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# Case Notes

# CASE NOTES

**Administrative Law—Procedural Due Process—Civil Service Commission Must Grant Open and Public Hearing Where Illegal Discharge from Statutorily Protected Employment Is Nonfrivolously Alleged.**—Plaintiff was separated from his Defense Department position after having given testimony before a congressional committee on cost overruns in the Air Force C5A program. The Civil Service Rules and Regulations regarding *removal* from federal employment did not apply to plaintiff's position,[1] but as a "preference eligible"[2] he was entitled to certain benefits under the terms of the Veterans Preference Act.[3] Among those benefits was a hearing before the Civil Service Commission to appeal any "adverse action"[4] which might be taken against him. The Defense Department gave as a reason for its action the abolition of plaintiff's position due to a reduction-in-force.[5] Plaintiff felt that his dismissal had been retaliatory—certainly an "adverse action." He requested a hearing before the Commission, which was granted;[6] however, the Commission refused his repeated requests that the hearing be "open to the public and press."[7] Plaintiff then brought suit on this issue in the District Court for the District of Columbia. The court granted his motion for summary judgment and enjoined the Commission from conducting further closed hearings.[8] On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed, holding that: (a) having non-frivolously alleged wrongful discharge from his

1. Plaintiff's position was in the "excepted service;" that is, it was a position included within the terms of that section of the Code of Federal Regulations which provides: "Except as may be required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions . . . excepted from the competitive service by statute." 5 C.F.R. § 6.4 (1971). However, the proviso "[e]xcept as may be required by statute" controlled. See notes 2-4 infra.

2. The term "preference eligible" is used to define a category which includes various classes of veterans and their dependents. 5 U.S.C. § 2108 (1970).

3. Id. §§ 1302, 2108, 3305, 3306, 3308-20, 3351, 3363-64, 3501-04, 7512, 7701.

4. An "adverse action" is defined as "a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay." Id. § 7511(2). Such action may only be taken by an agency for such cause as will "promote the efficiency of the service," and, generally, only after 30 days written notice, an opportunity to answer the charges and notice to the employee of a decision against him. Id. § 7512. A preference eligible employee has the right to appeal an unfavorable decision to the Civil Service Commission. Id. § 7701.

5. A reduction-in-force separation is not, by definition, an "adverse action," and no provision is made for a hearing in the case of such a step. Fitzgerald v. Hampton, 467 F.2d 755, 758 (D.C. Cir. 1972).

6. The Defense Department maintained that the granting of a hearing to Fitzgerald by the Civil Service Commission was not inconsistent with its position that only a reduction-in-force separation had occurred. The Department argued that it was the Commission's "practice" to grant hearings in such circumstances, even though a hearing could not be demanded as of right. 467 F.2d at 758.

7. Id. at 757.

8. Fitzgerald v. Hampton, 329 F. Supp. 997 (D.D.C. 1971).

statutorily protected employment, plaintiff was entitled to a hearing as of right and; (b) the due process clause of the fifth amendment required that that hearing be open and public. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

Traditionally, courts have been reluctant to review executive action. As early as 1840, in *Decatur v. Paulding*,[9] the Supreme Court expressed the rule that while "ministerial" actions might be reviewed, actions involving the exercise of discretion on the part of an executive officer or agency were not proper objects of judicial scrutiny. As the Court stated it:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them.[10]

The *Decatur* case held that the federal courts lacked authority, on a petition for mandamus, to review a determination by the Secretary of the Navy that the widow of a naval officer was not entitled to a special pension.[11] In subsequent years, actions held to be discretionary, and hence not reviewable, included: the granting of federal land patents;[12] the valuation of goods by a customs official;[13] and decisions of immigration authorities on whether to exclude aliens from admission to the United States under the immigration laws.[14]

During the period of its tenure, the ministerial-discretionary formula for testing reviewability proved an insurmountable obstacle to many litigants who wished to contest dismissal from federal employment. As the Supreme Court noted in *Keim v. United States*,[15]

> [t]he appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. . . . In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.[16]

9. 39 U.S. (14 Pet.) 418 (1840). For an example of an administrative action which was thought at the time of the Decatur case to be "ministerial" see Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 364 (1838) (entry of credit in account by Postmaster General pursuant to order of Congress).

10. 39 U.S. (14 Pet.) at 434.

11. Id. at 418. See also United States ex rel. Redfield v. Windom, 137 U.S. 636 (1891); United States ex rel. Dunlap v. Black, 128 U.S. 40 (1888).

12. United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); Gaines v. Thompson, 74 U.S. (7 Wall.) 347 (1868).

13. Hadden v. Merritt, 115 U.S. 25 (1885).

14. Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

15. 177 U.S. 290 (1900). Keim was a clerk in the Department of the Interior who had brought an action in the Court of Claims to protest his dismissal for inefficiency. The Supreme Court affirmed that court's holding that it did not have authority to supervise the Interior Department with respect to its personnel policy. "These are matters," said the Court, "peculiarly within the province of those who are in charge of and superintending the departments." Id. at 296.

16. Id. at 293.

Not long after *Keim*, however, it became apparent that the Court's rigid stance on review of the executive had begun to waiver. In the 1902 case of *American School of Magnetic Healing v. McAnnulty*,[17] the Court was requested to pass on the propriety of an order of the Postmaster General which barred plaintiff school from receiving mail on the ground that its medical claims were fraudulent. The Court decided that it *could* review and invalidate the order, establishing the principle that executive actions involving the determination of law questions may be reviewed by the judiciary.[18] *Decatur*, in which a contrary conclusion had been drawn, was not mentioned.

*Magnetic Healing* was the first step toward the development of what has been termed the "presumption of reviewability."[19] This presumption has been defined to mean that "administrative action is reviewable unless (a) legislative intent to the contrary can be found or (b) some special reason calling for unreviewability."[20] Cases which followed *Magnetic Healing* held that such administrative actions as alien exclusion[21] and denial of land patents[22] were in fact proper subjects for review. In *St. Joseph Stock Yards Co. v. United States*[23] the Court went so far as to affirm the reviewability of administrative *factual* determinations.[24] Significantly, the advent of the "presumption of reviewability" approach paved the way for judicial review of dismissals from

17. 187 U.S. 94 (1902).

18. Id. at 108.

19. L. Jaffe, Judicial Control of Administrative Action 339 passim (1965).

20. K. Davis, Administrative Law Text § 28.02, at 510 (3d ed. 1972) (footnote omitted) [hereinafter cited as Davis, Text]. See, e.g., Harmon v. Brucker, 355 U.S. 579 (1958); Leedom v. Kyne, 358 U.S. 184 (1958); Stark v. Wickard, 321 U.S. 288, 309-10 (1944); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); Dismuke v. United States, 297 U.S. 167 (1936). What would constitute a "special reason" for denying reviewability is an interesting question. Professor Davis gives two examples: the removal of enemy aliens during wartime, Ledecke v. Watkins, 335 U.S. 160 (1948); and the denial of an army commission, Orloff v. Willoughby, 345 U.S. 83 (1953). Davis, Text § 28.02, at 510 n.10.

21. Gegiow v. Uhl, 239 U.S. 3 (1915); The Japanese Immigrant Case, 189 U.S. 86 (1903).

22. Lane v. Hoglund, 244 U.S. 174 (1917).

23. 298 U.S. 38 (1936). The Secretary of Agriculture had been empowered by Congress to set maximum rates in the stockyards industry, provided those rates were "reasonable." Pursuant to this authorization the Secretary held hearings, received testimony, and then issued an order setting the rates. Plaintiff company brought an action alleging that the rates set were not supported by the evidence which had been adduced at the hearings, and hence were not "reasonable." The Court held that the evidence did in fact support the Secretary's determination but noted as well that it was in the power of the federal courts to review such administrative findings. Id. at 71-72.

24. Id. at 52. According to the Court, "to say that [the agency's] findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards." Id.

public employment; such review has since been uniformly granted on both state[25] and federal[26] levels.

Concurrent with this expansion of the *scope* of reviewability of administrative actions came the determination that administrative actions resulting in the deprivation of liberty or property must meet the due process requirements of the fifth and fourteenth amendments.[27] In the *Japanese Immigrant Case*[28] the Supreme Court declared in 1903:

> [T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.[29]

Moreover, the list of administrative actions to which the due process standard applies was greatly expanded by movement away from the "privilege doctrine" under which only those actions which deprive of a right, as opposed to a privilege had been held subject to constitutional strictures.[30]

The "privilege doctrine" had particular applicability to the field of public employment. In 1950 the Court of Appeals for the District of Columbia Circuit held in *Bailey v. Richardson*[31] that the due process clause of the fifth amendment did not apply to the dismissals of federal employees. Said the court:

> It has been held repeatedly and consistently that Government employ is not "property" and that in this particular it is not a contract. We are unable to perceive how it could be held to be "liberty." Certainly it is not "life." So much that is clear would

25. See Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).

26. See Cole v. Young, 351 U.S. 536 (1956); Peters v. Hobby, 349 U.S. 331 (1955); Garrott v. United States, 340 F.2d 615 (Ct. Cl. 1965); Kutcher v. Gray, 199 F.2d 783 (D.C. Cir. 1952); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd per curiam, 341 U.S. 918 (1951); Deak v. Pace, 185 F.2d 997 (D.C. Cir. 1950).

27. Although it has never explicitly been held that the "due process" requirements of the fifth and fourteenth amendments coincide in their demands on federal and state administrative proceedings, cases involving review of federal proceedings regularly rely on the authority of prior decisions dealing with state proceedings. See, e.g., Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961); Hannah v. Larche, 363 U.S. 420, 491 (1960) (Frankfurter, J. concurring); Morgan v. United States, 304 U.S. 1 (1938); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936). Conversely, cases dealing with due process in state proceedings cite cases arising in a federal context. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

28. 189 U.S. 86 (1903). Petitioner in this case, a Japanese alien incarcerated pending deportation, was found nevertheless to have been given a sufficient hearing and to have been afforded due process of law. Id. at 101.

29. Id. at 100.

30. For a discussion of the "privilege" doctrine see 1 K. Davis, Administrative Law Treatise, § 7.11 (1958) [hereinafter cited as Davis, Treatise]; Davis, Text § 7.12.

31. 182 F.2d 46 (D.C. Cir. 1950), aff'd per curiam, 341 U.S. 918 (1951); see notes 60 & 61 infra and accompanying text.

seem to dispose of the point. In terms the due process clause does not apply to the holding of a Government office.[32]

This decision was affirmed by an equally divided Supreme Court.[33] Furthermore, on at least one other occasion the Court, in dictum, suggested the conclusion that public employment is a "privilege" and not a "right."[34] The force of these opinions, however, has been dissipated by later cases. In the 1972 case of *Board of Regents v. Roth*,[35] Justice Stewart, speaking for the Court, referred to *Bailey* in the following terms:

> The basis of its holding has been thoroughly undermined in the ensuing years. For, as Mr. Justice Blackmun wrote for the Court only last year, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." '[36]

The *Roth* decision, and that of the Court in *Perry v. Sindermann*,[37] handed down on the same day, made significantly clearer the conditions under which discharge of public employees must conform to due process requirements. In *Roth*, plaintiff was an associate professor at a Wisconsin state university whose contract had not been renewed. Roth did not have tenure and the one year contract under which he was employed specifically provided that the granting of a new contract for the ensuing year would be discretionary on the part of the university. When the university failed to renew the contract, Roth brought suit, claiming that he had been discharged without due process.[38] In *Sindermann* plaintiff was a junior college professor who, in contrast to Roth, had been at his post for ten years, and was, moreover, a department co-chairman and president of the Texas Junior College Teachers Association. Although the junior college which employed Sindermann did not give official tenure, there was an "unofficial" tenure system, and Sindermann was entitled to "unofficial" tenure. When his contract was not renewed, Sindermann alleged that this failure to renew was in retaliation for his public opposition to the State Board of Regents on a policy issue, and for testimony given by him before a state legislative committee.[39] The Supreme Court found merit in Sindermann's due

32. Id. at 57.

33. 341 U.S. 918 (1951) (per curiam).

34. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959).

35. 408 U.S. 564 (1972), noted in 41 Fordham L. Rev. 684 (1973).

36. Id. at 571 n.9.

37. 408 U.S. 593 (1972).

38. 408 U.S. at 567-69. Specifically, Roth alleged that due process had been denied him because he had not been given a hearing on the question of the renewal of his contract. Id.

39. 408 U.S. at 595. Sindermann also claimed that the action violated his right to freedom of speech under the first amendment. Id. In this aspect the parallel to the Fitzgerald case is striking. The Supreme Court held with respect to Sindermann's first amendment allegation that he had indeed stated a claim upon which relief could be granted. Said the Court: "For at least a quarter-century, this court has made clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his

process claim,[40] but not in Roth's.[41]

According to the Court in *Roth*, the fourteenth amendment provides procedural safeguards of "security interests that a person has already acquired in specific benefits."[42] These property interests, the Court said,

> are created and their dimensions are defined by existing rules or understandings that stem from independent sources [independent of the Constitution] such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[43]

The unofficial tenure which Sindermann had earned sprang from such an "understanding;" therefore it was entitled to the protection of due process of law.[44] The same could not be said with respect to Roth's position.[45]

The Court also recognized in *Roth* that "liberty" as well as "property" deprivations may arise in employment cases.[46] Thus a discharge on some ground such as "dishonesty, or immorality" which "stigmatizes" an employee's "good name, reputation, honor, or integrity" must, the Court felt, also meet procedural due process standards.[47] Consistent with this approach was the Court's earlier decision in *Slochower v. Board of Higher Education*,[48] a 1956 case in which the summary discharge of a tenured university professor for claiming his fifth amendment privilege before a legislative committee was held to be unlawful.[49]

Once it has been established that a particular administrative action must meet procedural due process standards, the question arises, naturally enough, as to what these standards are. In the *Japanese Immigrant Case*[50] the Court announced that one of the principles of due process "is that no person shall be deprived of his liberty without opportunity . . . *to be heard* . . . in respect of the matters upon which that liberty depends . . . ."[51] The same has been held true when the contemplated action stands to deprive a person of a property interest.[52]

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constitutionally protected interests—especially, his interest in freedom of speech." Id. at 597. It will be recalled that Fitzgerald, like Sindermann, averred that his dismissal had been in retaliation for testimony given before a legislative committee.

40. Id. at 598.

41. 408 U.S. at 579.

42. Id. at 576.

43. Id. at 577.

44. 408 U.S. at 601-02.

45. 408 U.S. at 578.

46. Id. at 572-73.

47. Id. at 573; see Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

48. 350 U.S. 551 (1956).

49. Id. Said the Court: "[W]e must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." Id. at 557.

50. See notes 28 & 29 supra and accompanying text.

51. 189 U.S. 86, 101 (1903) (emphasis added); see Morrissey v. Brewer, 408 U.S. 471 (1972).

52. See Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Southern Ry. v. Virginia, 290 U.S. 190 (1933) (railroad required to replace crossing with overpass); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (contractor barred from future government contracts).

Even when it has been determined that a hearing is requisite, there remains the question of what form that hearing must take. What specific procedural rights does the due process clause guarantee? Must the hearing be a full blown "trial" type hearing, or will it suffice merely to give the person proposed to be acted against an opportunity to present his side of the argument?

Professor Davis suggests that the type of hearing to be given ought to depend on the nature of the question involved. It is his position that where "adjudicative facts" are at issue, *i.e.*, facts "about the parties and their activities, businesses, and properties,"[53] a "trial" type hearing, with the right to confrontation, cross-examination, and the introduction of rebuttal evidence and evidence in favor of each party's position, is appropriate.[54] Where, on the other hand, questions of law or policy, or "legislative facts," *i.e.*, "general facts that are used for making law or policy or for guiding the exercise of discretion,"[55] are involved, a "trial" type hearing is unnecessary. For such issues, Davis suggests, an "argument" or "presentation of ideas" is sufficient.[56]

While this approach has some support in the case law,[57] there is authority as well that questions of law require a "trial" type hearing.[58]

Perhaps the most litigated procedural rights area has been that involving the right of a party to confront and cross-examine witnesses who present evidence adverse to his position. Many cases in this area arose out of the "loyalty" programs of the early nineteen-fifties.[59] In *Bailey v. Richardson*,[60] the Court of Appeals for the District of Columbia Circuit held that the government had an overriding interest in maintaining security and that, therefore, the denial of the right of confrontation to an employee dismissed because of "reasonable grounds for belief of disloyalty" had not been improper.[61] However, this holding has been brought into question by the subsequent Supreme Court cases of *Peters v.*

53. Davis, Text § 7.04, at 160.

54. Davis, Treatise § 7.02, at 412. According to this authority: "The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstances when some other interest such as national security, justifies an overriding of the interest in fair hearing." Id.

55. Davis, Text § 7.03, at 160.

56. Id. § 7.01, at 157; Davis, Treatise § 7.01.

57. See, e.g., Mississippi River Fuel Corp. v. FPC, 281 F.2d 919 (D.C. Cir. 1960), cert. denied, 365 U.S. 827 (1961); Sun Oil Co. v. FPC, 256 F.2d 233 (5th Cir.), cert. denied, 358 U.S. 872 (1958).

58. Philadelphia Co. v. SEC, 175 F.2d 808 (D.C. Cir. 1948), cert. granted and remanded, 337 U.S. 901 (1949); L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948).

59. E.g., Greene v. McElroy, 360 U.S. 474 (1959); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd per curiam, 341 U.S. 918 (1951); see Peters v. Hobby, 349 U.S. 331 (1955). See also Cole v. Young, 351 U.S. 536 (1956).

60. 182 F.2d 46 (D.C. Cir. 1950), aff'd per curiam, 341 U.S. 918 (1951); see text accompanying notes 31 & 32 supra.

61. 182 F.2d at 61.

*Hobby*[62] and *Greene v. McElroy*.[63] Peters, a part-time government consultant, was barred from further government employ on the basis of secret reports made by F.B.I. agents.[64] At his hearing before a loyalty board he was not informed of the charges against him, nor was he given the opportunity to confront his accusers. The Supreme Court declared the proceeding improper, but did not base its decision on due process grounds. Instead, the Court found that the procedures adopted had not been authorized by the executive order establishing the loyalty boards.[65] In *Greene* a similar approach was taken. Greene had been denied a security clearance on the strength of the testimony of witnesses whom he was not allowed to confront. Although not a government employee, the withholding of a clearance made it impossible for him to obtain work in his field of aeronautical engineering.[66] As in *Peters* the Court felt the procedures by which this result had been accomplished exceeded statutory authorization.[67]

Although the *Greene* case was not decided on constitutional grounds, the Court implied strongly that it considered the condemned procedures unconstitutional.[68] Indeed, *Greene* has been cited in later opinions to support the proposition that due process requires an opportunity to confront and cross-examine one's accusers in many administrative proceedings.[69]

Confrontation and cross-examination in the administrative context were given further refinement a year after the *Greene* decision when, in 1960, the Court decided the case of *Hannah v. Larche*.[70]

The *Hannah* case went far in creating a framework for the determination of what procedural rights inhere in a particular administrative proceeding. The case

62. 349 U.S. 331 (1955).

63. 360 U.S. 474 (1959).

64. 349 U.S. at 335-37.

65. Id. at 338.

66. 360 U.S. at 475-76. It was on the basis of this disability that the Court distinguished Greene from the plaintiff in the later case of Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886 (1961). There the employee whose clearance was revoked was a short order cook employed by a concessionaire at the Naval Gun Factory. The Court felt that nothing about her discharge would impair her ability to obtain similar employment elsewhere, something which could not be said of Greene. Id. at 896, 898.

67. 360 U.S. at 508.

68. Id. at 504. Of the clearance program, the Court said that it "embodies procedures traditionally believed to be inadequate to protect affected persons." Id.

69. See, e.g., Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), in which Justice Douglas, speaking for the majority, cited Greene to support the following statement: "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." Id. at 103. The probable reason why decisions in many of the state cases are based upon constitutional grounds while the decisions in cases dealing with federal administrative actions do not is that the Supreme Court can construe the enabling legislation in cases dealing with federal action as narrowly as it wishes, thereby avoiding constitutional questions, whereas the Court has no power to construe state legislation, but must deal with the legislation as construed by the state courts.

70. 363 U.S. 420 (1960).

itself dealt with the right of voting registrars called as witnesses before the Civil Rights Commission in regard to alleged discriminatory practices to confront and cross-examine persons who had filed complaints against them with the Commission.[71] The Court concluded that the registrars were not entitled to confront and cross-examine the complaining parties,[72] drawing a distinction not unlike the "legislative fact"—"adjudicative fact" one advocated by Professor Davis:[73]

> Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.[74]

Since the findings of the Civil Rights Commission are not "binding determinations," but rather take the form of proposals for action,[75] a lesser standard of due process was held appropriate.[76] The significance of the *Hannah* decision transcends the question of the right to confrontation and cross-examination. The "adjudicatory"—"investigative" distinction seems suitable to the determination of whether other in the panoply of procedural rights, the right to an open and public hearing not excepted, apply to a particular administrative action.[77]

An open and public hearing has never explicitly been held by the Supreme Court to be a requirement of due process in an administrative proceeding.[78] The Court, however, did hold in *In Re Oliver*,[79] that *criminal proceedings* must be

71. Id. at 423-26.

72. Id. at 451. It has been said that even where a right to confrontation and cross-examination does inhere, it may be waived if the party asserting the right makes no effort to produce for cross-examination the witness with whose testimony he takes issue or, where the witness is an employee of the agency seeking the adverse ruling, if the party fails to give the agency adequate notice of his desire to cross-examine. See Williams v. Zuckert, 372 U.S. 765 (1963) (per curiam); Peters v. United States, 408 F.2d 719 (Ct. Cl. 1969); Begendorf v. United States, 340 F.2d 362 (Ct. Cl. 1965) (per curiam); McTiernan v. Gronouski, 337 F.2d 31 (2d Cir. 1964). However, if requests made of the agency by which the witness is employed have gone unheeded, it is considered that personal attempts to produce the witness would prove futile, and such attempts are therefore not required. Hanifan v. United States, 354 F.2d 358 (Ct. Cl. 1965) (per curiam).

73. See text accompanying notes 53-56 supra.

74. 363 U.S. at 442.

75. Id. at 443.

76. Id.

77. See text accompanying notes 97-99 infra.

78. See Davis, Treatise § 8.09 (Supp. 1970). A reason for this absence of authority is apparent in the following statement: "The usual problem is not an agency's denial of a public hearing, where a private party is protesting against secrecy; the usual problem is the agency's insistence upon a public hearing, where a party is urging secrecy." Davis, Treatise § 8.09, at 550-51.

79. 333 U.S. 257 (1948). In the Oliver case, a Michigan judge, acting as a one man grand-jury, heard testimony of the defendant, then cited him for contempt and imposed a jail

open and public; and Professor Davis argues that the same consideration which led the Court to require open criminal proceedings is present in most administrative proceedings: *viz.*, the need for protection against arbitrary and capricious action.[80] Strong preference for open and public proceedings has been expressed by the Attorney General's Committee on Administrative Procedure, a body established in 1940 to analyze and make recommendations about the procedures used by the many federal administrative bodies.[81] According to the Committee's Report, "the practice [of conducting hearings in public] is an effective guarantee against arbitrary methods in the conduct of hearings. Star Chamber methods cannot thrive where hearings are open to the scrutiny of all."[82]

While the Supreme Court has never expressly ruled in an administrative setting that due process may require an open and public hearing, the same has, at least, been implied. In *Morgan v. United States*,[83] Chief Justice Hughes, speaking for a majority of the Court, noted in dictum that the "rudimentary requirements of fair play . . . demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence . . . ."[84] In addition, the Court held in *FCC v. Schreiber*[85] that the denial of a request for a *closed hearing* was not an abuse of discretion in view of a "general policy favoring disclosure of administrative proceedings."[86]

In *Fitzgerald v. Hampton*[87] the Court of Appeals for the District of Columbia Circuit entertained the question whether an administrative proceeding in which statutory employment rights hang in the balance must be open and public. The court resolved this question in the affirmative.[88]

As a threshhold matter the court was faced with the defense assertion that not only was Fitzgerald not entitled to a hearing with " 'all the attributes of a criminal trial,' " but also that he was entitled to no hearing at all, at least as of right, since the stated ground for his separation had been a routine reduction-in-force.[89] The court noted, however, that:

Were we to look no further than the *stated* reason for an employee's separation, not only could an agency cavalierly discharge preference eligibles under the guise of a

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sentence, on the ground that the defendant's testimony did not "jell" with that of another witness. The "grand jury" proceeding and the "trial" for contempt were both conducted in secret. Id. at 259. This, the Supreme Court decided, had been a denial of due process under the fourteenth amendment. Id. at 273.

80. Davis, Treatise § 8.09, at 551-52.

81. S. Doc. No. 8, 77th Cong., 1st Sess. 1 (1941).

82. Id. at 68.

83. 304 U.S. 1 (1938).

84. Id. at 15.

85. 381 U.S. 279 (1965); accord, Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970); E. Griffiths Hughes, Inc. v. FTC, 63 F.2d 362 (D.C. Cir. 1933); cf. FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).

86. 381 U.S. at 293.

87. 467 F.2d 755 (D.C. Cir. 1972).

88. Id. at 766.

89. Id. at 758.

'reduction-in-force,' but under that type of action it could also deprive them of all adverse action procedural rights to which preference eligibles are entitled, including the *right* to a hearing.[90]

Here, Fitzgerald was contesting the matter. Thus, the court felt it appropriate to apply by analogy the rationale of the "coerced resignation" cases[91]—concluding that since Fitzgerald had "nonfrivolously" alleged wrongful discharge he should be granted a hearing.[92]

The court decided that Fitzgerald was entitled to due process because his employment was under "legislative protection."[93] That is, as a preference eligible no adverse action could be taken against him " 'except for a cause which will promote the efficiency of the service.' "[94] "We hold," said the court, "that the statutory employment rights of Fitzgerald are within the liberty and property concept of the Fifth Amendment and sufficient for him, as a preference eligible employee, to invoke the due process clause."[95]

Having determined that Fitzgerald was entitled to a hearing, and that due process standards would have to be observed, the court was brought, as it were, "face to face with the question as to whether procedures which provide that hearings be closed to the public and press deny [the plaintiff] due process of law."[96]

The proceeding before it, the court noted, would determine the merits of Fitzgerald's claim.[97] Thus it was of an "adjudicatory" or "quasi-judicial" character under the test set forth in *Hannah*,[98] and commanded a stricter standard of due process.[99] Was a facet of this stricter standard an open and public hearing? At least in the instant case, it was.[100] Indeed, broadly read the Fitzgerald case is authority for the meritorious proposition that an open and public hearing is required by due process in any administrative proceeding which can properly be characterized as an adjudicatory hearing. "Any lingering doubts," said the court, "as to the import of open hearings at the administrative level should have been put to rest by the Supreme Court's sanction of the 'public proceedings' in *Federal Communications Commission v. Schreiber*."[101] Any doubts which lingered after *Schreiber* are certainly dispelled by *Fitzgerald*.

90. Id. at 758-59.

91. Goodman v. United States, 358 F.2d 532 (D.C. Cir. 1966); Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1965); Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961). These cases held that an employee who had resigned his position and thereby given up his employment rights would nevertheless be entitled to a hearing on the question of whether his resignation had been coerced, provided allegations made by him to that effect were "nonfrivolous."

92. 467 F.2d at 760.

93. Id. at 762.

94. Id., referring to 5 U.S.C. § 7512 (1970).

95. Id.

96. Id. at 762-63.

97. 467 F.2d at 766.

98. Id.; see text accompanying notes 70-77 supra.

99. 467 F.2d at 766.

100. Id.

101. Id. at 764 (italics added); see text accompanying notes 85-86 supra.

**Constitutional Law—Freedom of Religion—Regulations Compelling Chapel Attendance at Military Academies Held Invalid.**—Plaintiffs, two West Point cadets and nine Annapolis midshipmen, brought a class action[1] on behalf of all cadets attending the United States Military, Naval and Air Force Academies,[2] challenging the validity of regulations[3] requiring chapel attendance on Sundays. Such regulations, it was contended, were violative of the establishment and free exercise clauses of the first amendment[4] and of the "religious test" prohibition of article VI of the Constitution.[5] The district court, finding the regulations to be valid, denied plaintiffs' motions for declaratory and injunctive relief.[6] The United States Court of Appeals for the District of Columbia Circuit reversed in a per curiam decision,[7] with two judges writing separately for reversal and one judge dissenting. It was agreed by the concurring judges that the establishment clause had been violated.[8] *Anderson v. Laird,* 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972).

The meaning of the establishment clause was not fully considered[9] by the

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1. Anderson v. Laird, 316 F. Supp. 1081, 1083 (D.D.C. 1970), rev'd per curiam, 466 F.2d 283 (D.C. Cir.), cert. denied, 93 S. Ct. 690 (1972).

2. Although no Air Force Academy cadet was a named plaintiff, the similarity of regulations and of cadet positions at the three service academies was deemed sufficient to bring the Air Force Academy into the suit, which the district court held to be a class action pursuant to Fed. R. Civ. P. 23. Id. at 1083 n.3.

3. Regulations for The United States Cadet Corps of the United States Military Academy, ch. 8, § IV, ¶ 819; Air Force Cadet Regulation No. 265-1; United States Naval Academy Regulations pt. II, ch. 15, § 1501. Violations of the regulations are punished. 466 F.2d at 284. The regulations are mandatory on their face although it is the stated policy of the Academies that exceptions can be made for individual cadets with "sincerely held convictions" against attendance. The Eleventh Conference of Superintendents of the Academies of the Armed Forces, Record of Proceedings, April 18, 1969 at 32. The Court of Appeals noted that in the last forty years only three Naval Academy midshipmen had been excused from attendance while no West Point Cadet had ever been excused. 466 F.2d at 284-85 n.5. In 1969 four West Point cadets who sought to be excused were labeled "troublemakers." 466 F.2d at 302.

4. U.S. Const. amend. I provides, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

5. U.S. Const. art. VI provides, in part: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

6. 316 F. Supp. at 1093.

7. Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).

8. The view was also expressed by one concurring judge that the free exercise clause had been violated. See text accompanying notes 58 and 68-71 infra.

9. The few pre-Everson cases dealing with the establishment clause were decided on narrow grounds, Quick Bear v. Leupp, 210 U.S. 50, 81 (1908) (agreement to make payments to the Bureau of Catholic Indian Missions for the education of certain Sioux Indians upheld on the ground that the payments were not "gratuitous appropriations of public money" but treaty debts); Bradfield v. Roberts, 175 U.S. 291, 298-99 (1899) (agreement to finance construction of a hospital run by Roman Catholic nuns sustained on the ground that the hospital was a "corporation" and not a "sectarian body"), discussed in 45 Mich. L. Rev. 1001, 1006 (1947); or in summary fashion, Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918) (the contention that exemption provisions in the Act violated the religion

Supreme Court until the 1947 case of *Everson v. Board of Education*.[10] Challenged in *Everson* was a New Jersey statute[11] allowing reimbursement of transportation costs to the parents of parochial school children. The validity of the statute was sustained by the Court.[12] Justice Black, speaking for the majority, declared in broad terms that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[13]

It appeared, however, that this "wall of separation" was not impenetrable. Upon closer scrutiny of the particular facts before it, the Court further submitted that the first amendment "requires the state to be a *neutral* in its relations with groups of religious believers and non-believers . . . ."[14] This neutral posture, the Court felt, had not been departed from by the challenged program because the program did no more to aid religious schools than do "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[15] In fact the program was aimed not at the schools but at the school children; it was a "general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[16] Thus, as commentators later explained, the New Jersey statute had a "secular purpose";[17] and for that reason was not invalidated despite "incidental aid to religion."[18]

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clauses thought to be so unsound as to require nothing more than a statement to that effect); or were not technically concerned with the establishment clause, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (dictum to the effect that the fourteenth amendment incorporated the establishment clause); Cochran v. Board of Educ., 281 U.S. 370 (1930) (Louisiana statute providing textbooks without charge to all school children, including those attending parochial schools, upheld on fourteenth amendment grounds). At the time of Cochran the establishment clause was not binding upon the states. See, e.g., Duval, The Constitutionality of State Aid to Nonpublic Elementary and Secondary Schools, 1970 U. Ill. L.F. 342, 343. But cf. Sutherland, Establishment of Religion-1968, 19 Case W. Res. L. Rev. 469, 487-88 (1968). See generally Manning, Aid to Education—Federal Fashion, 29 Fordham L. Rev. 495, 513-16 (1961).

10. 330 U.S. 1 (1947).

11. N.J. Rev. Stat. § 18:14-8 (1937).

12. 330 U.S. at 17.

13. Id. at 15-16 (citation omitted).

14. Id. at 18 (emphasis added).

15. Id. at 17-18.

16. Id. at 18.

17. See, e.g., Kauper, The Walz Decision: More on the Religion Clauses of the First Amendment, 69 Mich. L. Rev. 179, 181 (1970); Sutherland, Establishment of Religion-1968, 19 Case W. Res. L. Rev. 469, 486 (1968).

18. See, e.g., Kauper, The Walz Decision: More on the Religion Clauses of the First Amendment, 69 Mich. L. Rev. 179, 181 (1970).

Within a year the Court was presented with another suit grounded in the establishment clause—this time challenging a program whereby private groups were allowed to conduct religious education classes in Illinois public schools during school hours. In *Illinois ex rel. McCollum v. Board of Education*,[19] the Court struck down the arrangement on the rationale that it fell "squarely under the ban of the First Amendment . . . as we interpreted it in *Everson v. Board of Education*."[20] In 1952, however, the Court sustained a program of "released time" religious instruction in which classes were *not* held on public school premises, distinguishing the *McCollum* case.[21] In *Zorach v. Clauson*,[22] Justice Douglas, speaking for the majority, noted:

> The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.[23]

Want of "separation," if such it could be called, was not fatal to the program under consideration because it was not the purpose of the amendment to create governmental "hostility" to religion.[24] "We are," the Court declared,

> a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.[25]

While the *Zorach* decision shed new light on the "neutrality" concept, what was newly seen did not fail to create some surprise.[26] If the Court had seemed to waiver, however, in its determination to resist admixture of things ecclesiastical and governmental, this notion was dispelled by a series of decisions handed down in the early 1960's.

Declaring that "neither a State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers," and adding that "neither can aid those religions based on a belief in the existence of God as against those religions founded on different

19. 333 U.S. 203 (1948).

20. Id. at 210.

21. Zorach v. Clauson, 343 U.S. 306, 308-09, 315 (1952). The Court said: "In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the McCollum case. But we cannot expand it to cover the present released time program . . . ." Id. at 315 (italics omitted) (footnote omitted).

22. 343 U.S. 306 (1952).

23. Id. at 312.

24. Id. at 314. "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." Id.

25. Id. at 313-14.

26. See Hudspeth, Separation of Church and State in America, 33 Tex. L. Rev. 1035, 1052-53 (1955); Manning, supra note 9, at 495.

beliefs,"[27] the Court in *Torcaso v. Watkins*[28] invalidated a Maryland test oath requiring declaration of belief in God as a prerequisite for certain public appointments.[29] In *Engel v. Vitale*,[30] the Court one year later ended the practice of reciting in New York public schools a "nondenominational" prayer composed by the State Board of Regents.[31] Bible reading in the public schools of Pennsylvania was subjected to a similar fate in the 1963 case of *School District of Abington Township v. Schempp*.[32]

The *Schempp* decision is important because it articulated a specific test for establishment clause transgressions. The "secular purpose" rationale discerned in *Everson* became the "purpose and effect" test.[33]

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[34]

Characterizing as "religious" the Bible reading exercises before it, the Court in *Schempp* found that by the terms it had set up, such exercises did in fact violate the strictures of the establishment clause, constituting a departure from the "strict neutrality" which the government had been commanded to maintain.[35]

In 1968 the Court in *Board of Education v. Allen*[36] utilized the *Schempp* test to sustain a New York statute[37] which provided for the lending of secular textbooks to all students in grades seven through twelve—including students in parochial schools.[38] In 1970, in *Walz v. Tax Commission*,[39] the Court

27. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (footnotes omitted).

28. 367 U.S. 488 (1961).

29. Id. at 496. Torcaso, after his appointment to the office of Notary Public by the Governor of Maryland, was not allowed to serve because of his refusal to comply with a provision of the Maryland Constitution requiring " 'as a qualification for any office of profit or trust' " declaration of belief in God. Id. at 489.

30. 370 U.S. 421 (1962).

31. Id. at 424. The prayer read as follows: " 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy Blessings upon us, our parents, our teachers and our Country.' " Id. at 422.

32. 374 U.S. 203 (1963).

33. See note 17 supra and accompanying text. But cf. Tilton v. Richardson, 403 U.S. 672 (1971), wherein Chief Justice Burger, speaking for the Court, warned of the "risks in treating criteria discussed by the Court from time to time as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired." Id. at 678.

34. 374 U.S. at 222 (citations omitted).

35. Id. at 225.

36. 392 U.S. 236 (1968).

37. N.Y. Educ. Law § 701(3) (McKinney 1969).

38. 392 U.S. at 238. Speaking of the statute's "effect" the Court noted that "the finan-

sustained a New York property tax exemption[40] for properties used exclusively for religious purposes. In so deciding the Court added[41] yet another criterion for determining establishment clause violation: that the "end result [must not be] an excessive government entanglement with religion."[42] The *Walz* Court also explored more fully the relation of the two religion clauses of the first amendment, noting that it had struggled to chart a course of "constitutional neutrality" between the two clauses so as to accomplish the basic purposes of both: *viz.*, "to insure that no religion be sponsored or favored, none commanded, and none inhibited."[43]

At the same time it was developing these concepts, the Supreme Court consistently made clear that activities otherwise proscribed by the establishment clause would not be saved from invalidity by provisions allowing objecting individuals in one way or another to avoid them. Thus, the fact that students could be excused upon parental request from the Bible readings at issue in *Schempp*[44] did not deter the Court from declaring those ceremonies unlawful.[45] A similar conclusion had been reached in *Engel*,[46] the "Regents prayer" case. There the Court pointed out that

> [t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the *enactment* of laws . . . whether those laws operate directly to coerce nonobserving individuals or not.[47]

In *Anderson v. Laird*, the district court refused to enjoin mandatory chapel

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cial benefit is to parents and children, not to schools." Id. at 244 (footnote omitted). In this respect the logic of the decision resembled that advanced in Everson v. Board of Educ., 330 U.S. 1 (1947); see text accompanying notes 10-18 supra.

39. 397 U.S. 664 (1970).

40. The Court noted that the exemption did not apply exclusively to any one religion or to religious groups as such but "to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations . . . ." Id. at 673.

41. The Walz decision was unclear as to whether "excessive entanglement" was an addition to the "purpose and effect" test set forth in Schempp, or merely a refinement of Schempp's "effect" aspect. See id. at 674. However, the Court itself subsequently avowed that the former was true. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), noted in 40 Fordham L. Rev. 371 (1971).

42. 397 U.S. at 674. In characteristic fashion the Court made clear that "[t]he test is . . . one of degree." Id. It explained that while both taxation and exemption from taxation of church properties entail some degree of state involvement, such involvement in the case of taxation would tend to be more extensive, "giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." Id.

43. Id. at 669.

44. See notes 32-35 supra and accompanying text.

45. 374 U.S. at 224-25. The Court declared: "[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." Id. at 223.

46. See notes 30-31 supra and accompanying text.

47. 370 U.S. at 430 (emphasis added).

regulations of the nation's service academies.[48] In so deciding the court was persuaded both by the long tradition which such regulations had enjoyed—"an unbroken pattern of 150 years of mandatory chapel under the eyes of the President and the Congress"[49]—and by their military context. These were *training* regulations, the court emphasized;[50] and the consequences of this characterization were twofold. On the one hand, judicial interference was thereby discouraged. "[T]he amount of deference given the military in matters of discipline and training should be wide."[51] On the other hand, the conclusion that these were training regulations carried them safely beyond the bounds of the *Schempp* test.[52] Mandatory chapel, the court found, had as its sole purpose and primary effect not the inculcation of religious faith or motivation, but the development in future officers of a "sensitivity to the spiritual needs of men in times of combat crisis."[53]

The court was able to make this finding by virtue of a distinction it had earlier drawn between mere attendance at church or chapel and worship. This proved to be a crucial distinction indeed.[54] For not only did it dispose of "establishment" problems, it enabled the court as well to deal with the free exercise clause. It eliminated the element of coercion. "The cadets," said the court, "are required only to *attend* church or chapel services . . . they are not required to participate in the service or to worship. The choice is left to each individual."[55]

Mandatory chapel met its end at the appellate level. In a per curiam opinion, brief enough to be reproduced here in full, the Court of Appeals for the District of Columbia Circuit reversed the district court.[56] It noted:

48. 316 F. Supp. at 1093.

49. Id. at 1087. On this point Mr. Justice Holmes was quoted by the court from his opinion in Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922), wherein he said: "'[I]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" Id. at 1088.

50. This was a position the Government pressed throughout the case. Indeed, Circuit Judge Leventhal noted in his opinion on the appeal that: "In this litigation, the Government stands on the Chapel Attendance Statement adopted in 1969 by the Superintendents of the four Service Academies, which focuses on the requirment in training terms." 466 F.2d at 300 (concurring opinion) (footnote omitted).

51. 316 F. Supp. 1085-86.

52. Id. at 1088-92. Although the Walz case was variously cited, there was no mention in the district court's opinion of "entanglement" and the test which was in fact applied was for "purpose" and "effect." Id.

53. Id. at 1089.

54. Summing up, the court noted that it "first makes the necessary distinction between 'attendance' and 'worship' and holds that attendance under the circumstances in question does not constitute worship. While this distinction might be said to be slight, it is in this case crucial." Id. at 1091.

55. Id. at 1088, 1091 n.9. The court also decided that the "religious test" prohibition of article VI had not been violated. Id. at 1092-93. Noting the "close connection between the establishment prohibition and the test oath prohibition," the court concluded that since no transgression of the former had occurred, it followed that the same could be said of the latter. Id. at 93.

56. 466 F.2d 283-84. The Supreme Court of the United States denied certiorari. 409 U.S. 1076 (1972).

The separate opinions of Chief Judge Bazelon and Circuit Judge Leventhal concur in the conclusion that the judgment of the District Court, denying appellants' motions for declaratory and injunctive relief against compulsory chapel attendance at the military academies should be reversed. The case is remanded for the entry of an appropriate order. Circuit Judge MacKinnon dissents.[57]

Chief Judge Bazelon, in his separate opinion, was of the view that both the establishment and free exercise clauses had been contravened by the mandatory chapel regulations.[58] Turning first to the establishment clause, the Judge concluded from a review of its history that that provision had been written to abolish "specific Governmental practices," salient among which was "governmental compulsion of church attendance."[59] Moreover, the Supreme Court in its interpretation of the establishment clause had long adhered to the principle, set forth in *Everson*,[60] that government may neither " 'force nor influence a person to go to or to remain away from church against his will.' "[61]

The tests which the district court had applied, to ascertain the "purpose and effect" of the regulations,[62] Judge Bazelon felt to be inapposite. "Purpose" and "effect" were properly looked into, the Judge said, only where there was some ambiguity as to the nature of the activity at issue, *i.e.*, as to whether or not it was a "religious" activity.[63] But there was no ambiguity here. Compelling attendance was an integral part of compelling worship, for how else could worship be compelled than by "compelling certain overt actions"?[64] "[T]here are," Judge Bazelon concluded, "certain forms of governmental involvement with religion which the Establishment Clause prohibits absolutely."[65] Compulsory attendance at religious ceremonies, the Judge felt, was one of these. Furthermore, it was by virtue of this fact that the military context of the involvement did not relieve it of the onus of constitutional restrictions. "The military regulations in this case violate the core value of the Establishment Clause and completely abolish its protection. Therefore, judicial action is mandated now."[66]

Given this reasoning, the factual inquiry which the district court had made as to the effect and purpose of mandatory chapel was, from an establishment point of view, "unnecessary."[67] However, what was important on the factual level was the question whether there had been coercion. Looking to the record, Judge Bazelon found sufficient coercion[68] in the chapel regulations to constitute

57. 466 F.2d at 283-84.
58. Id. at 284 (concurring opinion).
59. Id. at 287 (concurring opinion).
60. See notes 10-18 supra and accompanying text.
61. 466 F.2d at 288 (concurring opinion) (quoting Everson).
62. 316 F. Supp. at 1087, 1088-91.
63. 466 F.2d at 291 (concurring opinion).
64. Id.
65. Id. at 290.
66. Id. at 295 (footnote omitted).
67. Id. at 294.
68. Id. at 296. Quoting from Schempp, Judge Bazelon said: " 'The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on

"manifest restraints" on the free exercise of religion.[69] Relying on *Sherbert v. Verner*,[70] he noted that such restraints could be constitutionally justified only if the regulations were enacted to serve "compelling state interests" and if there were no alternative means of achieving the government's goals. Such a showing, the Judge concluded, had not been made in this case.[71]

Judge Leventhal, in his separate opinion, argued that the compelling state interest test ought to have been applied by Judge Bazelon to the establishment aspect of the case, as well. He wrote:

> As I understand it, [Judge Bazelon's] view is that the compulsory chapel-church attendance requirement is per se a violation of the Establishment Clause. . . . It suffices, in my view, that an Academy regulation requiring chapel-church attendance is, at the very least, presumptively invalid as a measure respecting an establishment of religion, and that there is no showing that such an infringement of First Amendment liberties is unavoidably required on ground of military necessity.[72]

This, however, was not to say that, had a compelling interest in fact been shown, Judge Leventhal would have sustained the regulations. It was to say only that whether mandatory chapel is *per se* violative of the establishment clause was "a more difficult question than this case require[d to] be answered."[73] Presumptive invalidity, "at the very least," could be used as a measure, and since that presumption could not be overcome there was no need of proceeding further.[74] In a similar vein, having determined that the regulations under attack were invalid on establishment grounds, the Judge declined to embark on a free exercise analysis.[75]

What is important, it seems, in Judge Leventhal's reasoning is what he found

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the free exercise of religion . . . [a] violation of the Free Exercise Clause is predicated on coercion . . . .'" Id. at 295 (footnote omitted).

69. Coercion was said to exist because violations of the regulations were punished; there was peer pressure to conform; students could attend only "approved" alternatives which were non-existent for certain minorities; in order to change affiliations, consent of parents and chaplain were required; and "visitation of a variety of religious services, [was] absolutely prohibited." Id. at 296.

70. 374 U.S. 398 (1963). In Sherbert, a Seventh-Day Adventist who was discharged from her employment for refusing to work on Saturdays, her Sabbath, and who for that reason was also unable to obtain other employment, was denied unemployment compensation on the grounds that she had failed to accept suitable employment offered to her. The Supreme Court held that this imposed a "burden on the free exercise of appellant's religion." Id. at 403. The Supreme Court said that if such was to be tolerated there would have to be a showing of a "compelling state interest" to justify such a burden and, moreover, of a want of alternative measures to satisfy the compelling state interest. Id. at 406-07.

71. 466 F.2d at 296-97 (concurring opinion).

72. Id. at 297 (concurring opinion).

73. Id. Judge Bazelon, on the other hand, correctly indicated that no Supreme Court opinion had referred to compelling state interests as justifying imposition by government of activities otherwise proscribed by the establishment clause. Id. at 290 (concurring opinion).

74. Id. at 297 (concurring opinion).

75. Id. Like Judge Bazelon, Judge Leventhal expressed no opinion on the appellants' article VI contention.

in mandatory chapel to inspire the presumption of invalidity. It was the absence of "voluntarism."[76] "The Establishment Clause," he said, "assures that the exercise of religion will be truly free—will be voluntary, and not imposed."[77] The mere provision of property, facilities, and personnel in order to allow attendance at religious services, given the "special position of the military and needs of its often isolated personnel" does not, said the Judge, constitute an "excessive entanglement" with religion, "assuming the core element of *voluntarism* on the part of the attending military personnel."[78] This critical element the chapel regulations lacked by definition.

Judge MacKinnon in his dissenting opinion agreed with the district court that the military aspect of *Anderson* was crucial. This, he said,

> makes it impossible to consider this case as merely a sterile regulation requiring a group of people to attend religious services. These regulations must be examined through the overlay of their importance in properly effectuating the constitutionally recognized power of the armed services to train the necessary personnel to adequately defend this Nation.[79]

The Judge felt that the first amendment effects of the regulations were "*de minimis*."[80] Attendance, he said, was distinguishable from worship; what was sought was merely *exposure* to religion.[81] The judgement of military experts ought generally to be afforded great weight, and in this particular theirs was a very correct judgment. The Judge concluded: [T]rying to give a person an understanding of the moral force and motivation of religion without attending church is like trying [to] teach swimming without water."[82]

The essentiality of the attendance-worship distinction to the argument in support of mandatory chapel regulations cannot be doubted. Those who refused to accept the distinction were those at whose hands the regulations fell;[83] and those who would have preserved the regulations were adamant in their support of the distinction.[84] However, it seems true that no one would press such a distinction in any context other than that in which the *Anderson* case arose.[85]

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76. Id.

77. Id.

78. Id. at 298 (emphasis added) (citations omitted). Judge Leventhal argued that this "special position of the military" affected the establishment clause, and allows such provision. Id. Judge Bazelon disagreed and said that such "accommodation of the Establishment Clause . . . is necessitated not by military interests, but by the mandate of the Free Exercise Clause that soldiers be given the opportunity to worship." Id. at 290 n.36 (concurring opinion). The dissent struck a position midway between the two concurring opinions and argued that in this context the establishment clause was modified both by the free exercise clause and the nation's military power. Id. at 310-15 (dissenting opinion).

79. Id. at 307.

80. Id.

81. Id.

82. Id. at 315.

83. Id. at 291 (concurring opinion); Id. at 299-301 (concurring opinion).

84. 466 F.2d at 311 (dissenting opinion); 316 F. Supp. at 1091.

85. As Judge MacKinnon pointed out: "[T]he overriding factual difference in this case

Thus it might be said that *Anderson* really reduces to an exploration of the freedom of religion guarantee vis-à-vis the military. While in the past the Supreme Court has made clear that certain other Bill of Rights guarantees must "bend" to the exigencies of military service,[86] nothing specific has been said by the Court with respect to the area in question. *Anderson*, therefore, represents the view of at least one federal appellate court that in a confrontation between the congressional military powers and the religious freedom clauses, the force and effect of the latter will not lightly be diminished.

**Constitutional Law—Freedom of the Press—Newsmen Held to Possess No Testimonial Privilege With Respect to Confidential Communications.** —Petitioners Branzburg and Pappas and respondent Caldwell, three newsmen, were in separate instances cited for contempt for refusing to testify before grand juries concerning information received in confidence in the course of their news-gathering activities. Branzburg had on two occasions declined to give testimony regarding persons involved in a local "drug scene" about which he had written;[1] Pappas [2] and Caldwell[3] withheld information garnered in their investigations of the Black Panther movement. The reporters argued that to force them to reveal

derives from the crucial role these educational institutions play in our military establishment." 466 F.2d at 306 (dissenting opinion).

86. E.g., the sixth amendment right of trial by jury has been held not applicable to trials by courts-martial. Whelchel v. McDonald, 340 U.S. 122, 127 (1950); Kahn v. Anderson, 255 U.S. 1, 8-9 (1921). As Chief Justice Vinson noted in Burns v. Wilson, 346 U.S. 337 (1953), "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." Id. at 140 (plurality opinion). Justices Reed, Burton and Clark joined in this opinion.

1. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), aff'd, 408 U.S. 665 (1972), concerned a reporter for a Louisville newspaper who had written in-depth articles on the drug culture. In response to two separate grand jury subpoenas, he refused to testify, claiming immunity under a Kentucky reporters' privilege statute, Ky. Rev. Stat. Ann. § 421.100 (1970), as amended, (Supp. 1972), the first amendment to the United States Constitution and the Kentucky State Constitution.

2. In re Pappas, — Mass. —, 266 N.E.2d 297 (1971), aff'd, 408 U.S. 665 (1972), arose when the petitioner, a television news reporter, was allowed to enter Black Panther Party headquarters on the condition that he not reveal what he saw or heard. His claim of immunity was based on the first amendment.

3. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), rev'd, 408 U.S. 665 (1972), concerned a black New York Times reporter who was subpoenaed by a federal grand jury for information and tapes he had acquired while in the confidence of the Black Panthers. His contempt order for refusal to testify to the grand jury was reversed by the court of appeals, which held that the first amendment provided a qualified testimonial privilege to newsmen. The court reasoned that requiring reporters to testify, absent compelling reasons, would discourage informants from communicating with them in the future and would tend to make reporters censor their writings to avoid subpoenas.

their confidences would have the effect of deterring potential information sources and of enforcing upon newsmen a kind of self censorship, "all to the detriment of the free flow of information protected by the First Amendment."[4] The United States Supreme Court held, in a 5 to 4 decision, that the first amendment provides newsmen with no professional privilege exempting them from revealing confidential material to a grand jury or at a criminal trial. *Branzburg v. Hayes,* 408 U.S. 665 (1972).

Under the maxim that "the public . . . has a right to every man's evidence,"[5] no testimonial privilege for newsmen was recognized at common law.[6] As early as 1874, in *People ex rel. Phelps v. Fancher,*[7] a court held that it had the power to imprison a reporter until he agreed to respond to the questions of a grand jury.[8] Although in time newspapermen began to claim with greater frequency an actual privilege exempting them from disclosing confidential information,[9] such claims found little favor with the judiciary. To the assertion that it was a "canon of journalistic ethics" not to disclose confidences, the courts were quick to reply that such a canon must be subservient to the public interest and to the administration of justice.[10]

In response to public demand, state legislatures begun to pass statutes extending to newsmen the privilege which the courts had consistently withheld.[11] Even

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4. Branzburg v. Hayes, 408 U.S. 665, 680 (1972). For a discussion of newsmen's rights, see Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U.L. Rev. 18 (1969); Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 838 (1971); Note, Reporters and Their Sources: The Constitutional Right To A Confidential Relationship, 80 Yale L.J. 317 (1970).

5. 8 J. Wigmore, Evidence § 2192, at 70 (McNaughton 1961). Wigmore further states: "In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege.

. . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." Id. § 2286, at 528.

6. Generally, courts have held that there is no privilege before a state senate (Ex parte Lawrence, 116 Cal. 298, 48 P. 124 (1897)), before a police commission with the power of contempt (Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911)), before the taking of a deposition (Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969)), or before a grand jury (People ex rel. Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936)).

7. 2 Hun. 226 (N.Y. Sup. Ct. 1874).

8. Id. The grand jury was attempting to ascertain the identity of the author of an allegedly libellous article. The defendant's refusal to testify was not based upon an asserted privilege, but upon his belief that the responsibility for disclosure of the information belonged to the newspaper. Id. at 227.

9. See In re Grunow, 84 N.J.L. 235, 236, 85 A. 1011, 1012 (1913). See also Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); People ex rel. Mooney v. Sheriff, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936).

10. See, e.g., Clein v. State, 52 So. 2d 117, 120 (Fla. 1950).

11. See generally Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand. L. Rev. 667 (1971); Note, The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif. L. Rev. 1198 (1970).

where such statutes existed, however, the force of them was often limited by narrow construction in the case law.[12]

In 1958 it was urged for the first time that a reporter's privilege was protected by the freedom of press guarantee of the first amendment. In *Garland v. Torre*,[13] the singer Judy Garland brought suit on the basis of alleged defamatory statements made concerning her by "a network executive" to a newspaper reporter. When asked the identity of that executive during pretrial discovery, the reporter refused to answer, claiming a first amendment right.[14]

The reporter argued that the right to "freedom of the press" entailed as a corollary the right of newsmen to gather news, and to keep sources to themselves, in order to ensure the unrestricted flow of news to the public.[15] This right was viewed as analogous to rights hitherto held essential to press freedom: the right to publish without prior censorship;[16] the right of circulation;[17] the right to distribute literature;[18] and the right to receive printed matter.[19]

The Second Circuit Court of Appeals recognized that "compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news."[20] Nonetheless, the court found that freedom of the press was not absolute and that it must give way to a "paramount public interest in the fair administration of justice."[21] The court asserted moreover that it had before it neither a situation in which it was asked to direct a "wholesale disclosure" of a newspaper's sources, nor one in which the source demanded was of "doubtful relevance or materiality." Rather, the information sought went to the *"heart of the plaintiff's claim."*[22]

Some state courts refused, in the wake of *Torre*, to acknowledge that the protections of the first amendment extended to a reporter's sources.[23] In *State v.*

12. See, e.g., Beecroft v. Point Pleasant Print. & Publ. Co., 82 N.J. Super. 269, 197 A.2d 416 (1964); State v. Donovan, 192 N.J.L. 478, 30 A.2d 421 (1943).

13. 259 F.2d 545 (2d Cir.), cert. denied, 368 U.S. 910 (1958).

14. The first amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The Supreme Court has held that this protection also extends to legislative and judicial proceedings. Watkins v. United States, 354 U.S. 178, 187-88 (1957).

15. For additional discussion of this point, see notes 34, 55-57 infra and accompanying text.

16. Near v. Minnesota, 283 U.S. 697 (1931). See also New York Times Co. v. United States, 403 U.S. 713 (1971).

17. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

18. Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943).

19. Lamont v. Postmaster General, 381 U.S. 301 (1965).

20. 259 F.2d at 548 (footnote omitted).

21. Id. at 549.

22. Id. at 550 (emphasis added). See also In re Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961).

23. See, e.g., In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963). The case concerned a grand jury investigation into corruption of the Philadelphia city government. Ultimately, the reporter did not have to testify because of a Pennsylvania statute. See also notes 1 & 2 supra.

*Buchanan*,[24] the Oregon Supreme Court in 1968 presented several cogent reasons for this stance. Acknowledging that a reporter had neither a statutory[25] nor a common law[26] privilege, the court held that the press had no right to information not generally available to the public, and that freedoms of privacy and association as well as ethical convictions must yield to the duty of every citizen to give testimony.[27] The court also noted the possibility of infringement of certain constitutional rights, such as that contained in the Equal Protection Clause, where special testimonial rights are assigned to newsmen. Finally, the court observed that it would be dangerous for the government to attempt to regulate the granting of press credentials, because the concept of "press" includes respectable newspapers as well as disreputable ones, and free-lance writers as well as pamphleteers.[28]

In 1970, however, the trend appeared to turn in favor of the recognition of a reporter's privilege. A federal district court in *In re Grand Jury Witnesses*[29] was the first court explicitly to deal with the privilege. Although the court eventually required the reporter before it to testify to the grand jury, it first ruled that the government must show a "compelling and overriding national interest in requiring the testimony of respondents which cannot be served by any alternative means."[30]

A few months later, the Court of Appeals for the Ninth Circuit in *Caldwell v. United States*[31] also decided in favor of a reporter's privilege, holding that the government must demonstrate "a compelling need for the witness's presence before judicial process properly can issue to require attendance."[32] The government had argued that press freedoms were not endangered because groups such as the Black Panthers were dependent upon the media to maintain themselves in the public eye and therefore would disclose information without a promise of confidentiality. Furthermore, even if confidential sources were constricted, the press could still inform the public through press releases and other means of reporting. The court of appeals rejected these contentions, stating that the first

24. 250 Ore. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968). The case concerned the subpoena of a contributor to a student newspaper who had written an article about the use of marijuana by seven persons.

25. Id. at 246, 436 P.2d at 729-30 citing Ore. Rev. Stat. § 44.040 (1972), which lists such privileges as husband and wife, attorney and client, priest and penitent, physician and patient, public officer and official communication, stenographer and employer, professional nurse and patient, certified psychologist and client.

26. The privilege was recognized at common law only for the priest, physician and lawyer, and it was the contents of the communication, and not the identity of the declarant that was privileged. 250 Ore. at 246 n.4, 436 P.2d at 731 n.4.

27. Id. at 248, 436 P.2d at 731.

28. Id. at 249-50, 436 P.2d at 731-32.

29. 322 F. Supp. 573 (N.D. Cal. 1970). The case concerned the testimony of two professional journalists employed by the Black Panther newspaper.

30. Id. at 574; see State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

31. 434 F.2d 1081 (9th Cir. 1970), rev'd, 408 U.S. 665 (1972); see text accompanying note 3 supra.

32. Id. at 1089 (footnotes omitted).

amendment has as its purpose the preservation of "an 'untrammeled press as a vital source of public information.' "[33]

In *Branzburg,* Justice White responded[34] that the first amendment does not preclude "every incidental burdening of the press that may result from the enforcement of civil or criminal statutes . . . ."[35] The Court noted that the press is neither immune from reasonable business regulations,[36] nor from libel laws.[37] Moreover, the first amendment does not grant special access to gather information to the press above that available to the general public.[38]

Alternatively, it was emphasized that the first amendment interest asserted by the reporters "was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses."[39]

The Supreme Court noted that the main arguments of those seeking a constitutional privilege were based on a line of cases holding that the infringement of protected first amendment rights must be no broader than necessary to achieve a permissible governmental purpose.[40] However, requiring reporters to testify

33. Id. at 1084, citing Grosjean v. American Press Co., 279 U.S. 233, 250 (1936).

34. The high Court reversed United States v. Caldwell, 434 F.2d 1081 (9th Cir. 1970), and affirmed Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970) and In re Pappas, — Mass. —, 266 N.E.2d 297 (1971). A recent court of appeals decision, Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), declined to extend the Branzburg ruling to cover civil cases.

35. 408 U.S. at 682.

36. Id. at 683; see Associated Press v. United States, 326 U.S. 1, 20 (1945); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

37. 408 U.S. at 683-84, citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

38. 408 U.S. at 684; see Tribune Review Publ. Co. v. Thomas, 254 F.2d 883, 885 (3d Cir. 1958) (forbidding pictures in the court); United Press Assoc. v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954) (clearing the court of the public). The Court also noted that the press is barred from grand jury proceedings, Supreme Court deliberations, meetings of official bodies, and meetings of private organizations. 408 U.S. at 684. Moreover, newsmen "may be prohibited from or publishing information about trials, if such restrictions are necessary to assure a defendant a fair trial before an impartial court." Id. at 685; see Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532, 539-40 (1965); Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

39. 408 U.S. at 686. The grand jury, it was noted, held a high place in our system of justice as the only procedure of bringing charges of serious crimes. Id. at 687-88; see Hannah v. Larche, 363 U.S. 420, 489-90 (1960) (Frankfurter, J., concurring). To carry out this important role, the power to subpoena witnesses and hear their testimony was considered both historic and necessary. In addition, the Court noted that the evidence failed to show that there would be a significant reduction of the flow of news to the public, if the privilege to newsmen were denied. 408 U.S. at 693.

40. Id. at 680-81, citing Freedman v. Maryland, 380 U.S. 51, 56 (1965); NAACP v. Alabama, 377 U.S. 288, 307 (1964); Martin v. City of Struthers, 319 U.S. 141, 147 (1943); Elfbrant v. Russell, 384 U.S. 11, 18 (1966). See generally Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970).

involved no direct restrictions on freedoms of speech, press or assembly.[41] Observing that the government must show a compelling interest where first amendment rights are even indirectly burdened,[42] the Court reasoned that this test had been met because "the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen . . . ."[43]

Justice White stated that the available evidence did not prove the reporters' contention that denial of a privilege would constrict the "flow of news to the public."[44] The Court also asserted that, in any case, the conditional privilege claimed by the reporters could not be effective, given the sensitivity of the sources upon which the conditional privilege was based. Even if a conditional privilege could be effective, the administration of the privilege by the courts "would present practical and conceptual difficulties of a high order."[45] The courts would be forced to distinguish between those who could validly be considered newsmen and those who could not. Moreover, if a "compelling interest" was to be a central part of the conditional privilege, as argued by petitioners, the courts would of necessity become involved in the most intricate of legal determinations in the application of the test.[46]

While the Court would not recognize a privilege for these reasons, it expressly noted that the power of the grand jury was not without limits. Official harassment and bad faith investigation, Justice White stated, would not be justified, and judges would exercise control to prevent such conduct from occurring.[47]

In a concurring opinion, Mr. Justice Powell pointed out that the majority decision was limited, holding only that the claimed privilege should be judged by balancing the interests of freedom of the press with the obligations of all citizens to give pertinent testimony with respect to criminal activity.[48] Moreover, he noted that even if reporters were required to testify, they could

41. 408 U.S. at 681.

42. Id. at 680, citing DeGregory v. Attorney General, 383 U.S. 825, 829 (1966); NAACP v. Button, 371 U.S. 415, 439 (1963); Thomas v. Collins, 323 U.S. 516, 530 (1945).

43. 408 U.S. at 700. The Supreme Court thought it was obvious that the government's interest in fighting crime had met the test set forth in Gibson v. Florida Legislative Comm., 372 U.S. 539, 546 (1963), that the government " 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.' " Id. Finally, the Court was unwilling to set the judiciary upon the arduous task of administering a "constitutional newsman's privilege." If a qualified privilege were granted, once a reporter were subpoenaed, questions would arise as to probable cause, whether the reporter actually had useful information, whether the grand jury could obtain the information from other sources, and lastly, whether the government interest should take precedence over the claimed constitutional privilege. Id. at 705-06; see text accompanying note 64 infra.

44. Id. at 693.

45. Id. at 703-04.

46. Id at 705-06. See also note 43 supra.

47. Id at 707-08.

48. Id. at 709-10 (Powell, J., concurring). But the majority seemed to reject this method. See id. at 702-04 n.39.

receive a protective order from the court if the investigation was not made in good faith. Motions to quash would also be upheld if the information sought was immaterial or irrelevant, or if the government did not have a real need for the confidential information.[49]

Mr. Justice Douglas, dissenting, was of the view that reporters not only may not be compelled to testify before a grand jury, but need not even appear since their privilege is complete and absolute. He felt that there was no "compelling need" that could be shown to qualify this privilege before a grand jury.[50] Justice Douglas claimed that both the New York Times and the government in trying to balance first amendment freedoms against other interests of the government, were advancing a "timid, watered-down, emasculated" view of the amendment.[51] In a number of recent cases, he noted, the Supreme Court had stated that any regulations in areas concerning the first amendment must be "narrowly drawn" and "compelling," and not merely "rational" as in other areas of regulation.[52]

Despite these precedents, the majority opinion, in Justice Douglas' view, in effect would allow a reporter to be brought before a grand jury solely in order to expose his political ideas.[53] Furthermore, Justice Douglas warned that if the "compelling interest" test were found to be satisfied in this case, it would create a serious danger that the test would thereby become so elastic as to be of no use as a first amendment protection.[54]

In another dissent, Mr. Justice Stewart, joined by Justices Brennan and Marshall, decried what he found to be an undermining of the "historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government."[55] He contended that without freedom to gather information, the right to publish would be compromised[56] and that a

49. Id. at 710.

50. Id. at 712 (Douglas, J., dissenting).

51. Id. at 713. Mr. Justice Douglas stated that two first amendment principles were at issue. The first was that the people should have absolute freedom and thus privacy of their personal opinions and beliefs. Here Caldwell's position as a reporter is not as important as one who is seeking to formulate his own intellectual opinions. The second principle asserted was that in order for effective self-government to succeed, the people must have a steady and unhampered flow of information and opinion. It was here that Caldwell's role as a reporter became extremely important. Id. at 714-15.

52. See cases cited id. at 716-19 nn.5-8. This "compelling interest" did not refer to regulating one's personal opinions or beliefs, but to his mode of exercising them.

53. 408 U.S. at 719, citing Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

54. See text accompanying notes 47-50 supra. Justice Douglas analogized to what had happened to the "clear and present danger" test. He stated that "[e]ventually, that formula was so watered down that the danger had to be neither clear nor present but merely 'not improbable.'" Id. at 720, citing Dennis v. United States, 341 U.S. 490, 510 (1950); see Brandenburg v. Ohio, 395 U.S. 444, 447 (1968) (Douglas, J., concurring); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

55. 408 U.S. at 725.

56. "The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2)

person inside government might be afraid to expose corruption in view of possible identification in a subsequent trial or grand jury proceeding.[57]

The dissent also criticized the majority's contention that the evidence failed to show that the flow of news would be restricted without a privilege.[58] Mr. Justice Stewart asserted that the Court could not wait for unequivocal and empirical studies that may never come.[59] Similarly, the dissent attacked the majority's reliance on the importance of the grand jury and the public's right to every man's evidence.[60] It argued that the rule giving the grand jury "everyone's evidence" was not absolute.[61] Though the Supreme Court had never considered the extent to which the first amendment limited grand jury subpoena power, it has said that " '[t]he Bill of Rights is applicable to investigations as to all forms of governmental action.' "[62] Thus, the protections developed in the cases involving governmental investigations should likewise apply to grand jury investigations.[63]

Mr. Justice Stewart proposed certain criteria which should be met when a reporter is asked to appear before a grand jury:

> [T]he government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information. [64]

In *Branzburg*, the Supreme Court made the unfortunate choice of preferring an expedient method of investigating crime to the public's right to know.[65] The

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confidentiality—the promise or understanding that names or certain aspects of communications will be kept off-the-record—is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power—the absence of a constitutional right protecting, in any way, a confidential relationship from compulsory process—will either deter sources from divulging information or deter reporters from gathering and publishing information." Id. at 728 (Stewart, J., dissenting) (emphasis omitted).

57. Id. at 731. The dissent also noted that: "[s]urveys have verified that an unbridled subpoena power will substantially impair the flow of news to the public, especially in sensitive areas involving governmental officials, dissidents, or minority groups that require in-depth, investigative reporting." Id. at 732-33 (footnote omitted).

58. See notes 39 & 44 supra and accompanying text.

59. 408 U.S. at 736.

60. See note 39 supra and accompanying text.

61. 408 U.S. at 737. It has been limited by the fifth amendment. Blau v. United States, 340 U.S. 159 (1950). It has also been limited by the fourth amendment. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

62. 408 U.S. at 739, quoting Watkins v. United States, 354 U.S. 178, 188 (1957).

63. 408 U.S. at 741. Justice Stewart compared grand jury investigations to those of legislatures, citing DeGregory v. Attorney General, 383 U.S. 825 (1966); NAACP v. Alabama, 357 U.S. 449 (1958); Barenblatt v. United States, 360 U.S. 109, 111-12 (1958).

64. 408 U.S. at 743 (footnotes omitted).

65. Surveys have shown the importance of confidential sources to reporters and that with an untempered subpoena power, the flow of news to the public would be restricted.

majority emphasized the government's role of investigating crime through the grand jury,[66] and de-emphasized the role of the press in our constitutional system.[67] In denying the privilege, it placed the burden on the press to show that the government had overstepped constitutional freedoms.

The argument that the law is entitled to each man's testimony is, as a basis for the majority's decision,[68] something of a paradox. In the name of effective law enforcement, the criminal justice system will demand a reporter reveal what knowledge he possesses of criminal activity. It is also apparent that at times the reporter will have to divulge material other than that relating to a specific crime because of the grand jury's broad investigatory powers.[69] The result will soon be that the newsman will know nothing of criminal activity since no one will be inclined to confide in him. Not only will his testimony be valueless, but the catalytic function of the reporter will be stifled as well. If he cannot protect his source, he may soon cease making the crime reports which presently provide information to crime fighters and generate support from an aroused public.[70] Moreover, there is clear evidence that reporters will refuse, at least at present, to testify despite the threat of contempt, as authorized by the majority opinion.[71] This is hardly conducive to the effective functioning of the grand jury and the efficient administration of justice.

Justice White suggested that a conditional privilege would not protect reporters against the desertion of sensitive sources; as to that, only an absolute privilege could be successful.[72] One's suspicion might be aroused by an argument which, in part, justifies its refusal to recognize even a qualified right on the ground that an absolute right is preferable. In any event, the qualified right outlined by Justice Stewart would, in fact, provide genuine protection to reporters.[73] In any instance in which a reporter might be requested to testify concerning sensitive material, the government would be required to do more than show an interest in the material. It would affirmatively have to show probable cause to believe that the reporter possessed material which was relevant to a specific crime, which could not be obtained in some other manner, and for which there was a compelling interest shown. Inevitably, such a strict standard of proof would induce only a marginal destruction of the reporter's sources, and at the same time it would allow for the production of testimony in the extraordinary case.

The majority relied to some extent upon the difficulties of interpretation

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Blasi, Press Subpoenas: An Empirical and Legal Analysis 6-71 (1971); Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw. U.L. Rev. 18, 43-50 (1969).

66. See note 39 supra and accompanying text.
67. See notes 34-38 supra and accompanying text.
68. See text accompanying note 39 supra.
69. See 408 U.S. at 722 (Douglas, J., dissenting).
70. See id. at 746 (Stewart, J., dissenting).
71. See, e.g., Bridge, A Jailed Reporter Tells His Story, Student Law., Dec. 1972, at 11.
72. See 408 U.S. at 702.
73. See text accompanying note 64 supra.

which a qualified privilege would pose for the courts.[74] But, it is asserted, courts would, in the analysis and application of Justice Stewart's test, face no more of an insurmountable task in this than in other areas of the law. The definition of those who would be free to assert the privilege would admittedly be difficult, but such difficulty hardly disposes of the case. If the right is significant, then problems of application must be faced. Courts, after all, have not denied the existence of, for example, the defense of insanity in criminal cases merely because it may be difficult to formulate and apply.[75] Nor have the courts hesitated to set forth a definition of obscenity despite the myriad problems that have resulted.[76] Indeed, even the majority necessarily reserves a significant place for the interpretative function of courts. The Court takes pains to note the limited nature of its holding, stating that investigations undertaken in bad faith or for the purpose of harassment would not be justified, nor would a reporter be compelled to testify in such an investigation.[77] If courts are capable of deciding that first amendment rights deserve protection in certain cases because the investigations involved were in "bad faith" and for the purpose of "harassment," why do they lack the ability to exercise a similarly interpretive and analytical approach in the application of Justice Stewart's test?

The dissent of Mr. Justice Douglas is not much more persuasive than the majority opinion. His basic approach is,[78] as he argued in *New York Times v. United States*[79] and other cases,[80] that the first amendment is absolute in nature. Since the right claimed in *Branzburg* was, in his view, so useful or essential to the underlying right of freedom of the press as to be embraced by it, it had to be absolute as well.[81] The Court has never recognized the absolute nature of the first amendment and it appears late in the day to argue now for the adoption of that position. Of course, it is possible to recognize that freedom of the press is not absolute, and yet urge that the reporter's privilege be considered so. Yet such a view takes little cognizance of the long accepted compelling interest test. On the one hand, Justice Douglas warns of the possible dilution of the test, and, on the other, he effectively precludes the application of the test by asserting that the right involved is *absolute*. His suggestion that what is involved in this case is somehow the enforced exposition of private political views is unconvincing.

The decision in *Branzburg* is perhaps most disturbing because it comes at

74. See note 43 supra. See also text accompanying note 45 supra.

75. See, e.g., Leland v. Oregon, 343 U.S. 790 (1952); Whalem v. United States, 346 F.2d 812 (D.C. Cir. 1965).

76. See, e.g., Roth v. United States, 354 U.S. 476 (1957).

77. 408 U.S. at 707-08.

78. See notes 50-54 supra and accompanying text.

79. 403 U.S. 713, 714 (1971) (Black, J., concurring); id. at 720 (Douglas, J., concurring).

80. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Douglas, J., joining Black, J., concurring); Gibson v. Florida Legislative Comm., 372 U.S. 539, 565 (1963) (Douglas, J., concurring); Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).

81. See text accompanying note 46 supra.

a time in which the vitality and effectiveness of a free press are more necessary than ever before. The pace and scope of technological, governmental and social growth have become so great as to virtually smother the individual. Knowledge, it is said, is power, and it is to the press that the individual must often turn for knowledge. Clearly, matters such as official corruption or lassitude, social decay, and rising crime are problems which might well remain hidden without an effective press. *Branzburg* will surely decrease the effectiveness of the press, thus allowing these problems to go untouched. It is, to that extent, a decision especially regrettable at present.

**Constitutional Law—Search and Seizure—*Carroll* Doctrine For Warrantless Search Extended to Chattel Consigned to Common Carrier.**—Defendants left five cardboard cartons at a freight counter in San Diego airport for shipment to Seattle. The air freight agent, suspecting that the cartons contained contraband, opened one of them and discovered what he believed to be marijuana. The agent notified the police who, upon inspection of the opened carton, were of the same opinion. The police arrested the defendants and returned to the air freight office to inspect the remaining four cartons, each of which was found, like the first, to contain 10 "kilo" bricks of marijuana. Defendants were charged with transporting marijuana and possession of it for sale,[1] in violation of the California Health and Safety Code.[2] At trial they moved to suppress the evidence on the ground that it was the fruit of an illegal search and seizure,[3] no warrant having been obtained. The trial court granted the motion. On appeal, the Supreme Court of California reversed, holding that a "chattel consigned to a common carrier for shipment may lawfully be searched upon probable cause to believe it contains contraband."[4] *People v. McKinnon*, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), *cert. denied*, 41 U.S.L.W. 3550 (U.S. Apr. 17, 1973) (No. 72-857).

The fourth amendment's prohibition of "unreasonable searches and seizures"[5]

1. People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), cert. denied, 41 U.S.L.W. 3550 (U.S. Apr. 17, 1973) (No. 72-857).

2. Cal. Health & Safety Code §§ 11530.5, 11531 (West 1964) (currently codified at Cal. Health & Safety Code §§ 11359, 11360 (West Supp. 1972).

3. See Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (evidence seized by state officials by way of an illegal search held inadmissible).

4. 7 Cal. 3d at 902-03, 500 P.2d at 1099, 103 Cal. Rptr. at 899. The court also noted, preliminarily, that: (a) an airline has legal authority to "open and inspect [a] package if it suspects that the nature or value of the contents does not correspond" to the consignor's representations. Id. at 913, 500 P.2d at 1107, 103 Cal. Rptr. 907; and (b) the air freight agent was not acting as an agent of the police when he originally searched the carton. Id. at 916, 500 P.2d at 1109, 103 Cal. Rptr. at 909.

5. The fourth amendment provides: "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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things

is a subject which has in recent years been fraught with great difficulty and uncertainty.[6] One principal has, however, been established. As the Supreme Court declared in 1967,

> searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.[7]

Among the exceptions is that which the Court carved out in the 1925 case of *Carroll v. United States*.[8] Since it was upon *Carroll*, and its more recent progeny, that the California Supreme Court relied in allowing the warrantless search in *McKinnon*, it is to this line of cases that we turn first.

Carroll and his co-defendant Kiro were stopped and their automobile searched by federal agents, who suspected the two of dealing in illegal "bootleg" whiskey. The search turned up 68 bottles of whiskey, and the defendants were subsequently found guilty of having violated the National Prohibition Act.[9] The defendants attacked their convictions on the ground that the whiskey had been discovered in the course of an unlawful search[10] and therefore should not have been admitted into evidence.[11]

The Court found that Congress, in enacting the Prohibition Act, had intended to distinguish between searches of "private dwellings" and searches of "automobiles and other road vehicles."[12] In examining the warrantless search before it,

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to be seized." U.S. Const. amend IV. Although by its terms the amendment is not applicable to the states, it was "incorporated" into the "due process" clause of the fourteenth amendment by Mapp. v. Ohio, 367 U.S. 643 (1961), as a result of which all searches and seizures are now tested by the same standard.

6. See, e.g., LaFave, Warrantless Searches & the Supreme Court: Further Ventures Into the "Quagmire," 8 Crim. L. Bull. 9 (1972). Of course, the necessity of the search and seizure prohibition itself has never seriously been questioned. As was stated by Mr. Justice Jackson in his dissenting opinion in Brinegar v. United States, 338 U.S. 160 (1949): "Uncontrolled, search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." Id. at 180-81 (dissenting opinion).

7. Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). There are five basic categories of these exceptions: see Harris v. United States, 390 U.S. 234, 236 (1968) (seizure of contraband or evidence in "plain view" while police are lawfully on the premises); Warren v. Hayden, 387 U.S. 294, 298-300 (1967) (search conducted while police in "hot pursuit" of a suspected felon); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (emergency situation where evidence in danger of being destroyed); Carroll v. United States, 267 U.S. 132, 151-53 (1925) (search of an automobile with probable cause); and Weeks v. United States, 232 U.S. 383, 392 (1914) (search incident to lawful arrest).

8. 267 U.S. 132 (1925).

9. National Prohibition Act, ch. 85, tit. II, 41 Stat. 305, 307 (1919) (repealed 1935).

10. 267 U.S. at 134.

11. See Weeks v. United States, 232 U.S. 383, 392 (1914).

12. In 1921, Congress passed legislation supplementing the National Prohibition Act. Act

the Supreme Court in *Carroll* was faced with the question whether this was a constitutionally permissible distinction. The Court concluded that it was. It declared:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[13]

The Court did not mean of course that all safeguards were to be dispensed with in vehicular searches—only the safeguard of a warrant. "Probable cause" remained a prerequisite even for a *Carroll* search.[14]

Most early applications of the *Carroll* exception arose out of searches related to violations of the National Prohibition Act, and of federal revenue laws dealing with illegal alcohol.[15] These decisions added few refinements to the basic rule. Commencing in the middle 1960's, however, a series of cases put specific limitations on the *Carroll* doctrine.

*Preston v. United States*[16] was the first of these. In *Preston*, defendants were arrested for vagrancy and their car towed to a police garage. After the defendants had been jailed, the police searched the car without a warrant and found evidence of a planned bank robbery. The defense took the position that the search had been unlawful and that this evidence should have been suppressed.[17] Citing *Carroll*, the Court stated:

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of Oct. 28, 1919, ch. 85, tit. II, 41 Stat. 305, 307 (repealed 1935). As initially proposed, and adopted by the Senate, section 6 of the Supplemental Act made it a misdemeanor for a federal agent in the enforcement of the National Prohibition Act to "search or attempt to search the property or premises of any person without previously securing a search warrant . . . ." 61 Cong. Rec. 4737 (1921). The House Judiciary Committee objected to the wording of the Senate version on the grounds that it would "make it impossible to stop the rum running automobiles . . . [since b]efore a warrant could be secured the automobile would be beyond the reach of the officer . . . ." H.R. Rep. No. 344, 67th Cong., 1st Sess. 3 (1921). As a result of this objection, a compromise was reached, in which section 6 punished only warrantless searches of "private dwelling[s]" and searches of "other building[s] or property" without a warrant, done "maliciously and without reasonable cause." Act of Nov. 23, 1921, ch. 134, § 6, 42 Stat. 223 (repealed 1935). Discussing these events, the Court in Carroll concluded: "The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles is [sic] the enforcement of the Prohibition Act is thus clearly established by the legislative history . . . ." 267 U.S. at 147.

13. 267 U.S. at 153.

14. Id. at 156. The Court stated that before a warrantless search could be made, it was necessary that an officer have "reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein . . . ." Id.

15. See, e.g., Brinegar v. United States, 338 U.S. 160, 164 (1949); Scher v. United States, 305 U.S. 251, 252 (1938); Husty v. United States, 282 U.S. 694, 700 (1931).

16. 376 U.S. 364 (1964).

17. See id. at 366.

[Q]uestions involving searches of motorcars . . . cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar. . . . But even in the case of motorcars, the test still is, was the search unreasonable.[18]

The Court found that under the facts before it the warrantless search had been "unreasonable" since at the time it was conducted the defendants were already in jail—and their auto, by virtue of that fact, immobile.[19] *Preston* thus seemed to limit the *Carroll* rule to allow warrantless vehicular searches only so long as an emergency situation obtained.[20]

The next major case in this area was *Dyke v. Taylor Implement Manufacturing Co.*[21] There defendants were arrested for reckless driving as they sped away from the scene of a shooting which occurred during a labor dispute. After defendants were in jail, the police searched their car and found an air rifle, which was used as evidence to obtain their convictions.[22]

In *Dyke*, as in *Preston*, there was no exigent circumstance to justify the failure of the police to obtain a warrant. However, rather than reaffirm *Preston* the Court held that the search was illegal because the police lacked probable cause to believe they would find evidence of a crime.[23]

It was against this precedential background that the Supreme Court of California in 1969 considered the constitutional issues involved in searching a chattel consigned to a common carrier. In *People v. McGrew*[24] the suspicions of an air freight agent led police to a footlocker which had been left in the agent's custody, and another left in the custody of a second agent. Marijuana was found in both. In reversing the defendant's conviction, the court observed that "[t]he exceptions to the requirement of a search warrant . . . are [available] where there is a danger of 'imminent destruction, removal, or concealment of the property intended to be seized' . . . ."[25] The court held that since there was no reason to believe that the lockers would be removed or destroyed, no justification existed for the warrantless searches before it.[26]

A year after the *McGrew* case, the United States Supreme Court decided *Chambers v. Maroney*.[27] In *Chambers* the Court was faced with the same issue it had chosen to avoid in *Dyke*; however, the *Dyke* escape route was closed to it since the presence of probable cause could not be denied. The four defendants

18. Id. at 366-67 (citation omitted).

19. Id. at 368.

20. See United States v. Ventresca, 380 U.S. 102, 107 n.2 (1965). But see Chambers v. Maroney, 399 U.S. 42, 51-52 (1970).

21. 391 U.S. 216 (1968).

22. Id. at 218-19.

23. Id. at 222.

24. 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969), cert. denied, 398 U.S. 909 (1970), overruled, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

25. 1 Cal. 3d at 409, 462 P.2d at 4, 82 Cal. Rptr. at 476 (citation omitted).

26. Id. at 410, 462 P.2d at 5, 82 Cal. Rptr. at 476. See also the companion case Abt v. Superior Court, 1 Cal. 3d 418, 462 P.2d 10, 82 Cal. Rptr. 481 (1969), rev'd, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

27. 399 U.S. 42 (1970).

were linked to a gas station robbery through witnesses' descriptions of the persons and car involved. After they had been jailed, the police drove their car to the stationhouse where, in the course of a thorough search, certain items of incriminating evidence were discovered.[28] Convictions in which this evidence figured prominently were affirmed by the Court. Justice White, speaking for the majority, reasoned that since the car might properly have been searched on the highway—a "fleeting target for a search"—it was not improper that it be searched later, in the stationhouse, without a warrant: the "mobility" of the car having endured.[29] The Court reasoned that, in terms of "practical consequences," a warrantless search is indistinguishable from its alternative, seizure of the vehicle, until a warrant is obtained. "For constitutional purposes," the Court said, "we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant."[30]

The *Chambers* decision received widespread criticism as an undue extension of the *Carroll* doctrine.[31] The Court had, it seemed, in essence eliminated the warrant requirement from automobile searches.[32] Justice Harlan, dissenting, began his discussion of the *Carroll* rule by stating that:

> Fidelity to this established principle [the requirement of a warrant] requires that, where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented.[33]

Once the auto in *Chambers* had been removed to the police station, Harlan argued, there was no longer any "exigency," and allowance of the warrantless search had indeed been an undue extension of the *Carroll* exception. To the majority's argument, that searching a vehicle is no more constitutionally objectionable than immobilizing it without a warrant, Harlan replied that the latter

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28. Id. at 43-45.

29. 399 U.S. at 52. This argument, however, is difficult to accept in light of the Court's own pronouncement as to the rationale of the Carroll rule, i.e., that "[o]nly in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search." Id. at 51.

30. Id. at 52.

31. Professor Landynski wrote that "the automobile search is not subject to the same rigid constitutional standards as the house search, because the car's mobility makes swift police action imperative. That a relaxed standard should be applied to search of moving vehicles, or even of stationary vehicles which can be moved at any time, is thus understandable; that the less strict standard should also be applied to search of vehicles which cannot be moved, because they are in police custody, is not. Yet the Court's recent decisions have led precisely to this result. Now, more than ever before, the individual's citizenship becomes second-class, in so far as his right to privacy is concerned, whenever he steps into an automobile." Landynski, The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search, 45 Conn. B.J. 2, 30-31 (1971).

32. See, e.g., 55 Minn. L. Rev. 1011, 1030 (1971); 47 Notre Dame Law. 668 (1972); 46 Notre Dame Law. 610 (1971).

33. 399 U.S. at 61 (Harlan, J., dissenting in part).

course was that, precisely, which had been recommended by the Court in *Preston*.[34]

Beyond its inconsistency with the spirit of *Carroll*, the *Chambers* decision seemed out of step with contemporaneous rulings where other exceptions to the warrant requirement had been restricted.[35] It was not long, in any event, before the Court was presented with the opportunity to reexamine *Chambers*. That opportunity arose in 1971 in the case of *Coolidge v. New Hampshire*.[36] Coolidge was a murder suspect against whom arrest and search warrants had been issued by the state's attorney-general, acting as a justice of the peace. After he had been taken into custody, the police impounded his car pursuant to the search warrant.[37] The car was searched two days later, and twice more a year later. During the course of these examinations certain particles of gunpowder were found which were used as evidence to obtain a conviction.[38] The defendant argued that the search warrant was invalid since it had not been issued by a

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34. Id. at 65. "The Court now discards the approach taken in Preston, and creates a special rule for automobile searches that is seriously at odds with generally applied Fourth Amendment principles." Id. (italics omitted). The reasoning of the Court in Chambers seems also at odds with that adopted by the Court in United States v. Van Leeuwen, 397 U.S. 249 (1970). In that case defendant deposited two packages at a post office to be shipped as first class mail. (Under the rules of permissible searches and seizures, first class mail is equated to a dwelling in the sense that it is subject to inspection only under a valid search warrant. Id. at 251.) The postal agent notified the police that he was suspicious of the packages, and the police detained them for 29 hours while a warrant was procured. In declaring the acts of the police reasonable, the Court stated: "Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant." Id. at 253. See LaFave, Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire," 8 Crim. L. Bull. 9, 19 (1972).

35. Another well delineated exception to the warrant requirement is that of a search incident to a lawful arrest. In 1950, in Rabinowitz v. United States, 339 U.S. 56 (1950), the Supreme Court sustained the warrantless search of the defendant's entire home on the grounds that it was incident to a lawful arrest. Id. at 66. See also Harris v. United States, 331 U.S. 145 (1947); contra, Trupiano v. United States, 334 U.S. 699 (1948).

The law in this area remained fixed for over two decades, until the Court, in Chimel v. California, 395 U.S. 752 (1969), overruled Rabinowitz stating that this exception to the warrant requirement was limited to "a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Id. at 763.

As one commentator has put it: "On the one hand, the allowable extent of search incidental to arrest has been considerably narrowed by Chimel v. California; on the other, the authority of the police to search an automobile has been greatly expanded by Chambers v. Maroney." Landynski, The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search, 45 Conn. B.J. 2, 39 (1971).

36. 403 U.S. 443 (1971).

37. Id. at 447.

38. Id. at 448.

neutral magistrate.[39] Conceding the truth of this claim,[40] the Court proceeded to look at every exception to the search warrant requirement to discern what grounds, if any, would sustain the searches independent of a warrant. The Court concluded that the facts before it could be fitted into none of the excepting categories and that the evidence challenged had been improperly admitted.[41]

Justice Stewart was joined in his analysis of the various warrant exceptions by only three other members of the Court.[42] However, a majority of the Court was able to agree at least on the principle that "exigent circumstances," rendering it inopportune for authorities to obtain a warrant, are required before a warrantless vehicular search may be made.[43] To argue that warrantless vehicular searches are per se reasonable, given probable cause alone, a majority said, would be to "read the Fourth Amendment out of the Constitution."[44] Thus with respect to the particular facts in *Coolidge*,

> [s]ince the police knew of the presence of the automobile and planned all along to seize it, there was no '*exigent circumstance*' to justify their failure to obtain a warrant. The application of the basic rule of Fourth Amendment law therefore requires that the fruits of the warrantless seizure be suppressed.[45]

Certainly, by its language[46] and by what the Court *did* in *Coolidge, i.e.*, excluded

39. The attorney general was acting pursuant to N.H. Rev. Stat. Ann. § 595:1 (1955) (repealed 1969), when he signed the search warrant; but in addition, he had also "personally taken charge of all police activities relating to the murder, and was later to serve as chief prosecutor at the trial." 403 U.S. at 447.

40. 403 U.S. at 449-50.

41. Id. at 472-73.

42. Justice Stewart's opinion was divided into three parts, only one of which, Part II, is pertinent to the McKinnon case. This part was itself divided into four sections, the first three of which discussed the various exceptions to the warrant requirement as they applied to the Coolidge facts, concluding that none was applicable. However, these parts of the opinion (II-A, II-B, and II-C) were signed by only four members of the Court (Justice Stewart with Justices Douglas, Brennan, and Marshall concurring). The last of the sections in part II (II-D) involved a lengthy discussion of Justice White's dissenting opinion, and reaffirmed that the overriding limitation on all of the warrant exceptions is the presence of an emergency situation. That part of the opinion was also joined by Justice Harlan. It is the only part of Stewart's opinion dealing with the warrant exceptions which was agreed to by a majority of the Court. It was on the basis of this majority that the evidence upon which Coolidge had been convicted was rendered inadmissible.

43. 403 U.S. at 481.

44. Id. at 480.

45. Id. at 478 (emphasis added).

46. Speaking for a plurality of the Court, Justice Stewart stated: "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence . . . . In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant . . . .'" 403 U.S. at 461-62 (italics omitted).

the evidence, the view that via *Chambers* the warrant requirement had been eliminated from vehicular searches was soundly rebutted. Lest it appear that *Chambers* had in fact been repudiated, Justice Stewart, speaking for a plurality of the Court, noted that the case did not apply.[47]

The California Supreme Court, in *People v. McKinnon*, felt that the reasoning of the *Carroll* line of cases was apt. It declared:

> [G]oods or chattels consigned to a common carrier for shipment . . . are no less movable than an automobile, [and] the reasons for the rule permitting a warrantless search of a vehicle upon probable cause are equally applicable to the search of such a chattel.[48]

Once the police had probable cause to believe that the cartons consigned by McKinnon held contraband, the court said, two alternatives presented themselves. Either the cartons could have been searched without a warrant (as they were), or they could have been seized and a warrant obtained in the meanwhile.[49] "*Chambers* teaches us," said the court, "an immediate search without a warrant . . . is no greater intrusion on the rights of the owner than immobilization of the chattel until a warrant is obtained . . . ."[50]

The court's reasoning in *McKinnon* was founded on two premises: first, that the *Carroll* "family tree" ended with *Chambers* and did not extend to *Coolidge*;[51] and second, that the *Carroll* line of cases is not limited merely to searches of automobiles, but extends to "things readily moved."[52] Putting these premises together, the court concluded that since the consigned cartons were readily movable, the police search was permissible under the *Carroll-Chambers* rule despite the fact that it was conducted without a warrant.[53]

The latter proposition is arguably true. That is, there is language in *Carroll*[54] and in *Preston*[55] which lends support to an extension of the *Carroll* exception beyond automobile searches. However, this appears to be mere dictum: in fact, the *Carroll* line has never been applied other than to an automobile search.[56]

47. "Chambers . . . is of no help to the State, since that case held only that, where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station." 403 U.S. at 463 (italics omitted) (footnote omitted).

48. 7 Cal. 3d at 909, 500 P.2d at 1104, 103 Cal. Rptr. at 904 (footnote omitted).

49. Id.

50. Id.

51. But see text accompanying note 61 infra.

52. 7 Cal. 3d at 908-09, 500 P.2d at 1103-04, 103 Cal. Rptr. at 903-04 (emphasis omitted).

53. Id. at 911, 500 P.2d at 1105, 103 Cal. Rptr. at 905.

54. "Thus contemporaneously with the adoption of the Fourth Amendment we find . . . a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." 267 U.S. at 151.

55. "[Q]uestions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses." 376 U.S. at 366.

56. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S.

Language to the contrary appears in *Coolidge*,[57] but that part of the *Coolidge* decision carries the approval of only four justices. Since the Supreme Court has never defined the limits of the *Carroll* exception, it seems that indeed the California Supreme Court was free to accept the applicability of that exception to "things movable" other than automobiles. Having done so, however, the court was constrained to accept all the ramifications of the basic *Carroll* rule; among them that an emergency situation must exist for a warrantless search. Recognizing this, the California Supreme Court turned its attention to the exigencies present in *McKinnon*.

At this point the court was faced with the precedents it had established in *McGrew* and *Abt v. Superior Court*,[58] wherein on substantially the same facts it had found in essence that there was no emergency. Nonetheless, in *McKinnon* the court concluded that "in the light of supervening developments in the law [*i.e., Chambers*] . . . the rule of those decisions [*McGrew* and *Abt*] is no longer to be followed . . . ."[59] The court went on to say that it was

> not unmindful of the recent decision of the United States Supreme Court in *Coolidge v. New Hampshire* . . . properly considered, however, we do not interpret that decision to affect the impact of *Carroll* and *Chambers* on *McGrew* and *Abt*.[60]

Here, it is submitted, the court erred.

*Coolidge* was a definite descendant of the *Carroll* line of cases. This fact should be evident from the analysis set forth above. *Coolidge* was not only an automobile search case, it was one in which a majority of the Supreme Court determined that the exigencies of the situation did *not* merit a warrantless search.[61]

It seems, however, that the *Coolidge* case had somehow to be disposed of before the court could reach the conclusion that it did in *McKinnon*. Aside from Justice Stewart's language about the *Carroll* rationale not being applicable beyond automobile searches in the first place,[62] it is simply easier to draw an

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42 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Preston v. United States, 376 U.S. 364 (1964); Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931), see 403 U.S. at 461 n.18.

57. "[A] good number of the containers that the police might discover on a person's property and want to search are equally movable, e.g., trunks, suitcases, boxes, briefcases, and bags. How are such objects to be distinguished from an unoccupied automobile—not then being used for any illegal purpose—sitting on the owner's property. . . . [I]f Carroll v. United States . . . permits a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of Carroll." 403 U.S. at 461 n.18 (italics omitted).

58. 1 Cal. 3d 418, 462 P.2d 10, 82 Cal. Rptr. 481 (1969), overruled, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972); see text accompanying notes 24-26 supra.

59. 7 Cal. 3d at 902, 500 P.2d at 1099, 103 Cal. Rptr. at 899.

60. Id. at 910, 500 P.2d at 1104-05, 103 Cal. Rptr. at 904-05.

61. See note 42 supra.

62. See note 57 supra.

analogy between the *McKinnon* facts and those in *Coolidge* than it is between the former and those in *Chambers*.

In *Chambers*, the Court sustained a warrantless search on the ground that an emergency situation was present; the auto having been stopped on the open highway, opportunity for search was "fleeting."[63] In *Coolidge*, on the other hand, the search was not allowed, the Court concluding that a car parked in an arrestee's driveway could hardly create sufficiently exigent circumstances.[64] In *McKinnon*, the contraband was as stationary and immobile as was the car in Coolidge's driveway. It could hardly be said that the cartons were in a position "where they readily could be put out of reach of a search warrant."[65] The two defendants in *McKinnon* were in police custody at the time of the search, and the containers to be searched were in the hands of a common carrier who had alerted the police, (giving rise to their "probable cause") and who had proved most cooperative. Moreover, as the *McKinnon* court itself concedes, "a common carrier, no less than any other citizen, has the right, indeed the duty, not to knowingly allow its property to be used for criminal purposes."[66] It was highly unlikely, therefore, that the airline, once it had become aware that the consigned cartons contained contraband, would dispatch them.[67] The opportunity for police to make a search was thus hardly "fleeting," and the *Carroll* line of cases consequently inapplicable.

In deciding *McKinnon* the court might, perhaps, have paid closer heed to a 1970 decision of the United States Supreme Court, *United States v. Van Leeuwen*.[68] In that case the Court considered the question whether it is proper to delay in transit not air freight, but first class air mail. The Court decided that a 29-hour delay of first class air mail was reasonable.[69] In light of this, is it not at least arguable that of the two, air mail and air freight, delay of the former is more serious; and that therefore it would be if anything *as reasonable* to delay air freight during the time required to procure a warrant?

In adopting any exception to the fundamental protections of the fourth amendment, there ought to be recalled the admonition of Mr. Justice Bradley in *Boyd v. United States*[70] wherein he wrote:

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of

63. 399 U.S. at 52; see text accompanying notes 27-29 supra.

64. 403 U.S. at 478; see text accompanying notes 43-45 supra.

65. 267 U.S. at 151.

66. 7 Cal. 3d at 914, 500 P.2d at 1107, 103 Cal. Rptr. at 907 (footnote omitted).

67. As the court pointed out: "Although such freight may not present a physical hazard to other goods or the vehicle carrying them, the carrier is not required to risk the injury to its reputation and business which could well ensue from public knowledge that it permits its facilities to be used by criminals for the purpose of trafficking in narcotics." 7 Cal. 3d. at 914, 500 P.2d at 1107, 103 Cal. Rptr. at 907.

68. 397 U.S. 249 (1970); see note 34 supra.

69. Id. at 253; see note 34 supra.

70. 116 U.S. 616 (1886).

person and property should be liberally construed. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[71]

**Constitutional Law—Search and Seizure—Production of Voice and Handwriting Exemplars to Grand Jury May Be Compelled Without Preliminary Showing.**—Respondent Dionisio was summoned by subpoena before a federal grand jury and requested to submit voice exemplars, for comparison with certain recorded conversations obtained by court-ordered "wiretap"[1] and received previously into evidence.[2] Respondent declined, asserting that such disclosures would violate his rights under the fourth[3] and fifth[4] amendments. The district court rejected these constitutional arguments and ordered the respondent to comply with the jury's request. When he persisted in his refusal he was adjudged in civil contempt and ordered into custody. On appeal the Court of Appeals for the Seventh Circuit agreed that respondent's fifth amendment claim was without merit,[5] but reversed, concluding that compulsion of the voice exemplars would violate his right to be free of "unreasonable searches and seizures."[6] Subsequently, respondent Mara was adjudged in civil contempt for his refusal, on fourth amendment grounds, to furnish a grand jury in the same judicial district with handwriting exemplars.[7] The Court of Appeals for the Seventh Circuit again reversed, relying upon its decision in the *Dionisio* case.[8] The United States Supreme Court granted certiorari to

71. Id. at 635.

1. United States v. Dionisio, 93 S. Ct. 764 (1973). As the Court noted: "The court orders were issued pursuant to 18 U.S.C. § 2518, a statute authorizing the interception of wire communications upon [certain] judicial determination[s] . . . ." Id. at 766 n.1.

2. The jury had been convened to investigate, according to the Court, "possible violations of federal criminal statutes relating to gambling." 93 S. Ct. at 764; see 18 U.S.C. § 1955 (1970).

3. The fourth amendment provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

4. The fifth amendment provides, in part, that: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.

5. Dionisio v. United States, 442 F.2d 276, 278 (7th Cir. 1971), rev'd, 93 S. Ct. 764 (1973).

6. Id. at 279-80.

7. In Mara, the grand jury was investigating possible violations of the conspiracy provision of the Criminal Code, 18 U.S.C. § 371 (1970), and of the provision proscribing thefts of interstate shipments, 18 U.S.C. § 659 (1970). Mara v. United States, 454 F.2d 580, 582 (7th Cir. 1971), rev'd, 93 S. Ct. 774 (1973).

8. Id. at 582. The court stated summarily: "Under our opinion in In re Dionisio . . . it is plain that compelling petitioner to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its reasonableness requirement . . . ." Id. (citation omitted) (footnote omitted).

review both decisions,[9] and reversed both.[10] The Court held that while the Seventh Circuit had been correct in answering the fifth amendment question, it had erred in deciding that a fourth amendment objection could be raised against a request for either voice or handwriting exemplars. Such exemplars, the Court said, evidence "physical characteristics" which are "constantly exposed to the public"[11] and as to which, therefore, no reasonable expectation of privacy exists. There is no justification for requiring that any showing be made before production of them may be compelled.[12] *United States v. Dionisio*, 93 S. Ct. 764 (1973); *United States v. Mara*, 93 S. Ct. 774 (1973).

The right of the government to obtain evidence based on bodily intrusion was not considered by the Supreme Court in a *fourth amendment* context[13] until 1966. In that year the Court decided *Schmerber v. California*,[14] and it made the observation:

> Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—"houses, papers, and effects"—we write on a clean slate.[15]

In *Schmerber*, petitioner objected[16] to the admission of blood sample evidence taken from him following an auto accident in which he had been involved. An investigating officer had ordered the sample taken despite petitioner's refusal, on advice of counsel, to consent.[17] The Court ruled that this procedure "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment,"[18] but ruled as well that it had been "an appropriate incident to petitioner's arrest," and that "the test chosen to measure petitioner's blood-alcohol level was a reasonable one."[19]

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9. 406 U.S. 956 (1972) (cases to be argued in tandem).

10. United States v. Dionisio, 93 S. Ct. 764, 773 (1973); United States v. Mara, 93 S. Ct. 774, 776 (1973).

11. 93 S. Ct. at 771.

12. Id. at 772; 93 S. Ct. at 776.

13. In Holt v. United States, 218 U.S. 245 (1910), Justice Holmes, writing for the majority, termed "an extravagant extension of the Fifth Amendment" the argument that requiring the defendant to don a certain blouse for identification purposes violated her privilege against self-incrimination. Id. at 252. The due process clause had also been relied on as a ground for objection to alleged bodily intrusions. See, e.g., Rochin v. California, 342 U.S. 165 (1952) (forcible stomach pumping by narcotics agents to obtain evidence held violative of due process guarantee); Breithaupt v. Abram, 352 U.S. 432 (1957) (no due process violation in taking blood sample from unconscious party to multi-car accident for purposes of measuring blood-alcohol content).

14. 384 U.S. 757 (1966).

15. Id. at 767-68.

16. Aside from his fourth amendment argument, the petitioner in Schmerber also made claims based on the fifth amendment's privilege against self-incrimination, id. at 760-65, see note 45 infra, on the sixth amendment's guarantee of counsel, 384 U.S. at 765-66, and on the fourteenth amendment's requirement of due process of law, id. at 759-60.

17. 384 U.S. at 766.

18. Id. at 767.

19. Id. at 771.

In the wake of the *Schmerber* decision, other interferences with the "person" were brought to the Court's attention in *Terry v. Ohio*[20] and *Davis v. Mississippi*.[21] In *Terry*, a "stop and frisk" case, the Court ruled in 1968 that this sort of police-citizen encounter came, indeed, within the scope of the fourth amendment's guarantee.[22] Although it concluded that on the facts[23] the intrusion had been a reasonable one, the Court noted that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' "[24]

In *Davis*, a 1969 case, defendant was convicted of a rape, the victim of which had been able to identify her assailant only as a "Negro youth."[25] The police brought the defendant to the stationhouse, together with at least 23 other youths, where all were questioned, fingerprinted and released. The former was indicted and tried after his fingerprints were found to match prints left at the scene of the crime. The Supreme Court reversed his conviction, finding that the fingerprint evidence had been obtained in the course of an unlawful "seizure" and was therefore inadmissible.[26]

While the Court declined to decide whether, under other circumstances, fingerprint evidence could be obtained without probable cause and without violating the fourth amendment's prohibition,[27] it did characterize such evidence as involving "none of the probing into an individual's private life and thoughts that marks an interrogation or search."[28]

The argument that handwriting exemplars might be within the scope of the prohibition against "unreasonable searches and seizures" appears first to have been raised in *United States v. Long*.[29] In that case a federal officer obtained

20. 392 U.S. 1 (1968).

21. 394 U.S. 721 (1969).

22. Having previously held in Katz v. United States, 389 U.S. 347 (1967), that "the Fourth Amendment protects people, not places," id. at 351, the Court stated in Terry that "[t]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." 392 U.S. at 8-9.

23. A plain clothes policeman had observed two men pacing back and forth before a store window, conferring after each pass. Suspecting the two of "casing a job, a stick-up," the officer approached them apprehensively, fearing that they might be armed. When the two men mumbled something in response to his inquiry, the officer spun the defendant around and patted down the exterior of his clothing, finding a pistol in defendant's left breast pocket. 392 U.S. at 6-8.

24. 392 U.S. at 16.

25. 394 U.S. at 722.

26. Id. at 726-28.

27. Id. at 728. The Court noted: "We have no occasion in this case . . . to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." Id.

28. Id. at 727.

29. 325 F. Supp. 583 (W.D. Mo. 1971), aff'd sub nom. United States v. Harris, 453 F.2d 1317 (8th Cir. 1972).

handwriting exemplars from the defendant while he was incarcerated on a pending state charge. At the time, the defendant was unaware that federal charges were being considered and acquiesced in the federal officer's request before any *Miranda*-type warnings had been given.[30] The *Long* case was consolidated on appeal with *United States v. Harris*.[31] In *Harris*, postal inspectors called on the defendant at his home and informed him that they were investigating the theft and forgery of a welfare check. Defendant was then asked for samples of his handwriting without first having been advised of his rights.[32] The Eighth Circuit Court of Appeals ruled as to both cases that the taking of handwriting exemplars was a "search and seizure" within the terms of the fourth amendment, stating: "The search is still for evidence of guilt, the evidence must be obtained from the person of the suspect himself, and it involves some intrusion into the privacy of the person which the Fourth Amendment is intended to protect."[33]

The decisions in *Harris* and *Long* were followed shortly by the decision of the Seventh Circuit Court of Appeals in *Mara v. United States*.[34] As heretofore noted,[35] *Mara* involved the compelled production of handwriting exemplars to a grand jury, and relied on the same circuit court's earlier voice exemplar ruling in *Dionisio v. United States*.[36] In holding handwriting exemplars to be within the scope of the fourth amendment's prohibition, the court noted in *Mara* that "compelling . . . exemplars of [defendant's] handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its reasonableness requirement."[37]

Soon thereafter, the Second Circuit Court of Appeals was faced with the same question in *United States v. Doe* (*Schwartz*).[38] In *Doe* (*Schwartz*) appellant was summoned by subpoena before a grand jury and requested to furnish certain samples of her handwriting.[39] She refused, initially invoking the fifth amendment's privilege against self-incrimination. However, on reappearance appellant asserted the more advanced position that the fourth amendment's guarantee against "unreasonable searches or seizures" imposed upon the Government a "probable cause" burden which had to be satisfied before the exemplars could be compelled.[40] Appellant's contentions were

30. Id. at 583-84.

31. 453 F.2d 1317 (8th Cir. 1972).

32. Id.

33. Id. at 1320 (footnote omitted).

34. 454 F.2d 580 (7th Cir. 1971), rev'd, 93 S. Ct. 774 (1973).

35. See notes 7-12 supra and accompanying text.

36. 442 F.2d 276 (7th Cir. 1971), rev'd, 93 S. Ct. 764 (1973).

37. 454 F.2d at 582.

38. 457 F.2d 895 (2d Cir.), stay granted, 406 U.S. 9554 (1972).

39. In a situation factually similar to the Mara and Dionisio cases the government hoped to compare the writing samples with evidence obtained in a previous investigation into possible mail and wire frauds. Id. at 896; see notes 1-7 supra and accompanying text.

40. 457 F.2d at 896-97. Appellant's argument, as the court interpreted it, was that "the use of process to compel the furnishing of handwriting (or voice) exemplars to a grand jury constitutes a search or seizure within the Fourth Amendment which requires a preliminary

rejected and she was cited for civil contempt.[41] The Second Circuit Court of Appeals affirmed, holding that with respect to handwriting (and voice)[42] exemplars "no reasonable expectation of privacy exists,"[43] and that therefore the compelled production of such exemplars to a grand jury is not a "search" within the meaning of the fourth amendment and does not require a preliminary showing.[44]

The Supreme Court, in entertaining the *Mara* and *Dionisio* appeals, sought to resolve this split among the circuits.

First, however, the Court dealt with an issue on the resolution of which the circuits were in agreement: whether protection was afforded in the instant context by the self-incrimination privilege of the fifth amendment. The Court decided that it was not[45]—thereby affirming both the Seventh Circuit's holding in *Dionisio*[46] and reasoning which had been advanced by the Second Circuit in *Doe* (*Schwartz*).[47]

Turning to the fourth amendment issue, the Court noted that the proper focus

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showing of probable cause to believe that the witness' handwriting (or voice) resembles that of a person whom the Government has probable cause to believe has committed a crime." This at least, the court noted, "is our best understanding of what counsel means by 'probable cause' in this context; appellant's brief seems to take varying positions on this point." Id. at 897 & n.1.

41. Id. at 896. The lower court ruling was unreported.

42. Consistently, no attempt has been made to distinguish handwriting from voice exemplars. See, e.g., 93 S. Ct. at 776; 454 F.2d at 582.

43. 457 F.2d at 898.

44. Id. at 899-900.

45. United States v. Dionisio, 93 S. Ct. 764, 767-68 (1973); see note 4 supra. In deciding that no interest protected by the fifth amendment was violated the Court relied on a well-established line of cases. In Schmerber v. California, 384 U.S. 757 (1966), the Court had ruled that the privilege against self-incrimination was not available to a defendant from whom a blood sample had been taken without his consent. See notes 14-19 supra and accompanying text. The Court in Schmerber laid down an important test of the fifth amendment's scope, stating that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ." 384 U.S. at 761. Schmerber, in turn, formed the basis for Gilbert v. California, 388 U.S. 263 (1967), and United States v. Wade, 388 U.S. 218 (1967), in which the Court considered, respectively, handwriting and voice exemplars in arrest contexts and concluded in both cases that such evidence was not protected since not of a "testimonial" character. 388 U.S. at 266-67; 388 U.S. at 222-23. Finally, this same issue was treated in a grand jury setting, much like that of the instant cases, by the Second Circuit Court of Appeals in United States v. Doe (Devlin), 405 F.2d 436 (2d Cir. 1968). There the court again rejected the witness' self-incrimination claim, and since no privilege existed, found that refusal to furnish the requested handwriting exemplars justified a moderate sentence for civil contempt. Id. at 438-39. As was noted by Justice Marshall, respondent Mara did not make a fifth amendment argument before the Supreme Court, although he had pressed such an argument at the appellate level. United States v. Mara, 93 S. Ct. 777, 781 (1973) (dissenting opinion).

46. 442 F.2d at 281.

47. 457 F.2d at 896.

of attention was that aspect of the amendment which affords protection to the privacy of "persons."[48] As to the scope of this protection, the Court adopted a rule identical to that applied by Judge Friendly in *Doe* (*Schwartz*)[49]: " '[W]herever an individual may harbor a reasonable "expectation of privacy" . . . he is entitled to be free from unreasonable governmental intrusions.' "[50]

The Court derived its framework for analysis from reasoning it had advanced in the *Schmerber* case, wherein it had said that:

> the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the "seizure" of the "person" necessary to bring him into contact with government agents . . . and the subsequent search for and seizure of the evidence.[51]

No seizure had occurred in the instant case by virtue of its grand jury context. This was true, the Court noted, because the compulsion exerted by a subpoena to appear before a grand jury has not historically been thought to constitute a "seizure" for fourth amendment purposes, "even though that summons may be inconvenient or burdensome."[52]

Considering the second part of the two-pronged test, the Court queried whether the taking of voice exemplars would constitute an infringing search. Relying on the test it had previously formulated, the Court determined that no reasonable expectation of privacy exists with respect to one's voice.[53] Thus, it concluded that no protected right had been infringed by the grand jury's requests.[54]

Having thus decided that no valid fourth amendment claim had been raised in *Dionisio*, either by virtue of the summons to appear before the grand jury, or by the jury's directive to make a voice recording, the Court further concluded that "there was no justification for requiring the grand jury to satisfy even the minimal requirement of 'reasonableness' imposed by the Court of Appeals."[55]

The Court's decision as to handwriting exemplars in *Mara* achieved the same

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48. 93 S. Ct. at 768. See also 457 F.2d at 897, where the circuit court stated: "Decisions dealing with 'interferences with property relationships or private papers,' thus are marginally relevant at best." Id. (citation omitted).

49. 457 F.2d at 897.

50. 93 S. Ct. at 769, quoting Terry v. Ohio, 392 U.S. 1, 9 (1968).

51. 93 S. Ct. at 769.

52. Id. See Blair v. United States, 250 U.S. 273 (1919), where the Court stated: "[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned . . . ." Id. at 281. See also United States v. Bryan, 339 U.S. 323 (1950), where the Court reiterated the " 'fundamental maxim that the public . . . has a right to every man's evidence.' " Id. at 331, citing Wigmore, Evidence § 2192 (3d ed. 1940).

53. 93 S. Ct. at 771. The Court noted: "Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear." Id.

54. Id. at 772.

55. Id.

result. There the Court concluded: "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."[56]

If nothing else, the Court's decisions in *Dionisio* and *Mara* leave the reasoning of the Eighth Circuit in *Harris* and *Long* in grave doubt. While it is possible that those decisions might be distinguished on the basis of their arrest as opposed to grand jury contexts,[57] their reliance on the notion that handwriting samples are within an area protected by the fourth amendment makes even this distinction questionable. Additionally, the appeal on fourth amendment grounds of petitioner Schwartz in the Second Circuit *Doe* (*Schwartz*) case will now surely be rejected and her contempt citation upheld.[58]

The Court's determination that handwriting and voice exemplars are not protected by the "search and seizure" prohibition brings to mind both pragmatic and philosophical considerations. From a pragmatic view, it is at least conjecturable that had a preliminary showing requirement been imposed, refusal to consent to the taking of exemplars would have become matter of course. This true, the government would have been forced, on any occasion it desired to compel production of exemplars, to prematurely disclose at least enough of its evidence to make the requisite showing. In effect, this would have afforded witnesses who were also potential defendants an additional discovery tool perhaps inconsistent with the intent of Rule 16(b) of the Federal Rules of Criminal Procedure.[59] That rule presents a bar, even on a showing of materiality and reasonableness, to "the discovery or inspection of . . . statements made by government witnesses or prospective government witnesses . . . ."[60]

The role of the grand jury in criminal investigations is certainly the most vexing problem underlying the issues of the instant cases. In *Doe* (*Schwartz*), Judge Friendly summarized that role as it has traditionally been conceived when he noted: "The grand jury was regarded by the founders not as an instrument of oppression but as a safeguard of liberty so important as to be preserved in the Fifth Amendment."[61] Recently, however, the ability of the grand jury to perform its traditional function has been viewed with some skepticism.[62] Justice Douglas in his dissenting opinion in *Dionisio* remarked

56. 93 S. Ct. at 776.

57. See 453 F.2d at 1319, where the court stated, apparently erroneously, that: "We conclude that the taking of the handwriting exemplars in these cases was a search and seizure under the Fourth Amendment." Id.

58. The heavy reliance of the Court on Judge Friendly's opinion in Doe (Schwartz) is to be noted. See, e.g., 93 S. Ct. at 769-72.

59. Pragmatic considerations will not, of course, be allowed to stand in the way of clear constitutional mandates. See, e.g., the "exclusionary rule" enunciated in Mapp v. Ohio, 367 U.S. 643 (1961).

60. Fed. R. Crim. P. 16. See generally Comment, Discovery in Federal Criminal Cases—Rule 16 and the Privilege Against Self-Incrimination, 35 Fordham L. Rev. 315 (1966).

61. United States v. Doe (Schwartz), 457 F.2d 895, 899 (2d Cir. 1972).

62. The argument is raised consistently in these cases that to permit the grand jury to compel production of evidence of this nature without a preliminary showing is to allow the prosecutor to accomplish through the use of the grand jury what he could not do other-

that "the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."[63] Those who adhere to this view, however, were revealed by *Dionisio* to be a distinct minority of the Court. Justice Stewart, summing up the majority's viewpoint on this matter, declared:

> The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.[64]

Just what are these legitimate rights remains open to dispute, but the Court, it seems, has closed the door on the issue of protection of handwriting and voice exemplars.

**Constitutional Law—State Statutes Authorizing Summary Prejudgment Replevin Orders Held Violative of Constitutional Due Process Requirements.**—Plaintiffs purchased goods under terms of conditional sales contracts.[1] Upon default, creditors utilized state replevin procedures to regain possession of the chattels.[2] Plaintiffs instituted suit claiming that the statutes in question were violative of the due process clause of the fourteenth amendment insofar as they failed to provide for notice and a hearing prior to seizure.[3] In both cases, three-judge district courts sustained the statutes,[4] and plaintiffs appealed.[5] The Supreme Court reversed, holding that the Florida and Pennsylvania replevin statutes worked a deprivation of procedural due process since they denied

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wise. See, e.g., United States v. Doe (Schwartz), 457 F.2d 895, 899 (2d Cir. 1972). For an examination of the grand jury and the rights of the grand jury witness and the criminal defendant, see Boudin, The Federal Grand Jury, 61 Geo. L.J. 1 (1972), wherein the author concludes that reform is urgently needed if the grand jury is to fulfill its traditional role, and suggests several specific areas that require legislative attention.

63. United States v. Dionisio, 93 S. Ct. 764, 777 (1973) (Douglas, J., dissenting).

64. Id. at 773.

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1. The case is a consolidation of two actions. Margarita Fuentes purchased a gas stove and stereo. Three other appellants also purchased household goods. The fifth appellant had been engaged in a dispute with her ex-husband over child custody—the goods in question were the child's clothing, furniture and toys. Fuentes v. Shevin, 407 U.S. 67, 70-72 (1972).

2. Fla. Stat. Ann. §§ 78.01, .07, .08, .10, .13 (Supp. 1972); Pa. Stat. Ann. tit. 12, § 1821 (1967); id. R. Civ. Proc. §§ 1073, 1076, 1077, 1087(a) (1967); see 407 U.S. at 73-78 nn.6, 7, 9.

3. Plaintiffs additionally contended that the replevin provisions authorized searches and seizures in violation of the fourth and fourteenth amendments. 407 U.S. at 71 n.2, 92 n.32.

4. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970).

5. The Supreme Court noted probable jurisdiction, Epps v. Cortese, 402 U.S. 994 (1971); Fuentes v. Faircloth, 401 U.S. 906 (1971).

debtors an opportunity to be heard *before* chattels were seized. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The concept of procedural due process is a revered and ancient one; its roots have been traced to the eleventh century.[6] Designed to prevent capricious government deprivation of property,[7] due process guarantees "the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case *and proceeding upon notice and hearing*."[8] Since the Constitution does not detail the requirements of due process,[9] its application has not been confined by a rigid formula. Rather, it has traditionally entailed a "delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."[10] In its balancing of interests to determine the elusive requirements of due process, the Supreme Court has necessarily sought guidance in the common law.[11]

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6. R. Mott, Due Process of Law 1 (1926) [hereinafter cited as Mott]. "The basis of due process, orderly proceedings and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the stage of uncontrolled vengeance." L. McGehee, Due Process of Law Under the Federal Constitution 2 (1906) [hereinafter cited as McGehee]. The tradition of due process has been traced to the Bible: "God himself did not pass sentence upon Adam, before he was called upon to make his defence." The King v. Cambridge Univ., 93 Eng. Rep. 698, 704 (K.B. 1723).

7. 2 J. Story, Commentaries on the Constitution of the United States § 1951 (1891) [hereinafter cited as Story].

8. McGehee 1 (footnote omitted) (emphasis added); see id. at 76-77.

9. Murray's Lessee v. Hoboken Land & Improv. Co., 59 U.S. (18 How.) 272, 276 (1856). Historically, the requirements of due process have been equated with the standard of the "land of the land." McGehee 1, 10, 16, 24; Story §§ 1941-43. Contra, Mott 25. This definition presented Story with a paradox: If every sovereign act becomes the law of the land, then a guarantee of due process becomes a fiction, devoid of substance. Story § 1943. Due process, however, transcends the law of the land; it requires that justice be administered in accordance with certain fundamental principles to which even the sovereign must bow. Id. § 1945. The significance of the equation of due process with law of the land, in the context of the American federal system, lies in the idea that "[w]hile the cardinal principles of [due process] are immutable," the methods of the administration of justice in compliance with these guiding principles may find as many variations as there are states. McGehee 38.

10. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring); see Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886 (1961); FCC v. WJR, 337 U.S. 265 (1949); Murray's Lessee v. Hoboken Land & Improv. Co., 59 U.S. (18 How.) 272 (1856).

11. The Court has indicated that guidance as to the determination of the requirements of due process might be found by "look[ing] to those settled usages and modes of proceeding existing in the common and statute law of England. . . ." Murray's Lessee v. Hoboken Land & Improv. Co., 59 U.S. (18 How.) 272, 277 (1856); see Story § 1947. "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922); see Frank v.

Deeply imbedded in the common law tradition, and apparently invulnerable to constitutional attack, was the summary remedy of replevin, an ancient procedure dating as far back as the twelfth century.[12] It has been summarized as the right of one wrongfully deprived of his property to apply to the sheriff for its summary return "upon giving good security to try the right of taking it in a suit at law . . . ."[13] The remedy has withstood the rigorous test of time, and has been codified in most jurisdictions.[14]

In *McKay v. McInnes*,[15] the Supreme Court affirmed the decision of the Supreme Court of Maine[16] that summary attachment was not violative of due process of law.[17] The Maine court had held that the remedy was valid since "it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal."[18]

In two more recent decisions, the constitutionality of summary prejudgment procedures came under the close scrutiny of the Supreme Court.[19] In the landmark decision *Sniadach v. Family Finance Corp.*,[20] the Court determined that a summary prejudgment garnishment constituted a taking of property without the procedural due process required by the fourteenth amendment. The Court, in recognizing the necessity of balancing interests,[21] held that while under some circumstances summary procedures might be justifiable,[22] the working man's need to retain the use of his wages—"a specialized type of

Maryland, 359 U.S. 360, 370 (1959); McInnes v. McKay, 127 Me. 110, 114-15, 141 A. 699, 702 (1928), aff'd, 279 U.S. 820 (1929) (per curiam).

12. 3 W. Holdsworth, A History of English Law 283-84 (3d ed. 1927) [hereinafter cited as Holdsworth]. "Replevin is among the earliest remedies given by the common law." J. Cobbey, Law of Replevin § 1, at 1 (2d ed. 1900). The remedy first appeared in the lex scripta in 1267. Id. at 2.

13. W. Blackstone, Commentaries 529 (B. Gavit ed. 1941). An excellent description of the procedures of common law replevin and the dilatory measures utilized to circumvent its force may be found in Holdsworth 283-85. The scope of its process was initially limited to recovery of chattels detained by a landlord in the course of a dispute with his tenant, id. at 283, but later became greatly enlarged to include all claims against goods in the possession of another. J. Cobbey, Law of Replevin 30 (2d ed. 1900).

14. J. Cobbey, Law of Replevin 30 (2d ed. 1900).

15. 279 U.S. 820 (1929) (per curiam).

16. McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928).

17. The Court's brief decision was based on the authority of two prior holdings: Coffin Bros. v. Bennett, 277 U.S. 29 (1928) (sustaining the constitutionality of a prejudgment execution creating a lien on defendant's property); Ownbey v. Morgan, 256 U.S. 94 (1921) (sustaining the constitutionality of a writ of foreign attachment).

18. 127 Me. at 116, 141 A. at 702-03. Also central to this court's analysis was a strong presumption of constitutionality in view of the remedy's long, unchallenged history. Id. at 114-15, 141 A. at 702; see note 11 supra and accompanying text.

19. Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

20. 395 U.S. 337 (1969).

21. See note 10 supra and accompanying text.

22. 395 U.S. at 339. The Court enumerated several cases in which the circumstances were

property"[23]—completely outbalanced the interest of the creditor. Acknowledging the plight of the wage-earner, the Court noted that garnishments could "as a practical matter, drive a wage-earning family to the wall."[24]

The scope of *Sniadach* was particularly ambiguous since its language dealt primarily with situations involving necessities.[25] The decision failed, however, to provide any guidelines to determine the constitutionality of "ordinary" situations such as prejudgment replevin orders.[26]

*Goldberg v. Kelly*[27] provided no enlightenment. Examining a New York procedure which permitted the termination of welfare payments without prior notice or hearing,[28] the Court found that the requirements of due process were wanting.[29] "[T]ermination of aid pending resolution of a controversy . . . may deprive an eligible recipient of the very means by which to live while he waits."[30] Clearly the state's interest in preserving its funds by terminating

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such as to warrant a summary procedure: Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (promotion of public health by the seizure of misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (federal protection of the public against bank failures); Coffin Bros. v. Bennett, 277 U.S. 29 (1928) (state protection of the public against bank failures); Ownbey v. Morgan, 256 U.S. 94 (1921) (protection of creditors through writs of foreign attachment against non-residents).

23. 395 U.S. at 340.

24. Id. at 341-42 (footnote omitted), citing 114 Cong. Rec. 1833 (1968) (remarks of Congressman Gonzales). Mr. Justice Black, in a strongly worded dissent, deplored the Court's "plain, judicial usurpation of state legislative power to decide what the State's laws shall be." Id. at 345 (Black, J., dissenting).

25. See note 23 supra and accompanying text.

26. For an evaluation of the implications of Sniadach, see Lebowitz v. Forbes Leasing & Finance Corp., 326 F. Supp. 1335, 1341-48 (E.D. Pa. 1971), aff'd, 456 F.2d 979 (3d Cir.), cert. denied, 409 U.S. 843 (1972). Commentators were rife with analyses and speculation. See, e.g., Comment, Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditor's Ointment, 34 Albany L. Rev. 426 (1970); Comment, Some Implications of Sniadach, 70 Colum. L. Rev. 942 (1970); 68 Mich. L. Rev. 986 (1970); Note, Forcible Prejudgment Seizures, 25 Sw. L.J. 331 (1971); 4 Suffolk L. Rev. 585 (1970); 1971 U. Ill. L.F. 336; 24 Vand. L. Rev. 155 (1970); 72 W. Va. L. Rev. 165 (1970).

27. 397 U.S. 254 (1970).

28. Plaintiffs had been receiving welfare benefits pursuant to N.Y. Soc. Welfare Law §§ 343-62 (McKinney 1966), as amended, N.Y. Soc. Serv. Law §§ 343-62 (McKinney Supp. 1972), a federally supported program, and N.Y. Soc. Welfare Law §§ 157-65 (McKinney 1966), as amended, N.Y. Soc. Serv. Law §§ 157-66 (McKinney Supp. 1972), a program financed and administered by the state and local governments.

29. The Court determined that the principles of due process require that "a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend . . . by presenting his own arguments and evidence orally." 397 U.S. at 267-68.

30. Id. at 264. The Court, over Justice Black's dissent, wrote of the welfare recipient's "brutal need" for his benefits. Id. at 261, citing Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968), aff'd sub nom. Goldberg v. Kelly, 397 U.S. 254 (1970); see Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967).

the payments of those who were erroneously or fraudulently on the welfare rolls was outweighed by the competing interest of the welfare recipient[31]—perhaps a foregone conclusion in light of *Sniadach*.[32]

The issue of the constitutionality of summary prejudgment remedies became a much litigated matter, with varying results in the lower courts. Many courts, construing *Sniadach* as enunciating broad due process principles, struck down such remedies.[33] Other courts, however, seizing upon *Sniadach*'s description of the property there involved as a "specialized type of property" for which there was a particular need, limited the decision to its facts.[34]

In *300 West 154th St. Realty Co. v. Department of Buildings*,[35] the New York Court of Appeals sustained the validity of the extrajudicial remedy afforded tenants for the abatement of nuisances by the New York City Administrative Code.[36] The court held that a landlord was not entitled to a determination of his liability for repairs before tenants could be asked to make rent payments to the Department of Buildings. Taking a limited view of *Sniadach*, the court held that there would be no denial of due process in that there were none of the special irreversible economic hardships that the Supreme Court found in *Sniadach* and *Goldberg*.[37]

On the other hand, a three-judge federal court sitting in New York struck down that state's summary prejudgment replevin remedy[38] in *Laprease v. Raymours Furniture Co.*[39] In addition to its finding that the statute was violative of the fourth and fourteenth amendments as constituting an illegal search and seizure,[40] the court, relying on *Sniadach* and *Goldberg*, found that the failure to provide for notice and hearing *prior* to seizure rendered it an unconstitutional denial of due process.[41]

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31. 397 U.S. at 266; see Comment, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Fordham L. Rev. 604 (1969).

32. If wage garnishments require prior notice and hearing because of the "distinct problems" they present, a fortiori welfare payments for which recipients have a "brutal need" require a similar standard of protection. See notes 23-24, 30 supra and accompanying text.

33. See cases cited in 407 U.S. at 72 n.5.

34. Id.

35. 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970).

36. 3 N.Y.C. Adm. Code, ch. 22, §§ 564-15.0 to 564-31.0 (Williams Press 1969).

37. 26 N.Y.2d at 544, 260 N.E.2d at 537, 311 N.Y.S.2d at 903.

38. N.Y. C.P.L.R. §§ 7101-11 (McKinney 1963), as amended, (McKinney Supp. 1972). A short description of the usual course of proceedings pursuant to these provisions may be found in Comment, Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditor's Ointment, 34 Albany L. Rev. 426, 447-48 (1970); Comment, Laprease and Fuentes: Replevin Reconsidered, 71 Colum. L. Rev. 886, 888-89 (1971).

39. 315 F. Supp. 716 (N.D.N.Y. 1970).

40. Id. at 722.

41. Id. "Lack of refrigeration, cooking facilities and beds creates hardships, it would seem, equally as severe as the temporary withholding of 1/2 of Sniadach's pay, and measured by Sniadach, the hardships imposed cannot be considered de minimus." Id. at 723.

It was in the face of this uncertainty that the Supreme Court decided *Fuentes v. Shevin*.[42] In *Fuentes*, the Court was faced with a determination of the constitutionality of Florida and Pennsylvania laws authorizing a summary replevin procedure in which "a private party may obtain a prejudgment writ of replevin through a summary process of *ex parte* application."[43] Recognizing that it is well settled that a party is entitled to notice and hearing prior to a state-effected deprivation, the Court held that these protections must be provided at a " 'meaningful time.' "[44] It is only when an opportunity for a hearing *prior* to the seizure is provided, however, that "substantively unfair and simply mistaken deprivations of property interests can be prevented."[45] The Court reasoned that the constitutional right to a prior hearing does not merely ensure that "abstract fair play" will guide government activities.[46] The concrete embodiment of that right, as enunciated by the Court, mandates that there be *no* arbitrary encroachments upon the enjoyment of property rights. For while an award of damages may to some extent remedy an unjust deprivation, the individual's right to procedural due process—which would have guarded against that encroachment—will have been irretrievably lost.[47]

The Court noted, however, that in order for the constitutional guarantee of a prior hearing to attach, the interest involved must be a " 'significant property interest.' "[48] Thereafter, the fact that appellants may have been in

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Another New York court found tools of trade to be "special property" requiring prior notice due, inter alia, to "the effect upon the debtor of the deprivation of the use of the property pending the outcome of the lawsuit." Cedar Rapids Eng'r Co. v. Haenelt, 68 Misc. 2d 206, 209, 326 N.Y.S.2d 653, 657 (Sup. Ct. 1971), aff'd, 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (3d Dep't 1972). In Kosches v. Nichols, 68 Misc. 2d 795, 327 N.Y.S.2d 968 (Civ. Ct. 1971), the court limited Sniadach to the necessities of life, i.e., those goods used "personally rather than for a commercial enterprise." Id. at 797, 327 N.Y.S.2d at 970.

Following Laprease, section 7102 of the New York C.P.L.R. was amended to require that replevin orders issue only "upon such terms as may be required to conform to the due process of law requirements of the . . . constitution of the United States." N.Y. C.P.L.R. § 7102(d)(1) (McKinney Supp. 1972). The amended provision has been criticized for its "Olympian generality," as "no criteria are set forth to guide the judge in making this [constitutional] determination." J. McLaughlin, 1972 Supplementary Practice Commentary to N.Y. C.P.L.R. § 7102, at 125 (McKinney Supp. 1972).

42. 407 U.S. 67 (1972).

43. Id. at 76.

44. Id. at 80, quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

45. 407 U.S. at 81.

46. Id. at 80-81.

47. Id. at 81-82. The Court indicated that it " 'has not . . . embraced the general proposition that a wrong may be done if it can be undone.' " Id. at 82, quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972).

48. 407 U.S. at 86, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971). The Court paid little attention to the contention that the appellants, who had signed conditional sales contracts, did not have legal title to the goods, concluding that their interests in the continued "possession and use" of the chattels was adequate to invoke due process safeguards, "substantial [installment] payments" having been made. Id. at 86-87; see Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring). That the deprivation was a temporary one presented no difficulty for the Court since it had previously determined

default, and might have no valid defense, would not mitigate the constitutional requirement. The fact that a "significant property interest" was at stake was sufficient to invoke the protection of constitutional safeguards.[49]

The Court justified its reliance upon *Sniadach* by noting that the principles there enunciated were not to be construed as limited to situations involving necessities of life.[50] Emphasizing that prior Supreme Court due process cases did not differentiate between types of property involved,[51] the Court concluded that "[i]t is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary.' "[52]

The impact of the holding, however, was softened by the Court's indication that in " 'extraordinary situations,' " outright seizures might be justifiable.[53] In such cases, however, competing governmental or public interests must be quite strong, with a "special need for very prompt action."[54] Such interests include government seizures to collect the internal revenue,[55] to meet war needs,[56] to protect the public against the possibility of a bank failure,[57] to protect the public health,[58] and to confer jurisdiction upon state courts.[59] However, the added costs of providing for a hearing prior to replevin seizures

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that a temporary, non-final deprivation might nonetheless be a "deprivation" in terms of the due process requirements of the fourteenth amendment. 407 U.S. at 84-85.

49. Id. at 87. "It is enough that the right to continued possession of the goods was open to some dispute at a hearing since the sellers of the goods had to show, at the least, that the appellants had defaulted in their payments." Id. at 87 n.17 (emphasis omitted).

50. 407 U.S. at 88-90.

51. Id. at 89. See e.g., Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941); United States v. Illinois Cent. R.R., 291 U.S. 457 (1934); Southern Ry. v. Virginia, 290 U.S. 190 (1933); Londoner v. City of Denver, 210 U.S. 373 (1908); Central Ry. v. Wright, 207 U.S. 127 (1907); Security Trust Co. v. City of Lexington, 203 U.S. 323 (1906); Hibben v. Smith, 191 U.S. 310 (1903); Glidden v. Harrington, 189 U.S. 255 (1903). But see Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

52. 407 U.S. at 90 (footnote omitted). Perhaps uncomfortable at the apparent abdication of the traditional balancing of interests test of due process (see note 10 supra and accompanying text; Comment, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Fordham L. Rev. 604, 607-609 (1969)) the Court qualified this statement, noting that while the relative weights of each of the competing interests was relevant to a determination of the requirements of due process, in property cases involving an interest not characterizable as "de minimis," some form of notice and hearing is necessary. 407 U.S. at 90 n.21 (emphasis omitted).

53. Id. at 90-91, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971); see note 22 supra and accompanying text; notes 55-59 infra and accompanying text.

54. 407 U.S. at 91.

55. See Phillips v. Commissioner, 283 U.S. 589 (1931).

56. See Stoehr v. Wallace, 255 U.S. 239 (1921); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921).

57. See Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).

58. See Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (mislabeled drugs); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (contaminated drugs).

59. See Ownbey v. Morgan, 256 U.S. 94 (1921).

clearly do not, in the eyes of the Court, outweigh constitutional rights.[60] Indeed, the Court, noting that the Bill of Rights and the due process guarantee were designed to protect the citizenry from the possibility that an extreme government concern for speed and efficiency might result in the deprivation of their rights,[61] concluded that the rights of creditors and the interests of states in protecting those rights must be subservient to the interests of debtors in maintaining continued possession of their chattels, at least to the extent of requiring some form of hearing prior to a seizure of the chattels.[62] Thus, the Court found the challenged replevin statutes were not drawn narrowly enough to limit their application to those situations in which the elimination of a prior hearing was constitutionally justifiable.[63]

As to the contention that appellants had waived their constitutional rights by signing a contract permitting the creditor to retake the goods upon a default by the debtor,[64] the Court indicated that this signified little more than an intent to do so upon the buyer's default. It did not indicate by what means the seller could regain possession of the goods,[65] and could hardly be construed as a waiver of constitutional rights.[66] That the waiver was contained in a contract of adhesion would similarly have militated against the Court's giving it effect.[67]

The dissent concentrated upon what it deemed the central issue in *Fuentes*. The property interest of the creditor is, in many cases, no less than that of the debtor.[68] Given the flexible nature of the due process requirements,[69] and

60. 407 U.S. at 90 n.22. The Court indicated, however, that "[l]eeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing . . . ." Id. at 97 n.33.

61. Id. at 90-91 n.22, citing Stanley v. Illinois, 405 U.S. 645, 656 (1972).

62. Id. at 92-93, 96-97.

63. Id. at 93. The Court also noted that the procedure constituted an abdication of a state's control over its own power. Id.

64. Id. at 94. That due process rights to notice and hearing may be waived, see D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 184-87 (1972); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964).

65. 407 U.S. at 95-96.

66. Id. As to criminal matters, the Court has indicated that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970) (footnote omitted). As to civil matters, there is a similar presumption against waiver. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Public Util. Comm., 301 U.S. 292, 307 (1937).

In the instant case "[t]he purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights. ". . . [A] waiver of constitutional rights in any context must, at the very least, be clear." 407 U.S. at 95 (emphasis omitted).

67. 407 U.S. at 95.

68. Id. at 102 (Burger, C.J., and White & Blackmun, JJ., dissenting).

69. Id. at 101-02; see Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); note 10 supra and accompanying text.

the fact that the Court's decision might result in a diminishing of the availability of credit, or an increase in the cost of securing credit,[70] justice and the economy would be better served by sustaining the constitutionality of the replevin provisions under consideration.[71]

Additionally, the dissent concluded that section 9-503 of the Uniform Commercial Code, which permits a secured party to regain possession of goods if this can be accomplished without a breach of the peace, lends the support of modern authorities to the ancient replevin remedy.[72]

A serious constitutional question left unanswered by *Fuentes*, however, is the fate of this Code provision.[73] While a private agreement providing for repossession would be immune from the requirements of due process, if the law aiding a repossessing creditor falls within the contemporary concept of "state action,"[74] then there would appear to be little doubt that the statute's failure to require notice and hearing prior to the authorized seizure of the collateral chattel could not withstand the due process mandate of *Fuentes*.[75]

*Fuentes* is likely to upset the delicate equilibrium that has become established between debtor and creditor over the course of decades;[76] even a short period

70. 407 U.S. at 103.

71. The likelihood of wrongful deprivation of property pursuant to these statutes is minimal because it is in the economic self-interest of creditors that transactions proceed smoothly. Id. at 100-01.

72. Id. at 103; see N.Y. U.C.C. § 9-503 (McKinney 1964).

73. State action depriving a person of a significant property interest without prior notice and hearing is violative of due process. 407 U.S. at 96-97. Section 9-503 of the Code appears to violate this principle.

74. The original concept of state action was rather limited. "The provisions of the Fourteenth Amendment . . . have reference to State action exclusively, and not to any action of private individuals." Virginia v. Rives, 100 U.S. 313, 318 (1897); see Civil Rights Cases, 109 U.S. 3, 11 (1883); Avins, "State Action" and the Fourteenth Amendment, 17 Mercer L. Rev. 352, 361 (1966). Within the last thirty years, a deluge of activities became " 'state action' because they used, in some way or another, government facilities, assistance, or officials to help accomplish their purpose." Id. at 363.

75. The argument can be made, however, that this provision does no more than codify prior common law which permitted the peaceful repossession of chattels. "It is generally agreed that when the buyer defaults, the seller may retake possession, provided that he can do so peaceably, and without violence . . . ." W. Prosser, Torts, § 22, at 119 (4th ed. 1971) (footnote omitted). Repossession might thus be regarded as involving only private parties. Several courts have so held recently. Kirksey v. Theilig, 41 U.S.L.W. 2325 (D. Colo. Nov. 30, 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (Ch. 1972). But see Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). In practical terms, however, creditors would no longer be secure in the remedy. If the debtor were to institute suit for conversion, the courts might not uphold the creditor's statutory or common law defense of peaceful repossession. See Shelley v. Kraemer, 334 U.S. 1, 17 (1948); cf. Reitman v. Mulkey, 387 U.S. 369 (1967).

76. In refusing to strike down a replevin provision, one pre-Fuentes court has indicated that it "does not feel that the security [available to creditors] . . . should be jeopardized by a sudden declaration of unconstitutionality of one of the remedies relied upon by sellers

of notice prior to the preseizure hearing mandated by *Fuentes* may send many unscrupulous debtors scurrying for cover with their wrongfully gained chattels. As a result, credit may become difficult for the average person to secure.[77]

A recent appellate division decision[78] underscores the likely detrimental effect of *Fuentes* upon the economy. The court in that case correctly found that *Fuentes* had eliminated any distinction between different forms of property. The chattels with which the court dealt were tools to be used in a commercial enterprise, a far cry indeed from the "specialized type of property" and "brutal need" which formed the basis of *Sniadach* and *Goldberg*.[79]

The dissent in *Fuentes* predicted that the decision "will have little impact" because the constitutional rights which the majority devoted so much effort to protect are admittedly capable of being contractually waived; it is likely, therefore, that in the future, creditors will merely make clear to purchasers that the form of repossession that they will undertake in the event of the buyer's default will not entail a prior hearing.[80] A noted commentator has indicated, however, that creditors will find "cold comfort" in contract clauses waiving the right of prior notice.[81] While such clauses may under unusual circumstances be sustained,[82] courts will be unlikely to consider them "voluntary" waivers.[83]

The potential impact of *Fuentes* upon the general economy is overwhelming. *Fuentes* has already, in its immediate wake, effected a "decimation of state statutes providing for summary seizure of a variety of debtor's goods;"[84] it casts a morbid pall over a broad spectrum of provisional remedies, including the

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in security transactions." Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 69, 280 A.2d 862, 864 (Dist. Ct. 1971).

77. 407 U.S. 67, 103 (1972) (dissenting opinion).

78. Cedar Rapids Eng'r Co. v. Haenelt, 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (3d Dep't 1972).

79. See notes 23, 24, 30 supra and accompanying text.

80. 407 U.S. at 102 (dissenting opinion).

81. J. McLaughlin, 1972 Supplementary Practice Commentary to N.Y. C.P.L.R. § 7102, at 125 (McKinney Supp. 1972).

82. E.g., D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); see note 64 supra and accompanying text.

83. See notes 66, 67 supra and accompanying text.

84. 41 U.S.L.W. 1071 (1972). Among the decisions striking down various state statutes are: Hall v. Garson, 468 F.2d 845 (5th Cir. 1972) (Texas statute authorizing a landlord lien and seizure of tenant's personal property for failure to pay rent); Schneider v. Margossian, 41 U.S.L.W. 2189 (D. Mass. Sept. 22, 1972) (prejudgment attachment); Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972) (distraint procedure); Etheredge v. Bradley, 41 U.S.L.W. 2246 (Alas. Oct. 27, 1972) (prejudgment attachment); Thorp Credit, Inc. v. Barr, 41 U.S.L.W. 2205 (Iowa Sept. 19, 1972) (replevin); Seattle Credit Bureau v. Hibbitt, 7 Wash. App. 219, 499 P.2d 92 (1972) (prejudgment attachment). It has also been held that a state-regulated utility may not terminate its services without adequate notice and hearing. Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972). However, a statute authorizing summary foreign attachment has been sustained as falling within the "extraordinary situation" exception to Fuentes. Gordon v. Michel, 41 U.S.L.W. 2264 (Del. Ch. Oct. 24, 1972); see notes 22, 59 supra and accompanying text.

procedural devices of attachment,[85] civil arrest,[86] temporary restraining orders,[87]

85. See note 84 supra. New York law, for example, provides that: "An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment." N.Y. C.P.L.R. § 6211 (McKinney 1963). The broad New York grounds for attachment, id. § 6201(1)-(7) (McKinney 1963); id. § 6201(7)-(8) (McKinney Supp. 1972), are, therefore suspect. The subdivisions may be classified in descending order of likely validity.

Section 6201(1) will survive constitutional scrutiny as it deals with foreign attachment. 407 U.S. at 91 n.23 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969). In both cases, the Court cited Ownbey v. Morgan, 256 U.S. 94 (1921). See generally Comment, Foreign Attachment after Sniadach and Fuentes, 73 Colum. L. Rev. 342 (1973).

Since § 6201(2), involving attachment of the property of a resident defendant who cannot be personally served despite diligent efforts to do so, also entails "attachment necessary to secure jurisdiction . . . [this provision] will probably be safe from constitutional infirmity." J. McLaughlin, 1972 Supplementary Practice Commentary to N.Y. C.P.L.R. § 6211, at 25 (McKinney Supp. 1972).

Sections 6201(3)-(6) & (8) (subdivision 8 was previously numbered 7), N.Y. C.P.L.R. § 6201(8) (McKinney Supp. 1972), "are primarily designed to serve the security purpose" of attachment, and as such must surmount a far greater hurdle. J. McLaughlin, 1972 Supplementary Practice Commentary to N.Y. C.P.L.R. § 6201, at 15 (McKinney Supp. 1972); see text accompanying note 62 supra.

Sections 6201(3) & (4), inasmuch as they comprise situations in which fraudulent intent is ascribed to the defendant, might validly be upheld as emergency measures. New York courts have been reluctant, in any event, to use the remedies. Elliot v. Great Atl. & Pac. Tea Co., 11 Misc. 2d 133, 171 N.Y.S.2d 217 (City Ct. 1957), aff'd, 11 Misc. 2d 136, 179 N.Y.S.2d 127 (1st Dep't 1958).

Sections 6201(5), (6) & (8) are, on their face, invalid as they encompass mundane circumstances, clearly not of the type envisaged by the Court in Fuentes when it noted that under "extraordinary" circumstances there need be no notice prior to a seizure of property. Fuentes v. Shevin, 407 U.S. 67, 90 (1972).

Section 6201(8) which allows attachment without notice where "there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit" has, in fact, been recently struck down as violative of due process. Richman v. Richman, 72 Misc. 2d 803, 339 N.Y.S.2d 589 (Sup. Ct. 1973).

Section 6201(7) permits attachment in an action based on a foreign judgment. While it might be argued that since the defendant has had his proverbial "day in court," the requirement of notice prior to the seizure might here be obviated, the Supreme Court has made it abundantly clear that the absence of a valid defense will not mitigate the requirement of prior notice. 407 U.S. 67, 87 (1972); see note 49 supra, and accompanying text. This provision it is submitted will thus not withstand constitutional attack. But see Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924); Langford v. Tennessee, 41 U.S.L.W. 2534 (W.D. Tenn. Mar. 27, 1973).

Thus, it has been indicated that "the practitioner would be well advised to proceed on notice to the defendant in all attachment cases unless he is persuaded that the risk that the defendant will flee the jurisdiction or remove the property is sufficiently severe as to warrant taking the constitutional gamble which Fuentes creates." J. McLaughlin, 1972 Supplementary Practice Commentary to N.Y. C.P.L.R. § 6211, at 25 (McKinney Supp. 1972).

86. "The provisional remedy of arrest in civil actions is designated to insure the court's control over the defendant's person so that a judgment ultimately rendered, may, where proper, be enforced by imprisonment of the defendant." H. Wachtell, New York Practice

temporary receiverships[88] and lis pendens,[89] as well as replevin which is "not technically a 'provisional remedy.' "[90] Furthermore, its holding has been generalized beyond commercial matters.[91] This vast impending upheaval in the

under the CPLR 200 (3d ed. 1970). Notice is not presently required. N.Y. C.P.L.R. § 6111 (McKinney Supp. 1972).

Section 6101(1) which provides that an order of arrest may be granted "where there is a cause of action for the conversion of personal property, or for fraud or deceit," is unconstitutionally over-broad on its face, since if a seizure of property presumptively requires prior notice, a fortiori would the seizure of the defendant's person; see text accompanying note 63 supra.

Section 6101(2) which permits arrest under certain circumstances where the defendant is a non-resident, or is about to flee the jurisdiction, may be valid, reasoning by analogy to attachments for the purpose of conferring jurisdiction. See note 85 supra.

87. "If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice." N.Y. C.P.L.R. § 6313 (McKinney 1963). This provision will escape constitutional condemnation since its scope almost definitionally comprises " 'extraordinary situations' " of the type excepted by Fuentes from its notice requirement. See text accompanying note 53 supra. It may be noted that preliminary injunctions may not issue without notice to the defendant, N.Y. C.P.L.R. § 6311 (McKinney Supp. 1972), and are thus unaffected by Fuentes

88. A temporary receiver may be appointed by the court "[u]pon motion of a person having an apparent interest in property which is the subject of an action . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." N.Y. C.P.L.R. § 6401(a) (McKinney 1963). There has been some controversy as to whether there is presently a requirement of notice, D. Kochery, Practice Commentary to N.Y. C.P.L.R. § 6401, at 223-24 (McKinney 1963), but the practice has been to give notice to all parties, H. Wachtell, supra note 86, at 218. Due process is, therefore, satisfied. See Jennings v. Mahoney, 404 U.S. 25 (1971).

89. Lis pendens (notice of pendency) is a provisional remedy for the plaintiff which provides constructive notice to non-parties of the pendency of an action involving property. "A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he were a party." N.Y. C.P.L.R. § 6501 (McKinney 1963). The effective period of a valid notice of pendency is three years from the time of the filing. Id. § 6513. Insofar as a notice of pendency may be effective for as long as thirty days prior to the service of a summons upon the defendant, id. § 6512, it may be in violation of the mandate of Fuentes.

90. H. Wachtell, supra note 86, at 223.

91. It has been held, citing Fuentes, "that the Articles of the Louisiana State Bar Association (Article 15, Section 8), insofar as they allow the suspension of an attorney from the practice of law because of his conviction of a 'serious crime' without affording him a prior hearing on the issue are in violation of the due process provisions of the United States Constitution . . ." Louisiana State Bar Ass'n v. Ehmig, 41 U.S.L.W. 2485 (La. Feb. 19, 1973). In Geisinger v. Voss, 352 F. Supp. 104 (E.D. Wis. 1972), the convening of a three-judge court was ordered to determine the constitutionality of a provision permitting an ex parte order requiring a husband to leave his home during the pendency of divorce proceedings. "There is an old saw that a man's house is his castle. If modern times will not permit him moats and battlements, it still remains, I strongly suspect, that the constitution insists that he be allowed, except in exceptional circumstances, a few words before the sheriff escorts him out the door." Id. at 111.

law could surely not have been intended by the Supreme Court, and it is hoped that a clarification limiting the scope of *Fuentes*, perhaps by broadening the class of state interests sufficient to dispense with prior notice, will be forthcoming.

**Criminal Procedure—Right to Counsel—*Wade-Gilbert* Exclusionary Rules Held Not to Apply to Pre-Indictment Showup.**—When petitioner and a companion were stopped by police and asked for identification, petitioner produced traveller's checks and a Social Security card in the name of "Willie Shard." Other papers of "Willie Shard" were found in the possession of his companion. Petitioner at first explained that the checks were play money, and later, that he had won them in a crap game. Both men were arrested and taken to the station where the arresting officers learned that, on the previous day, one Willie Shard had reported that two men had robbed him. Shard was brought to the station, and upon entering the room in which the two suspects were seated, identified them as the robbers. Petitioner had not been told that he might have counsel at the identification confrontation, and he requested none. Six weeks later, both men were indicted. A pre-trial motion to suppress the identification evidence was denied, and at trial Shard identified the defendants as the robbers, and testified about the previous identification as well. Both defendants were convicted.[1] The Illinois appellate court[2] rejected petitioner's[3] contention that Shard's testimony had been improperly admitted under *United States v. Wade*[4] and *Gilbert v. California*.[5] Relying on Illinois precedent,[6] that court held that *Wade* and *Gilbert* did not apply to identification confrontations conducted before indictment, and affirmed the conviction.[7] On certiorari, the United States Supreme Court affirmed, holding that the sixth amendment right to counsel did not attach until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"[8] and that therefore the *Wade-Gilbert* exclusionary rules did not apply. *Kirby v. Illinois*, 406 U.S. 682 (1972).

A discussion of a criminal defendant's right to counsel must begin with the

1. Kirby v. Illinois, 406 U.S. 682, 686 (1972).
2. People v. Kirby, 121 Ill. App. 2d 323, 257 N.E.2d 589 (1970).
3. The conviction of Kirby's companion was reversed because Shard's identification testimony was the product of a concededly unlawful arrest and detention. People v. Bean, 121 Ill. App. 2d 332, 257 N.E.2d 562 (1970). Kirby's arrest, however, was based on probable cause since in addition to possession of the checks, which he surrendered voluntarily to the officer, he gave conflicting explanations. People v. Kirby, 121 Ill. App. 2d 323, 327-28, 257 N.E.2d 589, 592 (1970). The lawfulness of Kirby's arrest was not before the Supreme Court. Kirby v. Illinois, 406 U.S. 682, 684 n.1 (1972).
4. 388 U.S. 218 (1967); see text accompanying notes 61-82 infra.
5. 388 U.S. 263 (1967); see text accompanying note 75 infra.
6. People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969).
7. People v. Kirby, 121 Ill. App. 2d 323, 329, 257 N.E.2d 589, 592-93 (1970).
8. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

landmark decision of *Powell v. Alabama*.[9] That case recognized that the due process clause of the fourteenth amendment[10] requires a state to appoint counsel in a capital case if the defendant is either unable to employ counsel or incapable of making his own defense.[11] The Court added that counsel must be afforded not only at trial, but at such time before trial so as to provide "effective aid in the preparation and trial of the case."[12] A pre-trial opportunity for investigation and preparation was termed a "critical period of the proceedings,"[13] for the right to a fair hearing would be hollow without the opportunity for an intelligent defense to be prepared by the "guiding hand of counsel."[14] Powell's right to counsel was secured by the due process clause as essential to a fair hearing, but since *Gideon v. Wainwright*[15] made the sixth amendment guarantee of counsel[16] applicable to the states,[17] it is that amendment which defines the right to counsel both in federal cases directly and in state cases, through the due process clause. This distinction had importance only on the type of case in which counsel was guaranteed;[18] whenever the right existed, it operated during the pre-trial "critical period," as well as at trial. Having recognized the right, courts were faced with the task of deciding when the "critical" time began.

In time, there evolved three distinct classes of cases dealing with the time of attachment of the right to counsel. The first line of cases, like *Powell*, viewed the right to counsel in its traditional role as guardian of a fair trial or an

9. 287 U.S. 45 (1932).

10. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Reviewing statutes of the Revolutionary period which altered the common law, the Court demonstrated that the right to counsel is essential to a fair hearing, which is in turn a requisite for "due process of law." 287 U.S. at 60-70.

11. Id. at 71. Besides indigency, the Court mentioned illiteracy and feeble-mindedness as circumstances calling for the appointment of counsel. Id.

12. Id. The state had appointed counsel on the morning of trial. Id. at 56.

13. "[D]uring perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." Id. at 57.

14. Id. at 69. In Avery v. Alabama, 308 U.S. 444, 446 (1940), it was said that denial of an opportunity for pre-trial consultation would make the appointment of counsel a "sham".

15. 372 U.S. 335 (1963).

16. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend VI.

17. 372 U.S. at 342.

18. The concept of "due process of law" limited the right to counsel in state trials to capital cases. Betts v. Brady, 316 U.S. 455, 471 (1942), overruled by Gideon v. Wainwright, 372 U.S. 335 (1963). But cf. Moore v. Michigan, 355 U.S. 155 (1957). The sixth amendment, however, guaranteed counsel to federal defendants in non-capital cases as well. Johnson v. Zerbst, 304 U.S. 458 (1938).

effective hearing.[19] In *Hamilton v. Alabama*[20] a due-process right to counsel was held to exist at arraignment under Alabama procedure. Picking up the word "critical" from *Powell*, the Court found this arraignment a "critical stage in a criminal proceeding"[21] because "[a]vailable defenses may be . . . irretrievably lost, if not then and there asserted . . . ."[22] *White v. Maryland*[23] likewise found a due-process right to counsel at a "preliminary hearing," which was considered a "critical stage" because a plea was entered before a magistrate.[24] The "critical stage" test was recently reaffirmed in *Coleman v. Alabama*,[25] which involved a "preliminary hearing."[26] Despite the fact that Alabama excluded whatever had occurred at the hearing in absence of counsel from use at trial,[27] counsel's presence at the hearing was held "essential to protect . . . against an erroneous or improper prosecution."[28] This stage was therefore "critical" and counsel guaranteed.[29] It was irrelevant that this hearing had occurred before indictment.[30] The inquiry remained whether counsel's presence was necessary to preserve the right to a fair trial.

In the second line of cases, the Supreme Court considered the point at which counsel is guaranteed in connection with the admissibility of confessions. The argument raised was that the use of incriminating statements at trial would be violative either of due process of law[31] or the sixth amendment[32] if the statement was made after a request for counsel had been denied, or after counsel should have been appointed. Consequently, the Court had first to determine *when* counsel was guaranteed. In *Crooker v. California*[33] the defendant had been booked, and, after his request for counsel had been denied, confessed voluntarily.[34] Since the defendant had had some legal education and was aware of his right to remain silent,[35] he was capable of protecting his own interests, and counsel was therefore not required under the rationale of the *Powell* case. The prejudice resulting from counsel's absence at the time of confession was,

19. See note 10 supra.

20. 368 U.S. 52 (1961).

21. Id. at 53.

22. Id. at 54.

23. 373 U.S. 59 (1963) (per curiam).

24. Id. at 60.

25. 399 U.S. 1 (1970).

26. Unlike the "preliminary hearing" in White, which involved entering a plea before a magistrate, the purpose of this hearing was solely to see if there was sufficient evidence to present the case to a grand jury, and to fix bail, if necessary. Id. at 8; see text accompanying notes 23-24 supra.

27. Id. at 9.

28. Id. Counsel may expose a fatal weakness in the prosecution's case, lay the basis for later impeachment, make use of discovery or make effective arguments for bail. Id.

29. Id. at 9-10.

30. See id. at 8. But see id. at 22-23 (Burger, C. J., dissenting).

31. E.g., Spano v. New York, 360 U.S. 315, 320 (1959).

32. E.g., Massiah v. United States, 377 U.S. 201, 203-04 (1964).

33. 357 U.S. 433 (1958), overruled by Miranda v. Arizona, 384 U.S. 436 (1966).

34. So the Court found. 357 U.S. at 438.

35. Id. at 440.

the Court held, not so great as to render its use at trial "fundamentally unfair."[36] In *Spano v. New York*[37] the defendant raised the same argument, and attempted to distinguish *Crooker* on the ground that the return of an indictment against him had made his right to counsel absolute.[38] The Court did not hold that the indictment triggered the right to counsel, but held the confession involuntary, and therefore inadmissible on traditional due process grounds.[39] The two concurring opinions, however, would have found a right to counsel. Mr. Justice Douglas emphasized that at the time of confession Spano was not merely a suspect, but the "accused"[40] and especially needed counsel's protection against a "secret inquisition" which might make the trial a sham.[41] Mr. Justice Stewart similarly thought that the indictment initiated those criminal proceedings during which "the accused has an absolute right to a lawyer's help . . . ."[42]

*Massiah v. United States*[43] was the first case to find that the use at trial of incriminating statements made in counsel's absence but at a time when his presence was guaranteed was a violation of the sixth amendment.[44] Citing the two concurring opinions in *Spano*, the Court considered the case to be governed by the *Powell* line of authority,[45] and found that the point at which the evidence was obtained by electronic eavesdropping was a "critical stage."[46] Massiah was, at this point, free on bail under indictment,[47] but the Court did not say that indictment—or any other fact—automatically triggered the critical stage.

However, *Escobedo v. Illinois*[48] expressly declared that the fact of indictment or other formal charge was not decisive on the question of the critical stage.[49] That case held that when the pre-trial process "shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a a confession— . . . ."[50] the sixth amendment right to counsel attaches,[51] and

36. Id.; see Cicenia v. Lagay, 357 U.S. 504 (1958), overruled by Miranda v. Arizona, 384 U.S. 436 (1966), wherein similar reasoning was applied to a confession made before arraignment. Mr. Justice Douglas, however, dissented in Crooker on the theory that a guarantee of counsel would be a good "procedural safeguard against coercive police practices." 357 U.S. at 443 (footnote omitted).

37. 360 U.S. 315 (1959).

38. Id. at 320.

39. Id.; see Brown v. Mississippi, 297 U.S. 278 (1936).

40. 360 U.S. at 325 (concurring opinion).

41. Id. at 326 (concurring opinion).

42. Id. at 327 (concurring opinion).

43. 377 U.S. 201 (1964).

44. Id. at 206. This was a federal case.

45. Id. at 204-05. It should be noted that, unlike Powell, whatever prejudice counsel's absence caused Massiah did not go to the matter of preparation and investigation.

46. Id. at 205.

47. Id. at 201.

48. 378 U.S. 478 (1964).

49. Id. at 485-86.

50. Id. at 492.

51. Id. Gideon v. Wainwright, 372 U.S. 335 (1963), had incorporated this guarantee into

therefore a confession obtained after a denial of counsel during the accusatory process is inadmissible.[52] The Court felt that even though Escobedo was not *formally* accused, he was, in the eyes of his interrogators, "the accused," and was therefore under great pressure to confess his guilt.[53] Furthermore, since he could not know the legal implications of his confession, counsel's advice was at this time critical to him.[54] Thus, the Court found that the "accusatory" or "focusing" period, which, for Escobedo, began without formal accusation, commenced the critical stage.[55]

The decision in *Miranda v. Arizona*,[56] two years later, went further. The Court ruled that once a suspect is in custody, or "otherwise deprived of his freedom of action in any significant way,"[57] he must be informed of his right to have counsel present during interrogation and if he desires counsel's presence, no interrogation consonant with the sixth amendment may occur until counsel is secured.[58] *Miranda* was a fifth amendment case,[59] but it used the right to counsel to safeguard the privilege against self-incrimination.[60]

The third line of cases in which the Supreme Court has found a right to counsel during pre-trial proceedings concern the lineup. In *United States v. Wade*,[61] the defendant attacked his conviction for bank robbery principally[62] on the ground that in-court eyewitness identification should have been excluded. He claimed that an earlier identification by the same witness had been made at a post-indictment lineup conducted without notice to defendant's counsel.[63]

The governing principle was clear: counsel is assured at any "critical stage of the proceedings," which was defined to be the point at which "counsel's absence might derogate from the accused's right to a fair trial."[64] The Court then found identification confrontations[65] to be "riddled with innumerable

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the due process clause of the fourteenth amendment. All cases discussed hereinafter involve the guarantee as incorporated.

52. 378 U.S. at 490-91.

53. Id. at 485; cf. Spano v. New York, 360 U.S. 315, 325-26 (1959) (Douglas, J., concurring).

54. 378 U.S. at 486. His admission of complicity in the murder plot was, under Illinois law, as damaging as a confession of the deed itself. Id.

55. Id. at 490-91. But see id. at 493-94 (Stewart, J., dissenting).

56. 384 U.S. 436 (1966).

57. Id. at 445.

58. Id. at 474.

59. Id. at 477. Malloy v. Hogan, 378 U.S. 1, 8 (1964), had incorporated this privilege into the fourteenth amendment due process clause.

60. 384 U.S. at 466, 477.

61. 388 U.S. 218 (1967).

62. The Court rejected Wade's claim that participation in the lineup violated his privilege against self-incrimination, since exhibition for observation is not compulsion to give evidence of a "testimonial or communicative" nature, which alone is protected. Id. at 221-22, citing Schmerber v. California, 384 U.S. 757, 761 (1966).

63. 388 U.S. at 219-20.

64. Id. at 226 (footnote omitted).

65. These include the lineup, at which several persons are shown to the eyewitness or victim, and the showup, at which only the one suspected by the police is presented.

dangers"[66] to a fair trial, the chief vice being that the "suggestion inherent" in such confrontations often leads to mistaken identity.[67] The subtle suggestion that the authorities believe a particular participant in a lineup to be guilty may be communicated, intentionally or not, in many ways.[68] A witness is likely to be unaware that what he believes to be his objective judgment has been affected by the suggestion, or an excited victim may be only too ready to accept it.[69] In any event, a witness is unlikely to retract an identification once made.[70] Because of this serious danger, and because the defense can seldom reconstruct any unfairness at trial,[71] the post-indictment lineup was found to be a "critical stage of the prosecution,"[72] at which counsel is guaranteed.[73] To enforce its findings, the Court ruled that the prosecution would be prohibited from introducing into evidence any in-court identification of a defendant by a witness who had viewed such an unconstitutional lineup, unless the prosecution could establish that the in-court identification had a basis independent of such lineup.[74] In the companion case of *Gilbert v. California*,[75] the Court also applied the *Wade* rules to trials in state courts.

*Wade* restricted its holding to post-indictment confrontations,[76] yet contained language which seemed to encompass *any* pre-trial identification confrontation.[77] As a result, lower courts found diverse approaches and answers to

66. 388 U.S. at 228.

67. Id.

68. Id. at 227-39. Any circumstance which singles one participant out from the others is suggestive: a gross dissimilarity in appearance or bearing; making one participant alone wear clothing or speak words known to have been used by the criminal; or asking the witness if he "is sure it wasn't Number 3?" The suggestion may be quite unintentional, i.e., an officer may betray surprise if the witness fails to recognize the one he thought guilty. A showup, by its very nature, is even more suggestive. See generally, Williams & Hammelmann, Identification Parades, Parts I & II, 1963 Crim. L. Rev. (Eng.) 479-90, 545-55; Annot., 39 A.L.R.3d 487 (1971); Comment, The Right to Counsel During Pretrial Identification Proceedings—An Examination, 47 Neb. L. Rev. 740 (1968).

69. 388 U.S. at 230.

70. Id. at 229.

71. Id. at 230.

72. Id. at 237.

73. Id. at 236-37. By his presence alone, counsel may help avert suggestive practices, and, if they occur, he can testify to them. Id. at 238. It is unclear if counsel's role was envisaged to be more than that of a mere witness. But cf. id. at 256-59 (White, J., dissenting in part). On counsel's role see generally Comment, Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution, 29 U. Pitt. L. Rev. 65 (1967); 77 Yale L.J. 390 (1967).

74. 388 U.S. at 240. The free use of "independent basis" is a common way for courts to avoid the impact of Wade. See United States v. Phillips, 427 F.2d 1035, 1042 (9th Cir. 1970) (dissenting opinion). On ways of avoiding Wade in general, see Comment, The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts, 36 U. Chi. L. Rev. 830 (1969).

75. 388 U.S. 263, 272 (1967). It also excluded per se evidence of the previous lineup identification. Id. at 273.

76. 388 U.S. at 236-37.

77. See, e.g., id. at 227, where the Court said: "[T]he principle of Powell v. Alabama and

the question of *Wade*'s applicability to formal[78] confrontations conducted prior to the lodging of formal charges.

Most courts which considered the question concluded with little discussion that *Wade* was not meant to be restricted to post-indictment confrontations.[79] For example, the California Supreme Court in *People v. Fowler*[80] argued that an identification held before indictment is just as "critical" as one held after, since the fact of indictment in no way affects the dangers which led *Wade* to call such a lineup a "critical stage of the proceedings."[81] The court noted that the protection afforded by *Wade* could effectively be circumvented if *Wade* were limited to the post-indictment stage, since all lineups might then be conducted prior to indictment.[82]

Despite such reasoning, several other courts considered *Wade* to apply only to post-indictment situations.[83] One judge, having noted that the lineups in *Wade* and *Gilbert* occurred after the court had appointed counsel, suggested that *Wade* limited its holding to post-indictment lineups in view of the practical difficulties of appointing counsel before indictment, and of the prejudice resulting to an innocent suspect from delaying the confrontation until counsel is secured.[84]

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succeeding cases requires that we scrutinize any pretrial confrontation . . . ." (emphasis deleted).

78. The Wade opinion suggested that "countervailing policy considerations" in a given factual situation might produce a different result. Id. at 237. See generally Comment, Due Process Considerations in Police Showup Practices, 44 N.Y.U.L. Rev. 377, 385-89 (1969). Consequently, on-the-scene confrontations occurring moments after the crime have generally been held exempt from Wade, because the exigent circumstances justify any suggestiveness, and the short lapse of time makes for correct identification. See, e.g., Russell v. United States, 408 F.2d 1280 (D.C. Cir.), cert. denied, 395 U.S. 928 (1969).

79. E.g., Virgin Islands v. Callwood, 440 F.2d 1206 (3d Cir. 1971); United States v. Ayres, 426 F.2d 524 (2d Cir.), cert. denied, 400 U.S. 842 (1970); United States v. Phillips, 427 F.2d 1035 (9th Cir.), cert. denied, 400 U.S. 867 (1970); Long v. United States, 424 F.2d 799 (D.C. Cir. 1969); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (Ct. Spec. App. 1969); Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970); Thompson v. State, 451 P.2d 704 (Nev. 1969); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); In re Holley, 268 A.2d 723 (R.I. 1970); Martinez v. State, 437 S.W.2d 842 (Tex. Crim. App. 1969); State v. Hicks, 76 Wash. 2d 80, 455 P.2d 943 (1969).

80. 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).

81. Id. at 342, 461 P.2d at 649, 82 Cal. Rptr. at 369.

82. Id. at 344, 461 P.2d at 650, 82 Cal. Rptr. at 370.

83. E.g., State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969) (en banc); Perkins v. State, 228 So. 2d 382 (Fla. 1969) (per curiam); People v. Palmer, 41 Ill. 2d 571, 244 N.E.2d 173 (1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970).

84. Hayes v. State, 46 Wis. 2d 93, 108-09, 175 N.W.2d 625, 633 (1970) (concurring opinion).

Still other courts[85] adopted a third, *Escobedo*-type approach. These courts interpreted *Wade* to apply once the proceedings had reached the "accusatory," as distinguished from the "investigatory," stage.[86] It was felt that the danger of suggestion which *Wade* sought to obviate would be lessened if the police did not themselves think the suspect guilty. But when the suspect was in fact (though not necessarily formally) accused of the crime, the danger of suggestion became significant.[87]

The Supreme Court in *Kirby v. Illinois*[88] has settled the question by holding that the *Wade-Gilbert* exclusionary rules apply only to identification confrontations held "after the onset of formal prosecutorial proceedings."[89] Following *Wade*, Mr. Justice Stewart, writing for the plurality, first noted that the showup in no way compromised the privilege against self-incrimination because Kirby was not thereby compelled to give evidence of "testimonial significance."[90] Justice Stewart concluded that this fact meant that *Miranda* was not in point, inasmuch as that case was "based exclusively" on protection of that privilege.[91] *Miranda* had, of course, found a right to counsel during any *in custody* interrogation.[92]

The Court determined that only decisions construing the right to counsel were relevant and cited a line of such cases stretching back to *Powell* to support its conclusion that the "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated . . . ."[93] This period, according to the Court, was not limited to trial, but included the "formal charge, preliminary hearing, indictment, information, or arraignment."[94] The Court recognized that *Escobedo* was "[t]he only seeming deviation"[95] from this

85. E.g., United States v. Davis, 399 F.2d 948 (2d Cir.), cert. denied, 393 U.S. 987 (1968); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

86. United States v. Davis, 399 F.2d 948, 952 (2d Cir.), cert. denied, 393 U.S. 987 (1968); People v. Hutton, 21 Mich. App. 312, 322-23, 175 N.W.2d 860, 865 (1970); Hayes v. State, 46 Wis. 2d 93, 97, 175 N.W.2d 625, 627 (1970).

87. See generally Comment, The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts, 36 U. Chi. L. Rev. 830, 838-43 (1969). A Miranda-type approach, under which custody is suggestive enough to trigger the "critical stage," was rejected by one of these courts. United States v. Davis, 399 F.2d 948, 951-52 (2d Cir.), cert. denied, 393 U.S. 987 (1968); cf. Stovall v. Denno, 388 U.S. 293, 302 (1967), which said that a showup, though widely condemned, is not so unnecessarily suggestive in itself as to violate due process.

88. 406 U.S. 682 (1972).

89. Id. at 690.

90. Id. at 687, quoting United States v. Wade, 388 U.S. 218, 222 (1967).

91. Id. at 688; see text accompanying notes 59-60 supra. In answer, Mr. Justice Brennan called this conclusion "erroneous," since Wade had "specifically relied" on Miranda. 406 U.S. at 692 n.2 (dissenting opinion).

92. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

93. 406 U.S. at 688.

94. Id. at 689.

95. Id. But cf. Reece v. Georgia, 350 U.S. 85 (1955).

"firmly established"[96] principle, since it had held that the right to counsel applied before "formal prosecutorial proceedings." But the Court distinguished that case on the ground that "the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such,"[97] but to safeguard the privilege against self-incrimination.[98] For this purpose, *Escobedo*'s "accusatory" stage was indeed "critical" to the defendant; but, the Court implied, where the aim is to "vindicate the . . . right to counsel as such," the fact of accusation is irrelevant.[99]

The Court justified the line it drew at "the onset of formal prosecutorial proceedings"[100] by distinguishing between the investigatory and prosecutorial stages of the pre-trial proceedings.[101] Three distinct reasons were suggested for the validity of the division. First, the Court noted that the "explicit guarantees of the Sixth Amendment" apply only to " 'criminal prosecutions.' "[102] Why a prosecution within the meaning of the amendment commences only at *formal* proceedings was not explained beyond the circular reasoning that the start of "judicial criminal proceedings" is "the starting point of our whole system of adversary criminal justice."[103] If the sixth amendment demands that formal proceedings define the commencement of "criminal prosecutions," *Escobedo* is not merely distinguishable because it had a different purpose, but it is incorrect. This is necessarily so since that case explicitly declared that the lack of a formal charge "should make no difference" as to the attachment of the right to counsel.[104] The Court was silent on another reading of the constitutional guarantee: that it attaches when one is "the accused," as suggested in several previous right to counsel cases.[105] The Court did not distinguish these precedents on the ground that they were concerned with the

96. 406 U.S. at 688-89.

97. Id. at 689.

98. Id.; cf. Escobedo v. Illinois, 378 U.S. 478, 492 (1964). The Court further stated that Johnson v. New Jersey, 384 U.S. 719, 733-34 (1966), had limited Escobedo to its facts. 406 U.S. at 689.

99. Id. The dissent objected to the implication that the line of right to counsel cases—especially Wade—aimed to " 'vindicate the constitutional right to counsel as such.' " 406 U.S. at 693 n.3 (Brennan, J., dissenting). The dissenters argued that Wade, for example, aimed at lessening the hazards to a fair trial which result from mistaken identification. Id. at 695-98 (Brennan, J., dissenting).

100. Id. at 690.

101. "In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings." Id.

102. Id. at 690. But, as the dissent points out, the speedy-trial provision of the same amendment has been said to attach upon "formal restraint," i.e., arrest. Id. at 698-99 n.7, citing United States v. Marion, 404 U.S. 307, 325 (1971).

103. 406 U.S. at 689.

104. Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

105. E.g., id.; Spano v. New York, 360 U.S. 315, 325-26 (1959) (Douglas, J., concurring); Crooker v. California, 357 U.S. 433, 443 (1958) (Douglas, J., dissenting), overruled by Miranda v. Arizona, 384 U.S. 436 (1966).

dangers to the privilege against self-incrimination, to which one accused by his interrogators is particularly vulnerable. Instead, Justice Stewart stated broadly that the sixth amendment is applicable to criminal prosecutions "alone."[100] Yet, the Court cited with approval[107] *Coleman v. Alabama*,[108] which found a right to counsel to exist at a preliminary hearing which occurred *before* any formal "prosecution."[109] It may be that the terms "adversary judicial proceedings" and "formal prosecutorial proceedings" were used interchangeably so as to include the *Coleman* situation within the "prosecution." Nor did the Court attach any significance to the words "for his *defence*" in the sixth amendment. According to *Wade*, these words meant that counsel was guaranteed "whenever necessary to assure a meaningful 'defence.' "[110]

A second reason suggested for an investigation-prosecution distinction was that the start of "judicial criminal proceedings" sets in motion the complex machinery of the law, which may bewilder the uncounselled.[111] This consideration would be akin to a "critical stage" inquiry, which took into account the peril to a fair trial, and the ability of counsel to lessen the peril.[112] Yet *Kirby* breaks sharply with prior cases in that it does not inquire into the "criticalness" of a particular pre-trial stage, but asks merely if the "prosecution" has begun. In addition, "the intricacies of substantive and procedural criminal law"[113] pose a danger to the uncounselled only in the context of judicial confrontations.[114] Where, however, the counselless encounter is an identification confrontation, the danger is not the *arcana* of the law, but a mistaken identification, as *Wade* explained at length.[115]

Lastly, the Court suggested a wish not to hamper police by imposing a duty to provide counsel while they are investigating an unsolved crime.[116] This consideration, although eminently valid, need not obtain in every case.[117] It

106. 406 U.S. at 690. But Mr. Chief Justice Burger seemed to equate formal accusation with the start of a "criminal prosecution." Id. at 691 (concurring opinion).

107. Id. at 689 (concurring opinion).

108. 399 U.S. 1 (1970); see text accompanying notes 25-30 supra.

109. 399 U.S. at 8-10. Both concurring opinions in Coleman, however, were based on the finding that the hearing, despite the lack of formal prosecution, was nonetheless part of the "criminal prosecution" of the sixth amendment. Id. at 11-12 (Black, J., concurring); Id. at 14 (Douglas, J., concurring).

110. United States v. Wade, 388 U.S. 218, 225 (1967).

111. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." 406 U.S. at 689.

112. See, e.g., United States v. Wade, 388 U.S. 218, 227 (1967).

113. 406 U.S. at 689.

114. See cases discussed in text accompanying notes 20-30 supra.

115. United States v. Wade, 388 U.S. 218, 227-33 (1967).

116. "When a person has not been formally charged with a criminal offense, Stovall [v. Denno] strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime." 406 U.S. at 691 (emphasis deleted).

117. The police had completed their investigation at the time of Kirby's showup; allowing

might therefore have been preferable had the Court recognized this possibility as one of the "countervailing policy considerations" spoken of in *Wade*,[118] instead of defining "investigation" overbroadly.

The Chief Justice, concurring, agreed that counsel is guaranteed only when one "becomes the subject of a 'criminal prosecution.' "[119] He did not, however, concede that this necessarily includes every judicial confrontation. He cited his *Coleman* dissent, in which he had argued that the preliminary hearing, held before indictment, was therefore not part of a "criminal prosecution."[120] Mr. Justice Powell gave no reason for his concurrence in the result beyond his disinclination to "extend" *Wade*.[121]

Mr. Justice Brennan, the author of *Wade*, writing for three dissenters,[122] chided the plurality opinion for " 'mere formalism.' "[123] The dissent did not enter upon an examination of the wording of the sixth amendment; rather, *Wade* was thought to compel a contrary result. That decision was shown to have required counsel at post-indictment lineups not because of the words "criminal prosecutions," but because of the dangers inherent at identification encounters to a defendant's right to a fair trial. The "initiation of adversary judicial criminal proceedings" was considered completely irrelevant to the protection of this right, according to the dissent, since the identical hazards attend a pre-indictment confrontation.[124] Also significant in the dissenters' opinion was the fact that the Court had never adverted to a pre/post-indictment division in *Coleman* or similar cases.[125] Although the *Coleman* confrontation was held before "formal prosecutorial proceedings," the Court decided the question on the basis of *Wade*'s non-retroactivity, thereby impliedly admitting its applicability.[126] The dissent seemed to favor a more flexible, "critical stage" test, which would guarantee counsel at any formal[127] post-arrest identification confrontation.

The *Kirby* decision may be less instructive for its holding than for its approach to defendants' rights in criminal cases. The Court may have felt that *Wade* had, in the main, accomplished its work of lessening unfair aspects

for counsel before they contacted Shard would not have interfered with "prompt and purposeful investigation." The situation is different, however, in an on-the-scene confrontation, when the police are truly still investigating. Cf. Russell v. United States, 408 F.2d 1280 (D.C. Cir.), cert. denied, 395 U.S. 928 (1969).

118. 388 U.S. 218, 237 (1967).

119. 406 U.S. at 691 (Burger, C.J., concurring).

120. For him, formal accusation seems to commence the "prosecution." Coleman v. Alabama, 399 U.S. 1, 23 (1970) (dissenting opinion).

121. 406 U.S. at 691 (Powell, J., concurring).

122. Justices Douglas and Marshall joined. Mr. Justice White, a dissenter in Wade, dissented separately on the sole ground that Wade and Gilbert "govern this case and compel reversal." Id. at 705 (White, J., dissenting).

123. Id. at 699 (Brennan, J., dissenting).

124. Id. at 696-97 (Brennan, J., dissenting).

125. Id. at 701 (Brennan, J., dissenting).

126. Id. at 701-02 n.11 (Brennan, J., dissenting).

127. Id. at 699 (Brennan, J., dissenting).

of identification procedures,[128] and that any unfairness during the pre-indictment stage could better be handled on a case-by-case, due process basis than by a broad prophylactic rule.[129] However, in abandoning without comment the "critical stage" analysis of forty years' standing in favor of a formalistic approach to a complex question,[130] *Kirby* seems to indicate a fundamental shift of emphasis away from an activist Court.

**Securities—Merger Partner Not Liable as Matter of Law for Misleading Statements in Proxy Solicitation of Acquired Company.**—Having previously obtained summary judgment against Gains Guaranty Corp. (Gains), an acquired corporation, for violations of the federal securities law committed in the course of a merger with Life Investors, Inc. (Life Investors),[1] plaintiffs brought a derivative action[2] seeking summary judgment against Life Investors, the acquiring corporation, under sections 10(b) and 14(a) of the Securities Exchange Act of 1934.[3] Plaintiffs contended that both the merger agreement

128. Wade was aimed partly at inducing local police to overhaul lineup procedures, since it stated that reforms which eliminate the risk of suggestion might remove a lineup from the "critical stage." United States v. Wade, 388 U.S. 218, 237 (1967). In such a reformed jurisdiction, therefore, counsel would not be required. For the Kirby dissenters, this suggestion was another proof of the irrelevance, for Wade, of indictment. 406 U.S. at 697 (Brennan, J., dissenting).

129. The Court expressly left open the question whether Kirby's showup was so unnecessarily suggestive and conducive to mistaken identification as to violate due process. 406 U.S. at 691 n.8. This is a ground of attack independent of a right to counsel claim. See Foster v. California, 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293 (1967).

130. The Court adopted, as to identification confrontations, Mr. Justice Stewart's position that a "criminal prosecution" commences upon "formal prosecutorial proceedings." In authoring Kirby, however, he did not make clear why, on the wording of the sixth amendment, the starting point should be different in case of a judicial confrontation, as in Coleman. See text accompanying notes 25-30 supra. Nor did he account for the irrelevance of formal proceedings in the attachment of the speedy-trial provision (see United States v. Marion, 404 U.S. 307, 325 (1971)); rather, he seemed to apply the same standard of attachment to all sixth amendment guarantees. 406 U.S. at 690.

1. Beatty v. Bright, 318 F. Supp. 169 (S.D. Iowa 1970), wherein the plaintiffs had successfully argued that the solicitation in question violated section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9(a) and was materially misleading because the proxy material failed to adequately describe two lawsuits which had been filed in an Iowa state court as derivative actions on behalf of Gains and its shareholders and further because the proxy "instructed Gains shareholders that their management recommended approval of the sale without also informing them that their officers and directors had collectively a very keen self-interest in securing approval of the sale." Id. at 171.

2. For the basis of plaintiffs' standing, which is not discussed in the noted case, reference must be made to the prior Beatty case wherein it was stated that plaintiffs were suing both derivatively on behalf of Gains and as representatives of the class of certain of its shareholders. Id.

3. The court explicitly considered only the plaintiffs' contentions under section 14(a)

which provided Life Investors with certain rights to approve all actions and documents relating to the merger, and Life Investors activities under the agreement, rendered Life Investors equally liable with Gains for misleading proxy statements. In denying the motion, the United States District Court for the Southern District of Iowa held that neither the agreement nor the activities established such control over the proxy statement as to make the acquiring corporation or its officers liable as a matter of law for the misleading statements contained therein. *Beatty v. Bright*, 345 F. Supp. 1188 (S.D. Iowa 1972).

When the Securities Exchange Act was adopted in 1934,[4] section 14(a) was included to assure complete and candid disclosure by those seeking corporate control through proxy solicitation.[5] Section 14(a) stemmed from a congressional belief that "[f]air corporate sufferage is an important right that should attach to every equity security bought on a public exchange."[6] The section was intended to promote the free exercise of stockholder voting rights by mandating that proxies could be solicited only when accompanied by information which disclosed the true nature of the proposals for which the proxy was sought.[7] As construed by the Supreme Court, it was the congressional intent to ensure that "shareholders are able to make an informed choice when they are consulted on corporate transactions."[8]

In implementing this policy, Congress gave broad powers to the Securities and Exchange Commission. These powers were inherent in the "public interest" standards of the Act.[9] It was determined, moreover, that anyone who

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and Rule 14a-9. Concerning the 10(b) claim, it held that: "What has been said above relating to Section 14(a) and the proxy statement applies with equal force to the attempt to impose liability on the Life Investors defendants under Section 10(b)." 345 F. Supp. at 1193.

4. Act of June 6, 1934, Pub. L. No. 73-291, § 14(a), 48 Stat. 895 (codified at 15 U.S.C. § 78n(a) (1970)).

5. This purpose was noted in the prior Beatty case (318 F. Supp. at 171), citing Greater Iowa Corp. v. McLendon, 378 F.2d 783, 795 (8th Cir. 1967). See Orrick, The Revised Proxy Rules of the Securities and Exchange Commission, 11 Bus. Law 32 (1956); Von Mehren & McCarroll, The Proxy Rules: A Case Study in the Administrative Process, 29 Law & Contemp. Prob. 728, 729 (1964).

6. H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934). For a discussion of this congressional purpose by the Supreme Court see J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

7. S. Rep. No. 792, 73d Cong., 2d Sess. (1934). See also Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), where the Supreme Court held that to permit all liability to be foreclosed on the basis of a finding that a merger was fair would be to substitute judicial appraisal of the merger's merits for the informed vote of the stockholders and therefore frustrate congressional intent. Id. at 381.

8. 396 U.S. at 385.

9. Section 14 sets forth the "public interest" standard: "It shall be unlawful for any person . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit . . . any proxy . . . in respect of any security . . . registered pursuant to section 781 of this title." 15 U.S.C. § 78n(a) (1970).

solicited, or who "*permit[ted] the use of his name to solicit any proxy*" would be subject to standards thus established.[10]

Guided by these principles, the courts have employed various tests to effect the congressional purpose. Once it is established that the language complained of has a material effect on the outcome of the proxy solicitation,[11] courts have applied a "solicitation test" in determining a defendant's liability for misleading statements. Active solicitation of the proxy by the offending party, or as a minimum, some publication or correspondence on his part, coupled with an intent or continuous purpose to solicit proxy votes, has most frequently been required.[12]

In *Iroquois Industries, Inc. v. Syracuse China Corp.*[13] the United States Court of Appeals for the Second Circuit dismissed a count charging the defendant with violation of section 14(a) of the Act. It was determined that, as the complaint failed to aver "that any defendant solicited 'any proxy or consent or authorization in respect of any security,' "[14] a cause of action had not been stated.[15] *Robbins v. Banner Industries, Inc.*[16] was decided on the same

10. Id. (emphasis added).

11. Materiality was not at issue. 345 F. Supp. at 1191. It has generally been held that to show materiality the defect complained of must be of "such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970). In establishing this very broad test, the Supreme Court had disagreed with the conclusion of the court of appeals that if a merger would have been approved had the proxy statement not been misleading, no liability would exist. Therefore, actual causality was not required. Id. at 384-85. Furthermore, neither scienter nor reliance is essential to a finding of materiality of a misleading proxy statement. Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. 66, 97-98 (E.D. N.Y. 1969); Richland v. Crandall, 262 F. Supp. 538, 553 n.12 (S.D.N.Y. 1967). For other cases establishing rules regarding the materiality of a proxy statement see Gould v. American Hawaiian Steamship Co., 331 F. Supp. 981, 997 n.18 (D. Del. 1971) (omissions or misstatements not individually material might be material in the aggregate); Berman v. Thomson, 312 F. Supp. 1031, 1035 (N.D. Ill. 1970) (good faith of directors not to be considered); Evans v. Armour & Co., 241 F. Supp. 705, 709-10 (E.D. Pa. 1965) (information not available at the time of the solicitation cannot be considered); Shvetz v. Industrial Rayon Corp., 212 F. Supp. 308, 310 (S.D.N.Y. 1960) (materiality not determined by effect on person of limited education).

12. Iroquois Indus., Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969), and Robbins v. Banner Indus., Inc., 285 F. Supp. 758 (S.D.N.Y. 1966), employ the "active solicitation" test. Other cases have expanded upon the "active solicitation" test so as to encompass publication with intent or continuous plan to solicit proxies. See Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966); Brown v. Chicago Rock I. & Pac. R.R., 328 F.2d 122 (7th Cir. 1964); SEC v. Okin, 139 F.2d 87 (2d Cir. 1943); Union Pac. R.R. v. Chicago & N.W. Ry., 226 F. Supp. 400 (N.D. Ill. 1964).

13. 417 F.2d 963 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970). The section 14(a) claim was not the principal issue in this case. The extent to which section 10(b) was applicable to tender offer solicitations was the main question which the court resolved by refusing to extend section 10(b) protection to the plaintiffs since they had been neither purchasers nor sellers of stock. Id. at 965-70.

14. Id. at 970.

15. Id.

16. 285 F. Supp. 758 (S.D.N.Y. 1966). This was a complaint brought derivatively and

grounds. There a district court dismissed a complaint alleging violations of section 14(a) on the part of one who was not a director and who was alleged only to have aided and abetted the acts complained of, without actual solicitation of proxies.[17] The court pointed out that: "There is no allegation that [the defendant] solicited any proxies . . . . We thus cannot regard the complaint as either stating a violation of section 14(a) or adequately apprising [the defendant] of the acts for which he is being asked to account."[18]

In a 1964 SEC Release, the Commission bolstered this "solicitation test" by stating that:

> The application of Section 14(a) of the Securities Exchange Act and of the proxy rules is keyed to the concept of "solicitation" of a proxy. If an activity constitutes solicitation it is subject to the rules, otherwise not.[19]

Some courts have expanded the "active solicitation" test to encompass activities such as publication of writings and documents preliminary to the actual proxy issuance, requiring only that there have been an intent to eventually solicit proxies. For example, in *SEC v. Okin*,[20] the court found that a letter written to stockholders by Okin reporting that he had brought an action to enjoin the wasting of corporate assets, coupled with his intention to continue his plan to solicit proxies, was sufficient to grant equitable relief.[21] The court in *Studebaker Corp. v. Gittlin*[22] similarly found liability where authorization from 42 shareholders to inspect the record of the company's list of shareholders was held to have been obtained in violation of the proxy rules.[23]

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representatively by the plaintiff Robbins against the directors of Banner and one Friedman alleging that the defendant directors issued stock to themselves without fair consideration, and that Friedman was an aider and abettor. Id. at 760.

17. Id. at 761-62.

18. Id. The court also required that a causal connection exist between the proxy solicitation and the damage asserted. Id. at 762. This requirement does not represent the majority view. See Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. 66 (E.D.N.Y. 1969); Union Pac. R.R. v. Chicago & N.W. Ry., 226 F. Supp. 400 (N.D. Ill. 1964).

19. SEC Securities Act Release No. 7208 (Jan. 7, 1964), 2 CCH Fed. Sec. L. Rep. ¶ 24,107 at 17,619 (1964). "Solicitation" is defined by the Commission as: "(i) Any request for a proxy whether or not accompanied by or included in a form of proxy; (ii) Any request to execute or not to execute, or to revoke, a proxy; or (iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." SEC Rule 14a-1, 17 C.F.R. § 240.14a-1(f) (1972).

20. 139 F.2d 87 (2d Cir. 1943).

21. Id.

22. 360 F.2d 692 (2d Cir. 1966). As was the case in Iroquois Indus., Inc. v. Syracuse China Corp., 417 F.2d 693 (2d Cir. 1969), discussed in note 13 supra, the alleged proxy rules violation—which the court disposed of with dispatch—was not the principal issue in this case. Whether the "anti-injunction statute," 28 U.S.C. § 2283 (1970), was applicable to an action seeking to restrain securities law violations was the court's main problem. 360 F.2d at 696-97.

23. 360 F.2d at 696. The specific violation complained of was Gittlin's failure to register his solicitation of the 42 shareholders, which he had obtained for the purpose of qualifying

There the defendant had announced his intention to solicit proxies for the corporation's forthcoming annual meeting and the shareholder lists were to be used in making that solicitation.[24] The court relied on the opinion of the assistant general counsel of the SEC who reported that "the Commission believes § 14(a) should be construed, in all its literal breadth, to include authorizations to inspect stockholders lists, *even* in cases where obtaining the authorizations was *not* a step in a planned solicitation of proxies."[25] Following Judge Hand's "continuous plan" concept and his warning in *Okin* that "one need only spread the misinformation adequately before beginning to solicit, and the Commission would be powerless to protect shareholders,"[26] the Second Circuit pointed out that "the very fact that a copy of the stockholders list is a valuable instrument to a person seeking to gain control . . . is a good reason for insuring that shareholders have full information before they aid its procurement."[27]

Expanding the "solicitation test," *Union Pacific R.R. v. Chicago & North Western Ry.*[28] held that a broker's report which concluded that one merger offer was more attractive than a competing offer was a "communication to the stockholders 'reasonably calculated to result in the procurement [or] withholding . . . of a proxy' within the meaning of [the Securities & Exchange Commission's regulations]."[29] This was so because the report was in a form advisory to Rock Island stockholders: "The shareholder may be led readily to assume, contrary to fact, that the predictor has special knowledge or unique information to bear out fully his prediction, and be induced to rely upon a supposed expert judgment of the mysteries of finance."[30]

In the companion case, *Brown v. Chicago, Rock Island & Pacific R.R.*,[31] the *lack* of an intent to solicit a proxy was the sole factor considered by the court in reaching its decision. There it was found that a newspaper advertisement by the Union Pacific Railroad was not an unlawful proxy solicitation because no proxy statement accompanied the advertisement which was directed to the public as well as to Rock Island's shareholders.[32] The advertisement was, effectively, a

under a state statute to inspect shareholders lists, with the Securities and Exchange Commission. Id. at 694.

24. Id.

25. Id. at 695 (emphasis added) (footnote omitted). The courts to date have not construed section 14(a) with the breadth desired by the Commission in this opinion.

26. SEC v. Okin, 132 F.2d 784, 786 (2d Cir. 1943).

27. 360 F.2d at 696.

28. 226 F. Supp. 400 (N.D. Ill. 1964).

29. Id. at 408.

30. Id. at 409.

31. 328 F.2d 122 (7th Cir. 1964). These two cases arose from the competing proposals before the directors of the Rock Island railroad for merger with either the Union Pacific or the North Western railroads.

32. Id. at 125. The advertisement which was entitled "'Rock Island Stockholders, Employees, Shippers, [and] Midwest Communities will all benefit more if the Rock Island merges with the Union Pacific'" argued that "a Union Pacific-Rock Island merger would result in lower costs to shippers, better service to communities and substantial benefits to Rock Island stockholders." Id. "It also said that the North Western offer . . . would result in decreased employment and payroll cuts." Id.

counter argument to applications of the Chicago & North Western Railroad to the Interstate Commerce Commission for approval of its proposed acquisition of Rock Island's stock. The Court said: "[I]t appears that Union Pacific's purpose in publishing the advertisement was to inform the public and motivate it to oppose North Western's applications before the Commission. This is a valid purpose inasmuch as the Commission is required to consider the public interest and interested members of the public may be given an opportunity to be heard . . . ."[33] Thus, the advertisement was not deemed to be a proxy solicitation.

Three significant securities cases decided after 1967 may be read not only as a continuation of the law set forth in preceding cases, but, taken together, they seem to establish a trend toward stricter interpretation of the securities regulations and a broadening of defendant liability.

In *Myzel v. Fields*,[34] an action was brought pursuant to Rule 10b-5 to set aside a sale of stock of a closed corporation where favorable future prospects for the company and the true identity of the purchasers were alleged to have been secreted.[35] The court found the defendants liable for violation of Rule 10b-5 and refused to permit them to escape liability under the "good faith" provision[36] of section 20 of the Securities Exchange Act.[37]

*Escott v. BarChris Construction Corp.*,[38] which was based on an interpretation of section 11 of the 1933 Act,[39] also imposed liability on one found to be responsible for publishing misleading material in connection with a securities transaction. In *BarChris* a director of the company was held liable solely because he

33. Id. A similar question of solicitation under the proxy rules arose in 1966, but was never judicially resolved. See Wall St. J., Sept. 28, 1966, at 10, col. 2; W. Cary, Cases and Materials on Corporations 274 (4th ed. abr. 1970).

34. 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

35. Id. at 726-28.

36. Section 20 of the Securities Exchange Act of 1934, 15 U.S.C. § 78t (1970) provides:

"(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter . . . shall also be liable . . . to the same extent as such controlled person . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act . . . constituting the violation . . . .

"(b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter . . . through or by means of any other person."

37. 386 F.2d at 738-39. In dealing with this provision, the court found that "where the evidence shows the 'controlling person' is the actual intended beneficiary of the stock purchase, 'control' under the Act does not require knowledge of the specific wrongdoing any more than a principal must know in advance of his agent's fraud." Id. at 738. Furthermore, the court of appeals in Myzel criticized the district court for requiring not only knowledge of the unlawful activities by the defendant, but also approval of the acts before responsibility would attach. The court found that "[s]uch requirements are neither explicit not [sic] implicit in the Act." Id. at 739.

38. 283 F. Supp. 643 (S.D.N.Y. 1968). The case involved a spurious class action by buyers of debentures against the defendant issuer for damages which resulted from false statements and material omissions in the prospectus contained in the registration statement. The district court held that the defendant failed to prove both the due diligence asserted and any causal relationship between the damage suffered and the false statements. Id. at 682-92, 703-04.

39. Securities Act of 1933 § 11, 15 U.S.C. § 77k (1970).

had signed a debenture registration statement containing false statements and material omissions.[40] Whether or not he read or understood the offending prospectus was immaterial since the court imposed a standard of reasonable care on directors to investigate the facts presented in such situations;[41] a standard the court found him to have failed to meet.

Dealing specifically with a proxy solicitation, and basing its decision on alleged violations of Rule 14a-9, the court in *Gerstle v. Gamble-Skogmo, Inc.*[42] held that the defendant had become a fiduciary to the shareholders of General Outdoor Advertising Co., Inc. and as such was liable for failure to disclose appraised values of certain of General's properties which it intended to sell.[43] The court pointed out that a literal reading of section 14(a) and Rule 14a-9 revealed that *negligence alone* in connection with proxy solicitation is sufficient to establish the liability of the controlling company.[44]

*Miller v. Steinbach*,[45] decided in 1967 by the United States District Court for the Southern District of New York, was the first case which actually applied a strict liability test under section 14(a). There it was determined that strict liability must be imposed upon anyone who officially participates in the use of misleading proxy material. Neither the "active solicitation" nor "intent to solicit" tests were considered as the court completely ignored the defendant's

40. 283 F. Supp. at 685-86.

41. Id. at 684-92. For an interesting and rational discussion of BarChris, see BarChris: A Dialogue on a Bad Case Making Hard Law, 57 Geo. L.J. 221 (1968), wherein it was said that "[e]ssentially, all the plaintiff in a section 11 action must prove is that the registration statement, when it became effective, contained misstatements or omissions that were material." Id. at 225. If this is the case, it would seem that no considerations exist to dissuade the courts from extending similar liability to the proxy rules.

42. 298 F. Supp. 66 (E.D.N.Y. 1969). This action was brought by minority shareholders of an advertising corporation which was merged into its dominating majority stockholder. The plaintiffs sought restitution for damages alleged to have resulted from a proxy statement which did not disclose either the appraisals of the book value of the outdoor advertising plants acquired by the majority through the merger, or that offers to purchase for a price exceeding that book value had been received from other outside sources. Id. at 73-74. The court, in granting the relief sought, concluded that given a choice the reasonable stockholder with all the facts before him would not have voted for a merger depriving him of a participation in substantial profits realizable upon the sale of remaining outdoor advertising plants. Id. at 98.

43. Id. at 99. Skogmo's intent to sell also was undisclosed. Id.

44. Id. at 97. In treating the issues of this case the court found that "[t]he defendant offered no proof showing absence of either reliance or causation on the part of the [plaintiff]. . . ." Id. at 98. It noted further that a stockholder may bring an action under Rule 14a-9 on behalf of stockholders who as a body may have been deceived by the proxy statement although he himself may not have been misled. Id. at 96. Therefore the materiality of the omission and the existence of a duty to disclose known facts were the tests which the court employed. Id. at 98-99. Much of the court's language strongly suggested strict liability: "Negligence alone either in making a misrepresentation or in failing to disclose a material fact in connection with proxy solicitation is sufficient to warrant recovery." Id. at 97.

45. 268 F. Supp. 255 (S.D.N.Y. 1967). This case actually dealt with the question of whether a stockholder of a merged corporation had capacity to sue derivatively on behalf of the merged corporation and against directors and officers of the surviving corporation. Id. at 259-61.

purpose, holding that "[s]ince a cause of action has been stated under § 14(a) and Rule 14a-9, no discussion is necessary herein with respect to the directors . . . since all such defendants allegedly either solicited proxies or *permitted the use* of their names to solicit proxies within the meaning of § 14(a)."[46] This trend towards strict construction of the liability imposed by all securities regulations, including the proxy rules, provided the judicial setting in which *Beatty v. Bright*[47] was decided.

In *Beatty*, the court treated only one issue:

> [W]hether an acquiring company in a merger agreement which provides that all actions, proceedings, instruments and documents relating to the agreement shall be "approved as to legal form, content and sufficiency" by counsel for the acquiring company, becomes as responsible for misleading proxy statements as the soliciting management of the acquired company when it exercises the right of approval to the extent shown by the foregoing factual statements.[48]

The materiality of the offending omissions was conceded,[49] and there was no allegation that the defendants had themselves solicited any proxy.[50] The only basis for finding defendants liable, therefore, was the contention that Life Investors either contributed misleading proxy material or approved of its presence in the solicitation. The plaintiffs, in their motion for summary judgment, asked the court to rule that, as a matter of law, Life Investors, the acquiring corporation, was liable under section 14(a) and Rule 14a-9 because it had authority to control the wording of the illegal proxy statement and did so.[51] It was their position that Life Investors had jointly prepared the proxy statement with Gains and that: " 'Life Investors, through its attorneys, failed to recognize a material fact and failed to insist upon the inclusion of this material fact in the proxy statement . . . [therefore] Life Investors has violated Section 14(a) and Rule 14a-9(a). . . . Once having begun to approve "instruments and documents—as to legal form, content and sufficiency," Life Investors unquestionably and beyond all doubt brought itself within the purview of [the Act].' "[52]

The court, however, refused to follow either the trend towards strict liability evidenced in the recent decisions, or plaintiff's reading of the Act. It stated that: "[T]he contract provision, and Life Investors' activities under it do not

46. Id. at 278 (emphasis added) (footnote omitted). Motion for summary judgment for the defendants was thus denied. Note that the court applied the regulations literally, which suggests liability for even minimal participation in a deceptive proxy solicitation. 15 U.S.C. § 78n(a) (1970); see text accompanying notes 9-10 supra.

47. 345 F. Supp. 1188 (S.D. Iowa 1972).

48. Id. at 1191. The dearth of judicial guidance on this question adds to the importance of Beatty.

49. Id. at 1188-89. The court did not question the materiality of the provisions, merely noting that in the earlier case the court held the proxy statement was misleading and violated the proxy rules. Id.

50. Id. at 1191. It should also be noted that the plaintiffs specifically did not claim that Life Investors had voting control over Gains. Id.

51. Id. at 1189.

52. Id. at 1192.

establish *such control* over the Gains proxy statement to make Life Investors and its principal officers liable for misleading statements contained therein as a *matter of law*."[53] Distinguishing the cases relied on by plaintiffs on the grounds that the acquiring company had either voting control or actual control,[54] the court refused to hold that Life Investors' " 'ironclad contractual right of control over the content of the proxy statement . . . was every bit as effectual as voting control would have been . . . .' "[55] The decision pointed out that "[i]t would be reasonable to infer that these provisions were placed in the agreement to protect Life Investors, not to assume responsibility for the wording of the proxy statement."[56] Despite the broad terms of the provision,[57] and the number and nature of Life Investors' contributions in the preparation and approval of the proxy statement,[58] the court did not find sufficient control over the process to make Life Investors liable as a matter of law for the misleading statements.[59] The *Beatty* court refused to extend the recent trend to the ultimate rule that one should be liable as a matter of law for misleading proxy material for which he authorizes publication or permits the use of his name It is this refusal, more than the actual result of the case, that makes *Beatty* significant.

The distinctions drawn by the *Beatty* court to the cases upon which the plaintiffs relied should be examined. Although it did not specifically hold in order to find liability that the control existing in the acquiring company need be voting control, *Mills v. Electric Auto-Lite Co.*[60] was distinguished on the ground that in that instance the acquiring company had actual control over the acquired company.[61]

*Gerstle v. Gamble-Skogmo, Inc.*[62] was found to be unpersuasive for the same

53. Id. (emphasis added).

54. The court perfunctorily distinguished the Mills and Gerstle cases as well as Colonial Realty Corp. v. Baldwin-Montrose Chem. Co., 312 F. Supp. 1296 (E.D. Pa. 1970), finding that "[p]laintiffs have cited no authorities in which acquiring companies have been held responsible for misleading proxy statements under similar factual situations." 345 F. Supp. at 1192.

55. 345 F. Supp. at 1191.

56. Id. at 1192. This language implies a consideration of the defendant's motive in controlling material which appeared in the solicitation. If so deemed, the determination would be one of fact and strict liability as a matter of law could rarely be found.

57. Id. at 1189.

58. Twenty-two actions by Life Investors were reported in the record, including approval of mailing the proxy and permission of the use of its name therein even though information which the court found necessary, and which Life Investors had recommended be included in the proxy, was omitted from the mailed statement. Id. at 1189-91.

59. Id. at 1192.

60. 396 U.S. 375 (1970); see notes 7-8, 11 supra.

61. 345 F. Supp. at 1192. In Mills the minority shareholders had brought suit derivatively and as a class to set aside a merger of Auto-Lite and Merganthaler Linotype Co., which before the merger owned over half of Auto-Lite's stock. 396 U.S. at 377-78. The Supreme Court held that based on alleged violations of § 14(a) of the Act, a cause of action for dissolution of the merger existed. Id. at 381-85.

62. 298 F. Supp. 66 (E.D.N.Y. 1969); see notes 42-44 supra and accompanying text.

reason.[63] The *Beatty* court apparently did not consider that Life Investors might have had the fiduciary relationship to Gains shareholders which was found to exist in *Gerstle*. The literal reading of section 14(a) which resulted in *Gerstle*'s negligence test was also ignored by the *Beatty* court.[64] *Colonial Realty Corp. v. Baldwin-Montrose Chemical Co.*[65] was similarly distinguished; the acquiring corporation there had previously obtained working control of the company to be acquired.[66]

Both *BarChris*[67] and *Myzel*[68] were distinguished as not involving section 14 of the Securities Exchange Act.[69] This distinction seems to ignore the real significance of the cases, *i.e.*, that in *BarChris* an issuing director, once he signed the registration statement, was held to a duty to investigate the facts presented therein,[70] and in *Myzel* that the "good faith" provisions of section 20 did not provide a defense for securities law violations.[71]

Despite the persuasive language of *BarChris* and *Myzel*, the *Beatty* court apparently felt that sufficient control by Life Investors had not been shown to establish a violation as a matter of law, even though Life Investors manifestly had a greater part in the proxy publication than merely permitting the use of its name to solicit proxies in contravention of the securities regulations. This conclusion results in some significant observations to be drawn from *Beatty*.

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63. 345 F. Supp. at 1192.

64. In Gerstle it was said that "negligence alone . . . is sufficient to warrant recovery." 298 F. Supp. at 97; see notes 42-44 supra and accompanying text. Why the Beatty court ignored this language, in view of Life Investors' activities, is one of the perplexing questions about the decision.

65. 312 F. Supp. 1296 (E.D. Pa. 1970).

66. 345 F. Supp. at 1192. Colonial Realty concerned a proposed merger. The court held that the agreement therein would have increased the defendant's holdings of the acquired stock so as to give working control, and thus, the omission of these facts was misleading. 312 F. Supp. at 1299-1300.

67. 283 F. Supp. 643 (S.D.N.Y. 1968); see notes 38-41 supra and accompanying text.

68. 386 F.2d 718 (8th Cir. 1967); see notes 34-37 supra and accompanying text.

69. 345 F. Supp. at 1192.

70. 283 F. Supp. at 685-86. Although admittedly distinguishable from Beatty, the Beatty court might have seized the suggestion of strict liability which was apparent in the BarChris language. The New York court found that "[a]s a signer [of the registration statement, the defendant] could not avoid responsibility by leaving it up to others to make it accurate." Id. at 686. Further, the distinction made by the Beatty court seems less persuasive when one considers that the fundamental purpose of section 11 is to require full and truthful disclosure (id. at 686), the precise purpose of the proxy provisions.

71. 386 F.2d at 739. Since the Beatty court applied the same considerations to an imposition of liability for violations of section 10(b) (upon which Myzel's liability was founded) as for those it treated under section 14(a), the court could have noted that "good faith" (or provisions not intended to assume responsibility) likewise did not preclude a finding of liability. This would seem particularly appropriate since Life Investors not only knew of the contents of the offending material but also held and exercised the right to approve of its inclusion. At the very minimum the actions were "negligent" within the meaning of Gerstle. Compare note 58 with notes 44 & 64 supra. See also Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. 66 (E.D.N.Y. 1969). "[T]he precedents under Rule 10b-5 are in most cases applicable [to] violations of Rule 14a-9 [although] not limited by those precedents." Id. at 96.

Since there was no allegation that Life Investors solicited the proxies, solicitation and/or purpose to solicit proxies apparently were not required by the *Beatty* court in order to establish liability under section 14. The court thus based its decision strictly on the control exercised by the acquiring corporation over the proxy solicitation, while suggesting several alternatives that would establish sufficient control to find liability. Implicitly, the cases distinguished by the district court in *Beatty* do establish sufficent control to find liability as a matter of law. That is, the existence of voting control, working control, or a fiduciary relationship on the part of Life Investors apparently would have been sufficient to provide plaintiffs a basis for the relief they sought. Moreover, the *Beatty* court did not rule out the possibility that something less would also have sufficed to hold the defendants liable *in fact*. It is thus entirely possible that the facts of this case did establish defendant's liability; but the *Beatty* court held that this was a triable question, and hence plaintiffs' motion for summary judgment could not be granted.

The *Beatty* court should have gone further. A finding of strict liability of the acquiring corporation as a matter of law for any misleading material contained in a proxy solicitation in which it participates or permits the use of its name would have been desirable. Such a ruling would have provided the dual service of maximum protection to stockholders, and notice to the parties to a solicitation of precisely that for which they will be held accountable.[72] It would eliminate considerations of extent and degree of actual or implied control which are difficult to resolve and unnecessary to follow. Furthermore, this would be consistent with the almost universal belief that one should be responsible for that to which he officially gives his approval. The rights of acquiring corporations cannot be said to be less protected if these corporations are put on advance notice that they too will be held liable for misleading statements in a proxy solicitation to which they ascribe. Subterfuge by the parties in order to insulate the survivor would be eliminated, and the arguments against such strict liability which arose following the *BarChris* decision would not apply.[73]

Imposition of strict liability coincides with current market trends toward greater stockholder protection, satisfies the literal intent of Congress in enacting the securities provisions and is responsive to the growing concern for consumer welfare. Adoption of such a rule deserves judicial consideration in future cases of this nature.

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72. In this way the court would correct the objection in Robbins that the defendant was not apprised of that for which he would be held liable. See notes 16-18 supra.

73. The BarChris decision created a furor in the legal and securities communities. The prospect of its impact on the corporate world generally resulted in two fears which have since proved unfounded: first, that the new requirements in the filing of a prospectus would result in diminished financing available to corporations; and second, that prospective directors, wary of potential liability, would hesitate to assume directorships. See, e.g., Comment, Section 11 of the Securities Act: The Unresolved Dilemma of Participating Underwriters, 40 Fordham L. Rev. 869 (1972); Note, 43 N.Y.U.L. Rev. 1030 (1968).