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A COLLECTION OF

IN CHAMBERS OPINIONS

BY THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

covering the 1999 Term through the 2003 Term

and

previously unpublished or uncollected in chambers opinions from 1853, 1861, 1912, 1945, 1946, and 1952

with

cumulative, up-to-date Tables and Indexes for Volumes 1, 2, 3, and 4

Compiled by

Cynthia Rapp

and

Ross E. Davies

October 2004

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PREFACE

This is the first of what we hope will be many annual supplements to Cynthia Rapp's three-volume collection of *In Chambers Opinions by the Justices of the Supreme Court of the United States*. This year's supplement contains three categories of in chambers opinions: (1) new opinions that have been filed since Ms. Rapp completed her original work at the end of October Term 1998; (2) old opinions that have been published before but that did not make it into the original three-volume set of in chambers opinions; and (3) heretofore unreported old opinions. The provenance of the new opinions (see pages 1424-1459) is obvious. The previously published old opinions are:

Ex parte Kaine, a relatively obscure pre-Civil War habeas corpus case decided by Justice Samuel Nelson. The opinion appears in a very slightly corrupted form in West's *Federal Cases*. The version reproduced here is from the original report in the third volume of Samuel Blatchford's *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit* (1864). Blatchford himself would later serve on the Supreme Court from 1882 to 1893.

Ex parte Merryman, a famous Civil War habeas corpus case in which Chief Justice Roger Taney rejected Executive suspension of the writ. The opinion appears in a somewhat corrupted form in *Federal Cases*. The version used here is from a contemporaneous authorized pamphlet edition: *Decision of Chief Justice Taney, in the Merryman Case, upon the Writ of Habeas Corpus* (John Campbell 1862).

Public Utilities Commission of the District of Columbia v. Pollak, a quirky recusal statement by Justice Felix Frankfurter. The opinion is sandwiched between a concurring-and-dissenting opinion by Justice Hugo Black and a dissenting opinion by Justice William O. Douglas in volume 343 of the *United States Reports*.

The unreported old opinions are:

Marks v. Davis, an unusual two-Justice opinion issued by Justices Willis Van Devanter and Mahlon Pitney during the turbulent 1912 presidential campaign. From the Kansas Supreme Court Case Files at the Kansas State Historical Society.

Gum v. United States, an application for bail quickly disposed of by Justice Frankfurter. From the Frankfurter Papers at the Manuscript Division of the Library of Congress.

Ex parte Durant, Justice Harold Burton's denial of an application for a writ of habeas corpus by an officer of the United States Army accused of a million-dollar jewelry heist "from the Kronberg Castle in Germany at a time when the castle was in the possession of the U.S. Army." From the Burton Papers at the Manuscript Division of the Library of Congress.

PREFACE

The "Cumulative Table of Cases Orally Argued" on page xxiii features six additions. Four of the cases in this supplement were argued before a Justice or two: *Ex parte Kaine*, *Ex parte Merryman*, *Marks v. Davis*, and *Ex parte Durant*. In addition, we recently learned that *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 2 Rapp 684 (1976), was argued before then-Justice William Rehnquist. And we have corrected our failure to include *Dexter v. Schrunk*, 400 U.S. 1207, 1 Rapp xvi & 2 Rapp 467 (1970), in the oral argument table.

We follow the same conventions in this supplement as we have in our other in chambers volumes: (1) brackets not accompanied by a "Publisher's note" are in the original; (2) running heads are preserved where they appear in the originals, and added to originals that lack them; (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, but in each case the identity and posture of the parties are clear, and so they remain unchanged. Also bear in mind that 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. The relevant *United States Reports* citation appears in a "Publisher's note" at the beginning of each such opinion in this supplement.

The page numbers here are the same as they will be in the bound volume 4 of *In Chambers Opinions*, thus making the *permanent* citations available upon publication of this supplement. If you find any errors — or any in chambers opinions that we have missed — please let us know at editors@greenbag.org. We will give credit where credit is due.

Thanks as always to Cynthia Rapp for performing such a useful public service by collecting and indexing the Justices' solo efforts; William Suter, Clerk of the Court, for his support of this project; the George Mason University School of Law and the George Mason Law & Economics Center for their support of the *Green Bag*; and Susan Davies. Thanks also to Jason Constantine, Amy Eberhard, Robert Hall, and Ee-Ing Ong.

Ross E. Davies
October 31, 2004

CUMULATIVE TABLE OF CASES REPORTED

CUMULATIVE TABLE OF CASES REPORTED

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BY DATE

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none

CUMULATIVE INDEX OF CASES BY DISPOSITION

CUMULATIVE INDEX OF CASES BY TOPIC

[Publisher's note: Although this opinion appears in a circuit court reporter, Justice Nelson was acting as a member of the Supreme Court at the time. *In re Kaine*, 55 U.S. 103 (1853). The in chambers opinion to which he refers on page 1394 is not reproduced here because we have not tracked down the original in the papers of Judge Samuel Betts. We will have it for the 2005 supplement. For now, 14 F. Cas. 82 will have to do.]

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF THE UNITED STATES

WITHIN THE SECOND CIRCUIT.

Ex parte THOMAS KAINE.

The proceedings on a writ of *habeas corpus* in the Federal Courts are not governed by the laws of the States on the subject, but by the common law of England, as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe.

Under that system, a decision under one writ, refusing the discharge of a prisoner, is no bar to the issuing of any number of other successive writs by any Court or magistrate having jurisdiction.

Where the prisoner was arrested under an extradition treaty between the United States and Great Britain, and committed by a magistrate after examination, and then a *habeas corpus* was sued out by him before a Circuit Court of the United States, which, after a hearing, dismissed the writ and remanded the prisoner to be held under the commitment of the magistrate: *Held*, that the decision of such Court was no bar to an inquiry by a Justice of the Supreme Court of the United States, upon a *habeas corpus* issued by him, into the legality of the detention of the prisoner under said commitment.

The views expressed by Mr. Justice Nelson in his opinion *In re Kaine* (14 *How*., 103, 129), as to the construction of the Treaty between the United States and Great Britain, of August 9th, 1842, (8 *U.S. Stat. at Large*, 572, 576), and of the Act of Congress of March 3d, 1843, passed in pursuance thereof, (8 *Id*., 623), and as to the jurisdiction of the committing magistrate, and as to the competency of the evidence on which the prisoner was committed, applied to this case, and the prisoner discharged on *habeas corpus*, after a warrant had been issued by the Department of State for his surrender to the British Consul, to be carried back to Great Britain.

Considerations stated, why, under said Treaty, a demand must first be made directly upon the Government of the United States by the British Government for the surrender of a fugitive, and the authority of the former Government be obtained, before a warrant can be issued by a magistrate for the arrest of the fugitive.

The proof before a magistrate, under a Treaty of extradition, should, to warrant a commitment by him, be so full and satisfactory as to the commission of the offence charged, as, in his judgment, to authorize a conviction by him if he were sitting on the trial of the case.

(Before NELSON, J., Southern District of New York, April 25th, 1853.)

This was a *habeas corpus* before Mr. Justice Nelson, at Chambers. The facts are sufficiently set forth in his opinion. For the report of the case in the Supreme Court, see *In re Kaine*, (14 How., 103).

James T. Brady, *Richard Busteed*, and *Robert Emmet*, for the prisoner.

Ambrose L. Jordan, for the British Government.

NELSON J. The prisoner was originally apprehended on the 15th of June, 1852, under a warrant issued by Commissioner Bridgham, under the Treaty between the United States and Great Britain, of the 9th of August, 1842 (8 *U.S. Stat. at Large*, 572), on the application of Mr. Barclay, the British Consul at the port of New York, upon a charge of assault upon James Balfe, in Ireland, with intent to murder. Upon hearing the allegations and proofs, the Commissioner, on the 29th of June following, found him guilty of the charge, and directed that he be detained in custody, in pursuance of the provisions of the Treaty, to abide the order of the President of the United States. On the 1st of July, a writ of *habeas corpus* was sued out by the prisoner, returnable before the United States Circuit Court for the Southern District of New York, the Honorable Samuel R. Betts, District Judge, presiding, founded upon an alleged illegal detention under the warrant of the Commissioner. Upon a return to the writ by the Marshal, and a review of the proceedings that had taken place before the Commissioner, the Court, after consideration, held them to be legal and valid, and, on the 9th of the same month, dismissed the writ and remanded the prisoner to the custody of the Marshal, under the previous order of commitment by the Commissioner. On the 17th of July following, the proceedings having been forwarded to the proper Department at Washington, the acting Secretary of State issued his warrant, directing that the prisoner be surrendered and delivered up to Mr. Barclay, her Britannic Majesty's Consul. At this stage of the proceedings, an application was made before me, at Chambers, for a writ of *habeas corpus*, to bring up the prisoner, upon an alleged illegal detention and imprisonment, which I refused until the whole of the proceedings that had taken place before the Commissioner and the Circuit Court should be laid before me. These were subsequently furnished, and, upon a full and careful examination, I became satisfied that the Commissioner possessed no jurisdiction over the case, and that the proceedings were, in other respects, irregular and not warranted by law. But, instead of discharging the prisoner, differing in opinion, as I did, from my brother in the Circuit Court, and deeming some of the questions involved of sufficient magnitude and public interest to justify the submission of them to the highest judicial tribunal in the Government, I adjourned the case to the next term of the Supreme Court of the United States, in conformity with the established practice in the King's Bench of England in similar cases. That Court, after argument and due

consideration, and for reasons which were satisfactory to me, distinguished the adjournment of the case from Chambers to the term, from a similar proceeding in the King's Bench, on account of the limited jurisdiction of the Supreme Court in respect to original proceedings, their powers being mainly appellate, and consequently dismissed the adjourned case for want of jurisdiction. The case was, however, presented to that Court in another form. An application was made to it directly by the prisoner for a writ of *habeas corpus*, the application being accompanied by the proceedings that had taken place before the Commissioner and the Circuit Court. But the questions involved failed to meet a judicial determination, in consequence of a serious diversity of opinion among the members of the Court, a majority of my brethren not concurring in the interpretation to be given to the Treaty and the Act of Congress passed in pursuance thereof, nor in respect to the jurisdiction of the Commissioner under whose order the prisoner had been committed for the purpose of his surrender to the British authorities. The application was consequently denied, and an order entered dismissing the petition. The case before me, therefore, together with the questions involved on the return of the Marshal to the writ of *habeas corpus*, which were adjourned to the Supreme Court, having been dismissed for want of jurisdiction, or rather not having been entertained for want of it, necessarily remained for a final hearing at Chambers, as the prisoner was in custody under the authority of that writ, and must continue in such custody until discharged, or else be remanded for the purpose of being dealt with as directed by the former commitment. The hearing at Chambers upon the return was adjourned, accordingly, to the first Monday of this month, and the counsel on both sides, being advised thereof, have appeared and submitted their arguments upon the several questions arising in the case.

The learned counsel appearing on behalf of the British authorities has objected that the decision of Judge Betts, sitting in the Circuit Court, upon the return to the writ of *habeas corpus* before that Court, it being a Court of competent jurisdiction to hear and determine the question whether the commitment under the Commissioner's order or warrant was legal or not, is conclusive, and a bar to any subsequent inquiry into the same matters by virtue of this writ. I do not so understand the law. The learned counsel has referred to *Mercein* v. *The People*, (25 *Wend*., 64), as an authority. The question in that case arose under the statute of the State of New York regulating the proceedings upon the writ of *habeas corpus;* and, if the decision there is as supposed, it would not be an authority to govern this case. The question there, however, which arose upon the proceedings of a father to obtain the possession of an infant child from the custody and care of the mother, who had separated from her husband, is not analogous. But the conclusive answer to this objection is, that the proceedings upon this writ in the Federal Courts are not governed by the

laws and regulations of the States on the subject, but by the common law of England, as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe, (*Ex parte Watkins*, 3 *Peters*, 193; *Ex parte Randolph*, 2 *Brock. C.C.R.*, 447); that, according to that system of laws, so guarded is it in favor of the liberty of the subject, the decision of one Court or magistrate, upon the return to the writ, refusing to discharge the prisoner, is no bar to the issuing of a second or third or more writs, by any other Court or magistrate having jurisdiction of the case; and that such Court or magistrate may remand or discharge the prisoner, in the exercise of an independent judgment upon the same matters (*Ex parte Partington*, 13 *Mee. & W.* 679; *Canadian Prisoners' Case*, 5 *Id*., 32, 47; *The King* v. *Suddis*, 1 *East*, 306, 314; *Burdett* v. *Abbott*, 14 *Id*., 91; *Leonard Watson's Case*, 9 *Ad. & Ell*., 731). In one of the cases referred to, the prisoner had obtained this writ from two of the highest common law Courts of England, and also from the Chief Justice of the King's Bench, at Chambers, in succession, and their judgments had been given upon the cause of his imprisonment; and the learned Judge, in delivering his opinion on the last application, alluding to the decisions on the former writs, refusing to discharge, observed, that this was no objection to the hearing on that occasion, as a subject in confinement had a right to call upon every Court or magistrate in the kingdom, having jurisdiction of the matter, to inquire into the cause of his being restrained of his liberty. The decision, therefore, of the Circuit Court, upon a previous writ of *habeas corpus* obtained on behalf of the prisoner, refusing to discharge him, will not relieve me from inquiring into the legality of the imprisonment under the order of the Commissioner, upon the present application.

The learned counsel also asked permission to argue the questions arising upon the construction of the Treaty and of the Act of Congress passed in pursuance thereof, and upon the jurisdiction of the Commissioner and the competency of the evidence before him upon which the prisoner was found guilty, inasmuch as those questions had not been argued before the Supreme Court on the side of the British Government, as no counsel appeared, on that argument, in its behalf. The request was readily granted; and it is a matter of gratification to me, that I have had the benefit of the investigations and views of the learned counsel, in aid of the further consideration which I have been called upon to give to the very important and somewhat difficult questions involved in the final determination of the case. For, although, upon the further consideration of these questions, I am obliged to adhere to the opinions originally entertained, and which have been stated at large elsewhere, I am the more satisfied with their soundness, finding them unchanged after the able adverse argument submitted at the hearing. The opinions referred to, and which were concurred in by two of my learned brethren, the Chief

Justice and Mr. Justice Daniel, led to the conclusions: 1. That the judiciary possess no jurisdiction to entertain proceedings, under the Treaty, for the apprehension and committal of an alleged fugitive, without a previous requisition, made under the authority of Great Britain, upon the President of the United States, and his authority for the purpose; 2. That the United States Commissioner, Mr. Bridgham, was not an officer, within the Treaty or the Act of Congress, upon whom the power was conferred to hear and determine the question of criminality, upon which determination the surrender is to be made; 3. That there was no competent evidence before the Commissioner, if he possessed the power, to authorize or warrant the finding of the offence charged. As I have already observed, the grounds upon which these conclusions were arrived at have been stated at large elsewhere, and I shall not, on the present occasion, repeat them. They are such as would have satisfied my mind, beyond all question or doubt, had it not been for the different opinions entertained by four of my learned brethren, for whose judgment I entertain a sincere respect. Those opinions, however, not being the opinions of a majority of the Court, and there having been a dismissal of the case without any decision upon the merits, I am left to follow out my own convictions and conclusions, in the final disposition to be made of it; and, being satisfied of the soundness of them, I must enforce them, till I am otherwise authoritatively instructed.

The practice of delivering up offenders charged with felony and other high crimes, who have fled from the country in which the crime has been committed into a foreign and friendly jurisdiction, is highly commendable, and sanctioned by the usages of international law. At the same time, it is a delicate power of Government, which should be limited, and guarded with great care, to prevent abuses, and be exercised with the utmost deliberation and caution. The difficulty of entering into treaties for this purpose arises out of the character of the criminal codes of different nations, both as it respects the acts made penal by law, and the degree and mode of punishment annexed to offences. An enlightened nation, with a criminal code ameliorated by the advance of civilization, would not enter into a treaty with a barbarous one, whose code was bloody and cruel. And, even among enlightened nations, the stipulations for surrender are cautiously limited to a few specified crimes, of atrocious character, against persons and property. The Treaty of November 19th, 1794, (8 *U.S. Stat. at Large*, 116, 129), between this country and Great Britain, was confined to the crimes of murder and forgery. The present one of 1842 is more comprehensive, though still restricted, as is also the Treaty with France, of November 9th, 1843, (8 *U.S. Stat. at Large*, 580, 582). Mr. Jefferson, in 1793, in a letter in reply to a demand by the French Minister for the surrender of fugitives, observed: "The evil of protecting malefactors of every dye is as sensibly felt here as in other countries, but,

until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplices."

Another objection to entering into these treaties is the difficulty of guarding against the abuse arising out of demands for the surrender of political offenders, under the form of some of the crimes enumerated in the treaty. In most instances, perhaps, of political offences, the acts, detached from the political character of the transaction, would bring the case within some of the offences enumerated; and, unless the Government upon whom the demand is made takes the responsibility of distinguishing between the two, the treaty obligation would require the surrender. The surrender, in such cases, involves a political question, which must be decided by the political, and not by the judicial, powers of the Government. It is a general principle, as it respects political questions concerning foreign Governments, that the judiciary follows the determination of the political power, which has charge of its foreign relations, and is, therefore, presumed to best understand what is fit and proper for the interest and honor of the country. They are questions unfit for the arbitrament of the judiciary — especially so for the subordinate magistrates of the country. These questions growing out of political offences, greatly embarrass governments in canvassing the policy and expediency of entering into treaties of extradition, and, when they arise, are calculated to endanger the authority and force of such treaties. It was the apprehension of the people of this country, at the time, that the offence of Jonathan Robbins, who was delivered up under the Treaty with Great Britain of 1794, was a political offense, which prevented a renewal of the stipulations from that time down to the present Treaty of 1842, as it was claimed that he was an American citizen, and had been impressed on board of a British vessel, and that the crime was committed in rescuing himself from the hands of his oppressors. Assuming such apprehension to have been well founded, the intense public indignation that followed was creditable to the nation.

These considerations, thus briefly stated, (for I have not the time to enlarge upon them), show that treaties of extradition involve, in the execution of them, great national questions, which should be referred, in the first instance, to the political power of the nation, and which, under our system of government, belong to the Executive, as the head of the nation, to decide. The instances of political offences, in which demands may be made by one nation upon another for a surrender of the offender, are by no means imaginary or cases of no practical application. The history of the times informs us that, at this day, more than one Government on the Continent of Europe is agitated with apprehension and alarm on this subject, and from which even the Government of England seems not to have been entirely free. And, in our own country, how many political offenders, who have sought an asylum here from the

disastrous struggles for liberty in the other hemisphere, might be pointed out, some of whom even might be the subject of a requisition under the very Treaty in question.

These are some of the considerations that strongly urge the interpretation of the Treaty before us for which I have heretofore contended, and the result of which has been already stated, and which is the one given to it by Great Britain in providing for its execution on her part. The demand by this Government for the surrender of the fugitive must be first made directly upon that Government, and its consent and authority be obtained, before the judiciary can be called into requisition. In my judgment, this is a sound construction of the language of the Treaty, and carries out the intention and policy of the high contracting parties. The case immediately before me may be one of comparative unimportance, as the fugitive demanded is an obscure and humble individual, and may even be the proper subject of surrender, under the Treaty. But I cannot forget that the principles and rule of construction to be applied to him will be equally applicable to the case of a demand for the surrender of a political offender, and to all other cases falling within its provisions. I am, therefore, not at liberty to distinguish it, whatever may be the supposed merit of the application. I think the requisition should have been made, in the first instance, upon the Executive, and his authority obtained, in order to warrant the interposition of the judiciary; and further, that the Commissioner before whom the application was made, possessed no jurisdiction of the case, not being an officer within the Treaty or the Act of Congress passed in pursuance thereof; and that the evidence in the case, upon which the offence was found, was incompetent, and hence did not warrant the finding of the magistrate. The proof, in all cases under a treaty of extradition, should be, not only competent, but full and satisfactory, that the offence has been committed by the fugitive in the foreign jurisdiction — sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offence with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order a surrender short of such proof.

The result is, that the prisoner is entitled to be discharged from imprisonment under the warrant or order of the Commissioner, and, consequently, from arrest or confinement under the warrant issued by the acting Secretary of State in pursuance thereof. But, as the discharge is in consequence of illegality in the proceedings under the Treaty, and as the question of surrender is one of which I can entertain jurisdiction, I am ready to hear any further evidence on behalf of the application, which the representative of the British Government may see fit to present.

The counsel for the British Government not being prepared to furnish proof that any authority had been given by the President of the United States for the arrest of the prisoner, he was discharged.

[Publisher's note: Chief Justice Taney filed this opinion on June 1, 1861. Samuel Tyler, Memoir of Roger Brooke Taney, LL.D. 646 (1872).]

DECISION.

Ex parte	)	*Before the Chief Justice of the*
v.	)	*Supreme Court of the United States*
JOHN MERRYMAN.	)	*at Chambers.*

The application in this case for a Writ of Habeas Corpus is made to me under the 14th Section of the Judiciary Act of 1789, which renders effectual for the citizen the constitutional privilege of the Habeas Corpus. That Act gives to the Courts of the United States, as well as to each Justice of the Supreme Court, and to every District Judge, power to grant writs of Habeas Corpus for the purpose of an inquiry into the cause of commitment. The petition was presented to me at Washington, under the impression that I would order the prisoner to be brought before me there, but as he was confined in Fort McHenry, in the City of Baltimore, which is in my circuit, I resolved to hear it in the latter City, as obedience to the Writ, under such circumstances, would not withdraw Gen. Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore County. While peaceably in his own house, with his family, he was, at 2 o'clock on the morning of the 25th of May, 1861, arrested by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the Fort, Gen. George Cadwalader, by whom he is detained in confinement, in his return to the Writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of Gen. Keim, of Pennsylvania, and conducted as a prisoner to Fort McHenry by his order, and placed in his (Gen. Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant, or order, under which the prisoner was arrested, was demanded by his counsel and refused. And it is not alleged in the return that any specific act, constituting an offence against the laws of the United States, has been charged against him, upon oath; but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which, in the judgment of the military officer, constituted these crimes. And having the prisoner thus in custody, upon these vague and unsupported accusations, he refuses to obey the Writ of

Habeas Corpus upon the ground that he is duly authorized by the President to suspend it.

The case, then, is simply this: A military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night, he is seized as a prisoner, conveyed to Fort McHenry, and there kept in close confinement. And when a Habeas Corpus is served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is, that he is authorized by the President to suspend the Writ of Habeas Corpus at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the Writ.

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the Writ of Habeas Corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

No official notice has been given to the Courts of Justice, or to the public, by proclamation, or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the Writ could not be suspended, except by act of Congress.

When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the Writ, he claimed on his part no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety required it.

Having, therefore, regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion he refused obedience to the Writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the Writ has been suspended under the orders and by the authority of the President, and believing, as I do, that the President has exercised a

power which he does not possess under the Constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of this act without a careful and deliberate examination of the whole subject.

The clause of the Constitution which authorizes the suspension of the privilege of the Writ of Habeas Corpus is in the ninth section of the first article.

This article is devoted to the legislative department of the United States, and has not the slightest reference to the Executive department. It begins by providing "that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants, and legislative powers which it expressly prohibits; and, at the conclusion of this specification, a clause is inserted giving Congress "the power to make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof."

The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen, and to the rights and equality of the States, by denying to Congress, in express terms, any power of legislating over them. It was apprehended, it seems, that such legislation might be attempted under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt, where rights of such vital importance were concerned, and, accordingly, this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the Constitution attached to the privilege of the Writ of Habeas Corpus to protect the liberty of the citizen is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers — and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true that in the cases mentioned, Congress is of necessity the judge of whether the public safety does or does not require it; and their judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the

Government of the United States such power over the liberty of a citizen.

It is the second article of the Constitution that provides for the organization of the Executive Department, and enumerates the powers conferred on it and prescribes its duties. And if the high power over the liberty of the citizens now claimed was intended to be conferred on the President, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the Executive power shall be vested in a President of the United States of America, to hold his office during the term of four years — and then proceeds to prescribe the mode of election, and to specify in precise and plain words the powers delegated to him and the duties imposed upon him. And the short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehensions of future danger which the framers of the Constitution felt in relation to that department of the Government — and how carefully they withheld from it many of the powers belonging to the Executive branch of the English Government, which were considered as dangerous to the liberty of the subject — and conferred (and that in clear and specific terms,) those powers only which were deemed essential to secure the successful operation of the Government.

He is elected, as I have already said, for the brief term o [Publisher's note: "o" should be "of".] four years, and is made personally responsible, by impeachment, for malfeasance in office. He is, from necessity and the nature of his duties, the Commander-in-Chief of the army and navy, and of the militia when called into actual service. But no appropriation for the support of the army can be made by Congress for a longer term than two years, so that it is in the power of the succeeding House of Representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the President used, or designed to use it for improper purposes. And although the militia, when in actual service, are under his command, yet the appointment of the officers is reserved to the States, as a security against the use of the military power for purposes dangerous to the liberties of the people, or the rights of the States.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the Senate, and cannot appoint even inferior officers, unless he is authorized by an act of Congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the 5th article of the amendments to

the Constitution expressly provides that no person "shall be deprived of life, liberty, or property, without due process of law" — that is, judicial process.

And even if the privilege of the Writ of Habeas Corpus was suspended by act of Congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal, for the article in the Amendments to the Constitution immediately following the one above referred to — that is, the 6th article — provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

And the only power, therefore, which the President possesses, where the "life, liberty or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the Government, to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the Executive arm. But in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency, or in any state of things, can authorize the suspension of the privilege of the Writ of Habeas Corpus, or arrest a citizen except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the Writ of Habeas Corpus — and the judicial power also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessities of government, for self-defence in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches, Executive, Legislative, or Judicial, can exercise any of the powers of Government beyond those specified and granted. For the 10th article of the Amendment [Publisher's

note: "Amendment" probably ought to be "Amendments".] to the Constitution in express terms provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Indeed the security against imprisonment by executive authority, provided for in the fifth article of the Amendments of the Constitution, which I have before quoted, is nothing more than a copy of a like provision in the English Constitution, which had been firmly established before the Declaration of Independence.

Blackstone, in his Commentaries (1st vol., 137), states it in the following words:

"To make imprisonment lawful, it must be either by process from the Courts of Judicature or by warrant from some legal officer having authority to commit to prison." And the people of the United Colonies, who had themselves lived under its protection while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that in framing a government intended to guard still more efficiently the rights and the liberties of the citizens against executive encroachment and oppression, they would have conferred on the President a power which the history of England had proved to be dangerous and oppressive in the hands of the Crown, and which the people of England had compelled it to surrender after a long and obstinate struggle on the part of the English Executive to usurp and retain it.

The right of the subject to the benefit of the Writ of Habeas Corpus, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of statesmen engaged in framing a new, and, as they supposed, a freer government than the one which they had thrown off by the revolution. For from the earliest history of the common law, if a person was imprisoned, no matter by what authority, he had a right to the Writ of Habeas Corpus to bring his case before the King's Bench; and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if any offence was charged which was bailable in its character, the Court was bound to set him at liberty on bail. And the most exciting contests between the Crown and the people of England from the time of Magna Charta were in relation to the privilege of this Writ, and they continued until the passage of the statute of 31st Charles II., commonly known as the great Habeas Corpus Act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject from the usurpation and oppression of the executive branch of the Government. It nevertheless conferred no new

right upon the subject, but only secured a right already existing. For although the right could not be justly denied, there was often no effectual remedy against this violation. Until the statute of the 13th of William III. the Judges held their offices at the pleasure of the King, and the influences which he exercised over timid, time-serving, and partisan judges often induced them, upon some pretext or another, to refuse to discharge the party, although he was entitled to it by law, or delayed their decisions from time to time, so as to prolong the imprisonment of persons who were obnoxious to the King for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the Habeas Corpus Act of the 31st Charles II. is that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law upon this subject, and the abuses which were practiced through the power and influence of the Crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explains briefly, but fully, all that is material to this subject.

Blackstone, in his Commentaries on the Laws of England, (3d vol., 133, 134,) says:

"To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impossible.

"But the glory of the English law consists in clearly defining the times, the causes and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, that the court upon a Habeas Corpus may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

"And yet, early in the reign of Charles I., the Court of King's Bench, relying on some arbitrary precedents, (and those, perhaps, misunderstood,) determined that they would not, upon a Habeas Corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the King, or by the Lords of the Privy Council. This drew on a Parliamentary inquiry, and produced the *Petition of Right* — 3 Charles I. — which recites this illegal judgment, and enacts that no freeman hereafter shall be imprisoned or detained. But when, in the following year, Mr. Seldon and others were committed by the Lords of the Council in pursuance of his Majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the King and the Government,'

the judges delayed for two terms (including, also, the long vacation,) to deliver an opinion how far such a charge was bailable. And when, at length, they agreed that it was, they, however, annexed a condition of finding sureties for their good behavior, which still protracted their imprisonment, the Chief Justice, Sir Nicholas Hyde, at the same time declaring 'if they were again remanded for that cause, perhaps the Court would not afterward grant a Habeas Corpus, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Seldon's own account of the matter, whose resentment was not cooled at the distance of four and twenty years."

It is worthy of remark that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Seldon. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject that the delay of the time-serving judges to set him at liberty upon the Habeas Corpus issued in his behalf excited universal indignation at the bar. The extract from Hallam's Constitutional History is equally impressive and equally in point. It is in vol. 4, p. 14:

"It is a very common mistake, and not only among foreigners, but many from whom some knowledge of our Constitutional laws might be expected, to suppose this statute of Charles II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the Court of King's Bench a Writ of Habeas Corpus *ab subjiciendum* directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner with the warrant of commitment, that the Court might judge of its sufficiency and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This Writ issued of right, and could not be refused by the Court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta, (if, indeed, it were not more ancient,) that the statute of Charles II. was enacted, but to cut off the abuses by which the Government's lust of power, and the servile subtlety of Crown lawyers, had impaired so fundamental a privilege."

While the value set upon this Writ in England has been so great that removal of the abuses which embarrassed its enjoyments have been looked upon as almost a new grant of liberty to the subject, it is not to be

wondered at that the continuance of the Writ thus made effective should have been the object of the most jealous care. Accordingly no power in England short of that of Parliament can suspend or authorize the suspension of the Writ of Habeas Corpus. I quote again from Blackstone (1 Comm., 136): "But the happiness of our Constitution is that it is not left to the Executive power to determine when the danger of the State is so great as to render this measure expedient. It is the Parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the Habeas Corpus for a short and limited time, to imprison suspected persons without giving any reason for so doing." And if the President of the United States may suspend the Writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown — a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles I.

But I am not left to form my judgment upon this great question from analogies between the English Government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the Commentaries on the Constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States, and also the clear and authoritative decisions of that Court itself, given more than half a century since, and conclusively establishing the principles I have above stated. Mr. Justice Story, speaking in his Commentaries, of the Habeas Corpus clause in the Constitution, says:

"It is obvious that cases of a peculiar emergency may arise, which may justly, [Publisher's note: "justly" probably should be "justify".] nay, even require, the temporary suspension of any right to the Writ. But as it has frequently happened in foreign countries, and even in England, that the Writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the Writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the Writ of Habeas Corpus in cases of rebellion or invasion, that the right to judge whether the exigency

had arisen must exclusively belong to that body." — 3. Story's Com. on the Constitution, section 1336.

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *ex-parte* Bollman and Swartwout, uses this decisive language, in 4 Cranch, 95. It may be worthy of remark that this "act (speaking of the one under which I am proceeding,) was passed by the first Congress of the United States, sitting under a Constitution which had declared 'that the privilege of the Writ of Habeas Corpus should not be suspended, unless when, in case of rebellion and invasion, the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great Constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost although no law for its suspension should be enacted. Under the impression of this obligation, they gave to all the Courts the power of awarding Writs of Habeas Corpus."

And again, in page 101:

"If at any time the public safety should require the suspension of the powers vested by this act in the Courts of the United States, it is for the Legislature to say so. That question depends on political considerations, on which the Legislature is to decide. Until the Legislative will be expressed, this Court can only see its duty, and must obey the law."

I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show that the military authority in this case has gone far beyond the mere suspension of the privilege of the Writ of Habeas Corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers, for at the time these proceedings were had against John Merryman, the District Judge of Maryland, the Commissioner appointed under the act of Congress, the District Attorney, and the Marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any Court or judicial officer of the United States in Maryland, except by the military authority.

And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact, and the evidence to support it, to the District Attorney; and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his

warrant to the Marshal to arrest him; and upon the hearing of the party would have held him to bail, or committed him for trial, according to the character of the offence as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and, therefore, no reason whatever for the interposition of the military.

And yet, under these circumstances, a military officer stationed in Pennsylvania, without giving any information to the District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the District of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed, he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without having a hearing, even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It provides that the party accused shall be entitled to a speedy trial in a Court of justice.

And these great and fundamental laws, which Congress, itself, could not suspend, have been disregarded and suspended, like the Writ of Habeas Corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus, upon any pretext or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

[Publisher's note: In an April 10, 1863, letter to his friend Conway Robinson, Taney wrote as follows:

> MY DEAR SIR:— I send you, according to your request, a reference to two State papers which were inadvertently omitted in my opinion in the *habeas corpus* case of John Merryman. I can hardly account now for the omission. But I had named a day on which I would file the opinion in the Clerk's office of the Circuit Court, and other official duties intervening, I found

myself pressed for time. And after it was filed and a copy sent to the President, it was too late to correct it. These papers bear directly and strongly upon the point; and to show how forcibly they apply, I give the reference in the words in which they should have appeared in the argument, inserted immediately before the last paragraph in the pamphlet edition as follows:

"The constitution of the United States was framed upon the principles set forth and maintained in the Declaration of Independence; and in that memorable instrument one of the reasons assigned to justify the people of the several colonies in withdrawing their allegiance from the British monarch, and forming a new and separate government, is that 'He (the king) has affected to render the military independent and superior to the civil power.'"

And upon another occasion, scarcely less memorable, when Washington resigned his commission as commander-in-chief of the American army, and surrendered to Congress the great military powers which had been confided to him, Thomas Mifflin, then President of Congress, in accepting the resignation in behalf of the body over which he presided, said:

"Called upon by your country to defend her invaded rights, you accepted the sacred charge before it had formed alliances, and while it was without funds or a government to support you. You have conducted the great military contest with wisdom and fortitude, invariably regarding the rights of the civil power through all disasters and changes."

Such was Washington through all the disasters and changes of a seven years' war, while combating invasion from abroad and disaffection at home; and such the men who declared and achieved independence and formed the Constitution of the United States. They mark with emphasis his invariable respect for the civil power; and show that they regarded it as one of his strongest claims to the confidence and gratitude of his countrymen.

So much for the argument. But I may say to *you*, how finely and nobly Washington's conduct contrasts with the military men of the present day, from the Lieutenant-General down.

Very respectfully and truly yours,

R.B. Taney.

Samuel Tyler, Memoir of Roger Brooke Taney, LL.D. 460-61 (1872).]

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer on me, but that

power had been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the Clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

R.B. TANEY,
Chief Justice of the Supreme Court, U.S.

[Publisher's note: This opinion was typed on plain sheets of paper. "S4muel" should be "Samuel" in the caption. It is signed by two Justices, which means that it is not an opinion of the Court and not an opinion of a Justice in chambers. Perhaps it should be counted as an in-two-chambers opinion.]

In the Supreme Court of the United States.

S.A. Marks, et al.,	)	
	)	Before Justices
vs.	)	Van Devanter and
	)	Pitney
S4muel A. Davis, et al.	)	

This is an application for a writ of error and an order like unto a supersedeas in a primary election case determined adversely to the plaintiffs by the District Court of Harvey County, Kansas, and by the Supreme Court of that state. The date fixed for the election is August 6th 1912. [Publisher's note: The preceding sentence is a handwritten insert.] The record discloses that the plaintiffs specially and clearly asserted in the state courts certain rights claimed to arise under the Constitution and laws of the United States, and that these rights, by necessary implication and intendment, were denied by the two state courts.

Whether the rights asserted have a real basis in the constitution and laws of the United States is the criterion by which we must determine whether the writ of error shall be allowed. Under the settled practice, if the Justices to whom the application is made believe that the existence or non-existence of the rights asserted is involved in serious doubt, the writ should be allowed. We think that is the situation here.

The questions raised do not seem to be determined or settled by any previous decision of the United States Supreme Court. Some of the opinions of the court contain expressions which tend to sustain the contentions of the plaintiffs. Whether in view of the facts in the cases in which these expressions occur they should be regarded as deliberate and controlling ought not to be determined otherwise than by the court itself. It is conceded that the questions are important and of large public concern, and we have concluded that those who present them are fairly entitled to the judgment of the court which by the constitution is made the final arbiter of all controversies arising under that instrument. In this situation we think the writ of error should be allowed.

But as courts are reluctant to interfere with the ordinary course of elections, whether primary or otherwise, as the rights asserted are not clear but doubtful, and as the injury and public inconvenience which would result from a supersedeas or any like order, if eventually the

judgment of the state court should be affirmed, or the writ of error dismissed, would equal the injury which otherwise would ensue, we think no supersedeas or kindred order should be granted. [Publisher's note: The rest of the opinion is handwritten.]

Writ of error allowed, but without supersedeas or continuance of restraining order.

August 1st A.D. 1912.

Willis Van Devanter,
Mahlon Pitney,
Associate Justices
of the Supreme Court
of the United States.

[Publisher's note: This opinion was typed on plain sheets of paper. It is unsigned, but it is clear from the correspondence with which it is filed in the Frankfurter Papers at the Library of Congress that Justice Frankfurter is the author.]

CHIN GUM V. UNITED STATES OF AMERICA

MEMORANDUM ON MOTION FOR ADMISSION TO BAIL PENDING DISPOSITION OF APPEAL NOW BEFORE THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

An appeal by Chin Gum from a conviction for violation of the Harrison Narcotic Act in the United States District Court of Massachusetts is now pending before the Circuit Court of Appeals of the First Circuit. Applications for bail after conviction were successively made before the District Court and the Circuit Court of Appeals and denied by both courts. Application for admission to bail is made before me on the basis of Rule VI of the Criminal Rules, 292 U.S. 663.

Putting to one side my power to act under this Rule in the circumstances of this case, the motion is denied.

The Criminal Rules reflect in detail a policy for expedition in the disposition of criminal appeals, the importance of which no one will gainsay. I assume that the Government would cooperate with the appellant for the promptest possible hearing of the appeal. There is no reason why such appeals cannot be heard on the stenographic minutes of the trial, for I assume the Circuit Court of Appeals would accede to such a procedure if an appellant to whom bail is denied desires such a hearing. Where both the District Court and the Circuit Court of Appeals have denied applications for bail on the assumption that the points to be raised on appeal lack solidity, I do not feel justified, had I the power, to set aside such an exercise of discretion by the two lower courts unless upon a showing that either the Government or the Circuit Court of Appeals is not ready to cooperate with the appellant for the earliest possible hearing on the stenographic minutes in that such a procedure is, under the particular circumstances, inconsistent with the due administration of justice.

Associate Justice of the Supreme Court
of the United States

March 31, 1945

[Publisher's note: This opinion was typed on plain sheets of paper. Although it is identified as a "Personal Memorandum," it should be treated as an in chambers opinion because it includes Justice Burton's recap of his oral opinion.]

September 6, 1946

Personal Memorandum by Associate Justice Harold H. Burton

Miscellaneous Docket No. 19

In the Matter of the Application of Captain
Kathleen B. Nash Durant for leave to
file an original petition for writ of
habeas corpus

On August 22, Lieutenant Colonel John S. Dwinell, on behalf of Kathleen B. Nash Durant, filed with this Court an application for leave to file an original petition for writ of habeas corpus. On the same date he filed a copy of a notice served by him on the Attorney General and on the Judge Advocate General's Department to the effect that he proposed to file a petition for writ of habeas corpus in the Supreme Court. He attached to the notice a copy of his proposed petition. The applicant thereby was shown to be held in confinement by the U.S. Army in Germany and was about to be tried by general court martial under several charges, including particularly larceny of approximately a million dollars worth of jewelry and other articles alleged to have been taken by her and others, named in the charges, from the Kronberg Castle in Germany at a time when the castle was in the possession of the U.S. Army and when some of these articles were in the custody of the applicant as an officer of the U.S. Army.

The charges included one specification under the 61st Article of War for absence without leave, and three specifications under the 93d Article of War for feloniously taking, stealing and carrying away the jewels, etc. The third specification under the 93d Article of War charged that the applicant had feloniously embezzled and fraudulently converted to her own use certain articles of property consisting of silverware, etc., alleged to be the property of the United States and entrusted to her by the United States by virtue of her appointment as officer-in-charge at Kronberg Castle. There likewise was a charge under the 96th Article of War for conspiring with others to convert certain jewels, etc., to their own use.

The original basis for the writ of habeas corpus was primarily a claim of irregularity in the preliminary proceedings under the 70th Article of War. The applicant claimed that the preliminary investigation prescribed

by that Article is mandatory and that failure to comply with the requirements of that Article deprived the court martial of jurisdiction over her. She claimed an unlawful failure to permit her to present witnesses to the examining officer, to cross-examine available witnesses, and generally the failure of the investigating officer to make a thorough investigation.

In her application filed August 22, 1946, the applicant, on August 15, 1946, stated under oath "that she is a commissioned officer of the United States," etc. On August 26, 1946, she filed a copy of another notice served upon the Attorney General and the Judge Advocate General's Department containing a supplementary application for leave to file an original petition for a writ of habeas corpus. This supplemental application and supplemental petition, sworn to by the applicant under date of August 17, 1946, in contrast with the application sworn to by her under date of August 15, 1946, stated that she was not then a commissioned officer of the Army of the United States but that she was a civilian who had been discharged from the Army on or about May 30, 1946.

Lieutenant Colonel John S. Dwinell was assigned early as defense counsel to the applicant and repeatedly requested additional time within which to prepare his defense in the court martial proceedings. However, the trial began on August 22, 1946, and continued until August 29, 1946, at which time the Government rested its case. The court, at the request of the defense, then adjourned until September 16, 1946, to enable the defense to obtain statements and depositions from people who, for the most part, were in the United States.

Anxious to obtain consideration of his application for a writ of habeas corpus at the earliest possible date and before the termination of the court martial, the defense counsel sought to determine when action could be expected from the Supreme Court. He was advised by the Clerk of the Supreme Court that his application for permission to file his petition for a writ of habeas corpus would not be submitted to the Court until it met at its October Term, October 7, 1946, at which time it would be submitted together with other pending applications. He thereupon requested Mr. Justice Burton, as an Associate Justice of the Court, to consider his application for a writ of habeas corpus on the grounds set forth in the proceedings filed with the Clerk. This application was made orally to Mr. Justice Burton, in his Chambers, on September 4, 1946, and a time was set by the Justice when, on September 6 at 10:00 A.M., both counsel for the applicant and for the Government would be heard by the Justice, in his Chambers, on the application submitted to him.

On September 6, 1946, an informal hearing was held by Mr. Justice Burton, in his Chambers, at which, in addition to the proceedings on file, Colonel Dwinell presented a further written statement in support of the

application. In answer, Robert S. Erdahl for the Department of Justice and Colonel William J. Hughes, Jr., J.A.G., presented a memorandum in opposition. Counsel on both sides also made oral statements. Following the presentation, Mr. Justice Burton denied the application made to him for a writ of habeas corpus and authorized an entry that this denial was without prejudice, however, to the applications for leave to file an original petition for writ of habeas corpus then pending in the Supreme Court and without prejudice to any other right the applicant might have to secure a writ of habeas corpus from any Justice, Judge or court of competent jurisdiction.

In reaching this result, Mr. Justice Burton orally outlined his reasons substantially as follows:

There are two primary issues. The first is that of the jurisdiction of the Supreme Court and of a Justice of that Court to entertain an application for a writ of habeas corpus in an original proceeding such as this. The second, assuming the existence of such jurisdiction, is whether or not there exists a clear basis in law and fact for granting the writ on the ground that the applicant became a civilian on May 30 and therefore is held unlawfully in custody by the Army under court martial charges.

It is possible for an argument to be made that a Justice of the Supreme Court, either in his capacity as a Circuit Justice or as a Justice of the Supreme Court, has a broader original Jurisdiction than has the Supreme Court itself to consider this application. However, the basis for such a contention is not sufficiently strong to justify the exercise of such an exceptional personal jurisdiction while an application seeking the same relief is pending before the Supreme Court itself, unless there exists an extraordinary emergency and there impends such a clear and serious violation of the applicant's rights as will require immediate action in the midst of court martial proceedings already in progress and in advance of possible relief by the Supreme Court. In this case, if the Supreme Court later takes jurisdiction and acts favorably on the application made to it, there will have been little, if anything, gained by like favorable action taken by the individual Justice at this time. On the other hand, if the Supreme Court finds that it lacks original jurisdiction in a matter of this kind, it is highly probable that such reasoning will establish the lack of original jurisdiction on the part of the individual Justice acting as a Justice of the Supreme Court. Such a decision by the Court would nullify any action taken by the Justice. It is arguable that a Justice of the Supreme Court, in his capacity as Circuit Justice, might have original jurisdiction at least within his Circuit substantially equal to that of the Circuit Court of Appeals or of a District Court. Such [Publisher's note: The "Such" here is written above an obliterated "Some".] jurisdiction, however, probably would be limited to the geographical area of the Circuit or the District. In the present instance, furthermore, the

application is not made to a Justice of the Supreme Court in his capacity as a Circuit Justice and the writ is not aimed at anyone within the geographical limits of the Third Judicial Circuit to which Mr. Justice Burton is assigned.

In the absence of extraordinary reasons for taking immediate action, it seems clear that an individual Justice of the Supreme Court should deny the application for the writ at this time, particularly in the light of the proceeding which will reach the Supreme Court itself on October 7, 1946.

This conclusion is reinforced by the fact that the Supreme Court itself probably has no original jurisdiction over the case presented to it. The jurisdiction of the Supreme Court in habeas corpus proceedings rests upon its appellate jurisdiction except in those few cases in which the Constitution grants original jurisdiction to the Supreme Court. These are cases affecting Ambassadors, other public Ministers and Consuls and cases in which a state shall be a party. It has been held since Marbury v. Madison, 1 Cranch 137, that this narrow original jurisdiction established by the Constitution cannot be enlarged by statute. It was there held that it did not cover original jurisdiction to issue a writ of mandamus in spite of language in the First Judiciary Act considered to be broad enough to include it if it were constitutional to do so. See also, Bollman v. Swartwout, 4 Cranch 75, 100, et seq., and Ex parte Yerger, 8 Wall. 85.

While the original jurisdiction of the inferior federal courts probably is limited so that they cannot reach the Army officials who have personal custody of the applicant in Germany at this time, such a limitation of jurisdiction does not therefore require, as urged by the applicant, that the Supreme Court must have such original jurisdiction. In view of the limitations in the Constitution, the Supreme Court apparently does not have and cannot be given that original jurisdiction by statute. It can exercise such jurisdiction only through its appellate procedure. If, therefore, the so-called inferior courts do not now have statutory jurisdiction to reach these parties in Germany, it is for Congress to provide them with that jurisdiction if Congress so desires. On the other hand, there is a substantial basis for a claim that, for example, the District Court of the United States for the District of Columbia does have jurisdiction over the Secretary of War and that, through a writ of habeas corpus directed to him in the District of Columbia, it might be able to control the custody over the applicant even though the applicant herself may be held in custody by the United States Army in Germany. See In Re Kaine, 14 How. 103; McGowan v. Moody, 22 App. D.C. 148; Sanders v. Allen, 100 F.2d 717 (App. D.C. 1938); and Ex parte Peru, 318 U.S. 578, 582-583.

Looking at another aspect of the case, it is contrary to the general policy of the federal courts to interfere in any pending criminal proceeding in the midst of the trial except in cases of urgency. Curtis on

Jurisdiction of United States Courts, 2d Ed., p. 225. This general policy emphasizes the wisdom of withholding all action in the present case at least until completion of the court martial proceeding. This is particularly so as to the grounds originally urged for granting the writ because of inadequate preliminary proceedings under the 70th Article of War. This basis for attacking the jurisdiction of the court martial over the applicant can be more appropriately raised as an objection to the validity of the conviction secured if there be such a conviction.

There is not apparent merit in the objections raised to the procedure in the court martial based upon the proceedings under the 70th Article of War. Those proceedings, although summary, were generally in accordance with court martial procedure and in line with the requirement stated in the 70th Article of War that, when a person is held for trial by general court martial, the commanding officer will, within 8 days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court martial jurisdiction and furnish the accused with a copy of such charges. This implies summary action. The conduct complained of involves primarily discretion and procedure in which wide latitude is given to the officer in charge. The right of cross-examination of witnesses is limited by the 70th Article of War to witnesses available at the time of the preliminary investigation and the investigating officer here reported that the witnesses whom the applicant wished to cross-examine were not available. Objection was raised by the applicant to the consideration of two confessions made in detail by her. The ground of objection was that there was not a showing that she had been advised of her legal rights nor that these had not been obtained by coercion. In fact, however, the sworn statements of the officers taking these confessions expressly recite that the confessions were made without coercion and the accused included a like statement under oath in each confession. The officer taking the confessions also recited in a standard form that he had advised her of her legal rights and stated what they were. While these recitals may not be conclusive, there is nothing whatever suggested by the applicant to counterbalance the presumption of regularity which they support.

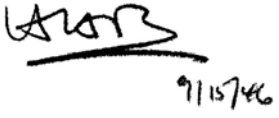
The strongest ground for seeking the writ of habeas corpus is that stated in the supplemental application to the effect that the applicant is a civilian and has been such since May 30, 1946, and that, therefore, the Army has no jurisdiction over her and has no jurisdiction to confine her under the court martial charges. If her civilian status were clearly established, this would be an important reason for immediate relief. Even here, however, her right to relief will not be substantially changed by completion of the court martial proceedings nor by awaiting the action of the Supreme Court on the application already made to it for the exercise of its jurisdiction, if any, in this case. The evidence also does not establish

clearly that she is a civilian. On the other hand, it indicates that she is in the military service and that she is subject to the jurisdiction of the Army as an officer in that service.

At this point, it may be noted that, in Article of War 94, it is provided that the Army has jurisdiction, in certain cases, to court martial a civilian after his discharge from the Army. Included among the offenses for which a civilian thus might be subject to court martial is that of embezzlement, committed by him while in the service, of property of the United States furnished or intended for the military service. It is conceivable that the charges in this case as set forth in the third specification under the third charge based on the 93d Article of War and relating to the embezzlement of certain items of personal property alleged to be the property of the United States entrusted to the accused by the United States by virtue of her appointment as officer-in-charge of Kronberg Castle might be brought within this provision of the 94th Article of War. It is doubtful, however, whether, without an amendment of these charges, the accused could be held on such a basis. (See bulletin of the Judge Advocate General of the Army, May, 1946, page 122, quoted in the memorandum of law filed on behalf of the applicant September 6 at page 8.)

The facts as to the applicant's claimed separation from the service seem to be that the applicant has not been discharged from the service although she was, by order of March 9, 1946, ordered to revert to an inactive status on May 30, 1946. On May 24, 1946, this order inactivating her was "hereby revoked," the unexpired portion of her terminal leave which she was then enjoying was terminated effective May 28, 1946, and she was transferred to Reception Center 7 at Fort Sheridan, Illinois. On May 29, 1946, she replied to a telegram advising her of such changes in her orders stating that she did not desire further active duty. On her failure to report at Fort Sheridan in accordance with these orders, she was arrested in Chicago on June 2, 1946. Since then she has been in the custody of the Army, has filed Army pay vouchers for pay allowances covering May, June, July and August, 1946, and has been paid as an officer of the Army of the United States for those periods. At the time of her affidavit of August 15, 1946, in this proceeding, she regarded herself as a commissioned officer of the United States and made her affidavit of August 17, 1946, claiming civilian status only after learning that a Certificate of Service had been issued to her in regular course by the Separation Center at Camp Beale, California, on May 30, 1946. In the meantime, she apparently had received $100 of her terminal leave pay [Publisher's note: The "pay" here is written above an obliterated "py".] which she had returned to the Government after having been placed in custody and after having resumed her commissioned status. The Government contends that the Certificate of Service [Publisher's note: A

repetition of the words "that the Certificate of Service" is obliterated here.] is merely evidence issued pursuant to the orders which would have taken effect on May 30 but which were revoked on May 24, 1946. The change of the orders simply did not catch up with the routine procedure for issuing the Certificate in time to prevent its issuance on the date originally specified on the assumption that the order of inactivation would take effect on May 30, 1946. Under these circumstances, there is grave doubt that the applicant has regained a civilian status. Such doubt removes the basis for a claim that there here exists such a clear and extraordinary violation of her rights as a civilian as would call for immediate action stopping a general court martial already in progress, especially where the relief is sought as here by application to an individual Justice of this Court at a time when the issue of jurisdiction of the Court itself on the issue is in grave doubt and will be submitted to the Court on October 7, l946.



[Publisher's note: See 343 U.S. 451, 466 for the official version. It is not identified as an in chambers opinion in the *U.S. Reports*, but it is written on a question to be decided by Justice Frankfurter on his own — that is, in chambers — rather than as a member of the Court en banc. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 869 (1988).]

SUPREME COURT OF THE UNITED STATES

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. *v.* POLLAK ET AL.

NO. 224. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Argued March 3, 1952.—Decided May 26, 1952.

MR. JUSTICE FRANKFURTER.

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it. I am explicit as to the reason for my non-participation in this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case.

[Publisher's note: See 530 U.S. 1301 for the official version. It is not identified as an in chambers opinion in the *U.S. Reports*, but it is written on a question to be decided by Chief Justice Rehnquist on his own — that is, in chambers — rather than as a member of the Court en banc. *See Public Utilities Comm'n of D.C. v. Pollak*, 4 Rapp 1423 (1952).]

SUPREME COURT OF THE UNITED STATES

September 26, 2000

Appeal Denied

No. 00-139. MICROSOFT CORP. *v.* UNITED STATES ET AL. Appeal from D. C. D. C.; and

No. 00-261. NEW YORK EX REL. SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL. *v.* MICROSOFT CORP. C. A. D. C. Cir. In No. 00-139, direct appeal denied, and case remanded to the United States Court of Appeals for the District of Columbia Circuit. The Clerk is directed to issue the judgment forthwith. In No. 00-261, certiorari before judgment denied. Reported below: No. 00-139, 97 F. Supp. 2d 59.

Statement of CHIEF JUSTICE REHNQUIST.

Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm and is one of the attorneys working on those cases. I have therefore considered at length whether his representation requires me to disqualify myself on the Microsoft matters currently before this Court. I have reviewed the relevant legal authorities and consulted with my colleagues. I have decided that I ought not to disqualify myself from these cases.

28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices. This statute is divided into two subsections, both of which are relevant to the present situation. Section 455(b) lists specific instances in which disqualification is required, including those instances where the child of a Justice "[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding." § 455(b)(5)(iii). As that provision has been interpreted in relevant case law, there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm's usual rates. Even assuming that my son's

nonpecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those interests when neither he nor his firm would have done any work on the matters here. Thus, I believe my continued participation is consistent with § 455(b)(5)(iii).

Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As this Court has stated, what matters under § 455(a) "is not the reality of bias or prejudice but its appearance." *Liteky* v. *United States*, 510 U.S. 540, 548 (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. *See ibid.*; *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (CA2 1988). I have already explained that my son's personal and financial concerns will not be affected by our disposition of the Supreme Court's Microsoft matters. Therefore, I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.

It is true that both my son's representation and the matters before this Court relate to Microsoft's potential antitrust liability. A decision by this Court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust suits in other courts. But, by virtue of this Court's position atop the federal judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to § 455(a) seems contrary to the "reasonable person" standard which it embraces. I think that an objective observer, informed of these facts, would not conclude that my participation in the pending Microsoft matters gives rise to an appearance of partiality.

Finally, it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here — unlike the situation in a District Court or a Court of Appeals — there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.

[Publisher's note: See 533 U.S. 1301 for the official version.]

SUPREME COURT OF THE UNITED STATES

BROWN ET AL. *v.* GILMORE, GOVERNOR OF VIRGINIA, ET AL.

ON APPLICATION FOR INJUNCTION

No. 01A194 (01-384). Decided September 12, 2001

The application of Virginia public school students and their parents for an injunction against enforcement of a Virginia statute requiring public schools to observe a "minute of silence" each schoolday, pending this Court's disposition of their petition for certiorari, is denied. Applicants, who claim that the statute establishes religion in violation of the First Amendment, have been unsuccessful in their repeated attempts to obtain injunctive relief from both the District Court and the Court of Appeals and in their attack on the statute's merits. The All Writs Act, this Court's only authority to issue an injunction against enforcement of a presumptively valid state statute, is appropriate only if the legal rights at issue are indisputably clear, *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313, which is not the case here. Finding that Virginia's statute has a clear secular purpose — namely, to provide a moment for quiet reflection in the wake of instances of violence in the public schools — the Court of Appeals distinguished the present case from *Wallace* v. *Jaffree*, 472 U.S. 38, in which this Court struck down a similar Alabama statute that was conceded to have the purpose of returning prayer to the public schools. At the very least, the lower court's finding places some doubt on the question whether Virginia's statute establishes religion in violation of the First Amendment. Justice Powell stayed a District Court order dissolving a preliminary injunction in *Wallace* when the plaintiffs there alleged that teachers led their classes in prayer daily. Here, by contrast, after more than a year in operation, the minute of silence seems to have meant just that. Also, that applicants did not make an immediate application to a Justice in September 2000, after the Court of Appeals denied their request for an injunction pending appeal, is somewhat inconsistent with the urgency they now assert.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

This case is before me on an application for injunctive relief pending writ of certiorari pursuant to 28 U.S.C. § 1651. Applicants seek an order enjoining further implementation of Virginia's mandatory "minute of silence" statute, Va. Code Ann. § 22.1-203 (2000), pending this Court's disposition of their petition for certiorari which has been filed contemporaneously with this application. The petition for certiorari seeks review of a decision of the Court of Appeals affirming the constitutionality of § 22.1-203. See 258 F.3d 265 (CA4 2001). For the reasons that follow, I conclude that an injunction should not issue.

Applicants are Virginia public school students and their parents who challenge the constitutionality of a state statute, effective as of July 1, 2000, that requires all of Virginia's public schools to observe a minute of

silence at the start of each schoolday. They challenge the statute on its face, contending that it establishes religion in violation of the First Amendment. For the past year, applicants have repeatedly sought temporary and permanent injunctive relief from both the District Court and the Court of Appeals to enjoin Virginia's enforcement and implementation of this statute. On August 31, 2000, the District Court for the Eastern District of Virginia held a hearing on applicants' motion for preliminary injunctive relief in light of the approaching school year. This motion was denied. Applicants then requested that the District Court enter an injunction pending appeal, which was also denied. They then moved in the Court of Appeals for an injunction pending appeal. This motion was denied as well.

Applicants have been no more successful on the merits. On October 26, 2000, the District Court granted respondents' motion for summary judgment and dismissed applicants' challenge in its entirety. Applicants then sought expedited review in the Court of Appeals, which was denied. On July 24, 2001, a divided panel of the Court of Appeals affirmed the District Court's dismissal of applicants' complaint, as well as its earlier denial of applicants' motion for injunctive relief. This application to me followed.

I note first that applicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute. The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue such an injunction. It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used "'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers) (quoting *Fishman* v. *Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). Such an injunction is appropriate only if "the legal rights at issue are 'indisputably clear.'" 479 U.S., at 1313 (quoting *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (REHNQUIST, J., in chambers)).

Whatever else may be said about the issues and equities in this case, the rights of the applicants are not "indisputably clear." The pros and cons of the applicants' claim on the merits are fully set forth in the majority and dissenting opinions in the Court of Appeals. Applicants contend that this case is virtually a replay of *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), in which we struck down a similar Alabama statute. But the majority opinion in the Court of Appeals took pains to distinguish the present case from *Wallace*. It noted our statement that the statute at issue there was "'quite different from [a statute] merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday.'" *Id*., at 59, as quoted in 258

F.3d, at 279. It further found ample evidence that § 22.1-203 had a clear secular purpose, namely, to provide a moment for quiet reflection in the wake of high-profile instances of violence in our public schools. *Id.*, at 276-277. This alone may distinguish *Wallace*, in which Alabama explicitly conceded that the sole purpose of its moment of silence law was to return prayer to the Alabama schools. We in fact emphasized in *Wallace* that the Alabama statute "had *no* secular purpose." 472 U.S., at 56 (emphasis in original). At the very least the lower court's finding of a clear secular purpose in this case casts some doubt on the question whether § 22.1-203 establishes religion in violation of the First Amendment. See, *e.g.*, *id.*, at 66 (Powell, J., concurring) ("[A] straightforward moment-of-silence statute is unlikely to 'advance or inhibit religion'"); *id.*, at 73 (O'CONNOR, J., concurring in judgment) ("Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives").

Without expressing any view of my own, or attempting to predict the views of my colleagues as to the ultimate merit of applicants' First Amendment claim, I can say with some confidence that their position is less than indisputable.

Applicants point out that Justice Powell stayed the order of the District Court dissolving a preliminary injunction in *Wallace*. See *Jaffree* v. *Board of School Comm'rs of Mobile Cty.*, 459 U.S. 1314 (1983) (opinion in chambers). But there the plaintiffs alleged that "teachers had 'on a daily basis' led their classes in saying certain prayers in unison." *Wallace*, *supra*, at 42. Here, by contrast, after more than a year of operation, the Virginia statute providing for a minute of silence seems to have meant just that. There is no allegation that Virginia schoolteachers have used the minute of silence, or any other occasion, to lead students in collective prayer. To the contrary, the Court of Appeals noted that between 1976 and 2000 at least 20 local school divisions in Virginia established a minute of silence in their classrooms, yet there is no evidence of the practice having ever been used as a government prayer exercise.

I also note that applicants could have made an immediate application to a Justice of this Court under 28 U.S.C. § 1651(a) in September 2000, after the Court of Appeals denied their request for an injunction pending appeal. That they did not do so is somewhat inconsistent with the urgency they now assert.

For these reasons, I decline to issue an injunction pending certiorari in this case.

[Publisher's note: See 534 U.S. 1301 for the official version.]

SUPREME COURT OF THE UNITED STATES

BAGLEY, WARDEN *v.* BYRD

ON APPLICATION FOR STAY

No. 01A375. Decided November 6, 2001

Applicant warden's request for a stay of District Court proceedings pending the disposition of her certiorari petition is denied. After that court and a Sixth Circuit panel denied respondent, an Ohio death-row inmate, relief on his second federal habeas petition, the en banc Sixth Circuit remanded the case for the District Court to develop a factual record sufficient to permit *sua sponte* consideration of a request for leave to file a second habeas petition supported by actual innocence allegations. Applicant argues that the Sixth Circuit's procedures are highly irregular, but she fails to demonstrate either that the District Court's hearing will cause irreparable harm to the State or that it will affect this Court's jurisdiction to act on her certiorari petition.

JUSTICE STEVENS, Circuit Justice.

Respondent, John W. Byrd, Jr., is an Ohio death-row inmate who has exhausted his state-court remedies and who was denied relief in his first federal habeas corpus proceeding. His application to file a second petition for a federal writ, which is supported by his allegations of actual innocence, has been denied by the District Court and a panel of the Court of Appeals for the Sixth Circuit. However, on October 9, 2001, a majority of the active judges of the Court of Appeals entered an order remanding the case to the District Court "for the development of a factual record sufficient to permit *sua sponte* consideration of a request for leave to file a second petition for a writ of habeas corpus." *In re Byrd*, 269 F.3d 585, 608 (CA6 2001). The order cites cases decided by the Second and Eighth Circuits, *Triestman* v. *United States*, 124 F.3d 361, 367 (CA2 1997); *Krimmel* v. *Hopkins*, 56 F.3d 873, 874 (CA8 1995), as "[t]he jurisdictional basis for a rehearing *sua sponte*." 269 F.3d, at 608.

Applicant, Margaret Bagley, has filed with the Clerk of the Court a petition for certiorari questioning the jurisdiction of the en banc court to enter the remand order, and has made an application to me as Circuit Justice for a stay of the District Court proceedings pending disposition of her certiorari petition. In addition, she filed a similar stay application with the Court of Appeals, which that court has denied. While expressing confidence that the District Court will find Byrd's claim of actual innocence lacking in credibility, she argues that the procedures followed and authorized by the Court of Appeals are highly irregular. She fails,

however, to demonstrate either that the hearing will cause any irreparable harm to the State of Ohio or that it will affect this Court's jurisdiction to act on her certiorari petition. See *Rubin* v. *United States*, 524 U.S. 1301 (1998) (REHNQUIST, C. J., in chambers) ("An applicant for stay first must show irreparable harm if a stay is denied"); 28 U.S.C. § 1651(a) (1994 ed.) (a stay is warranted only when "necessary or appropriate in aid of [our] jurisdictio[n]").

Because I have been advised that the hearing before the District Court has already commenced, I have decided to act on the stay application without calling for a response from the respondent. The failure to allege irreparable harm, coupled with the fact that there is no need to enter an extraordinary writ to preserve this Court's jurisdiction, persuade me that the stay application should be denied.

It is so ordered.

[Publisher's note: See 535 U.S. 1301 for the official version.]

SUPREME COURT OF THE UNITED STATES

BARTLETT ET AL. *v.* STEPHENSON ET AL.

ON APPLICATION FOR STAY

No. 01A848. Decided May 17, 2002

The application of North Carolina officials to stay a State Supreme Court decision invalidating the 2001 state legislative redistricting plan under the State Constitution is denied. That court held that the plan violated a state constitutional provision that does not allow a county to be divided when forming a senate or representative district. Harmonizing that provision with federal law, the court found that any new plan must preserve county lines except to the extent counties must be divided to comply with the United States Constitution and the Voting Rights Act. Applicants, who claim that a 1981 Department of Justice (DOJ) letter bars any consideration of the whole county provision in redistricting, do not satisfy the threshold requirement for the issuance of a stay. It is unlikely that four Members of this Court will vote to grant certiorari to resolve a dispute about the meaning of a single DOJ letter. This issue does not satisfy any of the criteria for the exercise of the Court's discretionary jurisdiction. And this case does not present the same situation as *Lopez* v. *Monterey County*, 519 U.S. 9, 19, 21, and *Clark* v. *Roemer*, 500 U.S. 646, 654-655, in which this Court issued stays enjoining a covered jurisdiction from conducting imminent elections under an unprecleared voting plan.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicants, North Carolina officials charged with administering the State's elections, seek a stay of a decision of the Supreme Court of North Carolina invalidating North Carolina's 2001 state legislative redistricting plan under the North Carolina Constitution. The application is denied.

The Supreme Court of North Carolina held that the 2001 plan violated what is known as the "whole county provision" of the North Carolina Constitution, which provides that "no county shall be divided in the formation of a senate or representative district," N.C. Const., Art. II, § 3(3). See 355 N.C. 354, 363, 562 S.E.2d 377, 384 (2002). The court thus affirmed a lower court injunction enjoining applicants from conducting any elections under the 2001 plan and ordered that a new plan be drawn. *Id.*, at 359-360, 386, 562 S.E.2d, at 382, 398. The court directed the state trial court to conduct a hearing on whether it is feasible for the state legislature to develop a new plan for the 2002 elections. If it is not, then the trial court is directed to solicit plans and adopt one. *Id.*, at 385, 562 S.E.2d, at 398.

The Supreme Court of North Carolina recognized, however, that

requirements of federal law will preclude the new plan from giving full effect to the "whole county provision." *Id.*, at 371, 381, 562 S.E.2d, at 389, 396. The court therefore "harmonized" the state constitutional provision with federal law, ordering that the new plan "must preserve county lines to the maximum extent possible, except to the extent counties must be divided to comply with Section 5 of the Voting Rights Act [of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c (1994 ed.)], and to comply with Section 2 of the Voting Rights Act, and to comply with the U.S. Constitution, including the federal one-person one-vote requirements." *Id.*, at 359, 562 S.E.2d, at 382. The court cited decisions in four other States that have reconciled similar county boundary requirements with federal law. *Id.*, at 372, n. 3, 562 S.E.2d, at 390, n. 3 (citing *In re Apportionment of Colo. Gen. Assembly*, 45 P.3d 1237 (Colo. 2002); *Hellar* v. *Cenarrusa*, 106 Idaho 571, 574-575, 682 P.2d 524, 527-528 (1984); *Fischer* v. *State Bd. of Elections*, 879 S.W.2d 475, 479 (Ky. 1994); *State ex rel. Lockert* v. *Crowell*, 631 S.W.2d 702, 714-715 (Tenn. 1982)). And the Supreme Court of North Carolina ordered that the trial court shall seek preclearance of the new plan, with respect to the districts in the 40 North Carolina counties that are covered jurisdictions under § 5 of the Voting Rights Act, before elections are held. 355 N.C., at 385, 562 S.E.2d, at 398.

Applicants contend that a stay is warranted because the Supreme Court of North Carolina's decision "defies the Voting Rights Act" and directs applicants "to violate the Voting Rights Act and to administer or enforce unprecleared state constitutional provisions." Application 13, 20. In support of these assertions, applicants rely on a 1981 Department of Justice (DOJ) letter that objected to the "whole county provision." In 1981, North Carolina submitted both its 1981 redistricting plan, which was faithful to the "whole county provision," and the "whole county provision" itself to the DOJ. The DOJ objected to both, stating that it was "unable to conclude that this amendment, prohibiting the division of counties in reapportionments, does not have a discriminatory purpose or effect." App. 2 to Application 1. The letter also stated that "until the objection is withdrawn or [a] judgment from the [United States District Court for the] District of Columbia is obtained, the effect of the objection by the Attorney General is to make the [whole county provision] legally unenforceable." *Id.*, at 2.

The Supreme Court of North Carolina rejected applicants' view that this letter bars any consideration of the whole county provision in redistricting. In its view, other statements in the letter demonstrate that the letter "merely disallows a redistricting plan that adheres strictly to a 'whole county' criterion without complying with the [Voting Rights Act]." 355 N.C., at 374, 562 S.E.2d, at 391. The court quoted the following statement from the DOJ letter: "'This determination with

respect to the jurisdictions covered by Section 5 of the Voting Rights Act should in no way be regarded as precluding the State from following a policy of preserving county lines whenever feasible in formulating its new districts. Indeed, this is the policy in many states, subject only to the preclearance requirements of Section 5, where applicable.'" *Id.*, at 372-373, 562 S.E.2d, at 390. The court thought this interpretation of the letter consistent with DOJ administrative guidance that provides "'criteria which require the jurisdiction to . . . follow county, city, or precinct boundaries . . . *may need to give way to some degree* to avoid retrogression.'" *Id.*, at 373, 562 S.E.2d, at 391 (quoting 66 Fed. Reg. 5413 (2001)) (emphasis added).

A "single Justice will grant a stay only in extraordinary circumstances." *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (Marshall, J., in chambers). Applicants do not satisfy the threshold requirement for the issuance of a stay. There is not a reasonable probability that four Members of this Court will vote to grant certiorari to resolve what is largely a dispute about the meaning of a single DOJ letter from 1981. See *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (KENNEDY, J., in chambers). This issue, which has few if any ramifications beyond the instant case, does not satisfy any of the criteria for the exercise of this Court's discretionary jurisdiction. See this Court's Rule 10.

Applicants cite two cases in which the Court issued stays enjoining a covered jurisdiction from conducting imminent elections "under an unprecleared voting plan." *Lopez* v. *Monterey County*, 519 U.S. 9, 19, 21 (1996); *Clark* v. *Roemer*, 500 U.S. 646, 654-655 (1991). This case does not present the same situation. The Supreme Court of North Carolina ordered that the new plan would have to be precleared before elections could be held in the 40 covered counties. On remand, the trial court has already made clear its understanding of this requirement, issuing an order stating that "[n]o plan submitted by the General Assembly and approved by this Court, or in the absence of such a plan, no plan adopted by the Court, shall be administered in the 2002 elections until such time as it is precleared pursuant to Section 5 of the Voting Rights Act." App. 13 to Response in Opposition 3. As there is no plan in North Carolina to hold elections in unprecleared districts, there are no grounds for granting a stay. The stay application is denied.

It is so ordered.

[Publisher's note: See 537 U.S. 1501 for the official version.]

SUPREME COURT OF THE UNITED STATES

CHABAD OF SOUTHERN OHIO ET AL. *v.* CITY OF CINCINNATI

ON APPLICATION TO VACATE STAY

No. 02A449. Decided November 29, 2002

The Sixth Circuit's stay of a District Court order enjoining enforcement of a Cincinnati ordinance that reserves to the city exclusive use of Fountain Square for seven weeks beginning on this date is vacated. Accepting the construction used by the courts below, the ordinance is significantly broader than a reservation of the exclusive right to erect unattended structures in the square during a high use period. Given the square's historic character as a public forum, under this Court's reasoning in *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, the District Court correctly enjoined the city from enforcing those portions of the ordinance giving the city exclusive use of the square for the next seven weeks.

JUSTICE STEVENS, Circuit Justice.

The Court of Appeals for the Sixth Circuit has entered a stay of a District Court order enjoining enforcement of a city of Cincinnati ordinance, and plaintiffs have filed a motion with me as Circuit Justice seeking an order vacating that stay. As did the District Court, the Court of Appeals states that the ordinance in question "reserves the exclusive use of Fountain Square to the City" for the 7-week period beginning today. No. 02-4340 (CA6, Nov. 27, 2002), p. 1. Though the city has filed a narrowing interpretation of this ordinance with me, for the purposes of the present motion I accept the construction of the ordinance by the courts below (who also had the benefit of this narrowing interpretation) even if I might have arrived at a different conclusion without such guidance. See *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976). Under the District Court's reading, the ordinance is significantly broader than a reservation of the exclusive right to erect unattended structures in the square during this period of high use, which I assume the city could have reserved to itself. Given the square's historic character as a public forum, under the reasoning in this Court's decision in *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753 (1995), I think the District Court correctly enjoined the city from enforcing "those portions" of the ordinance "which give the City exclusive use of Fountain Square" for the next seven weeks. No. C-1-02-840 (SD Ohio, Nov. 27, 2002), p. 21. It follows, I believe, that the Court of Appeals' stay should be vacated.

It is so ordered.

[Publisher's note: See 538 U.S. 1301 for the official version.]

SUPREME COURT OF THE UNITED STATES

KENYERES *v.* ASHCROFT, ATTORNEY GENERAL, ET AL.

ON APPLICATION FOR STAY

No. 02A777. Decided March 21, 2003

Applicant's request for a stay of his removal from the United States is denied, and a previously granted temporary stay to enable the United States to respond to his claims and to permit JUSTICE KENNEDY to consider the matter is vacated. When the Immigration and Naturalization Service initiated removal proceedings against him for overstaying his tourist visa, an Immigration Judge denied applicant's asylum request and ruled that withholding of removal was unavailable because there was reason to believe that applicant had committed a serious nonpolitical crime outside the United States. The Bureau of Immigration Appeals (BIA) affirmed. The Eleventh Circuit denied a stay of removal pending judicial review on the ground that 8 U.S.C. § 1252(f)(2) requires a court to adduce clear and convincing evidence before granting such a temporary stay. This is not an appropriate case in which to examine and resolve the important question of whether § 1252(f)(2)'s heightened standard applies to temporary stays, an issue that has divided the Courts of Appeals. Applicant is unlikely to prevail under either the Eleventh Circuit's standard or the more lenient one adopted by other Courts of Appeals. A reviewing court must uphold an administrative determination in an immigration case unless the evidence compels a contrary conclusion. Given the Immigration Judge's factual findings and the evidence in the removal hearing record, applicant is unable to establish a reasonable likelihood that a reviewing court will be compelled to disagree with the BIA's decision. Thus, his claim is not sufficiently meritorious to create a reasonable probability that four Members of this Court will vote to grant certiorari.

JUSTICE KENNEDY, Circuit Justice.

This case is before me on an application for a stay of an alien's removal from the United States.

Applicant, Zsolt Kenyeres, is a citizen of the Republic of Hungary. On January 29, 1997, he entered the United States on a tourist visa, which permitted him to remain in the country through July 28, 1997. Applicant remained past the deadline without authorization from the Immigration and Naturalization Service (INS), and on June 21, 2000, the INS initiated removal proceedings, alleging the overstay. Applicant sought asylum under 94 Stat. 105, as amended, 8 U.S.C. § 1158(a), withholding of removal under 110 Stat 3009-602, 8 U.S.C. § 1231(b)(3), and deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, see 8 CFR 208.17 (2002). An

Immigration Judge held applicant to be removable; but the Bureau of Immigration Appeals (BIA) concluded that the judge failed to provide sufficient explanation for his decision, and remanded the case.

On remand the Immigration Judge determined that Kenyeres' asylum application was untimely under 8 U.S.C. § 1158(a)(2)(B), and that he could not make a showing of changed circumstances or extraordinary conditions necessary to excuse the delay, see § 1158(a)(2)(D). As to withholding of removal, the judge ruled this relief was unavailable because of "serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States." § 1231(b)(3)(B)(iii).

The INS presented sufficient evidence that applicant was wanted in Hungary on charges of embezzlement, which is a serious nonpolitical crime. See *In re Castellon*, 17 I. & N. Dec. 616 (BIA 1981). Noting applicant's concession that he overstayed his visa, the Immigration Judge ordered him removed on account of this violation. (Applicant has withdrawn his application for deferral of removal under the Convention Against Torture.) The BIA affirmed the Immigration Judge's order without opinion.

Applicant sought review by the Court of Appeals for the Eleventh Circuit and requested a stay of removal pending review. The Court of Appeals denied the stay. No. 03-10845-D (Mar. 14, 2003). The court relied on 8 U.S.C. § 1252(f)(2), which provides that "no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The Court of Appeals relied on its decision in *Weng* v. *Attorney General*, 287 F.3d 1335 (2002) (*per curiam*), which holds that the evidentiary standard prescribed by § 1252(f)(2) applies to motions for a temporary stay of removal pending judicial review.

Kenyeres has filed with me as Circuit Justice an application for a stay of removal, arguing that the interpretation of § 1252(f)(2) adopted by the Court of Appeals is erroneous. By insisting that clear and convincing evidence be adduced in order to grant a stay, he maintains, the Eleventh Circuit in effect made judicial review unavailable in cases of asylum and withholding of deportation. He contends that an application for a stay should be assessed under a more lenient standard, one adopted by other Courts of Appeals. Their standard simply asks whether applicant has demonstrated a likelihood of success on the merits. Applicant submits he can satisfy this requirement and so a stay of removal should issue. I granted a temporary stay of the BIA order to enable the United States to respond to applicant's claims and to consider the matter.

The question raised by applicant indeed has divided the Courts of Appeals. The Courts of Appeals for the Second, Sixth, and Ninth Circuits

have examined the matter, both before and after the Eleventh Circuit's decision in *Weng* and have reached a contrary result. See *Andreiu* v. *Ashcroft*, 253 F.3d 477 (CA9 2001) (en banc); *Bejjani* v. *INS*, 271 F.3d 670 (CA6 2001); *Mohammed* v. *Reno*, 309 F.3d 95 (CA2 2002). In the cases just cited, these courts take the position that the heightened standard of § 1252(f)(2) applies only to injunctions against an alien's removal, not to temporary stays sought for the duration of the alien's petition for review. *Andreiu, supra*, at 479-483; *Bejjani, supra*, at 687-689; *Mohammed, supra*, at 97-100. These courts evaluate requests for a stay under their traditional standard for granting injunctive relief in the immigration context, which seeks to measure an applicant's likelihood of success on the merits and to take account of the equity interests involved. See *Andreiu, supra*, at 483 ("[P]etitioner must show 'either (1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor'" (quoting *Abassi* v. *INS*, 143 F.3d 513, 514 (CA9 1998))); *Bejjani, supra*, at 688 (requiring a showing of "(1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest" (quoting *Sofinet* v. *INS*, 188 F.3d 703, 706 (CA7 1999))); *Mohammed, supra*, at 101 ("'a substantial possibility, although less than a likelihood, of success'" (quoting *Dubose* v. *Pierce*, 761 F.2d 913, 920 (CA2 1985), vacated on other grounds, 487 U.S. 1229 (1988))).

The courts on each side of the split have considered the contrary opinions of their sister Circuits and have adhered to their own expressed views. See *Weng, supra*, at 1337, n. 2; *Mohammed, supra*, at 98-99. Both standards have been a subject of internal criticism. See *Andreiu, supra*, at 485 (Beezer, J., separately concurring); *Bonhomme-Ardouin* v. *Attorney General*, 291 F.3d 1289, 1290 (CA11 2002) (Barkett, J., concurring).

The issue is important. If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits. See *Addington* v. *Texas*, 441 U.S. 418, 425 (1979) (The "intermediate standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt"). An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped. A standard that is excessively stringent may impede access to the courts in meritorious cases. On the other hand, § 1252(f)(2) is a part of Congress'

deliberate effort to reform the immigration law in order to relieve the courts from the need to consider meritless petitions, and so devote their scarce judicial resources to meritorious claims for relief. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). If the interpretation adopted by the Second, Sixth, and Ninth Circuits is erroneous, and § 1252(f)(2) governs requests for stays, this congressional effort will be frustrated. As of this point, applicant already has overstayed his visa by more than five years. Had the Eleventh Circuit granted the stay under the more lenient approach, months more would elapse before his case is resolved.

Given the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case. This, however, is not an appropriate case.

Applicant is unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Appeals. Applicant argues that the Immigration Judge erroneously rejected his claim under the nonpolitical crime restriction of § 1231(b)(3)(B)(iii). He asserts that the Hungarian Government fabricated the embezzlement and fraud charges against him for political reasons. Whether these charges should be disregarded as fabricated depends on a question of fact. The Immigration Judge's findings in that respect are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." § 1252(b)(4)(B). Based on the record presented at the removal hearing, the Immigration Judge could find substantial grounds to believe that applicant committed serious financial crimes in Hungary. The record contains a translation of the Hungarian arrest warrant for embezzlement and aggravated fraud, as well as testimony that the warrant was obtained from Interpol, which the INS deems to be a reliable source. See App. E to Memorandum of Respondents in Opposition 100-101, 135-136. In his own testimony applicant did not dispute that he was engaged in money laundering for organized crime. See *id.*, at 111-112, 115-116, 120.

A reviewing court must uphold an administrative determination in an immigration case unless the evidence compels a conclusion to the contrary. *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481, n. 1, 483-484 (1992); see also *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (*per curiam*). Given the factual findings of the Immigration Judge and the evidence in the record, applicant is unable to establish a reasonable likelihood that a reviewing court will be compelled to disagree with the decision of the BIA. Applicant's claim is not sufficiently meritorious to create a reasonable probability that four Members of this Court will vote to grant certiorari in his case. See, *e.g.*, *Bartlett* v. *Stephenson*, 535 U.S. 1301, 1304-1305 (2002) (REHNQUIST, C.J., in chambers); *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (KENNEDY, J., in chambers). My assessment

likely would be different in a case where the choice of evidentiary standard applicable to a request for a stay could influence the outcome.

The stay previously granted is vacated, and the application for a stay is denied.

[Publisher's note: See 539 U.S. 1301 for the official version.]

SUPREME COURT OF THE UNITED STATES

PRATO *v.* VALLAS ET AL.

ON APPLICATION FOR EXTENSION OF TIME

No. 02A1042 (02-9753). Decided June 9, 2003

Petitioner's request for an extension of time to file a certiorari petition following this Court's May 19, 2003, order denying her leave to proceed *in forma pauperis* is denied because there are no grounds upon which this Court would grant certiorari.

JUSTICE STEVENS, Circuit Justice.

Petitioner filed a petition for a writ of certiorari and a motion for leave to proceed *in forma pauperis* in this Court on December 20, 2002. On May 19, 2003, over my unpublished dissent, the Court issued an order denying petitioner leave to proceed *in forma pauperis* and giving petitioner until June 9, 2003, to pay the docketing fees required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court. Petitioner now seeks an extension of time within which to comply with the May 19th order, explaining that she needs additional time to raise money to pay the docketing fee and printing costs. Having reviewed petitioner's petition for a writ of certiorari, I am satisfied that there are no grounds upon which this Court would grant certiorari, and I therefore deny petitioner's request for an extension of time.

[Publisher's note: See 541 U.S. ____ for the official version. It is not identified as an in chambers opinion in the *U.S. Reports*, but it is written on a question to be decided by Justice Scalia on his own — that is, in chambers — rather than as a member of the Court en banc. *See Public Utilities Comm'n of D.C. v. Pollak*, 4 Rapp 1423 (1952).]

SUPREME COURT OF THE UNITED STATES

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-475. Decided March 18, 2004.

Memorandum of JUSTICE SCALIA.

I have before me a motion to recuse in these cases consolidated below. The motion is filed on behalf of respondent Sierra Club. The other private respondent, Judicial Watch, Inc., does not join the motion and has publicly stated that it "does not believe the presently-known facts about the hunting trip satisfy the legal standards requiring recusal." Judicial Watch Statement 2 (Feb. 13, 2004) (available in Clerk of Court's case file). (The District Court, a nominal party in this mandamus action, has of course made no appearance.) Since the cases have been consolidated, however, recusal in the one would entail recusal in the other.

I

The decision whether a judge's impartiality can "'reasonably be questioned'" is to be made in light of the facts as they existed, and not as they were surmised or reported. See *Microsoft Corp.* v. *United States*, 530 U.S. 1301, 1302 (2000) (REHNQUIST, C.J.) (opinion respecting recusal). The facts here were as follows:

For five years or so, I have been going to Louisiana during the Court's long December-January recess, to the duck-hunting camp of a friend whom I met through two hunting companions from Baton Rouge, one a dentist and the other a worker in the field of handicapped rehabilitation. The last three years, I have been accompanied on this trip by a son-in-law who lives near me. Our friend and host, Wallace Carline, has never, as far as I know, had business before this Court. He is not, as

some reports have described him, an "energy industry executive" in the sense that summons up boardrooms of ExxonMobil or Con Edison. He runs his own company that provides services and equipment rental to oil rigs in the Gulf of Mexico.

During my December 2002 visit, I learned that Mr. Carline was an admirer of Vice President Cheney. Knowing that the Vice President, with whom I am well acquainted (from our years serving together in the Ford administration), is an enthusiastic duck-hunter, I asked whether Mr. Carline would like to invite him to our next year's hunt. The answer was yes; I conveyed the invitation (with my own warm recommendation) in the spring of 2003 and received an acceptance (subject, of course, to any superseding demands on the Vice President's time) in the summer. The Vice President said that if he did go, I would be welcome to fly down to Louisiana with him. (Because of national security requirements, of course, he must fly in a Government plane.) That invitation was later extended — if space was available — to my son-in-law and to a son who was joining the hunt for the first time; they accepted. The trip was set long before the Court granted certiorari in the present case, and indeed before the petition for certiorari had even been filed.

We departed from Andrews Air Force Base at about 10 a.m. on Monday, January 5, flying in a Gulfstream jet owned by the Government. We landed in Patterson, Louisiana, and went by car to a dock where Mr. Carline met us, to take us on the 20-minute boat trip to his hunting camp. We arrived at about 2 p.m., the 5 of us joining about 8 other hunters, making about 13 hunters in all; also present during our time there were about 3 members of Mr. Carline's staff, and, of course, the Vice President's staff and security detail. It was not an intimate setting. The group hunted that afternoon and Tuesday and Wednesday mornings; it fished (in two boats) Tuesday afternoon. All meals were in common. Sleeping was in rooms of two or three, except for the Vice President, who had his own quarters. Hunting was in two- or three-man blinds. As it turned out, I never hunted in the same blind with the Vice President. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them — walking to or from a boat, perhaps, or going to or from dinner. Of course we said not a word about the present case. The Vice President left the camp Wednesday afternoon, about two days after our arrival. I stayed on to hunt (with my son and son-in-law) until late Friday morning, when the three of us returned to Washington on a commercial flight from New Orleans.

II

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." Motion to Recuse 8. That

might be sound advice if I were sitting on a Court of Appeals. But see *In re Aguinda*, 241 F.3d 194, 201 (CA2 2000). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "[W]e do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court." (Available in Clerk of Court's case file.) Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.

Even so, recusal is the course I must take — and will take — when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term. See *Elk Grove Unified School District* v. *Newdow*, 540 U.S. ___ (cert. granted, Oct. 14, 2003). I believe, however, that established principles and practices do not require (and thus do not permit) recusal in the present case.

A

My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Why would that result follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials — and from the earliest days down to modern times Justices

have had close personal relationships with the President and other officers of the Executive. John Quincy Adams hosted dinner parties featuring such luminaries as Chief Justice Marshall, Justices Johnson, Story, and Todd, Attorney General Wirt, and Daniel Webster. 5 Memoirs of John Quincy Adams 322-323 (C. Adams ed. 1969) (Diary Entry of Mar. 8, 1821). Justice Harlan and his wife often "'stopped in'" at the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. M. Harlan, Some Memories of a Long Life, 1854-1911, p. 99 (2001). Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. 2 Memoirs of Herbert Hoover 327 (1952). Justice Douglas was a regular at President Franklin Roosevelt's poker parties; Chief Justice Vinson played poker with President Truman. J. Simon, Independent Journey: The Life of William O. Douglas 220-221 (1980); D. McCullough, Truman 511 (1992). A no-friends rule would have disqualified much of the Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the case that challenged President Truman's seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him. A no-friends rule would surely have required Justice Holmes's recusal in *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904), the case that challenged President Theodore Roosevelt's trust-busting initiative. See S. Novick, Honorable Justice: The Life of Oliver Wendell Holmes 264 (1989) ("Holmes and Fanny dined at the White House every week or two . . .").

It is said, however, that this case is different because the federal officer (Vice President Cheney) is actually a *named party*. That is by no means a rarity. At the beginning of the current Term, there were before the Court (excluding habeas actions) no fewer than 83 cases in which high-level federal Executive officers were named in their official capacity — more than 1 in every 10 federal civil cases then pending. That an officer is named has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government. That is why federal law provides for *automatic substitution* of the new officer when the originally named officer has been replaced. See Federal Rule of Civil Procedure 25(d)(1); Federal Rule of Appellate Procedure 43(c)(2); this Court's Rule 35.3. The caption of Sierra Club's complaint in this action designates as a defendant "Vice President Richard Cheney, *in his official capacity* as Vice President of the United States and Chairman of the National Energy Policy Development Group." App. 139 (emphasis added). The body of the complaint repeats (in paragraph 6) that "Defendant Richard Cheney is

sued *in his official capacity* as the Vice President of the United States and Chairman of the Cheney Energy Task Force." *Id.*, at 143 (emphasis added). Sierra Club has *relied* upon the fact that this is an official-action rather than a personal suit as a basis for denying the petition. It asserted in its brief in opposition that if there was no presidential immunity from discovery in *Clinton* v. *Jones*, 520 U.S. 681 (1997), which was a private suit, "[s]urely . . . the Vice President and subordinate White House officials have no greater immunity claim here, especially when the lawsuit relates to their official actions while in office and the primary relief sought is a declaratory judgment." Brief in Opposition 13.

Richard Cheney's name appears in this suit only because he was the head of a Government committee that allegedly did not comply with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. § 2, p. 1, and because he may, by reason of his office, have custody of some or all of the Government documents that the plaintiffs seek. If some other person were to become head of that committee or to obtain custody of those documents, the plaintiffs would name that person and Cheney would be dismissed. Unlike the defendant in *United States* v. *Nixon*, 418 U.S. 683 (1974), or *Clinton* v. *Jones*, *supra*, Cheney is represented here, not by his personal attorney, but by the United States Department of Justice in the person of the Solicitor General. And the courts at all levels have referred to his arguments as (what they are) the arguments of "the government." See *In re Cheney*, 334 F.3d 1096, 1100 (CADC 2003); *Judicial Watch, Inc.* v. *Nat. Energy Policy Development Group*, 219 F. Supp. 2d 20, 25 (DC 2002).

The recusal motion, however, asserts the following:

> "Critical to the issue of Justice Scalia's recusal is understanding that this is not a run-of-the-mill legal dispute about an administrative decision. . . . Because his own conduct is central to this case, the Vice President's 'reputation and his integrity are on the line.' (Chicago Tribune.)" Motion to Recuse 9.

I think not. Certainly as far as the legal issues immediately presented to me are concerned, this *is* "a run-of-the-mill legal dispute about an administrative decision." I am asked to determine what powers the District Court possessed under FACA, and whether the Court of Appeals should have asserted mandamus or appellate jurisdiction over the District Court.[1] Nothing this Court says on those subjects will have any bearing

[1] The Questions Presented in the petition, and accepted for review, are as follows:

"1. Whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, §§ 1 *et seq*., can be construed . . . to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint

upon the reputation and integrity of Richard Cheney. Moreover, even if this Court affirms the decision below and allows discovery to proceed in the District Court, the issue that would ultimately present itself *still* would have no bearing upon the reputation and integrity of Richard Cheney. That issue would be, quite simply, whether some private individuals were *de facto* members of the National Energy Policy Development Group (NEPDG). It matters not whether they were caused to be so by Cheney or someone else, or whether Cheney was even aware of their *de facto* status; if they *were de facto* members, then (according to D. C. Circuit law) the records and minutes of NEPDG must be made public.

The recusal motion asserts, however, that Richard Cheney's "reputation and his integrity are on the line" because

> "respondents have alleged, *inter alia*, that the Vice President, as the head of the Task Force and its sub-groups, was responsible for the involvement of energy industry executives in the operations of the Task Force, as a result of which the Task Force and its sub-groups became subject to FACA." *Ibid.*

As far as Sierra Club's *complaint* is concerned, it simply is not true that Vice President Cheney is singled out as having caused the involvement of energy executives. But even if the allegation had been made, it would be irrelevant to the case. FACA assertedly requires disclosure if there were private members of the task force, *no matter who* they were — "energy industry executives" or Ralph Nader; and *no matter who* was responsible for their membership — the Vice President or no one in particular. I do not see how the Vice President's "reputation and integrity are on the line" any more than the agency head's reputation and integrity are on the line in virtually all official-action suits, which accuse his agency of acting (to quote the Administrative Procedure Act) "arbitrar[ily], capricious[ly], [with] an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Beyond that always-present accusation, there is nothing illegal or immoral about making "energy industry executives" members of a task force on energy; some people probably think it would be a good idea. If, in doing so, or in allowing it to happen, the Vice President went beyond his assigned powers, that is no worse than what every agency head has done when his action is judicially set aside.

To be sure, there could be political consequences from disclosure of the fact (if it be so) that the Vice President favored business interests, and especially a sector of business with which he was formerly connected.

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that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation." Pet. for Cert. (I).

But political consequences are not my concern, and the possibility of them does not convert an official suit into a private one. That possibility exists to a greater or lesser degree in virtually all suits involving agency action. To expect judges to take account of political consequences — and to assess the high or low degree of them — is to ask judges to do precisely what they should not do. It seems to me quite wrong (and quite impossible) to make recusal depend upon what degree of political damage a particular case can be expected to inflict.

In sum, I see nothing about this case which takes it out of the category of normal official-action litigation, where my friendship, or the appearance of my friendship, with one of the named officers does not require recusal.

B

The recusal motion claims that "the fact that Justice Scalia and his daughter [sic] were the Vice President's guest on Air Force Two on the flight down to Louisiana" means that I "accepted a sizable gift from a party in a pending case," a gift "measured in the thousands of dollars." Motion to Recuse 6.

Let me speak first to the value, though that is not the principal point. Our flight down cost the Government nothing, since space-available was the condition of our invitation. And, though our flight down on the Vice President's plane was indeed free, since we were not returning with him we purchased (because they were least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights. In other words, none of us saved a cent by flying on the Vice President's plane. The purpose of going with him was not saving money, but avoiding some inconvenience to ourselves (being taken by car from New Orleans to Morgan City) and considerable inconvenience to our friends, who would have had to meet our plane in New Orleans, and schedule separate boat trips to the hunting camp, for us and for the Vice President's party. (To be sure, flying on the Vice President's jet was more comfortable and more convenient than flying commercially; that accommodation is a matter I address in the next paragraph.)[2]

The principal point, however, is that social courtesies, provided at Government expense by officials whose only business before the Court is

[2] As my statement of the facts indicated, by the way, my daughter did not accompany me. My married son and son-in-law were given a ride — not because they were relatives and as a favor to me; but because they were other hunters leaving from Washington, and as a favor to them (and to those who would have had to go to New Orleans to meet them). Had they been unrelated invitees to the hunt, the same would undoubtedly have occurred. Financially, the flight was worth as little to them as it was to me.

business in their official capacity, have not hitherto been thought prohibited. Members of Congress and others are frequently invited to accompany Executive Branch officials on Government planes, where space is available. That this is not the sort of gift thought likely to affect a judge's impartiality is suggested by the fact that the Ethics in Government Act of 1978, 5 U.S.C. App. § 101 *et seq.*, p. 38, which requires annual reporting of transportation provided or reimbursed, excludes from this requirement transportation provided by the United States. See § 109(5)(C); Committee on Financial Disclosure, Administrative Office of the U.S. Courts, Financial Disclosure Report: Filing Instructions for Judicial Officers and Employees, p. 25 (Jan. 2003). I daresay that, at a hypothetical charity auction, much more would be bid for dinner for two at the White House than for a one-way flight to Louisiana on the Vice President's jet. Justices accept the former with regularity. While this matter was pending, Justices and their spouses were invited (*all* of them, I believe) to a December 11, 2003, Christmas reception at the residence of the Vice President — which included an opportunity for a photograph with the Vice President and Mrs. Cheney. Several of the Justices attended, and in doing so they were fully in accord with the proprieties.

III

When I learned that Sierra Club had filed a recusal motion in this case, I assumed that the motion would be replete with citations of legal authority, and would provide some instances of cases in which, because of activity similar to what occurred here, Justices have recused themselves or at least have been asked to do so. In fact, however, the motion cites only two Supreme Court cases assertedly relevant to the issue here discussed,[3] and nine Court of Appeals cases. Not a single one of these even involves an official-action suit.[4] And the motion gives not a

[3] The motion cites a third Supreme Court case, *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989), as a case involving FACA in which I recused myself. It speculates (1) that the reason for recusal was that as Assistant Attorney General for the Office of Legal Counsel I had provided an opinion which concluded that applying FACA to presidential advisory committees was unconstitutional; and asserts (2) that this would also be grounds for my recusal here. My opinion as Assistant Attorney General addressed the precise question presented in *Public Citizen:* whether the American Bar Association's Standing Committee on Federal Judiciary, which provided advice to the President concerning judicial nominees, could be regulated as an "advisory committee" under FACA. I concluded that my withdrawal from the case was required by 28 USC 28 U.S.C. § 455(b)(3), which mandates recusal where the judge "has served in governmental employment and in such capacity . . . expressed an opinion concerning the merits of the particular case in controversy." I have never expressed an opinion concerning the merits of the present case.

[4] *United States* v. *Murphy*, 768 F.2d 1518 (CA7 1985), at least involved a judge's going on vacation — but not with the named defendant in an official-action suit. The judge had

single instance in which, under even remotely similar circumstances, a Justice has recused or been asked to recuse. Instead, the Argument section of the motion consists almost entirely of references to, and quotations from, newspaper editorials.

The core of Sierra Club's argument is as follows:

> "Sierra Club makes this motion because . . . damage [to the integrity of the system] is being done right now. As of today, 8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest have called on Justice Scalia to step aside . . . . Of equal import, there is no counterbalance or controversy: not a single newspaper has argued against recusal. Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned. These facts more than satisfy Section 455(a), which mandates recusal merely when a Justice's impartiality 'might reasonably be questioned.'" Motion to Recuse 3-4.

The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it.

The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right. The length of our hunting trip together was said to be several days (San Francisco Chronicle), four days (Boston Globe), or nine days (San Antonio Express-News). We spent about 48 hours together at the hunting camp. It was asserted that the Vice President and I "spent time alone in the rushes," "huddled together in a Louisiana marsh," where we had "plenty of time . . . to talk privately" (Los Angeles Times); that we "spent . . . quality time bonding together in a duck blind" (Atlanta Journal-Constitution); and that "[t]here is simply no reason to think these two did not discuss the pending case" (Buffalo News). As I have described, the Vice President and I were never in the same blind, and never discussed the case. (Washington officials know the rules, and know that discussing with judges pending cases — their own or anyone else's — is forbidden.) The Palm Beach Post stated that our "transportation was provided, appropriately, by an oil services company," and Newsday that a "private jet . . . whisked Scalia to Louisiana." The Vice President and I flew in a Government plane. The

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departed for a vacation with the prosecutor of Murphy's case, immediately after sentencing Murphy. Obviously, the prosecutor is personally involved in the outcome of the case in a way that the nominal defendant in an official-action suit is not.

Cincinnati Enquirer said that "Scalia was Cheney's guest at a private duck-hunting camp in Louisiana." Cheney and I were Wallace Carline's guest. Various newspapers described Mr. Carline as "an energy company official" (Atlanta Journal-Constitution), an "oil industrialist," (Cincinnati Enquirer), an "oil company executive" (Contra Costa Times), an "oilman" (Minneapolis Star Tribune), and an "energy industry executive" (Washington Post). All of these descriptions are misleading.

And these are just the inaccuracies pertaining to the *facts.* With regard to the *law*, the vast majority of the editorials display no recognition of the central proposition that a federal officer is not ordinarily regarded to be a personal party in interest in an official-action suit. And those that do display such recognition facilely assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney's reputation and integrity) is ground for recusal. Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question. It is well established that the recusal inquiry must be "made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances.*" *Microsoft Corp.* v. *United States*, 530 U.S. 1301, 1302 (2000) (REHNQUIST, C.J.) (opinion respecting recusal) (emphases added) (citing *Liteky* v. *United States*, 510 U.S. 540, 548 (1994)).

IV

While Sierra Club was apparently unable to summon forth a single example of a Justice's recusal (or even motion for a Justice's recusal) under circumstances similar to those here, I have been able to accomplish the seemingly more difficult task of finding a couple of examples establishing the negative: that recusal or motion for recusal did *not* occur under circumstances similar to those here.

Justice White and Robert Kennedy

The first example pertains to a Justice with whom I have sat, and who retired from the Court only 11 years ago, Byron R. White. Justice White was close friends with Attorney General Robert Kennedy from the days when White had served as Kennedy's Deputy Attorney General. In January 1963, the Justice went on a skiing vacation in Colorado with Robert Kennedy and his family, Secretary of Defense Robert McNamara and his family, and other members of the Kennedy family. Skiing Not The Best; McNamara Leaves Colorado, Terms Vacation "Marvelous," Denver Post, Jan. 2, 1963, p 22; D. Hutchinson, The Man Who Once Was Whizzer White 342 (1998). (The skiing in Colorado, like my hunting in Louisiana, was not particularly successful.) At the time of this skiing

vacation there were pending before the Court at least two cases in which Robert Kennedy, in his official capacity as Attorney General, was a party. See *Gastelum-Quinones* v. *Kennedy*, 374 U.S. 469 (1963); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). In the first of these, moreover, the press might have said, as plausibly as it has said here, that the reputation and integrity of the Attorney General were at issue. There the Department of Justice had decreed deportation of a resident alien on grounds that he had been a member of the Communist Party. (The Court found that the evidence adduced by the Department was inadequate.)

Besides these cases naming Kennedy, another case pending at the time of the skiing vacation was argued to the Court *by Kennedy* about two weeks later. See *Gray* v. *Sanders*, 372 U.S. 368 (1963). That case was important to the Kennedy administration, because by the time of its argument everybody knew that the apportionment cases were not far behind, and *Gray* was a significant step in the march toward *Reynolds* v. *Sims*, 377 U.S. 533 (1964). When the decision was announced, it was front-page news. See High Court Voids County Unit Vote, N.Y. Times, Mar. 19, 1963, p. 1, col. 2; Georgia's Unit Voting Voided, Washington Post, Mar. 19, 1963, p. A1, col. 5. Attorney General Kennedy argued for affirmance of a three-judge District Court's ruling that the Georgia Democratic Party's county-unit voting system violated the one-person, one-vote principle. This was Kennedy's only argument before the Court, and it certainly put "on the line" his reputation as a lawyer, as well as an important policy of his brother's administration.

Justice Jackson and Franklin Roosevelt

The second example pertains to a Justice who was one of the most distinguished occupants of the seat to which I was appointed, Robert Jackson. Justice Jackson took the recusal obligation particularly seriously. See, *e.g.*, *Jewell Ridge Coal Corp.* v. *United Mine Workers*, 325 U.S. 897 (1945) (Jackson, J., concurring in denial of rehearing) (oblique criticism of Justice Black's decision not to recuse himself from a case argued by his former law partner). Nonetheless, he saw nothing wrong with maintaining a close personal relationship, and engaging in "quite frequen[t]" socializing with the President whose administration's acts came before him regularly. R. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 74 (J. Barrett ed. 2003).

In April 1942, the two "spent a weekend on a very delightful house party down at General Watson's in Charlottesville, Virginia. I had been invited to ride down with the President and to ride back with him." *Id.*, at 106 (footnote omitted). Pending at the time, and argued the next month, was one of the most important cases concerning the scope of permissible federal action under the Commerce Clause, *Wickard* v. *Filburn*, 317 U.S.

111 (1942). Justice Jackson wrote the opinion for the Court. Roosevelt's Secretary of Agriculture, rather than Roosevelt himself, was the named federal officer in the case, but there is no doubt that it was important to the President.

I see nothing wrong about Justice White's and Justice Jackson's socializing — including vacationing and accepting rides — with their friends. Nor, seemingly, did anyone else at the time. (The Denver Post, which has been critical of me, reported the White-Kennedy-McNamara skiing vacation with nothing but enthusiasm.) If friendship is basis for recusal (as it assuredly is when friends are sued personally) then activity which suggests close friendship must be avoided. But if friendship is *no* basis for recusal (as it is not in official-capacity suits) social contacts that do no more than evidence that friendship suggest no impropriety whatever.

Of course it can be claimed (as some editorials have claimed) that "times have changed," and what was once considered proper — even as recently as Byron White's day — is no longer so. That may be true with regard to the earlier rare phenomenon of a Supreme Court Justice's serving as advisor and confidant to the President — though that activity, so incompatible with the separation of powers, was not widely known when it was occurring, and can hardly be said to have been generally approved before it was properly abandoned. But the well-known and constant practice of Justices' enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch has *not* been abandoned, and ought not to be.

V

Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse. See *Microsoft*, 530 U.S., at 1302. That alone is conclusive; but another consideration moves me in the same direction: Recusal would in my judgment harm the Court. If I were to withdraw from this case, it would be because some of the press has argued that the Vice President would suffer political damage *if* he should lose this appeal, and *if*, on remand, discovery should establish that energy industry representatives were *de facto* members of NEPDG — and because some of the press has elevated that possible political damage to the status of an impending stain on the reputation and integrity of the Vice President. But since political damage often comes from the Government's losing official-action suits; and since political damage can readily be characterized as a stain on reputation and integrity; recusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.

My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before — visited not at his invitation, but at his predecessor's. See New Trip Trouble for Scalia, Feb. 28, 2004, p. B22. The same paper has asserted that it was improper for me to speak at a dinner honoring Cardinal Bevilaqua given by the Urban Family Council of Philadelphia because (according to the Times's false report)[5] that organization was engaged in litigation seeking to prevent same-sex civil unions, and I had before me a case presenting the question (whether same-sex civil unions were lawful? — no) whether homosexual sodomy could constitutionally be *criminalized.* See *Lawrence* v. *Texas*, 539 U.S. ___ (2003). While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

* * *

As I noted at the outset, one of the private respondents in this case has not called for my recusal, and has expressed confidence that I will rule impartially, as indeed I will. Counsel for the other private respondent seek to impose, it seems to me, a standard regarding friendship, the appearance of friendship, and the acceptance of social favors, that is more stringent than what they themselves observe. Two days before the brief in opposition to the petition in this case was filed, lead counsel for Sierra Club, a friend, wrote me a warm note inviting me to come to Stanford

[5] The Times's reporter had interviewed the former President of the Urban Family Council, who told him categorically that the Council was neither a party to, nor had provided financial support for, the civil-union litigation. The filed papers in the case, publicly available, *showed* that the Council was not a party. The Los Angeles Times nonetheless devoted a lengthy front-page article to the point that (in the words of the lead sentence) "Justice Antonin Scalia gave a keynote dinner speech in Philadelphia for an advocacy group waging a legal battle against gay rights." Serrano and Savage, Scalia Addressed Advocacy Group Before Key Decision, Mar. 8, 2004, at A1. Five days later, in a weekend edition, the paper printed (at the insistence of the Council) a few-line retraction acknowledging that this asserted fact was wrong — as though it was merely one incidental fact in a long piece, rather than the central fact upon which the long piece was based, and without which *there was no story.* See For the Record, Mar. 13, 2004, at A2. Other inaccurate facts and insinuations in the article, brought to the paper's attention by the Council, were not corrected. See e-mail from Betty Jean Wolfe, President, Urban Family Council, to Richard Serrano, Los Angeles Times (Mar. 8, 2004) (available in Clerk of Court's case file).

Law School to speak to one of his classes. (Available in Clerk of Court's case file.) (Judges teaching classes at law schools normally have their transportation and expenses paid.) I saw nothing amiss in that friendly letter and invitation. I surely would have thought otherwise if I had applied the standards urged in the present motion.

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which *he* is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here — even to the point of becoming (as the motion cruelly but accurately states) "fodder for late-night comedians." Motion to Recuse 6. If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot. The motion is

Denied.

SUPREME COURT OF THE UNITED STATES

No. 04A73

THE ASSOCIATED PRESS, ET AL. *v.* DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF COLORADO

ON APPLICATION FOR STAY

[July 26, 2004]

JUSTICE BREYER, Circuit Justice.

This is an application for a stay of orders of the Colorado State District Court for Eagle County and the Supreme Court of Colorado restricting publication of the contents of transcripts of *in camera* pretrial proceedings held in a criminal prosecution for sexual assault. The applicants are several major newspaper publishers and media outlets that have been covering the prosecution. They filed their application in this Court of July 21, 2004. Due to a change in circumstances following the submission of their application, I deny the application without prejudice to its being filed again in two days' time (or thereafter), *i.e.*, subsequent to July 28, 2004.

At issue are the transcripts of trial court hearings, held *in camera* on June 21 and June 22, 2004, to determine the relevance and admissibility of certain evidence pursuant to Colorado's rape shield statute, Colo. Rev. Stat. § 18-3-407(2) (2003). The transcripts were mistakenly e-mailed to the applicants by a court reporter of the trial court. Upon realizing its mistake, the trial court issued an order prohibiting publication of the contents of the transcripts and requiring their deletion from the applicants' computers. See Order in *People v. Bryant*, No. 03-CR-204 (Dist. Ct., Eagle Cty., June 24, 2004). The applicants challenged the order before the Colorado Supreme Court, which agreed with them that the order imposed a prior restraint on speech, but concluded that a more narrowly tailored version of the order would pass constitutional muster.

See *People* v. *Bryant*, No. 04SA200, http://www.courts.state.co.us/supct/opinions/2004/04SA200.doc (July 19, 2004).

Accordingly, the Colorado Supreme Court ordered the trial court to:

> "(1) make its rape shield rulings as expeditiously as possible and promptly enter its findings of facts and conclusions of law thereon; (2) determine if some or all portions of the June 21 and June 22 transcripts are relevant and material and, therefore, admissible under the rape shield statute at trial; and (3) enter an appropriate order, which may include releasing to the [applicants] and the public a redacted version of the June 21 and June 22 transcripts that contain those portions that are relevant and material in the case, if any, and maintains the ongoing confidentiality of portions that are irrelevant and immaterial, if any." *Id.*, at 40.

In evaluating the validity of the prior restraint, the Colorado Supreme Court made clear that the Government's "interest of the highest order" in preventing publication applied only to those portions of "the *in camera* transcripts that are not relevant and material under the rape shield statute." *Ibid.* Two days after the Colorado Supreme Court issued its opinion, the applicants submitted their application for a stay of the trial court's and the Colorado Supreme Court's orders, directing it to me as Circuit Justice.

On July 23, the same day that responses to the application were filed in this Court, the Colorado trial court issued its ruling on the admissibility of evidence under the Colorado rape shield statute. See Order re: Defendant's Motion to Admit Evidence Pursuant to C.R.S. § 18-3-407 and People's Motions *in Limine # 5* and # 7 in *People* v. *Bryant*, No. 03-CR-204 (Dist. Ct., Eagle Cty., July 23, 2004). According to this ruling (which affects all of the hearings held *in camera* pursuant to the rape shield statute, not just those at issue in this application) the trial court

> determines that certain evidence . . . is relevant to a material issue(s) in this case . . . and will permit the evidence to be offered at the trial of this matter. The Court determines that certain other evidence . . . is not relevant to any material issue in this case, and therefore may not be offered at the trial of this matter, unless circumstances later warrant.

Id., at 5-6. The ruling goes on to specify the evidence that is relevant and material. To my knowledge, the trial court has not yet made its determination as to whether the transcripts of June 21 and 22, in whole or in part, shall be made public.

My reading of the transcripts leads me to believe that the trial court's determination as to the relevancy of the rape shield material will significantly change the circumstances that have led to this application. As a result of that determination, the trial court may decide to release the transcripts at issue here in their entirety, or to release some portions while redacting others. Their release, I believe, is imminent. I recognize the importance of the constitutional interests at issue. See, *e.g.*, *Capital Cities Media, Inc.* v. *Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J., in chambers); *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1327, 1329 (1975). But a brief delay will permit the state courts to clarify, perhaps avoid, the controversy at issue here. See *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1319, 1325 (1975) (Blackmun, J., in chambers).

Consequently, the application is denied without prejudice to the applicants' filing again in two days' time. Should they do so, the respondents shall file a response one day subsequent indicating: (1) (if the trial court has acted) why any redacted portions of the transcripts must remain confidential; or (2) (if the trial court has not acted) which portions of the transcripts they believe, in light of the trial court's admissibility determinations, should remain confidential and why. The applicants shall file their reply, if they wish to file one, one further day later.

The application is denied without prejudice.

[Publisher's note: See 542 U.S. ____ for the official version.]

SUPREME COURT OF THE UNITED STATES

No. 04A194

WISCONSIN RIGHT TO LIFE, INC. *v.*
FEDERAL ELECTION COMMISSION

ON APPLICATION FOR INJUNCTION

[September 14, 2004]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant Wisconsin Right to Life, Inc., has requested I grant an injunction pending appeal barring the enforcement of § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. 107-155, 116 Stat. 91-92, which bars corporations from using general treasury funds to finance electioneering communications as defined in BCRA § 201. Applicant contends that § 203 violates the First Amendment as applied to its political advertisements. A three-judge District Court, convened pursuant to BCRA § 403(a)(l), denied applicant's motion for a preliminary injunction and denied applicant's motion for an injunction pending appeal. I herewith deny the application for an injunction pending appeal.

An injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held that Act facially constitutional, *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 189-210 (2003), and when a unanimous three-judge District Court rejected applicant's request for a preliminary injunction. See *Turner Broadcasting System, Inc.* v. *FCC*, 507 U.S. 1301, 1302-1303 (1993) (REHNQUIST, C.J., in chambers). The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue such an injunction. That authority is to be used "'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers) (quoting *Fishman* v. *Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). It is only appropriately exercised where (1) "necessary or appropriate in aid of [our] jurisdictio[n]," 28 U.S.C. § 1651(a), and (2) the legal rights at issue are "indisputably clear," *Brown* v. *Gilmore*, 533 U.S. 1301 (2001) (REHNQUIST, C.J., in chambers).

Applicant has failed to establish that this extraordinary remedy is appropriate. Therefore, I decline to issue an injunction pending appeal in this case.