856 (CA6 1967); *Tucker* v. *Kerner*, 186 F.2d 79 (CA7 1950); *Walker* v. *Bishop*, 408 F.2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, *e.g.*, *Tinker* v. *Des Moines School District*, 258 F. Supp. 1971, affirmed by an equally divided court, 383 F.2d 988 (CA8 1967), certiorari granted and judgment reversed, 393 U.S. 503 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to

the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem one's self disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances.[6] Since one of the stated reasons for granting certiorari is to resolve a conflict among other federal courts or state courts, the frequency of such instances is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance. And since the notion of "public statement" disqualification which I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

The oath prescribed by 28 U.S.C. § 453 which is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice

[6] *Branzburg* v. *Hayes, In re Pappas,* and *United States* v. *Caldwell*, — U.S. — (1972), *Gelbard* v. *United States* and *United States* v. *Egan*, — U.S. — (1972), *Airport Authority* v. *Delta Airlines Inc.* and *Northeast Airlines Inc.* v. *Aeronautics Commission*, — U.S. — (1972).

without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him]. . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is, denied.[7]

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[7] Petitioners in *Gravel* v. *United States*, No. —, O.T. 1971, have filed a petition for rehearing which asserts as one of the grounds that I should have disqualified myself in that case. Because respondents' motion in *Laird* was addressed to me, and because it seemed to me to be seriously and responsibly urged, I have dealt with my reasons for denying it at some length. Because I believe that the petition for rehearing in *Gravel*, insofar as it deals with disqualification, possesses none of these characteristics, there is no occasion for me to treat it in a similar manner. Since such motions have in the past been treated by the Court as being addressed to the individual Justice involved, however, I do venture the observation that in my opinion the petition insofar as it relates to disqualification verges on the frivolous. While my peripheral advisory role in *United States* v. *New York Times*, — U.S. — (1971), would have warranted disqualification had I been on the Court when that case was heard, it could not conceivably warrant disqualification in *Gravel*, a different case raising entirely different constitutional issues.

[Publisher's note: See 409 U.S. 1236 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

ARTHUR P. WESTERMANN ET AL. *v.*
GARY K. NELSON, ATTORNEY GENERAL OF THE STATE OF ARIZONA, ET AL.

MOTION FOR INJUNCTION PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. A–412. October 20, 1972

MR. JUSTICE DOUGLAS, Circuit Justice.

Petitioners are candidates of the American Independent Party who complain of their inability to get on the ballot in Arizona for the November 7, 1972, election.

They brought suit in the District Court but their complaint was dismissed. They desire to appeal to the Court of Appeals but were denied a preliminary injunction by a judge of that court. They now apply to me as Circuit Justice.

The complaint may have merit. But the time element is now short and the ponderous Arizona election machinery is already underway, printing the ballots. Absentee ballots have indeed already been sent out and some have been returned. The costs of reprinting all the ballots will be substantial and it may well be that no decision on the merits can be reached by the Court of Appeals in time to reprint the ballots excluding petitioners, should they lose on the merits.

I have been unable to hear oral argument and have only the papers of the parties before me.

On the basis of these papers I have concluded that in fairness to the parties I must deny the injunction, not because the cause lacks merits but because orderly election processes would likely be disrupted by so late an action. The time element has plagued many of these election cases; but one in my position cannot act in a responsible way when the application is as tardy as this one.

So I deny the injunction.

[Publisher's note: This opinion was typed on sheets of plain paper.]

SUPREME COURT OF THE UNITED STATES

No. A–461.--October Term 1972

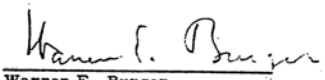
Finance Committee to Re-elect the President, et al.,	)
Petitioners	)
v.	)
Honorable Joseph C. Waddy United States District Court Judge United States District Court for the District of Columbia	)
Respondent	)

[October 31, 1972]

This matter came before the undersigned as Circuit Justice for the District of Columbia Circuit on the application of petitioners for an order staying commencement of trial in civil action 1780-82 in the U.S. District court for the District of Columbia under the title: Common Cause, et al. v. Finance Committee to Re-elect the President, et al.

Petitioners rest their Claim for extraordinary injunctive relief in the form of a stay of the trial on the grounds that the trial of said case will cause irreparable injury to petitioners and their supporters. It appearing, however, the injury to the petitioners can arise only

from an adverse judgment and that petitioners will have an adequate remedy at law by way of appeal and stay of judgment pending appeal, the motion for stay is hereby denied. October 31, 1972



Warren E. Burger
As Circuit Justice
District of Columbia Circuit

[Publisher's note: See 409 U.S. 1238 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–460

In the Matter of Berg et al.	)	Application for Stay and
	)	Bail Pending Appeal.

[November 2, 1972]

MR. JUSTICE DOUGLAS, Circuit Justice.

The Court of Appeals granted a stay in this case until 5:30 p.m. (p.s.t.) today. While the application was filed here October 28, 1972, I did not desire to act until the Solicitor General had time to respond. His response came in yesterday afternoon.

My conclusion is that the case is analogous to the *Ellsberg* case now before the Court; but is more particularly related to *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, 386 U.S. 385.

The issue of electronic surveillance in the present cases raises questions under the Sixth as well as the Fourth Amendment. Central is the question whether the unawareness of the prosecution is sufficient to bring to an end the judicial inquiry or whether some diligent search of the prosecution is necessary.[*] In *Black* a new trial was ordered even though the prosecutor did not know he had in his possession attorney-client conversations and even though none of them was used.

I have concluded to grant a stay, good until the matter can be presented to the full Court and until the Court acts on it.

[*] While the prosecution files [Publisher's note: "files" should be "filed".] affidavits that none of petitioners' conversations were "bugged," there had been no search for any conversations of their attorneys. It would seem that a client is an "aggrieved" person within the meaning of 18 U.S.C. §§ 2510(11) and 3504(a)(1) when and if the conversations of his attorney are "bugged" and used against him.

[Publisher's note: See 409 U.S. 1240 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–484

Edward F. O'Brien et al.	)	
v.	)	Application for Stay.
Albert Skinner, Sheriff, Monroe County, New York, et al.	)	

[November 6, 1972]

MR. JUSTICE MARSHALL, Circuit Justice.

Appellants, 72 prisoners in County Jail in Monroe County, New York, applied to me in my capacity as a Circuit Justice for a stay of a New York Court of Appeals judgment entered November 3, 1972.

The appellants are either convicted misdemeanants or persons who have been convicted of no crime but are awaiting trial. New York law makes no provision for the disfranchisement of these groups. Nonetheless, appellants allege that they have been prevented from registering to vote because correctional and election officials have refused to provide them with absentee ballots, refused to establish mobile voting and registration equipment at the prison, and refused to transport them to the polls. Appellants argue that this restriction on their right of franchise is not supported by the sort of "compelling state interest" which this Court has in the past required. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). They challenge the constitutionality of the New York statute which permits absentee voting by persons confined to state institutions by reason of physical disability but makes no provision for absentee voting by persons confined to state prisons after misdemeanor convictions or while awaiting trial.

In response, the State relies on this Court's decision in *McDonald* v. *Board of Election Commissioners*, 394

U.S. 802 (1969). In *McDonald*, we held that, under the circumstances of that case, the mere allegation that Illinois had denied absentee ballots to unsentenced inmates awaiting trial in the Cook County jail did not make out a constitutional claim. I am not persuaded, however, that *McDonald* governs this case. Cf. *Goosby* v. *Osser*, 452 F.2d 39 (CA3 1970), cert. granted, 408 U.S. 922 (1972). In *McDonald*, there was "nothing in the record to indicate that the Illinois statutory scheme [had] an impact on appellant's ability to exercise the fundamental right to vote." 394 U.S., at 807. We pointed out that the record was "barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.*, at 808, n. 6. Here, in contrast, it seems clear that the State has rejected alternative means by which appellants might exercise their right to vote. Deprivation of absentee ballots is therefore tantamount to deprivation of the franchise itself, and it is axiomatic that courts must "strictly scrutinize" the discriminatory withdrawal of voting rights. See, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 667, 670 (1964).

Compelling practical considerations nonetheless lead me to the conclusion that this application must be denied. Appellants waited until the last day of registration before submitting their registration statements to election officials, and they filed this application a scant four days before the election.

Moreover, neither party submitted to me the Court of Appeals opinion denying relief until 4 o'clock this afternoon, and I still do not have before me any written indication as to whether appellants have applied to the state court for a stay or as to the state court's disposition of any such application.

Even if it were possible to arrange for absentee ballots at this late date, election officials can hardly be expected to process the registration statements in the remaining time before the election. It is entirely possible that some of the appellants are disqualified from voting for other reasons or that, while qualified to vote somewhere in the State, they are not qualified to cast ballots in Monroe County. The States are, of course, entitled to a reasonable period within which to investigate the qualifications of voters. See *Dunn* v. *Blumstein*, *supra*, at 348.

Voting rights are fundamental, and alleged disfranchisement of even a small group of potential voters is not to be taken lightly. But the very importance of the rights at stake militate [Publisher's note: "militate" should be "militates".] against hasty or ill-considered action. This Court cannot operate in the dark, and it cannot require state officials to do the impossible. With the case in this posture, I conclude that effective relief cannot be provided at this late date. I must therefore deny the application.

[Publisher's note: See 409 U.S. 1243 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–705

William T. Farr,	)	Application for Release on
v.	)	Own Recognizance or Bail
Peter J. Pitchess, Sheriff of	)	Pending Appeal in United
Los Angeles County, California.	)	States Court of Appeals for
	)	the Ninth Circuit.

[January 11, 1973]

MR. JUSTICE DOUGLAS, Circuit Justice.

Petitioner Farr was a reporter for the Los Angeles Herald Examiner and published stories about the *Manson* trial, which was greatly publicized during the trial. The trial judge in the case had issued orders barring the litigants and their lawyers from giving certain information to the press. When the *Manson* trial was ended, the trial judge summoned Farr and asked him what the sources of his information were. Farr acknowledged that he had received the news story from two of the six attorneys of record in the *Manson* case and some of it from another individual who was subject to the order concerning publicity but who was not an attorney. Farr refused to disclose the names and was committed to prison for civil contempt. He obtained no relief in the state courts[1] and then brought federal habeas corpus which the District Court denied and, pending his appeal to the Ninth Circuit Court of Appeals, he has applied to me for bail or release on personal recognizance.

[1] The opinion of the California Court of Appeals, Second Appellate District, is reported in 22 Cal. App. 3d 60. The Supreme Court of California denied a hearing on March 27, 1972. This Court denied certiorari on November 13, 1972. 408 U.S. —.

Like the three cases decided in *Branzburg* v. *Hayes*, 408 U.S. 665, the present case involves civil, not criminal, contempt. *Branzburg*, however, involved refusal of a reporter to testify before a grand jury and reveal the sources of his news stories. The federal rule is that just as the power of Congress to commit a recalcitrant witness for civil contempt ends with the adjournment of that Congress, *Anderson* v. *Dann*, 6 Wheat. 204, 231, so does the power of the grand jury. *Shillitani* v. *United States*, 384 U.S. 364, 370-372.

What rule obtains in California is not clear; but it is intimated that theoretically at least imprisonment for civil contempt could be for life.

The commitment is defended on the ground that the trial court, armed with power to keep the trial free from prejudicial publicity, *Sheppard* v. *Maxwell*, 384 U.S. 333, has authority to discipline those who violated its order barring release of publicity. The necessity to make Farr talk was therefore held to be compelling.

California has a statute protecting a newsman from disclosing his sources of news and barring a court from holding him in contempt for refusal to disclose.[2] But the Court of Appeals held that it was inapplicable to the instant case because, while Farr was a newsman at the time he wrote the story, he had left that employment when he was questioned by the trial judge.

It is argued, in return, that the remedy of criminal contempt against those subject to the trial court's pub-

[2] Calif. Evid. Code § 1070 provides:

"A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, [Publisher's note: "or any person who has been so connected or employed," should appear here.] cannot be adjudged in contempt by a Court, the legislature, [Publisher's note: "Court" should be "court" and "legislature" should be "Legislature".] or any administrative body, for refusing to disclose the source of any information procured [Publisher's note: "while so connected or employed" should appear here.] for publication and published [Publisher's note: "and published" is surplus.] in a newspaper. [Publisher's note: A new paragraph should start here.] Nor can a radio or television news reporter or other person connected with or employed by a radio or television station [Publisher's note: ", or any person who has been so connected or employed," should appear here.] be so adjudged in contempt for refusing to disclose the source of any information procured [Publisher's note: "while so connected or employed" should appear here.] for and used [Publisher's note: "and used" should be replaced with "news".] or news commentary purposes on radio or television."

licity order is now out of reach because of the running of the statute of limitations on criminal contempt[3] and therefore that the present civil contempt proceedings against Farr serve no legitimate state interest. I have received a response from respondent which says that this is "purely a matter of state concern"—that "there is no statute of limitations" in California, for civil contempts. Whether this means that Farr could be imprisoned for life is not clear.

What the merits of the case may be is not in my province at this stage. The only question is whether the issue presented is a substantial one. Our *Branzburg* decision plainly does not cover it. Our denial of certiorari imparts no implication or inference concerning the Court's view of the merits, as Mr. Justice Frankfurter made clear in *Maryland* v. *Baltimore Rodeo Show Inc.*, 338 U.S. 912, 919.

The question, so far as I can tell, is not covered by any of our prior decisions. The case is a recurring one where the interests of a fair trial sometimes collide with the requirements of a free press. A fair trial requires that a jury be insulated from the barrage of prejudicial news stories that is sometimes laid down on the courtroom. It is said that in the present case the *Manson* jury was sequestered and so not subject to the kind of influence we condemned in *Sheppard* v. *Maxwell*.

The issue is not free from doubt. Yet since the precise question is a new one not covered by our prior decisions, I have concluded in the interest of justice to release Farr on his personal recognizance pending decision of his habeas corpus case by the Court of Appeals.

[3] Calif. Pen. Code § 166 provides that willful disobedience of a lawfully issued court order is a misdemeanor. Calif. Pen. Code § 801 provides a one year period of limitation from the commission of the crime to the filing of the indictment, information, or complaint.

[Publisher's note: See 412 U.S. 1201 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1124

	)	On Motion to Vacate Orders
Daniel Edward Henry et al.,	)	Staying District Court
Petitioners,	)	Judgment Pending
v.	)	Disposition of the Case by
Honorable John E. Warner et al.	)	the Court of Appeals
	)	for the Ninth Circuit.

[May 18, 1973]

MR. JUSTICE DOUGLAS, Circuit Justice.

The application for an order vacating the stay of the Court of Appeals is denied on the representations of the Solicitor General that the named petitioners in the case have all been released from confinement and that within the Central District of California no persons are currently confined in any military detention facility as a result of a conviction by summary court-martial without the aid of counsel. Whether the District Court has authority to issue a writ of habeas corpus for unnamed members of the class outside the District and [Publisher's note: Justice Douglas probably meant to put a slash between the "and" that precedes this note and the "or" that follows it.] or on a worldwide basis is so novel a question that an order granting such relief should be issued only after full argument. Application denied.

[Publisher's note: See 414 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–51 (72–1410)

Edelman et al., Petitioners,	)	
v.	)	Application for Stay.
Jordan et al.	)	

[July 19, 1973]

Memorandum of MR. JUSTICE REHNQUIST, Circuit Justice.

Application has been made to me by petitioner Edelman to stay the mandate and judgment of the Court of Appeals for the Seventh Circuit pending review of that judgment by this Court on writ of certiorari. Certiorari was granted on June 11, 1973, and therefore the critical question present in most stay applications—whether or not four Justices of this Court would vote to grant certiorari—is here already resolved. The judgment which is to be reviewed affirmed a District Court judgment holding certain procedures of the Illinois Department of Public Aid to be inconsistent with regulations promulgated by the Department of Health, Education, and Welfare, and therefore invalid to the extent that the State was receiving federal funds for this particular welfare program. Portions of the judgment, entered on March 15, 1972, are in their application prospective only, but paragraph 5 directs that lump sum payments be made retroactively to applicants who, in the view of the District Court and of the Court of Appeals, should have received benefits but did not because of the Illinois procedures held invalid. Paragraph 6 of the judgment directs that petitioner's predecessor within 15 days from its date submit to the Court a detailed statement as to the method for effectuating the relief required by paragraph 5.

I seriously doubt whether certiorari would have been granted in this case had it not been for the presence of paragraphs 5 and 6 in the judgment of the District Court. While the entire judgment will be before this Court for review, I am inclined to think that four Justices of this Court would not have voted to grant certiorari to review those portions of the judgment which are in their effect prospective only. I therefore deny the application for the stay of mandate and judgment as to those portions of the judgment other than paragraphs 5 and 6.

Insofar as paragraphs 5 and 6 of the judgment are concerned, the decision of the Court of Appeals for the Seventh Circuit in this case conflicts with a judgment of the Court of Appeals for the Second Circuit in *Rothstein* v. *Wyman*, 467 F.2d 226 (CA2 1972). If paragraph 5 of the judgment is not stayed, I would think it extremely unlikely that petitioner, should he succeed in this Court, would be able to recover funds paid out under that paragraph to respondent welfare recipients. Respondents, on the other hand, will be able to collect from petitioner all of the back payments found due under paragraph 5 should they prevail. A substantial legal question being present, these equities lead me to conclude that paragraph 5 should be stayed.

Respondents argue that even though paragraph 5 be stayed, paragraph 6 should be left in effect pending review here. The late Judge Napoli, however, in framing paragraph 6 apparently thought that it could be complied with in a period of 15 days; given the length of time already consumed by appellate review in this case, the addition of another two weeks following a conclusion by this Court favorable to respondents is not a matter of controlling significance in deciding the application for the stay. It is also conceivable that paragraph 5 of the judgment, with its detailed specifications as to dates, might be modified by this Court on appeal. Thus the procedures developed under paragraph 6 might prove

to be entirely useless, and a new set of procedures necessitated, not only on the hypothesis of outright reversal by this Court, but on the hypothesis of modification and affirmance.

On the basis of the foregoing considerations, an order will be entered staying paragraphs 5 and 6 of the judgment of the District Court in this case until further order of this Court.

[Publisher's note: See 414 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–150

Elizabeth Holtzman et al.	)	On Application to Vacate
v.	)	Stay.
James R. Schlesinger.	)	

[August 1, 1973]

MR. JUSTICE MARSHALL, Circuit Justice.

This case is before me on an application to vacate a stay entered by a three-judge panel of the United States Court of Appeals for the Second Circuit. Petitioners, a Congresswoman from New York and several air force officers serving in Asia, brought this action to enjoin continued United States air operations over Cambodia. They argue that such military activity has not been authorized by Congress and that, absent such authorization, it violates Article I, § 8, cl. 11 of the Constitution.[1] The United States District Court agreed and, on petitioners' motion for summary judgment, permanently enjoined respondents, the Secretary of Defense, the Acting Secretary of the Air Force, and the Deputy Secretary of Defense, from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia." However, the effective date of the injunction was delayed until July 27, 1973, in order to give respondents an opportunity to apply to the Court of Appeals for a stay pending appeal. Respondents promptly applied for such a stay, and the application

[1] Article I, § 8, cl. 11 provides: "The Congress shall have power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

was granted, without opinion, on July 27.[2] Petitioners then filed this motion to vacate the stay. For the reasons stated below, I am unable to say that the Court of Appeals abused its discretion in staying the District Court's order. In view of the complexity and importance of the issues involved and the absence of authoritative precedent, it would be inappropriate for me, acting as a single Circuit Justice, to vacate the order of the Court of Appeals.

I

Since the facts of this dispute are on the public record and have been exhaustively canvassed in the District Court's opinion, it would serve no purpose to repeat them in detail here. It suffices to note that publicly acknowledged United States involvement in the Cambodian hostilities began with the President's announcement an [Publisher's note: "an" should be "on".] April 30, 1970,[3] that this country was launching attacks "to clean out major enemy sanctuaries on the Cambodian-Vietnam border,"[4] and that American military action in that country has since met with gradually increasing congressional resistance.

[2] At the same time, the Court of Appeals ordered an expedited briefing schedule and directed that the appeal be heard on August 13. In the course of oral argument on the stay, Acting Chief Judge Feinberg noted that either side could submit a motion to further advance the date of argument. Counsel for petitioners indicated during argument before me that he intends to file such a motion promptly. Moreover, the Solicitor General has made representations that respondents will not oppose the motion and that, if it is granted, the case could be heard by the middle of next week. This case poses issues of the highest importance, and it is, of course, in the public interest that those issues be resolved as expeditiously as possible.

[3] It appears, however, that covert American activity substantially predated the President's April 30 announcement. See, *e.g.*, of [Publisher's note: "of" is surplus.] the New York Times, July 15, 1973, at 1, col. 1 ('Cambodian Raids Reported Hidden before '70 Foray." [Publisher's note: The quotation marks around the title of this *New York Times* article should be either both single or both double.]).

[4] The Situation in Southeast Asia, 6 Presidential Documents 596, 598.

Although United States ground troops had been withdrawn from the Cambodian theater by June 30, 1970, in the summer of that year, Congress enacted the so-called Fulbright Proviso prohibiting the use of funds for military support to Cambodia.[5] The following winter, Congress reenacted the same limitation with the added proviso that "nothing contained in this section shall be construed to prohibit support of actions required to insure the safe and orderly withdrawal or disengagement of U.S. Forces from Southeast Asia, or to aid in the release of Americans held prisoners of war." 84 Stat. 2037. These provisions have been attached to every subsequent military appropriations act.[6] Moreover, in the Special Foreign Assistance Act of 1971, Congress prohibited the use of funds to support American ground combat troops in Cambodia under any circumstances and expressly provided that "[m]ilitary and economic assistance provided by the United States to Cambodia . . . shall not be construed as a commitment by the United States to Cambodia for its defense."[7]

Congressional efforts to end American air activities in Cambodia intensified after the withdrawal of American ground troops from Vietnam and the return of American prisoners of war. On May 10, 1973, the House of Representatives refused an administration request to authorize the transfer of $175 million to cover the costs of the Cambodian bombing. See 119 Cong. Rec. H. 3561, 3592-3593 (daily ed. May 10, 1973). Shortly thereafter, both Houses of Congress adopted the so-called Eagleton Amendment prohibiting the use of any funds for Cam-

[5] The Fulbright Proviso states:

"Nothing [herein] shall be construed as authorizing the use of any such funds to support Vietnamese or other free world forces in actions designed to provide military support and assistance to the Government of Cambodia or Laos. [Publisher's note: There should be closing quotation marks here.] 84 Stat. 910.

[6] See 85 Stat. 423; 85 Stat. 716; 86 Stat. 734; 86 Stat. 1184.

[7] 84 Stat. 1943. See also 22 U.S.C. § 2416(g).

bodian combat operations.[8] Although this provision was vetoed by the President, an amendment to the Continuing Appropriations Resolution was ultimately adopted and signed by the President into law which stated:

> "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." H. J. Res. 636, The Joint Resolution Continuing Appropriations for Fiscal 1974, Pub. L. 93-52.[9]

II

Against this background, petitioners forcefully contend that continued United States military activity in Cambodia is illegal. Specifically, they argue that the President is constitutionally disabled in nonemergency situations from exercising the warmaking power in the absence of some affirmative action by Congress. See, *e.g.*, *Bas* v. *Tingy*, 4 Dall. 37 (1800); *Talbot* v. *Seeman*, 1 Cranch 1 (1801); *Mitchell* v. *Laird*, — U.S. App. D.C. —, 476 F.2d 533, 537-538 (1973); *Orlando* v.

[8] The Eagleton amendment provided:

"None of the funds herein appropriated under this Act or heretofore appropriated under any other Act may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia, or in or over Laos by United States forces."

[9] The President contemporaneously signed the Second Supplemental Appropriations Act of 1973, Pub. L. 93-50, which contained a provision stating that

"[n]one of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose."

Laird, 443 F.2d 1039, 1042 (CA2 1971). Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). In light of the Fulbright Proviso, petitioners take the position that Congress has never given its assent for military activity in Cambodia once American ground troops and prisoners of war were extricated from Vietnam.

With the case in this posture, however, it is not for me to resolve definitively the validity of petitioners' legal claims. Rather, the only issue now ripe for decision is whether the stay ordered by the Court of Appeals should be vacated. There is, to be sure, no doubt that I have the power, as a single Circuit Justice, to dissolve the stay. See *Meredith* v. *Fair*, 83 S. Ct. 10 (1962) (Black, J., Circuit Justice); 28 U.S.C. §§ 1651, 2101(f). But at the same time, the cases make clear that this power should be exercised with the greatest of caution and should be reserved for exceptional circumstances. Cf. *Aberdeen & Rockfish Railroad Co.* v. *Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972) (BURGER, C.J., Circuit Justice).

Unfortunately, once these broad propositions are recognized, the prior cases offer little assistance in resolving this issue, which is largely *sui generis*. There are, of course, many cases suggesting that a Circuit Justice should "balance the equities" when ruling on stay applications and determine on which side the risk of irreparable injury weighs most heavily. See, *e.g.*, *Long Beach Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank*, 76 S. Ct. 32 (1955) (DOUGLAS, J., Circuit Justice); *Board of Educ.* v. *Taylor*, 82 S. Ct. 10 (BRENNAN, J., Circuit Justice). *Socialist Labor Party* v. *Rhodes*, 89 S. Ct. 3 (1968) (STEWART, J., Circuit Justice).

But in this case, the problems inherent in attempting to strike an equitable balance between the parties are virtually insurmountable. On the one hand, petitioners assert that if the stay is not vacated, the lives of thou-

sands of Americans and Cambodians will be endangered by the Executive's arguably unconstitutional conduct. Petitioners argue, not implausibly, that if the stay is not vacated, American pilots will be killed or captured. Cambodian civilians will be made refugees, and the property of innocent bystanders will be destroyed.

Yet on the other hand, respondents argue that if the bombing is summarily halted, important foreign policy goals of our government will be severely hampered. Some may greet with considerable skepticism the claim that vital security interests of our country rest on whether the Air Force is permitted to continue bombing for a few more days, particularly in light of respondents' failure to produce affidavits from any responsible government official asserting that such irreparable injury will occur.[10] But it cannot be denied that the assessment of such injury poses the most sensitive of problems, about which Justices of this Court have little or no information or expertise. While we have undoubted authority to judge the legality of executive action, we are on treacherous ground indeed when we attempt judgments as to its wisdom or necessity.[11]

The other standards utilized for determining the propriety of a stay are similarly inconclusive. Opinions by Justices of this Court have frequently stated that lower court decisions should be stayed where it is likely that four Members of this Court would vote to grant a writ of certiorari. See, *e.g.*, *Edwards* v. *New York*, 76 S. Ct. 1058 (1956) (Harlan, J., Circuit Justice); *Appalachian Power Co.* v. *American Institute of C.P.A.*, 80 S. Ct. 16

[10] While respondents offered to produce testimony at trial by high government officials as to the importance of the bombing, no affidavits by such officials alleging irreparable injury in conjunction with the stay application were offered.

[11] For similar reasons, it would be a formidable task to judge where the public interest lies in this dispute, as courts traditionally do when determining the appropriateness of a stay. See, *e.g.*, *O'Brien* v. *Brown*, 409 U.S. 1, 3 (1972).

(1959) (BRENNAN, J., Circuit Justice); *English* v. *Cunningham*, 80 S. Ct. 18 (1959) (Frankfurter, J., Circuit Justice). But to some extent, at least, this standard reflects a desire to maintain the status quo in those cases which the Court is likely to hear on the merits. See, *e.g.*, *In re Bart*, 82 S. Ct. 675 (1962) (Warren, C.J., Circuit Justice); *McGee* v. *Eyman*, 83 S. Ct. 230 (1962) (DOUGLAS, J., Circuit Justice). This case is unusual in that regardless of what action I take, it will likely be impossible to preserve this controversy in its present form for ultimate review by this Court. Cf. *O'Brien* v. *Brown*, 401 U.S. 1, 9-10 (1972) (MARSHALL, J., dissenting). On August 15, the statutory ban on Southeast Asian military activity will take effect, and the contours of this dispute will then be irrevocably altered. Hence, it is difficult to justify a stay for purpose of preserving the status quo, since no action by this Court can freeze the issues in their present form.[12]

To some extent, as well, the "four-vote" rule reflects the policy in favor of granting a stay only when the losing party presents substantial contentions which are likely to prevail on the merits. See, *e.g.*, *O'Brien* v. *Brown*, *supra*; *Rosenberg* v. *United States*, 346 U.S. 273 (DOUGLAS, J., Circuit Justice); *Railway Express Agency* v. *United States*; [Publisher's note: The semicolon preceding this note should be a comma.] 82 S. Ct. 466 (1962) (Harlan, J., Circuit Justice); *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 396 U.S. 1201 (1969) (Black, J., Circuit Justice). In my judgment, petitioners' contentions in this case are far from frivolous and may well ultimately prevail. Although tactical decisions as to the conduct of an ongoing war may present political questions which the federal courts lack jurisdiction to decide, see, *e.g.*,

[12] I do not mean to suggest that this dispute will necessarily be moot after August 15. That is a question which is not now before me and upon which I express no views. Moreover, even if the August 15 fund cut-off does moot this controversy, petitioners may nonetheless be able to secure a Court of Appeals determination on the merits before August 15. See n. 2, *supra*.

DaCosta v. *Laird*, 471 F.2d 1146 (CA2 1973), and although the courts may lack the power to dictate the form which congressional assent to warmaking must take, see *e.g.*, *Massachusetts* v. *Laird*, 451 F.2d 26 (CA1 1971); *Mitchell* v. *Laird*, — U.S. App. D.C. —, 476 F.2d 533 (1973), there is a respectable and growing body of lower court opinion holding that Art. I, § 8, cl. 11, imposes some judicially manageable standards as to congressional authorization for warmaking, and that these standards are sufficient to make controversies concerning them justiciable. See *Mitchell* v. *Laird*, *supra*; *DaCosta* v. *Laird*, *supra*; *Orlando* v. *Laird*, 443 F.2d 1039 (CA2 1971); *Berk* v. *Laird*, 429 F.2d 302 (CA2 1970).

Similarly, as a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps in the case of a pressing emergency or when the President is in the process of extricating himself from a war which Congress once authorized. At the very beginning of our history, Mr. Chief Justice Marshall wrote for a unanimous Court that

> "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guide in this inquiry. It is not denied . . . that Congress may authorize general hostilities, in which case the general laws of war apply in our situation, or partial hostilities, in which case the laws of war, so far as they may actually apply to our situation, must be noticed." *Talbot* v. *Seeman*, 1 Cranch 1, 18 (1801).

In my judgment, nothing in the 172 years since those words were written alter [Publisher's note: "alter" should be "alters".] that fundamental constitutional postulate. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

A fair reading of Congress' actions concerning the war in Cambodia may well indicate that the legislature has authorized only "partial hostilities"—that it has never given its approval to the war except to the extent that it was necessary to extricate American troops and prisoners from Vietnam. Certainly, this seems to be the thrust of the Fulbright Proviso.[13] Moreover, this Court could easily conclude that after the Paris Peace Accords, the Cambodian bombing is no longer justifiable as an extension of the war which Congress did authorize and that the bombing is not required by the type of pressing emergency which necessitates immediate presidential response.

Thus, if the decision were mine alone, I might well conclude on the merits that continued American military operations in Cambodia are unconstitutional. But the

[13] The Solicitor General vigorously argues that by directing that Cambodian operations cease on August 15, Congress implicitly authorized their continuation until that date. But while the issue is not wholly free from doubt, it seems relatively plain from the face of the statute that Congress directed its attention solely to military actions after August 15, while expressing no view on the propriety of on-going operations prior to that date. This conclusion gains plausibility from the remarks of the sponsor of the provision—Senator Fulbright—on the Senate floor:

"The acceptance of an August 15 cut off date should in no way be interpreted as recognition by the committee of the President's authority to engage U.S. forces in hostilities until that date. The view of most members of the committee has been and continues to be that the President does not have such authority in the absence of specific congressional approval." 119 Cong. Rec. S. 12560 (Daily ed. June 29, 1973).

See also *id*., at S. 12562.

While it is true that some Senators declined to vote for the proposal because of their view that it did implicitly authorize continuation of the war until August 15, see *id*., at S. 12586 (Remarks of Sen. Eagleton); S. 12564 (remarks of Sen. Bayh); S. 12572 (remarks of Sen. Muskie), it is well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the act in question.

Supreme Court is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices. It follows that when I sit in my capacity as a Circuit Justice, I act not for myself alone but as a surrogate for the entire Court, from whence my ultimate authority in these matters derives. A Circuit Justice therefore bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them, cf. *Meridith* [Publisher's note: "*Meridith*" should be "*Meredith*".] v. *Fair*, 83 S. Ct. 10, 11 (1962) (Black, J., Circuit Justice), and this responsibility is particularly pressing when, as now, the Court is not in session.

When the problem is viewed from this perspective, it is immeasurably complicated. It must be recognized that we are writing on an almost entirely clean slate in this area. The stark fact is that although there have been numerous lower court decisions concerning the legality of the War in Southeast Asia, this Court has never considered the problem, and it cannot be doubted that the issues posed are immensely important and complex. The problem is further complicated by the July 1, 1973, amendment to the Continuing Appropriations Resolution providing that "on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States Military forces in or over or from all the Shores of North Vietnam, South Vietnam, Laos or Cambodia." This, it is urged, is the crux of this case and there is neither precedent nor guidelines toward any definitive conclusion as to whether this is or is not sufficient to order the bombings to be halted prior to August 15.

Lurking in this suit are questions of standing, judicial competence, and substantive constitutional law which go to the roots of the division of power in a constitutional democracy. These are the sort [Publisher's note: "sort" probably should be "sorts". But see 414 U.S. at 1314.] of issues which should not be decided precipitously or without the benefit of proper consultation. It should be noted, moreover, that since the stay below was granted in respondents' favor,

the issue here is not whether there is some possibility that petitioners will prevail on the merits, but rather whether there is some possibility that respondents will so prevail. In light of the uncharted and complex nature of the problem, I am unwilling to say that that possibility is nonexistent.

Finally, it is significant that although I cannot know with certainty what conclusion my Brethren would reach, I do have the views of a distinguished panel of the Court of Appeals before me. That panel carefully considered the issues presented and unanimously concluded that a stay was appropriate. Its decision, taken in aid of its own jurisdiction, is entitled to great weight. See, *e.g.*, *United States ex rel. Knauff* v. *McGrath* (Jackson, J., Circuit Justice) (unreported opinion); *Breswick & Co.* v. *United States*, 75 S. Ct. 912 (1955) (Harlan, J., Circuit Justice). In light of the complexity and importance of the issues posed, I cannot say that the Court of Appeals abused its discretion.

When the final history of the Cambodian War is written, it is unlikely to make pleasant reading. The decision to send American troops "to distant lands to die of foreign fevers and foreign shot and shell," *New York Times* v. *United States*, 403 U.S. 713, 717 (1972) (Black, J., concurring), may ultimately be adjudged to have not only been unwise but also unlawful.

But the proper response to an arguably illegal action is not lawlessness by judges charged with interpreting and enforcing the laws. Down that road lies tyranny and repression. We have a government of limited powers, and those limits pertain to the Justices of this Court as well as to Congress and the Executive. Our Constitution assures that the law will ultimately prevail, but it also requires that the law be applied in accordance with lawful procedures.

In staying the judgment of the District Court, the Court of Appeals agreed to hear the appeal on its merits on August 13 and advised petitioners to apply to that

panel for an earlier hearing before that date. It is, therefore, clear to me that this highly controversial constitutional question involving the other two branches of this Government must follow the regular appellate procedures on the accelerated schedule as suggested by the Court of Appeals.

In my judgment, I would exceed my legal authority were I, acting alone, to grant this application. The application to vacate the stay entered below must therefore be

Denied.

[Publisher's note: See 414 U.S. 1316 for the authoritative official version of this opinion.]

HOLTZMAN ET AL. *v.* SCHLESINGER ET AL.

ON REAPPLICATION TO VACATE STAY

No. A–150. Decided August 4, 1973[*]

Application to vacate Court of Appeals' order staying District Court's permanent injunction prohibiting respondent Defense Department officials from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia," denied by MR. JUSTICE MARSHALL, *ante*, p. 1304, [Publisher's note: See 2 Rapp 590.] is granted, as MR. JUSTICE DOUGLAS believes the merits of the controversy are substantial and that denial of the application would catapult American airmen and Cambodian peasants into a death zone. The case is treated as a capital case, and the stay altered by the Court of Appeals is vacated and the order of the District Court is reinstated.

MR. JUSTICE DOUGLAS, Circuit Justice.

My Brother MARSHALL, after a hearing, denied this application which in effect means that the decision of the District Court holding that the bombing of Cambodia is unconstitutional is stayed pending hearing on the merits before the Court of Appeals.

An application for stay denied by one Justice may be made to another. We do not, however, encourage the practice; and when the Term starts, the Justices all being in Washington, D.C., the practice is to refer the second application to the entire Court. That is the desirable practice to discourage "shopping around."

When the Court is in recess that practice cannot be followed, for the Justices are scattered. Yakima, Washington, where I have scheduled the hearing, is nearly 3,000 miles from Washington, D.C. Group action by all Members is therefore impossible.

[*] [REPORTER'S NOTE: This opinion was released on August 4, 1973. MR. JUSTICE DOUGLAS' order in this case was issued August 3, 1973.]

I approached this decision, however, with deliberation, realizing that, while the judgment of my Brother MARSHALL is not binding on me, it is one to which I pay the greatest deference.

My Brother MARSHALL accurately points out that if the foreign policy goals of this Government are to be weighed the Judiciary is probably the least qualified branch to weigh them. He also states that if stays by judicial officers in cases of this kind are to be vacated the circumstances must be "exceptional." I agree with those premises, and I respect the views of those who share my Brother MARSHALL'S predilections.

But this case in its stark realities involves the grim consequences of a capital case. The classic capital case is whether Mr. Lew, Mr. Low, or Mr. Lucas should die. The present case involve whether Mr. X (an unknown person or persons) should die. No one knows who they are. They may be Cambodian farmers whose only "sin" is a desire for socialized medicine to alleviate the suffering of their families and neighbors. Or Mr. X may be the American pilot or navigator who drops a ton of bombs on a Cambodian village. The upshot is that we know that someone is about to die.

Since that is true I see no reason to balance the equities and consider the harm to our foreign policy if one or a thousand more bombs do not drop. The reason is that we live under the Constitution and in Art. I, § 8, cl. 11, it gives to Congress the power to "declare War." The basic question on the merits is whether Congress, within the meaning of Art. I, § 8, cl. 11, has "declared war" in Cambodia.

It has become popular to think the President has that power to declare war. But there is not a word in the Constitution that grants that power to him. It runs only to Congress.

The Court in the *Prize Cases* said:

> "By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole Executive power. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic State. . . .
>
> "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." 2 Black 635, 668.

The question of justiciability does not seem substantial. In the *Prize Cases*, decided in 1863, the Court entertained a complaint involving the constitutionality of the Civil War. In my time we held that President Truman in the undeclared Korean war had no power to seize the steel mills in order to increase war production. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. The *Prize Cases* and the *Youngstown* case involved the seizure of property. But the Government conceded on oral argument that property is no more important than life under our Constitution. Our Fifth Amendment which curtails federal power under the Due Process Clause protects "life, liberty, or property" in that order. Property is important, but if President Truman could not seize it in violation of the Constitution I do not see how any President can take "life" in violation of the Constitution.

As to "standing," which my Brother MARSHALL correctly states is an issue, there seems to be no substantial question that a taxpayer at one time had no standing to complain of the lawless actions of his Government. But that rule has been modified. In *Flast* v. *Cohen*, 392 U.S. 83, 106, the Court held that a taxpayer could invoke

"federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." That case involved alleged violations of the Establishment Clause of the First Amendment. The present case involves Art. I, § 8, cl. 11, which gives Congress and not the President the power to "declare War."

If applicants are correct on the merits they have standing as taxpayers. The case in that posture is in the class of those where standing and the merits are inextricably intertwined. I see no difference, constitutionally speaking, between the standing in *Flast* and the standing in the present case for our Cambodian caper contested as an unconstitutional exercise of presidential power.

When a stay in a capital case is before us, we do not rule on guilt or innocence. A decision on the merits follows and does not precede the stay. If there is doubt whether due process has been followed in the procedures, the stay is granted because death is irrevocable. By the same token I do not sit today to determine whether the bombing of Cambodia is constitutional. Some say it is merely an extension of the "war" in Vietnam, a "war" which the Second Circuit has held in *Berk* v. *Laird*, 429 F.2d 302, to raise a "political" question, not a justiciable one. I have had serious doubts about the correctness of that decision, but our Court has never passed on the question authoritatively. I have expressed my doubts on the merits in various opinions dissenting from denial of certiorari.[†] But even if the "war" in Vietnam were

[†] *Sarnoff* v. *Shultz*, 409 U.S. 929; *DaCosta* v. *Laird*, 405 U.S. 979; *Massachusetts* v. *Laird*, 400 U.S. 886; *McArthur* v. *Clifford*, 393 U.S. 1002; *Hart* v. *United States*, 391 U.S. 956; *Holmes* v. *United States*, 391 U.S. 936; *Mora* v. *McNamara*, 389 U.S. 934, 935; *Mitchell* v. *United States*, 386 U.S. 972.

assumed to be a constitutional one, the Cambodian bombing is quite a different affair. Certainly Congress did not in terms declare war against Cambodia and there is no one so reckless to say that the Cambodian forces are an imminent and perilous threat to our shores. The briefs are replete with references to recent Acts of Congress which, to avoid a presidential veto, were passed to make clear—as I read them—that no bombing of Cambodia was to be financed by appropriated funds after August 15, 1973. Arguably, that is quite different from saying that Congress has declared war in Cambodia for a limited purpose and only up to and not beyond August 15, 1973. If the acts in question are so construed the result would be, as the District Court said, that the number of votes needed to sustain a presidential veto—one-third plus one—would be all that was needed to bring into operation the new and awesome power of a President to declare war. The merits of the present controversy are therefore, to say the least, substantial, since denial of the application before me would catapult our airmen as well as Cambodian peasants into the death zone. I do what I think any judge would do in a capital case—vacate the stay entered by the Court of Appeals.

It is so ordered.

[Publisher's note: See 414 U.S. 1321 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–175

James R. Schlesinger.	)	
v.	)	On Application to Stay.
Elizabeth Holtzman et al.	)	

[August 4, 1973]

MR. JUSTICE MARSHALL, Circuit Justice.

On August 1, 1973, I, as Circuit Justice for the Second Circuit, denied an application to vacate a stay entered by the United States Court of Appeals for the Second Circuit on July 27, 1973, staying the order of the District Court for the Eastern District of New York dated July 25, 1973.

On August 2, Elizabeth Holtzman and others, plaintiffs in the original action, presented an application to MR. JUSTICE DOUGLAS. A hearing was then set in Yakima, Washington, on Friday, August 3. On August 4 an order and opinion were issued by MR. JUSTICE DOUGLAS vacating the stay entered by the Court of Appeals on July 27, 1973, and thereby reinstating the order of the United States District Court for the Eastern District of New York.

On the same day, August 4, the Solicitor General presented an application for a stay of the order of the United States District Court for the Eastern District of New York.

Since the action of the Court of Appeals in granting a stay is set aside, the only order extant in this case is the order of the District Court dated July 25, 1973. The instant application calls on me to deal directly with that order of the District Court.

In the ordinary course, a Justice acting as a Circuit Justice would defer acting with respect to a District Court order until the Court of Appeals had acted, but in the present circumstances the Court of Appeals has already acted and the consequence of the order of Mr. JUSTICE DOUGLAS is to set aside the Court of Appeals order.

The consequence of the Court of Appeals stay order of August 1, 1973, was to preserve the status quo until it could act on the merits. The Court of Appeals, having originally expedited a hearing on the merits to August 13, 1973, has since further expedited the hearing on the merits to August 8, 1973.

Now therefore, the order of the District Court dated July 25, 1973, is hereby stayed pending further order by this Court.

I have been in communication with the other Members of the Court, and THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST agree with this action.

[Publisher's note: See 414 U.S. 1322 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–175

James R. Schlesinger.	)	
v.	)	On Application to Stay.
Elizabeth Holtzman et al.	)	

[August 4, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The stay I entered August 3, 1973, in *Holtzman* v. *Schlesinger* not only vacated the stay of the Court of Appeals but also reinstated the judgment of the District Court. I mailed it on August 3, 1973, and reported its contents to the Clerk's office. My order of August 3, 1973, reads as follows:

> "ORDER
>
> "On application of petitioners and after oral argument it is ordered:
>
> "(1) that the stay of the District Court's order entered by the Court of Appeals on July 27, 1973 is vacated and
>
> "(2) that the order of the District Court of July 25, 1973 enjoining Defendants from participating in any way in military activities in or over Cambodia or releasing any bombs which may fall on Cambodia is hereby restored.
>
> *W.O. Douglas*
>
> August 3, 1973."

My Brother MARSHALL in his opinion of August 4, 1973, misstates the facts when he says that "the only order extant in this case is the order of the District Court." A correct statement would be that the most recent order in this case was my order of August 3, 1973, reinstating the order of the District Court, which would thus leave

the Court of Appeals free to act on the merits and give full relief or, alternatively, permit this Court to reverse me. Under my Brother MARSHALL'S order of August 4, 1973, only this Court can act to give injunctive relief.[1]

The Court has unquestioned power to reverse me; and although I disagree with the Court's action on the merits, that is not the point of this dissent. If we who impose law and order are ourselves to be bound by law and order, we can act as a Court only when at least six of us are present. That is the requirement of the Act of Congress;[2] and heretofore it has been the practice to summon the Court to Special Term. Seriatim telephone calls cannot, with all respect, be a lawful substitute. A Conference brings us all together; views are exchanged; briefs are studied; oral argument by counsel for each side is customarily required. But even without participation the Court always acts in Conference and therefore responsibly.

Those of the Brethren out of Washington, D.C., on August 4, 1973, could not possibly have studied my opinion in this case. For although I wrote it late on August 3, it was not released until 9:30 a.m. on the 4th and before 3 p.m. [Publisher's note: There should be an "on" here. Cf. 414 U.S. at 1324.] the 4th I was advised by telephone that eight Members of the Court disagreed with me. The issue tendered in the case was not frivolous; the Government on oral argument conceded as much. It involved a new point of law never yet resolved by the Court. I have participated for enough years in Conferences to realize that profound changes are made among the Brethren once their minds are allowed to explore a

[1] The Court takes a bite out of the merits, for the order of August 4, 1973, bars the Court of Appeals from reinstating the judgment of the District Court until and unless this Court acts, as the order states that the order of the District Court "is hereby stayed pending further order by this Court."

[2] "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." 28 U.S.C. § 1.

problem in depth. Yet there were only a few of the Brethren who saw my opinion before they took contrary action.

Whatever may be said on the merits, I am firmly convinced that the telephonic disposition of this grave and crucial constitutional issue is not permissible. I do not speak of social propriety. It is a matter of law and order involving high principles. The principles are that the Court is a deliberative body that acts only on reasoned bases after full consideration, and that it is as much bound by the law of the land as is he who lives in the ghetto or in the big white house on the hill. With all respect I think the Court has slighted that law. The shortcut it has taken today surely flouts an Act of Congress providing for a necessary quorum. A Gallup Poll type of inquiry of widely scattered Justices is, I think, a subversion of the regime under which I thought we lived.

One Justice who grants bail, issues a stay of a mandate, or issues a certificate of probable cause cannot under the statutory regime designed by Congress vacate, modify, or reverse what another Justice does.[3] The Court of course can do so—and only the Court[4]—but when the Court acts it must have six Members present.

[3] The statutes authorizing individual Justices of this Court to affirmatively grant applications for such actions do not authorize them to rescind affirmative action taken by another Justice. See, *e.g.*, 28 U.S.C. § 2101(f) (stays of mandate); 28 U.S.C. § 2241(a) (writs of habeas corpus); 18 U.S.C. § 3141 and Fed. Rule Crim. Proc. 46(a)(2) (granting of bail).

[4] This requirement of collegial action is confirmed by the Rules of this Court and by this Court's prior decisions and practices.

Rules 50 and 51 govern the in chambers practices of the Court. Rule 50(5) provides that, when one Justice denies an application made to him, the party who has made the unsuccessful application may renew it to any other Justice. It was pursuant to this Rule that application for the stay in this case was made to me. But neither Rule 50 nor Rule 51 authorizes a party, once a stay has been granted, to contest that action before another individual Justice.

The Court has previously deemed it necessary and proper to meet

Under the law as it is written the order of MR. JUSTICE MARSHALL on August 4, 1973, will in time be reversed by that Higher Court which invariably sits in judgment on the decisions of this Court. The order of August 4, 1973, in this case would be valid only if we had the power to agree by telephone that the rules framed by Congress to

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together in Special Term before stays granted by an individual Justice out of Term could be overturned. In *Rosenberg* v. *United States*, 346 U.S. 273, the full Court felt constrained to consider its power to vacate a stay issued by an individual Justice, finally resting that power on the Court's position—as a body—as final interpreter of the law:

"We turn next to a consideration of our power to decide, in this proceeding, the question preserved by the stay. It is true that the full Court has made no practice of vacating stays issued by single Justices, although it has entertained motions for such relief. But reference to this practice does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power.

"The power which we exercise in this case derives from this Court's role as the final forum to render the ultimate answer to the question which was preserved by the stay.

• • • • •

". . . [T]he reasons for refusing, as a matter of practice, to vacate stays issued by single Justices are obvious enough. Ordinarily the stays of individual Justices should stand until the grounds upon which they have issued can be reviewed through regular appellate processes.

"In this case, however, we deemed it proper and necessary to convene the Court to consider the Attorney General's urgent application." 346 U.S., at 286-287 (footnote omitted).

Finally, it is our procedure during a Term of Court to take an application that has already been denied or acted upon by one of the Justices to the entire Court upon an application made by the opposing side, so that the entire Court can act and thus prevent "shopping around." That course is not possible during recess when the Justices are scattered around the country and throughout the world. Therefore it has been my practice if I grant a stay during recess to make that stay effective only until the Court convenes in October. This course could not be followed in the instant case because after August 15, 1973, the case will be moot.

govern our procedures should be altered. We have no such power. What Members of the Court told Brother MARSHALL to do on August 4, 1973, does not, with all respect, conform with our ground rules. It may have been done inadvertently, but it is nonetheless not a lawful order. Therefore, I respectfully dissent.

[Publisher's note: See 414 U.S. 1327 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–283

Ex Parte Hayes.	)	Application for Habeas
	)	Corpus.

[October 26, 1973]

MR. JUSTICE DOUGLAS.

This is an application for habeas corpus presented to me.

The petitioner is a United States Army private on active duty stationed in Mannheim, Germany. He contends that the Army has failed to fulfill an enlistment commitment made to him and that his continued retention by the Army is therefore in violation of law and army regulations. It is alleged that the petitioner's immediate commanding officer, in Mannheim, approved his application for discharge, but that the Chief of Personnel Actions in Washington denied the application. Named as respondents are these two officers and the Secretary of the Army, Howard Calloway.

In making his application here the petitioner invokes this Court's original habeas jurisdiction, 28 U.S.C. § 2241, in the belief that jurisdiction in the District Court may be questionable because both the petitioner and his commanding officer are located in Germany, outside the territorial jurisdiction of any district court. The Solicitor General in response suggests that jurisdiction may be had in the District Court for the District of Columbia, or alternatively that the application be transferred to that court pursuant to 28 U.S.C. § 2241(b).[1]

[1] "The Supreme Court, any Justice thereof, or any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."

I intimate no views on the question or on the merits of petitioner's claim.

We have previously upheld the jurisdiction of a district court over a habeas application when the person confined is moved out of the district after the application is filed. *Jones* v. *Cunningham*, 371 U.S. 236 (1963); *Ex parte Endo*, 323 U.S. 283 (1944). In *Ahrens* v. *Clark*, 335 U.S. 188 (1947), we reserved the question now here. *Id.*, 194, n. 4.

We noted in *Endo*, *supra*, at 306, that the more fundamental jurisdictional requirement was not the location in the district of the person confined but the presence of the person with custody over the habeas applicant. In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), we found that the District Court did not have jurisdiction over the habeas application of an Air Force enlisted man because neither his commanding officer nor anyone "in the chain of command" was a resident of the district. *Id.*, at 488-489. Here the petitioner's commanding officer is in Germany, outside the territorial limits of any district court. But others in the chain of command, as well as both of the other named respondents, are in the District of Columbia.

The District Court for the District of Columbia in *Rothstein* v. *Secretary of the Air Force* took jurisdiction in a like case on August 30, 1973. It has been suggested[2] that our prior decision in *Burns* v. *Wilson*, 346 U.S. 137, and *United States* v. *Quarles*, 350 U.S. 11, decided "*sub silentio* and by fiat, that at least a citizen held abroad by federal authorities has access to the writ in the District of Columbia."[3] On that basis I transfer the petition to the District Court for the District of Columbia, recognizing, of course, that the District Court has jurisdiction to determine the question of its jurisdiction.

So ordered.

[2] Cf. Hart & Wechsler's The Federal Courts and The Federal System (2d ed. 1973), at 359 n. 52.
[3] *Ibid.*

[Publisher's note: See 415 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–719

Howard R. Hughes, Chester C. Davis, and James H. Nall,	)	On Motion for Leave to File Petition for Writ of Mandamus and/or Prohibition, and Petition for Writ of Mandamus and/or Prohibition.
v.	)	
The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada.	)	

[January 25, 1974]

MR. JUSTICE DOUGLAS, Circuit Justice.

This motion for leave to file a petition for Writ of Mandamus or Prohibition has been presented to me after a like motion was denied by the Court of Appeals on January 24, 1974. The matter concerns proceedings before the U.S. District Judge in Reno, Nevada scheduled for a hearing at 9:30 a.m. Pacific Daylight Time today, January 25, 1974; which is only a little more than an hour from the time in which I write this short opinion.

The petitioners have been indicted for alleged manipulation of the stock of an airline company prior to its acquisition about five years ago—an acquisition which was approved by the Civil Aeronautics Board. Petitioners have filed with the District Court a motion to dismiss the indictment on the grounds that it does not state facts sufficient to constitute any offense against the United States and fails to inform petitioners of the nature of the cause of the accusation within the meaning of the Sixth Amendment to the Constitution. Petitioners desire that their motion to dismiss be ruled upon prior to the arraignment. They asked the District Judge for a stay of all proceedings until the motion to dismiss

the indictment was ruled upon. This stay was denied by the District Judge and as noted the Court of Appeals denied relief.

In cases such as the present one where the factor of time is all important it is customary (where possible) to consult other members of the Court before acting so that if there is a member of the Court available who feels that relief should be granted that fact can be taken into consideration. If, however, none of the Justices available feel relief should be granted then the prior consultation with those who are available is some aid to counsel seeking the relief.

Some members of the Court are out of the city at the present time, as the Court is in recess. I have talked with five who are present and they are of the opinion that the motion to file should be denied. That is my view. Under the Rules of Criminal Procedure the question of the sufficiency of the indictment "shall be noticed by the court at any time." Rule 12(b)(2). Whether the motion should be disposed of prior to the arraignment rests in the sound discretion of the District Court.[*] The District Court certainly has the power to follow that course and sometimes it may be important to prevent harassment or the use of other unconstitutional procedures against an accused. But it would take an extremely unusual case for an appellate judge to direct the District Court that he should exercise his discretion by postponing an arraignment until after the motion to dismiss the indictment has been resolved. As stated in *Costello* v. *United States*, 350 U.S. 359, 364:

> "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring

[*] Mandatory language directing when a motion shall be ruled upon is contained in Fed. Rule Crim. Proc. 12(b)(4) which states that motions raising defenses or objections "shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue."

about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial."

Motion denied.

[Publisher's note: See 415 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–839

Dr. S.I. Hayakawa et al.	)	
v.	)	On Application for Stay and
Edmund G. Brown, Jr., Secretary of	)	Restraining Order.
State of California, et al.	)	

[March 4, 1974]

MR. JUSTICE DOUGLAS, Circuit Justice.

Hayakawa desires to run for the Senate from California on the Republican ticket. He has until March 8, 1974, to file. When the County Clerk and Secretary of State refused to accept his papers, he petitioned California's Supreme Court for a writ of mandamus. That court on a 4-to-3 vote denied it, no opinion being written. Hayakawa plans to apply for certiorari here from that denial and meanwhile wants me to stay the order of the California Supreme Court denying mandamus, pending the filing and disposition of a petition for certiorari here. His motion also requests me to restrain the state officials from refusing to accept his nomination papers.

The barrier confronting the state officials in [Publisher's note: "in" should be "is".] § 6401 of the California Election Code which prohibits a candidate from being a candidate of one party when he has within 12 months been registered with another party. Cases raising the constitutionality of provisions of that character are before the Court and not yet decided in No. 72-812, *Storer* v. *Brown*, and No. 72-6050, *Frommhagen* v. *Brown*. It would seem at first blush that the present case, being of the same kind as *Storer* and *Frommhagen*, should be considered along with them.

The difficulty is that I have no way of knowing whether denial of the writ of mandamus rested on an

independent state ground. That is an extraordinary writ, the issuance of which is traditionally discretionary. It may be that one acquainted with the labyrinth of California procedure would see the answer more clearly than I do. Yet the federal question—our only fulcrum in the case—has not yet surfaced in the litigation, as denial of mandamus, without more, may conceal a number of independent state grounds.

Motions denied.

[Publisher's note: See 417 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1146

Warm Springs Dam Task Force et al., Applicants, *v.* Lieutenant General William C. Gribble, Jr.	)))))	On Application for Stay Pending Appeal to the Court of Appeals for the Ninth Circuit.

[June 17, 1974]

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicants brought an action on March 22, 1974, in the United States District Court for the Northern District of California and sought a preliminary injunction to halt further construction in connection with the Warm Springs Dam-Lake Sonoma Project on Dry and Warm Springs Creeks in the Russian River Basin, Sonoma County, California. The applicants alleged, *inter alia*, that the Environmental Impact Statement filed by the Army Corps of Engineers concerning the project did not comply with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq*.

A hearing was held in the District Court on the motion for a preliminary injunction. On May 23, 1974, the District Court rendered an oral ruling denying applicants' motion for the injunction.[1] A written opinion was filed thereafter. Applicants filed an application in the Court of Appeals for the Ninth Circuit for an injunction pending appeal, which was denied on May 24, 1974.

Application was then made to me as Circuit Justice for the Ninth Circuit seeking a stay of the order of the

[1] The order did prohibit respondents from disturbing certain architectural sites pending compliance with Executive Order 11593, 36 Fed. Reg. 8921.

District Court as well as a stay restraining further construction work on the Warm Springs Dam Project. Because of the seriousness of the claims made by the applicants, I issued an order, on May 30, 1974, staying further disturbance of the soil in connection with the dam (other than research, investigation, planning and design activity) "pending reconsideration of the application when the memoranda of the Solicitor General and the Environmental Protection Agency are received."

A response has been filed, along with further materials submitted by the applicants supporting their request for a stay. After consideration of these submissions, I have entered an order continuing my earlier stay order pending disposition of the appeal in this case by the Court of Appeals for the Ninth Circuit.

The Warm Springs Dam will be an earth fill dam, holding back a reservoir of water, across Dry Creek, a major tributary of the Russian River in Sonoma County. The dam was first authorized, in smaller form than is now contemplated, in the Flood Control Act of 1962, Pub. L. 87-874, 87th Cong., 2d Sess. On January 1, 1970, the National Environment Policy Act, which requires the filing of an Environmental Impact Statement (EIS) for major Federal actions significantly affecting the quality of the human environment, 42 U.S.C. § 4332(2)(C), became law. A Draft EIS was not distributed until June 1973, and the Final EIS was not filed with the Council on Environmental Quality until December 4, 1973. I am informed that approximately $35 million has been expended on the project already, and that another $7 million will be expended before this case will be heard and determined by the Court of Appeals.

The applicants for this stay focus on two extremely serious challenges to the adequacy of the EIS.

First, they note that the dam will sit atop an earthquake fault running along Dry Creek. There are other faults nearby. A town of 5,000 people is nestled below

the dam and the wall of water it will restrain. At the District Court hearing on applicants' motion for a preliminary injunction, substantial questions were raised about the integrity of the dam should an earthquake occur. There seems to be a recognized "credibility gap" as to the safety of the project; recommendations were received by the Corps from its own staff for further study; and reservations about the safety factor were expressed by the State of California. A contract has been made for further dynamic analysis of the safety of the dam. Should that analysis indicate that the dam is potentially risky, the Corps would have "no choice" but to consider abandoning the entire project. Tr. 1828-1829, 1832.

Second, challenges were made at the hearing to the adequacy of the EIS regarding expected poisoning of water in the reservoir behind the dam. The water will be used by consumers in the surrounding county. There were allegations at the hearing that the waters will be poisoned by mercury carried from an abandoned mercury mine which will be inundated when the dam is built, and that asbestos, fluoride, and boron particles will also leach into the waters. It is contended that the EIS is deficient in its treatment of these significant environmental effects.

The District Court rejected these contentions, finding that the Corps adequately dealt with the seismic problem and the water poisoning problem. It found the EIS adequate. The Solicitor General argues that the District Court's findings are not "clearly erroneous" and will be upheld by the Court of Appeals, and that therefore I should deny the requested stay.

Here, however, the views of the two federal agencies most intimately familiar with environmental issues and the requirements of the National Environmental Policy Act have been filed with the Court. They undermine the determination of the District Court.

The Environmental Protection Agency (EPA) has written to the Solicitor General expressing some doubt

about the treatment of the water poisoning issues in the final EIS.[2] The EPA goes on to say, however, that:

> "We wish to emphasize that the CEQ [Council on Environmental Quality] is the Executive Office charged with NEPA administration and ultimately with evaluating the performance of Federal agencies in complying with the Act. We understand that the Council has expressed concern over the adequacy of the final environmental statement on the Warm Springs project and the issues raised by the Council clearly fall under its administrative responsibilities relative to NEPA." Letter of June 4, 1974, from Alan G. Kirk II, Assistant Administrator for Enforcement and General Counsel to Robert [Publisher's note: There should be an "H." here.] Bork, Solicitor General.

The applicants have filed with this Court a letter from the General Counsel of the CEQ to the Solicitor General

[2] ". . . [C]ertain water quality related issues, which potentially impact the environment and which were not analyzed in the final environmental impact statement, came to light during the hearing on plaintiff's [Publisher's note: "plaintiff's" should be "plaintiffs'".] motion for a preliminary injunction. These issues include potential contamination of the reservoir water by boron and fluoride concentrations in the streams which would feed the reservoir and by asbestos concentrations in the serpentine rock underlying the reservoir site. Moreover, with respect to mercury contamination, we understand from a hasty and admittedly incomplete reading of the transcripts of the hearing and the affidavits submitted, that the Corps has agreed to perform pre-inundation studies to predict the biomagnification effect of mercury concentrations in sediments and algae in the reservoir site.

"We believe that the foregoing issues should have been raised and should have been discussed in the final impact statement. We cannot say, however, because we were not present during the proceedings and have not had sufficient opportunity to review the evidence, that these issues would, at the same time, have caused EPA to express environmental reservations as to the construction of the project, within the context of our own NEPA review procedures." Letter of June 4, 1974, from Alan G. Kirk II, Assistant Administrator for Enforcement and General Counsel, EPA, to Robert [Publisher's note: There should be an "H." here.] Bork, Solicitor General.

expressing the views of the Council on the adequacy of the Warm Springs Dam Final EIS. Letter of June 11, 1974, from Gary Widman, General Counsel, to Robert H. Bork, Solicitor General. In that letter, the Council expresses the view that the plaintiffs and the public are likely to be irreparably harmed if an injunction pending appeal is denied. The Council continues:

> "It is the Council's position that the best interests of the Government would be served by halting construction work (excluding environment study and testing) until the appeal is decided on the merits.
>
> "In its letter of February 4, 1974, the Council advised the Corps that its Environmental Impact Statement ("EIS") was not adequate in several respects. The Council asked for further study and consideration of the earthquake hazard, the problems of stimulating population growth in the area, the calculation of benefits and costs, and further asked consideration of an alternative project (enlargement of the existing Coyote Dam) that would not raise similar environmental problems. The letter asked the Corps to delay action on the project until such further study and consideration was completed.
>
> "Information revealed at trial strongly reinforced our original reservations about the seismic and other problems, and raised new concerns over potential hazards created by chemicals in the water, and in the fish. In its letter to you, the EPA now agrees that the project's adverse environmental effect [Publisher's note: "effect" should be "effects".] were not adequately raised or discussed in the EIS. The alternative projects (one of which was mentioned in our letter of February 14) have apparently not received the further study which we suggested. Therefore, if asked, CEQ would reaffirm its original advice to the Corps, that sound policy would require construction work on this project to be halted,

> pending further analysis of the problems and consideration of available alternatives."

The Council goes on to express in more detail its reasons for concluding that the EIS is deficient:

> "At the hearing in the District Court, plaintiffs questioned highly responsible experts, including one originally retained by the Corps, and others who were associated with State and Federal Government agencies who testified to professional reservations about the hazards that could be created by the dam. . . .
>
> • • • • •
>
> "Upholding the District Court's finding of adequacy of the statement, and the Court's approval of the Corps decision to proceed, will permit construction of a dam in the face of statements by responsible experts that the EIS information is insufficient to answer problems of earthquake hazards created by a fault underlying the dam, and water quality hazards raised by the presence of mercury, boron, fluoride and asbestos in the site area, (all of which may be carried into reservoir water by underlying hot springs). Whatever disagreement there may have been on this issue of adequacy of information, the Corps nevertheless stated during and after the hearing that there would be additional studies on the issues of seismicity, water quality and archaeology, and it recognized that the results of those studies may lead to a conclusion that the dam should not be built."

The Council cites numerous ways in which the Warm Springs EIS may flout Council Guidelines, including lack of research and analysis supporting its conclusions and lack of presentation of responsible opposing scientific opinion and of critical comments by responsible governmental agencies. It is the view of the CEQ that denial

of an injunction could further jeopardize the possibility of obtaining objective agency choice between alternative projects should an appellate court overturn the decision of the District Court,[3] that further construction could impair the freedom of choice of local voters who will be considering the project, and that "it is both contrary to law and an irreparable detriment to plaintiffs and the public to permit the construction to proceed in such circumstances."

The mandate of the National Environmental Policy Act regarding Environmental Impact Statements is stated in the Senate Report:

> "(c) Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment. If the proposal is considered to have such an effect, then the recommendation or report supporting the proposal must include statements by the responsible official of certain findings as follows:

[3] See *Power Reactor* v. *Electricians*, 367 U.S. 396, 417 (DOUGLAS, J., dissenting):

"But when that point is reached, when millions have been invested, the momentum is on the side of the applicant, not on the side of the public. The momentum is not only generated by the desire to salvage an investment. No agency wants to be the architect of a 'white elephant.'"

See also *Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323, 1333 (CA4 1972):

"Further investment of time, effort, or money in the proposed route would make alteration or abandonment of the route increasingly less wise and, therefore, increasingly unlikely. If investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and at some point his consideration would become a meaningless formality."

> "(i) A finding shall be made that the environmental impact of the proposed action has been studied and that the results of the studies have been given consideration in the decisions leading [Publisher's note: There should be a "to" here.] the proposal.
>
> "(ii) Wherever adverse environmental effects are found to be involved, a finding must be made that those effects cannot be avoided by following reasonable alternatives which will achieve the intended purposes of the proposal. Furthermore, a finding must be made that the action leading to the adverse environmental effects is justified by other considerations of national policy and those other considerations must be stated in the finding.
>
> "(iii) Wherever local, short-term uses of the resources of man's environment are being proposed, a finding must be made that such uses are consistent with the maintenance and enhancement of the long-term productivity of the environment.
>
> "(iv) Wherever proposals involve significant commitments of resources and those commitments are irreversible and irretrievable under conditions of known technology and reasonable economics, a finding must be made that such commitments are warranted." S. Rep. No. 91-296, 91st Cong., 1st Sess., 20-21 (1969).

The tendency has been to downgrade this mandate of Congress, to use shortcuts to the desired end, to present impact statements after a project has been started and when there is already such momentum that it is difficult to stop. There are even cases where the statement is not prepared by a Government agency but by a contractor who expects to profit from a project.[4] One hesitates to interfere once a project is started, but if the

[4] See *Life of the Land* v. *Brinegar*, — U.S. — (decided November 21, 1973); *Power Reactor* v. *Electricians*, 367 U.S. 396.

congressional mandate is to be meaningful it must be done here.

As the EPA observed, the CEQ is the Executive Office charged with administration of the National Environmental Policy Act (NEPA) and the Environmental Impact Statements. The NEPA requires all federal agencies both to consult with the CEQ to insure that environmental factors are adequately considered and to assist the CEQ. 42 U.S.C. § 4332(2)(B), (H). The CEQ is given the authority under NEPA to:

> "review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter [which includes the EIS requirement] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto." 42 U.S.C. § 4344(3).

The Council's members must be qualified "to appraise programs and activities of the Federal Government in the light of the policy" set forth in subchapter I of the Act. 42 U.S.C. § 4342.

The Council on Environmental Quality, ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements, has taken the unequivocal position that the statement in this case is deficient, despite the contrary conclusions of the District Court. That agency determination is entitled to great weight, see, *e.g.*, *Trafficante* v. *Metropolitan Life Ins.*, 409 U.S. 205, 210; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16, and it leads me to grant the requested stay pending appeal in the Court of Appeals to maintain the status quo in the construction of the Warm Springs Dam.

[Publisher's note: See 418 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1268

In the Matter of the Grand Jury Proceedings Re: Will Lewis, Applicant.	)))	Application for Stay of Execution and/or Bail Pending Appeal.

[July 4, 1974]

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant asks for release on bail or a stay of the execution of the District Court's order committing him for contempt pending decision of his case on the merits by the Court of Appeals. He had given the FBI copies of certain tapes and documents delivered to him by an underground group but refused to deliver the originals. So far as I am advised, he was held in contempt for that refusal. Substantial First Amendment claims are raised under the majority ruling in *Branzburg* v. *Hayes*, 408 U.S. 665, as evident from *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546. I indicate no view on the merits. But the applicant being a newsman with all First Amendment protections and with no criminal record, I have entered an order releasing him on his personal recognizance, pending decision of his appeal by the Court of Appeals.

[Publisher's note: See 419 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1305

Times-Picayune Publishing Corp.	)	
v.	)	Application for Stay.
Oliver P. Schulingkamp.	)	

[July 29, 1974]

MR. JUSTICE POWELL, Circuit Justice.

This is an application for stay of an order of the Louisiana Criminal District Court for the Parish of Orleans restricting media coverage of the trials of two defendants accused of committing a highly publicized rape and murder in the city of New Orleans. The applicant, a Louisiana corporation that owns and publishes two of the City's daily newspapers, has asked that I stay that order pending filing and disposition of a writ of certiorari in this Court. Respondent, the Honorable Oliver P. Schulingkamp, has at my request filed a memorandum in opposition to the application. The record before me indicates a substantial possibility that the state court's order is inconsistent with this Court's decisions governing prior restraint of the news media and that continuance of the order pending consideration of a writ of certiorari would inflict irreparable harm. I therefore have granted the requested stay.

In April of 1973, a young white nursing student was raped and murdered following her visit to an elderly patient living in one of the City's public housing projects. Shortly thereafter, two Negro suspects were arrested and charged with the crime. The case immediately became the focal point in the media for a number of more generalized concerns. The state university program that prompted the student's unescorted visit to the housing

project was called into sharp question, as was the sufficiency of law enforcement efforts in high-crime areas of New Orleans. The case also occasioned criticism of the criminal and juvenile justice systems.

Much of the initial publicity was directed toward one defendant, a 17-year-old with an apparently extensive history of juvenile offenses. Newspaper stories recounted in some detail the circumstances leading to his arrest and his subsequent alleged disclosure of the location where the victim's body was recovered. Additionally, stories dwelt on his prior juvenile offenses. Almost all of the many newspaper references characterized him as a youth with a history of 43 juvenile arrests, the accuracy of which has since been disputed. Some newspaper accounts referred to his previous arrest on charges of murder and armed robbery without simultaneously revealing that those charges had been dropped for insufficient evidence. Others reported a psychiatric diagnosis of this defendant made several years earlier and apparently contained in the records of the juvenile probation officer.

Within a few days reports concerning the crime, the accused, and other related concerns ceased to be of banner importance. Stories became shorter and began to move from the first page to less prominent positions in the papers. Newspaper coverage appears to have ceased within some 10 days of the arrest and the papers apparently published no stories about the defendants from the latter part of April until late January of the following year, when one subdued story announced the anticipated initiation of pretrial motions in the case.[1]

[1] Stories from the applicant's newspapers were included in the defendant's motion to restrict media coverage and have been made part of this application. They reveal that the story obtained immediate first-page banner coverage. On April 10, 1973, stories appeared that reported discovery of the victim's body and the arrest of a juvenile in connection with the crime. By the next day, this defendant had been identified and front-page stories began to

Some of the newspaper reporting that occurred in April can hardly be characterized as responsible journalism. Like many States, Louisiana maintains the confidentiality of the records of juvenile offenders. La. Rev. Stat. Ann. § 13:1586.3 (Supp. 1974). The record does not indicate how reporters came into possession of some of their information. Additionally, there appear to be inaccuracies or partial truths in matters that are of obvious importance.

In March of 1974, some 11 months after the crime and attendant extensive publicity, counsel for the defendant who had received the most journalistic attention moved that the Criminal District Court for the Parish of Orleans impose restrictions on reporting of the case. The court granted the motion on June 17, 1974. The court's order imposes a total ban on reporting of testimony given in hearings on pretrial motions until after the selection of a jury and also places other selective restrictions on reporting before and during trial.

At the time the order was issued, the court apparently contemplated only one trial. By its terms the order was to remain in effect until termination of *the*

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portray his history of juvenile arrests. The arrest of the second defendant received banner coverage on April 12, as did a report that allegedly linked property stolen from the victim to the possession of the first defendant. The following day first-page banner stories appeared purportedly detailing the first defendant's juvenile record and his psychiatric diagnosis. One newspaper also ran a picture of him being escorted to arraignment with his hands cuffed behind his back. During that same period other stories dealt with more general topics, and many mentioned this defendant and his juvenile record.

Publicity began to subside around April 15 and ended a few days thereafter. The record does not disclose any subsequent newspaper accounts mentioning the defendants until the appearance on January 22, 1974, of a story reporting the expected initiation of routine pretrial motions in the case.

The record does not specifically reveal the nature and extent of radio and television reporting. I assume that its timing and intensity more or less paralleled that of the newspaper reporting.

trial. The court later severed the defendants' cases and ordered separate trials of the rape and murder charges against each. It made no modification of its media coverage order to reflect this changed circumstance. The applicant has represented that the court stated that the order would remain in effect until the termination of the last trial. Respondent has not contradicted this representation, and I assume it to be correct.

The applicant sought relief from both the lower federal courts and the state court system prior to addressing this application to me. After failing to obtain immediate injunctive relief from the federal courts,[2] the applicant asked the state court to vacate its order. That request was denied, as was a request that the court stay its order pending submission of application for supervisory and remedial writs in the Louisiana Supreme Court. On July 9, 1974, the applicant sought writs of certiorari, review, prohibition, and mandamus, and a stay of the state trial court's order in the Louisiana Supreme Court. That same day the Louisiana Supreme Court denied relief by a vote of four to three, stating that the "[s]howing made does not justify the relief demanded." Following one more unsuccessful attempt to obtain an injunction in the United States District Court, the applicant has requested that I, as Circuit Justice for the Fifth Circuit, stay the state court's order pending this Court's consideration of a writ of certiorari.

I have previously expressed my reluctance, in considering in-chambers stay applications, to substitute my

[2] The United States District Court conducted a hearing at which it heard argument of counsel and the testimony of the respondent herein. Thereafter, the court determined that it should abstain from interfering with the state proceedings at that stage. The applicant noted an appeal from that decision and requested that the United States Court of Appeals for the Fifth Circuit stay the state court order pending appeal. A panel of the Fifth Circuit denied the request for a stay. Neither of these decisions is before me today.

view for that of other courts that are closer to the relevant factual considerations that so often are critical to the proper resolution of these questions. *Graves* v. *Barnes*, 405 U.S. 1202, 1203 (1972). In my in-chambers opinion in that case, I articulated the general standards governing the grant of a stay application: there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. *Ibid*.

The question of the possibility of irreparable harm is particularly troublesome in this case. It presents a fundamental confrontation between the competing values of free press and fair trial, with significant public and private interests balanced on both sides. If the order is not stayed, the press is subjected to substantial prior restraint with respect to a case of widespread concern in the community. If, on the other hand, the order is stayed and the press fails to act with scrupulous responsibility, the defendants' constitutional right to a fair trial may be seriously endangered.

The challenged portions of the order of the Criminal District Court for the Parish of Orleans impose a total prohibition on publication of testimony adduced in pretrial hearings until after selection of a jury. Noting that extensive testimony would be required in considering the many pretrial motions, including motions to suppress an alleged confession and other evidence, the court specifically ordered "that the reporting of such testimony be deferred until after the jury has been selected in order to preclude the possibility of such testimony influencing, in any way, prospective jurors yet to be selected, and rendering more difficult the task of selecting said jurors." In addition, the state court order imposes other selective

restrictions on what may be published both before and during trial. These restrictions are aimed at the content of news reporting. The order requires that the media avoid publication of interviews with subpoenaed witnesses. It also prohibits publication of any of the defendants' criminal records or discreditable acts or of any possible confessions or inculpatory statements unless made part of the evidence in the court record. The order forbids publication of any testimony striken [Publisher's note: "striken" should be "stricken".] by the court unless identified as having been stricken and bars publication of any leaks, statements, or conclusions of guilt or innocence that might be expressed or implied by statements of the police, prosecuting attorneys, or defense counsel. Finally, the order prohibits any editorial comment preceding or during trial "which tends to influence the Court, jury, or witnesses." By its terms, the order remains in effect "until the conclusion of the trial." The court's decision to continue the order during pendency of all of the trials ensures that it will extend over an indefinite and possibly lengthy period of time.

The court's order imposes significant prior restraints on media publication. As such, it would come to this Court "bearing a heavy presumption against its constitutional validity." *New York Times* v. *United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963); *Near* v. *Minnesota*, 283 U.S. 697 (1931). Decisions of this Court repeatedly have recognized that trials are public events. See, *e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333, 349-350 (1966); *Estes* v. *Texas*, 381 U.S. 532, 541 (1965); *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). And "reporters . . . are plainly free to report whatever occurs in open court through their respective media." *Estes* v. *Texas*, *supra*, at 541-542.

This Court also has shown a special solicitude for preserving fairness in a criminal trial. "Legal trials are not

like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California*, 314 U.S. 252, 271 (1941). See also *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961). The task of reconciling First Amendment rights with the defendant's right to a fair trial before an impartial jury is not an easy one. This Court has observed in dictum that newsmen might be prohibited from publishing information about trials if such restrictions were necessary to assure a defendant a fair trial. *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972). There was no indication in that opinion, however, that the standards for determining the propriety of resort to such action would materially differ from those applied in other decisions involving prior restraints of speech and publication.

I need only consider this question in the limited context of an application for a stay. On the record before me, and certainly in the absence of any showing of an imminent threat to fair trial, I cannot say that the order of the state court would withstand the limitations that this Court has applied in determining the propriety of prior restraints on publication. Cf. *United States* v. *Dickinson*, 465 F.2d 496 (CA5 1972). The state court was properly concerned that the type of news coverage described above might be resumed and might threaten the defendants' rights to a fair trial. But the restraints it has imposed are both pervasive and of uncertain duration. They include limitations on the timing as well as the content of media publication, cf. *The Miami Herald Publishing Co.* v. *Tornillo*, — U.S. — (1974). Moreover, the court has available alternative means for protecting the defendants' rights to a fair trial.[3]

[3] The court has already invoked several of these procedures. For example, portions of the court's order prohibit members of the bar and other persons under the court's supervision and control from making extrajudicial statements prior to the termination of trial.

The issues underlying this case are important and difficult. Without anticipating my views on the merits, I have concluded that this application satisfies the standards for the grant of a stay. Accordingly, I have decided to stay that portion of the order of the Louisiana Criminal District Court that imposes direct limitations on media reporting pending the timely filing and disposition of a writ of certiorari in this Court.[4]

These prohibitions are not challenged here. Additionally, respondent has indicated his intention to sequester the juries. This will protect against many of the hazards that the selective restrictions on reporting during trial are designed to prevent.

Some other options may yet be used to protect the defendants' rights. The defendant who sought the order apparently did not request that the pretrial hearings be closed to the public and press, and the court does not seem to have contemplated that possibility. As an initial matter, the court's power to take such action is a question governed by state law. Unlike some States, Louisiana does not appear to have a specific provision authorizing such action. Cf. Cal. Penal Code § 868 (West 1969); Iowa Code Ann. § 761.13 (1950); Mont. Rev. Code Ann. § 95-1202(c) (1947). This Court has not been called upon to determine whether these provisions are constitutional, and I express no view on that question. Of course, the court must conduct *voir dire* of the prospective jurors in these cases with particular care. Finally, the court retains the power to hold persons, including members of the media, in contempt in particular limited circumstances. See *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).

[4] The applicant has not questioned the portions of the court's order that relate to the conduct of other persons, and this stay order does not affect them. My order is limited to the portion of the respondent's order directed specifically to the news media. It does not, however, stay the portion of the court's order prohibiting the use of electronic or mechanical equipment within the court during the trial or related proceedings.

The Reporters' Committee for Freedom of the Press, and the Vieux Carre Courier Publishing Company, as *amici curiae*, have requested additionally that I enjoin any court proceeding about which the press is prohibited from reporting pending final disposition of this case on the merits. I find that action to be unwarranted and unwise.

[Publisher's note: See 419 U.S. 1310 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–93

John D. Ehrlichman	)	On Application for Stay
v.	)	Pending Consideration of a
John J. Sirica, United States District Judge, et al.	)	Petition for a Writ of Prohibition or Mandamus.

[August 28, 1974]

MR. CHIEF JUSTICE BURGER, Circuit Justice.

This application comes before me as Circuit Justice for a stay of the District Judge's order setting trial for September 30, 1974, of *United States* v. *Mitchell, et al.*, D.D.C. Crim. No. 74-110. Defendant Ehrlichman seeks this stay alleging that past and continuing prejudicial publicity has made it impossible for him to receive a fair trial in this venue at the time now set, and that he will not have sufficient time to prepare his defense.

The trial had been set for September 9, 1974. When both the prosecution and defense asked for more time to prepare for trial the District Court denied the requests and applicant, *inter alia*, petitioned for a writ of mandamus from the United States Court of Appeals for the District of Columbia Circuit to delay the trial. That court, sitting en banc, did not rule directly on the petition, but instead remanded and recommended the District Judge consider delaying the trial three or four weeks so all parties would have more time to prepare; one judge based his concurrence on prejudicial publicity as well. The District Judge then ordered the trial to be deferred for three weeks from September 9, 1974.

The present application is presented to me, as Circuit Justice for the District of Columbia Circuit, to delay the start of the trial until January 1975. The application

puts forth the same reasons as before the Court of Appeals. The United States has filed a response opposing any further delay.

The function of a Circuit Justice in these circumstances is limited. It does not ordinarily encompass overseeing pretrial orders in pending criminal prosecutions. Such matters are essentially within the sound judicial discretion of the trial judge who must be presumed to be intimately aware of the case at hand and other factors which bear upon the relief sought. *Frohwerk* v. *United States*, 249 U.S. 204 (1919); *Goldsby* v. *United States*, 160 U.S. 70 (1895); *Isaacs* v. *United States*, 159 U.S. 487 (1895).

The limited power of the Court of Appeals, whether by way of mandamus or in its supervisory function over trial courts, must be looked to as the primary source of relief since such courts are in closer touch with the facts and factors presented in the workings of the regular activities of the District Courts within a Circuit.

Here the Court of Appeals has denied mandamus relief, but exercised something in the nature of a *de facto* supervisory function by remanding the issue to the District Court with intimations that some delay would be appropriate. It is only a coincidence that the location of this trial is in the same city as the seat of this Court, giving Members of this Court essentially the same exposure as that of the trial judge and the Court of Appeals to the pretrial publicity which forms a partial basis for the relief requested. Except for cases coming from the District of Columbia Circuit, a Justice of this Court is ordinarily far removed from the setting of the trial. General principles about the function of a Circuit Justice in a situation of this kind are not to be formed from such a unique setting. An individual Circuit Justice does not possess the supervisory powers of a Court of Appeals concerning the activities of the District Courts within its Circuit.

One course open in this setting and in light of the gravity of the claim of prejudicial pretrial publicity would be to refer this application to the full Court for action at the opening of the October 1974 Term on October 7. However, this in itself would defer starting of the trial to at least sometime in the latter half of October since neither party would be expected to go to trial immediately following this Court's action. To follow this course would have the operative effect of an additional stay of three or four weeks, assuming denial of the relief requested.

The responsibility for passing on a claim for change of venue or delay in a trial because of prejudicial pretrial publicity calls for the exercise of the highest order of sound judicial discretion by the District Court. Doubts about the correctness of a district court decision fixing a trial date in these circumstances, particularly after the Court of Appeals has reviewed the matter and denied an application for mandamus, are not sufficient to form a basis for contrary action by an individual Circuit Justice. The District Court bears responsibility commensurate with its authority in such matters, and only in the most extraordinary circumstances should an individual Circuit Justice intervene.

The application for a stay is therefore denied, but this action is not to be taken as intimating any view whatever on the issues presented by the order of the District Court or the action of the Court of Appeals. The resolution of these issues should they arise after verdict must await the normal appellate processes. *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966).

Application denied.

[Publisher's note: See 419 U.S. 1314 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–534

Socialist Workers Party et al.	)	
v.	)	Application for Stay.
Attorney General of the United States of America et al.	)	

[December 27, 1974]

MR. JUSTICE MARSHALL, Circuit Justice

This case is before me on an application to stay an order entered by a panel of the Court of Appeals for the Second Circuit, vacating in part an order of the District Court for the Southern District of New York. The District Court had granted a preliminary injunction against the Director of the Federal Bureau of Investigation and others, barring government agents and informants from attending or otherwise monitoring the national convention of the Young Socialist Alliance (YSA), to be held in St. Louis, Missouri, between December 28, 1974, and January 1, 1975. Applicants also seek to have the injunction of the District Court reinstated in full.

Applicants, the Socialist Workers Party, the YSA—the party's youth organization—and several individuals, originally brought this action against various government officials, seeking injunctive and monetary relief for alleged governmental interference in the political activities of the two organizations. In the course of preparing for trial on the merits, the applicants apparently learned that the FBI planned to monitor the YSA national convention and to use confidential informants to gain information about convention activities. They sought to enjoin the FBI, its agents and its informants from "attending, surveilling [Publisher's note: In 1974 "surveilling" was an oddball word — odd enough to merit a "[*sic*]" in the official report of this opinion (see 419 U.S. at 1315) — but today it is acceptable. See, *e.g.*, *Murray* v. *United States*, 487 U.S. 533, 535 (1988).], listening to, watching, or in any way monitoring," the convention. After several hear-

ings, the District Court granted the injunction in the form requested by the plaintiffs. On an expedited appeal,[1] the Court of Appeals vacated the District Court's injunction in all respects except one: it barred the FBI from transmitting the names of persons attending the convention to the Civil Service Commission pending final determination of the action. For the reasons stated below, I have concluded that on the facts of this case, the extraordinary relief of a stay is not warranted.

I

The applicants argue that a stay is necessary to protect the First Amendment speech and association rights of those planning to attend the YSA convention. Surveillance and other forms of monitoring, they claim, will chill free participation and debate, and may even discourage some from attending the convention altogether. Beyond this, the applicants allege that the FBI has admitted that its agents or informants "intend to participate in the convention debate posing as *bona fide* YSA members."[2] This "double agent" activity, the

[1] Applicants object to the Court of Appeals' treatment of the case as an appeal, after initially setting it as a motion for a stay. When the time is as short as it was in this case, of course, the difference between the two is very slight. The court's determination that the District Court abused its discretion in ordering the injunction would appear to meet the standard of review for either a stay or the reversal of a preliminary injunction.

[2] Applicants argue that this admission, made after the District Court's decision, significantly alters the balance of the equities in this case. However, the Government has represented that no FBI agents will attend the convention and that the informants who are members of the YSA will participate in the convention only in a manner consistent with their previous roles in the organization. The Government assured both the Court of Appeals and me that the FBI has authorized no disruptive activity at the YSA convention. To require informants who may be active members of the organization to remain silent throughout the convention would render them as readily identifiable in some cases as an order excluding them.

applicants claim, will result in "corruption of the democratic process" and consequent irreparable harm to the applicants and others who would participate in the convention.

The applicants further assert that vacating the Court of Appeals' stay will not result in injury to the FBI. The fact that the FBI has a duty to keep itself informed concerning the possible commission of crimes, applicants say, does not justify its permitting informants and agents to participate in the convention, since the YSA has not been shown to have engaged in illegal activities. They further claim that the risk that FBI informants will become identifiable by their nonattendance at the convention is not sufficient to support the Court of Appeals' order. While the applicants' allegations evoke an unsavory picture of deceit and political sabotage, the facts as characterized by the Court of Appeals suggest a less sinister view of the Government's planned activities at the convention. The Court noted that the convention would be open to anyone under the age of 29; that anyone could register; that even the "delegated" sessions would be open to anyone registered at the convention; that the Government planed no electronic surveillance or disruptive activity; and that the only investigating method would be the use of informants who would attend the meetings just as any member of the public would be permitted to do.

The Court of Appeals held that on the facts of this case, the chilling effect on attendance and participation at the convention was not sufficient to outweigh the serious prejudice to the Government of permanently compromising some or all of its informants. The 11th-hour grant or denial of injunctive relief would not be likely to have a significant effect on attendance at the convention, the Court stated, and since the convention is to be open to the public and the press, the use of informants to gather information would not appear to

increase appreciably the "chill" on free debate at the convention. In weighing the nature of the planed investigative activity, the justification for that activity, and the claimed First Amendment infringement in this case, the Court of Appeals determined that the balance of the equities tipped in favor of the Government and that a preliminary injunction was therefore improper.

II

This case presents a difficult threshold question—whether the applicants have raised a justiciable controversy under this Court's decision in *Laird* v. *Tatum*, 408 U.S. 1 (1972). In *Laird*, the plaintiffs protested surveillance activities by the Army that were in many ways similar to those planned by the FBI in this case. The Court held, however, that the plaintiffs' claim that the Army's surveillance activities had a general chilling effect on them was not sufficient to establish a case or controversy under Article III of the Constitution.

The Government has contended that under *Laird*, a "chilling effect" will not give rise to a justiciable controversy unless the challenged exercise of governmental power is "regulatory, proscriptive, or compulsory in nature," and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging. 408 U.S., at 11. In my view, the Government reads *Laird* too broadly. In the passage relied upon by the Government, the Court was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not. More apposite is the Court's observation that in *Laird*, the respondents' claim was

> "that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling

effect upon the exercise of their First Amendment rights." *Id.*, at 13.

Because the "chilling effect" alleged by respondents in *Laird* arose from their distaste for the Army's assumption of a role in civilian affairs or from their apprehension that the Army might at some future date "misuse the information in some way that would cause direct harm to [them]," *ibid.*, the Court held the "chilling effect" allegations insufficient to establish a case or controversy.

In this case, the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III.

III

Although the applicants have established jurisdiction, they have not, in my view, made out a compelling case on the merits. I cannot agree that the Government's proposed conduct in this case calls for a stay, which, given the short life remaining to this controversy, would amount to an outright reversal of the Court of Appeals.

It is true that governmental surveillance and infiltration cannot in any context be taken lightly. The dangers inherent in undercover investigation are even more pronounced when the investigated activity threatens to dampen the exercise of First Amendment rights. See *DeGregory* v. *New Hampshire*, 383 U.S. 825 (1966); *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539 (1963); *NAACP* v. *Alabama*, 357 U.S. 449 (1958). But our abhorrence for abuses of governmental investigative

authority cannot be permitted to lead to an indiscriminate willingness to enjoin undercover investigation of any nature, whenever a countervailing First Amendment claim is raised.

In this case, the Court of Appeals has analyzed the competing interests at some length, and its analysis seems to me to compel denial of relief. As the Court pointed out, the nature of the proposed monitoring is limited, the conduct is entirely legal, and if relief were granted, the potential injury to the FBI's continuing investigative efforts would be apparent. Moreover, as to the threat of disclosure of names to the Civil Service Commission, the Court of Appeals has already granted interim relief. On these facts, I am reluctant to upset the judgment of the Court of Appeals.[3]

As noted above, the Government has stated that it has not authorized any disruptive activity at the convention. In addition, the Government has represented that it has no intention of transmitting any information obtained at the convention to nongovernmental entities such as schools or employers. I shall hold the Government to both representations as a condition of this order. Accordingly, the application to stay the order of the Court of Appeals and to reinstate the injunction entered by the District Court is

Denied.

[3] This is especially true where, as here, the matter before me involves a preliminary injunction granted without a full hearing on the merits. Much of the information before me is in dispute. The denial of the stay in this case in no way affects the outcome of the case on the merits, which was filed in 1973 and is still pending in the District Court.

[Publisher's note: See 419 U.S. 1321 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–553

The National League of Cities et al., Appellants, *v.* Peter J. Brennan, Secretary of Labor.	))))	Application for Stay.

[December 31, 1974]

MR. CHIEF JUSTICE BURGER, Circuit Justice.

This matter came to me as an individual Circuit Justice for the District of Columbia Circuit after the close of regular business hour [Publisher's note: "hour" should be "hours".] of this Court on Tuesday, December 31, 1974, on a motion of the above-named appellants, States, [Publisher's note: The comma preceding this note is surplus.] and municipalities, The National League of Cities and the National Governors' Conference. The application of said parties requests a stay of those parts of the 1974 Amendments to the Fair Labor Standards Act, Pub. L. 93-259, 88 Stat. 55, amending 29 U.S.C. § 201 *et seq*., which go into effect January 1, 1975, to stay Regulations promulgated by the Secretary of Labor, 29 CFR Part 553—Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activities, including security personnel in correctional institutions of said States and municipalities, and for an injunction against enforcement by the Secretary of Labor or by any other person in any federal court to enforce parts of the said 1974 Amendments to the above-described Act, which went into effect May 1, 1974.

The above-entitled case was filed in the United States District Court for the District of Columbia on December 12, 1974. A three-judge District Court was convened and on Monday, December 30, 1974, heard arguments on Plaintiffs' and Plaintiff Intervenors' (all of who, except for Plaintiff Intervenor State of California, are

Appellants on this Application) Application for a Preliminary Injunction. Earlier today an order was entered dated December 31, 1974, denying a Preliminary Injunction and dismissing the Complaint in the above-entitled action.

The three-judge District Court in denying the relief on the day after it heard arguments expressed the view that the Complaint raised "a difficult and substantial question of law" but concluded that it was bound by this Court's holding in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In light of the pervasive impact of the judgment of the District Court on every state and municipal government in the United States, the novelty of the legal questions presented, the expressed concern of the District Court as to the substantiality of the constitutional questions raised, the brevity of time available to the District Court and to me as Circuit Justice, and the extent and nature of the injury to the applicants, it is not appropriate to take final action as an individual Justice.

Against this background, and balancing the injury to the contemplated enforcement of the regulations by the Secretary, against the injury to the applicants if they are ultimately successful, and sharing the doubts and concerns articulated by the District Court, I am not prepared—less than five hours before the Regulations of the Secretary become effective—to do more than enter an interim order granting the relief prayed for until the application can be presented to the full Court at the earliest convenient date. At that time the entire matter can be considered with the benefit of a response from the Solicitor General on behalf of the Secretary.

Accordingly, an order will be entered forthwith, granting the relief prayed until further order of the Court and referring the application to the full Court.

The Solicitor General has been directed to file any response he desires to make on or before Wednesday, January 8, 1975.

[Publisher's note: See 420 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–765

William K. Patterson et al., Applicants,	)	
v.	)	
The Superior Court of the State of California in and for the County of Fresno et al., Respondents.	)	Application for Stay.

[March 21, 1975]

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicants are two California reporters and the managing editor of their newspaper. In January 1975, they published a series of articles containing references to testimony offered in a Fresno County grand jury proceeding, despite the fact that the transcript of that proceeding had been ordered sealed by the local state court judge before whom the grand jury's indictment was returned. The judge instituted an investigation seeking to uncover any possible violations of his order sealing the grand jury transcript; in the course of that investigation, numerous witnesses were called, including applicants. Applicants state that they were excluded from the courtroom during the testimony of the other witnesses, and that their counsel was prevented from cross-examining any of these witnesses. Applicants themselves, when called, refused to answer questions concerning the manner in which they had obtained access to the grand jury transcript, citing various state and federal privileges (not including, except as to one applicant, their privilege against self-incrimination). The judge refused to recognize these claims of privilege, and found applicants in contempt of court on many occasions, although the record before me

does not disclose whether these contempt adjudications have ever been formalized in any sense and does not indicate that any sanction has yet been imposed. Applicants unsuccessfully sought extraordinary relief in the state appellate courts, and now state their intention to seek a writ of certiorari to review the denial of such relief, claiming that their confrontation rights and their due process rights, including the right to a fair and impartial hearing, have been violated and will continue to be violated in these proceedings.

I am informed that proceedings are scheduled to continue in the Superior Court at 10 a.m. today. Intervention in a pending state proceeding of this sort undoubtedly is warranted only in extraordinary circumstances. The facts of this case, however, raise disquieting echoes of the constitutional infirmities which we identified in *In re Murchison*, 349 U.S. 133 (1955), and *In re Oliver*, 333 U.S. 257 (1948); if these proceedings continue in this fashion, applicants may well suffer a deprivation of constitutional rights which can never be adequately redressed. In light of applicants' expressed intention to seek certiorari from the denial of extraordinary relief below, I have this day entered an order staying further proceedings with respect to these applicants, pending my referral of this application to the full Court at the earliest opportunity.

[Publisher's note: See 423 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–133 (74–1606)

Hortonville Joint School District No. 1 et al., Petitioners,	)	
v.	)	On Application for Stay.
Hortonville Education Association et al.	)	

[August 18, 1975]

MR. JUSTICE REHNQUIST, Circuit Justice.

If the judgment of the Supreme Court of Wisconsin were plainly a "final judgment" for purposes of 28 U.S.C. § 1257, and if it plainly rested solely upon a construction of the Fourteenth Amendment to the United States Constitution, I would be inclined to grant the stay requested by the applicant School Board. I think that none of our cases require the conclusion, reached by the Wisconsin court, that a school board may not be allowed to dismiss teachers which it employs because it is not the sort of impartial decisionmaker required by due process of law. If this matter were before me on the petition for certiorari where I would be casting my vote as a Member of the Court, I would conclude that the judgment of the Supreme Court of Wisconsin did rest solely upon the Fourteenth Amendment. But in my capacity as Circuit Justice, where I act "as a surrogate for the entire Court," *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1313 (1973) (MARSHALL, J., in chambers), doubts as to whether the judgment may not rest also upon a construction of the Wisconsin Constitution, and as to the finality of the judgment, lead me to deny the application.

[Publisher's note: See 423 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–230

C. Arnholt Smith and Philip A. Toft, Applicants,	)	
v.	)	Application for Stay.
United States and San Diego County, California.	)	

[September 11, 1975]

MR. JUSTICE DOUGLAS, Circuit Justice.

Substantial questions may be raised under both the Federal Rules of Criminal Procedure and the Constitution whenever the files and records of a federal grand jury are turned over to a state prosecutor. Such an order was entered in this case by the District Court. The Court of Appeals for the Ninth Circuit denied a motion to stay the order pending appeal; however, a motions panel of that court granted an emergency stay so that the matter might be presented to me. I have now heard oral argument in Yakima, Washington, and I have concluded that I should issue the stay.

In 1973 and 1974 a federal grand jury in the Southern District of California conducted a lengthy investigation into the affairs of United States National Bank. This investigation resulted in multicount indictments against both applicants. On June 12, 1975, the federal case was concluded when applicants entered pleas of *nolo contendere* and were sentenced. On August 7, the District Attorney for San Diego County filed a motion in federal district court seeking the files and records of the grand jury. That motion, which was opposed by the applicants, has led to the present proceeding.

In a long line of cases the Supreme Court has reaffirmed the "long-established policy that maintains the

secrecy of the grand jury proceedings in the federal courts," *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). See, *e.g.*, *Dennis* v. *United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959). Although the Court has affirmed the power of district courts under Rule 6(e) of the Federal Rules of Criminal Procedure to order disclosure of evidence presented to grand juries, that Rule has been interpreted to require a showing of "particularized need" or "compelling necessity." See, *e.g.*, *Pittsburgh Plate Glass Co.*, *supra*, at 400. It is a substantial question whether the need cited by the state prosecutor in this case is great enough to justify breach of the grand jury's deliberations. The state prosecutor contends, first, that the grand jury materials will save the state substantial investigatory and prosecutorial resources and, second, that the materials will be generally useful in refreshing the memories of witnesses who appeared before the grand jury. However, it is doubtful whether either of these reasons—which will always be present whenever a State conducts an investigation following a similar one by a federal grand jury—meets the "compelling necessity" standard of Rule 6(e).

The prosecutor also points out that the California statute of limitations, which is three years for most felonies, see California Penal Code § 800, will bar prosecution of applicants sometime in 1976. The collapse of United States National Bank, and presumably the termination of any crimes that applicants may have committed, occurred on October 18, 1973. The prosecutor thus argues that the imminent running of the statute of limitations justifies the turnover order. The collapse of the bank, however, and the initiation of the federal investigation were well publicized. Yet the prosecutor chose to do nothing. Surely a state prosecutor may not demonstrate "compelling necessity" by a state of affairs that his own tardiness has brought about.

Finally, there is a serious question whether applicants can be prosecuted at all under California law. California Penal Code § 656 forbids prosecution upon "act[s] or omission[s]" for which the accused has already stood trial under the laws of "another State, Government, or country." See also California Penal Code §§ 793, 794. The California Supreme Court has held that a previous federal prosecution acts as a bar, under § 656, to subsequent state prosecution. *People* v. *Belcher*, 11 Cal. 3d, 113 Cal. Rptr. 1, 520 P.2d 385 (1974). It seems likely that a plea of *nolo contendere* would be considered the same for § 656 purposes as a plea of guilty. See, *e.g.*, *North Carolina* v. *Alford*, 400 U.S. 25, 35 & n. 8 (1970). Moreover, the state prosecutor, in his Declaration to the District Court, virtually conceded that the California crimes that applicants may have committed are state equivalents to the federal crimes charged in the federal indictment. It is a serious question whether prosecution would thus be based upon the same "act or omission" as the crimes upon which applicants pled *nolo contendere* and would thereby be barred under § 656. A substantial question arises whether the requirements for disclosure under Rule 6(e) are satisfied when a state investigation cannot, under state law, result in conviction.

If the moving parties had been witnesses before the federal grand jury, serious questions involving the Self-Incrimination Clause of the Fifth Amendment would be involved. No such issue is presented here as to applicants, because they did not testify before the grand jury. Other persons, however, who testified before the grand jury, were granted immunity. Immunity once granted in a federal proceeding may not be nullified by a turnover order obtained by a state prosecutor. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).

The District Court, moreover, might have granted motions to suppress evidence that had been obtained by the grand jury, and if that occurred, it is

difficult to see how motions that were won before the District Court can be lost at the instance of the state prosecutor. This Court has held that a witness before a grand jury may not refuse to answer questions on the ground that they are based upon evidence obtained in violation of the Fourth Amendment. *United States* v. *Calandra*, 414 U.S. 338 (1974). However, from the fact a grand jury may use illegally seized evidence, it does not follow that the evidence may in turn be given to a state prosecutor. *Calandra* was based upon the marginal deterrent value that application of the exclusionary rule to grand jury proceedings would have upon illegal police activity. *Id.*, at 351. In addition, the Court found that application of the exclusionary rule would hinder and disrupt grand jury proceedings. *Id.*, at 349. Neither of those reasons has much force in this case. First, there are no grand jury proceedings to disrupt. Second, a turnover of illegally seized evidence may undermine the deterrent effect of the exclusionary rule to a greater extent than contemplated in *Calandra*. Finally, *Calandra* cannot be read as approving illegal seizures of evidence. The only question before the Court was whether a potentially disruptive challenge to the seizure of evidence would lie during grand jury proceedings. After a trial court has ruled that evidence was, in fact, the product of unconstitutional police activity, there is no excuse for the continued use of the evidence. There apparently is such a question of illegally seized evidence in this case, although the record before me does not show precisely what the evidence suppressed was and how relevant it might be to the state as well as to the federal charges. It would seem to be a substantial question whether a turnover order should include such evidence.[*]

[*] It was suggested that applicants should seek relief from any oppressive aspects of the turnover order by appropriate motions in the state courts. It seems apparent, however, that even a cursory examination of the federal grand jury materials would likely

Double jeopardy might also preclude state prosecution. That kind of objection may, in time, be resolved upon an appropriate motion before state tribunals. I mention the matter because the Double Jeopardy Clause of the Fifth Amendment was held applicable to the States in *Benton* v. *Maryland*, 395 U.S. 784 (1969). *Benton* may cast doubt upon the continuing vitality of *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), which found that successive state and federal prosecutions upon substantially similar charges do not violate the Double Jeopardy Clause. See also *Abbate* v. *United States*, 359 U.S. 187 (1959).

It was suggested at oral argument that applicants' lawless actions can be curbed only by denying them legal refuge. Yet all constitutional guarantees extend both to rich and poor alike, to those with notorious reputations as well as to those who are models of upright citizenship. No regime under the Rule of Law could comport with constitutional standards that drew such distinctions.

I do not, of course, pass on the merits of the turnover order, which is presently before the Court of Appeals. Yet these questions seem to me to be so substantial that I have decided to issue the stay. It will remain in effect until the Court of Appeals decides the merits.

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give the state prosecutor "leads" to information that would result in a permanent loss to applicants of the value of the secrecy of the grand jury proceedings.

[Publisher's note: See 423 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–233

Chamber of Commerce of the United States, applicant,	)	
v.	)	Application for Stay.
Legal Aid Society of Alameda County et al.	)	

[September 29, 1975]

MR. JUSTICE DOUGLAS, Circuit Justice.

This application for stay of the discovery order by the District Court seemed to me, when I studied it at Goose Prairie, Wash., to present a series of very important and new questions under the Freedom of Information Act, 5 U.S.C. § 552, for which guidelines would be desirable. Thus I was initially disposed to issue the stay so that in due course new guidelines could be established. But the questions presented involved so many complexities that I felt the application should be put down for oral argument so that all parties could be heard.

The Legal Aid Society of Alameda County, Calif., is suing various federal officials in Federal District Court, seeking mandamus to remedy alleged noncompliance with Executive Order No. 11246. That order requires employers holding contracts with the Federal Government to ensure nondiscriminatory employment practices through affirmative action programs. Applicant, the United States Chamber of Commerce, has been permitted by the District Court to intervene on behalf of various contractors with the Federal Government. Pursuant to a Legal Aid request, the District Court ordered disclosure by the General Services Administration (GSA) of information filed with it by the various contractors, *Legal Aid Society* v. *Brennan*, No. C-73-0282 (ND Cal., filed

Mar. 26, 1975). The information comprises ethnic composition reports (EEO-1), affirmative action program reports (AAP), and compliance review reports (CCR). Applicant's petition for a stay of the District Court's discovery order was denied by the Ninth Circuit without opinion, *Legal Aid Society* v. *Brennan*, Civil No. 75-1870 (CA9, filed Aug. 4, 1975), as was its petition for rehearing and suggestion for rehearing en banc, *Legal Aid Society* v. *Brennan*, *supra* (filed Sept. 2, 1975).

In the District Court's opinion below, much is made of the policy of the Freedom of Information Act which requires access to official agency information. The GSA here is willing to disclose the requested information. But as the District Court also observed, "the production here sought is not pursuant to the Act, but part of a legitimate discovery effort by plaintiffs. . . . The only legitimate objections one could raise to preclude discovery are, under Fed. Rule Civ. Proc. 26(c), claims of privilege." Slip op., at 3.

While I agree with the District Court's analysis of the posture of Legal Aid's request for information, I part company with the court when it neglects consideration of the existence of a discovery privilege protecting those whom the applicant represents. While the Freedom of Information Act creates no privileges, *Verrazzano Trading Corp.* v. *United States*, 349 F. Supp. 1401, neither does it diminish those existing.

In my mind, a substantial question exists as to whether the parties represented by the applicant enjoy a privilege as to the information contained in the EEO-l's, AAP's, and CCR's. The Equal Employment Opportunity Commission (EEOC) is authorized to obtain the information contained in these reports. 42 U.S.C. § 2000e-8(c)-(d). However, § 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e), provides:

> "It shall be unlawful for any officer or employee of the Commission to make public in any manner

> whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information."

Accordingly, information contained in the EEO-l's, the AAP's and the CCR's, which are prepared from the EEO-l's, is arguably protected from disclosure by § 709(e). See *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (majority and dissenting opinions).

To be sure, the information in the AAP's and the EEO-l's in this case was not obtained directly by the EEOC. Rather, the information was apparently collected by a Joint Reporting Committee of both the EEOC and the federal compliance agency (in this case, GSA) under Executive Order No. 11246. But the information in the EEO-l's was obtained, in part, on behalf of the EEOC, see 41 CFR § 60-1.7(a)(1), and much of the information contained in the AAP's is essentially in the nature of that protected by § 709. Compare 41 CFR § 60-2 with 42 U.S.C. § 2000e-8(c). Indeed, certain policy considerations underlying the regulations precluding release by the GSA of information contained in the AAP's are akin to those motivating the confidentiality implemented by § 709. Compare *H. Kessler & Co*., *supra*, at 1150, with 41 CFR § 60-40.3(a)(5). In view of the foregoing, though some of the information involved here neither was obtained, nor is to be disclosed, by the EEOC, the congressional purpose of confidentiality, protected by criminal sanctions is not to be lightly circumvented.

Despite these questions on the merits, there is the further question whether interim relief is necessary. Applicant will not suffer irreparable injury from disclosure of the documents because the District Court has entered a protective order permitting only attorneys for the Legal Aid Society to examine the assertedly privileged documents. Only one of the reasons advanced by

the applicant may justify granting a stay despite the District Court's protective order, and it is meritless. Applicant contends that disclosure of the materials will enable Legal Aid to compel GSA, by litigation [Publisher's note: There should be a comma here.] to conduct reviews for compliance with Executive Order No. 11246. This in turn will result in ineligibility of the affected contractors for federal contracts pending review, an asserted denial of due process because the affected contractors will have no opportunity to defend the adequacy of their affirmative action programs. Applicant also asserts that this denial of due process causes the contractors irreparable injury. Apart from other serious difficulties with this argument, it is enough to note that the claimed irreparable injury is far from imminent since the GSA has yet to indicate that it will undertake a compliance review and the District Court has entered no order to that effect. Since applicant fails to show any imminent harm, on further study and consideration, I have decided to deny the stay.

[Publisher's note: See 423 U.S. 1313 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–368

Robert P. Whalen, Commissioner of Health of New York, Appellant	)	
v.	)	Application for Stay.
Richard Roe, an infant by Robert Roe, his parent, et al.	)	

[Publisher's note: There should be a comma after "infant" above.]

[October 28, 1975]

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application for a stay of the judgment of a three-judge court sitting in the Southern District of New York. The applicant, the Commissioner of Health of the State of New York, has been enjoined by the three-judge court from enforcing certain provisions of New York's Public Health Law (the Law). Respondents are various physicians, organizations of physicians, and patients in the State of New York who successfully brought suit to have those provisions declared unconstitutional.

The provisions at stake are those parts of §§ 3331(6), 3332(2)(a), and 3334(4) of the Law that require the name and address of each patient receiving a Schedule II controlled substance to be reported to the applicant. Schedule II drugs are those that have a high potential for abuse, but also have an accepted medical use. They include opiates and amphetamines. Under the state law, a doctor prescribing a Schedule II drug does so on a special serially numbered triplicate prescription form. One copy is retained by the doctor, a second goes to the pharmacist (if applicable), and the last copy goes to the applicant, who transfers the data, including the name

and address of the patient, from the prescription to a centralized computer file.

Respondents brought this action shortly after the effective date of the computerization program, alleging violations of their constitutional rights under 42 U.S.C. § 1983 and grounding jurisdiction on 28 U.S.C. § 1343(3). Specifically, respondents claimed that mandatory disclosure of the name of a patient receiving Schedule II drugs violated the patient's right of privacy and interfered with the doctor's right to prescribe treatment for his patient solely on the basis of medical considerations. A three-judge court was convened. *Roe* v. *Ingraham*, 480 F.2d 102 (CA2 1973).

At trial, various respondents testified that they were inhibited from using or prescribing Schedule II drugs they otherwise found beneficial because of a reluctance to disclose their or their patients' identities to the State. While questioning respondents' standing to sue, the State asserted that knowledge of patients' names was necessary to enable the computer system to detect drug abuse. When put to its proof by respondents, however, the State eventually conceded that the names and addresses of patients were useful in detecting only one abuse: patients who go from doctor to doctor (using the same name on each visit) in order to obtain an excess supply of drugs. Thereupon respondents showed that in 15 months of operation the computer system had located only one suspected "doctor-shopper" while processing over 125,000 prescriptions per month. Thus respondents contended that the centralization of patients' names and addresses served no compelling state interest sufficient to offset the asserted invasion of privacy.

The three-judge court accepted respondents' arguments. The court read our decisions in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), as placing the doctor-patient relationship among those zones of privacy accorded constitutional protection.

While noting that *Roe* and *Doe* concerned the most intimate of personal relations, sexual intimacy and the decision to bear a child, the court refused to hold the doctor-patient relationship constitutionally protected only when matters of childbearing were at stake. Rather, it noted the intimate nature of a patient's concern about his bodily ills and the medication he takes, and held that these matters too are protected by the constitutional right to privacy. While reaching this conclusion primarily on the basis of *Roe* and *Doe*, the court drew some support from the concurring and dissenting opinions in *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 78, 79, 91, 93 (1974), which it read as indicating that a majority of this Court would accord constitutional protection, at least against a wholesale reporting requirement, to all "intimate areas of an individual's personal affairs." *Id.*, at 78 (POWELL, J., concurring). Upon finding that respondents had a protected privacy interest in the medication they received, the court balanced that interest against the State's need for patient names, and concluded that, with one suspect uncovered over 15 months, the need shown was ephemeral. "The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield." *Roe* v. *Ingraham*, slip op. at 16 (footnote omitted).

Finding those portions of the Law that demanded disclosure of patients' names and addresses to the State to be unconstitutional on the facts, the court enjoined the State from enforcing those provisions and from accepting for filing prescriptions or other documents disclosing the identities of patients receiving Schedule II drugs. The court also ordered the destruction of any name-bearing prescription forms in the State's possession and the expungement of names from all computer records. The court stayed the destruction and expungement order pending disposition of the case by this Court; it refused,

however, to stay its declaration of unconstitutionality and its injunction against enforcement of the provisions and acceptance of incoming prescriptions.

Thus the application for stay now before me concerns only those matters the District Court refused to stay. The principles that govern a Circuit Justice's in-chambers review of stay applications are well known. A single Justice will grant a stay only in extraordinary circumstances. Certainly the judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay, is presumptively correct. To prevail here the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.

MR. JUSTICE POWELL has succinctly stated the considerations pertinent to evaluating these two factors:

> "As a threshold consideration, Justices of this Court have consistently required that there be a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See, *Mahan* v. *Howell*, 404 U.S. 1201, 1202; *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 4 L. Ed. 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erroneously decided below. Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in

> the interim." *Graves* v. *Barnes*, 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in chambers).

See also *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 409 U.S. 1207, 1218 (1972) (BURGER, C.J., in chambers); *Railway Express Agency* v. *United States*, 82 S. Ct. 466, 7 L. Ed. 432 (1962) (Harlan, J., in chambers); *United Fuel Gas Co.* v. *Public Service Comm'n*, 278 U.S. 322, 326 (1929).

Applying these standards to the application before me, I conclude a stay should not be granted. The three-judge court gave careful consideration to applicant's motion for a stay and, indeed, granted one insofar as it deemed necessary to prevent irreparable harm to applicant's interests. Applicant has shown nothing to persuade me the lower court erred. If applicant's position is sustained on appeal, all the data it is precluded from processing by the District Court's order will be readily available from the State's doctors and pharmacists, who are required by law to retain the complete prescription form for five years. The information now denied the State's computers can thus be located and tabulated at a later date. While the State may suffer delay in the complete implementation of its computerization program, delay alone is not, on these facts, irreparable injury.

I conclude that applicant would suffer no irreparable injury if a stay is denied. This conclusion necessarily decides the application and renders unnecessary consideration of the possibility, since this case involves an appeal as of right, that applicant will be able to convince five Justices to reverse the three-judge court. I do note, however, that the right to privacy is a sensitive and developing area of the law and that the three-judge court did not apply it in a manner plainly inconsistent with our decisions. Likewise, the court's conclusion that respondents had standing seems in accord with the liberal standing decisions of this Court. Of course, this conclusion and my denial of a stay on the papers now be-

fore me is not to be taken as a reflection of my views on the merits of this case, or as an indication of the ultimate disposition of the case in this Court.

The application is denied.

[Publisher's note: See 423 U.S. 1319 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–426

Nebraska Press Association et al., Applicants,	)	
v.	)	On Application for Stay.
Hugh Stuart, Judge, District Court of Lincoln County, Nebraska.	)	

[November 13, 1975]

MR. JUSTICE BLACKMUN, Circuit Justice.

This is an application for stay of an order of the District Court of Lincoln County, Neb., that restricts coverage by the media of details concerning alleged sexual assaults upon and murders of six members of a family in their home in Sutherland, Neb.; concerning the investigation and development of the case against the accused; and concerning the forthcoming trial of the accused. The applicants are Nebraska newspaper publishers, national newswire services, media associations, a radio station, and employees of these entities.

The accused is the subject of a complaint filed in the County Court of Lincoln County, Neb., on October 19, 1975. The complaint was amended on October 22 and, as so amended, charged the accused with having perpetrated the assaults and murders on October 18. On October 21, the prosecution filed with the County Court a motion for a restrictive order. This motion alleged "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is

reported to the public." The defense joined in the prosecution's request, and also moved that the preliminary hearing be closed to the public and the press.

Refusing the latter request, the County Court held an open preliminary hearing on October 22. On that day it bound the accused over to the District Court. It, however, did issue a protective order. The Court found that there was "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury." The Court then ordered that no party to the action, no attorney connected with the defense or prosecution, no judicial officer or employee, and no witness or "any other person present in Court" was to "release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing. It went on to order that no "news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guideline for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." Excepted, however, were (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The Court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order.

A copy of the Bar-Press Guidelines was attached to the court's order and was incorporated in it by reference. In their preamble the Guidelines are described as a "voluntary code." They speak of what is "generally" appropriate or inappropriate for the press to disclose or report. The identity of the defendant, and also the victim, may be reported, along with biographical information about them. The circumstances of the arrest may be disclosed, as may the evidence against the defendant, "if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial." Confessions or other statements of the accused may not be disclosed, unless they have been made "to representatives of the press or to the public." Also barred from disclosure are opinions as to the guilt of the accused, predictions of the outcome of trial, results of examinations and tests, statements concerning the anticipated testimony of witnesses, and statements made in court but out of the presence of the jury "which, if reported, would likely interfere with a fair trial." The media are instructed by the Guidelines that the reporting of an accused's prior criminal record "should be considered very carefully" and "should generally be avoided." Photographs are permissible provided they do not "deliberately pose a person in custody."

The petitioners forthwith applied to the District Court of Lincoln County for vacation of the County Court's order. The defense, in turn, moved for continuation of the order and that all future proceedings in the case be closed. The respondent, as judge of the District Court, granted a motion by the petitioners to intervene in the case. On October 27 he terminated the County Court's order and substituted his own. By its order of that date the District Court found that "there is a clear and present danger that pro-trial publicity could impinge upon the defendant's right to a fair trial." It ordered that the pretrial publicity in the case be in accord with

the above-mentioned Guidelines as "clarified by the court." The clarification provisions were to the effect that the trial of the case commences when a jury is impaneled and that all reporting prior to that event was pretrial publicity; that it appeared that the defendant had made a statement or confession "and it is inappropriate to report the existence of such statement or the contents of it"; that it appeared that the defendant may have made statements against interest to three named persons and may have left a note "and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported"; that the testimony of the pathologist witness "dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported"; that "the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported"; that the "exact nature of the limitations of publicity as entered by this order will not be reported," that is to say, "the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

The petitioners then sought from the District Court a stay of its order. Not receiving relief there, they applied to the Supreme Court of Nebraska for an immediate stay and also for leave to commence an original action in the nature of mandamus and/or prohibition to vacate the District Court order of October 27. On November 4, counsel for the petitioners was advised by the Clerk of the Supreme Court that under that court's rules "all motions must be noticed for a day certain when the

court is regularly in session," and that the "next date for submission of such a matter will be Monday, December 1, 1975, and I suggest that your motion be noticed for that date."

On November 5, the petitioners, reciting that the "District Court and the Nebraska Supreme Court have declined to act on the requested relief," filed with this Court, directed to me as Circuit Justice, the present application for stay of the order of the District Court in and for Lincoln County, Neb. Because of the obvious importance of the issue and the need for immediate action, and because of the apparent similarity of the facts to those that confronted MR. JUSTICE POWELL as Circuit Justice, in the case of *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974), I asked for prompt responses. That request has been honored and responses respectively were received on November 10 and 11 from the Attorney General of Nebraska on behalf of the respondent judge, from the Lincoln County attorney on behalf of the State, and from counsel for the accused.

I was advised yesterday, however, that on November 10 the Supreme Court of Nebraska issued a *per curiam* statement reciting that the applicants have petitioned that court for leave to file their petition for a writ of mandamus or other appropriate relief with respect to the District Court order of October 27, and further reciting that during that court's "consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme Court of the United States an application or a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction," and then providing:

> "The existence of the two concurrent applications could put this court in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We deemed this inadvisable. Ac-

> cordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter."

The issue raised is one that centers upon cherished First and Fourteenth Amendment values. Just as MR. JUSTICE POWELL observed in *Times-Picayune*, 419 U.S., at 1305, the case "presents a fundamental confrontation between the competing values of fair press and fair trial, with significant public and private interests balanced on both sides." The order in question obviously imposes significant prior restraints on media reporting. It therefore comes to me "bearing a heavy presumption against its constitutional validity." *New York Times Co.* v. *United States*, 403 U.S [Publisher's note: There should be a period after the "S". But see 423 U.S. at 1324.] 713, 714 (1971). But we have also observed that the media may be prohibited from publishing information about trials if the restriction is "necessary to assure a defendant a fair trial before an impartial tribunal." *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972). See *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S., at 1307; *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975).

It is apparent, therefore, that if no action on the petitioners' application to the Supreme Court of Nebraska could be anticipated before December 1, as the above described communication from that court's clerk intimated, a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the petitioners possess and may properly assert. Under those circumstances, I would not hesitate promptly to act.

It appears to me, however, from the Nebraska court's *per curiam* statement that it was already considering the petitioners' application and request for stay that had been submitted to that tribunal. That court deferred

decision, it says, because of the pendency of the similar application before me, and because it deemed inadvisable simultaneous consideration of the respective applications in Nebraska and here in Washington. Accordingly, the matter was "continued" until it was known whether I would act.

It is highly desirable, of course, that the issue, concerning, as it does, an order by a Nebraska state court, should be decided in the first instance by the Supreme Court of Nebraska, and that the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty. The application, after all, was submitted to me on the assumption that action by the Nebraska court would not be forthcoming until after a submission to be scheduled no earlier than December 1 and on the further assumption that the District Court's order satisfied the requirements of 28 U.S.C. § 1257. On the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that "time is of the essence," I hereby give the Supreme Court of Nebraska that assurance it desired that, at least for the immediate present, I neither issue nor finally deny a stay on the papers before me. My inaction, of course, is without prejudice to the petitioners to reapply to me should prompt action not be forthcoming.

[Publisher's note: See 423 U.S. 1327 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–426

Nebraska Press Association et al., Applicants,	)	
v.	)	On Reapplication for Stay.
Hugh Stuart, Judge, District Court of Lincoln County, Nebraska.	)	

[November 20, 1975]

MR. JUSTICE BLACKMUN, Circuit Justice.

An application for stay of the order dated October 27, 1975, of the District Court of Lincoln County, Neb., resulted in my issuance of a chambers opinion, as Circuit Justice, on November 13. In that opinion I indicated that the issue raised is one that centers upon cherished First and Fourteenth Amendment values; that the challenged state court order obviously imposes significant prior restraints on media reporting; that it therefore came to me "'bearing a heavy presumption against its constitutional validity,'" *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); that if no action on the application to the Supreme Court of Nebraska could be anticipated before December 1, there would be a delay "for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the applicants possess and may properly assert"; that, however, it was highly desirable that the issue should be decided in the first instance by the Supreme Court of Nebraska; and that "the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty." I stated my ex-

pectation that the Supreme Court, of Nebraska would entertain, "forthwith and without delay," the application pending before it, and would "promptly decide it in the full consciousness that 'time is of the essence.'" I refrained from either issuing or finally denying a stay on the papers before me. That, however, was without prejudice to the applicants to reapply to me should prompt action not be forthcoming. The applicants have now renewed their application for a stay.

One full week has elapsed since my chambers opinion was filed. No action has been taken by the Supreme Court of Nebraska during that week. The clerk of that court has stated, however, that the applicants have been allowed to docket their original application by way of mandamus to stay the order of the District Court of Lincoln County, and that the matter is set for hearing before the Supreme Court of Nebraska on November 25.

Whether the Nebraska court will reach a definitive decision on November 25, or very shortly thereafter, I do not know. Obviously at least 12 days will have elapsed, without action, since the filing of my chambers opinion, and more than four weeks since the entry of the District Court's restrictive order. I have concluded that this exceeds tolerable limits. Accordingly, subject to further order of this Court, and subject to such refinement action as the Supreme Court of Nebraska may ultimately take on the application pending before it, I issue a partial stay.

A question is initially raised as to my power and jurisdiction to grant a stay. As a single Justice, I clearly have the authority to grant a stay of a state court's "final judgment or decree" that is subject to review by this Court on writ of certiorari. 28 U.S.C. §§ 2101(f) and 1257(3). Respondents to the application for a stay have objected that there is no such "final judgment or decree" upon which I may act. The issue is not without difficulty, for the Supreme Court of Nebraska gives prom-

ise of reviewing the District Court's decision, and in that sense the lower court's judgment is not one of the State's highest court, nor is its decision the final one in the matter. Where, however, a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. I need not now hold that in any area outside that of prior restraint on the press, such delay would warrant a stay or even be a violation of federal rights. Yet neither can I accept that this Court, or any individual Justice thereof, is powerless to act upon the failure of a State's highest court to lift what appears to be, at least in part, an unconstitutional restraint of the press. When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay. I therefore conclude that I have jurisdiction to act upon that state court decision.

I shall not repeat the facts of the case. They were set forth in my chambers opinion of November 13. Neither shall I pause again to elaborate on this Court's acute sensitivity to the vital and conflicting interests that are at stake here. There is no easy accommodation of those interests, and it certainly is not a task that one prefers to take up without the benefit of the participation of all Members of the Court. Still, the likelihood of irreparable injury to First Amendment interests requires me to act. When such irreparable injury is

threatened, and it appears that there is a significant possibility that this Court would grant plenary review and reverse, at least in part, the lower court's decision, a stay may issue. *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974). Taking this approach to the facts before me, I grant the requested stay to the following extent:

1. The most troublesome aspect of the District Court's restrictive order is its wholesale incorporation of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. Without rehearsing the description of those guidelines set forth in my prior opinion, it is evident that they comprise a "voluntary code" which was not intended to be mandatory. Indeed, the word "guidelines" itself so indicates. They are merely suggestive and, accordingly, are necessarily vague. To cite only one example, they state that the publication of an accused's criminal record "should be considered very carefully" and "should generally be avoided." These phrases do not provide the substance of a permissible court order in the First Amendment area. If a member of the press is to go to jail for reporting news in violation of a court order, it is essential that he disobey a more definite and precise command than one that he consider his act "very carefully." Other parts of the incorporated Guidelines are less vague and indefinite. I find them on the whole, however, sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of "guidelines"—that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of

this order. That portion of the restrictive order that generally incorporates the Guidelines is hereby stayed.

2. No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487-497 (1975). These facts in themselves do not implicate a particular putative defendant. To be sure, the publication of the facts may disturb the community in which the crimes took place and in which the accused, presumably, is to be tried. And their public knowledge may serve to strengthen the resolve of citizens, when so informed, who will be the accused's prospective jurors, that someone should be convicted for the offenses. But until the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order, and to that extent the order is hereby stayed.

3. At the same time I cannot, and do not, at least on an application for a stay and at this distance, impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial. Restraints of this kind are not necessarily and in all cases invalid. See *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972); *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S., at 1307; *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975). I am particularly conscious of the fact that the District Court's order applies only to the period prior to the impaneling, and presumably the sequestration, of a jury at the forthcoming trial.

Most of our cases protecting the press from restrictions on what they may report concern the trial phase of the criminal prosecution, a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard. See, *e.g.*, *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). Restrictions limited to pretrial publicity may delay media coverage—and, as I have said, delay itself may be impermissible—but at least they do no more than that.

I therefore conclude that certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm. See *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Irvin* v. *Dowd*, 366 U.S. 717 (1961). A prospective juror who has read or heard of the confession or statement repeatedly in the news may well be unable to form an independent judgment as to guilt or innocence from the evidence adduced at trial. In the present case, there may be other facts that are strongly implicative of the accused, as, for example, those associated with the circumstances of his arrest. There also may be facts that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one. Certain statements as to the accused's guilt by those associated with the prosecution might also be prejudicial. There is no litmus paper test available. Yet some accommodation of the conflicting interests must be reached. The governing principle is that the press, in general, is to be free and unrestrained and that the facts are presumed to be in the public domain. The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt. Of course, if a change of venue will not allow

the selection of a jury that will have been beyond the reach of the expected publicity, that also is a factor.

4. Paragraph 6 of the restrictive order also prohibits disclosure of the "exact nature of the limitations" that it imposes on publicity. Since some of those limitations are hereby stayed, the restrictions on the reporting of those limitations are stayed to the same extent. Inasmuch as there is no point in prohibiting the reporting of a confession if it may be reported that one has been made but may not be spoken of, the provision in paragraph 6 that the restriction on reporting confessions may itself not be disclosed is not stayed.

5. To the extent, if any, that the District Court's order prohibits the reporting of the pending application to the Supreme Court of Nebraska, and to the extent, if any, that the order prohibits the reporting of the facts of the filing of my chambers opinion of November 13, or of this opinion (other than those parts of the opinions that include facts properly suppressed), the restrictive order is also stayed.

6. Nothing herein affects those portions of the restrictive order governing the taking of photographs and other media activity in the Lincoln County courthouse. Neither is it to be deemed as barring what the District Judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media.

The District Court and the Supreme Court of Nebraska obviously are closer than I am to the facts of the crimes, to the pressures that attend it, and to the consequences of community opinion that have arisen since the commission of the offenses. The Supreme Court, accordingly, is in a better position to evaluate the details of the restrictive order. It may well conclude that other portions of that order are also to be stayed or vacated. I have touched only upon what appear to me to be the most obvious features that require resolution immediately and without one moment's further delay.

[Publisher's note: See 423 U.S. 1335 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–538

Pasadena City Board of Education et al., Applicants, *v.* Nancy Anne Spangler et al.	))))	On Application for Stay.

[December 22, 1975]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants, members of Pasadena City Board of Education, have presented to me as Circuit Justice a request to stay an order entered by the United States District Court for the Central District of California pending disposition of their appeal to the Court of Appeals for the Ninth Circuit. After two interim stays by single judges of the Court of Appeals, a panel of that court denied a further stay on December 2, 1975, but ordered expedited argument.

The District Court, in its ruling which applicants seek to stay, overturned applicants' action in establishing one of two "fundamental schools" in the summer of 1975. It ruled that the burden was on applicants to prove that their action did not result in resegregation. Finding that applicants had not met this burden, the Court enjoined the creation of the new school and ordered its students returned to their previously assigned classrooms. The result of the District Court's order and the subsequent stay rulings of the Court of Appeals is that if I decline to stay the order there will be at least some disruption of the school system in the middle of a school year.

Ordinarily a stay application to a Circuit Justice on a matter currently before a Court of Appeals is rarely granted, and were it not for the fact that this Court on

November 11, 1975, granted certiorari on a related petition of applicants, *Pasadena City Board of Education* v. *Spangler*, No. 75-164, I would deny this application. But one of the issues presented in No. 75-164, is whether "a unitary school system which has been in compliance with a school desegregation decree for four years remains subject indefinitely to the control of the trial court which entered the decree." In my opinion, should this Court reverse or significantly modify the conclusion of the Court of Appeals for the Ninth Circuit with respect to the above quoted "question presented" in No. 75-164, there would be serious doubt as to the correctness of the order of the District Court which applicants now seek to stay.

Because under my analysis the critical event will not be the decision of the Court of Appeals on applicants' presently pending appeal, but rather the disposition by this Court of No. 75-164, IT IS ORDERED that the order of the District Court in this case entered on October 8, 1975, is stayed pending disposition of *Pasadena City Board of Education* v. *Spangler*, No. 75-164, by this Court.

[Publisher's note: See 424 U.S. 1301 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

COLEMAN, SECRETARY OF TRANSPORTATION *v.* PACCAR INC. ET AL.

ON APPLICATION TO VACATE STAY

No. A–651. Decided February 2, 1976

Application by the Secretary of Transportation to vacate the Court of Appeals' order staying the operation of a certain motor vehicle safety standard, which was before the court upon respondents' petition for review, is granted, where it appears that the Court of Appeals in ordering the stay failed to consider the likelihood of respondents' success on the merits, and the Secretary has demonstrated that irreparable harm might result from the stay.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Secretary of Transportation has moved to vacate a stay order entered by the United States Court of Appeals for the Ninth Circuit in a case presently pending before that court. The case arose in that court by reason of a petition for review of amendments to a motor vehicle safety standard promulgated by the Secretary's delegate on November 12, 1974, and scheduled to take effect on March 1, 1975. (MVSS-121; see 49 CFR § 571.121). The original petition for review in the Court of Appeals was filed by respondent PACCAR on January 3, 1975, and meanwhile two other challenges to the same standard filed in two other Courts of Appeals were transferred to the Court of Appeals for the Ninth Circuit and consolidated with PACCAR's challenge. PACCAR moved to stay the effective date of the regulation in the Court of Appeals for the Ninth Circuit, but its motion was denied on February 10, 1975. Oral argument on the

merits of the petition for review was set by the Court of Appeals for January 16, 1976. In December 1975, the Secretary's delegate gave notice that he proposed to modify the standard in question, and the Secretary moved in the Ninth Circuit to postpone oral argument until after the modification. The Court of Appeals advised counsel for the Secretary to appear at oral argument on January 16, 1976, as scheduled.

Following oral argument, the Court of Appeals entered the following order:

> "IT IS HEREBY ORDERED that [the motor vehicle safety standard] is stayed for a period of sixty days, this stay to remain in effect thereafter pending further order of this court upon the application of any party."

It is incumbent upon me first to determine whether I have jurisdiction to grant the relief requested by the Secretary. This case does not come before me in the usual posture of a stay application, where a court of appeals has rendered a judgment disposing of a case before it and the losing litigant seeks a stay of the judgment of the court of appeals pending the filing of a petition for certiorari to review that judgment in this Court. There the question is whether four Justices are likely to vote to grant certiorari, and what assessment is to be made of the equities pertinent to the grant of such interim relief. *Edelman* v. *Jordan*, 414 U.S. 1301 (1973) (REHNQUIST, J., in chambers). Here the Court of Appeals has not finally disposed of the case; indeed, it has not ruled on the merits nor apparently rescheduled oral argument on the question presented by the petition for review of the safety standard.

Pursuant to Rules 50 and 51 of this Court I have authority as Circuit Justice to take any action which the full Court might take under 28 U.S.C. § 1651. But

even the full Court under § 1651 may issue writs only in aid of its jurisdiction. The Secretary contends that the Court of Appeals' stay order is the equivalent of a preliminary injunction which, if issued by a three-judge district court, would be reviewable here. Certainly the full Court, in the exercise of its normal appellate jurisdiction, has noted probable jurisdiction, heard argument, and written opinions in cases where the district court has issued only a preliminary injunction. See *Brown* v. *Chote*, 411 U.S. 452 (1973); *Withrow* v. *Larkin*, 421 U.S. 35 (1975). But in each of those cases the action of the District Court was made appealable to this Court by statute. 28 U.S.C. § 1253. There is no similar provision for appeal *eo nomine* from an interlocutory order of a court of appeals.

This Court has jurisdiction to review by certiorari any case in a court of appeals, 28 U.S.C. § 1254. Although the Secretary is not presently seeking certiorari from this Court in order to review the stay order of the Court of Appeals, if I have authority as Circuit Justice to vacate the stay, it must be on the ground that the vacation of the stay is "in aid of this Court's jurisdiction" to review by certiorari a final disposition on the merits of respondents' petition to review and set aside the safety standard in question. See *McClellan* v. *Carland*, 217 U.S. 268, 279-280 (1910).

The closest opinions in point seem to be the in-chambers opinions of my Brother MARSHALL in *Holtzman* v. *Schlesinger*, 414 U.S. 1304 (1973), and of Mr. Justice Black in *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962). Both opinions considered on their merits motions to vacate interlocutory stays issued by a judge or panel of judges of a Court of Appeals; in *Holtzman* the motion was denied and in *Meredith* it was granted. I think the sense of the two opinions, and likewise that of

Mr. Justice Douglas' dissent in *Schlesinger* v. *Holtzman*, 414 U.S. 1321, 1322 (1973), is that a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay. A narrower rule would leave the party without any practicable remedy for an interlocutory order of a court of appeals which was *ex hypothesi* both wrong and irreparably damaging;[*] a broader rule would permit a single Justice of this Court to simply second-guess a three-judge panel of the court of appeals in the application of principles with respect to which there was no dispute.

The Secretary contends that since the action of the Court of Appeals is equivalent to a preliminary injunction issued by a district court, the Court of Appeals should be required to make the same sort of findings

[*] The losing litigant could, of course, petition this Court for a writ of certiorari to review the stay order of the court of appeals. Since the case is "in" the court of appeals within the meaning of 28 U.S.C. § 1254, the Court would presumably have jurisdiction to grant the writ if it chose to do so in the exercise of its discretion. *New York Times Co.* v. *United States*, 403 U.S. 942 (1971). See also *Far East Conference* v. *United States*, 342 U.S. 570 (1952). But the exercise of such power by the Court is an extremely rare occurrence. Supreme Court Rule 20.

The losing litigant might likewise proceed by motion to vacate the stay presented to the full Court. But since my authority under Rules 50 and 51 of the Court is coextensive with that of the Court, if I am right in the standards which govern me in exercising jurisdiction under 28 U.S.C. § 1651, the full Court would have no broader authority in such an instance than that which I exercise today.

before granting such a stay as are required of a district court by Fed. Rule Civ. Proc. 65. Perhaps the full Court in the exercise of its supervisory authority could impose such a requirement, even though no rule or statute does, but certainly a Circuit Justice in chambers may not do so. A court in staying the action of a lower court, see *O'Brien* v. *Brown*, 409 U.S. 1, 3 (1972), or of an administrative agency, *Sampson* v. *Murray*, 415 U.S. 61 (1974), must take into account factors such as irreparable harm and probability of success on the merits. But in the absence of a statute, rule, or controlling precedent there is no fixed requirement that a court recite the fact that it has taken these into consideration, or explain its reason for taking the action which it did.

It is thus not dispositive that the Court of Appeals failed to specifically address in terms the factors of irreparable harm and probable success on the merits. But this does not mean that the Court of Appeals' action in entering the stay is entirely beyond review. For if the record convincingly demonstrates that the Court of Appeals could not have considered each of these factors at all and the effect of its decision is shown to pose a danger of irreparable harm impairing this Court's ability to provide full relief in the event it ultimately reviews the action of the Court of Appeals on the merits, I believe that I should afford the interim relief sought.

The following description of the order of the court, and its instructions to counsel, is taken from the Secretary's application, but is not disputed in material portion by respondents:

> "When the case was called for oral argument the court announced to the parties that it was uncertain about the status of MVSS 121 due to the modification proposed by NHTSA [National Highway Traffic Safety Administration], that it did not under-

> stand the contentions of the parties on the merits, and that it was suspending the operation of MVSS 121 forthwith for a minimum period of 60 days, after which it would continue the suspension while entertaining appropriate motions from the parties. The court instructed the parties to submit an order whose terms would require the parties to agree upon another order setting forth the issues in controversy, the parties' position on each issue, the documents in the record relevant to the issues, and the uncontroverted facts, or, failing such agreement, to pay for the services of a 'master,' to be appointed by the court, who would examine the pleadings, the record, and the briefs and submit to the court for approval a proposed order fixing the issues and record for review."

I can readily understand the uncertainty of the Court of Appeals with respect to the issues in controversy, the parties' position on them, and the like. I have resolutely resisted the efforts of both parties to dispel my own uncertainty on these issues, which remains pristine. Congress in a complex statute has imposed an arduous burden on the Secretary's delegate, and then provided for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*., which places enormously difficult burdens on the Court of Appeals. But the complexity of the issue does not change the time-honored presumption in favor of the validity of the Administrator's determination, nor shift the burden of showing probable success from the shoulders of the parties who seek to upset that determination. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

I do not find the Court of Appeals' direction to the parties with respect to the formulation of issues and

stipulation as to the record to be consistent with a finding, which must be implied since it is not expressed, that respondents would probably succeed on the merits of their petition to set aside the standard promulgated by the Secretary's delegate. Moreover, applicant has persuasively urged that the Government will suffer irreparable harm if MVSS-121 is not permitted to remain in effect during the pendency of the litigation on the merits. Congress' desire "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," § 1, 80 Stat. 718, 15 U.S.C. § 1381, is currently being pursued under the statutory scheme by requiring compliance with prescribed motor vehicle safety standards at the time of vehicle manufacture. 15 U.S.C. § 1397(a)(1). Presently, vehicles manufactured while a standard is not in effect may be later sold or transferred without restriction and may thereby find their way to the highways although not in compliance with safety requirements properly deemed necessary by the Secretary.

As long as the stay entered by the Court of Appeals remains in effect, manufacturers are free to produce as many vehicles as they can and so may obtain substantial stockpiles of noncomplying vehicles for later sale. The Secretary has represented to me that vehicle manufacturers such as respondents may, during the initial 60-day period of the Ninth Circuit's stay, be able to produce enough vehicles to satisfy anticipated demand for as much as a full year thereafter. I do not understand this suggestion to be seriously disputed by respondents.

Thus, even if the stay ordered by the Court of Appeals is ultimately dissolved and the Secretary's decision upheld on the merits, the goals of the federal motor vehicle safety program will have been dealt a serious setback.

Effective implementation at the manufacturing stage of the congressionally mandated safety program will have been delayed for a year or more. And the natural desire on the part of operators to obtain a fleet of the cheaper, noncomplying vehicles while they are still available may cause increased purchases of such vehicles now, resulting in a subsequent prolonged depression in the market for complying vehicles if and when the safety standard is again effective. This predictable eventuality will further impede Congress' intention to promote improved highway safety as expeditiously as is practicable.

The Secretary has, in my opinion, therefore not only shown that the Court of Appeals did not evaluate the likelihood of respondents' success on the merits, but has in addition shown that the harm flowing from the stay issued by the Court of Appeals could not be redressed by an ultimate decision, either in that court or this, in his favor on the merits.

The Secretary's motion to vacate the stay order entered by the Court of Appeals on January 16, 1976, is therefore granted, without prejudice to the right of respondents or any of them to renew their application for a stay of the standard in the Court of Appeals agreeably to the rules and practices of that court.

[Publisher's note: See 424 U.S. 1309 for the authoritative official version of this opinion.]

BRADLEY ET AL. *v.*
LUNDING, CHAIRMAN, STATE BOARD OF ELECTIONS COMMISSIONERS, ET AL.

ON APPLICATION FOR STAY

No. A–695 (75–1146). Decided February 17, 1976

Application by appellant independent candidates for judicial office in Illinois for stay, pending this Court's disposition of appeal, of Illinois Supreme Court's judgment reversing Circuit Court's order enjoining appellee State Board of Elections Commissioners from conducting a lottery to assign ballot positions in accordance with Board regulation prescribing lottery system for breaking ties resulting from simultaneous filing of petitions for nomination to elective office, is denied, where there is insufficient indication of unfairness or irreparable injury and (because the questions presented by the appeal are capable of repetition) no suggestion that the forthcoming election will moot the case.

MR. JUSTICE STEVENS, Circuit Justice.

On February 13, 1976, appellants filed an application for a stay of the judgment of the Supreme Court of Illinois entered on January 19, 1976, reversing an order entered by the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Ill., on January 12, 1976, enjoining the defendant officers of the Illinois State Board of Election Commissioners from conducting a lottery for the purpose of assigning ballot positions in accordance with Regulation 1975-2 adopted by the State Board of Elections on November 21, 1975.

Regulation 1975-2 prescribes a lottery system for breaking ties resulting from the simultaneous filing of petitions for nomination to elective office.[1] Appellants

[1] The regulation provides in part:

"1. The names of all candidates who filed simultaneously for the same office shall be listed alphabetically and shall be numbered consecutively commencing with the number one which shall be as-

are independent candidates for judicial office who argue that the regulation increases the probability that their names will appear in the bottom portion of the ballot rather than in the middle portion, and therefore that their federal constitutional rights are impaired.[2] This consequence flows from the fact that candidates filing a group petition for the same office are treated as one for lottery purposes.

As I understand the regulation, it also increases the

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signed to the candidate whose name is listed first on the alphabetical list; provided, however, that candidates filing a group petition for the same office shall be treated as one in the alphabetical listing using the name of the first candidate for such office to appear on the petitions as the name to be included in the alphabetical list. . . .

"2. All ties will be broken by a *single* drawing. . . ."

[2] Two separate election contests are involved. Ten judges are to be selected by the voters of the city of Chicago and 15 by the voters of Cook County. With respect to the municipal election, at the opening of the filing period, 14 candidates filed contemporaneous petitions for Democratic nominations for the 10 Chicago judgeships. Four of these filed individual petitions; the other 10 filed a single group petition. Pursuant to the lottery procedure prescribed by the regulation, see n. 1, *supra*, each of the individual petitions, as well as the group petition, had one chance in five of being drawn for the top position on the ballot. Thus, each individual candidate's chance of receiving the first position was considerably better than if all 14 names were treated separately in the drawing. On the other hand, since the group petition also had one chance in five of being drawn first, the four independents ran the risk that if that should happen, none of them could appear in any of the first 10 positions.

Appellants' statistical evidence indicates that if the names of all 14 municipal candidates were placed in the lottery on an individual basis, each of the appellants would have only a 28.6-percent chance (4 out of 14) of being below the top 10, whereas the regulation increases that chance to 50 percent. On the other hand, each of them now has a 50-percent chance of being among the top four names on the ballot, whereas on a completely independent basis, each would have only a 28.6-percent chance.

probability that each of the appellants' names will appear in the top portion of the ballot rather than the middle portion. Thus, the adverse effect of increasing the probability of an especially unfavorable position is offset by the beneficial effect of increasing the probability of an especially favorable position.[3] Although there may be undesirable consequences of a regulation which permits organization candidates to be grouped in sequence on the ballot, I do not understand the Jurisdictional Statement to present any question as to the propriety of that feature, in and of itself, of the regulation. The questions presented relate only to the impact of the regulation on the ballot positions of the individual appellants.[4] With respect to that matter, I find insufficient indication of unfairness or irreparable injury to warrant the issuance of a stay against enforcement of the judgment of the Supreme Court of Illinois. Presumably because the questions presented are capable of repetition, appellants

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[3] I do not suggest that the advantage precisely offsets the disadvantage; for no doubt, when voters are to choose 10 candidates from a long list of unfamiliar names, there is a risk that many will simply pick the first 10. Nevertheless, the difference between the disadvantage and the advantage hardly seems significant enough to warrant either the emergency attention of this entire Court, or a summary substitution of my judgment for the unanimous appraisal of the problem by the Justices of the Supreme Court of Illinois.

[4] As stated at p. 3 of the Jurisdictional Statement, the questions presented by the appeal are:

"Does the federally-protected right to equal treatment in the assignment of state ballot positions apply only to the top ballot position? Or does it apply to the second and successive positions as well, at least where more than one candidate will be elected to the same office?

"Where a state system for assigning ballot positions increases the likelihood that politically-favored candidates will obtain the higher ballot positions, does that system deny due process, equal protection and political rights as guaranteed by the federal Constitution?"

do not suggest that there is any danger that the election will moot the case; accordingly, the stay need not issue to protect our jurisdiction.

The motion for stay is denied.

[Publisher's note: See 424 U.S. 1313 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–731

Meda Flamm,	)	
v.	)	On Application for Stay.
REAL-BLT, Inc., d/b/a Ponderosa Acres.	)	

[February 25, 1976]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant requests that I stay the judgment of the Supreme Court of Montana in this eviction proceeding. As matters currently stand, that court has denied a stay and applicant will be evicted on February 29th.

Applicant lives in federally subsidized low-income housing which was built and is operated by respondent. On September 26, 1974, respondent sent to applicant a notice to quit, pursuant to the lease which provided that "either party may terminate this lease . . . by giving thirty days' written notice in advance to the other party."

Applicant sued in the Montana state trial courts claiming that respondent's project was so intertwined with the Federal Government that its action in evicting her was subject to the limitations of the Due Process Clause of the Fifth Amendment. She further contended that these limitations entitled her to a statement of reasons amounting to a showing of "good cause," and to a hearing before she could be evicted.

The state trial court agreed. The Supreme Court of Montana reversed, holding that the project was sufficiently independent of the Federal Government so as to make it subject only to those laws regulating private landlords. The Supreme Court described the above

quoted lease provision, but did not rely upon it in its decision.

In view of the express provision of the lease, it seems to me that this Court, if it were to hear and decide the case, would find it unnecessary to reach the question of whether respondent's activities are subject to the Due Process Clause of the Fifth Amendment. I conclude, therefore, that four Justices of this Court would not vote to grant certiorari in this case. Accordingly, I deny the stay.

[Publisher's note: See 429 U.S. 1301 for the authoritative official version of this opinion.]

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

GREGG *v.* GEORGIA

ON APPLICATION FOR STAY OF MANDATE

No. A–31 (74–6257). Decided July 22, 1976[*]

Application for stay of mandate is granted pending disposition of a petition for rehearing, since, if executions were carried out before that petition could be acted on, petitioners would be irreparably harmed and cases would be moot, and since granting of stay will not prejudice respondent States' interests.

MR. JUSTICE POWELL, Circuit Justice.

The petitioners in these cases have filed with the Court a consolidated petition for rehearing, and also have presented to me as Circuit Justice for the Fifth Circuit an application for a stay of the mandate heretofore scheduled to issue on July 27, the stay to be effective pending the disposition of the consolidated petition for rehearing. Under controlling statutes, such petition cannot be acted upon except by the full Court in regular or special session. If the executions in these cases were carried out before the petition for rehearing could be acted on by the Court, the harm to petitioners obviously would be irreparable. In addition, the cases would then be moot. Nor is there reason to believe that the granting of a stay until the petition for rehearing can be duly considered will prejudice the interests of the respondent States. In these circumstances, I conclude that the issuance of the mandate in each of these cases should be, and hereby is, stayed until further order of this Court.

The decision to grant this stay is not suggestive of my position on the merits of the petition.

[*] Together with Nos. A-31 (75-5706), *Proffitt* v. *Florida*, and A-31 (75-5394), *Jurek* v. *Texas*.

[Publisher's note: See 429 U.S. 1302 for the authoritative official version of this opinion.]

BATEMAN *v.* ARIZONA

ON APPLICATION FOR BAIL OR STAY

No. A–110 (76–5033). Decided August 16, 1976

Application for bail pending certiorari or for stay of Arizona Supreme Court's mandate is denied absent any showing of compelling necessity for a stay, and where it is doubtful if applicant's petition for certiorari will be granted and there is a question as to the finality of the Arizona Supreme Court's judgment sought to be reviewed.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant has filed a motion denominated an "Application for Bail Pending Certiorari or in the Alternative Application for Stay of Mandate of the Supreme Court of the State of Arizona." Such an applicant—who, in effect, seeks to have a single Justice of this Court stay what the state-court system has concluded should not be stayed—bears a heavy burden of demonstrating that he meets the traditional tests which a Circuit Justice must consider in passing on an application of this sort. Because of the serious questions going to applicant's standing to have this Court hear the question he tenders in his petition for a writ of certiorari, the application will, therefore, be denied.

Applicant was convicted by a jury of one count of sodomy with his wife, in violation of Ariz. Rev. Stat. § 13-651 (Supp. 1973), and of one count of lewd and lascivious acts, to wit, forcing his wife to commit fellatio on him, in violation of Ariz. Rev. Stat. § 13-652 (Supp. 1973). The jury was instructed:

> "Consent is a defense in the infamous crime against nature [the sodomy count], and to the crime of the committing lewd and lascivious acts [the fellatio count]. Any evidence which reasonably tends to show consent is relevant and material."

As applicant notes, the jury verdict of guilty "necessarily impl[ied]" that the jurors found that applicant's wife did not consent. After the trial, upon a renewed motion of applicant, the trial court dismissed the information, holding:

> "It appear[s] to the court that the Arizona statutes on sodomy and lewdness violate the Arizona and U.S. Constitutions because they could violate the right to privacy, and further that this court's interpretation of the statutes to permit the defense of consent without the benefit of legislative or appellate court guidance was improper . . . ."

The Arizona Court of Appeals affirmed, *State* v. *Bateman*, 25 Ariz. App. 1, 540 P.2d 732 (1975). Thereafter, the Supreme Court of Arizona, after consolidating this case with *State* v. *Callaway*, vacated the Court of Appeals' decision, and remanded the case to the trial court to enter a judgment of conviction and to sentence applicant, 113 Ariz. 107, 547 P.2d 6 (1976). The Arizona Supreme Court first concluded:

> "The Arizona statutes may . . . be properly construed to prohibit nonconsensual sexual conduct and remain constitutional." *Id.*, at 110, 547 P.2d, at 9.[1]

The court then noted that "[t]he State may also regulate other sexual misconduct in its rightful concern for the moral welfare of its people," and therefore held:

> "[S]exual activity between two consenting adults in private is not a matter of concern for the State except insofar as the legislature has acted to properly regulate the moral welfare of its people, and has specifically prohibited sodomy and other specified lewd and lascivious acts." *Id.*, at 111, 547 P.2d, at 10.

[1] "The court noted that while the distinction between consenting and nonconsenting adults "does not appear facially from the statutes," nonetheless, "statutes do not stand alone. Judicial interpretation adds meaning to a statute as certainly as if the words were placed there by the legislature."

Applicant, in his petition for a writ of certiorari seeking review of this judgment, raises the question of whether the Arizona statutes as construed, are unconstitutional as prohibiting "some sexual acts between consenting married persons . . . ."

After the Arizona Supreme Court handed down its decision on March 10, 1976,[2] applicant was sentenced to a term of two to four years in the Arizona State Prison on April 15, 1976. On May 11, 1976, the trial judge denied bail pending review in this Court, and, on July 13, 1976, the Arizona Supreme Court likewise denied bail.

Applicant thus presents this application for bail, or, alternatively, for a stay of mandate, to me after similar applications have been denied by two courts, including the highest tribunal of the State of Arizona. In all cases, the fact weighs heavily "that the lower court refused to stay its order pending appeal." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (POWELL, J., in chambers). This normal presumption deserves even greater respect in cases where the applicant is asking a Circuit Justice to interfere with the state judicial process. Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 378-380 (1976); *Mitchum* v. *Foster*, 407 U.S. 225, 230-231 (1972); *Younger* v. *Harris*, 401 U.S. 37, 46 (1971). Due respect for the principles of comity necessitates a demonstration of compelling necessity before a single Justice of this Court will stay the considered mandate of the highest state tribunal.[3]

[2] A motion for rehearing and an application to stay the judgment pending an application for a writ of certiorari in this Court were denied on April 13, 1976.

[3] Applicant does not claim that there is a constitutional right to bail, after conviction, pending appeal. I am unable to conclude that the standards enunciated in 18 U.S.C. § 3148 apply, to the exclusion of a state court's determination, in the case of a petition for a writ of certiorari to review a state conviction.

No such showing has been made. The threshold—although by no means the only—question is whether there is a reasonable probability that four Justices will vote to grant certiorari, *Graves*, *supra*. Considered abstractly, and without intimating any view on the merits, the question applicant tenders to this Court might be considered to meet this threshold hurdle. But serious doubts exist as to the ability of this applicant to raise a question concerning consensual sexual activity between married adults. These doubts are not lessened by the fact that the Supreme Court of Arizona chose to decide the issue which applicant now tenders to this Court. The courts of a State are free to follow their own jurisprudence as to who may raise a federal constitutional question, but this Court in reviewing a state-court judgment is bound by the requirements of case and controversy and standing associated with Art. III of the United States Constitution. See, *e.g.*, *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952).

First of all, applicant was convicted by a jury that had been charged that consent was a defense. Even assuming, *arguendo*, that this Court would conclude that the Arizona Supreme Court was incorrect in holding that a State may prohibit consensual sexual acts between married adults, it is difficult to see how applicant would be benefited, as his conviction was based on nonconsensual sexual acts, as to which applicant does not press constitutional objections.[4] See *United States* v. *Raines*, 362 U.S. 17 (1960). Doubts such as these make it difficult for me to conclude that appli-

[4] There is little indication that Arizona would vitiate applicant's conviction should this Court hold the statutes unconstitutional as applied to consensual behavior; certainly it is not "clear" that they would do so, see *United States* v. *Raines*, 362 U.S. 17, 23 (1960). Indeed, the language of the Arizona Supreme Court, quoted *supra*, at 1303, and n. 1, indicates that the question of nonconsensual activity, applicable here, was decided separately from the question of consensual activity, applicable in deciding *State* v. *Callaway*.

cant's petition for a writ of certiorari has a substantial chance of being granted.[5]

Secondly, applicant petitions from the March 10 decision of the Arizona Supreme Court which vacated and remanded for the imposition of a judgment of conviction and a sentence. This Court is precluded from taking cases unless the petition is from a "final judgment" within the meaning of 28 U.S.C. § 1257. In a criminal case, the "final judgment" is, of course, the imposition of a sentence, *Parr* v. *United States*, 351 U.S. 513, 518 (1956); *Berman* v. *United States*, 302 U.S. 211, 212 (1937). The Arizona Supreme Court did not remand simply for the performance of a ministerial duty—*e.g.*, the reinstating of a judgment of conviction and sentence—but for the initial imposition of a sentence. It seems likely, therefore, that the decision of the Arizona Supreme Court is not a "final judgment." While applicant was sentenced prior to the filing of his petition for a writ of certiorari, there nonetheless remains a question of the finality of the judgment applicant seeks to have reviewed by this Court. Such a doubt weighs against applicant here, *Hortonville Joint School Dist.* v. *Hortonville Education Assn.*, 423 U.S. 1301 (1975) (REHNQUIST, J., in chambers).

These considerations lead me to deny the application.

[5] Applicant does not appear to meet the exception whereby the individual may assert a right that cannot otherwise be raised and protected. The question applicant tenders to this Court could be raised, for example, by a person who was convicted after a trial judge had refused to charge a jury that consent is a defense.

[Publisher's note: See 429 U.S. 1307 for the authoritative official version of this opinion.]

NEW YORK ET AL. *v.*
KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON APPLICATION TO VACATE STAY

No. A–150. Decided August 19, 1976

Application to vacate the Court of Appeals' stay of the District Court's order preliminarily enjoining the Secretary of the Interior from opening sealed bids for oil and gas leases of submerged lands under the Mid-Atlantic Outer Continental Shelf on the ground that the environmental impact statement (EIS) required by the National Environmental Policy Act of 1969 (NEPA) before the leasing program could go forward was materially deficient, is denied absent "exceptional circumstances" warranting a Circuit Justice's vacating a stay. It is not clear that the question whether the EIS complied with the NEPA would warrant review by this Court, nor is it necessary for a Circuit Justice to act "to preserve the limits of the parties pending the final determination of the cause," *Meredith* v. *Fair*, 83 S. Ct. 10, 11, 9 L. Ed. 2d 43, 44.

MR. JUSTICE MARSHALL, Circuit Justice.

On Friday, August 13, 1976, the United States District Court for the Eastern District of New York preliminarily enjoined the Secretary of the Interior from proceeding with plans to open, on August 17, 1976, sealed bids due to be submitted for oil and gas leases of submerged lands under the Mid-Atlantic Outer Continental Shelf. On Monday, August 16, 1976, the United States Court of Appeals for the Second Circuit stayed the District Court's order. The State of New York, the Natural Resources Defense Council, and the counties of Suffolk and Nassau, plaintiffs in the District Court, applied to me as Circuit Justice to vacate the stay. After holding oral argument, I concluded that the extraordinary relief they requested was not warranted.

I

The facts are exhaustively stated in the opinion of the District Court, and can be summarized briefly here. In

January 1974, President Nixon directed the Department of the Interior to rapidly lease Outer Continental Shelf lands for mining of oil and natural gas. In accordance with this directive, the Department of the Interior prepared a preliminary environmental impact statement (EIS), held hearings on the statement, and in July 1975 issued a final impact statement, as required by § 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 853, 42 U.S.C. § 4332(2)(C). On September 29, 1975, the Acting Secretary announced his decision to adopt the accelerated oil- and gas-leasing programs.

One of the areas to be leased under the accelerated program is an area designated as Mid-Atlantic Sale No. 40, consisting of lands off the coasts of New York, New Jersey, Delaware, Maryland, and Virginia. In August 1975, the Secretary announced which tracts within the area would be leased. A new EIS devoted specifically to Sale No. 40 was drafted, hearings were held in January 1976, and a final, four-volume EIS was issued in May 1976. On July 16, 1976, a notice of the proposed lease sale was published in the Federal Register, 41 Fed. Reg. 29437. Pursuant to the notice, sealed bids were to be submitted for each tract on a cash bonus basis, accompanied by one-fifth of the cash bonus in cash or by cashier's check, bank draft, certified check, or money order. The bids were due by 9:30 a.m., August 17, 1976, and were to be opened beginning at 10 a.m.; the notice stated that if the bids were not opened by midnight, they would be returned unopened to the bidder. *Ibid.* After opening the bids, the Secretary has 30 days to accept the highest bid, *ibid.*, see 43 CFR § 3302.5 (1975); if no bid is accepted within 30 days, all bids are deemed rejected, *ibid.* Once a bid is accepted, the bidder must sign a lease within a specified time or forfeit his deposit. *Ibid.* The lease grants the lessee the exclusive right to drill for, remove, and dispose of oil and gas deposits in the leased lands; however, the lessee must submit all exploratory drilling plans

and development plans to the supervisor of the lease for approval. 30 CFR § 250.34 (1975).

Prior to the publication of the notice of the lease sale, the plaintiffs instituted the instant action to enjoin the lease sale on the ground that the final EIS did not comply with the requirements of the NEPA. After 11 days of hearings the District Court issued a comprehensive opinion. In most respects, the Court found the EIS to be adequate, indeed "[i]f anything . . . too detailed and encyclopedic for a lay executive to fully comprehend." Nos. 76C1229 and 75C208 (EDNY Aug. 13, 1976). On one issue, however—an issue raised by the court *sua sponte* during the hearings—the court found the EIS materially deficient: it failed, in the court's view, to adequately analyze state laws governing the use of shorelines, and to evaluate "the probable extent of state cooperation [with] or opposition" to the offshore exploration program. To the contrary, the court found that the EIS assumed that the States would grant rights-of-way for pipelines on shorelands, thereby obviating the need for the lessees to use tankers to transport the oil and minimizing the risk of oil spills. The court concluded that as a result of this single omission, there was a likelihood that plaintiffs would succeed on the merits in demonstrating a violation of the NEPA, and it found that plaintiffs would be irreparably injured if the Secretary were permitted to grant the leases without prior compliance with the NEPA. Accordingly, the court issued a preliminary injunction.

The Secretary, joined by the National Ocean Industries Association which had intervened on the side of the Secretary, appealed the District Court's order and requested that the injunction be stayed. After hearing oral argument, the Court of Appeals granted the stay. In a brief *per curiam* opinion, the Court of Appeals stated:

> "We find nothing in this case which satisfies us that the August 17, 1976 sale, in and of itself, will cause

appellees any irreparable injury. On the other hand, the national interests, looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted." No. 76-8369 (CA2 Aug. 16, 1976).

II

The power of a Circuit Justice to dissolve a stay is well settled. See, *e.g.*, *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308 (1973) (MARSHALL, J., in chambers); *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) (Black, J., in chambers); *Cunningham* v. *English*, 78 S. Ct. 3, 2 L. Ed. 2d 13 (1957) (Warren, C.J., in chambers). But it is equally well established that a Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J, in chambers). This is especially true where, as here, I had only a few hours to review the District Court's 200-page opinion, the briefs of the parties, and the four-volume EIS, and where I did not have before me—nor could I have meaningfully considered even if it were here—the voluminous record compiled in the District Court.

Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals. See R. Stern & E. Gressman, Supreme Court Practice § 17.19 (4th ed. 1969). Despite the practical importance of the Secretary of the Interior's decision to issue leases for the Mid-Atlantic Outer Continental Shelf, however, I am not persuaded that the legal question involved here—whether this EIS complied with the uncontested requirements of the NEPA—would warrant review by this Court. Just this past Term, in *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976), we had occasion to examine the purposes and requirements of the NEPA. Although we disagreed on certain issues, we were

unanimous in concluding that the essential requirement of the NEPA is that before an agency takes major action, it must have taken "a 'hard look' at environmental consequences." 427 U.S., at 410 n. 21, quoting *Natural Resources Defense Council* v. *Morton*, 148 U.S. App. D.C. 5, 16, 458 F.2d 827, 838 (1972). In evaluating the adequacy of EIS's the Courts of Appeals consistently have enforced this essential requirement, tempered by a practical "rule of reason."[1] As the Court of Appeals for the Second Circuit has explained:

> "[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." *Natural Resources Defense Council* v. *Callaway*, 524 F.2d 79, 88 (1975).

In the instant case, respondents do not appear to challenge the requirement that the agency take a "hard look" at the environmental consequences, nor do applicants question the appropriateness of employing a rule of reason in evaluating impact statements. Thus, the sole question at issue is whether the District Court properly applied the controlling standards in concluding that the EIS lacked information concerning state regulation of shorelands which was "reasonably necessary" for evaluating the project. That question appropriately is for the Court of Appeals, and I do not believe that four Members of this Court would vote to grant a writ of certiorari to review its conclusion on such a fact-intensive issue. Accordingly, it is not appropriate for me to exercise my

[1] See, *e.g.*, *Sierra Club* v. *Morton*, 510 F.2d 813, 819 (CA5 1975); *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (CA9 1974); *Harlem Valley Transportation Assn.* v. *Stafford*, 500 F.2d 328, 337 (CA2 1974); *Iowa Citizens for Environmental Quality* v. *Volpe*, 487 F.2d 849, 852 (CA8 1973); *Natural Resources Defense Council* v. *Morton*, 148 U.S. App. D.C. 5, 12, 458 F.2d 827, 834 (1972).

extraordinary powers as Circuit Justice in order to preserve a question for review by the full Court.

Nor is it necessary for me to act in this case "to preserve the rights of the parties pending final determination of the cause." *Meredith* v. *Fair*, 83 S. Ct., at 11, 9 L. Ed. 2d, at 44. The Court of Appeals concluded that plaintiffs would not be irreparably injured if the Secretary were permitted to open the bids. I cannot say that the court abused its discretion. It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an "irreversible commitment of resources," *Natural Resources Defense Council* v. *NRC*, 539 F.2d 824, 844 (CA2 1976), a citizen's right to have environmental factors taken into account by the decision-maker would be irreparably impaired. For this reason, the lower courts repeatedly have enjoined the Government from making such resource commitments without first preparing adequate impact statements.[2] Indeed this past Term, in *Kleppe* v. *Sierra Club*, *supra*, we indicated that it would have been appropriate for the Court of Appeals to have enjoined the approval of mining plans had that court concluded that "the impact statement covering [the mining plans] inadequately analyzed the environmental impacts of, and the alternatives to, their approval." 427 U.S., at 407-408, n. 16.

In the instant case, however, the Court of Appeals apparently decided that the opening of bids does not constitute an "irreversible commitment of resources." I am unprepared to say that the court was wrong in so holding. In the first instance, it is quite clear that the actual opening of the bids does not involve a commitment of any kind, since the Secretary reserves the right to reject all bids. Thus it is not until

[2] See, *e.g.*, *Natural Resources Defense Council* v. *NRC*; *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1183-1184 (CA6 1972); *Scherr* v. *Volpe*, 466 F.2d 1027, 1034 (CA7 1972); *Calvert Cliffs' Coordinating Comm.* v. *AEC*, 146 U.S. App. D.C. 33, 52, 449 F.2d 1109, 1128 (1971). See generally F. Anderson, NEPA in the Courts 239-246 (1973).

a bid is accepted—which may not happen for 30 days—that an irreversible commitment is even arguably made.[3] Moreover, even after the bids are accepted, I cannot say that the Court of Appeals would be without power to declare the leases invalid if the court determined that the Government entered into leases without compliance with the requirements of the NEPA.

For the foregoing reasons, I have concluded that this case does not present the "exceptional circumstances," *Holtzman* v. *Schlesinger*, 414 U.S., at 1308, that warrant a Circuit Justice to vacate a stay.

[3] In the instant case, it is possible that before the bids are accepted the District Court will decide that the defect in the EIS has been remedied by a supplemental affidavit prepared by the Secretary in response to the court's opinion. That affidavit was presented to the Court of Appeals as an appendix to the Government's brief; it was also presented to me, but because it had not yet been given to the District Court, I declined to consider it. I was informed at argument, however, that the affidavit discusses the extent to which the Secretary considered the possibility of lack of state cooperation in making his decision to approve Sale No. 40.

[Publisher's note: See 429 U.S. 1314 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–190

George F. Gruner et al., Applicant,	)	
v.	)	
Superior Court of the State of California in and for the County of Fresno.	)	On Application for Stay.

[Publisher's note: "Applicant" above should be "Applicants".]

[September 3, 1976]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants seek a stay of orders of commitment, pursuant to state contempt judgments, pending this Court's disposition of a petition for a writ of certiorari on the underlying issue. Applicants also seek a temporary stay until this Court acts upon their request for a stay pending disposition of the petition.

Applicants are editors and reporters employed by The Fresno Bee, a California daily newspaper. Applicants have refused to answer in open court certain questions propounded regarding the identity of sources used by applicants for certain news articles. The articles contained information based upon sealed grand jury testimony. The Superior Court entered judgments of contempt against each of the applicants and ordered that the applicants be jailed until they answer the questions propounded. Applications for stays were denied by the Superior Court in Fresno on August 25, 1976, and by the California Supreme Court on September 2, 1976.

On two prior occasions the applicants have unsuccessfully sought review by this Court. In March 1975, an Application for Stay Pending Determination of Petition for Writ of Certiorari entitled *Patterson et al.* v. *Superior Court*, No. A-765, October Term, 1974, was filed with this Court and denied

shortly thereafter. No petition for certiorari was filed in that matter. In December 1975, a petition for writ of certiorari seeking review of the California courts' affirmation of the contempt judgments was filed with this Court. *Rosato et al.* v. *Superior Court*, No. 75-919. The petition for the writ of certiorari was denied. 44 U.S.L.W. 3756 (June 29, 1976).

On those occasions applicants raised the sort of First and Fourteenth Amendment issues that were dealt with in this Court's opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Their present stay application relies largely on the same grounds; since there were not four Justices of the Court disposed to grant certiorari on this very issue in this very case less than three months ago, there is no reason to think that there are four so disposed now. Applicants in their petition for certiorari raise a somewhat different claim, asserting that, before they may be committed for their refusal to testify, they are entitled to a "due process hearing" to determine whether or not the commitment for contempt has a reasonable prospect of accomplishing its purpose. None of our cases support the existence of any such requirement, and applicants' position seems to boil down to a contention that if they but assure the court of their complete recalcitrance, the court is powerless to commit them for contempt.

The application for a stay pending the disposition of the petition for a writ of certiorari in No. 76-328, *Gruner* v. *Superior Court*, and the application for a temporary stay are therefore denied.

[Publisher's note: See 429 U.S. 1316 for the authoritative official version of this opinion.]

MCCARTHY ET AL. *v.* BRISCOE, GOVERNOR OF TEXAS, ET AL.

ON APPLICATION FOR STAY

No. A–201. Decided September 14, 1976

Application for a partial stay of a three-judge District Court's order and judgment denying injunctive relief to applicants on the ground of laches, is denied, since a direct appeal to this Court does not lie under 28 U.S.C. § 1253 and hence the Court is without jurisdiction to grant the requested relief.

MR. JUSTICE POWELL, Circuit Justice.

This application, for a partial stay of an order and judgment of a three-judge District Court for the Western District of Texas, reaches me during the summer recess of the Court. Following a practice utilized by other Justices and by myself on previous occasions, see, *e.g.*, *Graves* v. *Barnes*, 405 U.S. 1201 (1972) (POWELL, J., in chambers), I have consulted informally with each of my Brethren who was available.[*] Although no other Justice has participated in the drafting of this order, I am authorized to say that each of those consulted would vote to deny the application for the reason stated below.

In denying injunctive relief to applicants, the three-judge District Court based its action not upon resolution of the merits of the constitutional claim presented (which it resolved in favor of applicants), but upon the equitable doctrine of laches. I conclude, therefore, that direct appeal to this Court does not lie under 28 U.S.C. § 1253, *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975), and that the Court is without jurisdiction to grant the relief now requested. Accordingly, the application for a stay is denied, but without prejudice to the right of applicants to seek relief in the Court of Appeals.

[*] All Members of the Court, save two who were not available, have been consulted.

[Publisher's note: See 429 U.S. 1317 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–247

Eugene J. McCarthy, Paul Spragens, Ronald C. Engle, Janice Lindley Yeager, and James D. Clark, Petitioners,	)	Application for Injunction.
v.	)	
Dolph Briscoe, Governor of Texas and Mark W. White, Jr., Secretary of State of the State of Texas.	)	

[Publisher's note: There should be a comma after "Governor of Texas" above.]

[September 30, 1976]

MR. JUSTICE POWELL, Circuit Justice.

This is an application for injunctive relief,[1] presented to me as Circuit Justice. The applicants, former Senator Eugene J. McCarthy and four Texas voters who support Senator McCarthy's independent candidacy for President, have asked that I order Senator McCarthy's name placed on the 1976 general election ballot in Texas. They sought relief without success from a three-judge District Court for the Western District of Texas and, on appeal, from the Court of Appeals for the Fifth Circuit.[2] Upon consideration

[1] Although the application is styled "Application for a partial stay of an order and judgment of the United States Court of Appeals, Fifth Circuit," the applicants actually seek affirmative relief. I have therefore treated the papers as an application for an injunction pursuant to 28 U.S.C. § 1651 and Rules 50 and 51 of this Court.

[2] The applicants filed an initial application in this Court for a stay of the District Court order on September 8, 1976, before they had filed an appeal to the Court of Appeals. In my capacity as Circuit Justice, I denied that request on September 14 on the ground that this Court was without jurisdiction to entertain a direct appeal from the District Court under 28 U.S.C. § 1253. See *MTM, Inc*. v. *Baxley*, 420 U.S. 799, 804 (1975). I specified that the denial was without prejudice to the appli-

of the record before me, I have concluded that the courts below erred in failing to remedy a clear violation of the applicants' constitutional rights. I have therefore granted the requested relief.

Effective September 1, 1975, Texas amended its Election Code so as to preclude candidates for the office of President from qualifying for position on the general election ballot as independents. Acts of 1975, c. 682, § 23, codified in Tex. Election Code, Art. 13.50, Subdiv. 1 (Supp. 1976). Before that date independent candidates for all offices had been able to gain access to the ballot by submitting a prescribed number of voters' signatures by a deadline several months in advance of the general election. Tex. Election Code, Arts. 13.50, 13.51 (1967); see *American Party of Texas* v. *White*, 415 U.S. 767, 788-791 (1974). Under the new law that method of qualifying for the ballot was carried forward for most offices, but not for the office of President.[3] A presidential candidate must now be a member of a political party as a precondition to securing a place on the ballot [Publisher's note: There should be a period here. But see 429 U.S. at 1318.] An independent candidate can seek election as President only by joining or organizing a political party, Tex. Election Code Arts. 13.02, 13.45 (Supp. 1976), or by mounting a campaign to have his supporters "write in" his name on election day, *id*., Arts. 6.05, 6.06 (Supp. 1976).

On July 30, 1976, the applicants filed this suit in the District Court, claiming that Art. 13.50 of the Texas Election Code, as amended, violated the rights "secured to them under

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cants' right to seek relief in the Court of Appeals. The applicants filed a notice of appeal in the Court of Appeals on September 16; the Court of Appeals denied their request for interlocutory relief on September 23; and the applicants renewed their application here the following day.

[3] Candidates for the offices of Vice-President and presidential elector are similarly excluded from qualifying as independents. Art. 13.50, Subdiv. 1 (Supp. 1976). Although two of the applicants are candidates for the office of presidential elector, they have not specifically sought relief with respect to their own candidacies. My order of September 27 is sufficiently broad to encompass such relief as may be necessary to perfect Senator McCarthy's qualification for general election.

Article II, Section 1, Clauses 2 and 4, and Article VI, Clause 2 of the United States Constitution and the First, Twelfth and Fourteenth Amendments thereto." The applicants asked the court to order Senator McCarthy's name placed on the ballot or, alternatively, to devise reasonable criteria by which Senator McCarthy might demonstrate support for his candidacy as a means of qualifying for ballot position. The applicants submitted affidavits that tended to show that Senator McCarthy was a serious presidential aspirant with substantial support in many States.

The defendants, the Governor and Secretary of State of the State of Texas, denied that the new law was unconstitutional and claimed that Senator McCarthy was barred by laches from obtaining the injunctive relief he requested. In support of the laches claim, the defendants presented the affidavit and later the live testimony of Mark W. White, Jr., the Secretary of State, to the effect that it would be impossible in the time remaining before the November election for the State to verify that Senator McCarthy had substantial support among Texas voters.

On September 2, 1976, the District Court held that the Texas law, as amended, was constitutionally invalid for failure to provide independents a reasonable procedure for gaining ballot access, but declined to enter injunctive relief. The court perceived its only choice to be one

> "between standing by and permitting this incomprehensible policy to achieve its apparent objective or substantially burdening the entire general election at the behest of one who has at least dawdled over his rights . . . ." Memorandum Opinion, at 2.

Believing it to be "too late for us to fashion meaningful relief without substantially disrupting the entire Texas election scheme," the court concluded that injunctive relief was not warranted. *Ibid.*

On September 23, 1976, the Court of Appeals denied the

applicants [Publisher's note: There should be an apostrophe after "applicants".] request for emergency injunctive relief on the same basis:

> "We are . . . regretfully constrained to agree with the District Court that because the complaint was so lately filed there is insufficient time for the Court to devise a petition requirement for ascertaining whether McCarthy has substantial community support in Texas without disrupting the entire election process in that state. . . ."

The following day, September 24, 1976, the applicants presented this application to me as Circuit Justice.

The new Texas law precluding independent candidates for President from gaining access to the general election ballot as independents raises no novel issue of constitutional law. In *Storer* v. *Brown*, 415 U.S. 724 (1974), the Court flatly rejected the notion that an independent could be forced to seek ballot position by joining or organizing a political party:

> "It may be that the l% registration requirement is a valid condition to extending ballot position to a new political party. Cf. *American Party of Texas* v. *White*, [415 U.S., at] 767. But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status . . . such as the conduct of a

> primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not." *Id.*, at 745-746.

And in *Lubin* v. *Panish*, 415 U.S. 709 (1974), the Court characterized as "dubious at best" the intimation that a write-in provision was an acceptable means of ballot access:

> "The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. . . . That disparity would, itself, give rise to constitutional questions . . . ." *Id.*, at 719 n. 5.

In view of these pronouncements, the District Court was fully justified in characterizing the new Texas law—enacted little more than a year after *Storer* and *Lubin* were decided—as demonstrating an "intransigent and discriminatory position" and an "incomprehensible policy."

Despite this recognition of the clear constitutional infirmity of the Texas statute, the District Court refused to grant the requested relief. The District Court, and the Court of Appeals, apparently assumed that the only appropriate remedy was to order implementation of the former statutory procedure permitting independent presidential candidates to demonstrate substantial support by gathering a prescribed number of voters' signatures—a procedure still available to independent candidates for most other elective offices. Since the signature-gathering procedure involved not only a filing deadline which had long since expired but also a lengthy process of signature verification, both lower courts concluded that there was too little time to impose a signature-gathering requirement without undue disruption of the State's electoral process.

This Court will normally accept findings of a district court, affirmed by a court of appeals, on factual considerations such as those underlying a determination of laches. But acceptance of findings of fact does not in this case require acceptance of the conclusion that violation of the applicants' constitutional rights must go unremedied. In assuming that a signature-gathering process was the *only* available remedy, the courts below gave too little recognition to the amendment passed by the Texas Legislature making that very process unavailable to independent candidates for the office of President. In taking that action, the Texas Legislature provided no means by which an independent presidential candidate might demonstrate substantial voter support. Given this legislative default, the courts were free to determine on the existing record whether it would be appropriate to order Senator McCarthy's name added to the general election ballot as a remedy for what the District Court properly characterized as an "incomprehensible policy" violative of constitutional rights. This is a course that has been followed before both in this Court, see *Williams* v. *Rhodes*, 89 S. Ct. 1 (Opinion of STEWART, J., in-Chambers, 1968), and, more recently, in three District Court decisions involving Senator McCarthy. *McCarthy* v. *Noel*, No. 76-0402 (R.I. Sept. 24, 1976); *McCarthy* v. *Tribbitt*, No. 76-300 (Del. Sept. 16, 1976); *McCarthy* v. *Askew*, No. 76-1460-Civ-NCR (Fla. Sept. 15, 1976).

In determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access, a court should be sensitive to the State's legitimate interest in preventing "laundry list" ballots that "discourage voter participation and confuse and frustrate those who participate." *Lubin* v. *Panish*, *supra*, 415 U.S., at 715. But where a state forecloses independent candidacy in presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to

assume the requisite community support. See *McCarthy* v. *Askew*, *supra*, Memorandum Opinion, at 6.

It is not seriously contested that Senator McCarthy is a nationally known figure; that he served two terms in the United States Senate and five in the United States House of Representatives; that he was an active candidate for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary elections; and that he has succeeded this year in qualifying for position on the general election ballot in many States. The defendants have made no showing that support for Senator McCarthy is less substantial in Texas than elsewhere.

For the reasons stated, I have ordered that the application be granted and that the Secretary of State place the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of President of the United States.[4] I have consulted informally with each of my Brethren and, although no other Justice has participated in the drafting of this opinion, I am authorized to say that a majority of the Court would grant the application.[5]

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[4] The order granting the application was issued on September 27, 1976. The Texas Election Code does not appear to prescribe a deadline for the printing of ballots for the general election. The earliest date when printed ballots are required for any purpose is October 13, 20 days before the election, when the statutory period for absentee voting by mail begins. Art. 5.05, Subdiv. 4(a) (Supp. 1974). Ballots are to be mailed to persons outside the United States "as soon as possible after the ballots become available, but not earlier than [October 3]," Art. 5.05, Subdiv. 4e, and to others intending to vote by mail on October 13 "or as soon thereafter as possible," Art. 5.05, Subdiv. 4(b). Political parties are not required to certify their nominees to the Secretary of State until September 28, Art. 11.04 (1967), and the Secretary of State is not required to certify the names of those who have qualified for ballot position to local election officials until October 3, Art. 1.03, Subdiv. 2 (Supp. 1976). Thus there appears to be ample time to add Senator McCarthy's name.

[5] MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST have asked to be recorded as holding a different view.

[Publisher's note: See 429 U.S. 1325 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–257

Joelle Fishman et al.	)	
v.	)	Application for Injunction.
Gloria Schaffer, Secretary of State of Connecticut, et al.	)	

[October 1, 1976]

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application to me as Circuit Justice for an injunction ordering officials of the State of Connecticut to place on the ballot for the November 2 election the names of the Communist Party candidates for President and Vice President of the United States, Gus Hall and Jarvis Tyner, respectively. Applicants[1] sought relief without success from a three-judge District Court for the District of Connecticut and, on appeal, from the Court of Appeals for the Second Circuit.[2] While there is no question of my power to grant such relief, Supreme Court Rule 51, *McCarthy* v. *Briscoe* (opinion of POWELL, J., in-Chambers, September 30, 1976), *Williams* v. *Rhodes*, 89 S. Ct. 1, 21 L. Ed. 2d 69 (opinion of STEWART, J., in-Chambers, 1968), it is equally clear that "such power should be used sparingly and only in the most critical and exigent circumstances." *Williams* v. *Rhodes*, *supra*, 89 S. Ct. at —, 21 L. Ed. 2d, at 70. Since this case does not meet that standard, I must deny the requested relief.

[1] Applicants are two petition circulators (Fishman and Gagyi) and the Presidential and Vice Presidential candidates of the Communist Party (Hall and Tyner), for whose candidacy Fishman and Gagyi circulated petitions.

[2] In view of the District Court's denial of relief on equitable grounds without deciding the merits of the constitutional attack, plaintiffs properly sought review initially in the Court of Appeals. See *McCarthy* v. *Briscoe*, *supra*, n. 2 [Publisher's note: See 2 Rapp 714.]; *MTM Inc*. v. *Baxley*, 420 U.S. 799, 804 (1975).

Plaintiffs filed their complaint on July 2, 1976, attacking as unconstitutionally burdensome certain provisions of the Connecticut election law which apply to candidates seeking to get on the ballot by means of nominating petitions. They sought declaratory and injunctive relief against enforcement of only a small segment of this procedure—the prescribed method for filing the completed petitions. Conn. Gen. Stat. § 9-453.

In order to demonstrate a "significant modicum of support" [Publisher's note: There should be a comma after "support" and before the closing quotation marks preceding this note.] *Jenness* v. *Forton*, 403 U.S. 431, 432 (1971), Connecticut requires potential candidates to submit petitions signed by electors equal to one percent of the number who voted for the same office in the previous election. Conn. Gen. Stat. § 9-453d. The petitions are available immediately after ther [Publisher's note: "ther" should be "the".] last state-wide election and do not have to be filed until nine weeks before the relevant election. Conn. Gen. Stat. § 9-453n. Thus, the numerosity and time requirements of the statute are, as the District Court observed, "markedly more favorable" to the potential candidate than are constitutionally required. District Court Slip op., at 3; see *Storer* v. *Brown*, 415 U.S. 724 (1974); *American Party of Texas* v. *White*, 415 U.S. 767 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); Note, Developments in the Law, Elections, 88 Harv. L. Rev. 1111, 1123-1130 (1975).

As a means of assuring the authenticity of the signatures collected, the law requires that the circulator sign a statement under penalty of perjury that (1) each signer of a petition signed the petition in his or her presence, and (2) he or she either knows the signer, or that the signer satisfactorily identified himself or herself to the circulator. This procedure must be performed personally before the Town Clerk in each town where any petition signer resides. Plaintiffs do not object to the need for the circulator to make the required statement. They claim, however, that the requirement that it be done personally in front of numerous Town Clerks necessitates so much travel that it is unconstitutionally

burdensome. While acknowledging that the state interest [Publisher's note: "interest" is surplus.] has a valid and important interest in assuring the authenticity of the signatures and the eligibility of the signers, plaintiffs argue that this interest can be served in ways less burdensome to the circulators.

The District Court, while sympathetic to this claim, did not rule on the merits, since it found plaintiffs' suit barred by laches. It noted that plaintiffs had tried and failed to qualify for a position on the ballot in a previous election. They were familiar with the statute and could have brought suit earlier. The delay meant that the legislature could not consider alternative filing requirements; instead, relief, if warranted, would have to be the drastic remedy of putting the candidate on the ballot, leaving the State with no protection of its interest in authenticity. Accordingly, the District Court dismissed the action. The Court of Appeals, in an expedited appeal, affirmed without opinion.

Turning to the merits of the application, as I noted previously, the relief sought is extraordinary. So far as I am aware, a single Justice of this Court has ordered a State to put a candidate's name on the ballot only twice. *Williams* v. *Rhodes*, *supra*; *McCarthy* v. *Briscoe*, *supra*. This case lacks all the significant features warranting relief in those cases.

McCarthy presented "no novel issue of constitutional law," [Publisher's note: The simplest way to make sense of this paragraph and the two that follow it is to (a) replace the comma preceding this note with a period and (b) elide the text from here to the bottom of the page. See 429 U.S. at 1328.] in MR. JUSTICE POWELL'S view. Slip op. at 4. The Texas Legislature had adopted an "incomprehensible policy," amending its Election Code so as to preclude independent candidates for the office of President from qualifying for the general election ballot. Slip op., at 5. This deliberate refusal to provide access to independents was characterized by both the District Court and MR. JUSTICE POWELL as demonstrating an "intransigent and discriminatory position." *Ibid*. Thus, there was no question that Texas had clearly violated the constitutional requirements for ballot access.

In contrast, the constitutionality of the Connecticut statute

Slip op., at 4. In MR. JUSTICE POWELL'S view, the Texas Legislature had adopted an "incomprehensible policy," amending its Election Code so as to preclude independent candidates for the office of President from qualifying for the general election ballot. Slip op., at 5. This deliberate refusal to provide access to independents was characterized by both the District Court and MR. JUSTICE POWELL as demonstrating an "intransigent and discriminatory position." *Ibid*. Thus, there was no question that Texas had clearly violated the constitutional requirements for ballot access.

In contrast, the constitutionality of the Connecticut statute is at best a close question. I have no doubt about the correct standard of review:

> "Whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discrimination . . . their validity depends upon whether they are necessary to further compelling state interests.
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> • • • • •
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> [The limitations must be] reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *American Party of Texas*, v. *White*, *supra*, 415 U.S., at 780-781.

Nevertheless, there is little precedent dealing specifically with filing procedures. Indeed, the one case touching on the subject, *American Party of Texas* v. *White*, *supra*, suggests that a requirement more burdensome than Connecticut's—that all signatures be notarized at the time they are collected—is not unconstitutional, at least absent more proof of impracticability or unusual burdensomeness than was before the Court. *Id.*, at 787. Moreover, unlike the Texas law in *McCarthy* which provided no means of access whatever for an independent candidate, and the Ohio law which made it "virtually impossible" for a new political party to get on the ballot, *Williams* v. *Rhodes*, *supra*, 393 U.S., at 25, Connecticut has one of the more liberal ballot access statutes. Far from the

intransigence found in *McCarthy*, here the Connecticut Legislature apparently sought to deal rationally with abuses it had encountered in the petitioning process. See Connecticut General Assembly 1957, House Proceedings Volume 7, Part 4, pp. 2313-2314.

Furthermore, while there may be less burdensome ways to authenticate signatures, the fact remains that a number of groups have successfully used the Connecticut procedures. Since 1968, four petitioning parties have qualified on a state-wide basis under the same procedures now attacked. Affidavit of Henry Cohn, Elections Attorney and Director of the Elections Division of the Secretary of State's Office, August 2, 1976. In addition, according to Mr. Cohn's later affidavit, as of September 17, 1976, it appeared that the U.S. Labor Party would qualify Presidential candidates this year. In view of this record showing that it is feasible to comply with the requirement under attack, plaintiffs' claims that the statute is unduly onerous become less compelling. See *American Party of Texas* v. *White*, *supra*, 415 U.S., at 779, 783-784. While I do not intimate that plaintiffs may not ultimately prevail on the merits,[4] I do conclude that unlike *McCarthy*, the question is too novel and uncertain to warrant a single Justice's acting unilaterally to strip the State of its chosen method of protecting its interests in the authenticity of petition signatures.

In addition to these distinctions on the merits, there are several additional factors militating against the extraordinary relief sought. First, the plaintiffs delayed unnecessarily in commencing this suit. The statute is not a new enactment and plaintiffs have, in fact, utilized it before. In 1972, the Communist Party unsuccessfully circulated petitions for pres-

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[4] I imply no view on the correctness of the dismissal of the action insofar as it seeks declaratory relief. Moreover, I note that that claim will not be rendered moot by the occurrence of the election or by our refusal to grant affirmative relief now. *American Party of Texas* v. *White*, *supra*, 415 U.S. at 770, n. 1; *Storer* v. *Brown*, 415 U.S. 724, 737, n. 8 (1974).

[Publisher's note: There is no footnote 3 in this opinion, but the amended version at 429 U.S. 1325 has one. It appears after the word "burdensome" at the top of page 723, *supra*, and reads as follows:

Specifically, they object to those portions of Conn. Gen. Stat. §§ 9-453i and 453k (1975) which require:

1. "Each page of a nominating petition shall be submitted *by the person who circulated the same to the town clerk of the town in which the signers reside* . . . ." § 9-453i (emphasis supplied).

2. "The town clerk shall not accept any page of a nominating petition *unless the circulator thereof signs in his presence the statement* as to the *authenticity* of the signatures thereon required by section 9-453j." § 9-453k(a) (emphasis supplied).

3. "The town clerk shall *certify* on each such page that the circulator thereof signed such statement in his presence and that either he knows the circulator or that the circulator satisfactorily identified himself to the town clerk." § 9-453k(b) (emphasis supplied).]

idential electors. And in 1974, Joelle Fishman, one of the plaintiffs-electors [Publisher's note: "plaintiffs-electors" should be "plaintiff-electors" or, better still, "applicant-electors".] in this suit, successfully qualified as a petitioning candidate for Congress. Thus plaintiffs were sufficiently familiar with the statute's requirements and could have sued earlier. Moreover, defendants strongly oppose the relief sought, claiming that an injunction at this time would have a chaotic and disruptive effect upon the electoral process. Defendants' Response, at 1. The Presidential and Overseas Ballots have already been printed; some have been distributed. The general absentee ballots are currently being printed. *Id.*, at 2. This stands in marked contrast to the situation in *Williams* v. *Rhodes*, where Ohio agreed that the Independent Party could be placed on the ballot without disrupting the election. *Williams* v. *Rhodes*, *supra*, 21 L. Ed. 2d. at 70; *Williams* v. *Rhodes*, 393 U.S. 23, 35 (1968). It also differs from *McCarthy*, where it appears that Texas had neither printed nor distributed any ballots when the injunction was issued. Slip op., at 7 n. 4.

For these reasons, I conclude that the application should be denied.

It is so ordered.

[Publisher's note: See 429 U.S. 1331 for the authoritative official version of this opinion.]

VOLVO OF AMERICA CORP. *v.* SCHWARZER, U.S. DISTRICT JUDGE (ROSACK ET AL., REAL PARTIES IN INTEREST)

ON APPLICATION FOR STAY

No. A–395. Decided November 15, 1976

Application for stay of District Court's order pursuant to 28 U.S.C. § 1447(c) remanding an alleged diversity class action to state court on the ground that the District Court had no jurisdiction of the action is denied, since appellate review of a remand order based on § 1447(c), whether erroneous or not, is barred by § 1447(d). *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, distinguished.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks a stay of an order of the District Court for the Northern District of California remanding this case to the California state-court system. Because I believe, for the reasons outlined below, that the order of the District Court is not subject to review, the application will be denied.

This state-law antitrust action was originally brought by Charlene Rosack in the California Superior Court for San Mateo County seeking damages individually and on behalf of a class of persons who purchased new Volvo automobiles from California Volvo dealers during the years 1967-1976. Defendants removed the action to the Federal District Court pursuant to 28 U.S.C. § 1441(a), alleging that the action was within the original diversity jurisdiction of this court as prescribed in 28 U.S.C. § 1332. Plaintiff moved to remand the action to the state court on the ground, *inter alia*, that the amount in controversy did not exceed $10,000 as required by § 1332. The District Court granted the motion. Its action was premised on the belief that the case "must be treated as a class action for the purpose of determining jurisdictional issues," whereas here "it appears that only a few members of a class estimated to have some 50,000 mem-

bers meet the jurisdictional requirement." The District Court accordingly held:

> "It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn* [v. *International Paper Co.*, 414 U.S. 291 (1973)], all of those plaintiffs would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. § 1447(c)."[1]

Applicant attacks this conclusion, contending that since the District Court specifically found that jurisdiction existed over "a few members of" the class, the court's order remanding the entire action was not authorized by 28 U.S.C. § 1447(c). The flaw in this argument is that, while the District Court may have been wrong in its analysis, it clearly stated, citing to § 1447(c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with § 1447(c), which allows a remand where an action is "removed improvidently and without jurisdiction." Review of this order, therefore, is presumptively barred by the operation of 28 U.S.C. § 1447(d):

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

[1] The Ninth Circuit denied the petition for a writ of mandamus and/or prohibition on November 11, 1976.

We held last Term in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), where the District Court ordered a remand because of its crowded docket, that § 1447(d) did not bar review of remand orders "issued on grounds not authorized by § 1447(c)," 423 U.S., at 343.[2] But the District Court here *did* base its order on § 1447(c). *Thermtron* is of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the court "does not have jurisdiction of this action," see 423 U.S., at 343-344. Applicant's position would mean that any allegedly erroneous application of § 1447(c) would be reviewable by writ of mandamus, leaving the § 1447(d) bar extant only in the case of allegedly proper applications of § 1447(c), a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron*.[3]

Since I do not believe four Members of this Court would find the order of the District Court subject to review, the application for a stay is denied.

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[2] In *Thermtron*, the District Court acknowledged that the defendant had a "right" to remove the action, pursuant to 28 U.S.C. § 1441, but that this right had to be "'balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action.'" 423 U.S., at 340. As we noted, that order "was based on grounds wholly different from those upon which § 1447(c) permits remand." *Id.*, at 344.

[3] "It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to § 1447(c) *whether erroneous or not* . . . . If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." 423 U.S., at 343 (emphasis added).

[Publisher's note: See 429 U.S. 1334 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–456

Daniel J. Evans, Governor of Washington, et al., Applicant, *v.* Atlantic Richfield Company et al.	))))	On Application of Stay.

[Publisher's note: "Applicant" above should be "Applicants" and "Application of Stay" above should be "Application for Stay".]

[December 9, 1976]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants, officials of the State of Washington, seek a stay of the order of the United States District Court for the Western District of Washington, entered November 12, 1976, enjoining enforcement of Chapter 125 of the laws of the State of Washington, 1975, First Extraordinary Session. Rev. Code Wash. § 88.16.170 *et seq*. This statute, designed "to decrease the likelihood of oil spills on Puget Sound and its shorelines," imposes regulations on oil tankers over 40,000 deadweight tons ("DWT")[*] and prohibits "supertankers" of over 125,000 DWT. On the date the statute became effective, September 8, 1975, respondents filed suit in the United States District Court for the Western District of Washington, claiming that Chapter 125 had been preempted by federal law, particularly the Ports and Waterways Safety Act of 1972 ("PWSA"), 33 U.S.C. § 1221 *et seq*., 46 U.S.C. § 391a, and that Chapter 125 imposed an undue burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. A three-judge court was convened pursuant to 28

[*] Tankers between 40,000 and 125,000 DWT may enter Puget Sound (a) if they contain certain enumerated safety features or (b) if they are accompanied by a tug escort. Tankers over 50,000 DWT are required to have State licensed pilots on board when navigating Puget Sound.

U.S.C. §§ 2281 and 2284, the case was heard pursuant to an agreed statement of facts, and an opinion was issued on September 23, 1976, holding Chapter 125 pre-empted in its entirety: the State pilotage requirement by conflict with 46 U.S.C. §§ 215 and 364, and the remainder of Chapter 125 by the PWSA. On motion by respondents a permanent injunction was issued on November 12, 1976, but that order was stayed until December 15, 1976.

On consideration of the application and response, it appears that the issues involved are of sufficient complexity, and their resolution sufficiently uncertain, to warrant consideration by the full court. Such consideration ordinarily occurs at a regularly scheduled conference of the Court, to which the matter is referred by the Circuit Justice. The Court has a conference scheduled for Friday, December 10, but I have elected not to refer this application to that conference. Consideration by the full Court presupposes adequate time for each Justice to study the application and response prior to conference, and at this point such time simply is not available.

Since I do not believe that this case is of such extraordinary urgency as to warrant my requesting THE CHIEF JUSTICE to schedule a special conference to consider it, I have elected to refer the application to the next regularly scheduled conference of the Court. Because that conference will occur after December 15, the date on which the stay issued by the District Court expires, I think it is incumbent on me to exercise my authority as Circuit Justice to determine how the matter shall remain until it can be considered by the full Court. The state officials' showing of irreparable injury in the absence of a temporary stay, while not entirely unpersuasive, is not by any means overwhelming. Respondents' estimates of financial loss if the District Court stay is continued are at least equally marginal. Respondents have operated in compliance with the state statute for more than a year, and at no time during the pendency of their suit in the District Court did they seek preliminary

relief. On balance I have decided that respondents should be required to continue to operate in this manner pending consideration of the application by the Court.

It is therefore ordered that the stay of the order of permanent injunction dated November 12, 1976, which would by its term expire December 15, 1976, be continued until further order of this Court. The application for stay will be referred to the full Court at the conference following December 10.

[Publisher's note: See 429 U.S. 1337 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–543

Michael Meeropol and Robert Meeropol, Applicants, *v.* Louis Nizer, Doubleday & Co., Inc. and Fawcett Publications, Inc.	)))))	On Application for Issuance of a Certificate of Necessity.

[January 18, 1977]

MR. JUSTICE MARSHALL, Circuit Justice.

Applicants Michael and Robert Meeropol brought this action in the District Court for the Southern District of New York against respondent Nizer, author of the book The Implosion Conspiracy, and respondents Doubleday and Fawcett, its publishers, alleging copyright infringement, libel and invasion of privacy. Summary judgment was granted for respondents on all claims, and applicants have appealed to the Court of Appeals for the Second Circuit. Applicants move before me as Circuit Justice to issue a certificate of necessity under 28 U.S.C. § 291(a) or 28 U.S.C. § 1651, requesting THE CHIEF JUSTICE to designate judges from other circuits to sit in the appeal of this case.[1]

[1] Petitioners initially moved before the Second Circuit for en banc consideration of their request for issuance of a certificate of necessity or transfer of the appeal to another circuit. That request was denied, with Chief Justice Kaufman and Judge Oakes not participating. No application for a certificate of necessity was made to the Chief Judge. The motion was then set down for a hearing before a panel of the Second Circut [Publisher's note: "Circut" should be "Circuit".], and after some delay was heard by Judges Mansfield, Van Graafeiland, and Meskill. At the conclusion of oral argument, the motion was denied in an oral opinion delivered by Judge Mansfield, a transcript of which is in the record before me.

Applicants are the sons of Julius and Ethel Rosenberg, who were executed in 1953 after their convictions for conspiracy to commit espionage. See *United States* v. *Rosenberg*, 195 F.2d 583 (CA2), cert. denied, 344 U.S. 838 (1952); *Rosenberg* v. *United States*, 346 U.S. 273 (1953). The gravamen of applicants' action is that the Nizer book infringed the copyright which applicants own in the book Deathhouse Letters of Ethel and Julius Rosenberg, and libeled and invaded the privacy of applicants in its portrayal of the Rosenbergs' relationship with their children. Applicants contend in this motion that all of the judges of the Second Circuit are disqualified from hearing their appeal, essentially because they are, in the words of Judge Mansfield's decision, "associates," "friends," and "consultants" of Chief Judge Irving R. Kaufman of the Second Circuit, who presided as a District Judge over the Rosenberg trial and imposed the death sentences.[2]

As far as I can determine, 28 U.S.C. § 291(a)[3] has never been construed by this Court, although it is often used to assign judges to temporary duty on the circuit courts. Generally such assignments are made to assist a circuit with a heavy workload, although assignments have been made where

[2] Although petitioners have specifically addressed this application to me as Circuit Justice for the Second Circuit, and have not requested my disqualification, I note that they do suggest that "any judges who sat on the appeals of the Rosenbergs would very likely conclude that they should disqualify themselves from the current appeal." Application ¶ 11. I was a member of a Second Circuit panel, along with Judges Swan and Friendly, which denied postconviction relief to Rosenberg codefendant Morton Sobell. *United States* v. *Sobell*, 314 F.2d 314 (CA2), cert. denied, 374 U.S. 857 (1963). Despite this, I will not disqualify myself from ruling on the instant application. I do not believe that my "impartiality" to decide the extent of a Circuit Justice's powers under § 291(a) "might reasonably be questioned," 28 U.S.C. § 455(a), in light of this participation in a case not related to the present action.

[3] Section 291(a) provides:

"The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises."

an entire court of appeals has disqualified itself from hearing a case. See, *e.g.*, *United States* v. *Isaacs*, 493 F.2d 1124, 1167-1168 (CA7), cert. denied, 417 U.S. 976 (1974); cf. *United States* v. *Manton*, 107 F.2d 834 (CA2 1938), cert. denied, 309 U.S. 664 (1940). In such cases, however, the circuit judges themselves make the decision not to sit, thereby making it impossible to designate a panel to hear an appeal, and causing the "need" under § 291(a) for the issuance of a certificate of necessity. Such need is plain to anyone looking at the situation, and the duty to issue the certificate must be considered purely a ministerial act to deal with an administrative problem, whether performed by the chief judge of the circuit or the circuit justice. See "An Act to amend the Judicial Code to authorize the Chief Justice of the United States to assign circuit judges to temporary duty in circuits other than their own," 56 Stat. 1094 (Dec. 29, 1942); H.R. Rep. No. 2501, 77th Cong., 2d Sess. (1942); S. Rep. No. 1606, 77th Cong., 2d Sess. (1942).

Because § 291 (a) deals with a purely administrative matter, it would be inappropriate for me to rule in the context of an application under it that all of the judges of the Second Circuit are as a matter of law disqualified from hearing applicants' appeal. At best that question could be addressed only by the full Court. Cf. *Locks* v. *Commanding General*, 21 L. Ed. 2d 78 (1968) (Douglas, J., in chambers). Sitting as a Circuit Justice, I simply do not have the power to unseat all of the judges of a court of appeals in a particular case absent any showing that they have recused themselves.

Applicants move in the alternative for transfer of their appeal to another circuit court. They have cited no statutory or case authority even intimating that a Circuit Justice may exercise any such far-reaching power. See *MacNeil Bros. Co*. v. *Cohen*, 264 F.2d 186 (CA1 1959).

The application is denied in all respects.

[Publisher's note: See 429 U.S. 1341 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–594

Thomas L. Houchins, Sheriff of the County of Alameda, California, Applicant, *v.* KQED, Inc., et al.	)	On Application for Stay.

[February 1, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Houchins is the sheriff of Alameda County in the State of California and in that capacity controls access of the press and public to the Alameda County jail. Respondents KQED, Inc., a nonprofit educational television-radio station, and the Alameda and Oakland branches of the NAACP sued applicant in the United States District Court for the Northern District of California in order to obtain an injunction granting KQED personnel access to the Alameda County jail at Santa Rita. The District Court granted respondents a preliminary injunction on November 20, 1975, which restrained applicant:

> ". . . [F]rom excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County Jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein.
> ". . . [F]rom denying KQED news personnel and responsible representatives of the news media access to the Santa Rita facilities, including Greystone, at reasonable times and hours.
> ". . . [F]rom preventing KQED news personnel and

> responsible representatives of the news media from utilizing photographic and sound equipment or from utilizing inmate interviews in providing full and accurate coverage of the Santa Rita facilities. [Applicant] may, in his discretion, deny KQED and responsible representatives of the news media access to the Santa Rita facilities for the duration of those limited periods when tensions in the jail make such media access dangerous."

Applicant sought a stay of this order in the Court of Appeals for the Ninth Circuit, and a two-judge panel of the court granted the stay on December 24, 1975, observing that:

> "the injunction appears to exceed the requirements of the First Amendment as interpreted in *Pell* v. *Procunier*, 417 U.S. 817 (1974) and *Saxbe* v. *Washington Post Co*., 416 U.S. 843 (1974). Should the injunction be modified by the District Court, this Court will entertain a motion to lift the stay."

Applicant's appeal was thereafter heard by a different panel of the Court of Appeals which affirmed the order of the District Court. Applicant filed a petition for rehearing and suggestion for rehearing en banc, and a motion for stay of mandate, all of which were denied. He now requests that I stay the injunction pending the filing and disposition of a petition for certiorari to review the judgment of the Court of Appeals. For the reasons set forth below, I grant his application.

The dispute between the parties centers upon questions of law, rather than of fact. The principal dispute involves the interpretation of our opinion in *Pell* v. *Procunier*, 417 U.S. 817 (1974). Applicant would urge that we reach the same result in this case as we did in *Saxbe* v. *Washington Post Co*., 417 U.S. 843 (1974):

> "We find this case constitutionally indistinguishable from *Pell* v. *Procunier*, *ante*, p. 817, and thus fully controlled by the holding in that case. '[N]ewsmen have no

> constitutional right of access to prisons or their inmates beyond that afforded the general public.' *Id.*, at 834." *Saxbe*, 417 U.S., at 850.

Respondents, on the other hand, rely upon the Court's observation at the outset of the opinion in *Pell* that the prison regulation there involved was:

> ". . . not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current correction [Publisher's note: "correction" should be "corrections".] policy, both the press and the general public are afforded full opportunities to observe prison conditions. . . . In short, members of the press enjoy access to California prisons that is not available to other members of the public." *Id.*, at 831.

Concededly the access of the public and the press to the Alameda County jail is less than was their access to the California prisons in *Pell*. Public access to the Alameda County jail at Santa Rita presently consists of monthly public tours which, in the words of the Court of Appeals, "were limited to 25 people, booked months in advance, prohibited use of cameras or sound equipment, prohibited conversation with inmates, and omitted views of many parts of the jail, including the notorious Greystone building." Here the injunction did grant to the press greater[1] access to the jail than the public is granted, a result seemingly inconsistent with our holding[2] in *Pell* that the press is not entitled to greater access. But respondents suggest that the access given to the press in this case by the injunction may, as a factual matter, not significantly exceed that given to the press in *Pell* before the injunction and after our disposition of that case.

The Court of Appeals struggled with the resolution of this issue. Judges Chambers and Sneed, in granting the stay

[1] See *KQED, Inc.* v. *Houchins*, (CA9, No. 75-3643, Nov. 1, 1976), Slip op., at 18 (Duniway, J., concurring).
[2] See *Saxbe* v. *Washington Post*, *supra*, at 850.

before argument, felt that the injunction went beyond that which we countenanced in *Pell*. The panel that decided the issue on the merits unanimously affirmed the District Court, but each member of the panel wrote separately. In discussing the injunction, which he felt clearly granted the press greater access than is granted to the public, Judge Duniway, in his concurring opinion, was moved to conclude:

> "I cannot reconcile this result [the injunction] with the decisions in *Pell*, *supra*, and *Washington Post*, *supra*." *KQED, Inc.* v. *Houchins*, Slip op., at 18. (Duniway, J., concurring.)

Judge Hufstedler, concurring specially, viewed the reconciliation of the injunction in this case with the holdings in *Pell* and *Washington Post* as a "thorny question." *Id.*, at 19.

The legal issue to be raised by applicant's petition for certiorari seems quite clear. If the "no greater access" doctrine of *Pell* and *Saxbe* applies to this case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this Court of the propriety of the injunction, in light of those cases, would be appropriate, although not necessary. In my opinion at least four Justices of this Court would vote to grant certiorari to resolve this issue, if for no other reason than that departure from unequivocal language in one of our opinions which on its face appears to govern the question ought to be undertaken in the first instance by this Court, rather than by the Court of Appeals or by the District Court.

Of course, I accord due deference to the judges of the Ninth Circuit who declined to grant the stay. See *Winters* v. *United States*, 89 S. Ct. 57, 21 L. Ed. 2d 80 (1968) (Douglas, J., in chambers). But such deference does not relieve me of the obligation to decide the issue:

> "Although a judge of a 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." *Board of School Commissioners* v. *Davis*, 84 S. Ct. 10, 11, 11 L. Ed. 2d 26, 27 (1963) (Black, J., in chambers).

For the reasons set forth above, I think that the issue in this case is of sufficient importance to surmount the threshold barrier confronting all stay applications: reasonable likelihood that the petition for certiorari will be granted. *E.g.*, *English* v. *Cunningham*, 80 S. Ct. 659, 4 L. Ed. 2d 42 (1959) (Frankfurter, J., in chambers).

Respondents suggest that, regardless of the correctness of the decision below, the equities do not favor the applicant, and that it is they, the respondents, who will suffer the irreparable injury should a stay be granted. Respondents contend that they are irreparably injured each time they are denied news coverage; applicant suggests that in the District Court hearing "there was uncontradicted evidence that jail operations come to a virtual standstill in the presence of a media tour." Respondents' intimation that the interim denial of their access to the prison, in violation of their asserted First and Fourteenth Amendment rights, will inexorably injure them in a way that applicant cannot be injured by the injunctive restraint—which he asserts is based on a misapprehension of the Constitution—is one with which I cannot agree. There are equities on both sides of the case.

I would be more hesitant to disturb the District Court's preliminary injunction if it were evident that the injunction were actually "preliminary" to substantial further proceedings which might substantially modify that injunction. But the injunction was issued some 15 months ago, after a full evidentiary hearing, and none of the parties suggests that there are any new factual or legal issues which would cause the District Court to modify it. The injunction has in fact been stayed virtually since its issuance, and I conclude that, in light of the present posture of the case and given the sub-

stantial chance that the petition for certiorari will be granted, the preservation of that status quo is an important factor favoring a stay. This is preferable to forcing the applicant to develop new procedures which might be required only for a short period of time. See *Edelman* v. *Jordan*, 414 U.S. 1301, 1303 (1973) (REHNQUIST, J., in chambers).

The preliminary injunction issued by the District Court in this case on November 20, 1975, should therefore be and hereby is stayed pending the filing of a timely petition for certiorari by applicant, and the disposition of the petition and the case by this Court.

[Publisher's note: See 429 U.S. 1347 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–600

Ray Marshall, Secretary of Labor, Applicant, *v.* Barlow's, Inc.	))))	On Application for Stay.

[February 3, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

The Solicitor General on behalf of the Secretary of Labor, applies for a partial stay of an injunction issued by a three-judge District Court in the District of Idaho. That court held that § 8(a) of the Occupational Health and Safety Act, 29 U.S.C. § 657(a), allowing warrantless entry and inspection of work places for OSHA violations, is in conflict with the Fourth Amendment of the United States Constitution, and enjoined further searches by the Secretary's representative pursuant to that section. The Government does not seek a stay of the order insofar as it protects the respondent from future searches, but only as it protects persons not party to this suit. On January 25, 1977, I granted a stay of the order to the extent that the order restrains the applicant's conduct outside of the District of Idaho.

Upon consideration of the response subsequently filed, I now grant in full the Government's request for a stay of the three-judge court order as it affects persons other than the respondent. On the merits of the Fourth Amendment question, the District Court relied on our decisions in *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *Seattle*, 387 U.S. 541 (1967). The Government relies on our decisions in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) and *United States* v. *Biswell*, 406 U.S. 311 (1972) to urge a contrary result. The proposed stay will not affect the

respondent in any way, and there are no equities weighing against it which may be asserted by persons actually before the Court. In such a situation, where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court.

The Government's application for a stay is accordingly granted pending the timely filing of a notice of appeal and jurisdictional statement, and the disposition of the same by this Court.

[Publisher's note: See 434 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–46

Joseph A. Califano, etc.	)	
v.	)	On Application for Stay.
Cora McRae et al.	)	

[July 20, 1977]

[Publisher's note: The "etc." above appears to be shorthand for "Secretary of Health, Education, and Welfare".]

MR. JUSTICE MARSHALL, Circuit Justice.

Section 209 of Public Law 94-439 prohibits the Secretary of Health, Education, and Welfare from expending federal Medicaid funds for abortions. In the instant case, the United States District Court for the Eastern District of New York enjoined operation of the law. On June 29, 1977, this Court entered the following order:

> The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of New York for further consideration in light of *Maher* v. *Roe*, 432 U.S. — (1977) and *Beal* v. *Doe*, 432 U.S. — (1977).

This is an application for "a stay of execution of this Court's vacatur of the district court's injunction of Section 209 of Public Law 94-439 (the 'Hyde Amendment') and/or, in the alternative for a stay as follows:

"1. A stay, pending conclusion of the district court's reconsideration of this case in light of *Maher* v. *Roe*, 432 U.S. — (1977) and *Beal* v. *Doe*, 432 U.S. — (1977), as ordered by this Court on June 29, 1977 in this case. A stay is necessary to prevent irreparable harm during the remand proceedings in the district court and to assure full and effective presentation to and consideration by the district court of the issues left open by this Court's remand order; and/or in the alternative,

"2. A stay, pending the timely filing and disposition in this Court of a petition for rehearing pursuant to Rule 59(2) of this Court."

It is obvious that in essence applicants seek to have this Court reconsider its order vacating the District Court's judgment, and seek an injunction to protect them during the consideration of a Petition for Rehearing. It is also clear that the controlling legal precedents bearing on whether to grant rehearing are *Maher* v. *Roe*, 432 U.S. — (1977) and *Beal* v. *Doe*, 432 U.S. — (1977). I dissented in both of those cases. Rule 58 governing rehearings provides: "A petition for rehearing . . . will not be granted, *except at the instance of a justice who concurred in the judgment or decision* and with the concurrence of a majority of the court." (Emphasis added.) For that reason I have decided to abstain on this application and suggest that the application be made to one of the Justices "who concurred in the judgment or decision" in *Maher* and *Beal*.

[Publisher's note: See 434 U.S. 1303 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–91

Kenneth Eugene Divans,	)	
v.	)	On Application for Stay.
State of California.	)	

[July 28, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant has requested that I stay the commencement of his second trial in the superior court of Santa Clara County, Cal., pending the filing and disposition of a petition for certiorari here. His first trial aborted as a result of the trial judge's declaration of a mistrial upon application's [Publisher's note: "application's" should be "applicant's".] motion. I have determined the application should be denied.

Any order granting a mistrial at the behest of a defendant in a criminal case is typically based upon error or misconduct on the part of other counsel or the court. In order to elevate such a typical order into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial.

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith' conduct by judge or prosecutor, *United States* v. *Jorn*, *supra*, at 485, threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. *Downum* v. *United States*, 372 U.S., at 736." *United States* v. *Dinitz*, 424 U.S. 600, 611 (1976).

The finding of the superior court that the prosecutorial error which resulted in the original mistrial in this case was of the former and not the latter kind convinces me that this Court would not grant certiorari to review the applicant's double jeopardy claim.

[Publisher's note: See 434 U.S. 1305 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–81

Pacific Union Conference of Seventh-Day Adventists, et al., Petitioners,	)	
v.	)	On Application for Stay.
F. Ray Marshall, Secretary of Labor, et al.	)	

[August 2, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants are conferences and other institutional bodies of the Seventh Day Adventist Church which operates some 150 religious schools and colleges in California. They request that I stay enforcement of three discovery orders entered by the District Court for the Central District of California pending their filing of a petition for certiorari in this Court. The Court of Appeals for the Ninth Circuit refused to grant relief by way of mandamus against the District Court's discovery orders and the District Court's order denying applicants' motion for summary judgment. The action in which these orders were entered was brought by respondent Secretary of Labor against applicants to enforce the 1972 Amendments to the equal pay provision of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. The District Court, in denying applicants' motion for summary judgment, noted that the Secretary was seeking to apply these provisions only to the lay employees of the applicant and not to their clergy.

Applicants contend that the principle of separation between church and state embodied in the First Amendment to the United States Constitution forbids Congress from applying to them this statute which requires in substance that men and women be paid equally for the same work, because such ap-

plication would be contrary to their religious principles. They claim that even the presence on church school premises of representatives of the Secretary, pursuant to the District Court's authorization of discovery, for the purpose of examining payroll records in aid of the prosecution of this lawsuit is an "intrusion" forbidden by that Amendment.

While I am not prepared to say that four Members of this Court would not vote to grant certiorari to consider such a claim if it were squarely presented by a final order or decision of the District Court affirmed by the Court of Appeals, see *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963), I do not think certiorari would be granted to review the order of the Court of Appeals denying mandamus at this stage of the case. I have therefore decided to deny the application for a stay without attempting to inquire further as to what irreparable injury would be suffered by applicants in the event of such denial.

The order denying summary judgment which the applicants seek to have reviewed here, although they do not request that it be "stayed," is not even appealable to the Court of Appeals under 28 U.S.C. § 1291, to say nothing of being directly appealable to this Court. Because it is not a "final order or decision" within the meaning of that section, it is reviewable only pursuant to the provisions for interlocutory appeal set forth in 28 U.S.C. § 1292(b). These provisions require as a first step in that procedure that the District Court certify the question as appropriate for interlocutory appeal. The District Court, however, in this case declined to make such a certification.

In their petition to the Court of Appeals, applicants requested that Court "to require respondent Court to dismiss said action or to enter summary judgment for defendants therein." So far as I am aware, such relief is not available, pursuant to statute or otherwise, in the Court of Appeals. Since the Court of Appeals issued no opinion in this matter, it could have construed the petition as a request to order the District Court to certify the question for interlocutory review.

It would necessarily be this order of the Court of Appeals denying the requested relief which would be presented for review of applicants' petition for certiorari to that court.

Before any First Amendment claim would be reached upon such review, it would be necesary [Publisher's note: "necesary" should be "necessary".] for this Court to decide that the Court of Appeals had authority by a writ of mandamus to require the District Court to certify a question for interlocutory appeal, and that it abused its discretion in refusing to do so in this case. While there have been differing views expressed by the Court of Appeals as to the availability of mandamus to require certification under § 1292(b), the order of the Court of Appeals for the Ninth Circuit in this case does not seem to me to present the question in a way which would warrant review by this Court. The Court of Appeals did not indicate whether the writ was refused because of lack of authority, or by reason of that court's exercise of its discretion even though the authority was thought to exist. Shrouded as it is in these vagaries of certification procedure pursuant to 28 U.S.C. § 1292(b) [Publisher's note: There should be a comma here.] the First Amendment claim would not be squarely presented in any petition for certiorari at this time.

Applicants' request for a stay of the discovery orders pending review here of the Court of Appeals' refusal to interfere with them by mandamus stands on a somewhat different footing than the request to review the District Court's denial of summary judgment. While discovery orders are not themselves appealable, in extraordinary circumstances interlocutory review of them may be had by way of mandamus. *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964); *Kerr* v. *United States District Court*, 426 U.S. 394 (1976). In *Schlagenhauf*, however, where this Court reversed a denial of mandamus by the Court of Appeals, it was careful to point out that the case was the first opportunity it had been afforded to construe the provisions of the Fed. Rules Civ. Proc. 35(a).

In the present case applicants sought mandamus in the Court of Appeals for the Ninth Circuit to review at least the

first of the discovery orders which they request that I stay.[*] The Court of Appeals declined to issue the writ. Unlike the situation in *Schlagenhauf, supra*, the Court of Appeals for the Ninth Circuit was not presented with any novel interpretation or first impression question concerning the discovery rules themselves; there seems to be no question that if respondent is correct as to the underlying merits of the dispute over the applicability of the equal pay provisions, the discovery ordered by the District Court was entirely orthodox. Applicants' objection to the discovery orders is therefore impossible to separate from their underlying claim that they should not have been required to defend against the Secretary's action beyond the summary judgment stage. The discovery orders do require a degree of physical intrusion into applicants' records, but so long as that intrusion is within the normal bounds of discovery, I do not think this Court would grant certiorari to review the Court of Appeals' refusal of relief from that discovery by way of mandamus.

While *Schlagenhauf, supra*, opened the door a crack to permit review of a discovery order under the special circumstances of that case, to grant such review here would permit an application for review of a discovery order to serve in effect as a vehicle for interlocutory review of the underlying merits of the lawsuit. The policy against piecemeal interlocutory review other than as provided for by statutorily authorized appeals is a strong one, see *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1975). I think that this Court would be disposed to review applicants' constitutional claims, if at

[*] After the writ had been denied by the Court of Appeals, the District Court on July 18 issued a discovery order amounting to a reinstatement of its original order of June 6. The Solicitor General contends that the last order, issued July 20, involves a substantially different phase of the litigation and is not properly before this Court, not having been considered by the Court of Appeals. In view of my conclusion that a stay is inappropriate under the circumstances disclosed by this petition, if the Solicitor General's argument is factually correct it amounts to an additional reason for denying the stay.

all, only after a full record is compiled in the course of the present litigation in the District Court followed by statutory appeal to the Court of Appeals.

The application to stay the orders of the District Court entered on June 6, July 18, and July 20, respectively, are accordingly

Denied.

[Publisher's note: See 434 U.S. 1310 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–99 (76–1718)

Abraham Beame et al., Applicants,	)	
v.	)	On Application for Stay.
Friends of the Earth et al.	)	

[August 5, 1977]

MR. JUSTICE MARSHALL, Circuit Justice.

Applicants, the City of New York (the City) and several of its officials, seek a stay of enforcement of a judgment of the United States Court of Appeals for the Second Circuit pending determination by this Court of their petition for certiorari. In its judgment, entered January 18, 1977, the Court of Appeals directed the District Court to take steps to ensure that the Transportation Control Plan for the Metropolitan New York Area (the Plan) "will be promptly implemented." *Friends of the Earth* v. *Carey*, 552 F.2d 25, 39 (CA2 1977). Pursuant to this judgment, the District Court in February ordered applicants to begin implementation of four pollution control strategies, involving reductions in business district parking, taxicab cruising, and daytime freight movements, and the imposition of tolls on certain bridges into Manhattan. Applicants moved for a stay of this directive in the District Court and the Court of Appeals; both motions were denied. Applicants then sought a stay from me, and oral argument was heard in chambers. For the reasons that follow, I must deny the application for a stay.

I

This case is the most recent skirmish in a long legal battle. In April 1973, the State of New York (the State) submitted to the Administrator of the United States Environmental Protection Agency (EPA) the Plan here at issue, pursuant to

§ 110(a)(1) of the Clean Air Act of 1970 (the Act), 42 U.S.C. § 1857c-5(a)(1). The Administrator approved the Plan, and his approval was then challenged in court. The Second Circuit upheld the validity of the Plan in all material respects in *Friends of the Earth* v. *U.S. EPA*, 499 F.2d 1118 (CA2 1974) (*Friends I*).

Soon after the *Friends I* decision, respondents filed the instant action, a citizen suit brought pursuant to § 304 of the Act, 42 U.S.C. § 1857h-2. They sought to compel applicants to implement the four pollution control strategies referred to above. The District Court denied this request for enforcement of the Plan, and the Court of Appeals reversed. *Friends of the Earth* v. *Carey*, 535 F.2d 165 (CA2 1976) (*Friends II*). The District Court then entered partial summary judgment for respondents in April 1976, but in July it significantly modified its judgment, ruling that the City did not have to enforce the Plan against any polluter other than itself. This holding was purportedly based on the Tenth Amendment as interpreted by this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and by lower courts in the cases consolidated in *EPA* v. *Brown*, — U.S. — (1977) (*per curiam*).

In January 1977, the Court of Appeals again reversed, *Friends of the Earth* v. *Carey*, 552 F.2d 25 (CA2 1977) (*Friends III*), giving two alternative rationales for its holding that the April 1976 partial summary judgment should be reinstated. First, the Court reasoned that applicants were precluded by § 307(b)(2) of the Act, 42 U.S.C. § 1857h-5(b)(2), from making their constitutional attack on the Plan as a defense to a civil enforcement proceeding. Such an attack could only have been made, the Court stated, in a petition for review of the EPA Administrator's approval of the Plan in 1973—a time when the City was supporting the Plan. Second, even assuming no statutory preclusion, the Court held that the District Court's Tenth Amendment analysis was in error, because the State here promulgated its own Plan, which thus represented its own policy choices. In the cases involved in *EPA* v. *Brown*, *supra*, by contrast, the EPA had promul-

gated plans for the States, pursuant to its mandate to do so whenever a State fails to submit a plan or submits an inadequate plan, see § 110(c)(l) of the Act, 42 U.S.C. § 1857c-5(c)(1). The Court of Appeals concluded that the federal intrusion into state affairs is much more limited in a case in which the Federal Government sets only goals and the State decides for itself how to reach them. Applicants' certiorari petition seeks review in this Court of both grounds for the Court of Appeals' holding.

II

In deciding whether to grant a stay pending disposition of a petition for certiorari, the Members of this Court use two principal criteria. First, "a Circuit Justice should 'balance the equities' . . . and determine on which side the risk of irreparable injury weighs most heavily." *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-1309 (1973) (MARSHALL, J., Circuit Justice). Second, assuming a balance of equities in favor of the applicant, the Circuit Justice must also determine whether "it is likely that four Members of this Court would vote to grant a writ of certiorari." *Id.*, at 1310. The burden of persuasion as to both of these issues rests on the applicant, and his burden is particularly heavy when, as here, a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals. See *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163-164 (1923); *Board of Education* v. *Taylor*, 82 S. Ct. 10, 10-11 (1961) (BRENNAN, J., Circuit Justice); cf. *Holtzman* v. *Schlesinger*, *supra*, 414 U.S., at 1314-1315 ("great weight" given to decision by Court of Appeals to grant stay).

Applicants have not met their burden of showing a balance of hardships in their favor. Were the injury to the City from implementation of the Plan as severe as applicants now claim, one would think that they would have filed their petition for certiorari with dispatch, so that this matter could have been resolved by the entire Court prior to the June 29, 1977, adjournment of the 1976 Term. Instead, applicants waited the maximum time, 90 days, after the Court of Appeals denied rehearing and rehearing en banc before filing their petition on

June 2, 1977. In the interim, they did not seek any stay of the Court of Appeals' judgment and the ensuing District Court order; they first sought such a stay in the District Court a full 20 days after filing their certiorari petition. The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm.

The allegations themselves are not compelling. The affidavits of City and Chamber of Commerce officials are offered to indicate some adverse economic impact on the City from implementation of the entire Plan. The Plan, however, is to be phased in over several months, and the affidavits and accompanying submissions contain little, if any, specific information as to the harm to be expected over the two months remaining until the entire Court can act on applicants' petition.

Respondents contend, moreover, that there will be some economic benefits from implementation of the Plan (*e.g.*, faster delivery times for trucks that currently have to maneuver around illegally parked cars, enhanced attractiveness of the City to businesses and tourists who currently avoid it because of its traffic, air pollution, and noise). Thus the economic impact factor does not weigh entirely in applicants' favor. In addition, any adverse economic effect of the Plan's partial implementation over the next two months is balanced to some considerable extent by the irreparable injury that air pollution may cause during that period, particularly for those with respiratory ailments. See *Friends II*, *supra*, 535 F.2d, at 179-180 (noting that Congress made decision to put "the lungs and health of the community's citizens" ahead of some "inconvenience and expense to . . . governmental and private parties" and that the City's carbon monoxide levels are "over five times the federal health standards"). Finally, if specific aspects of the Plan prove to be onerous or unworkable, applicants are free at any time to seek an accommodation with EPA and a modification of the District Court's order.

III

I have therefore concluded that the "balance of equities" does not weigh in applicants' favor. Even if it did, however, I am not persuaded that four Justices of this Court would vote to grant a writ of certiorari in this matter. The Court of Appeals gave alternative rationales for its result, and its opinion as to each appears facially correct. Applicants are thus not "likely to prevail on the merits," *Holtzman* v. *Schlesinger*, *supra*, 414 U.S., at 311; see *Times-Picayune Publishing Corp*. v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (POWELL, J., Circuit Justice) (requiring "significant possibility of reversal" in order to grant stay).

Judicial consideration of applicants' constitutional claim appears precluded at this point by the language of § 307(b)(2) of the Act, 42 U.S.C. § 1857h-5(b)(2). While this Court has granted certiorari in *Adamo Wrecking Co*. v. *United States*, No. 76-911, in part to consider the validity of § 307(b)(2)'s preclusion of defenses in a criminal context, applicants do not argue that any analogous considerations would make § 307(b)(2) invalid as applied in this civil case. Applicants' Tenth Amendment contentions are based on alleged similarities between this case and *EPA* v. *Brown*, *supra*, but the fact that New York promulgated its own plan makes this case significantly different from *Brown* and, in my view, renders insubstantial the Tenth Amendment issue here.

Finding neither a balance of irreparable harm in favor of applicants nor a likelihood that four Justices will vote to grant a writ of certiorari, I am compelled to deny the application for a stay.

[Publisher's note: See 434 U.S. 1316 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–86 (77-96)

Commodity Futures Trading Commission et al., Applicants, *v.* British American Commodity Options Corp. et al.	)))))	On Application to Vacate Stays.

[August 8, 1977]

MR. JUSTICE MARSHALL, Circuit Justice.

The Solicitor General, on behalf of the Commodity Futures Trading Commission and its members, has applied to me as Circuit Justice to vacate stays of mandate entered by the United States Court of Appeals for the Second Circuit pending applications for certiorari by the respondents herein. The stays have the consequence, for their limited duration, of preventing a Commission regulation that has yet to be enforced, Rule 32.6, 41 Fed. Reg. 51815-51816 (1976), from going into effect. The regulation, promulgated under the Commodity Futures Trading Commission Act of 1974 (CFTA), 7 U.S.C. §§ 1-22 (Supp. V, 1975), would require commodity options dealers to segregate in special bank accounts 90% of the payments made by each of their customers until such time as the customer's rights under his options are exercised or expire. Having examined the written submissions of the Solicitor General and the responses thereto, I have concluded that this case does not present the exceptional circumstances required to justify vacation of the stays.

I

Prior to the enactment of CFTA, trading in options on certain agricultural commodities was prohibited under the Commodity Exchange Act, 7 U.S.C. § 6c (1970), but options transactions in other commodities were wholly unregulated.

Unsound and fraudulent business practices developed with respect to the unregulated options, and at least one major dealer went bankrupt, causing substantial losses to investors. In order to prevent such abuses in the future, CFTA created the Commission as an independent regulatory body and gave it the power to prohibit or regulate options transactions in the previously unregulated commodities. See 7 U.S.C. § 6c(a) (Supp. V, 1975).

Pursuant to this authority, the Commission immediately adopted an antifraud rule, and on November 24, 1976, after informal rulemaking proceedings, the Commission promulgated a comprehensive set of regulations that included the segregation requirement at issue in this application. The latter set of regulations also included provisions requiring options dealers (1) to be registered with the Commission; (2) to maintain certain minimum amounts of working capital; and (3) to provide customers with disclosure statements setting forth information about commissions and fees and explaining the circumstances under which the customer would be able to make a profit. The segregation requirement was to go into effect on December 27, 1976; the other regulations were to take effect variously on December 9, 1976, and January 17, 1977.

Respondents, the National Association of Commodity Options Dealers (NASCOD) and a number of its members, brought suit in the United States District Court for the Southern District of New York, seeking pre-enforcement review of the November 24 regulations. The Commission defended the segregation requirement as a reasonable means of protecting investors in the event that a dealer holding options on their behalf becomes insolvent or otherwise unable to execute the options; presumably, the investors could at least recoup most of their initial outlays from the segregated fund. But respondents argued that the rule would drive them out of business;[*] was unnecessary in light of other existing

[*] Respondents deal in "London options," which are options on futures contracts traded on various exchanges in London, England. American

safeguards; and might not even be effective in facilitating return of customers' investments should a dealer go bankrupt.

The District Court concluded that the segregation rule threatened respondents with irreparable harm and that respondents had a reasonable likelihood of success in having it overturned as arbitrary and capricious. Accordingly, on December 21, 1976, six days before the rule was to go into effect, the District Court preliminarily enjoined its enforcement. At the same time it granted summary judgment in favor of the Commission as to the remainder of respondents' claims, and the other regulations went into effect as scheduled.

On cross-appeals, the Court of Appeals reversed the order insofar as it granted a preliminary injunction, holding "that the Commission's decision to impose a segregation requirement was a reasonable exercise of its discretion in an effort to protect the public," and affirmed the District Court in all other respects. *British American Commodity Options Corp.* v. *Bagley*, 552 F.2d 482, 490-491 (CA2 1977). This decision was announced on April 4, 1977, and rehearing was denied on June 6, 1977. Respondents then moved the Court of Appeals, under 28 U.S.C. § 2101(f) and Fed. Rule App. Proc. 41(b), to stay its mandate pending applications to this Court for certiorari. On June 14, 1977, the members of the panel that had decided the case granted stays to respondents NASCOD, British American Commodity Options Corp. (British American), and Lloyd, Carr & Co. (Lloyd, Carr), conditional in the

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customers make cash payments to individual respondents, in amounts equal to the sum of the "premium" (the price charged for the option in London) and the respondent's commission and fees. The respondent then forwards the premium to a "clearing member" of the London exchange, who purchases the option for the account of the respondent. When the customer wishes to exercise the option, he informs the respondent dealer, who in turn informs the clearing member in London.

The customers' cash payments can be segregated or used to pay the premiums in London, but not both. Since respondents apparently cannot supply the additional cash from internal sources, they would have to borrow. They claim that they would be unable to obtain such loans and would consequently be forced out of business.

cases of British American and Lloyd, Carr on the postingf [Publisher's note: "postingf" should be "posting".] of bonds in the amounts suggested in their motion—$250,000 for British American and $100,000 for Lloyd, Carr. On June 15, the Commission moved the Court of Appeals to reconsider the amounts of the bonds set in the June 14 order, but this motion was denied by the panel on June 24. On July 8 the panel granted stays of mandate to four additional NASCOD members, again conditional on posting of security, and this time the court ordered amounts greater than had been suggested with respect to three of the four firms. The instant application to vacate the stays entered on June 14 and July 8 was filed on July 25.

II

There is no question as to the power of a Circuit Justice to dissolve a stay entered by a Court of Appeals. See, *e.g.*, *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (MARSHALL, J., in chambers); *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308 (1973) (MARSHALL, J., in chambers); *Meredith* v. *Fair*, 83 S. Ct. 10 (1962) (Black, J., in chambers). "But at the same time the cases make clear that this power should be exercised with the greatest of caution and should be reserved for exceptional circumstances." *Holtzman* v. *Schlesinger*, *supra*. Since the Court of Appeals was quite familiar with this case, having rendered a thorough decision on the merits, its determination that stays were warranted is deserving of great weight, and should be overturned only if the court can be said to have abused its discretion. See, *e.g.*, *id*., at 1305; *Magnum Import Co*. v. *Coty*, 262 U.S. 159, 163-164 (1923).

It is well-established that the principal factors to be considered in evaluating the propriety of a stay pending application for certiorari and, correspondingly, whether to vacate such a stay granted by a Court of Appeals, are the "balance of equities" between the opposing parties, and the probability that this Court will grant certiorari. See, *e.g.*, *Beame* v. *Friends of the Earth*, — U.S. — (1977) (MARSHALL, J., in chambers); *Holtzman* v. *Schlesinger*, *supra*, at 1308-1311;

Meredith v. *Fair*, *supra*. The relative weights of these factors will of course vary according to the facts and circumstances of each case.

As to the equities here, it is important to note that the stays entered by the Court of Appeals merely preserve the regulatory status quo pending final action by this Court. Options dealers were never in the past required to segregate customer payments, and the rule in question here has yet to be enforced. If and when the regulation does go into effect, respondents may well be driven out of business, and on this basis the District Court expressly found that respondents are threatened with irreparable harm.

Arrayed against this irreparable harm to respondents is the contention of the Solicitor General that the segregation requirement must be placed into effect immediately, in order to protect customers from loss in the event that respondents become insolvent or unable to execute their customers' options during the time before this Court disposes of the case. The Solicitor General argues, quite correctly of course, that the Commission enacted the regulation because it felt the public needed the protection, and the Court of Appeals upheld the Commission's judgment as reasonable.

But the same panel which sustained the regulation also deemed it appropriate to enter stays of mandate. Undoubtedly, the court recognized that during the time in which the case is pending before this Court customers will be guarded at least to some degree by the other Commission regulations, which were not enjoined and have already gone into effect. More importantly, the court secured interim protection for investors by ordering bonds to be posted by respondents. Although the Solicitor General now complains that the bonds are not large enough to guarantee adequate insurance against loss, and that nothing short of the amounts that would have to be segregated under the terms of the regulation will suffice, these same arguments were made to, and rejected by, the Court of Appeals when it granted the stays and when it denied the Commission's motion to reconsider the amount of bond

which had been set for respondents British American and Lloyd, Carr. No significant change in circumstances is offered to justify re-evaluation of the Court of Appeals' determination that the posted sums are adequate. See *Jerome* v. *McCarter*, 21 Wall. 17, 28-31 (1874). With the case in this posture, the risk of harm from putting off enforcement of the regulation for a few more months certainly appears to be outwieghed [Publisher's note: "outwieghed" should be "outweighed".] by the potential injury to respondents from allowing the regulation to go into effect.

If I were certain that this Court would not grant certiorari, the fact that the balance of equities clearly favors respondents would not be a sufficient justification for leaving the stays in force. But, without in any way expressing my own view as to the merits, it is not entirely inconceivable to me that four Justices of this Court will deem respondents' attack on the segregation requirement worthy of review. Although the question of whether that requirement is arbitrary and capricious is rather fact-intensive, and is thus the type of matter that is normally appropriate for final resolution by the lower courts, see *New York* v. *Kleppe*, *supra*, at 1311, it does appear that the regulation would fundamentally alter the ground rules for doing business in a substantial industry, with potentially fatal consequences for a number of the firms currently in the trade, and this case presents the first opportunity for this Court to pass on action taken by the recently created Commission.

In these circumstances, I cannot say that the Court of Appeals abused its discretion by staying its mandate. The application to vacate the stays must accordingly be denied.

It is so ordered.

[Publisher's note: See 434 U.S. 1323 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–108 (76–6720)

Willie Lee Richmond, Applicant,	)	On Application to Suspend
v.	)	Effect of Order Denying
State of Arizona.	)	Certiorari.

[August 8, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Willie Lee Richmond requests either a suspension of our order denying certiorari in *Richmond* v. *Arizona*, — U.S. — (1977), or a stay of execution pending action on his petition for rehearing. The Supreme Court of Arizona has fixed September 14, 1977, as the date of execution of applicant and has denied his application for a stay. Because the petition for rehearing seems to me to demonstrate nothing that would indicate any reasonable likelihood of this Court's reversing its previous decision and granting certiorari, I have decided to deny the application.

On appeal of his conviction and death sentence to the Arizona Supreme Court, applicant argued that the Arizona capital punishment statute was unconstitutionally ambiguous in not specifically limiting mitigating circumstances to the four factors enumerated in Section F of that statute. After the Arizona Supreme Court ruled that only the enumerated factors could be taken into account, applicant moved for a rehearing on the ground that the statute as so limited failed to allow consideration of the character of the defendant in determining whether the death penalty should be imposed. While the statute includes in its list of mitigating circumstances significant impairment of a defendant's capacity to tell right from wrong or to conform to the law, it fails to take into account other factors such as age, lack of prior criminal history, and intellectual level. Rehearing was denied.

Applicant renewed his constitutional attack against the Arizona death penalty statute in his petition for certiorari before this Court, again on the ground that it failed to allow consideration of the character and record of the individual offender. While specifically noting that the statute does not allow consideration of the defendant's age or prior criminal history, the applicant did not suggest that such factors were relevant in his case. Certiorari was denied by this Court on June 27, 1977, with JUSTICES BRENNAN and MARSHALL dissenting.

Applicant in his petition for rehearing here continues his attack on Arizona's failure to adopt a more expansive list of mitigating circumstances. Applicant argues that our grant of certiorari in *Bell* v. *Ohio*, No. 76-6513, is an intervening circumstance that demands as a matter of "justice and judicial economy" that we also grant certiorari in his case. Certiorari was granted in *Bell* v. *Ohio*, however, on the same day in which we denied certiorari in *Richmond*. Applicant's assertion attributes a degree of irrationality to the Court in simultaneously granting Bell's petition and denying his in which I cannot join. In my opinion, the cases are quite different. The Ohio and Arizona death penalty statutes are similar in that their lists of mitigating circumstances do not include such factors as age and lack of prior criminal convictions, which are included in the Florida statute approved in *Proffitt* v. *Florida*, 428 U.S. 242 (1976). Applicant, unlike Bell, however, does not allege that he would be aided by an expansion of the statutory list of mitigating circumstances. The petition in *Bell* pointed out that the defendant was 16 at the time of the penalty trial, had a low IQ, was considered emotionally immature and abnormal, had cooperated with the police, and had no significant history of prior criminal activity. What evidence is alluded to in the applicant's papers does not suggest that any of the factors that applicant contends must be considered in imposing capital punishment would be relevant to his case. There is no indication in any of the applicant's papers as to his age at either the time of the offense or trial.

It is doubtful, particularly after our grant of certiorari in *Bell*, that applicant would have failed to include this fact in his petition for rehearing if he had been a minor at these times. The record also indicates that applicant had previously been convicted of kidnapping a victim at knifepoint. The only mitigating ground apparently suggested by applicant before the Arizona courts was psychological testimony characterizing applicant as a sociopath.

Applicant raises a second argument in his petition for rehearing that was not raised either before the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in *Proffitt*.

In summary, I conclude that there is no reasonable likelihood that applicant's petition for rehearing would be granted by the full court. I am fortified in this view by consultation with my colleagues. Applicant's argument as to mitigating factors was before us in his initial petition for certiorari. He does not suggest any new reason why our initial decision to deny certiorari was wrong. Applicant's jury contention appears to have been rejected in *Proffitt*. A motion for rehearing of an order denying certiorari does not automatically suspend the order during the term, unlike a petition for rehearing after full consideration of the case on the merits. The petitioner must apply to an individual justice for a suspension of the order denying certiorari. Cf. Supreme Court Rules 25(2) and 59(2). The question under such circumstances must be whether there is any reasonable likelihood of the Court changing its position and granting certiorari. As elaborated above, there does not seem to me to be any such likelihood here. The application for a suspension of our order denying certiorari or, in the alternative, a stay of execution is therefore denied.

[Publisher's note: See 434 U.S. 1327 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–162

National Socialist Party of America et al., Applicant,	)	On Application for Stay.
v.	)	
Village of Skokie.	)	

[Publisher's note: "Applicant" above should be "Applicants".]

[August 26, 1977]

MR. JUSTICE STEVENS, Circuit Justice.

Following the entry of this Court's order of June 14, 1977, the Illinois Appellate Court reviewed and substantially modified the injunction entered against applicants by the Circuit Court of Cook County, upholding only that portion of the injunction that prevented applicants from displaying the swastika "in the course of a demonstration, march or parade." Thereafter, the Illinois Supreme Court scheduled an expedited review of the Appellate Court's decision, but it denied an application for a stay of the injunction pending that review. On August 18, 1977, a similar application was submitted to me, as Circuit Justice. I requested a response from the village of Skokie and have now decided to deny the application.

Applicants have not demonstrated that a stay is necessary to protect this Court's appellate jurisdiction. There appears to be no danger that the controversy will become moot while the appeal is pending in the Illinois Supreme Court. Nor have applicants demonstrated that the Illinois courts have failed to comply with the "immediate appellate review" requirement of this Court's order of June 14, 1977. After the entry of that order, both the Illinois Appellate Court and the Illinois Supreme Court expedited their consideration of the case, and I am confident that the Illinois Supreme Court will make its decision without any unnecessary delay. Even "immediate" appellate review of an important and difficult issue necessitates

appropriate deliberation. Considering these facts, the fact that the injunction has been substantially modified, and the fact that the entry of the stay would be tantamount to a decision on the merits in favor of the applicants, it seems clear that a stay should not be granted.

The application submitted to me as Circuit Justice is denied.

[Publisher's note: See 434 U.S. 1329 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–149

Wes Wise et al., Applicants,	)	
v.	)	On Application for Stay.
Albert L. Lipscomb et al.	)	

[August 30, 1977]

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment and recall of the mandate of the United States Court of Appeals for the Fifth Circuit. That judgment directs the District Court for the Northern District of Texas to require the exclusive use of single-member districts in the election of the Dallas city council. Applicants, the mayor and city council of Dallas, contend that any redistricting pending review by this Court could have the effect of mooting the case and defeating this Court's jurisdiction.

I

Before 1975 the 11 members of the Dallas city council were elected by an exclusively at-large system of voting. Eight places on the ballot were reserved for candidates who resided in one of the city's eight residential districts. Three seats, including the mayor's, were open to candidates regardless of residence. Voting for all 11 seats was citywide. For many years council elections have been nonpartisan, involving slating groups rather than political parties. Electoral success has depended in major part upon support of one such group, the Citizens' Charter Association.

Plaintiffs representing Negro citizens of Dallas challenged this election system in 1971. Certain Mexican-Americans intervened, but were dismissed from the case for failure to respond to interrogatories. In 1975, the District Court concluded that the at-large election system unconstitutionally

diluted the vote of Dallas' Negro citizens. The court rested this conclusion on findings dealing with the geographic concentration of Negroes within the city, the effect of slating groups, and the city's history of *de jure* discrimination.

Instead of formulating its own districting plan, the court afforded the city council an opportunity to enact a valid plan. The council duly adopted an ordinance that provides for election of a council member from each of eight single-member districts, the remaining three to be elected from the city at large. After careful examination of this plan, the District Court approved it. The court observed that single-member districts generally are preferable, but concluded that several facts weighed in favor of the city's new system. First, the court noted that any plan which did not consider the effect on Mexican-American voters might itself be constitutionally suspect. Indeed, detailed consideration of the plan's effect upon those voters, who were more geographically dispersed than Negro citizens, convinced the District Court that their electoral power would be enhanced. Second, the new plan permitted some citywide representation in a body that functioned as a legislature for the entire city. At-large voting in Dallas dated back to 1907, and there was no showing that its use in the new plan would have adverse effects on any minority. The court found a recent marked improvement in the political participation and general posture of minority groups in Dallas.[1]

On appeal, the Court of Appeals reversed. Relying primarily on *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), and apparently drawing no distinction in this respect between court-ordered and legislatively enacted redistricting, the court held that absent unusual circumstances single-member districts are to be preferred. It concluded that no such circumstance existed. The case thereupon was remanded with instructions that the city redistrict itself into

[1] As noted in the opinion of the District Court, the racial composition of the Dallas city council in 1975 was two Negroes, one Mexican-American, and eight whites. 399 F. Supp. 782, 787 n. 5 (ND Tex. 1975).

an appropriate number of single-member districts. A rehearing was denied, and a requested stay of mandate was refused.

II

Applicants level three charges of error at the judgment below. First, they contend that the Court of Appeals improperly ignored the distinctions drawn by this Court between state-enacted and court-ordered reapportionment plans. Applicants further argue that the court erroneously held that the city, in fashioning a remedy to correct unconstitutional dilution of the voting rights of one minority group, cannot consider the remedy's impact on other groups in the absence of an adjudication that the other groups' rights also were impaired unconstitutionally. Applicants' final claim is that the court below erred in failing to consider the city's need for some citywide representation.

This Court has declared repeatedly that the standards for evaluating the use of multimember and at-large voting plans differ depending on whether a federal court or a state legislative body initiated the use. *E.g.*, *Chapman* v. *Meier*, 420 U.S. 1, 18 (1975); see *Connor* v. *Finch*, — U.S. —, 97 S. Ct. 1828, 1833 (1977). When a federal court imposes a reapportionment plan upon a State, single-member districts are preferable in the absence of unusual circumstances. *East Carroll Parish School Bd.*, *supra*, at 639. But "legislative reapportionment is primarily a matter for legislative consideration and determination." *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). When the State accepts this responsibility, its decisions as to the most effective reconciling of traditional policies should not be restricted beyond the commands of the Equal Protection Clause. *Burns* v. *Richardson*, 384 U.S. 73, 85 (1966); cf. *Connor* v. *Finch*, — U.S., at —, 97 S. Ct., at 1833. The Court of Appeals, by holding the Dallas city council to the "unusual circumstances" test of *East Carroll Parish School Bd.*, appears to have confused these two standards.[2] While we have never explicitly held that municipal

[2] The distinction is between a court-*ordered* plan, which may or may not

election plans are entitled to the same respect accorded those of state legislatures, there is reason to believe that they should be. We indicated as much in *Chapman* v. *Meier*, *supra*, at 27:

> "[R]eapportionment is primarily the duty and responsibility of the state through its legislature or other body rather than of a federal court."

(Citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964).) See also *Dusch* v. *Davis*, 387 U.S. 112, 116-117 (1967).

The two additional errors advanced by applicants also may have merit. The view of the court below that a plan's effect on various minority groups can be considered only after an adjudication of unconstitutional impairment as to those groups may be incompatible with the rationale of our recent decision in *United Jewish Orgs.* v. *Carey*, — U.S. —, 97 S. Ct. 996 (1977). See also *Gaffney* v. *Cummings*, 412 U.S. 735, 752-754 (1973).[3] Moreover, no apparent weight was given the express findings of the District Court with respect to the legitimate interest of the city in "having some at-large

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have been proposed by a legislative body, and a court-*approved* plan, which has been initiated and promulgated as law by the legislative body. *East Carroll Parish School Bd.* involved the former, and this Court noted that "in submitting the plan to the District Court, the [police] jury did not purport to reapportion itself in accordance with the 1968 enabling legislation . . . , which permitted police juries and school boards to adopt at-large elections." 424 U.S., at 639 n. 6. Here, by contrast, "[t]he district court approved the City's plan for relief, which was enacted as a city ordinance following the court's decision that the prior system was unconstitutional." 551 F.2d 1043, 1045 (CA5 1977). Thus, a rule of limited deference to local legislative judgments is appropriate in this case, for as we held in *Burns* v. *Richardson*, 384 U.S., at 85, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

[3] The opposition to the new plan of certain Mexican-American voters does not render the District Court's findings in this respect automatically invalid. Those intervenors were never certified as the representatives of any class.

representation on [its] City Council." 399 F. Supp., at 795.[4] I had thought it clear that a federal court reviewing a reapportionment plan should consider and give appropriate weight to any valid state or municipal interest found to be furthered by the plan under consideration. See, *e.g.*, *Reynolds* v. *Sims*, *supra*, at 578-581. Citywide representation appears to be such an interest. Cf. *Dusch*, *supra*; *Forston* v. *Dorsey*, 379 U.S. 433, 438 (1965).

III

The general principles that guide a Circuit Justice with respect to stay applications are well settled. The judgment of the court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that court not to stay its judgment. Moreover, the party seeking a stay bears the burden of advancing persuasive reasons why failure to grant could lead to irreparable harm. In light of the foregoing considerations, the Circuit Justice must make a judgment whether there is a "reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972).

I think there is a reasonable probability that at least four Members of the Court will grant certiorari in this case. The case involves a major city that has adhered to its tradition of at-large elections since 1907.[5] As indicated above, the Court

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[4] After alluding to the evidence and to the concession by the plaintiffs (who had themselves proposed a plan involving the citywide election of the member of council designated as mayor), the District Court found:

"The Court believes and so finds that there is a legitimate governmental interest to be served by having some at-large representation on the Dallas City Council; that this governmental interest is the need for a city-wide view on those matters which concern the city as a whole, e.g., zoning, budgets, and city planning; and that three at-large members do not render the city's plan constitutionally infirm." 399 F. Supp., at 795 (footnote omitted).

[5] The District Court found:

". . . that at-large voting, especially on the municipal level has been an integral part of Texas local governments [since 1907 in Dallas] and that

of Appeals may well have thought that the principles applicable to a state legislative redistricting did not apply with full force to such action by a city council. It also appears likely that established principles of general application in the redistricting cases were not applied correctly. Applicants also claim irreparable injury unless a stay is granted. Although the next regular election is not scheduled until April 1979, if the judgment of the Court of Appeals is not stayed, experience indicates that respondents will press promptly for a special election. In their response to this application, they comment that a stay "would unjustifiably prolong" an appropriate remedy. If the remedy ordered by the Court of Appeals were effectuated, the issues presented here probably would be mooted. In any event, in a situation of this kind the capacity of the incumbent council to function effectively in the public interest may be impaired if the judgment is not stayed.

I will, therefore, enter an order recalling the mandate and staying the judgment of the Court of Appeals pending disposition of the petition for certiorari.

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at large voting schemes have their genesis in reasons other than those racially motivated." 399 F. Supp., at 797.

[Publisher's note: See 434 U.S. 1335 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–260

Arthur Krause et al., Petitioners,	)	Application for Injunction
v.	)	and/or Stay.
James A. Rhodes et al.	)	

[September 16, 1977]

MR. JUSTICE STEWART, Circuit Justice.

This is an application for an injunction and/or a stay of mandate of the United States Court of Appeals for the Sixth Circuit, pending the filing of a petition for certiorari in the Supreme Court of the United States. Its purpose is to secure from me, as Sixth Circuit Justice, an order stopping for the time being the construction of a gymnasium on a site at Kent State University in Ohio. The claim is that only such an order will prevent the obliteration of evidence necessary to a fair retrial of a lawsuit in which the applicants are plaintiffs.

Similar applications are now pending in the United States District Court for the Northern District of Ohio and in the United States Court of Appeals for the Sixth Circuit. Because of the intimate familiarity with the factual environment of this litigation acquired by those courts during the original trial and appeal, they are both now in a position far superior to that of an individual Justice of this Court fairly to assess the merits of the applicants' position.

Accordingly, the application is hereby denied, without prejudice to the right of the applicants to continue to pursue similar relief in the District Court and/or the Court of Appeals, or to petition this Court for certiorari.

It is so ordered.

[Publisher's note: See 434 U.S. 1337 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–247

Roger Barthuli, Applicant,	)	On Application to Stay the
v.	)	Judgment of Supreme Court
Board of Trustees of Jefferson	)	of California.
Elementary School District.	)	

[September 20, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Roger Barthuli seeks a stay of the judgment of the Supreme Court of California in the case of *Barthuli* v. *Board of Trustees*, 19 Cal. 3d 717 (1977), pending his filing of a petition for writ of certiorari to review that judgment. The Supreme Court of California held that the applicant, who had an employment contract with the respondent School District as an associate superintendent of business, was not entitled to notice and a hearing before being discharged from that position. Although I am not entirely confident that four Justices of this Court will not vote to grant applicant's petition for certiorari when filed, my doubt on that score combined with the failure of applicant to demonstrate any irreparable injury have led me to deny the requested stay. I also have serious reservations whether the requested stay is consistent with the Art. III limitations on my powers.

Applicant, after being discharged, filed suit in the California courts seeking a writ of mandate reinstating him to his administrative position. The Supreme Court of California, by a vote of five to one, decided that applicant had no statutory right to continue in his position as associate superintendent of business. It stated that he did have a statutory right to continue as a tenured classroom teacher and that the latter right could be enforced by writ of mandate; applicant, however, has never sought reinstatement as a classroom teacher.

The Supreme Court of California further held that under California law an employee cannot obtain specific performance of an employment contract where he has an adequate remedy at law in an action for damages; the Supreme Court affirmed the finding of the lower court that applicant's damages action was adequate.

The relevant cases of this Court dealing with the due process rights of public employees discharged from their positions are *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); and *Bishop* v. *Wood*, 426 U.S. 341 (1976). Examining the various views expressed in *Arnett*, *supra*, a majority of the Court might conclude that California's refusal to grant specific performance where there is an adequate remedy at law acts as a limitation upon the expectation of the employee in continued employment, which is a necessary condition to a constitutional claim under *Roth*; alternatively, a majority might conclude that the expectancy embraces the performance of the promise contained in the contract. For myself, I would adhere to the former view, and would be inclined to think that this is not one of the "rare" cases in which the "federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing." *Bishop* v. *Wood*, *supra*, 426 U.S. 341, 349 n. 14. But I am not prepared to confidently assert that four of my colleagues might not think otherwise.

Applicant, in order to secure a "stay" of the judgment of the Supreme Court of California, must show not only a reasonable probability that certiorari will be granted in his case but also that irreparable injury will result in the event that a stay is denied. The judgment of the Supreme Court of California simply affirmed a judgment of the Superior Court denying applicant a writ of mandate to compel his reinstatement as an associate superintendent of business in respondent School District. Obviously, a "stay" of the judgment of the Supreme Court of California will accomplish nothing whatever for applicant. He does not seek the extraordinary interim

remedy of a mandatory injunction requiring his reinstatement to the position he previously held; he was dismissed from that position in 1973, his unsuccessful litigation in the state courts of California has apparently consumed the intervening four years, and in his application to me he expressly disavows any desire to "undo or alter" that dismissal.

A "stay" of the judgment of the Supreme Court of California such as applicant seeks would affect no present rights of either applicant or respondent. Given the Art. III limitation of our jurisdiction to "cases and controversies," I therefore have serious reservations whether the limited and abstract stay which applicant seeks is even within my power to grant. "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially" that this Court or members thereof can take judicial action. *Texas* v. *ICC*, 258 U.S. 158, 162 (1922). A stay of the judgment of the Supreme Court of California in these circumstances would amount to nothing more than "a mere declaration in the air." *Giles* v. *Harris*, 189 U.S. 475, 486 (1903). See also *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90 (1947); *Ashwander* v. *TVA*, 297 U.S. 288, 324 (1936).

I accordingly decline to issue the stay.

[Publisher's note: See 434 U.S. 1340 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–222

Otis Bobby Mecom, Applicant,	)	On Application for
v.	)	Reduction of Bail, Pending
United States.	)	Appeal.

[September 20, 1977]

MR. JUSTICE POWELL, Circuit Justice.

This is an application for reduction of bail pending appeal to the Court of Appeals for the Fifth Circuit. Following a jury trial in the District Court for the Southern District of Texas, applicant was convicted of conspiracy to possess marihuana, with intent to distribute it, in violation of 21 U.S.C. § 846. He was sentenced to five years' imprisonment to be followed by a special parole term of five years. Applicant's appeal from that conviction is pending in the Court of Appeals.

Before trial, bail was set at $1,000,000. Upon applicant's motion, this was reduced to $750,000. The District Court provided no statement of reasons for setting bail at so high an amount, despite the requirements of 18 U.S.C. § 3146(d).[1] Bail was continued at the same amount pending appeal, and again no statement of reasons was provided, although one is required by Rule 9(b) of the Federal Rules of Appellate

[1] 18 U.S.C. § 3146(d) provides in pertinent part as follows:

"A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall [Publisher's note: There should be a comma here.] upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed."

See *United States* v. *Briggs*, 476 F.2d 947 (CA5 1973) (defendants entitled to know reasons for imposition of conditions of release).

Procedure.[2] The Court of Appeals denied applicant's motions for reduction of bail. Unable to raise the required amount, he remains incarcerated pending appeal.

Applicant argues that his bail has been set in an excessive and unreasonable amount, citing *Sellers* v. *United States*, 89 S. Ct. 36 (1968) (Black, Circuit Justice). He insists that neither the District Court nor the Court of Appeals made a specific finding that applicant would fail to appear. In particular, he alleges that he has substantial roots in the community, that he had never before been charged with a criminal offense, and that his interests in a local laundromat-grocery store and a shrimp boat business will serve to keep him from fleeing the jurisdiction.

Decisions of the District Court with respect to bail are entitled to the "greatest deference." *Harris* v. *United States*, 404 U.S. 1232, 1232 (1971) (Douglas, Circuit Justice). A Circuit Justice, however, has a responsibility to make an independent determination on the merits of the application. *Ibid*. Because of the District Court's failure to adduce reasons for its decision,[3] it was necessary to obtain from the Government a response to applicant's allegations.[4]

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[2] Rule 9(b) provides as follows:

"(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or judge thereof may order the release of the appellant pending disposition of the motion."

[3] Applicant has raised no objection to the District Court's failure to provide a statement of reasons.

[4] Compliance with the requirements of § 3146(d) and Rule 9(b) not only facilitates review in this Court of bail decisions, but also may serve to focus the attention of the District Court upon the relevant elements of such decisions.

According to the Government response, the evidence at trial indicated the following: Applicant was involved in a large-scale smuggling enterprise, which imported marihuana into Texas from Mexico in loads of 200 to 700 pounds; the marihuana was then distributed to locations as far away as Indiana; applicant's wife, a co-indictee, acted as his "connection" in Mexico and is currently a fugitive there; another associate in the enterprise is also a fugitive; and applicant and his associates were frequently in possession of large amounts of cash. The Government further states that at the bond hearing there was evidence that applicant paid $100,000 for the murder—unsuccessfully attempted—of an associate suspected of cooperating with the authorities.

Under these circumstances, there is certainly no reason to disturb the rulings of the courts below. Accordingly the application for reduction of bail is denied.

[Publisher's note: See 434 U.S. 1343 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–302 (77–5353)

Rufus Junior Mincey, Petitioner,	)	
v.	)	On Application for Stay.
State of Arizona	)	

[October 6, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Petitioner was convicted of murder, assault, and related drug offenses growing out of an incident which occurred at an apartment leased by him in Tucson, Ariz. The Supreme Court of Arizona reversed the murder and assault convictions because of erroneous jury instructions, but affirmed the judgments of conviction on the drug counts. Petitioner now requests a stay of his second trial on the murder and assault counts, presently scheduled to take place on November 4th for the reason that evidence which he claims was obtained in violation of his rights under the United States Constitution will be admitted at that trial. The evidence in question was found by the Supreme Court of Arizona to have been properly admitted in his first trial, but petitioner is seeking review of that determination in a petition for certiorari presently pending before this Court. He asks that the stay of his retrial be effective until his petition for certiorari is finally disposed of here.

The petition for certiorari is less than precise as to how much of the judgment of the Supreme Court of Arizona petitioner wishes this Court to review. I think his constitutional claims with respect to the admission of evidence at his trial can be reviewed here only insofar as they pertain to those convictions affirmed by the Supreme Court of Arizona (the drug counts). Indeed, the application does not seek a stay of the judgments affirming those convictions, but refers only to

the murder and assault counts. Since the judgments of conviction in those counts have been reversed by the Supreme Court of Arizona, they are not final under 28 U.S.C. § 1257. But the constitutional claims which petitioner seeks to assert in his petition for certiorari are, so far as I can tell, common to all counts. I assume for purposes of this motion that reversal by this Court of petitioner's conviction on the drug counts would require reversal of a conviction obtained on the retrial of the murder count if the same evidence were admitted in that proceeding.

I find it unnecessary to engage in the usual speculation as to whether the petition will commend itself to four Justices of this Court, because I think that even if the petition is granted the present application should be denied. The federal constitutional right asserted by petitioner is not one such as is conferred by the Double Jeopardy Clause of the Fifth Amendment, where the protection extends not only to incarceration following trial in violation of the prohibition but to the subjection of the defendant to a second trial at all. Petitioner's constitutional claim is based on constitutional prohibitions against the admission of certain evidence at trial, and will be sufficiently vindicated if he be freed from incarceration as a result of a conviction had in reliance on such evidence. Such a claim must be asserted through normal post-trial avenues of review. Cf. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Stefanelli* v. *Minard*, 342 U.S. 117 (1951).

I therefore conclude that even though this Court were to grant the petition for certiorari to review petitioner's conviction on the drug counts, he would not be entitled to have his presently scheduled trial in the Arizona court stayed pending our determination of the merits of the claims made in the petition. I accordingly deny his motion to stay the trial.

[Publisher's note: See 434 U.S. 1345 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–451

New Motor Vehicle Board of the State of California	)	On Application for Stay.
v.	)	
Orrin W. Fox Co. et al.	)	

[December 6, 1977]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant, the New Motor Vehicle Board of the State of California, has requested me to stay a judgment of the United States District Court for the Central District of California entered on October 19, 1977. That judgment enjoined enforcement of the California Automobile Franchise Act (California Vehicle Code §§ 3060-3069), insofar as that Act's provisions relate to the establishment and relocation of franchised motor vehicle dealerships.

The pertinent provisions of the Act provide that before an automobile manufacturer or its proposed or existing dealer may establish a new dealership or relocate an existing one notice of such intention must be given to the Board [Publisher's note: "Board" and "board" are used interchangeably in this opinion.] and to all existing dealers for the "same line make" (direct competitors) within the "relevant market area." California Vehicle Code § 3062. Upon receiving such a notice any dealer may file within 15 days a protest against the proposed establishment or relocation, and the board is thereupon required to order the postponement of the establishment or relocation of the dealership pending hearing and final decision on the merits of the protest. Failure to comply with the order is a misdemeanor under California law, and can result in the suspension or revocation of the license of a manufacturer or dealer.

Upon receipt of a protest, the board is also required to issue an order fixing a time for the hearing, which is to commence within 60 days following the order.[1] Without further elaborating the statutory proceedings relating to the hearing and ultimate decision of the Board, I am satisfied that the District Court correctly concluded that in the normal course of events manufacturers and dealers wishing to establish or relocate a franchise would be prevented from doing so for a period of several months during which the hearing is conducted and the Board renders its decision.

Respondents, General Motors Corp. and two Southern California retail automobile dealers [Publisher's note: There should be a comma here.] brought this action seeking to enjoin the enforcement of these provisions of the Act. The three-judge District Court granted the relief requested by these respondents, and expressed the view that "the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another" fell within the ambit of liberty interests protected by the Fourteenth Amendment. The court further concluded, citing *Fuentes* v. *Shevin*, 407 U.S. 67, 84-86 (1972), *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, 313 (1950), that under the Due Process Clause this "liberty" could be curtailed only after a hearing. Here, the Court reasoned, since respondents were deprived of their "liberty" to move or establish a dealership for many months pending the Board's decision, enforcement of the statute occasioned a "gross violation of the Due Process Clause of the Fourteenth Amendment."[2]

[1] It is unclear under the statute whether the same communication should contain both the order enjoining the proposed establishment or relocation of the dealership and the order setting the date of the hearing. In the case of one of the respondents in the instant action, the Board set the hearing date six weeks after issuing the injunction. The District Court, however, interpreted the statute to require the injunction and the order setting the hearing date to be promulgated concurrently.

[2] The court also thought this statute permitted action distinguishable from that authorized in *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (statute permitting government to summarily seize banks in serious financial diffi-

Upon consideration of the application and the response, I have decided that the stay should be granted conditioned as hereinafter indicated. Because the case comes to us by appeal and is therefore within our obligatory jurisdiction, I feel reasonably certain that four Members of the Court will vote to note probable jurisdiction and hear the case on the merits, and I am also of the opinion that a majority of the Court will likely reverse the judgment of the District Court. Cf. *Graves* v. *Barnes*, 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in chambers). It should not be necessary to add that neither of these matters can be predicted with anything like mathematical certainty, and the respondent whose judgment is stayed is free to move the full Court to vacate a stay if he feels the Circuit Justice has miscalculated on these points.

I believe the District Court was wrong when it decided that an automobile manufacturer has a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment to locate a dealership wherever it pleases, and was also wrong when it concluded that such a protected liberty interest could be infringed only after the sort of hearing which is required prior to ceasing a constitutionally protected property interest. Our cases in this difficult area do not offer crystal clear guidance, and I venture my own analysis of the problem fully realizing that it is not apt to be the last word authoritatively spoken on the subject.

Meyer v. *Nebraska*, 262 U.S. 390, 399 (1923), did indeed state that the right to liberty guaranteed by the Due Process

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culty), or *Erving* v. *Mytinger & Casselberry*, 339 U.S. 594 (1950) (procedure for summary seizure of misbranded drugs by government). Here there was no provision authorizing a public official to exercise discretion as to whether the public interest required immediate action, but rather the injunction automatically followed a protest by a competitor.

The court also thought the acts authorized under the statute differed from the act of a party obtaining a restraining order pending hearing. A party seeking a restraining order must make a persuasive showing of irreparable harm and likelihood of prevailing on the merits. No such showing was required of the competitor before his protest turned into an injunction under the statute.

Clause included the right "to engage in any of the common occupations of life," and went on to say that such liberty could not be interfered with "under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competence of the state to effect." *Meyer* v. *Nebraska*, *supra*, at 399-400. *Meyer*, I think, was what many would call a "substantive due process" case, where the legislature had flatly prohibited or limited a particular type of action without regard to individualized differences among potential actors. For example, six years after *Meyer* the Court held that the Due Process Clause prohibited States from limiting fees charged by employment agencies. *Ribnik* v. *McBride*, 277 U.S. 350 (1928). This decision was based not on any procedural defect in the statute, because the New Jersey statutory scheme made no provision for individualized determinations as to what fees might be charged; the statute by its terms set the limits, and no fact that could have been proven at a hearing would have been grounds under the statutory scheme for avoiding the limits imposed by the statute. The sort of substantive due process analysis embodied in cases such as *Ribnik*, *supra*, has long since faded from the scene, and that case itself was expressly overruled in *Olsen* v. *Nebraska*, 313 U.S. 236 (1941). While it may well be that there remains a core area of liberty to engage in a gainful occupation that may not be "arbitrarily" denied by the State, I do not think that the claim to establish an automobile dealership whenever and wherever one chooses is within that core area. Prior to the enactment of the Act here in question, respondents were not restrained by state law of this kind from so doing, but the absence of state regulation in the field does not by itself give them a protected "liberty" interest which they may assert in a constitutional attack on newly enacted limitations on their previously unrestricted ability to locate a dealership.

The cases upon which the District Court specifically relied in concluding that the California Act was unconstitutional were, as noted above, *Fuentes*, *supra*, *Sniadach*, *supra*, and *Mullane*, *supra*. But all of these cases involved "property"

interests found to be protected under the Due Process Clause against deprivation without prior hearing. There is no question that these cases state the law with respect to property interests such as were involved in them. But I cannot accept, and do not believe that a majority of this Court would accept, the proposition that respondents' "liberty" interest in establishing a car dealership was also a "property interest" which is protected against deprivation without prior hearing in the same manner as were the property interests involved in *Fuentes*, *supra*, *Sniadach*, *supra*, and *Mullane*, *supra*. The State of California was not seizing any existing tangible property interest of respondents by this Act; it was simply requiring them to delay establishment of a dealership on property which they presumably owned or leased or were in the process of buying or leasing until the Board considered and decided the protests against the proposed establishment. The suggestion that one has a right to conduct whatever sort of business he chooses from property he owns or leases was rejected at least as long ago as *Euclid* v. *Ambler Realty Co*., 272 U.S. 365 (1926); *Forest City Enterprises* v. *City of Eastlake*, 426 U.S. 668 (1976); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).[3]

If California had by statute conferred upon automobile manufacturers and dealers the right to establish and relocate franchises wherever they chose, and then imposed [Publisher's note: There should be an "a" here.] procedural hurdle such as the one here in question before the right could be effectuated, the case would be close to decisions such as *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), and *Bishop* v. *Wood*, 426 U.S. 341, 348-349 (1976). But the respondents had no such statutorily conferred entitlement or property right before the passage of this Act; they were free to locate their franchises where they chose, subject to state and local restrictions of differing kinds, simply because the State had not chosen to limit that freedom by legislation. When the State later

[3] Respondents also attack the statute on the grounds that it conflicted with the federal antitrust laws. The District Court did not pass upon this contention.

decided to impose the limits here in question, and establish the hearing procedures which it did, I think it deprived respondents of neither "liberty" nor "property" within the meaning of the Fourteenth Amendment to the United States Constitution.[4]

Respondents argue that the State is not injured by the injunction because the proposed relocations are almost invariably approved, and therefore even if the District Court was wrong on the merits a stay should not be granted. This argument casts too narrowly the purpose of the statute and the injury to the State, however. The interest of the State does not necessarily find expression through disapproval of relocation plans, but rather through the act of examining the proposed relocations to make sure that existing dealers are not being impermissibly harmed by the manufacturer and that the move is otherwise in the public interest. This interest is infringed by the very fact that the State is prevented from engaging in investigation and examination. And the occasion for this review may arise often during the time this injunction is in effect. In an affidavit presented to the District Court, Sam W. Jennings, Executive Secretary of the New

[4] The stated concerns which prompted enactment of the Act were "to avoid undue control of the independent . . . dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient services to consumers generally." Calif. Stat. 1973, ch. 996, § 1. This concern has prompted at least 17 other States to enact statutes which prescribe conditions under which new or additional dealerships may be permitted in the territory of the existing dealership. See Ariz. Rev. Stat. § 28-1304.02; Colo. Rev. Stat. § 13-11-20; Fla. Stat. § 320-642; Ga. Code § 84-6610(8)(10); Hawaii Rev. Stat. § 437-28(a)(22)(b); Iowa Code Ann. § 322A.4; Mass. Stat. Ann. ch. 9313, § 4(3)(1); Neb. Rev. Stat. § 60-1422; N.H. Rev. Stat. Ann. §§ 357-B, 4(III)(1); N.M. Stat. Ann. ch. 6; N.C. Gen. Stat. § 20-305(5); R.I. § 31-51-4(c)(11); S.D. Laws §§ 32-6A-3, 32-6A-4; Tenn. Code Ann. ch. 17, § 59-1714(j); Vt. Stat. Ann. Tit. 9, ch. 107, § 4074(c)(9); Va. Code Ann. § 46.1-547(d); Wis. Stat. Ann. § 218.01(3)(8); W. Va. Code vol. 14, 347-17-5(i). Congress has also taken remedial action. See "Automobile Dealer Day in Court Act," 15 U.S.C. §§ 1222-1225.

Motor Vehicle Board, indicated that in the first 44 days following the issuance of the District Court's injunction, the Board received 99 notices of intent to relocate or establish new dealerships in California. Under the terms of the injunction, all those applicants will be allowed to locate dealerships without undergoing any scrutiny by the State. And assuming the State eventually prevails on the merits and the injunction is lifted, it is not at all clear that the New Motor Vehicle Board will have the authority to examine the propriety of all those relocations or to force those relocated dealerships to stop doing business. It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.

Respondents further argue that they are delayed in completing the necessary business arrangements for establishing or relocating and this often results in losing the opportunity to locate in a particularly desirable spot. This irreparable injury outweighs any short-term interest the State has in enforcing the statute, they argue. While respondents' contentions are not completely without force, I am ultimately unpersuaded. Respondents may undergo some hardships because of the delay between the protest and the hearing, but the statute appears to minimize the delay and the applicants appear to agree to abide by such a construction, at least for purposes of this stay. In their proposed stay order presented to the District Court applicants suggested a provision along the following lines:

> "FURTHER ORDERED that pending determination of said appeal, all orders required by California Vehicle Code section 3066, subdivision (a), fixing the times and places of hearings upon protests against relocation or establishment of dealerships shall be issued and served by defendant New Motor Vehicle Board concurrently with the notification required to be made by the Board to the franchisor under the California Vehicle Code section 2062. . . ."

They have indicated a willingness to have this same provision incorporated into a stay issued by me. Under these conditions, I think the hardship worked on respondents by the statutory scheme does not outweigh the damage done to the State by the injunction and therefore I grant the proposed stay on the terms described above. As I have said before, statutes are presumptively constitutional and, absent compelling equities on the other side, which I do not find in this case, should remain in effect pending a final decision on the merits by this Court. Cf. *Marshal* v. *Barlow's, Inc*., 429 U.S. 1347, 1348 (1977) (REHNQUIST, J., in chambers).

It is therefore ordered that, pending the timely filing and disposition of a jurisdictional statement on the part of applicant, the injunction entered by the District Court for the Central District of California in this case on October 19, 1977, be and the same hereby is stayed. The stay order shall incorporate the above quoted paragraph proposed by applicant to the District Court.

[Publisher's note: See 434 U.S. 1354 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–652

National Broadcasting Co., Inc. and Chronicle Publishing Co., Petitioners, *v.* Olivia Niemi, a Minor, by and through her Guardian ad Litem.	)	On Application for Stay.

[February 10, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have requested that I stay the commencement of a civil trial in the Superior Court of the City and County of San Francisco in which they are defendants in order that they may have an opportunity to apply for and obtain a writ of certiorari from this Court to review the judgment of the Court of Appeal of the State of California filed October 26, 1977. That court reversed the judgment of dismissal rendered by the Superior Court in a case wherein respondent sought damages from petitioners for injuries allegedly inflicted upon her by persons who were acting under the stimulus of observing a scene of brutality which had been broadcast in a television drama entitled "Born Innocent." Applicants contend that the First and Fourteenth Amendments to the United States Constitution prevent their being subjected to liability and damages in an action such as this, and intend to petition this Court for certiorari to review the judgment of the Court of Appeal remanding the case for trial.

I find it unnecessary to determine whether four Justices of this Court would vote to grant a petition for certiorari by these applicants to review a California judgment sustaining a judgment for damages against them on the basis described above in the face of their claim that the First and Fourteenth Amendments prohibit the rendering of such a judgment. The only question before me is whether those same constitutional

provisions would be thought by at least four Justice of this Court to call for the granting of a writ of certiorari to review the interlocutory judgment of the state Court of Appeal which did no more than remand the case for a trial on the issues joined. I am quite prepared to assume that the Court would find the decision of the Court of Appeal sought to be stayed a "final judgment" for purposes of 28 U.S.C. § 1257(2) pursuant to its holding in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). But the mere fact that the Court would have jurisdiction to grant a stay does not dispose of all the prudential considerations which, to my mind, militate against the grant of the application in this case. Every year we grant petitions for certiorari or note probable jurisdiction in cases in which we ultimately conclude that a state or federal court has failed to give sufficient recognition to a federal constitutional claim, and have as a consequence reversed the judgment of such court rendered upon the merits of the action. But this is a far cry from saying that this Court would have stayed further proceedings in the same cases at an interlocutory stage comparable to the case now before me.

True, in the case of double jeopardy, we have held that the subjecting of the defendant to the second trial itself is a violation of the constitutional right secured by the Sixth Amendment, *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977), even though any judgment of conviction rendered in that trial would be subject to ultimate reversal on appeal. The same doctrine is found in cases more closely resembling this such as *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and *Cox*, *supra*. But in both *Tornillo* and in *Cox* the First and Fourteenth Amendment claims were far more precisely drawn as a result of the decisions of the state courts than is the case here. A reading of the opinion of the Court of Appeal indicates that it might have been based on a state procedural ground, by reason of the fact that the trial judge after denial of a motion for summary judgment but before the empanelment of a jury himself viewed the entire film and rendered judgment for applicants because he found that it did not

"advocate or encourage violent and depraved acts and thus did not constitute an 'incitement.'" The Court of Appeal held that this was a violation of respondent's right to trial by jury guaranteed her by the California Constitution, and went on to state that:

> "It is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been the responsibility of the trial court, or perhaps of this Court on appeal, to determine upon a reevaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a 'constitutional fact.' (*Rosenbloom* v. *Metromedia*, *supra*, 403 U.S. 29, 54)."

The contours of California tort law are regulated by the California courts and the California Legislature, subject only to the limitations imposed on those bodies by the United States Constitution and laws and treaties enacted pursuant thereto. In the principal case relied upon by applicants in support of their stay, *United States* v. *Shipp*, 203 U.S. 503 (1906), according to applicants "a sheriff allowed appellant to be lynched pending appeal to this Court of his conviction." A requirement to defend an action such as respondent's [Publisher's note: "respondent's" should be "respondents" or, better still, "applicants".] are now required to defend in the Superior Court, and if unsuccessful there to post supersedeas bond and prosecute their constitutional claims through the normal appellate process to this Court, is scarcely a comparable example of irreparable injury. Since I find that applicants' claims of irreparable injury resulting from the judgment of the Court of Appeal in this case are not sufficient to warrant my granting their application, I accordingly deny the stay.

[Publisher's note: See 435 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–798 (77–1360)

Boyer Alfredo Bracy and Sandra Denise Martin, Petitioners, *v.* United States.	))))	On Application for Stay.

[March 29, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants were convicted of several related narcotics offenses in the United States District Court for the Southern District of California. The Court of Appeals for the Ninth Circuit affirmed their convictions, and denied their petition for rehearing on February 28, 1978. That court granted their request for a stay of its mandate only pending consideration of their petition for rehearing, and not pending their petition for certiorari. The Court of Appeals denied rehearing, issued its mandate and applicants now request that I stay the enforcement of the judgment of the Court of Appeals pending disposition of that petition for certiorari here.

The chief contention raised by applicants in their petition for certiorari is that a witness committed perjury before the grand jury which indicted them. The witness admitted his perjury at trial, and applicants moved to dismiss the indictment, contending that the prosecutor should have immediately informed the defense and the court when he became aware of the perjury. The District Court denied the motion, and the Court of Appeals affirmed, relying on its opinion in *United States* v. *Basurto*, 497 F.2d 781, 785-786 (CA9 1974), which held that perjury by a witness would invalidate an indictment only when his testimony was material.

Applicants rely upon such cases as *Mooney* v. *Holohan*, 294 U.S. 103 (1935), in support of their contention that the disclosure of the perjury required the Court to declare a

mistrial on its own motion. Pet. for Cert. 10. In that case, this Court first held that the knowing introduction of perjured testimony at a criminal trial rendered the resulting conviction constitutionally invalid. Later cases have held that the prosecutor has a duty to correct testimony he knows to be false, even if its introduction was not knowing and intentional. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Applicants suggest that the prosecutor has a similar duty with regard to testimony introduced in grand jury proceedings which is later shown to have been false.

Because it seems to me that applicants misconceive the function of the grand jury in our system of criminal justice, I cannot conclude that four Justices of this Court are likely to vote to grant their petition. The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand his trial. Because of this limited function, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay, *Costello* v. *United States*, 350 U.S. 359 (1956), or by the introduction of evidence obtained in violation of the Fourth Amendment, *United States* v. *Calandra*, 414 U.S. 338 (1974). While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of that factfinding process, its introduction before the grand jury poses no such threat. I have no reason to believe this Court will not continue to abide by the language of Mr. Justice Black in *Costello*, *supra*, at 363: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The application is denied.

[Publisher's note: See 435 U.S. 1304 for the authoritative official version of this opinion.]

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. A–830 (77–1395)

Richard Vetterli et al., Applicants,	)	
v.	)	On Application for Stay.
United States District Court for the Central District of California et al.	)	

[April 10, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants, members of the Pasadena City Board of Education, seek a stay of an order issued by the United States District Court for the Central District of California, pending disposition of a motion for leave to file a petition for a writ of mandamus and a petition for writ of mandamus.[1] They claim that portions of the District Court's order violate the decision and judgment of this Court in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), and that the order, unless stayed, will subject them to the irreparable harm of having to engage in burdensome and disruptive activities necessary to comply with the District Court's order. Since my reading of the record indicates that the order does not conflict with our decision in *Spangler*, *supra*, I decline to issue the stay.

Spangler, *supra*, arose out of a suit commenced in 1968 by high school students and their parents, alleging that various school officials had unconstitutionally segregated the public schools in Pasadena. In 1970, after trial, the District Court, holding that the defendants had violated the Fourteenth Amendment, ordered them to submit a plan for desegregation which would provide that beginning with the 1970-1971 school

[1] Three separate orders are actually involved, but all are substantially identical.

year there would be no school "with a majority of any minority students." The defendants complied. In 1974, however, applicants, successors in office to the previous defendants, filed a motion with the District Court seeking to modify the 1970 order by eliminating the "no majority" requirement. The District Court denied the motion, ruling that the "no majority" requirement was an inflexible one to be applied anew each school year even though subsequent changes in the racial mix in the schools were caused by factors for which the defendants might not be considered responsible. The Court of Appeals affirmed that ruling, but we reversed, concluding that the District Court had exceeded its authority in enforcing the "no majority" provision so as to require annual readjustment of attendance zones.

Upon remand to the District Court, a hearing was scheduled on applicants' motion for dissolution of the 1970 injunction.[2] Applicants represented that there was no plan at that time to make any changes in the method of making student assignments. Shortly thereafter, on July 1, 1977, the District Court deleted the "no majority" provision from the injunction.[3] The hearing was completed and the matter submitted to the District Court for resolution. By late January 1978, when no further action had been taken by the District Court, however, applicants withdrew their representation that no changes would be made in the method of student assignments and on February 28, 1978, the District Court entered the following oral order:

> ". . . pending decision of this Court on the submitted matters before the Court or until further order of the

[2] The cause was initially remanded to the Court of Appeals which in turn merely remanded it to the District Court, noting that "all determinations as to modifications required under [*Spangler, supra*] . . . should initially be made by the district court." 549 F.2d 773 (CA9 1977).

[3] The District Court entered that following order:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED: The no majority of any minority provision contained in this Court's judgment of January 23, 1970 is hereby striken [Publisher's note: "striken" should be "stricken".] from the Pasadena Plan as required by the Supreme Court's opinion of June 28, 1976."

> Court, that each of you are enjoined from making any changes in the method of student assignments in the Pasadena Unified School District that was in effect on October 21, 1977."[4]

The applicants, concerned that the District Court did not include in the order anything expressly relating to the "no majority" provision, sought a clarification of the order later that same day. Applicants' counsel stated:

> "We have concluded from that omission, your Honor, that the purport of the order which was issued or the injunction which was issued this morning to those defendants was that they are indeed enjoined to take measures for the purpose of insuring that no school in the district has a majority of any minority students."

The judge replied:

> "That is right, Mr. McDonough. There is to be no change in the student assignment system that was in force on October 21st, 1977."

Applicants, relying totally on the judge's comment that "[t]hat is right," now contend that the District Court has reimposed the "no majority" requirement contrary to the dictates of our decision in *Spangler*, *supra*. If that were true, a writ of mandamus might properly issue to execute the Court's judgment. See *Vendo Co.* v. *Lektro-Vend Corp.*, No. 76-156, decided January 23, 1978. But I do not think the judge's statements during the colloquy can be read as having that effect, and I accordingly deny the application for a stay.

[4] Prior to issuance of the order the District Court had entertained proposed orders to be entered against the applicants pending disposition of the case. The United States and the student plaintiffs-intervenors submitted proposed written orders which expressly reaffirmed the District Court's order striking the "no majority" requirement. Applicants argued that no further order was justified, but that if an order were made it should specifically include the provision that "Nothing in this Order requires defendants to take any measures for the purpose of insuring that no school in the Pasadena Unified School District has a majority of any minority students."

The District Court took steps which unequivocally lifted the offending part of the 1970 order. See n. 3. That was done on July 1, 1977. And there is nothing in the record before me to indicate that after that date the "no majority" requirement was part of the method of student assignments. On February 28 the District Court ordered applicants to refrain from making any changes in the method of student assignments in effect as of October 21, 1977, a date well after the July 1 date on which the "no majority" requirement was eliminated from the 1970 injunction. On its face this order certainly cannot be read as reimposing the "no majority" requirement.

Even as a matter of language, one would have to strain to read the colloquy occurring later that same day as indicating that the judge thought his order bad reimposed the "no majority" provision. Busy judges and busy lawyers do not invariably speak with matematical [Publisher's note: "matematical" should be "mathematical".] precision in such a colloquy. The obligations imposed by an injunction must be clear and well-defined. A judge should not be thought, by a cryptic and off-handed remark in a later proceeding, to have reimposed an obligation which he specifically and unequivocally eliminated just a few months before pursuant to the direction of this Court and to which he made absolutely no reference in the original order. I will not indulge the presumption that the District Court acted contrary to these well settled principles in the absence of a clear indication that it in fact did.

Since the District Court's order of February 28 does not conflict with our decision in *Spangler*, *supra*, by placing applicants under any obligation to annually reassign students so that there is no school "with a majority of any minority students," I do not think five Members of this Court will vote to grant a writ of mandamus. Thus, I see no reason to issue the requested stay.

Of course, if at some future time the District Court actually reimposes the "no majority" requirement in contravention of our decision in *Spangler*, *supra*, or otherwise requires appli-

cants to comply with such a provision, applicants may again petition this Court or the Court of Appeals for relief. At this time such relief appears unwarranted, however, because applicants do not appear to be under any such obligation.

[Publisher's note: See 436 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1007

Joan Little, Petitioner,	)	
v.	)	
William Ciuros, Jr., Commissioner of Corrections of the City of New York and Essie Murphy, Superintendent of New York City Correctional Institution for Women.	)	On Further Application for Stay of Execution of Judgment Pending Appeal.

[June 7, 1978]

MR. JUSTICE MARSHALL, Circuit Justice.

The application for a stay in this case was denied by the Court on June 5, 1978.

This new application is based on the following allegation:

> "Following this Court's denial on June 5, 1978, of Petitioner's original application for the aforesaid stay, counsel for Petitioner has been informed that the Office of the Attorney General of the State of North Carolina has stated publicly that it intends to prosecute Petitioner for the crime of escape upon her return to said jurisdiction."

In support of this new application it is stated:

> "Under the principle of specialty, a demanding country may not try an individual who has been extradicted [Publisher's note: "extradicted" is in the original.] for any offense other than that for which extradition was granted, unless the alleged offense was committed *after* extradition. *United States* v. *Rauscher*, 119 U.S. 407 (1886)."

It just so happens that *United States* v. *Rauscher* was controlled by a treaty between the United States and Great Britain. Needless to say, there is no treaty involved here.

The application is, therefore, without legal support and is denied.

[Publisher's note: See 439 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–38

The New York Times Company et al., Petitioners,	)	On Application for Stay.
v.	)	
Mario E. Jascalevich.	)	

[July 11, 1978]

MR. JUSTICE WHITE.

MR. JUSTICE BRENNAN having disqualified himself in this matter, I have before me an Application for Stay of an order of the Supreme Court of New Jersey of July 6, 1978, which refused to stay and denied leave to appeal from an order of a state trial court refusing to quash a subpoena issued in the course of an ongoing criminal trial for murder. The order of the trial court, issued June 30, ordered the New York Times Company and Myron Farber, a reporter for the New York Times, to produce certain documents covered by a subpoena served upon them in New York pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, N.J. Stat. Ann. §§ 2A: 81-18-2-A: 81-23 (West 1976). The subpoena was issued at the behest of the defendant in the New Jersey murder trial; and the documents, which were sought for the purpose of cross-examining prosecution witnesses, included statements, pictures, recordings, and notes of interviews with respect to witnesses for the defense or prosecution. The subpoena was challenged by applicants on the grounds that it was overbroad and sought irrelevant material and hence was illegal under state law; that it violated the state reporter's Shield Law; and that it invaded rights of the reporter and the press protected by the First Amendment to the U.S. Constitution.

In denying the motion to quash and in ordering *in camera* inspection, the trial judge, having already certified that the

documents sought were "necessary and material for the defendant in this criminal proceeding," stated that when the materials had been produced for his inspection, he would afford applicants a full hearing on the issues, including the state law issues of the scope of the subpoena and the materiality of the documents sought, as well as upon the claim under the state Shield Law.

I cannot with confidence predict that four Members of the Court would now vote to grant a petition for certiorari at this stage of the proceedings. Motions to quash subpoenas are not usually appealable in the federal court system, *United States* v. *Nixon*, 418 U.S. 683, 690-691 (1974); *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906), and since leave to appeal was denied in this case it may be that such orders are not appealable in the New Jersey system. The applicants insist that as a constitutional matter, the rule must be different where, as here, the subpoena runs against a reporter and the press, and that more basis for enforcing the subpoena must be shown than appears in this record. There is no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case, cf. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), or that the obligation to obey an otherwise valid subpoena served on a newsman is conditioned upon the showing of special circumstances. But if the Court is to address the issue tendered by applicants, it appears to me that it would prefer to do so at a later stage in these proceedings. The asserted federal issue might not survive the trial court's *in camera* inspection should applicants prevail on any of their state-law issues. Nor, in light of the trial court's evident views that the documents sought appear sufficiently material to warrant *in camera* inspection, do I perceive any irreparable injury to applicants' rights that would warrant staying the enforcement of the subpoena at this juncture. Cf. *United States* v. *Nixon*, *supra*, at 714.

The application for stay is denied. Of course, applicants are free to seek relief from another Justice.

[Publisher's note: See 439 U.S. 1304 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–38

The New York Times Company et al., Petitioners,	)	On Re-Application for Stay.
v.	)	
Mario E. Jascalevich.	)	

[July 12, 1978]

MR. JUSTICE MARSHALL.

The New York Times and one of its journalists have applied to me for a stay of an order of the Supreme Court of New Jersey, issued July 6, 1978, pending the filing and disposition of applicants' petition for certiorari. MR. JUSTICE WHITE yesterday denied the application, and the pertinent facts are stated in his opinion. *Ante*, p. —. [Publisher's note: See 2 Rapp 803.] The principal issue that applicants intend to raise in their petition for certiorari is whether,

> "when a motion to quash a subpoena *duces tecum* issued to the news media is made, the court before which such motion is returnable shall be required to make threshold determinations with respect to the facial invalidity of the subpoena, as well as preliminary rulings on materiality and privilege, *prior to* compelling the production of all subpoenaed materials." Application 10 (emphasis in original).

The standards for issuance of a stay pending disposition of a petition for certiorari are well-established. Applicants bear the burden of persuasion on two questions: whether there is "a balance of hardships in their favor"; and whether four Justices of this Court would likely vote to grant a writ of certiorari. *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1312-1314 (1977) (MARSHALL, J., in chambers). Their "burden is particularly heavy when, as here, a stay has been

denied by the [lower courts]," *id.*, at 1312, in this case including two appellate courts as well as the trial court. Here, moreover, a stay has been denied by another Justice of this Court.

I do not believe that applicants have met their burden. There are, of course, important and unresolved questions regarding the obligation of a newsperson to divulge confidential files and other material sought by the prosecution or defense in connection with criminal proceedings. It may well be, moreover, that forced disclosure of these materials, even to a judge for *in camera* inspection, will have a deleterious effect on the ability of the news media effectively to gather information in the public interest, as is alleged by applicants.

It does not follow, however, that applicants are entitled to a stay at this stage in the proceedings. It has been the rule in the federal courts for many years that

> "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States* v. *Ryan*, 402 U.S. 530, 532 (1971), citing *Cobbledick* v. *United States*, 309 U.S. 323 (1940).

While this rule is based on a federal statute and is thus not directly applicable here, the policies underlying it are clearly relevant to resolution of this stay application. These policies include a desire to avoid "obstructing or impeding an ongoing judicial proceeding" and a corresponding interest in "hasten[ing] the ultimate termination of litigation." *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); see *Cobbledick* v. *United States*, *supra*, at 324-326. Such considerations cannot be ignored in evaluating the "balance of hardships" in this case and the likelihood that four Justices would vote to grant certiorari.

Applicants are seeking a stay and certiorari in the midst of an ongoing criminal trial. If a stay were granted, the trial might be interrupted to await this Court's decision on the

certiorari petition, or, if the trial proceeded to conviction, reversal on appeal might result from the defendant's inability to obtain evidence that he apparently considers vital to his defense. It is true, of course, that either of these undesirable outcomes might occur if applicants refuse to comply with the subpoenas and are adjudicated in contempt. At that point, however, the judicial system would have done all that it could do to obtain the materials sought by the defense.

In light of these considerations, applicants are plainly not entitled to a stay at this time. This conclusion is buttressed by the fact that, if applicants do refuse to comply with the subpoenas, they presumably will have an opportunity in subsequent contempt proceedings to raise the same arguments that they seek to raise here. This case, moreover, involves an order to turn materials over to a judge for *in camera* inspection; whether the materials will eventually be released to the defense and the public is a matter yet to be litigated.

The application for a stay is denied.

[Publisher's note: See 439 U.S. 1307 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1091

Reproductive Services, Inc., Applicant,	)	On Application to Stay an
v.	)	Order of the Supreme Court
Dee Brown Walker, District Judge.	)	of Texas.

[July 17, 1978]

MR. JUSTICE BRENNAN.

I have before me an application[1] to stay an order of the Supreme Court of Texas, which denied applicant's motion for a writ of mandamus directed to respondent. The questions at issue here arise in a suit brought by Claudia E. Lott against applicant, which in essence charged applicant with medical malpractice in performing an abortion on Mrs. Lott. The complaint further charged applicant with violating the Texas Deceptive Trade Practices-Consumer Protection Act, Texas Bus. & Comm. Code Ann. § 17.41 *et seq.* (Supp. 1977), in that applicant misrepresented the quality of care it was prepared to provide and failed to disclose material information regarding the risks involved in procedures used at applicant's abortion clinics. The State of Texas was allowed to intervene in this action pursuant to the Deceptive Practices Act. Mrs. Lott and the State of Texas are the true parties in interest here.

Mrs. Lott caused a subpoena *duces tecum* to be issued against applicant. This subpoena sought the medical records of five named patients at applicant's clinics and also sought the medical records of any other patient who had any major or serious complications arising from an abortion at applicant's clinics or who had received certain medications. Applicant sought to quash this subpoena on the ground of invasion of

[1] This application was originally presented to MR. JUSTICE POWELL as Circuit Justice and, in his absence, was referred to MR. JUSTICE REHNQUIST, who denied the application.

its patients' privacy. This motion was granted in part by the respondent trial judge, who ruled that the records must be turned over, but that patient names could be deleted. Applicant sought mandamus in the Supreme Court of Texas to overturn this order. Subsequently counsel for applicant, Mrs. Lott, and the State of Texas entered a consent order and temporary injunction in which applicant agreed that on determination of applicant's petition for mandamus the State could take discovery "on all names of all patients of [applicant's] clinics throughout the State and all records on the nature of the conditions shown in those records."

The question sought to be raised by applicant—whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients—is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this court would vote to grant certiorari to hear it.[2] However, this issue is not presented here. First, the order of the trial court challenged by applicant's petition for mandamus did in fact provide that the names of applicant's patients could be deleted. Second, the State of Texas has represented in its response in this Court that it is prepared to enter into a protective order which will ensure the privacy of all patients at applicant's clinics. In light of the representations of the State of Texas, there is no irreparable injury to any patient's privacy interests which would justify a stay of the order of the Supreme Court of Texas.

Therefore, on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application.

[2] Applicant has styled his application as one for a stay pending petition for mandamus, but the appropriate avenue of relief would be by certiorari and I so read the papers.

[Publisher's note: See 439 U.S. 1310 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–33

Kenneth F. Fare, as Acting Chief Probation Officer, etc.	)	Application for Stay of Enforcement of a Judgment of the California Supreme Court.
v.	)	
Michael C.	)	

[Publisher's note: The "etc." above appears to be surplus.]

[July 28, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

The State of California requests a stay of enforcement of a judgment of the California Supreme Court ordering a rehearing for respondent under California Welfare and Institutions Code § 602. The Superior Court of Los Angeles County had originally committed respondent to the California Youth Authority as a ward of the court after finding that he was guilty of murder. That committal was affirmed by the California Court of Appeals. On May 30, 1978, the California Supreme Court reversed, holding that a confession relied on by the Superior Court was inadmissible under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). It ruled that when a juvenile, during the course of a custodial interrogation, requests the presence of his probation officer, all interrogation must cease and any statement taken after that point is inadmissible at the adjudication hearing. I have decided to grant the stay so that the full Court can consider the State of California's petition for certiorari and the important *Miranda* questions that underlie it.

Three pertinent inquiries are usually made in evaluating a request for stay of enforcement of an order of a state court: whether that order is predicated on federal as opposed to state grounds; whether the "balance of equities" militate [Publisher's note: "militate" should be "militates".] in favor of the relief requested by petitioner; and whether it is likely

that four Justices of this Court will vote to grant certiorari. Recognizing the case for a stay is a relatively close one, I conclude that each of these questions must be answered in the affirmative.

The decision of the California Supreme Court is clearly premised on the federal Constitution. It is posited as an extrapolation of *Miranda* and there are no references to state statutory or constitutional grounds. The California Supreme Court cases relied on were also efforts to determine the implications of *Miranda* and did not purport to construe the State Constitution. See *People* v. *Burton*, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971); *People* v. *Randall*, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970).

The "balance of equities" presents a more difficult question. The State argues that a stay is imperative, because a rehearing in Superior Court would preclude this Court's review of the California Supreme Court's decision. If on retrial the respondent is committed to the Youth Authority on the basis of evidence other than the confession, the instant controversy will be moot.[*] On the other hand, should the Superior Court find the remaining evidence insufficient to order a committal, this prosecution would terminate and any effort by the State to appeal such a determination would be bound to raise serious if not insuperable difficulties under both California law and the Double Jeopardy Clause. See *California* v. *Stewart*, 384 U.S. 436, 497-499 and n. 71 (1966).

The law enforcement efforts of the State of California will be substantially affected by the California Supreme Court's decision. The ruling builds upon the *Miranda* prescription that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S., at 474; but it goes well beyond the express language

[*] The California Court of Appeals suggested that if the confession were suppressed, there would be insufficient evidence in the record to sustain a finding of guilt. *In re Michael C.*, 21 Cal. 3d 471, 481 n. 2 (1978) (Clark, J., dissenting).

of the *Miranda* decision. For example, the Supreme Court of California said in the course of its opinion here:

> "Michael wanted and needed the advice of someone whom he knew and trusted. He therefore asked for his probation officer—a personal advisor who would understand his problems and needs and on whose advice the minor could rely. By analogy to [*People* v. *Burton*, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971)], we hold that the minor's request for his probation officer—essentially a "call for help"—indicated that the minor intended to assert his Fifth Amendment privilege. By so holding, we recognize the role of the probation officer as a trusted guardian figure who exercises the authority of the state as *parens patriae* and whose duty it is to implement the protective and rehabilitative powers of the juvenile court.
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> • • • • •
>
> Here, . . . we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination. Thus our question turns not on whether the defendant had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege. We hold that in doing so he no less invoked the protection against self-incrimination than if he asked for the presence of an attorney." 21 Cal. 3d, at 476-477.

The court explicitly eschewed a "totality of circumstances" analysis; respondent's waiver of his *Miranda* rights, his experience in custodial settings, or any other factor that might bear on the voluntariness of his confession was simply irrelevant.

Although the California Supreme Court made some effort to limit its holding to probation officers, it is unclear what types of requests authorities must now regard as *per se* invocations of the Fifth and Fourteenth Amendment privilege against self-incrimination. Many relationships could be char-

acterized as ones of trust and understanding; indeed, it seems to me that many of these would come to mind long before the probationer—probation officer relationship. In fact, under California law the probation officer is charged with the duty to file charges against a minor if he has any knowledge of an offense. California Welfare & Institutions Code §§ 650, 652-655. Certainly that also encompasses a duty of reasonable investigation. It would be a breach of that duty for the probation officer to withhold information regarding an offense or advise a probationer that he should not cooperate with the police. These considerations troubled Justice Mosk, who noted in his separate concurrence in this case that "[w]here a conflict between the minor and the law arises, the probation officer can be neither neutral nor in the minor's corner." 21 Cal. 3d, at 479. To treat a request for the presence of an enforcement officer as a *per se* invocation of the right to remain silent cannot but create serious confusion as to where the line is to be drawn in other custodial settings.

Respondent asserts that this injury is outweighed by the fact that a stay delays ultimate disposition of the charges against him, and that he has been in the custody of the Youth Authority for over two years. Obviously the weight of this argument depends on one's view of the merits. If certiorari is granted in this case and a majority of this Court finds respondent's confession admissible as a matter of federal constitutional law, then the original disposition order will not be disturbed and detention during deliberations in this Court will not exceed the time set in the original order.

Ultimately, therefore, my decision to stay enforcement of the California Supreme Court's order must rest on my assessment of the likelihood of four Justices voting to grant certiorari and of the petitioner prevailing on the merits. This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicated on *Miranda* and related cases, and, as with many issues that recur in petitions before this Court, we decline most such tenders. But some pattern has developed in the handling of

Miranda issues that, I think, portends a substantial likelihood of success for the instant petition.

Miranda v. *Arizona* was decided by a closely divided Court in 1966. While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, its supporters saw that rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise. But this core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other courts under the guise of "interpreting" *Miranda*, particularly if their decisions evinced no principled limitations. Sensitive to this tension, and to the substantial burden which the original *Miranda* rules have placed on local law enforcement efforts, this Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies. I think this reluctance is shown by our decisions reviewing state court interpretations of *Miranda*. As we noted in *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975), "a State may not impose . . . greater [*Miranda*] restrictions as a matter of *federal constitutional law* when this court specifically refrains from imposing them." (Emphasis in original.)

In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), we overturned a federal habeas ruling that all evidence proving to be the fruit of statements made without full *Miranda* warnings must be excluded at the subsequent state criminal trial. We overruled a state supreme court in *Oregon* v. *Hass*, *supra*; we held that a statement was admissible for purposes of impeachment even though it was given after the defendant indicated a desire to telephone an attorney. This Court has also recently rejected contentions that a confession was inadmissible after a reiterated *Miranda* warning if some hours earlier the defendant had indicated he did not want to discuss a different charge. *Michigan* v. *Mosley*, 423 U.S. 96 (1975). These are not to suggest that refusals to extend *Miranda* always please prosecutors, see *Brown* v. *Illinois*, 422 U.S. 590 (1975), or that this

Court has shunned all logical developments of that opinion, see *Doyle* v. *Ohio*, 426 U.S. 610 (1976). But the overall thrust of these cases represent [Publisher's note: "represent" should be "represents".] an effort to contain *Miranda* to the express terms and logic of the original opinion.

In our most recent pronouncement on the scope of *Miranda*, we found that the Oregon Supreme Court's expansive definition of "custodial interrogation" read *Miranda* too broadly. *Oregon* v. *Mathiason*, 429 U.S. 492 (1977). Our reason for so ruling is probably best encapsulated in an observation we made in a similar context, "such an extension of the *Miranda* requirements would cut this Court's holding in that case completely loose from its own explicitly stated rationale." *Beckwith* v. *United States*, 425 U.S. 341, 345 (1976). I think the decision of the California Supreme Court also risks cutting *Miranda* loose from its doctrinal moorings. The special status given legal counsel in *Miranda*'s prophylactic rules is related to the traditional role of an attorney as expositor of legal rights and their proper invocation. He is also the principal bulwark between the individual and the state prosecutorial and adjudicative system. A probation officer simply does not have the same relationship to the accused and to the system that confronts the accused, and I believe this fact would lead four Justices of this Court to grant the State's petition for certiorari in this case.

The request for stay of the judgment of the California Supreme Court pending consideration of a timely petition for certiorari by the State of California is accordingly granted, to remain into effect until disposition of the petition for certiorari. If the petition is granted, this stay is to remain in effect until this Court decides the case or until this Court otherwise orders.

[Publisher's note: See 439 U.S. 1317 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–111

The New York Times Company and Myron Farber	)	On Application for Stay.
v.	)	
Mario E. Jascalevich.	)	

[August 1, 1978]

MR. JUSTICE WHITE, Circuit Justice.

This is an application for a stay of an order of the Supreme Court of New Jersey refusing to stay, except temporarily to permit this application, an order of the Superior Court of New Jersey holding applicants in civil contempt for refusing to obey a subpoena for documents that was issued at the behest of the defendant in the course of an ongoing murder trial and that the Superior Court refused to quash.[1] Applicant Farber, a reporter for *The New York Times*, a newspaper, was committed to jail until he complied with the subpoena by submitting the requested documents for *in camera* inspection by the trial judge; and The New York Times Company, the corporation owning and controlling the newspaper, was ordered to pay $5,000 for each day of noncompliance with the subpoena. Both applicants were also found guilty of criminal contempt. On appeal to the Superior Court of New Jersey, Appellate Division, that court stayed the convictions for

[1] Judge Arnold informed petitioners that he would not rule on the merits of their motion to quash until he had the opportunity to examine *in camera* the documents. He then ordered the production of the documents for his inspection. Petitioners unsuccessfully appealed through the New Jersey system seeking a stay of Judge Arnold's order. They then took their application to two individual Justices of this Court, both of whom denied relief. *New York Times Co.* v. *Jascelevich*, [Publisher's note: "*Jascelevich*" should be "*Jascalevich*".] 47 U.S.L.W. 3013 (No. A-38, July 25, 1978 (WHITE, J., and MARSHALL, J.)).

criminal contempt but refused to stay the civil contempt judgment. It did expedite the appellate proceedings, which are still pending. The Supreme Court of New Jersey in turn refused to stay the Superior Court's judgment, as well as itself to take immediate jurisdiction of the appeal.

This application for stay, which then followed, was addressed to MR. JUSTICE BRENNAN but upon his recusal was referred to me at 11 a.m. on July 28. Because the stay entered by the New Jersey Supreme Court would otherwise have expired an hour later, a temporary stay was entered to permit an examination of the somewhat voluminous papers filed in support of the application and to consider a response which was requested from respondent.

There is an initial question of the jurisdiction of a circuit justice or of the Court to enter a stay in circumstances such as these. Under 28 U.S.C. § 2101(f), a stay is authorized only if the judgment sought to be stayed is final *and* is subject to review by the Supreme Court on writ of certiorari.[2] Whether a state court judgment is subject to review by the Supreme Court on writ of certiorari is in turn governed by 28 U.S.C. § 1257, which provides that we have jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." Also, it is only final judgments with respect to issues of federal law that pro-

[2] (f) 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, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allowed therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. June 25, 1948, ch. 646, 62 Stat. 9612; May 24, 1949, ch. 139, § 106, 63 Stat. 104.

vide the basis for our appellate jurisdiction with respect to state court cases.

Although an order, such as is involved in this case, refusing to quash a subpoena and directing compliance would ordinarily not satisfy the finality requirement, *United States* v. *Nixon*, 418 U.S. 683, 690-691 (1974), and cases cited, a criminal or civil contempt judgment imposed for refusing to obey the order presents a different consideration. At least where such judgments are entered against nonparty witnesses, such as the present applicants, the judgments are "final" for the purposes of appellate jurisdiction within the federal system.[3] They are also final for purposes of this Court's jurisdiction to review state-court judgments if they have been rendered by the highest court of the State in which decision could be had.

In this case, the New Jersey Superior Court entered civil and criminal contempt judgments against each of the applicants. Appeals from these judgments are pending in the appellate division. The criminal contempt judgments have been stayed; but both the appellate division and the New Jersey Supreme Court have refused to stay the judgments for civil contempt, and it is the civil judgment that is the object of the present stay application. Because the judgment for civil contempt remains under review in the New Jersey appellate courts, it would not appear to be a final judgment "rendered by the highest court of the state in which a decision could be had." This was the case in *Valenti* v. *Spector*, 3 L. Ed. 2d 37 (1958), where Mr. Justice Harlan, as Circuit Justice, was asked to stay an order committing applicants to jail for contumacious refusal to answer certain ques-

[3] *Nelson* v. *United States*, 201 U.S. 92, 97-98 (1906); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 337-338 (1904); *United States* v. *Reynolds*, 449 F.2d 1347 (9th Cir. 1971); *In re Vericker*, 446 F.2d 224 (2d Cir. 1971); *In re Manufacturers Trading Corp.*, 194 F.2d 948, 955 (6th Cir. 1952); see *Doyle* v. *London Guarantee*, 204 U.S. 599, 605 (1907); cf. *Nye* v. *United States*, 313 U.S. 33 (1941); *Fox* v. *Capital Co.*, 299 U.S. 105, 107 (1936); *Alexander* v. *United States*, 201 U.S. 117, 121 (1906). See generally 9 J. Moore, Federal Practice ¶ 110.13[4], at 166 (1975).

tions. He denied the applications "for lack of jurisdiction, and in any event, in the exercise of my discretion," saying among other things:

> "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." 3 L. Ed. 2d, at 39.

The rule would appear to be, as Mr. Justice Goldberg observed, "Of course, no stay should be granted pending an appeal that would not lie." *Rosenblatt* v. *American Cyanamid Company*, 15 L. Ed. 2d 39, 42 (1965) (Goldberg, J., Circuit Justice).

Applicants insist, however, that the refusal to stay the civil contempt judgments brings the case within 28 U.S.C. § 1257 and § 2101(f) because (1) if the applicants comply with the order, they forfeit the very First Amendment right which they claim, that is the right to refuse to turn over to a court what they consider to be the confidential files of the reporter, at least until the court demanding them has provided further justification for its order than it has to this date; and (2) if applicants do not comply, they will suffer continuing and irreparable penalties for exercising their claimed First Amendment rights.

Applicants are not without some support for their position. In *Nebraska Press Assn.* v. *Stewart*, 423 U.S. 1327 (1975), a state trial court had entered an order prohibiting the publication of certain information about a pending criminal case. The order was not stayed pending appeal to the Nebraska Supreme Court. After initially refusing a stay, 423 U.S. 1319 (1975), MR. JUSTICE BLACKMUN concluded that the delay in the Nebraska courts "exceeded tolerable limits" and entered a partial stay. He recognized that in a meaningful sense "the

lower court's judgment is not one of the State's highest courts, nor is its decision the final one in that matter," 423 U.S., at 1329; but he reasoned that a partial stay should be entered anyway:

> "Where, however, a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crown [Publisher's note: "crown" should be "crowd".] upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. I need not now hold that in any area outside that of prior restraint on the press, such delay would warrant a stay or even be a violation of federal rights. Yet neither can I accept that this Court, or any individual Justice thereof, is powerless to act upon the failure of a State's highest court to lift what appears to be, at least in part, an unconstitutional restraint of the press. When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay. I therefore conclude that I have jurisdiction to act upon that state-court decision." 423 U.S., at 1329-1330.

It should also be noted that the Court later found it unnecessary to decide whether the stay had been properly entered, 423 U.S. 1010, but that in deciding the merits of the controversy, the Court referred to MR. JUSTICE BLACKMUN'S "careful decision" with respect to the stay issue, 427 U.S. 539, 544 n. 2 (1976).

Of course, MR. JUSTICE BLACKMUN partially stayed an order imposing a prior restraint upon the press, and this is not a prior restraint case. Farber has been jailed and the

company has been fined until they comply with the court's order, but it is doubtful, to say the least, that a state court's refusal to grant bail or to stay a criminal judgment pending appeal in the state courts automatically transforms the judgment into a case reviewable here on the merits and hence subject to a stay order under § 2101(f) by the court or by an individual justice. I am nevertheless inclined to think that the question of our jurisdiction is not frivolous and is sufficiently substantial that the Court and an individual justice necessarily has [Publisher's note: "has" should be "have".] power to issue a stay pending a final determination of the jurisdictional issue—and should enter such a stay if there are otherwise adequate grounds for doing so.

Proceeding on this basis, then, I conclude that the application for stay should be denied. There is no present authority in this Court either that newsmen are constitutionally privileged to withhold duly subpoenaed documents material to the prosecution or defense of a criminal case or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had. Cf. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); see *Zurcher* v. *Stanford Daily*, — U.S. —, 56 L. Ed. 2d 528, 542 (1978). But even if four or more Members of the Court would hold that a reporter's obligation to comply with the subpoena is subject to some special showing of materiality not applicable in the case of ordinary third party witnesses, I would not think that they would accept review of this case at this time. The order at issue directs submission of the documents and other materials for only an *in camera* inspection; it anticipates a full hearing on all issues of federal and state law; and it is based on the trial court's evident views that the documents sought are sufficient to warrant at least an *in camera* inspection.

In *United States* v. *Nixon*, *supra*, we recognized a constitutionally based privilege protecting Presidential communications in the exercise of Article II powers, but we held that there had been a sufficient initial showing of materiality to warrant requiring the President to submit the subpoenaed documents for *in camera* examination. Here, the Superior Court

has twice issued a certificate under the Uniform Act to Secure the Attendance of Witnesses from Out of State in Criminal Proceedings, N.J. Stat. Ann. §§ 2A:81-18-2-A:81-23 (West 1976), declaring that the documents sought "are necessary and material" for the defendant on trial for murder in the New Jersey courts. In the first certificate the court declared that the materials sought:

> "contain statements, pictures, memoranda, recordings and notes of interviews of witnesses for the defense and prosecution in the above proceedings as well as information delivered to the Bergen County Prosecutor's Office, and contractual information relating to the above. Specifically, the documents include a statement given to Mr. Farber by Lee Henderson of Whitmere, South Carolina and other witnesses and notes, memoranda, recordings, pictures and other writings in the possession, custody or control of The New York Times and/or Myron Farber."

On the second occasion, the court certified:

> "6. That I have reviewed the petition of Raymond A. Brown and find, inter alia, that substantial constitutional rights of Dr. Jascalevich to a fair trial, compulsory process and due process of law are in jeopardy without the appearance of Myron Farber and the documents so that an in camera examination can be made.
>
> "7. That this certificate is made with the full awareness of the totality of the proceeding before the Court—pre-trial, in the presence of the jury and outside the presence of the jury—which are hereby referenced. These include the testimony of: Myron Farber, Dr. Baden, Mr. Herman Fuhr, Judge Galda, Judge Calissi, Mr. Herman Fuhr (sic), Mr. John Fischer, Detective Lange, Mr. Joseph Woodcock, and the proceedings regarding Myron Farber and the New York Times."

These determinations were made by a trial judge after sitting through some 22 weeks of a criminal trial and based, among other grounds, on a defendant's right to call witnesses

for his defense, which includes the right to secure witnesses and materials for the purposes of impeaching the witnesses against him. Cf. *Davis* v. *Alaska*, 415 U.S. 308 (1974). Furthermore, these conclusions have not been disturbed by the New Jersey appellate courts, each of which has refused to stay the order for *in camera* inspection as well as the ensuing civil contempt judgments. In my view, the proceedings to date satisfy whatever preconditions to the enforcement of the subpoena that may be applicable in this case.

On this record, I would not vote to grant certiorari and am unconvinced that four other justices would do so. It also appears to me, as it did on the earlier application for stay, that *in camera* inspection of these documents by the court will not result in any irreparable injury to applicants' claimed, but unadjudicated, rights that would warrant staying the enforcement of the subpoena at this time, with its consequent impact on a state criminal trial. It should also be noted that applicants' resistance to the subpoena and the order rest on state law as well as federal grounds; that the Superior Court deems inspection necessary to inspect the documents in connection with ruling on the state claims including the claim of protection under the state "Shield" statute; and that if applicants prevail on those grounds, it will be unnecessary to deal with whatever federal constitutional grounds might also be urged.

For these reasons, I decline to grant the application for stay pending the filing of a petition for certiorari, and the temporary stay I have entered will expire at 12:00 noon tomorrow, August 2, 1978.

[Publisher's note: See 439 U.S. 1331 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–111

The New York Times Company and Myron Farber	)	On Reapplication for Stay.
v.	)	
Mario E. Jascalevich.	)	

[August 4, 1978]

MR. JUSTICE MARSHALL, Circuit Justice.

The New York Times and one of its reporters, Myron Farber, have reapplied to me for a stay of an order issued by the Supreme Court of New Jersey on July 25, 1978, after MR. JUSTICE WHITE denied their initial application on August 1, 1978.

At issue is the New Jersey Supreme Court's denial of a motion for a stay of civil contempt penalties imposed by the Superior Court of Bergen County in order to coerce the applicants to submit for *in camera* inspection materials sought by the defendant in a murder trial now in progress. The New Jersey Supreme Court also denied the applicants' motion for direct certification of their appeals from the contempt orders entered by the Superior Court.

The applicants have requested a stay pending the filing and determination of their petition for certiorari, which would raise the issue

> "whether the First and Fourteenth Amendments to the Constitution of the United States permit a State to incarcerate and fine a newsperson or newspaper to force them to disclose to a court, *in camera*, all materials, including confidential sources and unpublished information, called for by a subpoena *duces tecum*, prior to making determinations with respect to the facial invalidity of the subpoenas as well as claims of First Amendment and

> statutory shield law privileges, when such issues are raised in a motion to quash the subpoena *duces tecum*."

Alternatively, they seek a stay pending review of those issues by the New Jersey appellate courts. This application was denied by MR. JUSTICE WHITE and then referred to me. Although a single Justice would ordinarily refer a reapplication for a stay to the full conference of this Court, as we are now in recess and widely scattered, such a referral is not immediately practicable.

I

A preliminary question is whether a Justice of this Court has jurisdiction to grant a stay under the circumstances of this case. Under 28 U.S.C. § 2101(f), the execution and enforcement of a judgment or decree may be stayed by a Member of this Court 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." The application of that provision, in turn, depends upon 28 U.S.C. § 1257, which provides that this Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

The proceedings relevant here began with an order of the Superior Court on June 30, 1978, denying the applicants' motion to quash the subpoena and directing them to produce the subpoenaed materials. The Superior Court declined to consider any constitutional or statutory claims of privilege until the applicants submitted the materials for *in camera* review. The applicants sought review of the Superior Court's order before the Appellate Division and the New Jersey Supreme Court, on the grounds they intend to raise in their petition for certiorari. Both courts denied leave to appeal and declined to stay the order to produce. With the case in that posture, both MR. JUSTICE WHITE and I denied the applicants' request for a stay.

Since the initial application for a stay, a different judge of the Superior Court on July 24 found the applicants guilty of both criminal and civil contempt for refusing to comply with the June 30 order to produce the subpoenaed materials.

Without considering the issues that I previously had expected would be addressed in a contempt proceeding, see 47 U.S.L.W. 3013, 3014, the Superior Court held that the applicants could not raise their constitutional or statutory challenges to the validity of the June 30 order to produce. As a coercive sanction for the civil contempt, the court sentenced Farber to jail and fined the New York Times $5,000 per day until the applicants complied with the order to produce. On the criminal contempt charges, Farber received a sentence of six months in jail and the New York Times was assessed a fine of $100,000.

The applicants appealed both the criminal and civil sanctions, and the Appellate Division agreed to accelerate those appeals to the extent possible. The Appellate Division decided to stay the criminal penalties against the applicants, but not the coercive civil penalties, which mandate immediate imprisonment of Farber. On July 25, the New Jersey Supreme Court also declined to stay the coercive penalties and refused to certify the applicants' appeals for direct consideration by that court. At present, the Appellate Division still has not set a date for hearing the applicants' appeals.

In most cases where an appeal is still pending in the state courts, Members of this Court would not have jurisdiction to issue a stay under 28 U.S.C. § 2101(f). See *United States* v. *Nixon*, 418 U.S. 683, 690-691 (1974). However, this Court has shown a special solicitude for applicants who seek stays of actions threatening a significant impairment of First Amendment interests. The inability of an applicant to obtain timely substantive review by state courts of a serious First Amendment issue, prior to incurring substantial coercive penalties, may justify a determination that the applicant has satisfied the jurisdictional requirements of 28 U.S.C. § 2101(f). Even though this application does not involve a direct prior restraint, MR. JUSTICE BLACKMUN'S analysis in *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327 (1975) (in chambers), is applicable here:

> "When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state

> court as having finally decided that the restraint should remain in effect during the period of delay. I therefore conclude that I have jurisdiction to act upon that state-court decision." 433 U.S., at 1330.

As in *Nebraska Press*, the delay by the appellate courts has left standing a serious intrusion on constitutionally protected rights. MR. JUSTICE WHITE credited these same First Amendment considerations when he determined to reach the merits of the present applicants' request for a stay. *Ante*, p. —. [Publisher's note: See 2 Rapp 816.]

II

Although I agree with MR. JUSTICE WHITE's conclusion that he had the power to issue a stay at least until a final determination of the jurisdictional issue, I must differ with his conclusion on the merits of the constitutional questions raised by the applicants. As I observed in my previous opinion in this case,

> "There are, of course, important and unresolved questions regarding the obligation of a newsperson to divulge confidential files and other material sought by the prosecution or defense in connection with criminal proceedings. It may well be, moreover, that forced disclosure of these materials, even to a judge for in camera inspection, will have a deleterious effect on the ability of the news media effectively to gather information in the public interest, as is alleged by applicants." 47 U.S.L.W. 3013.

Many potential criminal informants, for example, might well refuse to provide information to a reporter if they knew that a judge could examine the reporter's notes upon the request of a defendant.

Given the likelihood that forced disclosure even for *in camera* review will inhibit the reporter's and newspaper's exercise of First Amendment rights, I believe that some threshold showing of materiality, relevance, and necessity should be required. Cf. *United States* v. *Nixon*, 418 U.S. 683 (1974). See generally *Carey* v. *Hume*, 492 F.2d 631 (DC Cir.), *cert.*

dismissed under Rule 60, 417 U.S. 938 (1974); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394 (DDC 1973). Examination of the record submitted with this application discloses that the Superior Court did not make any independent determinations of materiality, relevance, or necessity prior to ordering the applicants to submit the subpoenaed materials for *in camera* review.

Initially defense counsel submitted *ex parte* to the Superior Court judge an affidavit averring the need for "notes, memoranda, reports, statements, tape recordings and other written memorializations" of Farber's interviews of witnesses. The affidavit provided only one example of a statement given to Farber by a potential witness. With respect to the other material requested, the affidavit included only a general assertion of necessity, but afforded no factual basis for the judge to determine whether any of the doccuments [Publisher's note: "doccuments" should be "documents".] other than the statement mentioned above were material, relevant, or necessary for the defense. It cannot be supposed that the Superior Court judge knew from conducting the trial that the material requested met those criteria, because counsel failed to specify the materials that came within the terms of his extremely broad request. Conclusory assertions by the defense counsel are insufficient to justify a subpoena of the breadth of the one involved here.

Moreover, an *ex parte* determination of materiality, relevance, and necessity provides little assurance that First Amendment interests will not be infringed unnecessarily. Without affording counsel for the applicants an opportunity to respond and narrow the scope of the subpoena, the Superior Court issued a certificate under the Uniform Act to Secure the Attendance of Witnesses from Out of State in Criminal Proceedings, N.J. Stat. Ann. §§ 2A: 81-18 to -23 (West 1976), for all documents in the possession of the applicants that

> "contain statements, pictures, memoranda, recordings and notes of interviews of witnesses for the defense and prose-

> cution in the above proceeding as well as information delivered to the Bergen County Prosecutor's Office, and contractual information relating to the above."

Similarly, the second certificate issued by the Superior Court reveals no further consideration of materiality, relevance, and necessity. Although the certificate did add a list of a few of the witnesses who appeared at the trial, that listing at best argued in favor of a subpoena confined to documents regarding those particular witnesses.

Just as the Superior Court judge did not make any independent determinations of materiality, relevance, and necessity before issuing the certificates to obtain the subpoenas, neither did he make those determinations before requiring *in camera* inspection. Even after the criminal and civil contempt proceedings, the applicants have been unable to obtain a state-court decision, except perhaps by implication from the Superior Court's order of June 30, on the issue of whether a judge must make a threshold determination of materiality, relevance, and necessity before requiring them to submit the materials for *in camera* inspection.

III

Were I deciding this issue on the merits, I would grant a stay pending the timely filing of a petition for certiorari or at least pending the Appellate Division's consideration of the important constitutional and statutory issues raised by the applicants. But the well-established criteria for granting a stay are that the applicants must show "a balance of hardships in their favor" *and* that the issue is so substantial that four Justices of this Court would likely vote to grant a writ of certiorari. *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1312-1314 (1977) (MARSHALL, J., in chambers). The applicants here bear an especially heavy burden, for a single Justice will seldom grant an order that has been denied by another Justice. See *Levy* v. *Parker*, 396 U.S. 1204, 1205 (1969) (Douglas, J., in chambers).

After reviewing the applicable decisions of this Court, I cannot conclude in good faith that at least four Justices would vote to grant a writ of certiorari with the case in its present posture. See *United States* v. *Nixon*, 418 U.S. 683 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Consequently, I am compelled to deny this application for a stay.

[Publisher's note: See 439 U.S. 1326 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–73

Truong Dinh Hung, Applicant,	)	
v.	)	On Application for Bail.
United States of America.	)	

[August 4, 1978]

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application[1] for bail pending appeal to the Court of Appeals for the Fourth Circuit from the conviction of applicant on May 19, 1978, following a jury trial in the United States District Court for the Eastern District of Virginia, of conspiracy to commit espionage (Count 1); conspiracy to violate laws prohibiting the unlawful conversion of government property and the communication of classified information to a foreign agent (Count 2); espionage (Count 3); theft of government property (Count 5); acting as a foreign agent without registration (Count 6); and unlawful transmission of defense information (Count 7).[2] Applicant was sentenced to 15 years' imprisonment on Counts 1 and 3, two years' imprisonment on Count 2, and five years' imprisonment on Counts 5, 6, and 7, all sentences to be served concurrently.

The District Court admitted applicant to bail prior to trial in the amount of $250,000, but immediately after applicant's conviction revoked the bail pursuant to 18 U.S.C. § 3148,[3]

[1] This application was originally presented to CHIEF JUSTICE BURGER as Circuit Justice. In his absence it was referred to me.

[2] See 18 U.S.C. §§ 371, 641, 793(e), 794(a) and (c), 951; 50 U.S.C. §§ 783(b) and (c).

[3] The statute states, in the pertinent part:

"A person . . . who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of [18

stating three reasons: (l) the substantial evidence of guilt; (2) the seriousness of the crimes and the length of the potential sentences;[4] and (3) the risk of flight, given the severity of the potential sentences and the fact that applicant was not an American citizen. The Court of Appeals in an unreported opinion sustained the revocation, stating:

> "The defendant is a Vietnamese citizen. The charge upon which he was convicted involved the receipt and transmission of classified information to the Vietnamese Ambassador in Paris. The defendant has not established a permanent residence in this country, and, should he flee to Vietnam, the United States would have no means to procure his return for the imposition of sentence or for sentence service.
>
> "Under the circumstances, we find no abuse of discretion of the district judge in denying the defendant bail pending appeal."

See Application for Release Upon Reasonable Bail, Exhibit A, at 2.

Applicant's appeal presents, *inter alia*, an important question heretofore specifically reserved by this Court in *United States* v. *United States District Court*, 407 U.S. 297 (1972), namely, "the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.*, at 308. There is a difference of view among the Courts of Appeals on this question. Compare

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U.S.C. § 3146] unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee . . . . If such a risk of flight . . . is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained."

[4] At the time applicant faced the possibility of two life sentences as well as additional terms of imprisonment totaling 35 years. After the Court of Appeals had affirmed the District Court's revocation of bail, applicant was sentenced to a maximum of only 15 years. He has not, however, brought this fact to the attention of either the District Court or the Court of Appeals by way of a motion for reconsideration of bail revocation.

Zweibon v. *Mitchell*, 516 F.2d 594, 651 (DC Cir. 1975) (en banc), with *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (en banc). See also *Katz* v. *United States*, 389 U.S. 347, 359 (1967) (Douglas, J., concurring); *id.*, at 362 (WHITE, J., concurring). The question arises in this case because of applicant's challenge to the admission of evidence obtained from a wiretap placed in applicant's apartment over a period of approximately three months without prior judicial warrant. As phrased in the application, "The court of appeal . . . will be asked to rule upon the government's claim of power to conduct lengthy warrantless surveillance of domestic premises, in light not only of the fourth amendment but of the express authorization of 18 U.S.C. § 2516(1)(a) for the use of warrants in espionage cases."

The uncertainty of the ultimate answer to this important constitutional question is not of itself, however, sufficient reason to continue applicant's bail. Section 3148 expressly authorizes the detention of a convicted person pending appeal when "risk of flight . . . is believed to exist." It was the risk "[u]nder the circumstances" upon which the Court of Appeals rested its conclusion that "we find no abuse of discretion of the district judge in denying the defendant bail pending appeal." This judgment is entitled to "great deference." *Harris* v. *United States*, 404 U.S. 1232 (1971) (Douglas, J., in chambers). Nevertheless, "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." *Reynolds* v. *United States*, 80 S. Ct. 30, 32 (1959) (Douglas, J., in chambers). See *Mecom* v. *United States*, 434 U.S. 1340, 1341 (1977) (POWELL, J., in chambers). The question for my "independent determination" is thus whether the evidence justified the courts below in reasonably believing that there is a risk of applicant's flight. In making that determination, I am mindful that "[t]he command of the Eighth Amendment that 'Excessive bail shall not be required . . .' *at the very least* obligates judges passing upon the right to bail to deny such

relief only for the strongest of reasons." *Sellers* v. *United States*, 89 S. Ct. 36, 38 (1968) (Black, J., in chambers). [Publisher's note: It is not clear whether "*at the very least*" was emphasized in the original version of the *Sellers* opinion issued by Justice Black, or whether the emphasis was added later. Compare *Sellers* v. *United States*, 2 Rapp 395, 396 (1968) (without emphasis), with *Sellers* v. *United States*, 89 S. Ct. 36, 38 (1968) (with emphasis).]

Given this constitutional dimension, I have concluded that the reasons relied upon by the courts below do not constitute sufficient "reason to believe that no one or more conditions of release will reasonably assure" that applicant will not flee. The evidence referred to by the Court of Appeals is that applicant maintained contact with the Vietnamese Ambassador in Paris, that he has not established a permanent residence in this country, and that, should applicant flee to Vietnam, the United States would have no means to procure his return.[5] But if these considerations suggest opportunities for flight, they hardly establish any inclination on the part of applicant to flee. And other evidence supports the inference that he is not so inclined. Applicant faithfully complied with the terms of his pretrial bail and affirmed at sentencing his faith in his eventual vindication and his intention not to flee if released on bail. He has resided continuously in this country since 1965, and has extensive ties in the community. He has produced numerous affidavits attesting to his character and to his reliability as a bail risk.[6] He has maintained a close relationship with his sister, a permanent resident of the United States since 1969. The equity on his sister's Los Angeles home comprises a substantial measure of the security for applicant's bail. In addition, applicant's Reply to the Memorandum of the United States in Opposition informs us that the "American Friends Service Committee and the National Council of Churches have come forward with large sums which are now in the registry of the court in Alexandria."

I conclude, therefore, that there was insufficient basis for revocation of applicant's bail following his conviction, and

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[5] The Solicitor General, in his Memorandum in Opposition, notes in addition that applicant's parents and other close relatives still reside in Vietnam, and that applicant's lack of a passport or other travel documents would present no great obstacle to his flight.

[6] Applicant has filed 11 such affidavits: affiants include Ramsey Clark, Noam Chomsky, Richard Falk, and George Wald.

that his bail should be continued at $250,000 pending decision of his appeal by the Court of Appeals. The application is therefore remanded to the District Court for the determination of further appropriate conditions of release, and for further proceedings consistent with this opinion.

[Publisher's note: See 439 U.S. 1338 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A–99 AND A– 87

Michael H. Miroyan, Petitioner, A–99 *v.* United States.	))))	On Motion for Stay Under Supreme Court Rules 27, 50, and 51 and 28 U.S.C. § 2101(f).
Eugene Logan McGinnis, Petitioner, A–87 *v.* United States.	)))	On Motion for Order Staying Mandate.

[August 8, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants McGinnis and Miroyan seek a stay of the mandate of the United States Court of Appeals for the Ninth Circuit pending both the filing of a petition for a writ of certiorari and this Court's final disposition of their case. Their convictions for several drug-related offenses were secured largely on evidence obtained through the use of an electronic tracking device, or "beeper," attached to an airplane used by applicants to import several hundred pounds of Mexican marihuana into this country. Applicants maintain that the Government's installation and use of the beeper violated their rights under the Search and Seizure Clause of the Fourth Amendment and that the decision of the Ninth Circuit conflicts with decisions of other courts of appeals. Twice within the last year this Court has declined to review similar Fourth Amendment claims in strikingly similar cases. *Houlihan* v. *Texas*, 551 S.W.2d 719 (Tex. Crim. App.), cert. denied, 434 U.S. 955 (1977); *United States* v. *Abel*, 548 F.2d 591 (CA5), cert. denied, 431 U.S. 956 (1977). This fact leads me to conclude that unless applicants can demonstrate

a conflict among the Courts of Appeals of which this Court was unaware at the time of the previous denials of certiorari, or which has developed since then, applicants' petition for certiorari will not command the four votes necessary for the granting of the writ in their case. While there is undoubtedly a difference of approach between the Circuits on the question, I am not sure that there is a square conflict, and I am even less sure that the granting of certiorari in this case would result in the resolution of any conflict which does exist. I think it quite doubtful that applicants' petition for certiorari will be granted and have accordingly decided to deny the application for a stay.

Miroyan arranged with Aero Trends, Inc., of San Jose, Cal., to rent a Cessna aircraft for one week. On the day before the beginning of the rental period, pursuant to a United States Magistrate's order and with the aircraft owner's express permission, Drug Enforcement Administration (DEA) agents installed a beeper in the aircraft. Miroyan and McGinnis then departed in the rented airplane and journeyed to Ciudad Obregon in the Republic of Mexico. Following in a United States Customs aircraft, federal agents monitored applicants' trip into Mexico by means of the beeper's signals and visual sightings. On May 11 Customs personnel in Phoenix, Ariz., picked up the beeper's signals and determined that the aircraft was returning to the United States. Federal agents again took to the air and tracked the aircraft's progress to Lompoc, Cal., where McGinnis deplaned and checked into a Lompoc motel. Miroyan flew on to nearby Santa Ynez airport and was arrested while transferring several hundred pounds of marihuana from the airplane to a pickup truck. McGinnis was arrested at his motel room in Lompoc. Both men were separately tried and convicted of conspiracy to possess a controlled substance with intent to distribute, importation of a controlled substance, and possession of a controlled substance with intent to distribute.

Applicants appealed their convictions to the Ninth Circuit, urging, *inter alia*, that the District Court had erred in refusing

to suppress the marihuana and other evidence obtained as a result of the use of the beeper. In essence, applicants argued that the installation of the beeper and the monitoring of its signals constituted a search or searches within the meaning of the Fourth Amendment. Because the installation of the beeper had been authorized by a federal magistrate, applicants focused their attack on the sufficiency of the affidavit upon which the magistrate's order had been predicated. The Ninth Circuit examined the Fourth Amendment implications of both the installation of the beeper and the monitoring of its signals. Finding no distinction between visual surveillance and surveillance accomplished through the use of an electronic tracking device, the court held that the mere use of the beeper to monitor the location of the aircraft as it passed through public airspace did not infringe upon any reasonable expectation of privacy and therefore did not constitute a search subject to the warrant requirement of the Fourth Amendment. It went on to hold that the installation of the device, having been performed with the owner's express consent and prior to the beginning of the rental period, did not violate applicants' Fourth Amendment rights. The court, having found neither search nor seizure, did not reach the question concerning the sufficiency of the affidavit.

Both the decision in this case and the decisions with which applicants claim it is in conflict used *Katz* v. *United States*, 389 U.S. 347 (1967), as their point of departure. There this Court held that "[t]he Government's activities in electronically listening to and recording the petitioner's [telephone conversation] violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."

In other cases in which enterprises similar to applicants' have been frustrated with the aid of electronic tracking devices, defendants have frequently cited *Katz* for the proposition that installation and use of the devices are searches subject to the strictures of the Fourth Amendment. In support

of their contention that the Ninth Circuit's position on this question is at odds with that of other Circuit Courts, applicants point to *United States* v. *Moore*, 562 F.2d 106 (CA1 1977) and *United States* v. *Holmes*, 521 F.2d 859 (CA5 1975), aff'd by an equally divided en banc court, 537 F.2d 227 (CA5 1976).

In *Moore* DEA agents, without the benefit of a warrant or the owner's consent, surreptitiously attached beepers onto two vehicles parked by defendants in a shopping center parking lot. As the Court of Appeals for the First Circuit framed the issue, "The basic question [was] whether use of the beepers so implanted to monitor the movements of the U-Haul van and the 1966 Mustang . . . violated defendants' reasonable expectation of privacy." *United States* v. *Moore*, 562 F.2d, at 112. That court answered the question affirmatively, but reasoned that the lessened expectation of privacy associated with motor vehicles justifies the installation and use of beepers without a warrant so long as the officers installing and using the device have probable cause. Finding the electronic surveillance in that case supported by probable cause to believe that defendants planned to manufacture a controlled substance, the court held that use of the beepers did not violate defendants' Fourth Amendment rights.

In *Holmes* Government agents attached a beeper to defendant's van while defendant was in a nearby lounge negotiating with an undercover agent for the sale of 300 pounds of marihuana. The tracking device ultimately led to the seizure of over a ton of marihuana. In affirming the District Court's order suppressing all evidence obtained through the use of the beeper, a panel of the Fifth Circuit held that installation of the beeper constituted a search within the Fourth Amendment and that Government agents "had no right to attach the beacon without consent or judicial authorization." *United States* v. *Holmes*, 521 F.2d, at 865. An evenly divided en banc court affirmed the panel's decision without comment. 537 F.2d 227 (CA5 1976).

Both *Moore* and *Holmes* are plainly different from this case

case [Publisher's note: One "case" is surplus.] with respect to one important fact: the beeper leading to the arrest of McGinnis and Miroyan was installed on their rented airplane with the owner's express consent before possession of the aircraft passed to applicants. Equally plainly, the Fourth Amendment analysis employed by the Court of Appeals for the First Circuit differs from that employed by the Court of Appeals for the Ninth Circuit in this case. I do not think that the same can be said with respect to the Fifth and Ninth Circuits: *Holmes* was ultimately an affirmance of the District Court by an equally divided Court of Appeals after withdrawal of the panel opinion; and, indeed, on two separate occasions since *Holmes*, the Fifth Circuit has rejected Fourth Amendment claims on facts virtually identical to those of the instant case on the ground that the owner-authorized installation of beepers on the airplane there involved came within the third-party consent exception to the warrant requirement. See *United States* v. *Cheshire*, 569 F.2d 887 (CA5 1978); *United States* v. *Abel*, 548 F.2d 591 (CA5), cert. denied, 431 U.S. 956 (1977).

The question, then, it seems to me, boils down to how significant the difference between the approaches of the First and Ninth Circuits is. Assuming that it is sufficiently significant to ultimately lead this Court to grant certiorari to resolve the difference, is the Court likely to do so in this case? I think that in all probability this Court may eventually feel bound to decide whether government agencies must have probable cause to install tracking devices on motor vehicles or in articles subsequently used in a criminal enterprise when the installation is expressly authorized by the owner of the vehicle or article. Such a decision could require a choice between the Ninth Circuit's view that the operator of an airplane has no legitimate expectation of privacy which would prevent observation of the plane's movement through the public airspace, and the First Circuit's view that the operator of a vehicle does have an expectation "not to be carrying around an uninvited device that continually signals his presence." *United States* v. *Moore*, 562 F.2d, at

112. Or conceivably this Court could choose to adopt the third-party consent ruling of the Fifth Circuit. See *United States* v. *Cheshire, supra*.

But because the question is an important and recurring one, the Court is apt to feel that the case taken under consideration should pose the issue as clearly as possible. Having within the past year denied certiorari in two cases strikingly similar to applicants', the Court is not likely to grant certiorari in this case unless such an action would appear to offer the strong likelihood of deciding an issue on which a square conflict exists. I simply cannot tell from the applicants' motion papers or from the opinion of the Court of Appeals for the Ninth Circuit whether the District Court made any finding on the existence of probable cause, or whether the applicants' arguments to that court went to a lack of probable cause as well as to the insufficiency of the affidavit in support of the warrant. If upon review of the applicants' petition for certiorari and the Government's response thereto, it appears that there was in fact probable cause to justify installation of the beeper in this case, it seems to me very likely that this Court would hesitate to grant certiorari to decide the abstract proposition of whether probable cause is in fact required.

This latter factor also bears to some extent on applicants' claim of irreparable injury should a stay not be granted. That claim is the customary one that should a stay be denied, but certiorari be granted and the position of the First Circuit be adopted as the law by this Court, they will have served time in prison under a judgment of conviction which will eventually be reversed. But on the papers before me, I think that even under their most favorable hypothesis, the most applicants could expect is a remand to the Ninth Circuit for consideration by that court or by the District Court of whether there was probable cause. And if that question was resolved adversely to the applicants, there is no reason to think that their judgments of conviction would not again be affirmed by the Ninth Circuit.

Accordingly, applicants' motions to stay the mandate of the United States Court of Appeals for the Ninth Circuit is [Publisher's note: "is" should be "are".] denied.

[Publisher's note: See 439 U.S. 1348 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–134

Columbus Board of Education et al., Applicants, *v.* Gary L. Penick et al.	))))	On Application for Stay.

[August 11, 1978]

MR. JUSTICE REHNQUIST.

The Columbus, Ohio, Board of Education and the Superintendent of the Columbus Public Schools request that I stay execution of the judgment and the mandate of the Court of Appeals for the Sixth Circuit in this case pending consideration by this Court of their petition for certiorari. The judgment at issue affirmed findings of systemwide violations of the Equal Protection Clause of the Fourteenth Amendment on the part of the Columbus Board of Education, and upheld an extensive school desegregation plan for the Columbus school system. The remedy will require reassignment of 42,000 students, alteration of the grade organization of almost every elementary school in the Columbus system, the closing of 33 schools, reassignment of teachers, staff and administrators, and the transportation of over 37,000 students. The 1978-1979 school year begins on September 7, and the applicants maintain that failure to stay immediately the judgment and mandate of the Court of Appeals will cause immeasurable and irreversible harm to the school system and the community. The respondents are individual plaintiffs and a plaintiff class consisting of all children attending Columbus public schools, together with their parents and guardians.

This stay application comes to me after extensive and complicated litigation. On March 8, 1977, the District Court for the Southern District of Ohio issued an opinion declaring the

Columbus school system unconstitutionally segregated and ordering the defendants to develop and submit proposals for a systemwide remedy. That decision predated this Court's opinions in three important school desegregation cases: *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Brennan* v. *Armstrong*, 433 U.S. 672 (1977); and *School District of Omaha* v. *United States*, 433 U.S. 667 (1977). In the lead case, *Dayton*, this Court held that when fashioning a remedy for constitutional violations by a school board, the court "must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." 433 U.S., at 420. The defendants moved that the District Court reconsider its violation findings and adjust its remedial order in light of our *Dayton* opinion. Upon such reconsideration, the District Court concluded that *Dayton* simply restated the established precept that the remedy must not exceed the scope of the violation. Since it had found a systemwide violation, the District Court deemed a systemwide remedy appropriate without the specific findings mandated by *Dayton* on the impact discrete segregative acts had on the racial composition of individual schools within the system. The Sixth Circuit affirmed. *Penick* v. *Columbus Board of Education*, Nos. 77-3365-3366, 3490-3491, and 3553 (July 14, 1978).

Prior to its submission to me, this application for stay was denied by MR. JUSTICE STEWART. While I am naturally reluctant to take action in this matter different from that taken by him, this case has come to me in a special context. Four days before the application for stay was filed in this Court, the Sixth Circuit issued its opinion in the *Dayton* remand. *Brinkman* v. *Gilligan* (*Dayton IV*), No. 78-3060 (July 27, 1978). Pursuant to this Court's opinion in *Dayton*, the District Court for the Southern District of Ohio had held

a new evidentiary hearing on the scope of any constitutional violations by the Dayton school board and the appropriate remedy with regard to those violations. It had concluded that *Dayton* required a finding of segregative intent with respect to each violation and a remedy drawn to correct the incremental segregative impact of each violation. On that basis the District Court had found no constitutional violations and had dismissed the complaint. The Sixth Circuit reversed, characterizing as a "misunderstanding" the District Court's reading of our *Dayton* opinion. *Dayton IV*, *supra*, slip. op., at 4. It reinstated the systemwide remedy that it had originally affirmed in *Brinkman* v. *Gilligan* (*Dayton III*), 539 F.2d 1084 (1976), vacated and remanded, 433 U.S. 406 (1977).

Dayton IV and the instant case clearly indicate to me that the Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion. During the Term of the Court, I would refer the application for a stay in a case as significant as this one to the full Court. But that is impossible here. The opinions of the District Court and the Court of Appeals total almost 200 pages of some complexity. It would be impracticable for me to even informally circularize my colleagues, with an opportunity for meaningful analysis, within the time necessary to act if the applicants are to be afforded any relief and the Columbus community's expectations adjusted for the coming school year.

I am of the opinion that the Sixth Circuit in this case evinced an unduly grudging application of *Dayton*. Simply the fact that three Justices of this Court might agree with me would not necessarily mean that the petition for certiorari would be granted. But this case cannot be considered without reference to the Sixth Circuit's opinion in *Dayton IV*. In both cases the Court of Appeals employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as "isolated" instances. *Penick* v. *Columbus Board of Education*, *supra*, slip op., at 36 (July 14, 1978). The Sixth Circuit is apparently of the opinion that presumptions, in combination with such isolated

violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect [Publisher's note: The first "e" in "effect" is written above an obliterated "a".] of the identified violations. That is certainly not my reading of *Dayton* and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*. In my opinion, this questionable use of legal presumptions, combined with the fact that the Dayton and Columbus cases involve transportation of over 52,000 school children, would lead four Justices of this Court to vote to grant certiorari in at least one case and hold the other in abeyance until disposition of the first.

On the basis of the District Court's findings, some relief may be justified in this case under the principles laid down in *Dayton*. Two instances where the school system set up discontiguous attendance areas that resulted in white children being transported past predominantly black schools may be clear violations warranting relief. But the failure of the District Court and the Court of Appeals to make any findings on the incremental segregative effect of these violations make [Publisher's note: "make" should be "makes"] it impossible for me to tailor a stay to allow the applicants a more limited form of relief.

In their response, the plaintiffs/respondents also take an "all or nothing" approach and do not offer any suggestions as to how the mandate and judgment of the Court of Appeals can be stayed only in part consistent with the applicants' legal contentions. I therefore have no recourse but to grant or deny the stay of the mandate and judgment in its entirety.

The last inquiry in gauging the appropriateness of a stay is the balance of equities. If the stay is granted the respondent-children's opportunity for a more integrated educational experience is forestalled. How many children and how integrated an educational experience are impossible to discern because of the failure of the courts below to inquire how the complexion of the school system was affected by specific violations.

In contrast, the impact of the failure to grant a stay on the applicants is quite concrete. Extensive preparations toward

implementation of the desegregation plan have taken place, but an affidavit filed in this Court by the Superintendent of the Columbus Public Schools indicates that major activities remain for the four weeks before the new school term begins. These activities include inventory, packing, and moving of furniture, textbooks, equipment and supplies; completion of pupil reassignments, bus routes and schedules, and staff and administrative reassignments; construction of bus storage and maintenance facilities; hiring and training of new bus drivers; and notification to parents of pupil reassignments and bus information. Such activities cannot be easily reversed. Most important, on September 7 there will occur the personal dislocations that accompany the actual reassignment of 42,000 students, 37,000 of which will be transported by bus.

The Columbus school system has severe financial difficulties. It is estimated that for calendar year 1978 the system will have a cash deficit of $9.5 million, $7.3 million of which is calculated to be desegregation expenses. Under Ohio law school districts are not permitted to operate when cash balances fall to zero and it is now projected that the Columbus school system will be forced to close in mid-November of 1978. Financial exigency is not an excuse for failure to comply with a court order, but it is a relevant consideration in balancing the equities of a temporary stay.

Given the severe burdens that the school desegregation order will place on the Columbus school system and the Columbus community in general, and the likelihood that four Justices of this Court will vote to grant certiorari in this case, I have decided to grant the stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit.

As this Court noted in *Dayton*, "local autonomy of school districts is a vital national tradition." 433 U.S., at 410. School desegregation orders are among the most sensitive encroachments on that tradition, not only because they affect the assignment of pupils and teachers, but also because they often restructure the system of education. In this case the desegregation order requires alteration of the grade organiza-

tion of virtually every elementary school in Columbus. As this Court emphasized in *Dayton*, judicial imposition on this established province of the community is only proper in the face of factual proof of constitutional violations and then only to the extent necessary to remedy the effect of those violations.

It is therefore ordered that the application for a stay of the judgments and mandates of the Court of Appeals for the Sixth Circuit and the District Court for the Southern District of Ohio be granted pending consideration of a timely petition for certiorari. The stay is to remain in effect until disposition of the petition for certiorari. If the petition is granted, the stay shall remain in effect until further order of this Court.

[Publisher's note: See 439 U.S. 1345 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–152

Patricia H. Brennan and J. Paul Brennan, d/b/a P.H. Brennan Hand Delivery, Petitioners, *v.* United States Postal Service.	)	On Application for Stay.

[August 11, 1978]

MR. JUSTICE MARSHALL, Circuit Justice.

Patricia H. Brennan and J. Paul Brennan have applied to me for a stay of the judgment of the Second Circuit Court of Appeals pending the filing and disposition by this Court of their petition for a writ of certiorari. Applicants operate a hand delivery mail service in Rochester, N.Y. The United States Postal Service (USPS) brought suit in the Western District of New York to enjoin operation of this service on the ground that the Private Express Statutes, 39 U.S.C. §§ 601-606 and 18 U.S.C. §§ 1693-1699, proscribe private carriage and delivery of "letters and packets." Applicants concede that the Private Express Statutes do indeed prohibit their activities, but they challenge the prohibition principally on the basis that the Constitution does not confer upon Congress exclusive power to operate a postal system.[1] The District Court rejected the challenge and permanently enjoined further violations. The Court of Appeals affirmed, denied motions for rehearing and rehearing en banc, and refused to

[1] They contend also that the legislation violates the Tenth Amendment because it denies to the States and to the people a concurrent power reserved to them, that Congress improperly delegated to the USPS the power to define "letters and packets," and that the extension of the postal monopoly only to letter mail arbitrarily discriminates against their business. Applicants intend to pursue these challenges in their petition for certiorari, but do not elaborate on them here.

stay its judgment pending disposition of a petition for a writ of certiorari. Applicants invoke the jurisdiction of this Court under 28 U.S.C. § 2101(f).

The argument applicants press here is that Congress exceeded its powers by granting the USPS a monopoly over the conveyance of letter mail. Article I, § 8, cl. 7 of the Constitution provides that "Congress shall have Power . . . To establish Post Offices and post Roads." Nothing in this language or in any other provision of the Constitution, applicants submit, implies that the postal power is invested *exclusively* in the Legislative Branch. Although Congress has authority under Art. I, § 8, cl. 18, to make such laws as are "necessary and proper" for carrying out its delegated functions, applicants argue that this provision does not permit it to convert a nonexclusive power into an exclusive one.

The well-established criteria for granting a stay are "that the applicants must show 'a balance of hardships in their favor' *and* that the issue is so substantial that four Justices of this Court would likely vote to grant a writ of certiorari." *New York Times* v. *Jascalevich*, — U.S. —, 47 U.S.L.W. —, — (Aug. 4, 1978). I cannot conceive that four Justices would agree to review the Court of Appeals' ruling on the argument advanced here. That argument rests on the tenuous premise that the Framers intended to create categories of exclusive and nonexclusive powers so inviolable that a subsequent Congress could not determine that a government monopoly over letter mail was "necessary and proper" to prevent private carriers from securing all of the profitable postal routes and relegating to the USPS the unprofitable ones. Applicants have presented no convincing evidence of such an intent, and such a miserly construction of congressional power transgresses principles of constitutional adjudication settled since *M'Culloch* [Publisher's note: "*McCulloch*" is the preferred form these days. See 439 U.S. at 1346.] v. *Maryland*, 4 Wheat. 316 (1819). As Chief Justice Marshall stated there, "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which

will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." 4 Wheat., at 421.

Moreover, long historical practice counsels against reviewing this novel constitutional claim. The Private Express Statutes have existed in one form or another since passed by the First Congress in 1792,[2] and their constitutionality has never been successfully challenged. While such longevity does not ensure that a statute is constitutional, it is certainly probative here of whether four Justices would vote to hear the merits of applicants' case. Cf. *Myers* v. *United States*, 272 U.S. 52, 175 (1926). This Court's recent refusal to review the Tenth Circuit's decision upholding the Private Express Statutes, *United States* v. *Black*, 569 F.2d 1111, cert. denied, — U.S. —, 46 U.S.L.W. 3601 (Mar. 28, 1978), and the absence of any conflict among the circuits on this point also indicate that applicants have not satisfied the criteria for the granting of a stay.

Accordingly, the application is denied.

[2] Indeed, the 1792 Act continued in effect a statute of the Continental Congress that had created a postal monopoly. Act of Feb. 20, 1792, 1 State [Publisher's note: "State" should be "Stat."] 232, 236, adopting Act of Oct. 18, 1782, 23 J.C.C. 672-673.

[Publisher's note: See 439 U.S. 1354 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1091

Reproductive Services, Inc., Applicant,	)	On Renewed Application to
v.	)	Stay an Order of the
Dee Brown Walker, District Judge.	)	Supreme Court of Texas.

[August 21, 1978]

MR. JUSTICE BRENNAN.

On July 17, 1978, in a chambers opinion, I stated that "on express condition that the parties agree to a protective order ensuring the privacy of patients at applicant's clinics, the stay I entered on July 10, 1978, in these proceedings is hereby dissolved. If such a protective order is not entered, applicant may resubmit a further stay application."

On August 14, 1978, applicant renewed its application, filing therewith a copy of an order entered August 1, 1978, by respondent, which they alleged did not constitute "such a protective order." Upon examination of said order of August 1, 1978, it is my view that said order does not constitute "such a protective order." Accordingly, the "express condition" upon which my stay entered on July 10, 1978, was to be dissolved not having been satisfied, said stay of July 10, 1978, is continued in effect pending the timely filing of a petition for certiorari.

Should said petition for writ of certiorari be denied, the stay of July 10, 1978, is to terminate automatically. In the event said petition for writ of certiorari is granted, the stay of July 10, 1978, is to continue in effect pending the issuance of the mandate of this Court.

[Publisher's note: See 439 U.S. 1355 for the authoritative official version of this opinion.]

GENERAL COUNCIL ON FINANCE & ADMINISTRATION, UNITED METHODIST CHURCH *v.* CALIFORNIA SUPERIOR COURT, SAN DIEGO COUNTY (BARR ET AL., REAL PARTIES IN INTEREST)

ON APPLICATION FOR STAY

No. A–200. Decided August 24, 1978

Application to stay, pending consideration of a petition for certiorari, California Superior Court proceeding in which applicant is a defendant is granted temporarily, pending receipt and consideration of a response to the application, notwithstanding inexcusable delay in filing the application.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant requests that proceedings in the Superior Court of the State of California for the County of San Diego in which it is a defendant be stayed as to it pending consideration by this Court of its petition for a writ of certiorari to review the judgment of that court filed March 20, 1978. I have decided to grant a temporary stay of the proceedings against applicant pending receipt and my consideration of a response to the application.

Applicant has, in my opinion, inexcusably delayed the filing of its application for a stay. The Supreme Court of the State of California denied applicant's petition for hearing on its request for a writ of mandate on July 27, 1978. On August 3, 1978, the Superior Court granted applicant 30 days from July 27, 1978, until August 28, in which to plead, but denied any additional stay of the proceedings. Applicant did not seek any further stay of the proceedings from either the California Court of Appeal or the California Supreme Court. Nevertheless, it did not file its application for a stay in this Court until August 22, nearly three weeks after the Superior Court's order and only six days before it was required to plead.

It is only because a delay of a few days will have virtually no effect on the progress of the state-court proceedings that I have decided to grant this temporary stay. It should be noted, however, that in deciding whether to grant or deny any further relief of this nature beyond that provided in this order, I shall take into consideration the above-described delay on the applicant's part.

[Publisher's note: This version of the opinion was typed on a sheet of plain paper. See 439 U.S. 1357 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–212

Dayton Board of Education, Applicant,	)	
v.	)	On Application for Stay
Mark Brinkman, et al.	)	

August 28, 1978

MR. JUSTICE STEWART, Circuit Justice.

The Dayton, Ohio Board of Education requests that I stay execution of the judgment and mandate of the Court of Appeals for the Sixth Circuit in this case pending consideration by the Court of its petition for certiorari. The judgment reversed the dismissal by the district court of the plaintiffs' school desegregation suit, and ordered the extensive desegregation plan continued.

The applicant urges that this case be stayed because it raises many of the issues presented by Columbus Board of Education v. Penick. Mr. Justice Rehnquist stayed the mandate of the Sixth Circuit in that case on August 11, 1978. A crucial distinction between these cases leads me to believe that this application should be denied. Columbus had never been the subject of a school desegregation remedy; the Dayton system, by contrast, will enter its third year under the current plan on September 7. In Columbus the status quo was preserved by granting a stay; here it can be preserved only by denying one. To avoid disrupting the school system during our consideraton [Publisher's note: "consideraton" should be "consideration".] of the case, the stay should be denied. This disposition, of course, does not reflect any view on the merits of the issues presented

The application for a stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit is denied.

[Publisher's note: This version of the opinion was typed on Supreme Court stationery. See 439 U.S. 1358 for the authoritative official version of this opinion.]

Supreme Court of the United States
Washington, D.C. 20543

No. A–212

Dayton Board of Education, Applicant,	)	
v.	)	On Application for Stay
Mark Brinkman, et al.	)	

[August 30, 1978]

MR. JUSTICE REHNQUIST.

The applicant, Dayton Board of Education, has presented to me an application for stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit, which has been denied by Mr. Justice Stewart. In his chambers opinion Mr. Justice Stewart stated:

> "The applicant urges that this case be stayed because it raises many of the issues presented by Columbus Board of Education v. Penick. Mr. Justice Rehnquist stayed the mandate of the Sixth Circuit in that case on August 11, 1978. A crucial distinction between these cases leads me to believe that this application should be denied. Columbus had never been the subject of a school desegregation remedy; the Dayton system, by contrast, will enter its third year under the current plan on September 7. In Columbus the status quo was preserved by granting a stay; here it can be preserved only by denying one. To avoid disrupting the school system during our consideration of the case, the stay should be denied. This disposition, of course, does not reflect any view on the merits of the issues presented."

I am in complete agreement with Mr. Justice Stewart that there is a difference between the status quo in the Dayton school system and that in the Columbus school system. Since the maintenance of the status quo is an important consideration in granting a stay, I agree with Mr. Justice Stewart that the application for a stay should be denied.

[Publisher's note: This version of the opinion was typed on Supreme Court stationery. See 439 U.S. 1367 for the authoritative official version of this opinion.]

Supreme Court of the United States
Washington, D.C. 20543

No. A–233

Kenneth Eugene Divans, Petitioner,	)	
v.	)	On Application for Stay
California	)	

[September 1, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant's motion to stay the proceedings in the superior court of Santa Clara County, California, is denied.

In July 1977 applicant filed a similar motion for stay pending review in this Court of his claim that the double jeopardy clause of the United States Constitution prohibits the State of California from retrying him for murder. In denying the stay, I noted the California superior court's finding that the error resulting in the court's mistrial declaration was not intentionally committed by the prosecution for the purpose of provoking applicant's mistrial request. Divans v. California, 434 U.S. 1303 (1977) (Rehnquist, J., in chambers). During January of last Term, both Mr. Justice Brennan and I denied applicant's second stay application, in which he alleged that additional facts had come to light which proved that the prosecutor had acted in bad faith at the first trial.

In the instant motion applicant contends that he has acquired still more information demonstrating the prosecutor's bad faith. Applicant presents, however, only his own assertions to this effect, and none of the moving papers before me contain any findings which contradict the superior court's finding, referred to in my earlier chambers opinion, that the prosecutor's error was not calculated to force applicant to move for a mistrial. On

the contrary, repeated summary rejections of applicant's claim in the California state courts indicate that the superior court's original finding stands undisturbed. Accordingly, I remain convinced that this Court would not grant certiorari to review applicant's double jeopardy claim.

[Publisher's note: See 439 U.S. 1369 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–200 (78–300)

The General Council on Finance and Administration of The United Methodist Church, Petitioner, *v.* Superior Court of California, County of San Diego (Frank T. Barr, et al., Real Parties in Interest).	)	On Application for Stay Pending Review on Certiorari.

[September 1, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

The General Council on Finance and Administration of The United Methodist Church requests that proceedings in the Superior Court of the State of California for the County of San Diego in which it is a defendant be stayed as to it pending this Court's consideration of its petition for a writ of certiorari. Applicant, an Illinois not-for-profit corporation, is one of six defendants in a class action seeking, *inter alia*, damages for breach of contract, fraud and violations of state securities laws arising out of the financial collapse of the Pacific Homes Corporation, a California nonprofit corporation that operated 14 retirement homes and convalescent hospitals on the west coast. *Barr* v. *The United Methodist Church*, No. 404611 (Cal. Super. Ct., San Diego Cty.). Respondents, some 1,950 present and former residents of the homes, allege that Pacific Homes was the alter ego, agency or instrumentality of The United Methodist Church ("Methodist Church"), applicant and certain other defendants affiliated with the Methodist Church. The judgment at issue is the Superior Court's denial of applicant's motion to quash service of process for lack of *in personam* jurisdiction. That court, in a minute order decision, concluded that applicant was "doing business"

in the State of California and, therefore, was subject to the jurisdiction of the California courts. Applicant's petition for a writ of mandate to review the judgment of the Superior Court was denied by the Court of Appeal for the Fourth Appellate District in a one-sentence order, and the California Supreme Court summarily denied applicant's petition for a hearing on the issue. Thereafter, applicant was ordered by the Superior Court to respond to respondents' complaint on or before August 28, 1978. I granted a temporary stay of the proceedings below to permit consideration of a response to the application.

Applicant challenges the Superior Court's order on three grounds. First, citing this Court's decision in *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, 426 U.S. 696 (1976), applicant maintains that the Superior Court violated the First and Fourteenth Amendments in basing its assertion of jurisdiction on respondents' characterization of applicant's role in the structure of the Methodist Church and rejecting contrary testimony of church officials and experts and statements set forth in The Book of Discipline, which contains the constitution and bylaws of the Methodist Church. Applicant's next contention is that use of the "minimum contacts" standard of *International Shoe Co.* v. *Washington*, 326 U.S [Publisher's note: There should be a period after the "S".] 310 (1945), in determining jurisdiction over a nonresident religious organization violates the First and Fourteenth Amendments. Finally, applicant argues that even under the traditional minimum contacts mode of analysis, its connection with the State of California is too attenuated, under the standards implicit in the Due Process Clause of the Fourteenth Amendment, to justify imposing upon it the burden of a defense in California.

Because the Superior Court's order denied a pretrial motion, an initial question is whether the judgment below is "final" within the meaning of 28 U.S.C. § 1257, which permits this Court to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." Applicant argues that it can preserve its jurisdic-

tional argument only by suffering a default judgment, since under California law in order to defend on the merits it must appear generally and, accordingly, waive its objection to *in personam* jurisdiction. See *McCorkle* v. *City of Los Angeles*, 70 Cal. 2d 252, 449 P.2d 453, 74 Cal. Rptr. 389 (1969). It therefore finds itself between Scylla and Charybdis, and, citing *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), asserts that under such circumstances the Superior Court's judgment is final. In *Shaffer*, this Court, taking a "pragmatic approach" to the question of finality, held that a Delaware court's pretrial decision to assert jurisdiction over the defendants was final within the meaning of § 1257 because under Delaware law the defendants' only choices were to incur default judgments or to file general appearances and defend on the merits, thereby submitting themselves to the court's jurisdiction. *Id.*, at 195-196, n. 12. Respondents contest applicant's interpretation of California procedural law. They claim that a defendant can defend on the merits and still preserve his jurisdictional objections so long as he seeks immediate appellate review of an adverse decision on a motion to quash. See Cal. Civ. Proc. Code Ann. § 418.10. As noted above, applicant did avail itself of this procedure.

If the views of the respective parties are each to be credited, California law may not be clear on this issue, and it certainly is not within my province to resolve their differences with respect to it.[*] If California procedural law is as applicant describes it, I am convinced that this Court would find the Superior Court's judgment to be "final" within the meaning of § 1257. See *Shaffer* v. *Heitner*, *supra*; *Cox Broadcasting*

[*] I recognize that in determining whether to grant a stay, Members of this Court may hold differing views on the weight to be accorded any doubt as to the finality of a state-court judgment. See *New York Times Co.* v. *Jascalevich*, 439 U.S. — (No. A-111, Aug. 4, 1978) (MARSHALL, J., in chambers); *New York Times Co.* v. *Jascalevich*, 439 U.S. — (No. A-111, Aug. 1, 1978), (WHITE, J., in chambers); *Bateman* v. *Arizona*, 429 U.S. 1302, 1306 (1976) (REHNQUIST, J., in chambers). It is not necessary to explore that issue in this case.

Corp. v. *Cohn*, 420 U.S. 469 (1975). I need not resolve this issue, however, since I have concluded that even if the Superior Court's order were a final judgment under § 1257, a stay is nonetheless not warranted in this case.

Any intrusion into state-court proceedings at an interlocutory stage must be carefully considered and will be granted only upon a showing of compelling necessity. *Bateman* v. *Arizona*, 429 U.S. 1302, 1305 (1976) (REHNQUIST, J., in chambers). Those proceedings are presumptively valid. See *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (MARSHALL, J., in chambers). A party seeking a stay of a state-court judgment or proceeding must first demonstrate that there is a reasonable probability that four Justices will consider the issues sufficiently meritorious to vote to grant certiorari or note probable jurisdiction. *Bateman* v. *Arizona*, *supra*, at 1305. Applicant has failed to clear this first hurdle.

In my view, applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constitutent [Publisher's note: "constitutent" should be "constituent".] units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes. See *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, *supra*. But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. Thus, *Serbian Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. *Id.*, at 709-710. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of

contract and statutory violations are alleged. As the Court stated in another context, "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940). Nor is it entirely clear that the Superior Court's determination of the jurisdictional question was based upon its interpretation of Methodist polity; it is equally likely that the court's decison [Publisher's note: "decison" should be "decision".] was founded on the related but separate issue of applicant's contacts with the State of California.

Likewise untenable, in my view, is applicant's claim that the First and Fourteenth Amendments somehow forbid resort to traditional minimum contacts analysis in determining the existence of *in personam* jurisdiction over a defendant that is affiliated with an organized religion. Not surprisingly, applicant has failed to cite any authority in support of this novel proposition.

The only remaining issue presented by applicant is whether the quality and nature of its contacts with the State of California are such that "maintenance of the suit [in the forum state] does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, *supra*, at 316, quoting, *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940). Such questions generally tend to depend on the particular facts of each case, *Kulko* v. *Superior Court*, 436 U.S. — (May 15, 1978), and I believe that only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari. While the Superior Court's decision does not purport to resolve all of the factual disputes between the parties, there is no indication that it failed to apply the due process standards enunciated in *International Shoe*, and cases which have followed it, to the circumstances presented, and, therefore, I believe it unlikely that this issue would command the votes necessary for certiorari.

Accordingly, the application for a stay pending review on certiorari is denied. The temporary stay I previously entered is hereby terminated.

[Publisher's note: See 439 U.S. 1360 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–188

Madeline Buchanan et al., Applicants,	)	
v.	)	On Application for Stay.
Brenda Evans, et al.	)	

[September 1, 1978]

MR. JUSTICE BRENNAN, Circuit Justice.

The Delaware State Board of Education and eight intervening defendant suburban school districts[1] request that I stay execution of the judgment and mandate of the Court of Appeals for the Third Circuit in this case pending consideration by this Court of their petition for certiorari. The judgment affirmed an order of the District Court for the District of Delaware prescribing a school desegregation plan involving the city of Wilmington and 11 surrounding suburban school districts.[2]

[1] Pursuant to the desegregation order of the United States District Court for the District of Delaware these eight suburban districts, along with three others, were abolished as of July 1, 1978, and replaced by a single unified school district administered by the New Castle County Board of Education. The District Court, however, granted the suburban school districts limited legal status "for the limited purpose of pursuing rights of appeal or judicial review." 447 F. Supp, 982, 1039 (Del. 1978). Applicants do not now request that the order abolishing these school districts be stayed. "The independent school districts having been dissolved effective July 1, 1978, [applicants] believe that any attempt to reconstitute these districts and to operate them separately at this late date would be more disruptive than to permit the single judicial district to operate at least for the current school year." Application for Stay, at 8.

[2] Applicants request a stay of so much of the District Court's order as compels mandatory pupil and staff reassignment as well as other forms of ancillary relief. See Application for Stay, at 8; Exhibit A, at 10-13.

In deciding whether to grant a stay pending disposition of a petition for certiorari, I must consider two factors.

> "First, 'a Circuit Justice should "balance the equities". . . and determine on which side the risk of irreparable injury weighs most heavily.' *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-1309 (1973) (MARSHALL, J., in chambers). Second, assuming a balance of equities in favor of the applicant, the Circuit Justice must also determine whether 'it is likely that four Members of this Court would vote to grant a writ of certiorari.' *Id.*, at 1310. The burden of persuasion as to both of these issues rests on the applicant . . . ." *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (MARSHALL, J., in chambers).

That burden is "particularly heavy," *ibid*., when, as here, a stay has been denied by the District Court and unanimously by the Court of Appeals sitting en banc.

The thrust of applicants' position is that the desegregation plan ordered by the District Court and approved by the Court of Appeals is administratively and financially onerous, and that it is inconsistent with the precepts enunciated in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977).[3] *Dayton* vacated the order of a Court of Appeals which had "imposed a remedy . . . entirely out of proportion to the constitutional violations found by the District Court . . . ." *Id.*,

[3] Applicants also contend that since the District Court's order entailed "the extinction of eleven, historic, independent political entities of the State of Delaware," it "constitutes an unprecedented exercise of judicial power which should be reviewed by this Court pursuant to certiorari." Application for Stay, at 11. Applicants, however, do not seek to stay that aspect of the District Court's order that abolishes the 11 school districts; indeed, applicants state that they will not suffer an irreparable injury if this aspect of the order is not presently stayed. See n. 1, *supra*. Were a grant of certiorari appropriate to this issue, any relief pertinent if applicants were to prevail as to this claim would in my view be distinct from the relief presently requested by applicants. See n. 2, *supra*. Consideration of this contention is therefore not relevant to my determination as to whether to grant a stay.

at 418. The District Court had found only "three separate . . . relatively isolated instances of unconstitutional action on the part of petitioners," *id*., at 413, but the Court of Appeals had nevertheless ordered a systemwide remedy. *Dayton* invoked the familiar "rule laid down in *Swann*, and elaborated upon in *Hills* v. *Gautreaux*, 425 U.S. 284 (1976)," that "'[o]nce a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." 418 U.S., at 714; *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S., at 16.' *Hills* v. *Gautreaux*, at 293-294." *Id.*, at 419-420. Applying this rule, *Dayton* required the District Court on remand to determine the "incremental segregative effect [constitutional] violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S., at 213." *Id.*, at 420.

The facts of *Dayton* are fundamentally different from the circumstances presented by this application. Segregation in Delaware, unlike in Ohio, was mandated by law until 1954.[4] In the instant case the District Court found that "[a]t that time . . . Wilmington and suburban districts were not meaningfully 'separate and autonomous'" because "*de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs." 393 F. Supp. 428, 437 (Del. 1975). So far from finding only isolated examples of unconstitutional action, the District Court in this case concluded

[4] A lineal ancestor of the present case was *Gebhart* v. *Belton*, 33 Del. Ch. 144, 91 A.2d 137 (Del. S. Ct. 1952), in which the Delaware Supreme Court ordered the immediate admission of black children to certain schools previously attended only by whites. The case was appealed to this Court and consolidated and decided with *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The instant case has been in the federal courts at least since 1957. See 379 F. Supp. 1218, 1220 (Del. 1974); 424 F. Supp. 875, 876 n. 1 (Del. 1976).

"that segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system." 379 F. Supp. 1218, 1223 (Del. 1974). The District Court found that this dual school system has been perpetuated through constitutional violations of an interdistrict nature,[5] necessitating for their rectification an interdistrict remedy. See 393 F. Supp. 428 (Del. 1975). See also 416 F. Supp. 328, 338-341 (Del. 1976). The District Court's finding of these interdistrict violations was summarily affirmed by this Court, 423 U.S. 963 (1975), and it thus constitutes the law of the case for purposes of this stay application. Unlike the situation in *Dayton*, therefore, the record before the Court of Appeals in the instant case was replete with findings justifying, if not requiring, the extensive interdistrict remedy ordered by the District Court.

Applicants argue, however, that the order of the District Court violates the principles of *Dayton* because no findings were made as to "incremental segregative effect." But even assuming that such an analysis were appropriate when, as here, there is an explicit finding that a *de jure* school system has never been dismantled,[6] the remedy of the District Court was consciously fashioned to implement the familiar rule of

[5] The District Court concluded that an interdistrict remedy would be appropriate, based on its findings that:

"1) there had been a failure to alter the historic pattern of inter-district segregation in Northern New Castle County;

"2) governmental authorities at the state and local levels were responsible to a significant degree for increasing the disparity in residential and school populations between Wilmington and the suburbs;

"3) the City of Wilmington had been unconstitutionally excluded from other school districts by the State Board of Education, pursuant to a withholding of reorganization powers under the Delaware Educational Advancement Act of 1968." 424 F. Supp. 875, 877 (Del. 1976).

The Court specifically found that "the acts of the State and its subdivisions . . . had a substantial, not a de minimis, effect on the enrollment patterns of the separate districts." 416 F. Supp. 328, 339 (Del. 1976).

[6] In *Dayton*, of course, "mandatory segregation by law of the races in the schools [had] long since ceased . . . ." 433 U.S., at 420.

Swann and *Gautreaux* that equitable relief should be tailored to fit the violation. "Our duty," stated the District Court in 1976, "is to order a remedy which will place the victims of the violation in substantially the same position which they would have occupied had the violation not occurred." 416 F. Supp. 328, 341 (Del. 1976). And, as the District Court most recently stated:

> "[T]he firmly established constitutional violations in this case are the perpetuation of a dual school system and the vestige effects of pervasive *de jure* inter-district segregation. *Evans* v. *Buchanan*, 416 F. Supp. at 343; 393 F. Supp. at 432-438, 445, 447. *Dayton* reaffirms that '[o]nce a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation."' 433 U.S. at 420; see *Milliken I*, 418 U.S. at 744; *Swann*, 402 U.S. at 16. Eradication of the constitutional violation to the scope and extent enumerated by the three-judge court is all that any of the plans and concepts submitted purport to accomplish, and that is all the concept endorsed by the Court does accomplish." 447 F. Supp. 982, 1011 (Del. 1978).[7]

The Court of Appeals accepted the principles of this analysis, and approved their application by the District Court. See Application for Stay, Exhibit B, at 22; 555 F.2d 373, 379-380 (CA3 1977). In these circumstances, I find no violation of the principles of *Dayton* sufficient to justify the conclusion that four Justices of this Court would vote to grant certiorari.

Applicants strenuously urge that irreparable financial and

[7] Applicants' strenuous insistence upon such a narrow reading of the phrase "incremental segregative effect" entangles them in a contradiction. Before the District Court they took the position that "it is not 'feasible' to determine what the affected school districts and school populations would be today 'but for' the constitutional violations found by the three-judge court and affirmed on appeal." 447 F. Supp. 982, 1010 n. 123 (1978). The end result of applicants' positions is thus apparently that *no* equitable remedy would be appropriate.

administrative difficulties attend upon the District Court's order. But both the District Court and the Court of Appeals, sitting en banc, have rejected this contention and concluded that, balancing the equities of this protracted litigation, applicants are not entitled to a stay. The judgments of these Courts are entitled to great deference. See *Board of Education of the City School District of the City of New Rochelle* v. *Taylor*, 82 S. Ct. 10, 11 (1961) (BRENNAN, J., in chambers). "It is clear that the . . . Court of Appeals gave full consideration to a similar motion and with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter." *Magnum Import Co., Inc.* v. *Coty*, 262 U.S. 159, 164 (1923).

The "devastating, often irreparable, injury to those children who experience segregation and isolation was noted [24] years ago in *Brown* v. *Board of Education*, 347 U.S. 483 (1954)." *Jefferson Parish School Board* v. *Dandridge*, 404 U.S. 1219, 1220 (1971) (MARSHALL, J., in chambers). This case has been in continuous litigation for the past 21 years. As my Brother MARSHALL stated seven years ago when asked to stay a school desegregation order:

> "Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. The rights of children to equal educational opportunities are not to be denied, even for a brief time, simply because a school board situates itself so as to make desegregation difficult." *Ibid*.

In such circumstances, I cannot conclude that the balance of equities lies in favor of applicants. The application for a stay is accordingly denied.

[Publisher's note: See 439 U.S. 1380 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–249

Bustop, Inc., Applicant,	)	
v.	)	On Application for Stay.
The Board of Education of the City of Los Angeles et al.	)	

[September 8, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Bustop, Inc., supported by the Attorney General of California, requests that I stay, pending the filing of a petition for certiorari or an appeal, the order of the Supreme Court of California. That order vacated a supersedeas or stay issued by the California Court of Appeal, which had in turn stayed the enforcement of a school desegregation order issued by the Superior Court of Los Angeles County.

The desegregation plan challenged by applicants apparently requires the reassignment of over 60,000 students. In terms of numbers it is one of the most extensive desegregation plans in the United States. The essential logic of the plan is to pair elementary and junior high schools having a 70% or greater Anglo majority with schools having more than a 70% minority enrollment. Paired schools are often miles apart, and the result is extensive transportation of students. Applicant contends that round-trip distances are generally in the range of 36 to 66 miles. Apparently some students must catch buses before 7 a.m. and have a one and one half hour ride to school. The objective of the plan is to insure that all schools in the Los Angeles Unified School District have Anglo and minority percentages between 70% and 30%.

Applicant urges on behalf of students who will be transported pursuant to the order of the Superior Court that the order of the Supreme Court of California is at odds with this

Court's recent school desegregation decisions in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977), *Brennan* v. *Armstrong*, 433 U.S. 672 (1977), and *School District of Omaha* v. *United States*, 433 U.S. 667 (1977). The California Court of Appeal, which stayed the order of the Superior Court, observed that the doctrine of these cases "reflects a refinement of earlier case law which should not and cannot be ignored." The majority of the Supreme Court of California, however, in a special session held Wednesday, September 6, vacated the supersedeas or stay issued by the Court of Appeal and denied applicant's request for a stay of the order of the Superior Court.

Were the decision of the Supreme Court of California premised on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, I would be inclined to agree with the conclusion of the California Court of Appeal that the remedial order entered by the Superior Court in response to earlier decisions of the Supreme Court of California was inconsistent with our decisions cited above. But the earlier opinion of the Supreme Court of California in this case, *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 551 P.2d 28 (1976), and *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 382 P.2d 878 (l963), construe the California State Constitution to require less of a showing on the part of plaintiffs who seek court-ordered busing than this Court has required of plaintiffs who seek similar relief under the United States Constitution. Although the California Court of Appeal is of the view that this Court's cases would require a different result than that reached by the Supreme Court of California in *Crawford*, and although the order of the Supreme Court of California issued Wednesday was not accompanied by a written opinion, in the short time available to me to decide this matter I think the fairest construction is that the Supreme Court of California continues to be of the view which it announced in *Jackson* and adhered to in *Crawford*. Quite apart from any issues as to finality, it is this conclusion which effectively disposes of applicant's suggestion that four Justices of this

Court would vote to grant certiorari to review the judgment of the Supreme Court of California, which in effect overturned the order of the Court of Appeal and reinstated the order of the Superior Court.

Applicant relies upon my action staying the judgment and order of the Court of Appeals for the Sixth Circuit in *Columbus Board of Education* v. *Penick*, No. A-134 (Aug. 11, 1978), but that case is of course different in that the only authority that a federal court has to order desegregation or busing in a local school district arises from the United States Constitution. But the same is not true of state courts. So far as this Court is concerned, they are free to interpret the Constitution of the State to impose more stringent restrictions on the operation of a local school board.

Applicants phrase their [Publisher's note: "Applicants phrase their" should be "Applicant phrases its".] contention in this language:

> "Unlike desegregation cases coming to this Court through the lower federal courts, of which there must be hundreds, if not thousands, here the issue is novel. The issue: May California in an attempt to racially balance schools use its doctrine of independent state grounds to ignore the federal rights of its citizens to be free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy?"

App., at 16.11. But this is not the traditional argument of a local school board contending that it has been required by court order to implement a pupil assignment plan which was not justified by the Fourteenth Amendment to the United States Constitution. The argument is indeed novel, and suggests that each citizen of a State who is either a parent or a school child has a "federal right" to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy." While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.

Even if I were of the view that applicant had a stronger federal claim on the merits, the fact that the Los Angeles schools are scheduled to open on Tuesday, September 12, is an equitable consideration which counsels against once more upsetting the expectations of the parties in this case. The Los Angeles Board of Education has been ordered by the Superior Court of Los Angeles County to bus an undoubtedly large number of children to schools other than those closest to where they live. The Board, however, raises before me no objection to the plan, and the Supreme Court of California has apparently placed its imprimatur on it. I conclude that the complaints of the parents and the children in question are complaints about California state law, and it is in the forums of that State that these questions must be resolved. The application for a stay is accordingly

Denied.

[Publisher's note: See 439 U.S. 1375 for the authoritative official version of this opinion.]

ALEXIS I. DU PONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL.

ON REAPPLICATION FOR STAY

No. A–188. Decided September 8, 1978

Reapplication to stay Court of Appeals' judgment and mandate affirming District Court's school desegregation order (see *ante*, p. 1360) [Publisher's note: See 2 Rapp 864.] is denied. It appears unlikely that four Justices of this Court would vote to grant certiorari at this time to consider the liability issues decided below, and, although four Justices might grant certiorari to consider the scope of the District Court's authority to grant such a drastic remedy as it did, the case is not presently at the certiorari stage, and a stay would be too disruptive since school is to begin in three days.

MR. JUSTICE REHNQUIST.

Applicants, seven defendant suburban school districts in the area of Wilmington, Delaware, have requested that I stay execution of the judgment and mandate of the Court of Appeals for the Third Circuit in this case pending consideration by this Court of their petition for certiorari.[*]

MR. JUSTICE BRENNAN denied the application for a stay one week ago, on September 1, 1978, *Buchanan* v. *Evans*, *ante*, p. 1360. [Publisher's note: See 2 Rapp 864.] Although earlier this summer I granted a stay in *Columbus Board of Education* v. *Penick*, *ante*, p. 1348, [Publisher's note: See 2 Rapp 842.] after it had been denied by MR. JUSTICE STEWART, I have decided to deny this application. Since my reasons are somewhat different from those expressed by MR. JUSTICE BRENNAN in his opinion, I shall state them here.

[*] The Delaware State Board of Education joined in the application to MR. JUSTICE BRENNAN, but has now advised the Clerk's Office that because of the shortness of time it does not join in the reapplication to me. It has advised the Clerk, however, that it does intend to petition for certiorari for review of the judgment of the Court of Appeals for the Third Circuit. Intervenor, Alfred I. du Pont School District, also does not join in this reapplication.

As MR. JUSTICE BRENNAN noted, the District Court earlier in this litigation found interdistrict violations on the part of several of the independent school districts located in New Castle County. It also declared unconstitutional a Delaware statute granting to the State Board of Education the authority to reorganize school districts within the State, but exempting from the operation of the statute the Wilmington School District. The judgment of the District Court was summarily affirmed without an opinion by this Court over three dissents. *Buchanan* v. *Evans*, 433 U.S. 963 (1975). For the reasons expressed in my dissent in that case, I cannot agree with my Brother BRENNAN that the unexplicated summary affirmance renders the District Court's finding that "this dual school system has been perpetuated through constitutional violations of an interdistrict nature" the law of the case. *Buchanan* v. *Evans*, *ante*, at 1363 (BRENNAN, J., in chambers). [Publisher's note: See 2 Rapp at 867.]

The case later came to this Court on a petition for certiorari from a judgment of the Court of Appeals for the Third Circuit that had concluded that some consolidation of school districts would be necessary in order to formulate an appropriate decree. Certiorari was denied by this Court, *Delaware Board of Education* v. *Evans*, 434 U.S. 880 (1977), with three Justices voting to grant certiorari, and vacate and remand the case for reconsideration in light of this Court's opinion in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977). Were I alone deciding these issues on the merits, I would probably grant a stay pending the timely filing of a petition for certiorari. Cf. *New York Times Co.* v. *Jascalevich*, *ante*, at 1337 (MARSHALL, J., in chambers). [Publisher's note: See 2 Rapp at 829.] But as MR. JUSTICE MARSHALL went on to point out in his in-chambers opinion, the Circuit Justice must be reasonably satisfied that four Justices would vote to grant certiorari in the case, and while I do not view any of the prior actions of this Court as dispositive of the merits of the issues decided by the District Court or the Court of Appeals for the Third Circuit, neither do I feel that I can in good con-

science say that four Justices of this Court would vote to grant certiorari to consider them at this time.

Present in the instant application, however, is an elaborate, specific plan devised by the District Court to remedy the violations which it had previously found. That remedy consists in part of a court-ordered reorganization and consolidation of 11 independent school districts in northern New Castle County. What had been 11 independent governing boards is for the present 1 interim board having supervisory authority over all 11 districts. The order requires the Delaware State Board of Education to appoint the five-person governing board. Included within the interim board's authority is the assignment of students, the levying of necessary taxes, the hiring of faculty, and the choice of curriculum.

The second aspect of the remedy is a system of pupil assignment which the District Court ordered the Board to adopt in the judgment which the Court of Appeals affirmed in the case now before me. The *modus operandi* of that plan is that all students from the two predominantly black school districts are to be reassigned to the nine predominantly white districts for nine years of their elementary and secondary education, and all students in the predominantly white districts are to be reassigned to the predominantly black districts for three consecutive years. In affirming this judgment of the District Court, the Court of Appeals for the Third Circuit relied in part on this quotation from *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971):

> "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right."

However, the language in *Swann* immediately following the language quoted by the Court of Appeals for the Third Circuit states:

> "The task is to correct, by a balancing of the individual

> and collective interests, the condition that offends the Constitution.
>
> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Id.*, at 16.

In the succeeding cases of *Milliken* v. *Bradley*, 418 U.S. 717 (1974), *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), and *Dayton Board of Education* v. *Brinkman*, *supra*, this Court has with increasing emphasis insisted that the scope of the District Court's authority to fashion a remedy is limited by the constitutional wrong that is to be righted. I believe that before a remedy of this drastic a nature is finally imposed, not merely on 1 school board but on 11 previously independent school boards, four Justices of this Court would wish to grant certiorari and consider that question on its merits. No case from this Court has ever sanctioned a remedy of this kind, or any remedy remotely like it. The only case in which a District Court has become this deeply involved in the day-to-day management of school affairs is *Morgan* v. *Kerrigan*, 530 F.2d 401 (CA1 1976), in which this Court denied certiorari, 426 U.S. 935 (1976). In that case, however, the District Court was dealing with a single school district, and it does not appear that the community superintendents appointed to oversee particular schools by the District Court's order had any authority to levy taxes. If the Court meant what it said in *Dayton*, that "local autonomy of school districts is a vital national tradition," 433 U.S., at 410, I think it would give plenary consideration to a case where the District Court has treated a series of independent school districts which were found to have

committed constitutional violations much as if they were a railroad in reorganization.

This case, however, is not presently at the certiorari stage, and no petition for certiorari has been filed. The applicants seek only a partial stay of the District Court's order, conceding that the pressures of time would render inappropriate a complete stay in view of the fact that the schools in question are scheduled to open Monday, September 11.

This case was argued to the Court of Appeals for the Third Circuit on May 10, 1978, and that court handed down its opinion on July 24. No application for stay of the mandate of the Court of Appeals was presented to MR. JUSTICE BRENNAN until August 18. He denied the application on September 1, and it was presented to me late in the day on Tuesday, September 5. In a case of this magnitude, with a school opening date of September 11 rapidly approaching, it could be said that applicants might have acted more quickly than they did in seeking a stay from MR. JUSTICE BRENNAN. But be that as it may, equitable considerations involving stays do not necessarily turn on notions of laches. I conclude that in view of all the considerations which must be weighed in a matter such as this, the application for stay should be denied. The consolidated school system has been subject to the desegregation order, without interruption, since January 1978. It would simply be too disruptive to upset established expectations now. "This disposition, of course, does not reflect any view on the merits of the issues presented." *Dayton Board of Education* v. *Brinkman*, *ante*, at 1357 (STEWART, J., in chambers). [Publisher's note: See 2 Rapp 854.]

[Publisher's note: See 439 U.S. 1384 for the authoritative official version of this opinion.]

BUSTOP, INC. *v.*
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON REAPPLICATION FOR STAY

No. A–249. Decided September 9, 1978

Reapplication to stay California Supreme Court's order is denied for same reasons initial application was denied, *ante*, p. 1380. [Publisher's note: See 2 Rapp 870.]

MR. JUSTICE POWELL.

The application for a stay in this case, denied by MR. JUSTICE REHNQUIST by his in-chambers opinion and order of September 8, 1978, *ante*, p. 1380, [Publisher's note: See 2 Rapp 870.] has now been referred to me.

As I am in accord with the reasons advanced by MR. JUSTICE REHNQUIST in his opinion, I also deny the application.

[Publisher's note: See 439 U.S. 1389 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–355 (78–649)

	)	On Application for Stay
City of Boston et al., Appellants,	)	of Mandate of the
v.	)	Supreme Judicial Court
Richard L. Anderson et al.	)	for the Commonwealth
	)	of Massachusetts.

[October 20, 1978]

MR. JUSTICE BRENNAN, Circuit Justice.

The City of Boston, its Mayor, and several of its elected officials, [Publisher's note: The comma preceding this note is surplus. But see 439 U.S. at 1389.] have applied to me for a stay of the judgment of the Massachusetts Supreme Judicial Court entered October 4, 1978, enjoining them, *inter alia*, from expending city funds in support of a referendum proposed on the ballot of the November 1978 general election. If adopted, the proposal would authorize the Massachusetts Legislature to supersede the present tax system of 100% valuation of real properly by a system that would, *inter alia*, classify real property according to its use in no more than four classes and assess, rate and tax such property differently in the classes so established.

The Supreme Judicial Court held that Mass. G. L. C. 55, as appearing in St. 1975, ch. 151, § 1, barred municipalities from engaging in the expenditure of funds to influence election results. *Anderson et al.* v. *City of Boston, et al.*, 1978 Mass. Adv. S. W. 2297 (Juris. Statement la, 8a [Publisher's note: There should be a closing parenthesis here.] (Aug. 23, 1978). Only last Term this Court struck down a provision of chapter 55 that imposed a ban on private corporation financing of advocacy on referendum questions as abridging expression that the First and Fourteenth Amendments were meant to protect. *First National Bank* v. *Bellotti*, — U.S. — (1978). The Supreme Judicial Court held in the instant case, however, that even if "constitutionally protected speech includes the right of a municipality to speak militantly about

a referendum issue of admitted public importance where the Legislature of the State has said it may not" (Juris. Statement, at 15a), "there are demonstrated, compelling interests of the Commonwealth which justify the 'restraint' which the Commonwealth has placed on the city," (*Id*., at 15a-16a), namely, "The Commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree." *Id.*, at 20a.

In deciding whether to grant a stay pending disposition of the Jurisdictional Statement I must consider two factors:

> "First, 'a Circuit Justice should "balance the equities" . . . and determine on which side the risk of irreparable injury weight [Publisher's note: "weight" should be "weighs".] most heavily.' *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308-1309 (1973) (MARSHALL, J., in chambers). Second, assuming a balance of equities in favor of the applicant, the Circuit Justice must also determine whether 'it is likely that four Members of this Court would vote to grant a writ of certiorari.' *Id.*, at 1310. The burden of persuasion as to both of these issues rests on the applicant. . . ." *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1312 (l977) (MARSHALL, J., in chambers).

In my view the balance of the equities favors the grant of the application. In light of *Bellotti*, corporate industrial and commercial opponents of the referendum are free to finance their opposition. On the other hand, unless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views in support of the referendum as required in the interests of all taxpayers, including residential property owners.

I am also of the view that at least four Members of this Court will vote to grant plenary review of this important constitutional question.

Accordingly, I grant the application and stay the judgment of October 4, 1978, pending further action of this Court or myself as Circuit Justice.

[Publisher's note: See 439 U.S. 1385 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–354 (78–657)

Isabel Kimble et al., Applicants,	)	
v.	)	On Application for
William D. Swackhamer, Secretary of State of Nevada, et al.	)	Injunction.

[October 20, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I "summarily reverse" a judgment of the Supreme Court of Nevada holding that the Constitution of the United States does not prohibit the Nevada Legislature from providing for an advisory referendum on the proposed amendment to the United States Constitution commonly known as the Equal Rights Amendment. In the alternative, they apparently request that I either enjoin the placement of the referendum question on the November ballot in Nevada, or require that the ballots be impounded and their counting be deferred until this Court has had an opportunity to pass on applicants' jurisdictional statement seeking review of the judgment of the Supreme Court of Nevada.

It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to "summarily reverse" a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider the applicant's claim on the merits. 28 U.S.C. § 1651(b) (1976); this Court's Rule 51(1). Since the likelihood that applicants' claim on the merits would induce four Justices of this Court to note probable jurisdiction on their appeal seems to me very remote, I find it unnecessary to deal with their contention that failure on the part of a single Justice to grant some sort of interim relief will cause them irreparable injury.

In 1977 the Nevada Legislature enacted a statute requiring the submission of an advisory question to the registered voters of the State as to whether the Equal Rights Amendment should be ratified by the legislature. The statute expressly provides that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." 1977 Nevada Stats. ch. 174, §§ 3, 5. Applicants asked the Nevada state courts to enjoin respondent Swackhamer, the Secretary of State of Nevada, from complying with the statute. The trial court in Carson City denied their request for relief, and the Supreme Court of Nevada affirmed that ruling by a vote of four to one.

Applicants contend that the Nevada statute providing for an advisory referendum for the benefit of the legislature is repugnant to Art. V of the United States Constitution because it "alters the mode of ratification of a proposed constitutional amendment by . . . providing for citizen participation in the amendatory process through the State's electoral machinery." Jurisdictional Statement 3. Applicants also contend that Art. V is offended insofar as the statute requires the Nevada Legislature to defer action on ratification until it receives the results of the referendum, which is not to occur until the next regularly scheduled election of Nevada legislators.

The plain meaning of the Nevada statute and the opinion of the Supreme Court of Nevada convince me that the deferral issue presented by the latter contention is not in this case because the Nevada statute does not *prevent* the state legislature from acting on the Equal Rights Amendment before the referendum. That the Nevada Legislature is *unlikely* to vote on the amendment before a referendum that it mandated is not a constitutionally cognizable grievance. Applicants' other contention, objecting to citizen participation in the amendatory process, is in my opinion not substantial because of the nonbinding character of the referendum. The Supreme Court of Nevada said with respect to the statute that it "does not concern a binding referendum, nor does it impose a limitation upon the legislature. As already noted, the legislature

may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote. The recommendation of the voters is advisory only." Jurisdictional Statement 4a.

Under these circumstances, applicants' reliance upon this Court's decisions in *Leser* v. *Garnett*, 258 U.S. 130 (1922), and *Hawke* v. *Smith*, 253 U.S. 221 (1920), is obviously misplaced. Both seem to me to stand for the proposition that the two methods for state ratification of proposed constitutional amendments set forth in Art. V of the United States Constitution are exclusive: ratification must be by the legislatures of three-fourths of the States or by conventions in three-fourths of the States. *Leser*, *supra*, held that Art. V afforded no basis for the argument that an amendment was not properly ratified because ratification resolutions in certain States had not complied with state statutory requirements over and above those prescribed for ratification by Congress and by Art. V. *Hawke*, *supra*, held that a state statute providing for ratification by a binding referendum of the electorate was contrary to Art. V, since that Article had specified one of the alternative methods as being ratification by the state legislature and Congress had chosen that alternative.

Under the Nevada statute in question, ratification will still depend on the vote of the Nevada Legislature, as provided by Congress and by Art. V. I would be most disinclined to read either [Publisher's note: "either" is surplus. But see 439 U.S. at 1387.] *Hawke*, *supra*, or *Leser*, *supra*, or Art. V as ruling out communication between the members of the legislature and their constituents. If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort. The application for interim relief is accordingly

Denied.

[Publisher's note: This version of the opinion was typed on sheets of plain paper. The missing characters in the caption appear to be the result of imperfect photoduplication of the original. See 439 U.S. 1392 for the authoritative official version of this opinion.]

ME COURT OF THE UNITED STATES

October 20, 1978

A–357

Warm Springs Dam Task Force, Applicants	)	Application for Stay and Injunctive Relief Pending Appeal to the Ninth Circuit
v.	)	
William C. Gribble, Jr., et al.	)	

MR. JUSTICE REHNQUIST, Circuit Justice

Applicants request that I stay an order of the United States District Court for the Northern District of California pending disposition of their appeal therefrom by the United States Court of Appeals for the Ninth Circuit. The District Court's order denied applicants' request for a permanent injunction to halt further construction in connection with the Warm Springs Dam-Lake Sonoma Project on Dry and Warm Springs Creeks in Sonoma, California (the "Dam"). Applicants also ask that pending

disposition of their appeal I enjoin all further construction activity at the site, except work for the purpose of protecting the soil from effects of weathering and erosion.

The Dam will be an earthen-filled dam, holding back a reservoir of water, across Dry Creek, a major tributary of the Russian River in Sonoma County. It is a multi-purpose project designed to provide flood control, water supply and recreation. The Dam was first authorized in the Flood Control Act of 1962, Pub. L. 87-874, 76 Stat. 1173, 1192, and was under construction when the National Environmental Protection Act of 1969, 42 U.S.C. § 4321 et seq. ("NEPA"), became law. An environmental impact statement was filed prior to the award of a contract for a major segment of the Dam and it is the adequacy of that statement under NEPA which has been the focus of this litigation. When built, the Dam will sit atop the Dry Creek earthquake fault.

A second fault is about 1½ miles away and the San Andreas fault is 18 miles distant.

Applicants brought an action in the District Court on March 22, 1974, seeking a preliminary injunction to stay further construction activity with respect to the Dam. During fourteen days of hearings on the motion for a preliminary injunction, applicants raised questions about the integrity of the Dam should an earthquake occur and alleged poisoning of the water in the reservoir behind the Dam. On May 23, 1974, the District Court found that the environmental impact statement fully complied with NEPA and denied applicants' motion for the injunction. Thereafter, the Ninth Circuit denied applicants' motion for an injunction pending appeal. On June 17, 1974, Mr. Justice Douglas issued an order staying further disturbance of the soil in connection with the Dam, other than for research, investigation,

planning and design activity, pending decision of their appeal by the Court of Appeals. Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301 (1974).

On August 18, 1975, the Court of Appeals remanded the case to the District Court to permit it to consider further the adequacy of the environmental impact statement in the areas of seismicity and purity of water in the proposed reservoir. The Court of Appeals continued the existing stay in effect until further action by the District Court. Although not ordered by the court, the Corps prepared and widely circulated a supplement to the environmental impact statement covering the archaelogical [Publisher's note: "archaelogical" should be "archaeological"] aspects of the Dam and the seismicity and water purity problems [Publisher's note: There should be a period here.] After holding three days of hearings, the District Court concluded that all segments of the environmental impact statement fully complied with NEPA and denied applicants' motion for a

permanent injunction.

On November 23, 1977, the Court of Appeals expedited applicants' appeal of the District Court's order but denied applicants' request for interim injunctive relief in an opinion in which it concluded that applicants had not shown that they would suffer "significant harm" during the pendency of the expedited appeal. Oral argument on the appeal was heard on March 13, 1978. When decision of the appeal was not forthcoming, applicants renewed their request for a stay on May 8, 1978. A hearing on the motion was held on May 11, 1978, and on May 30, the Court of Appeals again denied applicants' request for interim relief. That same day, the Corps signed a major construction contract for the Dam.

On October 4, 1978, the Corps opened bids on a new contract for the construction of a proposed fish hatchery for the Dam. The Corps intends to let the contract on October 20, 1978. This

development prompted applicants to make the instant request for a stay to me. They claim that this work will entail extensive expenditures and will have a direct impact on the physical environment of the area. Applicants did not first present their request to the Court of Appeals.

After considering all of the factors required by our rules and customary Circuit Justice practice, I have decided to deny applicants' request for a stay pending disposition of their appeal by the Ninth Circuit.

Denied.

[Publisher's note: See 439 U.S. 1395 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–534 (78–987)

William T. Dolman et al., Petitioners,	)	
v.	)	On Application for Stay.
United States.	)	

[December 21, 1978]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants Dolman and Wilson were convicted of criminal contempt of court pursuant to 18 U.S.C. § 401(3) for violation of an injunction entered by the United States District Court for the Western District of Washington. Their convictions were affirmed by the Court of Appeals for the Ninth Circuit on September 7, 1978, and their application to stay issuance of the mandate of the Court of Appeals pending determination by this Court of related petitions for certiorari pending before it was denied on November 16. Meanwhile, this Court granted certiorari on October 16 in No. 78-139, *Puget Sound Gillnetters Association* v. *United States District Court for the Western District of Washington*, and *State of Washington* v. *United States of America et al*. There is no question, as the government maintains in the response which I have requested, that a conviction for criminal contempt may be valid quite apart from the validity of the underlying injunction which was violated, and that the invalidity of an injunction may not ordinarily be raised as a defense in contempt proceedings for its violation. *Walker* v. *City of Birmingham*, 388 U.S. 307, 315-320 (1967); *United States* v. *United Mineworkers of America*, 330 U.S. 258, 293-294 (1947).

Applicants' basic contention here is that since they were not named as parties in the action in the District Court in which the United States was plaintiff and the State of Washington

defendant, they were not bound by any injunctive decree which was issued by that court. The District Court rejected this contention, and the Court of Appeals affirmed the convictions for criminal contempt relying upon cases from this Court holding that in some circumstances citizens of a State who claim rights pursuant to state law may be deemed "in privity" with a State and be bound by an injunction or decree to which only the State was a party. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958); *Wyoming* v. *Colorado*, 286 U.S. 494, 506-509 (1932).

One of the questions presented in No. 78-139, in which this Court granted certiorari on October 16, is this:

> "Is an individual who conducts business in a State in such privity to that State that a court may directly enjoin the citizen without his being a party to or a participant in the cause of action in which the State is a party? Assuming privity, if an injunctive order is sought against an individual, is that individual entitled to notice of and participation in the injunctive hearing prior to its issuance?"

The government in its response to this application simply does not address that question, and the fact that certiorari has been granted in No. 78-139 suggests that at least some Members of the Court regard the question as being of substance.

Both *Walker*, *supra*, and *United Mineworkers*, *supra*, contain language limiting the doctrine that the validity of a conviction for criminal contempt is not vitiated by the invalidity of the underlying injunction to cases in which the court issuing the injunction had jurisdiction of the parties. In *Walker*, the court quoted approvingly the following language from *Howat* v. *Kansas*, 258 U.S. 181, 189-190 (1922):

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon *persons made parties therein and within the jurisdiction*, must be obeyed by

> them however erroneous the action of the court may be. . . .” 388 U.S., at 314. (Emphasis supplied.)

See also Fed. Rule Civ. Proc. 65(d). The claim made by these applicants is that they were not in fact parties to the proceedings in the District Court, and that the District Court did not have jurisdiction over them merely because the State of Washington was a party. Since this question will be reviewed in No. 78-139, and since there is some possibility that applicants' convictions for criminal contempt would be moot once having been served, even under cases such as *Sibron* v. *New York*, 392 U.S. 40 (1968), I think there are substantial arguments which favor the granting of a stay in this case.

Nonetheless, I have decided as of now to deny the application. The information available to me as to related proceedings in the Court of Appeals for the Ninth Circuit may not be completely accurate, but I am advised that that court granted a stay at the request of Denne M. Harrington and Gary D. Rondeau, whose appeals from convictions for criminal contempt for violation of the same injunction were consolidated with those of applicants in the Court of Appeals and decided by that court in the same opinion. While applicants did seek a stay from the Court of Appeals of its affirmance of their contempt convictions, it is not apparent from the information available to me that they did so after this Court granted certiorari in No. 78-139, or that they requested the stay pending disposition of a petition for certiorari in their own cases, rather than pending disposition of No. 78-139. Our Rule 27 provides that applications for a stay here will not normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed. On the basis of the information before me, I cannot say that applicants have requested a stay from the Court of Appeals for the Ninth Circuit pending disposition by this Court of *their* petition for certiorari seeking to review the affirmance of their contempt collections, though I cannot say with certainty that they have not. Because of

this uncertainty on my part, because of our grant of certiorari in No. 78-139, and because the Court of Appeals apparently has granted a stay with respect to Harrington and Rondeau, I think it the better exercise of my discretion to require applicants to apply to the Court of Appeals for the Ninth Circuit for a stay pending this Court's disposition of their petition for certiorari. In the event that such an application is denied, I shall entertain a renewed application for a stay on behalf of applicants Dolman and Wilson.

Denied.

[Publisher's note: This opinion was typed on a sheet plain of paper.]

General Dynamics Convair Aerospace Division, et al.	)	On Application for Stay Pending Review on Certiorari
v.	)	
David Anderson	)	[A–815]

[March 20, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice

In view of the fact that certiorari was denied on January 8, 1979 in Southern Pacific Transportation Co., et al. v. Burns, No. 78-706, a case raising substantially the same issues as the present case, I think that it is unlikely that four Justices will vote to grant certiorari in this case. In addition, it does not appear that the applicants will suffer irreparable injury if a stay is not granted. Accordingly, the application for a stay pending review on certiorari is denied.

[Publisher's note: See 440 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–868

Betty Evans, individually and as next friend acting on behalf of John Louis Evans, III, Applicant,	)	
v.	)	On Application for Stay of Execution.
Larry Bennett, Commissioner, Alabama Correctional System, and Joseph Oliver, Warden, Holman Unit.	)	

[April 5, 1979]

MR. JUSTICE REHNQUIST, [Publisher's note: "REHNQUIST" should be "REHNQUIST".] Circuit Justice.

This application for stay has come to me by reason of the unavailability of MR. JUSTICE POWELL. Applicant is the mother of John Louis Evans; her son was tried and convicted of robbery-murder and was sentenced to death pursuant to Alabama law by an Alabama trial court in April 1977. Evans did not contest his guilt at trial. Instead, he took the stand, confessed to the crime, and requested the jury to find him guilty so that he could receive the death penalty. His conviction and sentence were appealed (according to the application, against his will) under the Alabama automatic appeal statute, and the judgment and sentence were affirmed by the Alabama Court of Criminal Appeals and the Supreme Court of Alabama. *Evans* v. *State*, 381 So. 2d 654 (Ala. Crim. App. 1977); *Evans* v. *State*, 361 So. 2d 666 (Ala. 1978). With his approval, a petition for writ of certiorari seeking review of the sentence imposed upon him was filed in this Court in November 1978. On February 3, 1979, Evans' counsel, at his insistence, filed a formal request for withdrawal of his petition for writ of certiorari, but both the petition for withdrawal and

the petition for writ of certiorari were denied by this Court on February 20, 1979. Following that action by this Court, the Supreme Court of Alabama set an execution date of April 6, 1979.

According to the application for stay, John Louis Evans has refused to undertake any further appeals on his behalf and has repeatedly expressed his desire to die. On April 2, 1979—nearly six weeks after this Court had denied the petition for certiorari, and only four days before the execution date set by the Supreme Court of Alabama—applicant, the mother of the condemned killer, filed a petition for a writ of habeas corpus in the United States District Court in the Southern District of Alabama. That court heard oral argument on April 3, and following that argument dismissed the petition on the grounds that "the reason forwarded by petitioner for the inmate's failure to verify the petition, *i.e.*, incompetency, is not supported by credible evidence, that Betty Evans is not entitled to next friend status by reason thereof, that, accordingly, this Court has no jurisdiction over the action and the action must therefore be dismissed and the stay denied."

A timely notice of appeal was filed and the District Court issued a certificate of probable cause. On April 4th, the applicant moved for a stay of execution in the Court of Appeals for the Fifth Circuit. That court likewise denied the application for a stay, reciting in its order:

> "A majority of the Court concludes that a factual issue justifying standing in a next friend has not been made.
>
> "Judge Hill would grant the stay in order to ascertain whether or not a mental deficiency short of incompetency would authorize proceedings by a next friend."

If I were casting my vote on this application for a stay as a Member of the full Court, I would vote to deny the stay. Evans has been found guilty of an atrocious crime, sentenced to be put to death in accordance with Alabama law, and has had his conviction and sentence reviewed both by the Alabama Court of Criminal Appeals and by the Supreme Court of Alabama. His petition for certiorari to review the judg-

ments of those courts affirming his conviction and sentence was denied by this Court. A federal district court has denied a stay and dismissed the petition for habeas corpus filed by Evans' mother on his behalf, and a panel of the Court of Appeals for the Fifth Circuit also has denied a stay. There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, that the legal issues in the case have been sufficiently litigated and relitigated so that the law must be allowed to run its course. If the holdings of our Court in *Proffitt* v. *Florida*, 428 U.S. 242 (1976), *Jurek* v. *Texas*, 428 U.S. 262 (1976), and *Woodson* v. *North Carolina*, 428 U.S. 305 (1976) [Publisher's note: There should be a comma here.] are to be anything but dead letters, capital punishment when imposed pursuant to the standards laid down in those cases is constitutional; and when the standards expounded in those cases and in subsequent decisions of this Court bearing on those procedures have been complied with, the State is entitled to carry out the death sentence. Indeed, just as the rule of law entitles a criminal defendant to be surrounded with all the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that when the State has taken all the steps required by that rule of law, its will, as represented by the legislature which authorized the imposition of the death sentence, and the state courts which imposed it and upheld it, should be carried out.

There is not the slightest doubt in my mind that the United States District Court made every effort to resolve doubts as to legal issues in favor of granting a stay, but was nonetheless unable to find legal authority for granting the stay. My conclusion in this regard is supported by the following language from the opinion of that Court:

> "Having concluded that next friend applications are permissible in habeas corpus cases, it remains for the Court to determine whether this is such a case that a next friend petition ought to be allowed. Both *Funaro* and *Preiser* limited the use of such applications to inci-

dents of infancy, incompetency, or lack of time, and the Court is unpersuaded that any other grounds are permissible. In the instant case the inmate is over the age of majority and adequate time exists for him to verify his own petition, so the petitioner must fail unless the inmate is incompetent.

"The only evidence presented to the Court in support of John Evans' incompetency is a sworn affidavit of a staff psychiatrist at the Mobile Mental Health Center. The psychiatrist, who has not personally interviewed or otherwise examined John Evans, concludes from conversations with other individuals that John Evans is 'not able to deal rationally with his situation and . . . probably need[s] someone else to make legal decisions affecting his life for him.' The affidavit further reveals that the doctor tried to arrange an interview between John Evans, himself, and a psychologist, but Evans refused to be evaluated. The evidence in rebuttal to the allegation of incompetency is quite strong. John Evans was evaluated prior to his murder trial and was determined fit to stand trial, and there is no indication of any intervening physical or mental disability arising between the time of trial and the filing of the petition in the instant case. Clearly one who is competent to stand trial is competent to make decisions as to the course of his future. At no time prior to the filing of this petition, as far as the Court can ascertain, has John Evans' competency been questioned. The fact that Evans has elected not to pursue post-conviction remedies that would serve to forestall the impending execution is not controlling, since it may well be, as the media has advertised, that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his debts [Publisher's note: "debts" should be "bets". See *Evans* v. *Bennett*, 467 F. Supp. 1108, 1110 (S.D. Ala. 1979); but see 440 U.S. at 1305.] on a new existence in some world beyond this. The Court finds no evidence of irrationality in this; indeed, in view of the allegations in the case of *Jacobs* v. *Locke*, the death row conditions of confinement case presently pending in this

> Court, it may well be that John Evans has made the more rational choice. In any event, this Court is not persuaded that John Evans is incompetent merely from a professional opinion rendered on hearsay information."[1]

"[1] Evans' attorney stated during the hearing that he had observed no change in Evans' mental condition in the past two years, but of course his counsel is without any training in psychiatry."

The application for stay cites a number of decisions relating to mental competency, none of which seem to me to bear directly on the issue in this case. The application states (p. 7):

> "The criticism of the trial judge that the affidavit is based on hearsay is due solely to the fact that John Louis Evans refused to see the psychiatrist. Clearly Evans should not be allowed to control his mother's standing to raise issues on his behalf."

To my mind. this argument stands the question on its head: It is not Betty Evans, the applicant, who has been sentenced to death, but her son, and the fact that her son refuses to see a psychiatrist and has expressed a preference for electrocution rather than serving the remainder of his life in a penitentiary cannot confer standing upon her as "next friend" which she would not have under recognized legal principles.

Nonetheless, since this matter is not before the full Court, but simply before me as a Circuit Justice, I must act as surrogate for the full Court. The most closely analogous case to come before us in this posture is that of *Bessie Gilmore, applicant and next friend of Gary Mark Gilmore* v. *State of Utah* (No. A-453, O.T. 1976). There, a majority of the Court denied an application for a stay of execution over the dissents of MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, and of MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN. 429 U.S. 1012 (1976). As I understand the dissent of MR. JUSTICE WHITE, its linchpin was the absence of any consideration or decision as to the constitutionality of the Utah statute providing for

the imposition of the death penalty by the Utah courts. MR. JUSTICE MARSHALL'S dissent, as I read it, was based upon what he regarded as the inadequacy of the procedures provided by the State to determine the competency of the waiver by Gilmore of his right to appeal from the sentence imposed by the Utah trial court. MR. JUSTICE BLACKMUN's dissent expressed the view that the question of the standing of Gilmore's mother to raise constitutional claims on behalf of her son was not insubstantial, and should receive a plenary hearing from this Court.

Were this a case involving an issue other than the death penalty, I think I would be justified in concluding that because the Alabama Court of Criminal Appeals and the Alabama Supreme Court have fully reviewed Evans' conviction and sentence, the same considerations which led four Members of this Court to disagree with our denial of a stay of execution in Gilmore's case would not necessarily lead all of them to do so here. But because of the obviously irreversible nature of the death penalty, and because of my obligation as Circuit Justice to act as surrogate for the Court, I do not feel justified in denying the stay on that assumption.

I have therefore decided to grant a stay of the execution ordered by the Supreme Court of Alabama to be carried out at 12:01 a.m. on April 6, 1979, pending further consideration by me, or by the full Court at its Conference scheduled for Friday, April 13th in the event that I should refer the application to that Conference, of the following submissions:

(a) a response by respondent Larry Bennett, Commissioner of the Alabama Correctional System, to this application for stay;

(b) a detailed explanation by counsel for applicant as to why, in a matter of this importance, she waited from February 20, 1979, the date upon which this Court denied John Louis Evans' petition for certiorari seeking to review the judgment of the Supreme Court of Alabama, until April 2, 1979, to file a petition for a writ of habeas corpus in the United States District Court for the Southern District of

Alabama. There may be very good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a "hydraulic pressure" which is brought to bear upon any judge or group of judges and inclines them to grant last minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them. To use the technique of a last minute filing as a sort of insurance to get at least a temporary stay when an adequate application might have been presented earlier, is, in my opinion, a tactic unworthy of our profession. Such an explanation is not a condition of the granting of this or any further stay, but the absence of it will be taken into consideration by me.

The parties are required to file the foregoing submissions by 12:00 noon, e.s.t., on Tuesday, April 10, 1979. Unless otherwise ordered by me or by the Court, this stay shall expire at 5:00 p.m., e.s.t., on Friday, April 13, 1979.

The application for a stay is granted on the terms and conditions set forth in this opinion, and an order will issue accordingly.

[Publisher's note: See 440 U.S. 1308 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–864

David Haner, Applicant,	)	On Application for Recall on
v.	)	Mandate and Stay.
United States.	)	

[Publisher's note: "Recall on" above should be "Recall of".]

[April 6, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice.

Petitioner requests that I stay, pending consideration of his petition for writ of certiorari, the order of the United States Court of Appeals for the Ninth Circuit committing him for civil contempt. This petition [Publisher's note: "petition" here and in the next sentence probably should be "application", but it is possible that the references are to the petition for a writ of certiorari. See, *e.g.*, 2 Rapp at 903-04 (quoting the cert. petition); see also 440 U.S. at 1308-09.] arises out of a grand jury investigation currently being conducted in the District of Oregon. According to the petition, the grand jury is investigating an allegedly fraudulent funding scheme involving the [Publisher's note: The "the" preceding this note is surplus.] Allstates Funding, Inc., of which petitioner is President. Pursuant to a subpoena *duces tecum*, petitioner appeared before the grand jury and refused to answer questions regarding corporate records maintained by Allstates Funding on the grounds that he might incriminate himself. The United States District Court for the District of Oregon ruled that petitioner could not invoke his Fifth Amendment privilege against self-incrimination with regards [Publisher's note: "regards" should be "regard".] to the nature of records that were maintained by Allstates Funding. An [Publisher's note: "An" should be "A".] unanimous Court of Appeals panel affirmed, noting that "[t]he privilege against compulsory self-incrimination protects against real dangers, not remote and speculative possibilities."

Petitioner claims that if he testifies regarding the existence of corporate records he confronts a Hobson's choice which will inevitably result in self-incrimination.

> "[I]f the Government learns from the testimony of Petitioner in response to Question number seven, and its various subparts, that no corporate records were ever maintained in the first instance, the Petitioner will have

> provided the government with very strong circumstantial evidence of criminal intent and wrongdoing in his connection with the corporation. By the same token, if the Petitioner testifies that certain records that have not been produced under subpena [Publisher's note: "subpena" should be "subpoena". But see 440 U.S. at 1309.] were in fact maintained, the Petitioner will have provided the government with equally strong circumstantial evidence of criminal intent and consciousness of criminal wrongdoing by their likely destruction or surrepticious (sic) transfer to third parties." Petition, at 8-9.

Petitioner places his principal reliance on *Curcio* v. *United States*, 354 U.S. 118 (1957). In *Curcio* this Court held that the contempt sanction cannot be used to compel a custodian of records to disclose the whereabouts of books and records which he has failed to produce if he claims that disclosure of their location will incriminate him. The *Curcio* Court recognized that the privilege does not extend to all oral testimony about the records. Certainly the custodian can be compelled to "identify documents already produced," *id*., at 125, for the touchstone for evaluating the appropriateness of the privilege must be the "incriminating tendency of the disclosure." *Wilson* v. *United States*, 221 U.S. 361, 379 (1911). The Ninth Circuit relied on *Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472, 478 (1972), for the proposition that the self-incrimination privilege "protects against real dangers, not remote and speculative possibilities." A court contemplating a contempt citation must look to circumstances and context and gauge whether there is a real possibility that a responsive answer will incriminate the witness.

Given the very general nature of the inquiry in this case—a description of the type of records kept by the corporation[*]—I think the courts below properly struck the balance and that it is accordingly unlikely that four Members of this Court will vote to grant certiorari. The application for stay of the order of commitment is denied.

[*] The petition does not relate the precise working of the question and to that extent is deficient under this Court's Rule 23.

[Publisher's note: See 442 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1016

John A. Spinkellink, Applicant,	)	On Application for Stay of
v.	)	Execution.
Louie L. Wainwright et al.	)	

[Publisher's note: "Spinkellink" above, in the running heads, and throughout this opinion (except for the case names associated with the citations to 313 So. 2d 666 on this page and 578 F.2d 582 on the next page) should be "Spenkelink". But see 442 U.S. at 1301-02.]

[May 22, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice.

This application for stay has come to me by reason of the unavailability of MR. JUSTICE POWELL. On December 20, 1973, following a trial and jury verdict, applicant was sentenced to death pursuant to the Florida statute that we upheld in *Proffitt* v. *Florida*, 428 U.S. 242 (1976), for a murder committed in February 1973. On applicant's appeal, the Supreme Court of Florida affirmed both the conviction and sentence, *Spinkellink* v. *State*, 313 So. 2d 666 (Fla. 1975), and this Court denied certiorari, 428 U.S. 911 (1976). Applicant next sought executive clemency from the Governor of Florida, but his request for that relief was denied on September 12, 1977, and at the same time the Governor signed a death warrant setting Spinkellink's execution for 8:30 a.m. on September 19, 1977. The following day, applicant filed a motion for collateral relief in the Florida trial court that had convicted him; this motion, too, was denied, the Supreme Court of Florida affirmed its denial, *Spinkellink* v. *State*, 350 So. 2d 85 (Fla. 1977), and we again denied certiorari. 434 U.S. 960 (1977).

One day after he filed his petition for collateral relief in state court, however, applicant filed a petition for federal habeas corpus in the United States District Court for the Middle District of Florida, which transferred the case to the Northern District of Florida. That court stayed the execution and scheduled an evidentary [Publisher's note: "evidentary" should be "evidentiary". But see 442 U.S. at 1302.] hearing for September 21,

1977. At that time a hearing was held, which lasted from the late morning into the evening and produced over 300 pages of testimony. On September 23, the District Court dismissed the petition and ordered that the stay of execution previously issued by it terminate at noon on September 30. But the District Court also granted applicant a certificate of probable cause to appeal, and the Court of Appeals for the Fifth Circuit then stayed applicant's execution pending its decision of his appeal.

On August 21, 1978, a panel of the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. *Spinkellink* v. *Wainwright*, 578 F.2d 582. In an opinion comprising 39 pages in the Federal Reporter, the Court of Appeals for the Fifth Circuit dealt at length with all of applicant's claims, which had previously been rejected by the United States District Court and by the Supreme Court of Florida. It affirmed the judgment of the District Court, and we again denied certiorari on March 26, 1979, with MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissenting on the basis of their views set forth in *Gregg* v. *Georgia*, 428 U.S. 153, 227, 231 (1976). — U.S. — (1979).

According to the application now before me, the Governor of Florida again denied executive clemency on Friday, May 18, 1979, and signed a death warrant authorizing the execution of applicant on Wednesday, May 23, 1979 at 7:00 a.m. E.D.T. On Monday, May 21st, applicant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida requesting the court to stay his execution pending consideration and final determination of the petition. According to the applicant, the only point he seeks to preserve in his application to me for a stay is "that [Publisher's note: The quotation marks preceding "that" are surplus.] under this Court's decision in *Presnell* v. *Georgia*, No. 77-6885, decided November 6, 1978, "the failure to accord petitioner adequate advance notice of the aggravating circumstances alleged by the prosecution as the basis for seeking the death penalty" denied applicant rights secured to him by the Eighth and Fourteenth Amendments to the Constitution of the

United States. In *Presnell*, *supra*, this Court held that the "fundamental principles of procedural fairness" enunciated in *Cole* v. *Arkansas*, 333 U.S. 196 (1948), "apply with no less force to the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Cole*, in turn, had held that "to conform to due process of law, petitioners wree [Publisher's note: "wree" should be "were".] entitled to have the validity of their convictions appraised on considerations of the case as it was tried and as the issues were determined in the trial court." 333 U.S. 196, 201 (1948).

This claim was submitted to and denied by the District Court for the Northern District of Florida on Monday, May 21, 1979. The District Court simultaneously entered a second order refusing certification of the appeal under both local and statutory rules, and denying a stay of execution pending appeal. Today, a panel of the Court of Appeals for the Fifth Circuit has, by a divided vote, denied applicant a certificate of probable cause, a certificate for leave to appeal *in forma pauperis*, and denied his motion for a stay of execution.[*]

Throughout these many hearings, appeals and applications, there has been virtually no dispute that substantial evidence supported the jury's verdict that applicant was guilty of first-degree murder, or that the Florida State trial judge had ample basis for following the jury's recommendation that the death penalty be imposed. The Supreme Court of Florida in its opinion affirming applicant's conviction stated:

> "As more fully set out above the record shows this crime to be premeditated, especially cruel, atrocious, and heinous and in connection with robbery of the victim to secure return of money claimed by Appellant. The aggravating circumstances justify imposition of the death sentence. Both Appellant and his victim were career

[*] In light of the extensive scrutiny applicant's claims have received in the courts below, I decline to take the extraordinary step of granting a certificate of probable cause authorizing an appeal to the United States Court of Appeals for the Fifth Circuit from the District Court's judgment.

> criminals and Appellant showed no mitigating factors to require a more lenient sentence." 313 So. 2d, at 671.

The Court of Appeals for the Fifth Circuit, in affirming the denial of federal habeas relief, said:

> "On February 4, 1973, petitioner John A. Spenkelink [*sic*], a 24-year-old white male and twice convicted felon, who had escaped from a California correctional camp, murdered his traveling companion, Joseph J. Szymankiewicz, a white male, in their Tallahassee, Florida motel room. Spenkelink [*sic*] shot Szymankiewicz, who was asleep in bed, once in the head just behind the left ear and a second time in the back, which fragmented the spine, ruptured the aorta, and resulted in the victim's death. [Spinkellink] then recounted a cover story to the motel proprietor in order to delay discovery of the body and left." 578 F.2d, at 586.

When I granted an application for stay of execution as Circuit Justice in No. A-868, *Evans* v. *Bennett* (Apr. 5, 1979), I referred to the oft-repeated rule that a Circuit Justice must act as surrogate for the entire Court when acting on a stay application. Even though he would deny the application if he were to consider only his own views as to its merits, he is obligated to consider the views that each Member of the Court may have as to its merits, and if he believes that four Members of the Court would vote to grant certiorari to review the applicant's claims, he is obligated to grant the application, provided it meets the other requirements for a stay. In *Evans*, *supra*, although I would not have voted to grant certiorari to consider applicant's claims, I was satisfied that there was a reasonable probability that four other Members of the Court would have voted differently. I therefore granted the application pending referral to the next scheduled Conference of the full Court.

In this case, by contrast, I have consulted all of my colleagues who are available, and am confident that four of them would not vote to grant certiorari to hear any of the numerous

constitutional claims previously presented by applicant in his three earlier petitions for certiorari to this Court. It devolves upon me, however, as a single Justice, to answer as best I can whether four Members of the Court would grant certiorari to consider applicant's new claim that his death sentence was imposed in violation of our opinion in *Presnell* v. *Georgia*, *supra*. The easiest way to find out, of course, would be to have the necessary copies of applicant's papers circulated to all eight of my colleagues in order to obtain their first-hand assessment of this contention at the next regularly scheduled Conference of the Court on Thursday. Even if I were only marginally convinced that there were four Justices who might vote to grant certiorari in order to hear this claim presented, in view of the fact that applicant's life is at stake, I would probably follow that course. But evaluating applicant's "new" claim as best I can, it does not impart to me even that degree of conviction. As I understand it, he contends that *Presnell*, which required that a state appellate court affirm a capital sentence on the same theory under which it had been imposed by the trial court, be extended to require that the defendant receive some sort of formal notice, perhaps in the form of a specification in the indictment or information, of each and every one of the statutorily prescribed aggravating circumstances upon which the prosecution intends to rely for the imposition of the death penalty. I do not believe that four Members of this Court would find that claim either factually or legally sufficient to persuade them to vote to grant certiorari in order to review its denial in the federal habeas proceeding.

Applicant has conceded in his memorandum of law in support of the present federal habeas action that "defense counsel could properly have been expected to know that the State might seek a death sentence on the grounds that the offense was (1) committed by a defendant previously convicted of a felony involving the use or threat of violence or (2) committed by a defendant under sentence of imprisonment." Application, Exhibit B, p. 10. But the memorandum goes on to

state that "a homicide caused by a single gun shot wound to the heart is not self-evidently 'especially heinous, atrocious, or cruel.' And it was not until the sentencing hearing itself that petitioner was appraised [Publisher's note: "appraised" should be "apprised". But see 442 U.S. at 1306.] that the state would seek the death penalty on this ground." *Id.*, at 11.

Cole v. *Arkansas*, *supra*, which *Presnell* simply extended to the sentencing phase of a capital trial, was after all decided in 1948, and was not then thought to embody any novel principle of constitutional law. Applicant concedes that there was adequate notice at the sentencing stage of the hearing for the State to seek the death penalty on two of the statutorily defined aggravating circumstances, and the fact that it has required six years for him to discover that he did not have adequate notice as to the other grounds upon which it was sought, and was thereby prejudiced, tends to detract from the substantiality of his contention.

Applicant has had not merely one day in court. He has had many, many days in court. It has been the conclusion of the Supreme Court of Florida that the death sentence was imposed in accordance with the requirements of Florida law as well as those of the United States Constitution, and it has been the conclusion of the United States District Court for the Northern District of Florida and the Court of Appeals for the Fifth Circuit that there was no federal constitutional error in the process by which applicant was sentenced to death. Three times this Court has refused to review the determinations of these state and federal courts. I do not believe that the claim presented in the present application would be any more successful than the claims presented in the preceding three petitions for certiorari. The application for stay of execution of John A. Spinkellink, presently scheduled for Wednesday, May 23 [Publisher's note: There should be a comma here.] 1979, at 7:00 a.m. E.D.T. is accordingly

Denied.

Dated at Washington, D.C., this twenty-second day of May, 1979, at 7:35 p.m., E.D.T.

[Publisher's note: See 442 U.S. 1308 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–1016

John A. Spinkellink, Applicant,	)	On Re-application for Stay
v.	)	of Execution.
Louie L. Wainwright et al.	)	

[Publisher's note: "Spinkellink" above and throughout this opinion should be "Spenkelink".]

[May 23, 1979]

MR. JUSTICE MARSHALL, Circuit Justice.

John A. Spinkellink, who is scheduled to be put to death at 7:00 a.m. on May 23, 1979, has applied to me for a stay of his execution. MR. JUSTICE REHNQUIST and MR. JUSTICE STEVENS have both denied the application, and the pertinent facts are set forth in MR. JUSTICE REHNQUIST's opinion. Given the Court of Appeals' divided vote on whether to grant a certificate of probable cause, the irrevocable nature of the penalty to be imposed, and the ability of the full Court to consider this case within 36 hours at our regular Conference, I believe it appropriate to grant the application for a stay until further action by the entire Court.

Granted.

Dated at Washington, D.C., this twenty-third day of May, 1979, at 12:15 a.m., E.D.T.

[Publisher's note: See 442 U.S. 1309 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A–958 AND A–967

Jasper F. Williams, M.D., et al., Applicant, A–958 *v.* David Zbaraz, M.D., et al.	)	On Applications for Stay.
Arthur F. Quern, Applicant, A–967 *v.* David Zbaraz, M.D., et al.	)	

[May 24, 1979]

MR. JUSTICE STEVENS, Circuit Justice.

Applicants seek a stay of an order of the United States District Court for the Northern District of Illinois enjoining the State of Illinois from refusing to fund under its medical assistance programs medically necessary abortions performed prior to viability.

The plaintiffs in this action are a class of pregnant women eligible for Illinois medical assistance programs for whom an abortion is medically necessary and a class of physicians who perform such procedures and are certified to receive reimbursement for necessary medical services. Their complaint alleged that the Illinois Statute, P.A. 80-1091, denying reimbursement for medically necessary abortions violated their rights under both the Social Security Act and the Fourteenth Amendment. After the United States Court of Appeals for the Seventh Circuit reversed the District Court's initial decision to abstain, 572 F.2d 582, the District Judge held that the Illinois statute violated the federal Social Security Act and its implementing regulations, since Illinois' funding of only "life-preserving" abortions fell short of the federal statutory responsibility to "establish reasonable standards" for provid-

ing medically necessary treatment. The Court rejected the argument that the Hyde Amendment's[1] prohibition of federal funding of certain categories of abortions limited the State's statutory responsibility, and entered an injunction requiring Illinois to fund medically necessary abortions. The Court of Appeals, after denying a stay of the injunction pending appeal, reversed the District Court decision. The Court of Appeals concluded that the Hyde Amendment was not simply a limitation on the use of federal funds for abortions, but was itself a substantive amendment to the obligations imposed upon the State by Title XIX of the Social Security Act. The Court recognized the constitutional questions raised by its interpretation, nad [Publisher's note: "nad" should be "and".] remanded to the District Court with instructions to consider the constitutionality of both the Illinois statute and the Hyde amendment. [Publisher's note: "amendment" should be "Amendment".]

The District Court held both provisions to be unconstitutional on equal protection grounds. While rejecting the argument that strict scrutiny was appropriate, Judge Grady concluded that the statute's distinction between indigent women in medical need of abortions and those in need of other surgical procedures failed to further any legitimate, articulated state purpose. He was not persuaded by the State's argument that its interest in "fiscal frugality" supported the classification, since the costs of prenatal care, childbirth and postpartum care were established to be substantially higher than the cost of abortions. As to the State's asserted interest in the encouragement of childbirth, the Court recognized that while this interest was clearly legitimate in certain circum-

[1] Pub. L. 95-48, § 210 (1978), commonly known as the Hyde Amendment, provides:

"None of the funds contained in this act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, where such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-standing physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

stances, see *Maher* v. *Roe*, 432 U.S. 464; *Poelker* v. *Doe*, 432 U.S. 519, the State does not have a legitimate interest in promoting the life of a nonviable fetus in a woman for whom an abortion is medically necessary. The United States had intervened as a defendant on remand, when the constitutionality of the Hyde Amendment was called into question. The District Court's injunction, however, was directed solely to the State of Illinois, which was ordered to fund medically necessary abortions prior to viability. The District Court refused to stay this order, and applicants—the Director of the Illinois Department of Public Aid and two physicians who intervened as defendants below—now seek a stay from me in my capacity as Circuit Justice, pending their appeal to this Court.

The standards governing the issuance of stays are well established. "Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of vality." [Publisher's note: "vality" should be "validity".] *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (MR. JUSTICE POWELL, in chambers). "To prevail here the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (MR. JUSTICE MARSHALL, in chambers). In my view, the application before me does not present the "extraordinary circumstances" necessary to justify a stay.

An initial inquiry where a stay is sought in a case within this Court's appellate jurisdiction is "whether five Justices are likely to conclude that the case was erroneously decided below." *Graves* v. *Barnes*, *supra*. Applicants' claim that the District Court improperly distinguished our prior decisions in *Maher* and *Poelker* is far from frivolous, and may well prevail in this Court. While the District Court's judgment is entitled to a presumption of validity, so are statutes validly enacted by Congress and the State of Illinois. Even so, a stay is not necessary to preserve the issue for decision by the Court: the

controversy between plaintiffs and defendants is a live and continuing one, and there is simply no possibility that, absent a stay, our appellate jurisdiction will be defeated. Cf. *In Re Bart*, 82 S. Ct 675, 7 L. Ed. 2d 767 (Mr. Chief Justice Warren, in chambers). The question, then, is only whether the District Court's injunction should be observed in the interim. Unless the applicants will suffer irreparable injury, it clearly should be. See *Whalen* v. *Roe*, *supra*, at 1317-1318.

In addressing the irreparable injury issue, the task of a Judge or Justice is to examine the "competing equities," *Socialist Labor Party* v. *Rhodes*, 89 S. Ct. 3, 21 L. Ed. 2d 72 (MR. JUSTICE STEWART, in chambers), a task that involves "balancing th[e] injury [to one side] against the losses that might be suffered by [the other]." *Railway Express Agency* v. *United States*, 82 S. Ct. 466, 468, 7 L. Ed. 2d 432, 434 (Mr. Justice Harlan, in chambers). Where the lower court has already performed this task in ruling on a stay application, its decision is entitled to weight and should not lightly be disturbed. *Graves* v. *Barnes*, *supra*; *Railway Express Agency* v. *United States*, *supra*.

Both sides agree as to the consequences of a stay of the District Court's order in this case: if a stay is not granted, indigent women for whom an abortion is medically necessary will be able to have abortions prior to viability; with a stay, many or most of them will not. In support of their argument that the former course will cause irreparable injury, applicants point to two factors. First is the State's financial integrity, and the losses which Illinois will suffer if forced to fund medically necessary abortions pending appeal, particularly since no federal reimbursement for these expenses has been ordered. I find this argument unpersuasive. Both the findings of the District Court and the record before me compellingly demonstrate that it is less expensive for the State to pay the entire cost of abortion than it is for it to pay only its share of the costs associated with a full-term pregnancy. Far from suffering any irreparable financial losses without a stay, the State will benefit financially if one is not granted.

The second state interest asserted merits greater concern. A refusal to stay the District Court's order, it is argued, will result in irreparable injury to the interest of the people of Illinois in protecting potential human life. We have in the past recognized the legitimacy of the state interest in encouraging childbirth, and I do not doubt its validity here. How much weight can properly be accorded to that interest, however, is a somewhat different question; *Roe* v. *Wade*, 410 U.S. 113, itself establishes that the State's interest in potential life is never so great that it can outweigh the woman's interest in her health or in deciding, prior to viability, whether to have an abortion. Moreover, the State clearly has an interest in preserving and protecting the life and health of the mother, as well as in promoting childbirth. In this case, where we deal only with "medically necessary" abortions, the weight to be accorded to the State's interest in childbirth must necessarily be diminished by its acknowledged interest in the health of the mother. Finally, the State's policy of encouraging childbirth is in no way guaranteed if a stay is granted. Even without State assistance, at least some indigent women will secure abortions: they may "beg, borrow, or steal" the money; they may find doctors willing to treat them without charge; or they may resort to less costly and less safe illegal methods. While the refusal of a stay will in many cases defeat the State's ability to enforce its interest in promoting childbearing, the grant of a stay will not ensure the full effectuation of that interest.

These claims of irreparable injury to the interests of the State must be weighed against the plaintiff's claims of irreparable injury to their interests if a stay is granted. First, the women plaintiffs here have a conceded constitutional right to choose to have an abortion. Whether or not the State is under a constitutional obligation to fund their abortions, the fact remains that meaningful exercise of this constitutional right depends on the actual availability of abortions. Under the District Court's judgment, the women will in fact be free to decide whether or not to have an abortion; if the judgment

is stayed, the constitutional right to choose will for many be meaningless. And in these circumstances, the loss to the women may be particularly grievous. The order here is addressed only to abortions which are "medically necessary" for the health of the mother. The District Court found that if medically necessary abortions are not performed, "the mother may be subjected to considerable risk of severe medical problems, which may even result in her death."

> "Under the Hyde Amendment standard, a doctor may not certify a woman as being eligible for a publicly funded abortion except where 'the life of the mother would be endangered . . . or . . . where severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term . . . .' Most health problems associated with pregnancy would not be covered by this language . . . and those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother . . . . At the earlier stages of pregnancy, and even at the later stages, doctors are usually unable to determine the degree of injury which may result from a particular medical condition . . . . The effect of the new criteria, then will be to increase substantially maternal morbidity and mortality among indigent pregnant women." Memorandum opinion, at 11; Applicant's Exhibit 8-11.

Whether or not these findings provide support for the District Court's judgment on the merits, a district [Publisher's note: "district" should be "distinct".] question which I do not consider here, it is clear that they do provide support for plaintiffs' claims of irreparable injury if a stay is granted.

Balancing these same equities of the plaintiffs and defendants, the District Court denied a stay of its injunction pending appeal. The applicants had also sought a stay from the Seventh Circuit, pending appeal, of the District Court's earlier order requiring the State to fund medically necessary abortions on the grounds that its refusal to do so violated the Social Security Act. That application was denied by Judges Fair-

child, Bauer and Wood, who concluded that "the defendant-appellant and intervening defendants-appellants have not sustained their heavy burden of demonstrating immediate irreparable harm in the absence of a stay of the District Court's injunction pending appeal." Plaintiffs' Exhibit K-2.[2] Both of these courts [Publisher's note: There should be a comma here.] evaluating the same or substantially the same claims as those made here, concluded that a stay was not warranted. Their decisions must be given some weight. I am persuaded that they are correct.

Whether or not the plaintiffs prevail in this Court, the fact is that they did in the District Court. The burden is on the defendants-applicants to establish that the order of the District Court should not be enforced. Balancing the equities is always a difficult task, and few cases are ever free from doubt. Where there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents. Cf. *Enomoto* v. *Spain*, 424 U.S. 951 (STEVENS, J., dissenting). In my judgment, as in the judgment of the District Court and the Court of Appeals, the equities here appear to favor the plaintiffs. The applications for a stay are therefore denied.

[2] A stay was then sought in this Court, and both THE CHIEF JUSTICE and I denied the application. I have reviewed the claims of the parties anew in connection with these applications. And I have concluded once again that the judgment of the lower court should not be disturbed.

[Publisher's note: See 443 U.S. 1301 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

Nos. A–101 AND A–102

Pacific Telephone & Telegraph Co., Petitioner,	)	
A–101 *v.*	)	
Public Utilities Commission of California et al.	)	On Applications for Stay.
	)	
General Telephone Co., Petitioner,	)	
A–102 *v.*	)	
Public Utilities Commission of California et al.	)	

[August 13, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I continue in effect a temporary injunction issued by the Court of Appeals for the Ninth Circuit on April 2, 1979, pending disposition by the full Court of their petitions for certiorari to review the judgment of the Court of Appeals. On July 18 that court, in a consolidated case in which both applicants were appellants, affirmed the judgment of the United States District Court for the Northern District of California denying applicants' injunctive relief against the enforcement of a rate order earlier promulgated by respondent California Public Utility Commission (PUC). The PUC in September 1977 (Decision No. 87838), [Publisher's note: Either the comma preceding this note is surplus or there should be a comma between "The PUC" and "in September 1977". But see 443 U.S. at 1302.] had ordered applicants to refund charges paid by subscribers before 1978 and to reduce certain of its rates for that and future years. The PUC, however, stayed implementation of its order pending judicial review. *Pacific Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, No. 79-3150, slip. op., at 2 (CA9, July 18, 1979).

After the Supreme Court of California denied applicants' request for review, applicants petitioned this Court for certiorari. Applicants argued this Court should review the PUC rate order because it was premised on the PUC's interpretation of an unsettled question of federal tax law. They claimed that if this interpretation subsequently proved incorrect, they would be subject to substantial liability in back taxes. Applicant Pacific Telephone also challenged the PUC's decision on the ground that it violated the Due Process Clause. The petitions were denied on December 12, 1978, 439 U.S. 1052, with MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN dissenting from the order of denial. Petitions for rehearing were thereafter denied on February 21, 1979, 440 U.S. 931. On March 14, 1979, the PUC terminated the stay of its own order of September 13, 1977, stating in its order so doing that "the avenues of judicial review have been exhausted." *Pacific Telephone & Telegraph Co.*, *supra*, slip op., at 2. The following day applicants filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of California. That court denied relief, but the Court of Appeals granted its own temporary injunction on April 2, 1979, pending consideration of applicants' appeal from the order of the District Court. Last month, as previously noted in this opinion, the Court of Appeals affirmed the judgment of the District Court, dissolved its own injunction, and denied applicants' request for a stay of mandate in order that they might petition this Court for certiorari.

With this sort of procedural history, one would expect applicants' petitions for certiorari to deal principally with questions arising under the United States Constitution or laws governing the setting of rates by state utility commissions for public utilities. But the questions which applicants seek to have reviewed on certiorari pertain to the application of federal tax statutes as they relate to depreciation which may be claimed by public utilities. Since it is this type of question which applicants seek to litigate if certiorari is granted, one

would likewise expect either an agency or officer of the United States having some responsibility for administering these tax statutes named as respondents, instead of the California PUC or intervening California municipal corporations. Without dwelling further on the anomalous nature of applicants' petitions for certiorari, I have concluded that their actions in the United States District Court for the Northern District of California begun in March 1979, [Publisher's note: Either the comma preceding this note is surplus or there should be a comma between "California" and "begun". But see 443 U.S. at 1303.] were simply an effort to relitigate issues which had been determined adversely to them by the administrative and judicial processes of the State of California, and with regard to which this Court denied certiorari and denied rehearing last Term. 439 U.S. 1052 (1978); 440 U.S. 931 (1979). These denials took place notwithstanding the fact that the Solicitor General urged the Court to grant certiorari and decide the issues presented by the petitions.

The PUC in its Decision No. 90094, rendered on March 14, 1979, after the proceedings in this Court, was doing no more than formally stating that the conditions on which its stay had been granted—exhaustion of judicial review—had occurred, and therefore the stay expired by its own terms. The PUC dissolved this stay despite applicants' contention that the PUC's interpretation of federal tax law in Decision No. 87838 was incorrect and that the rate order would consequently result in the IRS's assessment of substantial tax deficiencies against applicants. In my opinion, the determination of whether or not the PUC's rate order should have been stayed pending resolution of the federal tax issues was, at this late stage in the proceedings, entirely a matter for the State to decide.

One need not question the assertion of applicants that very large financial stakes hinge on the manner in which the IRS, subject to whatever review of its action is provided by law, treats the refund and rate reduction orders imposed by the PUC's order of September 13, 1977. Nor need one doubt that this Court had jurisdiction, under cases such as *Zacchini* v. *Scripps-Howard Broadcasting Co*., 433 U.S. 562 (1977), to

review applicants' earlier petitions for certiorari in Nos. 78-606 and 78-607, O.T. 1978, on the ground that the PUC had reached a decision based on a misapprehension of federal law which it might not have reached had it correctly understood federal law. But that is now water over the dam. This Court denied those petitions last Term, and denied petitions for rehearing.

If I thought it necessary in passing upon this stay application to determine the present day correctness of this Court's reading of California law in *Napa Valley Co.* v. *Railroad Commission*, 251 U.S. 366 (1920), I would naturally defer to the opinion of the Court of Appeals, which must deal with California law more frequently than does this Court. But I do not actually think it is necessary to make this determination; a State may enunicate [Publisher's note: "enunicate" should be "enunciate". But see 443 U.S. at 1304.] policy through an administrative agency, as well as through its courts, and so long as there is an opportunity for judicial review the fact that such review may be denied on a discretionary basis does not make the agency's action any less the voice of the State for purposes of this Court's jurisdiction or for purposes of federal-state comity. See *United States* v. *Utah Construction Co.*, 384 U.S. 394, 419-423 (1966). Nor is this a case where any claim of bias is made against the agency, see *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), or where an action of the federal courts in refusing to allow applicants to relitigate the merits of their claim on which this Court has previously denied certiorari amounted to the imposition of a requirement of "exhaustion of administrative remedies." Here the administrative action was the source of the claimed wrong, not a possible avenue for its redress.

The net of it is that I believe applicants' federal court litigation is new wine in old bottles. When it was new wine in new bottles, last Term, this Court denied certiorari, and I have no reason to believe that any intervening events would change that outcome. Accordingly, without considering the second part of the requirement which applicants must meet in order to obtain a stay—the so-called "stay equities"—the temporary

stay which I previously issued is dissolved forthwith, and applicants' request for a stay of the mandate of the Court of Appeals for the Ninth Circuit is hereby

Denied.

Dated in Washington, D.C. this
13th day of August, 1979.

[Publisher's note: See 443 U.S. 1306 for the authoritative official version of this opinion.]

SUPREME COURT OF THE UNITED STATES

No. A–172

Kirk B. Lenhard and George E. Franzen, Clark County Deputy Public Defenders, individually and as next friends acting on behalf of Jesse Walter Bishop, Applicants, *v.* Charles Wolff, Warden, Nevada State Prison System, et al.	)	On Application for Stay of Execution.

[September 7, 1979]

MR. JUSTICE REHNQUIST, Circuit Justice.

On August 25, 1979, I temporarily enjoined respondents from executing Jesse Bishop, upon whom a death sentence was imposed by the State District Court for Clark County, Nev., and affirmed by the Supreme Court of Nevada in July 1979. I issued the injunction so that I would be able to consider the response of Nevada officials and additional information of record which I requested from each of the parties. In the exercise of what I find to be as difficult a task as must be performed by any Member of this Court—the obligation to act as surrogate for the entire Court in deciding whether to grant or deny extraordinary relief pursuant to 28 U.S.C. § 1651 pending disposition of a petition for certiorari by the full Court, [Publisher's note: The comma preceding this note should be a dash.] I have determined that it is appropriate to continue the stay of execution pending consideration by the full Court. Since the State of Nevada is entitled to have the mandates of its courts enforced unless they offend the laws or Constitution of the United States, and since Jesse Bishop has concededly disclaimed any effort either by himself or by others on his behalf to prevent his execution, I feel obliged to briefly summarize the reasons which lead me to refer the application to the full Court.

The defendant under sentence of death has wholly disclaimed any effort to seek a stay from this Court or to seek review of the decision of the Supreme Court of Nevada by means of certiorari in this Court. The only two comparable cases which have come before this Court are *Gilmore* v. *Utah*, 429 U.S. 1012 (1976), and *Evans* v. *Bennett*, No. A-868, in which I granted a stay of execution on April 5, 1979 (47 L.W. 3671) in order that the case might be considered by the full Court. The full Court thereafter vacated the stay. *Evans* v. *Bennett*, No. A-868 (April 13, 1979). In each of these cases, the defendant under sentence of death had disassociated himself from efforts to secure review of that sentence.[*] In *Evans*, I entered the stay of execution in recognition of the fact that four Members of the Court had dissented from the ultimate denial of the stay in *Gilmore*, *supra*. While my Brothers BRENNAN'S and MARSHALL'S view of the death sentence as "cruel and unusual punishment" within the prohibition of the Eighth Amendment under all circumstances might permit review of any capital case by this Court, the dissenting opinions of my Brothers WHITE and BLACKMUN seem more limited in scope. Those opinions urged plenary consideration of the application to resolve doubts about the standing of Gilmore's mother to prosecute the action without her son's consent when substantial questions regarding the constitutionality of the state statute remained unresolved. I therefore concluded in *Evans* that a stay until the regularly scheduled Conference of the Court the following week would be most consonant with my obligations as Circuit Justice.

In my view, the initial barrier to be overcome in the present case by applicants Lenhard and Franzen, who with commendable fidelity to their assignment by the trial court have sought this stay and petitioned for habeas relief in the federal courts, is the finding of the courts which have passed on the question that defendant Jesse Bishop is competent to waive

[*] In *Evans*, *supra*, the Court was informally advised after the date upon which I granted the stay that Evans had authorized the prosecution of the federal habeas corpus action in the United States District Court of the Southern District of Alabama.

the assertion of any constitutional infirmities in the sentence imposed upon him by the Nevada courts. A successful attack on Bishop's competency is the requisite threshold for applicants' standing. Even if standing were not a barrier, a view some Members of the Court may well subscribe to, applicants still would have the burden of demonstrating some constitutional deficiency in the proceedings, as I read the views of my Brother WHITE. For this reason, I have considered both the nature of the judicial review afforded on the merits thus far, as well as the review afforded the determination of Bishop's competency.

At the trial court level, both Evans and Bishop pleaded guilty, whereas Gilmore was tried and sentenced by a jury. Gilmore declined to seek any appellate review in the Supreme Court of Utah, and was granted none. Evans' conviction and sentence was [Publisher's note: "was" should be "were".] reviewed pursuant to a requirement for mandatory appeal in both the Alabama Court of Appeals and in the Supreme Court of Alabama. Bishop's case was comprehensively reviewed by the Supreme Court of Nevada. Evans additionally unsuccessfully sought a writ of certiorari from this Court to review the judgment of the Supreme Court of Alabama, which writ was denied on February 20, 1979. Thus each of the three cases had progressed to different levels of review within the judicial system: Gilmore had neither sought nor obtained any appellate review of the death sentence imposed upon him by the trial court; Bishop has obtained full review by the Supreme Court of Nevada of the death sentence and proceedings which led up to it in the trial court; Evans obtained not only state appellate review, but petitioned this Court unsuccessfully for a writ of certiorari challenging the affirmance of his death sentence by the Alabama courts.

In *Gilmore*, no state or federal court had reviewed the constitutionality of the Utah statute. The Supreme Court of Nevada in reviewing Bishop's case, however, expressly upheld the constitutionality of the Nevada capital punishment statute. The court reasoned that the

> "Nevada statutes authorizing the imposition of the death penalty are similar to the Florida statutes which were

> found to be constitutional in *Proffitt* v. *Florida*, 428 U.S. 242 (1976). The Nevada statutes provide for a consideration of any mitigating factor the defendant may want to present. NRS 200.035(7). Cf. *Lockett* v. *Ohio*, *supra*. The imposition of the death penalty in this case offends neither the "United States Constitution nor the Nevada constitution." *Bishop* v. *Nevada*, — Nev. — (July 2, 1979).

Again, in my view, the substantive constitutional arguments which might be made by defendant Bishop in this Court in support of review of the judgment of the Supreme Court of Nevada bear only tangentially on the merits of the application for stay, since the contentions are not being made by Bishop, but rather by the public defenders asserting that they act as "next friends." But since MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in *Gilmore*, stated that "Until the state courts have resolved the obvious, serious doubts about the validity of the state statute, the imposition of the death penalty in this case should be stayed." 429 U.S., at 1018, and MR. JUSTICE BLACKMUN stated that "The question of Bessie Gilmore's standing and the constitutional issue are not insubstantial," *id*., at 1020, it is apparent that four Members of this Court do not consider the issue of the "standing" of a relative to assert claims which the convicted defendant refuses to assert and the merits of those claims to be wholly disassociated from one another. The constitutionality of Bishop's sentence has, in any event, been subjected to substantially greater scrutiny than the sentence imposed in *Gilmore*.

From my view of the controlling legal precepts, the record evidence of competency is more important to the determination of whether a stay is appropriate than is the merit of the underlying application. While I do not purport to have extensive knowledge of the concept of "next friend" in a legal proceeding such as this, it strikes me that from a purely technical standpoint a public defender may appear as "next friend" with as much justification as the mother of John L. Evans or

of Gary Gilmore. But I do think the contrast between the position of Bishop's family in this case and that of Gilmore's mother and Evans' mother in those cases is worth noting. Here Bishop's family has by no means repudiated him, but they have at the same time declined to pursue or join in the pursuit of any further judicial review of the death sentence. While the familial relationship of the "next friend" to the defendant may not be relevant to the technical question of standing, it may provide some inferences as to the issue of competence. The refusal of the family to seek relief may well support the finding of the courts which have considered the question that the defendant is competent to waive additional proceedings.

Gilmore underwent competency proceedings both prior to trial and after he announced his intention to waive appellate review. With respect to the waiver of the latter right, the trial judge appointed a prison psychiatrist to examine Gilmore. On the basis of a one-hour interview the psychiatrist submitted a report to the court finding Gilmore competent to waive appeals. Reports of two prison psychologists were submitted as corroboration, and the trial judge entered a finding of competency.

Bishop was found competent to plead guilty and represent himself after an evidentiary hearing at which three examining psychiatrists reported that Bishop was competent. There has been no subsequent *judicial* determination of his competency to waive further litigation. A state-appointed psychiatrist, however—the only psychiatrist that Bishop would consent to see—submitted a report based on a four-hour interview, concluding that Bishop is competent to waive further review. The United States District Court for the District of Nevada, in its opinion in the habeas proceeding dated August 23, 1979, stated:

> ". . . The Court has reviewed the record of the proceedings before the Nevada Supreme Court and the Eighth Judicial District of the State of Nevada and based thereon, finds that Jesse Walter Bishop made a knowing

> and intelligent waiver of any and all federal rights he might have asserted both before and after the Eighth Judicial District imposed sentence, and, specifically, that the State of Nevada's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded." Application, Appendix B, p. 5.

On appeal to the Court of Appeals for the Ninth Circuit, a panel of that court stated in its opinion:

> "Bishop himself has steadfastly maintained that he does not wish to seek relief in the federal courts and refuses to authorize any petition for habeas corpus or stay of execution to be filed on his behalf. Most recently he appeared in open court at the hearing before the District Court on August 23, 1979 and declared that he believes he has a constitutional right to waive any rights to a federal appeal and desires to do so. He maintained he was intelligently and competently exercising his right to refrain from seeking relief from the federal courts." Application, Appendix A, p. 3.

The Court of Appeals went on to observe that following the initial determination of competence to stand trial and plead guilty,

> "there has been no showing of Bishop's incompetence. . . . Bishop was found to be competent at the time of trial by three psychiatrists; he was observed by the panel of three judges during the penalty hearing; he was observed in a subsequent proceeding before the trial court on July 25, 1979; he appeared personally before the United States District Court on August 23, 1979; and he was examined by a licensed psychiatrist on August 21, 1979. On none of these occasions was there an indication to those responsible persons that he was incompetent. We find that there has been no evidence of incompetence sufficient to warrant a hearing on the issue." Application, Appendix A, p. 4.

I thus find myself much in the position in which I found myself in *Evans* v. *Bennett*. If I were casting my vote on the application for a stay as a Member of the full Court, I would vote to deny the stay. I am in full agreement with the *per curiam* opinion of Judges Wright, Sneed, and Hug of the United States Court of Appeals for the Ninth Circuit. I am likewise in full agreement with the observations of Judge Sneed in his concurring opinion suggesting that however worthy and high minded the motives of "next friends" may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chess board larger than his own case. The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

But because I am acting as surrogate for the full Court, and because the Court will have an opportunity to consider this application at its regularly scheduled Conference the last week of this month, I have resolved doubts which greatly trouble me as to my proper course of action in favor of continuing the injunction which I previously issued to and including Monday, October 1, 1979, unless previously modified or vacated by the Court.

September 7, 1979