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Case Notes

CASE NOTES

Constitutional Law—Mental Patients Have a Right to Notice and Hearing Before Seizure of Their Property.—Plaintiff, a non-adjudicated incompetent who had assets of less than $2500, was a patient at a state mental hospital. She challenged on due process and equal protection grounds a Pennsylvania statute[1] which enabled the state to seize, without notice or hearing, the property of non-adjudicated incompetent mental patients who had assets of less than $2500 and to apply them to the cost of their care in state hospitals. A three-judge district court held the statute unconstitutional as a denial of equal protection because it created two classes of mental patients, one class consisting of adjudicated incompetents and non-adjudicated incompetents with over $2500 in assets who were entitled to prior notice and hearing, and the other class consisting of non-adjudicated incompetents with assets under $2500, who were not. In addition, the court held that the statute violated the due process rights of patients who were not adjudicated incompetent by authorizing state seizure of their property without prior notice or hearing. *Vecchione v. Wohlgemuth,* 377 F. Supp. 1361 (E.D. Pa. 1974).

In Pennsylvania a person may statutorily be committed to a state institution either voluntarily or involuntarily. In the case of voluntary commitment, an application is made to the facility by the person seeking care who is thereupon examined and committed if found to be in need of care or observation.[2] In the case of involuntary commitment, a petition for commitment may be filed with the court by a relative or friend.[3] After notice, and a hearing, the court may order examination by a court-appointed physician and, if it is determined that such person needs care at a facility, he is committed.[4]

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1. Plaintiff challenged §§ 424 and 501 of the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§ 4424, 4501 (1969). § 424(1) allowed the authorized agent of the Department of Revenue to "without application to any court, take custody of, receive and manage in accordance with this section any money or other personal property in such person's possession at the time he is admitted to a facility . . . ." Id. § 4424(1). § 424(4) provided that: "Whenever the money and other personal property of [a mentally disabled person admitted or committed to a State operated facility] exceeds . . . ($2,500) in value, the revenue agent shall request the Department of Justice to apply for the appointment of a guardian . . . in accordance with the . . . 'Incompetents' Estates Act . . . .' " Id. § 4424(4). § 501 provided in pertinent part: "Whenever public funds are expended under any provision of this act on behalf of a mentally disabled person, the governmental body expending such funds may recover the same from such person . . . and for this purpose liability is hereby imposed upon such person . . . for all costs, payments or expenditures . . . ." Id. § 4501.

2. Id. § 4403 (1969). Commitment under this provision may not be for more than thirty days although successive applications for thirty day periods are allowed. A person committed under this section may be released not more than ten days after he has given written notice of his desire to leave the facility. Id. See also the similar procedure in New York, New York Mental Hygiene Law § 31.13 (McKinney Supp. 1974).

3. Pa. Stat. Ann. tit. 50, § 4406 (1969).

4. Id.

Under the procedure involved in *Vecchione,* the state revenue agent, without application to any court, could appropriate the property of committed persons with assets of less than $2500 and deduct costs for care and maintenance. When the patient was discharged, he received any property remaining after the state's deduction of its costs. However, these patients were afforded neither an accounting of the validity of the deductions nor an opportunity to contest them.[5]

The statute placed committed persons with assets over $2500 in a different category. These patients were entitled to notice and a hearing before the state could receive its costs for care of the patient since the state was required to apply for the appointment of a guardian to handle the estate.[6]

The court in *Vecchione* was faced with two constitutional arguments against the statute—one, that the equal protection clause was violated by this procedure, and the other, that by failing to provide notice or hearing before depriving the plaintiff of her property the due process clause was also violated. In deciding the plaintiff's equal protection claim, Judge Becker applied the rational basis test, under which the plaintiff will not prevail if the legislative classification has a reasonable relationship to the purpose of the statute.[7] The court first noted that the challenged procedure, when viewed in light of section 504(a) of the act which is "calculated to alleviate the harsh economic and psychological consequences to indigent mental patients of strict imposition of [liability] . . . appear[ed] counter-productive and internally inconsistent with the goals of the Act."[8] Judge Becker did not consider revenue raising[9] to be a valid justification for this procedure since the

5. Vecchione v. Wohlgemuth, 377 F. Supp. 1361, 1365 (E.D. Pa. 1974).

6. See note 1 supra. § 504(a) of the challenged statute allowed reduction of liability in certain instances. The Secretary of Public Welfare was authorized to reduce or discharge liability for costs of care if he was satisfied that imposition of liability would "create such a financial burden upon such mentally disabled person as to nullify the results of care, treatment, service or other benefits afforded to such person . . . ." Pa. Stat. Ann. tit. 50, § 4504(a)(1)(iv) (1969). Once the guardian was appointed the estate was handled in conformity with the Incompetents' Estates Act which provided for notice and a hearing before the state received its costs under § 501, set out in note 1 supra.

7. 377 F. Supp. at 1368; see Wyman v. James, 400 U.S. 309 (1971) (home visitation in connection with Aid to Families with Dependent Children program was a reasonable administrative tool); Dandridge v. Williams, 397 U.S. 471 (1970) (ceiling on grants to Families with Dependent Children program regardless of family size and actual need rationally related to state purpose of encouraging employment and avoiding discrimination between welfare families and families of working poor); Baxstrom v. Herold, 383 U.S. 107 (1966) (statute allowing commitment of prisoner nearing the end of a prison term without the jury review available to all other persons created an unreasonable classification for the purpose of determining mental illness). See also, Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 366-68 (1949); Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605 (1973) [hereinafter cited as Equal Protection]; Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1077-87 (1969).

8. 377 F. Supp. at 1368.

9. Revenue raising was not raised by the government as a justification of the statutory classifications. Id. at 1368.

classification "allow[ed] the Commonwealth to exercise stronger creditor's rights against competent patients . . . without any regard to the liability or financial capability of these patients to meet their obligations."[10] Moreover, the court found such differentiation arbitrary and rejected the presumption that mental patients are less capable of handling their assets than the public at large.[11] Finally, the court discussed the state's differentiation of patients in accordance with their assets, under which those with assets above $2500 were given an opportunity to resist imposition of liability through the mandatory hearing which the state provided, while those with assets below $2500 were never given the opportunity to argue imposition of liability since they were not entitled to a hearing.[12] Yet it is this class on which fell the heaviest burden of strict imposition of liability with corresponding harsh economic and psychological consequences.[13]

The court based its decision on the fact that the statutes in question did not meet even the minimal requirements of the rational basis test.[14] Although the government's burden of showing that there was a rational relationship

10. Id. at 1368-69; see notes 50-52 infra.

11. 377 F. Supp. at 1366-68. The court did not even appear to distinguish between adjudicated and non-adjudicated incompetents. The court based its finding, inter alia, on the testimony of two psychiatrists that mental patients similar to the plaintiff are generally as capable of handling their property as the public at large and that such control is therapeutic. Id. at 1367-68; see R. Allen, E. Ferster & H. Weihofen, Mental Impairment and Legal Incompetency 46-68, 89-90, 229 (1968). See also Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. pt. 1, at 262 (1961) (Statement of Dr. Thomas Szasz): "While the term 'mental illness' has . . . virtually an infinity of meanings, it can be confidently asserted that in most instances in which it is used nowadays . . . the patient's alleged mental illness most assuredly does not mean that his capacity to decide about matters of concern to him is significantly impaired." Counsel for the defendants had conceded that the plaintiff and mental patients in general are competent to handle their own funds. 377 F. Supp. at 1367.

Rejection of the presumption that mental patients are incapable of handling their affairs is not new in Pennsylvania. See In re Estate of Myers, 395 Pa. 459, 462, 150 A.2d 525, 526 (1959). Other jurisdictions have reached the same conclusion. See, e.g., Cal. Welf. & Inst'ns Code § 5331 (West Supp. 1974); Conn. Gen. Stat. Rev. § 17-206(b) (1974); N.Y. Mental Hygiene Law § 15.01 (McKinney Supp. 1974). Contra, Colo. Rev. Stat. Ann. § 71-1-11 (1963); id. § 71-1-26 (Supp. 1971) (together indicating that a commitment order is an automatic adjudication of incompetency); Wis. Stat. Ann. § 51.005 (1957) (commitment raises a rebuttable presumption of incompetency).

12. 377 F. Supp. at 1368. The court noted that a possible argument for the classification might stem from § 201 of the Incompetents' Estates Act, Pa. Stat. Ann. tit. 50, § 3201 (1969) which did not require appointment of a guardian for incompetents with assets of less than $2500. However, that statute required prior judicial approval of the receipt and use of any part of those assets. The cut-off of $2500 was made because it is difficult to find guardians to serve such small estates. Since the plaintiff in Vecchione did not seek appointment of a guardian but only a hearing, the rationale for the classification in the Incompetents' Estates Act was not applicable. In addition, the challenged procedure did not provide the judicial supervision which was required in the Incompetents' Estates Act. 377 F. Supp. at 1369.

13. See notes 6, 8 supra and accompanying text.

14. 377 F. Supp. at 1369; see note 7 supra and accompanying text.

between the legislation and the classes it created was not great,[15] the government did not sustain this burden. It is possible to argue that the court in *Vecchione* applied the rational basis test set out by the Supreme Court in *Reed v. Reed,*[16] rather than the more traditional test in this area.[17] Under the *Reed* test the burden is on the government to prove that the statute is not arbitrary and is reasonably related to its purpose, while under the more traditional test, the burden is on the plaintiff to show that the statute has no reasonable relationship to a valid state interest.[18] However, as the court in *Vecchione* noted, a possible state rationale for the statute—revenue raising—could not be achieved by this legislation since those with more money were given a greater opportunity to resist the state's seizure of the property.[19] After applying its rational basis test the court noted:

> Since the Act under challenge does not meet the minimum rationality test of the Equal Protection Clause, *a fortiori* it will not satisfy a stricter scrutiny test requiring a compelling state interest when there are suspect classifications or fundamental interests involved.[20]

However, although the court suggested that mental illness may be a suspect classification,[21] it has not yet been considered one by the Supreme Court, nor was there a fundamental right involved.[22] Yet, the court's apparent use of

15. See Equal Protection 612.

16. 404 U.S. 71 (1971). Under the Reed test "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " Id. at 76. For the Vecchione discussion of the rational basis test see 377 F. Supp. at 1368. But cf. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). See also Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute prohibiting the selling or giving of contraceptive devices to persons who were unmarried and who did not have a doctor's prescription held unconstitutional because similarly circumstanced people were treated differently); Gunther, The Supreme Court, 1971 Term—Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8-48 (1972); Equal Protection 614-38.

17. See note 7 supra.

18. Equal Protection 615-16.

19. 377 F. Supp. at 1368; see notes 9, 10 supra and accompanying text.

20. 377 F. Supp. at 1369 n.11. The court noted that there is some question on whether wealth is a suspect classification. Compare Boddie v. Connecticut, 401 U.S. 371 (1971) (state prohibited from barring access to divorce courts solely because of inability to pay court fees) and Griffin v. Illinois, 351 U.S. 12 (1956) (indigency not justifiable grounds for denying free trial transcript for appellate review) with San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth discrimination in real estate taxes as basis for public school financing alone not basis for strict scrutiny). See also Ross v. Moffitt, 417 U.S. 600 (1974) (indigent not entitled to court-appointed counsel for assistance in preparation of discretionary appeals); United States v. Kras, 409 U.S. 434 (1973) (indigent not denied equal protection by $50 filing fee requirement for discharge in bankruptcy).

21. 377 F. Supp. at 1369 n.11, citing Note, Mental Illness: A Suspect Classification? 83 Yale L.J. 1237 (1974).

22. See Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote a fundamental right); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel a fundamental right).

Reed appears to be a correct recognition that the rights of the committed are at least important, and subject to a test more stringent than rational basis.

The court next discussed the plaintiff's claim that she was denied procedural due process since she was not provided with notice or opportunity for a hearing. In his opinion, Judge Becker relied on recent cases in which the Supreme Court has extended the right to notice and hearing in such areas as garnishment of wages,[23] termination of welfare benefits,[24] and suspension of drivers' licenses.[25] However, in these cases the Supreme Court emphasized the fact that since basic needs such as food and shelter were involved, a hearing was essential before deprivation.[26] *Vecchione* may be distinguished. In *Vecchione* a hearing was provided before the loss of the fundamental right of personal liberty through commitment.[27] Once a person had been committed, he was provided with food and shelter, with the state seizure of his property a means of assuring his payment for such services. The court in *Vecchione* did not make this distinction.

After noting that the state had seized the plaintiff's only means of

23. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); see Scott v. Danahzer, 343 F. Supp. 1272 (N.D. Ill. 1972) (ex parte garnishment of non-wage assets); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (ex parte replevin statute); Swarb v. Lennox, 314 F. Supp. 1091 (1970), aff'd, 405 U.S. 191 (1972) (cognovit notes). See generally 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); Note, Forcible Prejudgment Seizures, 25 Sw. L.J. 331 (1971).

24. Goldberg v. Kelly, 397 U.S. 254 (1970); see Anderson v. Richardson, 454 F.2d 596 (6th Cir. 1972) (pretermination hearing appropriate in the context of survivor's benefits under Social Security if the beneficiary's interest outweighs that of the government); Wheeler v. Vermont, 335 F. Supp. 856 (D. Vt. 1972) (termination of unemployment benefits must be preceded by a hearing); Java v. California Dep't of Human Resources Dev., 317 F. Supp. 875 (N.D. Cal. 1970), aff'd, 402 U.S. 121 (1971) (pretermination hearing required for unemployment benefits). See also Note, Procedural Due Process in Government Subsidized Housing, 86 Harv. L. Rev. 880 (1973); The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 100 (1970).

25. Bell v. Burson, 402 U.S. 535 (1971); see Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973) (statute making monetary restitution to the victim a condition to probation of convicted perpetrator denied due process because the defendant never had an opportunity to challenge accuracy of the amount); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972) (failure to establish effective pretermination procedural safeguards with reference to contested gas service could violate due process).

26. In Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) the Court pointed to wages as a "specialized type of property," garnishment of which could "drive a wage-earning family to the wall." Id. at 340-42. Similarly in Bell v. Burson, 402 U.S. 535 (1971) a driver's license was characterized as an "important interest" which "may become essential in the pursuit of a livelihood." Id. at 539. However, it may be, as the Court subsequently stated, that "if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions [between importance and necessity] . . . . It 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.' " Fuentes v. Shevin, 407 U.S. 67, 90 (1972). See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192, 4194 (U.S. Jan. 22, 1975).

27. At the commitment proceeding notice and a hearing were provided. See text accompanying note 4.

support—her periodic Social Security benefits[28]—the court discussed the seizure of this property in terms of two recent Supreme Court cases dealing with the due process clause in the context of repossession of goods—*Fuentes v. Shevin*[29] and *Mitchell v. W.T. Grant Co.*[30] These cases are analogous to the instant case since the state was acting on its own behalf as creditor. Noting in *Vecchione* that the plaintiff was deprived of her constitutionally protected property with no opportunity to regain possession before discharge from the hospital and with no hearing either prior or subsequent to her discharge, the court found the procedure involved more objectionable than that struck down in *Fuentes*.[31] The court stated:

> Here, unlike *Fuentes*, the state interference with the plaintiff's right to use and control her property is in behalf of itself as creditor. . . . Here, unlike *Fuentes*, there is no provision for posting of a counter-bond by the plaintiff, or any analogous procedure, by which the plaintiff can seek restoration of her property pending final determination of liability. Finally, the *Fuentes* court struck down the Florida replevin statute even though it included a full subsequent hearing. In the instant action there is no requirement that Pennsylvania ever afford plaintiff a subsequent hearing, nor any administrative procedure called to our attention for doing so.[32]

Although the court relied on *Fuentes*, in which the ex parte seizure of property by creditors without a prior hearing was held to be unconstitutional, there are a number of distinctions between the two cases. The fact that the state was the creditor might justify the lack of prior hearing since there was no risk that the state would disappear with the plaintiff's assets in the event that the seizure had been improper. The same argument may be advanced regarding the availability of a procedure by which the plaintiff might regain possession. In this case the only property seized was money to which the state had an ultimate legal right. Although the two cases may have been distinguished on these grounds, the court also might have sought to justify the plaintiff's right to a prior hearing on the basis that the state interest in seizing the plaintiff's property did not fall within the definition of extraordinary situations as outlined in *Fuentes*,[33] which would justify postponing notice and

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28. Social Security benefits, as statutory entitlement, are considered to be property entitled to protection under the due process clause. 377 F. Supp. at 1370 n.12. The interest entitled to due process protection must be within the notions of "liberty" and "property" implicit in the due process clause. Board of Regents v. Roth, 408 U.S. 564, 570-72 (1972). There must be a "legitimate claim of entitlement" to the interest created by existing rules or statutes or mutually explicit understandings. Id. at 577; accord, Perry v. Sindermann, 408 U.S. 593 (1972).

29. 407 U.S. 67 (1972). The Fuentes court held that a debtor was entitled to a prior hearing before the seizure of his goods.

30. 416 U.S. 600 (1974). In Mitchell, based on the judicial procedures in the statute in question, the Court held that a prior hearing was not required.

31. 377 F. Supp. at 1370.

32. Id. (citation omitted).

33. 407 U.S. at 90-93. An extraordinary situation which would justify postponing a hearing until after the seizure, would occur when the seizure was directly necessary to secure an important governmental interest or general public interest and when there was a need for very prompt action. Id. at 91; see Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (protection of

hearing. Moreover, as Judge Becker noted, in *Vecchione* the state statute did not provide for either a prior or subsequent hearing.[34]

Since *Mitchell v. W.T. Grant Co.*[35] has been viewed as a retreat from the due process requirements of *Fuentes,* the court distinguished *Vecchione* from *Mitchell.* In *Mitchell,* a state statute permitting ex parte seizure of goods upon a writ issued by a judge was held to be a constitutional accommodation of the competing interests of buyer and seller. The procedure in *Mitchell* allowed the debtor-buyer to immediately challenge the grounds upon which the writ was issued and to regain possession if the creditor-seller could not prove his right to the goods.[36] In *Mitchell,* according to the Supreme Court, the judicial control over the ex parte procedure minimized the risk of wrongful dispossession and a full subsequent hearing on the merits was provided.[37] In *Vecchione,* however, there was no judicial supervision over the procedure, nor was a hearing ever provided.[38] The *Vecchione* court considered "the respective interests of the parties to plaintiff's assets . . . significantly different, with the balancing clearly tipping in plaintiff's favor."[39] The court was able to reconcile *Fuentes* and *Mitchell,* finding that the required judicial procedure in the statute was a distinguishing factor.[40] A question still unanswered is the degree of judicial supervision necessary to comport with due process standards,[41] but it is clear that the *Vecchione* procedure did not meet this standard since no judicial supervision whatsoever was provided. However, when the state is the creditor, perhaps judicial

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the public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (protection of the public against possibility of a bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (collection of internal revenue); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (meet needs of the national war effort); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (protection of the public from contaminated food).

34. 377 F. Supp. at 1371.

35. 416 U.S. 600 (1974).

36. Id. at 606.

37. Id. at 609-10.

38. 377 F. Supp. at 1371.

39. Id.

40. See id.

41. This unanswered question has led lower courts to differing interpretations of Mitchell. In a recent case where Mitchell was narrowly construed, the New York attachment statute was held unconstitutional. The challenged statute contained all the procedural safeguards of the constitutionally acceptable Louisiana statute, except in seeking dissolution of the writ the burden of proof was on the creditor under the Louisiana statute and on the debtor in the New York statute. See Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974), appeal docketed, 43 U.S.L.W. 3405 (U.S. Jan. 13, 1975) (No. 74-859). Mitchell was given a broader construction in Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974). In that case the Florida mechanics' lien law, which permitted imposition of a lien against property without a prior hearing, was held constitutional under Mitchell. The court stated that the deprivation was not so severe and the post deprivation hearing not so inadequate that a prior hearing was required. See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975) (a return to Fuentes?).

supervision in the first instance, at least in the *Vecchione* situation, should not be required.[42]

The state attempted to justify its seizure without notice in two ways. First, the state claimed that there was an immediate risk of destruction, loss or mismanagement of the property by the mental patient which justified the taking of the property without hearing. The court rejected this argument, stating that if the statute had been drawn to cover *only* those situations where such a risk was present, the statute might have been justifiable.[43] However, the court found that the statute was too broad to accomplish its purpose.[44] A similar defense that the debtor would destroy or conceal disputed goods was raised in *Fuentes*.[45] There, the Supreme Court, acknowledging that there may be special situations which demanded prompt action,[46] considered the replevin statute involved not " 'narrowly drawn to meet any such unusual situation.' "[47] Similarly in *Vecchione,* the statute was "aimed at an entire undifferentiated population"[48] and was not constructed to apply only to the special situation where there was immediate risk of mismanagement.[49] The question might be raised as to the probability of patients in state institutions destroying or concealing their assets. The situation is thus not truly analogous to that in the creditor-debtor cases where the property might be destroyed by the debtor.

The second justification by the state for the statute, that "mental patients are presumptively incapable of handling their own funds"[50] was also rejected by the court as inaccurate. In addition, according to the court, the record showed that preventing mental patients from handling their own affairs would tend to prolong a person's stay in a mental hospital, while giving them such control and responsibility was therapeutic.[51] The court also noted that the state's presumption in *Vecchione* was, in some cases, irrebuttable.[52]

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42. Cf. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974) (government seizure without notice).

43. 377 F. Supp. at 1371.

44. Id.

45. See 407 U.S. at 93.

46. Id. at 90-91; see note 33 supra and accompanying text.

47. 407 U.S. at 93, quoting Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969).

48. 377 F. Supp. at 1371.

49. Id. Such a risk is a "special situation" in view of the rejection of any presumption that mental patients are less capable of handling their affairs than the public at large. See note 11 supra and accompanying text.

50. 377 F. Supp. at 1372; see note 11 supra.

51. Id. at 1367.

52. Id. at 1371 n.14. If a legislative classification is imperfect in that it sweeps too broadly or too narrowly, it violates due process unless the presumption created by the classification is rebuttable. Cf. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (maternity leave); Vlandis v. Kline, 412 U.S. 441 (1973) (proof of residence); Stanley v. Illinois, 405 U.S. 645 (1972) (fitness to be a parent); Shelton v. Tucker, 364 U.S. 479 (1960) (condition of employment). See also Comment, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 Ind. L.

Patients in the class with assets below $2500 were never given a hearing and thus had no opportunity to rebut the presumption that they could not handle their own funds. This irrebuttable presumption, according to the court, "is not only factually unfounded, but also an unconstitutional deprivation of due process rights."[53]

The court considered a New York case, *Dale v. Hahn*[54] analogous to the instant case. In *Dale* the failure to provide adequate notice of a judicial proceeding which declared the plaintiff incompetent and appointed a committee to receive and disburse her assets was found violative of due process. The court in *Vecchione* noted that the procedure involved "[did] not even provide a judicial hearing, let alone notice thereof. *A fortiori* the practice assailed herein must be set aside as violative of the Due Process Clause."[55] However, *Dale* may be distinguished from *Vecchione*. The former involved a judicial hearing in which the plaintiff was declared incompetent. In *Vecchione,* on the other hand, the plaintiff was not adjudicated incompetent by the state's action of seizing her property. The serious ramifications of a declaration of incompetency may justify the application of more stringent procedural safeguards.[56] The court's reliance on *Dale,* therefore, was somewhat misplaced. However, the procedure in *Vecchione,* at least in so far as it provided no hearing, was clearly unconstitutional under both *Fuentes* and *Mitchell.*

Although the court did not discuss the substantive due process issue involved in *Vecchione,* it might have been relevant to the decision. Substantive due process requires that all state action be reasonably related to a valid state goal.[57] In this case the state was acting in its *parens patriae* role as guardian of those incapable of controlling their own lives.[58] In that role the

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Rev. 644 (1974). See generally Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

53. 377 F. Supp. at 1371 n.14.

54. 486 F.2d 76 (2d Cir. 1973), cert. denied, 95 S. Ct. 44 (1974).

55. 377 F. Supp. at 1371.

56. Pa. Stat. Ann. tit. 50, § 3511 (1969) provides that an incompetent "shall be incapable of making any contract or gift or any instrument in writing . . . before he is adjudged to have regained his competency." See In re Ballay, 482 F.2d 648, 651-52 (D.C. Cir. 1973) (discussing legal disabilities such as restrictions on voting rights, right to serve on a federal jury, and right to obtain a driver's license, resulting from an adjudication of incompetency). See also Lynch v. Baxley, 43 U.S.L.W. 2276 (M.D. Ala. Dec. 14, 1974) (three judge court).

57. See, e.g., Jackson v. Indiana, 406 U.S. 715, 738 (1972) (indefinite commitment of a criminal defendant incompetent to stand trial was not reasonable to determine whether there was a probability that he would be able to stand trial in the near future); Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923) (law forbidding the teaching of any modern language other than English to students below eighth grade had no reasonable relation to any end within the competency of the state); Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir.), cert. granted, 95 S. Ct. 171 (1974) (No. 74-8) (nature of mental patient's commitment bore no reasonable relationship to the purpose for which he was committed—to receive treatment); cf. Negron v. Preiser, 382 F. Supp. 535, 542 (S.D.N.Y. 1974).

58. In re Ballay, 482 F.2d 648, 650 (D.C. Cir. 1973); Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. pt. 1, at 11 (1961); 1 Legal Rights of the Mentally Handicapped

state may limit the constitutional rights of the mentally ill when reasonably necessary to effectuate the valid state goal of caring for those incapable of caring for themselves.[59] However, in this case the limitation on the plaintiff's right to control and use her property was not reasonably necessary to the state's goal of protecting her, since there was no presumption that she was any less capable of handling it than were members of the public at large.[60]

Vecchione may be an indicator of the way the courts are changing the standards which are applied in the context of procedural due process and the rights of mental patients. The case applied traditional due process concepts to mental patients committed by the state. While there has been much judicial concern over the constitutional rights of persons sought to be committed,[61] only recently has attention focused on the rights of patients in mental institutions.[62] As in the area of prisoner's rights[63] courts no longer are

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105 (B. Ennis & P. Friedman eds. 1974); Comment, Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1207-12 (1974); see Note, Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudications, 42 Fordham L. Rev. 611, 615-17 (1974). See also Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv. L. Rev. 1288, 1293-95 (1966); Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134, 1138-43 (1967).

59. Cf. Donaldson v. O'Connor, 493 F.2d 507, 520-21 (5th Cir.), cert. granted, 95 S. Ct. 171 (1974) (No. 74-8); In re Ballay, 482 F.2d 648, 658-60 (D.C. Cir. 1973). See also A Symposium: The Right to Treatment, 57 Geo. L.J. 673, 689-90 (1969).

60. 377 F. Supp. at 1368; see note 11 supra and accompanying text.

61. E.g., In re Ballay, 482 F.2d 648 (D.C. Cir. 1973) (beyond reasonable doubt standard for commitment); In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971) (patient requesting a statutory hearing to challenge an emergency detention order must have a proceeding in the nature of a probable cause hearing); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (right to counsel in civil commitment hearing); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974) (mandatory notice of civil commitment proceeding).

62. E.g., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (constitutional right to treatment); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), cert. granted, 95 S. Ct. 171 (1974) (No. 74-8) (constitutional right to treatment); Winters v. Miller, 446 F.2d 65 (2d Cir.), cert. denied, 404 U.S. 985 (1971) (mentally ill person free to refuse treatment absent determination of incompetency); Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973) (Fair Labor Standards Act applies to working mental patients).

63. See Wolff v. McDonnell, 418 U.S. 539 (1974) (due process clause requires that prisoners in procedure for forfeiture of good time credits be afforded advance written notice of claimed violation and written statement of fact finding); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (prison regulation which prohibited face to face interviews by newsmen of individually designated inmates did not violate first amendment); Pell v. Procunier, 417 U.S. 817 (1974) (prison regulation under which media representatives were able to interview prison inmates but not select particular inmates, and prisoner himself could not initiate an interview held not to infringe prisoners' first amendment rights nor the right of free press); Procunier v. Martinez, 416 U.S. 396 (1974) (prison mail censorship regulations justified only if necessary to further government interest of security, order or rehabilitation of inmates); O'Brien v. Skinner, 414 U.S. 524 (1974) (statute construed as denying trial detainees in county of their residence absentee voting while granting rights to persons similarly detained outside county of residence was unconstitutionally onerous burden on exercise of franchise and denied equal protection); Marshall v. United

adhering to a "hands off" policy with respect to the custody and treatment of mental patients,[64] at least where constitutional rights are involved.

Kathryn V. McCulloch

Criminal Law—Apprehension Abroad of Alien Criminal Defendant in Violation of Fourth Amendment Ousts Trial Court of Jurisdiction to Hear Charges—Second Circuit Restricts *Ker-Frisbie* Rule.—Appellant Toscanino, an Italian national, was arrested in January, 1973, on board a commercial airliner arriving in New York from Rio de Janeiro. He was charged with conspiracy to import narcotics into the United States in connection with a shipment of heroin from Uruguay in 1970.[1] Before trial, appellant challenged the court's jurisdiction to adjudicate the charges, alleging that he was kidnapped in Montevideo by Uruguayans employed by the United States, delivered to Brazilians[2] who questioned him under torture for seventeen days with the knowledge and participation of American officials, drugged, and placed aboard the commercial flight to New York on which he was arrested. He also alleged that information acquired through improper electronic surveillance of his activities, conducted by an employee of the Uruguayan telephone utility at the request of American authorities, was transmitted to federal prosecutors in New York. Appellant moved for an order to compel the government to affirm or deny whether it had participated in this electronic surveillance.[3] His pre-trial motions were denied, and after trial and conviction, appellant moved to vacate the verdict, dismiss the indictment and secure his return to Uruguay. Relying on the *Ker-Frisbie* rule, the district court denied the motion and refused to allow an evidentiary hearing into appellant's allegations. On appeal, the Second Circuit held that, if appellant's allegations were true, his seizure and transportation into the court's territorial jurisdiction violated the fourth amendment. Accordingly, the court held that the principles of due process would oust the trial court of jurisdiction to hear the charges and remanded for evidentiary hearings on the kidnapping and

States, 414 U.S. 417 (1974) (addicts with two or more prior felony convictions not denied due process or equal protection by exclusion from consideration for rehabilitative commitment in lieu of penal incarceration); Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (unreasonable failure to allow prisoner to pursue religious beliefs); Johnson v. Avery, 393 U.S. 483 (1969) (unconstitutional denial of aid to illiterate inmates in preparation of post conviction writs).

64. See note 62 supra. See generally Comment, Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974).

1. 21 U.S.C. §§ 173, 174 (1964). While these provisions were repealed by Act of Oct. 27, 1970, Pub. L. No. 91-513, tit. III, § 1101(a)(2), 84 Stat. 1291, the repealer contained a saving clause allowing prosecution under repealed sections for acts committed prior to the effective date of the repeal.

2. Although the Second Circuit's opinion refers only to unidentified "Brazilians," United States v. Toscanino, 500 F.2d 267, 269 (2d Cir. 1974), appellant's brief asserts that they were agents of the Brazilian government. Brief for Appellant at 17.

3. Application was made pursuant to 18 U.S.C. § 3504 (1970).

electronic surveillance allegations. The government's request for rehearing en banc was denied over the dissent of two judges who asserted that to allow the panel's decision to stand would be "at least fissiparous" with prior decisions of the Second Circuit, if not directly contrary to controlling Supreme Court precedent. The effect of the holding, in their view, would be to extend, for the first time, constitutional protection to foreign nationals not present within the United States and to create a drastic remedy of dismissal of charges for alleged misconduct by federal prosecuting authorities. *United States v. Toscanino,* 500 F.2d 267 (2d Cir.), *petition for rehearing en banc denied,* 504 F.2d 1380 (2d Cir. 1974).

Under the *Ker-Frisbie* rule, the manner in which a criminal defendant is brought within the territorial jurisdiction of a court is immaterial in determining that court's personal jurisdiction *vel non* over the defendant.[4] A defendant who is subjected to a court's jurisdiction as a result of an illegal arrest, kidnapping, or other irregular mode of apprehension may be tried, convicted and punished, and will have no claim to violation of due process solely on the basis of the manner of capture.[5] Although the rule has been criticized,[6] it has been applied in a variety of circumstances in cases adjudicated in federal[7]

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4. See notes 14-18 infra and accompanying text.

5. "A multitude of cases indicate that, if the accused be brought personally before a court which has jurisdiction of the subject matter, he may be tried, convicted, sentenced and imprisoned. It makes no difference by what means, rightful or wrongful, his body was brought into court." Strand v. Schmittroth, 251 F.2d 590, 600 (9th Cir.) (en banc), petition for cert. dismissed, 355 U.S. 886 (1957) (footnotes omitted).

6. United States v. Cotten, 471 F.2d 744, 748 (9th Cir.), cert. denied, 411 U.S. 936 (1973); United States v. Edmons, 432 F.2d 577, 583 (2d Cir. 1970); Government of V.I. v. Ortiz, 427 F.2d 1043, 1045 n.2 (3d Cir. 1970).

7. The Ker-Frisbie rule has been applied in cases involving illegal arrests (e.g., United States v. Johnson, 167 U.S. 120 (1897) (territorial court did not have subject matter jurisdiction at time it authorized arrest warrant but did at time of indictment); United States v. Villella, 459 F.2d 1028 (9th Cir. 1972) (per curiam); see Huerta-Cabrera v. INS, 466 F.2d 759, 761 n.5 (7th Cir. 1972); Green v. United States, 460 F.2d 317 (5th Cir. 1972) (per curiam); Vlissidis v. Annadell, 262 F.2d 398 (7th Cir. 1959)), fraudulently procured extraditions (Pettibone v. Nichols, 203 U.S. 192 (1906)), apprehension of a person by a foreign state which does not comply with its own extradition procedures in delivering the person into American custody (United States v. Hamilton, 460 F.2d 1270 (9th Cir. 1972) (per curiam); Stevenson v. United States, 381 F.2d 142 (9th Cir. 1967); Wentz v. United States, 244 F.2d 172 (9th Cir., cert. denied, 355 U.S. 806 (1957)), violation by one foreign country of the sovereignty of another at the behest of the United States (United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934)), forcible handing over of a prisoner without any extraction proceedings (United States ex rel. Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971); Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964) (per curiam)), illegal transportation into the judicial district for trial (Ex parte Lamar, 274 F. 160 (2d Cir. 1921), aff'd per curiam sub nom. Lamar v. United States, 260 U.S. 711 (1923); cf. United States ex rel. Voigt v. Toombs, 67 F.2d 744 (5th Cir. 1933)), kidnapping and transporting defendant to federal court for trial (United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), aff'd, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873 (1957)). See also Guzman-Flores v. United States Immig. & Natur. Serv., 496 F.2d 1245, 1248 (7th Cir. 1974); In re Chan Kam-Shu, 477 F.2d 333, 339 (5th Cir.), cert. denied, 414 U.S. 847 (1973).

and state courts.[8] It has been applied irrespective of whether the challenged apprehension occurred within the forum state,[9] in a different state[10] or in a foreign country.[11] Improper procurement of the person of the defendant for purposes of personal jurisdiction in most civil cases, however, will cause the court to decline to entertain the case.[12] The Supreme Court has attributed the different result in criminal cases to the overriding public interest in the prosecution of criminals.[13]

Underlying the *Ker-Frisbie* rule is a narrow view of due process which is not in accord with the more recent trends in criminal constitutional theory. In *Ker v. Illinois,*[14] the progenitor of the *Ker-Frisbie* rule, the Supreme Court asserted that due process normally is satisfied

> when the party is regularly indicted by the proper grand jury . . . , has a trial according to the forms and modes prescribed for such trials, and when, *in that trial and proceedings,* he is deprived of no rights to which he is lawfully entitled.[15]

Although the *Ker* Court conceded that some activities engaged in before trial might violate due process so as to give rise to a basis for challenging conviction, it did not consider due process protection to extend to "mere irregularities in the manner in which [a person is] brought into the custody of the law . . . ."[16] Almost seventy years later, in *Frisbie v. Collins,*[17] the Supreme Court unanimously reaffirmed this narrow focus of due process and added that "[t]here is nothing in the Constitution that requires a court to

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8. E.g., People v. Bradford, 70 Cal. 2d 333, 450 P.2d 46, 74 Cal. Rptr. 726 (1969), cert. denied, 399 U.S. 911 (1970); Sexton v. State, 228 A.2d 605 (Del. 1967); People v. Masterson, 45 Ill. 2d 499, 259 N.E.2d 794 (1970), cert. denied, 401 U.S. 915 (1971); Annot., 165 A.L.R. 948 (1946). Contra, State v. Simmons, 39 Kan. 262, 18 P. 177 (1888), overruled in State v. Wharton, 194 Kan. 694, 401 P.2d 906 (1965); In re Robinson, 29 Neb. 135, 45 N.W. 267 (1890), overruled in Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124 (1946); People v. Walls, 35 N.Y.2d 419, 363 N.Y.S.2d —, — N.E.2d — (1974).

9. United States ex rel. Voigt v. Toombs, 67 F.2d 744 (5th Cir. 1933) (removal from one judicial district to another within the forum state); cf. In re Johnson, 167 U.S. 120 (1897) (removal from one district to another within the same territory).

10. E.g., Frisbie v. Collins, 342 U.S. 519 (1952); Pettibone v. Nichols, 203 U.S. 192 (1906); Cook v. Hart, 146 U.S. 183 (1892).

11. E.g., Ker v. Illinois, 119 U.S. 436 (1886); United States v. Cotten, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973); United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), aff'd, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873 (1957).

12. Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937); see Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 256-57 (1909); Fitzgerald & Mallory Constr. Co. v. Fitzgerald, 137 U.S. 98 (1890). Contra, The Merino, 22 U.S. (9 Wheat.) 391 (1824) (admiralty condemnation proceeding); The Richmond, 13 U.S. (9 Cranch) 102 (1815) (Marshall, C.J.) (same).

13. In re Johnson, 167 U.S. 120, 126 (1897).

14. 119 U.S. 436 (1886), discussed in Editorial Comment, Ker v. Illinois Revisited, 47 Am. J. Int'l L. 678 (1953).

15. 119 U.S. at 440 (emphasis added).

16. Id.

17. 342 U.S. 519 (1952).

permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[18]

The effect of this view is to immunize governmental misconduct in the apprehension of criminal defendants from sanctions in the form of the exclusionary remedies. This attitude stands in marked contrast to the development by the judiciary of remedies to control violations of defendants' rights by law enforcement officials that occur in connection with other aspects of the criminal judicial process and violate specific constitutional prohibitions. Presently, information obtained by unreasonable searches is excluded from evidence in federal[19] and state[20] prosecutions, as is evidence that derives from information discovered through the use of improper police activities.[21] Similarly excluded from evidence are coerced confessions and evidence derived therefrom, including any information obtained during the time that a suspect is deprived unconstitutionally of the right to be represented by counsel.[22]

In *Rochin v. California,*[23] the Supreme Court expounded a broader power to control the conduct of law enforcement officials, based on a liberal construction of the requirements of due process. In *Rochin,* the Court reversed a conviction which had been based on the introduction into evidence of drugs swallowed by the defendant and recovered by the police through the use of medical apparatus.[24] The Court rejected narrow examination into specific, isolated acts of questionable governmental conduct, looking instead at the whole course of the proceedings, and imposed a broad requirement

> that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."[25]

This scope of analysis has been relied on in state and federal prosecutions and may prohibit not only the use of evidence but the very prosecution of a

18. Id. at 522.

19. Weeks v. United States, 232 U.S. 383 (1914).

20. Mapp v. Ohio, 367 U.S. 643 (1961).

21. See generally Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961).

22. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

23. 342 U.S. 165 (1952). Rochin was decided two months before the decision in Frisbie v. Collins, 342 U.S. 519 (1952) (discussed in notes 17-18 supra and accompanying text). Although the Supreme Court had devised the exclusionary rules to prevent the use of information acquired through unconstitutional means by law enforcement officials as evidence in federal courts, it was not until the decision in Mapp v. Ohio, 367 U.S. 643 (1961), that the Court "constitutionalized" these exclusionary rules and applied them to state prosecutions through the fourteenth amendment. Compare Mapp v. Ohio, supra, with Wolf v. Colorado, 338 U.S. 25 (1949), Irvine v. California, 347 U.S. 128 (1954), and Elkins v. United States, 364 U.S. 206 (1960). Thus, since the Rochin Court was not yet prepared to extend the remedy of exclusion of the drugs from evidence, one may only speculate about the result of the case in view of the later developments in the application of exclusionary devices.

24. 342 U.S. at 166-74.

25. Id. at 173.

defendant who has been deprived of the fundamental fairness required by due process of law.[26]

Another source of authority for judicially imposed sanctions against governmental misconduct, which does not depend on the existence of a clear violation of the defendant's constitutional rights and is not limited to exclusion of evidence, is the power of a court to supervise and regulate the standards for the administration of justice within its territorial jurisdiction. In *McNabb v. United States*[27] the Supreme Court ordered the exclusion of evidence obtained during a prolonged and coercive interrogation without reaching the defendant's constitutional claim of violation of the fifth amendment privilege against self-incrimination.[28] The Court held that the basic necessity of "maintaining civilized standards of procedure and evidence" is "not satisfied merely by observance of those minimal historic safeguards" known collectively as due process.[29] In other cases, courts have not hesitated to afford other remedies for improper governmental activities.[30]

These various sanctions employed by courts to deter unconstitutional, unlawful and otherwise "uncivilized" governmental actions have never been applied in cases arising within the purview of the *Ker-Frisbie* rule.[31] This is true even though an illegal arrest has been recognized to fall within the prohibitions of the fourth amendment,[32] and a forcible abduction presumably constitutes an unlawful seizure or arrest. There is no apparent reason why the courts should apply a rigid exclusionary rule to illegal seizure of things while withholding similar remedies in the case of illegal arrests and abductions of persons.[33] Nevertheless, as one court noted:

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26. See United States v. Russell, 411 U.S. 423, 430-32 (1973).

27. 318 U.S. 332 (1943).

28. Id. at 340-41.

29. Id. at 340.

30. E.g., Rea v. United States, 350 U.S. 214 (1956) (federal agent enjoined from transferring illegally seized evidence to state or testifying about it in state court); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (indictment dismissed and conviction reversed for improper presentation of hearsay to grand jury); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) (conviction based on information from informer paid on contingent fee basis reversed).

31. But see note 6 supra and accompanying text.

32. Cupp v. Murphy, 412 U.S. 291, 294 (1973); Davis v. Mississippi, 394 U.S. 721, 726-27 (1969); Henry v. United States, 361 U.S. 98, 100-01 (1959).

33. This anomaly has attracted the critical attention of commentators. Allen, Due Process and State Criminal Procedures: Another Look, 48 Nw. U.L. Rev. 16, 27-28 (1953); Pitler, "The Fruit of the Poisoned Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 601 (1968); Scott, Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud, 37 Minn. L. Rev. 91, 101-02 (1953). One author noted that the wide availability of exclusionary rules and similar sanctions pertaining to objects related to the unlawful seizure of the person tend to reduce the impact of the impropriety of the apprehension. Pitler, supra, at 601. As a practical matter, exclusion of physical evidence may deprive the prosecutor of the means to prove his case and, consequently, may result in abandonment of the prosecution. Id. Moreover, to release a prisoner who was apprehended under irregular circumstances, only to rearrest him immediately pursuant to proper procedure, would be a futile exercise in which "logic interferes with the criminal process without any meaningful gain to society." Id. Another commentator

In the many cases in which the Supreme Court has ordered suppressed the fruits of an unlawful arrest, none has voided the arraignment or other matters simply because they were dependent upon the [improperly procured] physical presence of the defendant. Still less has the defendant been ordered released.[34]

All of the sanctions discussed above, except those based on the supervisory power of the courts over the administration of justice within their jurisdiction,[35] require a finding that defendant's constitutional rights have been infringed.[36] As a general rule, the Constitution offers full protection and applies in full force if the defendant claiming violation of constitutional rights is an American citizen and the offensive governmental conduct arose within the United States. If, however, the conduct about which the defendant complains occurred outside the United States,[37] or if the defendant is not an American citizen,[38] judicial authority indicates that the Constitution does not apply in full force to protect against the offending activities.

A number of cases decided early in this century held that many constitutional guaranties do not apply within unincorporated territories and possessions of the United States.[39] These holdings were in accord with the then-current view that constitutional guaranties did not apply in foreign countries.[40] More recently, however, the Supreme Court extended the protection of the fifth and sixth amendments and the right to trial by jury to civilian dependents accompanying armed forces personnel abroad, barring the exercise of court martial jurisdiction over such persons.[41] A number of lower

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adopted a stricter view, insisting that "the only effective way to deter police from such lawlessness is to say to them, 'We will not try a criminal whose presence in the state has been thus secured.' " Scott, supra, at 102. The necessity for such an approach may have been reduced greatly by the Supreme Court's finding of an implied cause of action for damages on behalf of persons injured by law enforcement officials through violation of their fourth amendment rights. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-97 (1971).

34. Bowlen v. Scafati, 395 F.2d 692, 693 (1st Cir. 1968).

35. See notes 27-30 supra and accompanying text.

36. The fourth amendment exclusionary rule obviously presupposes a violation of the defendant's fourth amendment rights. See notes 19-22 supra and accompanying text. The Rochin rule, at least ostensibly, requires a violation—albeit a vague or indefinite one—of due process during the proceedings taken as a whole. See notes 23-26 supra and accompanying text. But see note 94 infra and accompanying text.

37. See notes 39-43 infra and accompanying text.

38. See notes 44-50 infra and accompanying text.

39. E.g., Balzac v. Porto Rico, 258 U.S. 298, 304-05 (1922) (sixth and seventh amendments and right to trial by jury not applicable in Puerto Rico); Dorr v. United States, 195 U.S. 138, 143, 148-49 (1904) (jury trial not constitutionally required in Philippines). Recent cases in accord are Government of the C.Z. v. Scott, 502 F.2d 566 (5th Cir. 1974) (grand jury indictment not constitutionally required in Canal Zone); Escuté v. Delgado, 317 F. Supp. 234 (D.P.R. 1970), aff'd, 439 F.2d 891 (1st Cir.), cert. denied, 404 U.S. 824 (1971) (Escobedo rule not required by Constitution in Puerto Rico).

40. In re Ross, 140 U.S. 453, 464 (1891); cf. Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929).

41. McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 284 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 249 (1960).

courts have extended fourth amendment protections in similar cases.[42] There is no general rule, however, that constitutional guaranties accorded to United States' citizens apply independently of geographical restrictions.[43]

Aliens present within the United States have been extended the protection of a number of constitutional guaranties[44] on "a generous and ascending scale of rights as [the alien] increases his identity with our society."[45] It is clear, however, that aliens are not accorded the full measure of constitutional rights insured to citizens.[46] A close reading of the cases involving aliens not present within the United States reveals that the Supreme Court has imposed both jurisdictional[47] and geographical[48] limitations on its power to extend constitutional guaranties to such persons. These cases are in accord with the cases imposing geographic restrictions on the constitutional guaranties of citizens[49] and also with cases holding that Congress has the power to exclude aliens from entering or reentering the United States without benefit of hearing or disclosure of the reasons for exclusion.[50] Consequently, aliens not present

42. Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) (search by Air Force personnel of civilian employee's off-base quarters in Japan under Japanese warrant held violative of fourth amendment). See also Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969) (search by Philippine police in Philippines not within fourth amendment's scope because not sufficient American participation to render it a joint venture).

43. Mr. Justice Black, speaking for four members of the Court in Reid v. Covert, 354 U.S. 1, 6-8 (1957), proposed that since the Bill of Rights is universal in its wording, it must be construed to apply without geographic restriction. Accord, In re Yamashita, 327 U.S. 1, 26-28 (1946) (Murphy, J., dissenting). Contra, Johnson v. Eisentrager, 339 U.S. 763, 783 (1950).

44. The rights extended were enumerated in Harisiades v. Shaughnessy, 342 U.S. 580, 586 n.9 (1952), to include the right to habeas corpus and the fifth and sixth amendments in criminal cases and, in civil cases, due process, equal protection and the right to be compensated for property taken by the government. Fourth amendment rights were extended in Au Yi Lau v. United States Immig. & Natur. Serv., 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971).

45. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950); see In re Griffiths, 413 U.S. 717 (1973) (denial to aliens of right to practice law violates equal protection); Sugarman v. Dougall, 413 U.S. 634 (1973) (discrimination in awarding civil service jobs to aliens violates equal protection); Graham v. Richardson, 403 U.S. 365 (1971) (denial to aliens of public assistance violates equal protection); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (denial of commercial fishing license to aliens violates equal protection). But see Kleindienst v. Mandel, 408 U.S. 753 (1972) (denial to alien Marxist professor of visa to enter the United States does not violate the Constitution).

46. Harisiades v. Shaughnessy, 342 U.S. 580, 586 n.10 (1952); Johnson v. Eisentrager, 339 U.S. 763, 771-77 (1950). See generally Gordon, The Alien and the Constitution, 9 Calif. W.L. Rev. 1 (1972); Comment, Constitutional Protection of Aliens, 40 Tenn. L. Rev. 235 (1973).

47. Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). But see Hirota v. MacArthur, 338 U.S. 197, 199-207 (1949) (Douglas, J., concurring). See generally Fairman, Some New Problems of the Constitution Following the Flag, 1 Stan. L. Rev. 587 (1949); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1398-1401 (1953).

48. Johnson v. Eisentrager, 339 U.S. 763, 768, 777-79, 782-85 (1950).

49. See notes 39-40 supra and accompanying text.

50. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212-13 (1953); United States ex

within the United States face formidable obstacles to a broad extension of constitutional protection. Indeed, there appears to be no authority for the proposition that the Constitution protects such aliens from American governmental activities that would be prohibited if engaged in within the United States or if applied to American citizens.

The Second Circuit's decision in *United States v. Toscanino*[51] represents the first radical departure from the *Ker-Frisbie* rule.[52] The court recognized that exclusion of evidence was the most widely used remedy in the line of cases that expanded the scope and sanctions employed in cases concerning due process,[53] but noted that, in those cases, it had been unnecessary to apply more drastic sanctions.[54] Viewing the case before it as one requiring greater sanctions, the court reasoned that

> [w]here suppression of evidence will not suffice . . . we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct . . . and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct.[55]

Accordingly, the court concluded that, if the government had violated Toscanino's fourth amendment rights, the only appropriate remedy "as a matter of fundamental fairness . . . [should be] to return him to his *status quo ante*" and to divest the district court of jurisdiction to hear the government's charges.[56] Thus, the court, in effect, extended the theory of the exclusionary rules prohibiting the use of unconstitutionally acquired evidence[57] to create a general prohibition against the prosecution of a defendant whose jurisdictional presence was unconstitutionally acquired. The Second Circuit justified this extension, which is clearly at odds with the *Ker-Frisbie* rule,[58] on the basis of the underlying rationale of the exclusionary remedies as expressed by the Supreme Court in a number of cases.[59] Furthermore, the court asserted that exclusionary rules are *mandated* by the requirements of due process in order "to bar the government from realizing directly the fruits of its own

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rel. Knauff v. Shaughnessy, 338 U.S. 537, 543-44 (1950). See generally Hart, supra note 47, at 1388-96; Comment, Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts, 71 Yale L.J. 760, 768-80 (1962).

51. 500 F.2d 267 (2d Cir.), petition for rehearing en banc denied, 504 F.2d 1380 (2d Cir. 1974).

52. See notes 4-18 supra and accompanying text.

53. 500 F.2d at 275.

54. Id.

55. Id. (citation omitted).

56. Id.

57. Id.; see Wong Sun v. United States, 371 U.S. 471, 484-88 (1963).

58. See notes 4-18 supra and accompanying text.

59. 500 F.2d at 272, citing United States v. Russell, 411 U.S. 423 (1973) (entrapment); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination); Wong Sun v. United States, 371 U.S. 471 (1963) (illegal arrest and seizure of evidence); Mapp v. Ohio, 367 U.S. 643 (1961) (same); Silverman v. United States, 365 U.S. 505 (1961) (illegal electronic surveillance).

deliberate and unnecessary lawlessness in bringing the accused to trial."[60] No Supreme Court case has expounded this approach to the use of the exclusionary devices, although in the cases cited in *Toscanino* the Court did order their application in other circumstances.[61]

Looking only to the cases upon which the Second Circuit built a foundation for its view of the exclusionary rule, it is possible to support the proposition that, in those instances at least, the rule was necessarily applied as the sole effective remedy for fourth amendment violations.[62] In recent cases, however, the Supreme Court appears to have slowed the trend toward extensive use of exclusionary remedies and to have begun to apply the rule more selectively and after balancing carefully the rights of criminal defendants against the needs of society.[63] First, the Court has provided a remedy in damages for invasions of fourth amendment rights.[64] Secondly, at least one case may be read to signal the Court's intention to restrict the reach of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served."[65] Consequently, the framework on which the *Toscanino* court rested its holding that due process requires a broad application of exclusionary remedies may be questioned seriously both on the court's interpretation of prior case law and on the trend which appears to be developing in the Supreme Court regarding the proper use of exclusionary remedies.

As an alternative line of reasoning, the Second Circuit invoked *Rochin v. California,*[66] as amplified by dictum in a recent Supreme Court case.[67] The

60. 500 F.2d at 272.

61. See note 59 supra. But cf. United States v. Russell, 411 U.S. 423 (1973), rev'g 459 F.2d 671 (9th Cir. 1972). In Russell, the Ninth Circuit had invoked due process to bar prosecutions based either on entrapment or on other forms of enmeshment of the government in criminal activity. 459 F.2d at 674.

62. E.g., Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971) (" 'only effectively available way' "); Terry v. Ohio, 392 U.S. 1, 12 (1968) ("only effective deterrent"). These cases were cited by the Second Circuit in Toscanino, 500 F.2d at 276-77 n.6.

63. See generally Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting).

64. Id. at 390.

65. United States v. Calandra, 414 U.S. 338, 348 (1974). In Calandra, the Supreme Court emphasized that the fourth amendment exclusionary rule is a "judicially created remedy . . . rather than a personal constitutional right of the . . . aggrieved." Id. Judge Mulligan, dissenting from denial of rehearing en banc in Toscanino, cited Calandra for the view that the exclusionary rule is "presumably of judicial and not constitutional stature," and thus need not be applied in all cases as a matter of the defendant's right. United States v. Toscanino, 504 F.2d 1380, 1381 (2d Cir. 1974).

66. 342 U.S. 165 (1952) (discussed in notes 23-26 supra and accompanying text). The court also invoked the often quoted language of Mr. Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 484-85 (1928); cf. United States v. Archer, 486 F.2d 670, 675-77 (2d Cir. 1973). In Archer, however, the Second Circuit cited Justice Brandeis' views in Olmstead with the caveat that those views had never commanded the support of a full majority of the Supreme Court. Id. at 675.

67. United States v. Russell, 411 U.S. 423, 431-32 (1973). In Russell, the Court stated: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so

court set forth a broad rule, available to a potentially large class of defendants and based on an "enlightened" concept of due process,[68] which would prohibit prosecution of criminal defendants when personal jurisdiction was obtained through "deliberate, unnecessary and unreasonable" violation of the defendant's constitutional rights.[69] The authorities cited by the *Toscanino* court, however, suggest only that principles of due process *may* bar prosecutions that result from outrageous law enforcement activities.[70] Within the peculiar and extreme facts alleged by Toscanino, the court's holding, that the defendant be returned to his status quo ante, may be supportable. However, the breadth and potential impact of the court's language give rise to serious objection, as they may tend to crystalize a rule that should remain flexible and discretionary.

Under the *Rochin* rule, the court must determine in each case whether the governmental activities proved are such as to offend a " 'universal sense of justice' "[71] or constitute "conduct that shocks the conscience."[72] No guidance is available to the court—other than prior cases and the judge's sensibilities—as to the characteristics of activities that meet these general standards. Because the *Rochin* approach contemplates an examination of all the facts, and is not limited in application to specific instances of conduct that violate a particular constitutional prohibition, it has never been, and should not become the foundation of a rigid doctrine such as the Second Circuit's opinion would suggest.[73] Moreover, the *Rochin* rule's prohibition of prosecutions is a drastic device[74] and was not created as an exclusive or mandatory remedy.[75] Thus, it should be applied sparingly and only in exceptional cases when the court finds other remedies to be inadequate.

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outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952) . . . ." Id., quoted in United States v. Toscanino, 500 F.2d at 274.

68. "Faced with a conflict between the two concepts of due process, the . . . restricted version found in Ker-Frisbie and the . . . expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the Ker-Frisbie version must yield." 500 F.2d at 275.

69. "[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." Id. This language appears to represent an attempt by the Second Circuit to define one class of "outrageous" situations in which the Russell Court would bar prosecution of criminal defendants. See id. at 276; note 67 supra.

70. See United States v. Russell, 411 U.S. 423, 431-32 (1973); United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973).

71. United States v. Russell, 411 U.S. 423, 432 (1973), quoting Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246 (1960).

72. Rochin v. California, 342 U.S. 165, 172 (1952).

73. 500 F.2d at 274-75. But see notes 105-08 infra.

74. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting); People v. Defore, 242 N.Y. 13, 20-21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926).

75. See United States v. Calandra, 414 U.S. 338, 348 (1974).

In order to apply the *Rochin* rule, which operates to remedy abuses that are violative of due process of law,[76] it was necessary for the *Toscanino* court to find that the defendant was entitled to the protection of the fourth and fifth amendments in connection with events that took place outside the United States.[77] In reaching the conclusion that Toscanino was so protected,[78] the court invoked, by analogy, cases involving the rights of American citizens and nationals within the United States, its territories and possessions and in foreign countries,[79] as well as cases involving the rights of aliens within the United States.[80] From these sources the court determined that the Bill of Rights protects citizens abroad,[81] and that many of its provisions—including the fourth amendment—apply to aliens within the United States.[82] By extension, the court concluded that, since

> [n]o sound basis [was] offered in support of a different rule with respect to *aliens who are the victims of unconstitutional action abroad,* at least where the government seeks to exploit the fruits of its unlawful conduct [within the United States,][83]

the fourth and fifth amendments protect such aliens, such as Toscanino, who are not present within the United States.[84]

This conclusion is not only unprecedented, but rests on an interpretation of case law regarding the extraterritorial applicability of the Constitution that is not fully in accord with the holdings of the cases cited.[85] Indeed, the weight

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76. See notes 23-26 supra and accompanying text.

77. But see note 94 infra and accompanying text.

78. 500 F.2d at 280.

79. To support the view that the fifth and sixth amendments protect citizens abroad, the Second Circuit cited Reid v. Covert, 354 U.S. 1 (1957), a case dealing with the right of civilian dependents of military personnel stationed abroad to a civilian trial. 500 F.2d at 280. Evidently, the Toscanino court intended to adopt the sweeping assertions, made by Mr. Justice Black in an opinion representing the views of four Justices, that the entire Bill of Rights applies to citizens without geographical restrictions. 354 U.S. at 5-12; cf. Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); see note 41 supra and accompanying text.

The Second Circuit cited Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922), for the view that due process applies to American citizens in foreign countries. 500 F.2d at 280. In Balzac, however, the Court discussed the applicability of the Bill of Rights not in foreign countries but in territories and possessions of the United States, and actually held that due process principles extend to citizens in such places only those rights which are deemed "fundamental." 258 U.S. at 312-13; cf. Dorr v. United States, 195 U.S. 138, 148-49 (1904); Hawaii v. Mankichi, 190 U.S. 197, 216 (1903); Downes v. Bidwell, 182 U.S. 244, 282-83 (1901) (no opinion of the Court).

Finally, the Toscanino court appropriated a phrase from Balzac, supra, to the effect that "[t]he Constitution of the United States is in force . . . whenever and wherever the sovereign power . . . is exerted." 500 F.2d at 280, quoting Balzac v. Porto Rico, 258 U.S. at 312. This excerpt, taken alone, misrepresents the sense of those words which were clearly limited to exertion of sovereignty in American territories and possessions.

80. See notes 44-50 supra and accompanying text.

81. 500 F.2d at 280; see id. at 281 (Anderson, J., concurring).

82. Id. at 280.

83. Id. (emphasis added).

84. Id.

85. Judge Anderson, concurring in the result, termed the majority's holding as "novel" and

of authority[86] strongly suggests a conclusion contrary to that reached by the Second Circuit, although it must be recognized that no prior case constitutes controlling precedent since none specifically decided the general availability of constitutional rights to aliens abroad.[87] In fact, the court's position rests principally on its assertion that the fourth and fifth amendments, in terms, protect " 'people' rather than 'areas,' . . . or 'citizens' . . . ."[88] While this may be true literally,[89] it is nonetheless clear that the Supreme Court consistently has restricted the application of constitutional guaranties both geographically and by the nationality of the person claiming protection.[90] Finally, the court's decision to include aliens abroad within the class of persons protected by constitutional guaranties was made simply because "[n]o sound basis [was] offered in support of a different rule . . . ."[91] Whether or not this is true,[92] it was incumbent on the court to analyze carefully the cases touching upon the area and to assess meticulously the ramifications of such a rule as the court set forth.[93]

It was not necessary, however, for the Second Circuit to reach a decision as to Toscanino's constitutional status. Whether or not the *Rochin* rule would apply in the absence of a finding that defendant was protected by the due process clause,[94] the court invoked,[95] and unquestionably could have relied on the *McNabb* rule respecting a court's power to supervise the administration

objectionable on policy grounds. Id. at 281. Judge Mulligan, dissenting from denial of rehearing en banc, objected to the holding as made "for the first time and without any discernible authority," and questioned the "intent or even the power of the Founding Fathers to endow foreign nationals while resident in foreign climes with American constitutional rights . . . ." 504 F.2d 1380, 1381 (2d Cir. 1974).

86. See notes 39-50 supra and accompanying text.

87. But see Johnson v. Eisentrager, 339 U.S. 763, 785 (1950), where the Court specifically held that the Constitution does not protect enemy aliens in foreign countries.

88. 500 F.2d at 280 (citations omitted).

89. The court's quotation was taken from a discussion in Katz v. United States, 389 U.S. 347, 353 (1967), concerning whether a technical trespass need be shown to establish a violation of a defendant's fourth amendment rights in connection with electronic telephone surveillance. Whether the distinction between protected places and protected persons set forth in Katz can be extended into the area of rights of aliens abroad is problematical.

90. See notes 39-50 supra and accompanying text.

91. 500 F.2d at 280.

92. See note 94 infra and accompanying text.

93. See notes 103-04 infra and accompanying text.

94. Judge Anderson, concurring in the result in Toscanino, considered the Rochin rule to be dispositive, even though he did not believe the Bill of Rights had extraterritorial application to aliens. 500 F.2d at 280. Although the Rochin rule is predicated upon a violation of due process, it does not require a showing of violation of a specific constitutional right, such as the fourth amendment, but rather proscribes generally "outrageous" and "uncivilized" law enforcement activities. See notes 23-30 supra and accompanying text. Assuming that Toscanino, as an alien present within the United States, acquired some measure of fifth amendment due process protection upon entry into the country, Wong Wing v. United States, 163 U.S. 228, 238 (1896), Rochin could be construed to prevent future acts (e.g., prosecution) which would exploit prior outrageous conduct.

95. 500 F.2d at 276.

of justice within its territorial jurisdiction.[96] As *McNabb* does not depend on the existence of any constitutional issue,[97] the court correctly recognized that the rule

> may legitimately be used to prevent district courts from themselves becoming "accomplices in willful disobedience of law." . . . Moreover the supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process.[98]

On this basis, the court was fully justified in concluding that, if Toscanino's allegations were true, it could dismiss the prosecution on the strength of its view that it "could not tolerate such an abuse without debasing 'the processes of justice.' "[99]

The Second Circuit's decision in *Toscanino* is not objectionable so much for its result as for the potentially far-reaching impact of the broad language and arguably incorrect analyses contained in discussion of points not essential to resolution of the case. Narrowly its holding can be read simply as requiring American law enforcement agents to pursue lawful procedures—e.g., extradition—before resorting to self-help remedies in bringing criminals to justice in order to preserve a government of laws and not of men. This could explain the court's use of the words "deliberate" and "unnecessary" in describing the types of activities against which it would apply the sanction of non-prosecution.[100] The *Toscanino* decision, despite its apparent inaccuracies respecting the extraterritorial application of constitutional guaranties[101] and

96. See notes 27-30 supra and accompanying text. The court attempted to distinguish Ker-Frisbie on the basis that Toscanino, unlike the defendants in those cases, was protected from the kinds of activities that he alleged by provisions in the Charters of the United Nations and the Organization of American States. 500 F.2d at 277-78, citing Cook v. United States, 288 U.S. 102 (1933), and Ford v. United States, 273 U.S. 593 (1927). The court's authority for the distinction is not convincing, however, since the treaty involved in Cook and Ford contained an express provision prohibiting the seizure of British ships which, in the Supreme Court's view, ousted American courts of jurisdiction to hear condemnation proceedings involving ships seized in violation of the terms of the treaty. 288 U.S. at 121-22; 273 U.S. at 607-11. Since neither the U.N. nor the O.A.S. Charter contains such a provision, the court's reliance is misplaced. See also United States v. Toscanino, 500 F.2d at 281-82 (Anderson, J., concurring).

The power of American courts to exercise jurisdiction over persons seized in violation of a treaty provision is, however, beyond the scope of this Case Note. See generally United States v. Sobell, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873 (1957); Bassiouni, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, 7 Vand. J. Transnat'l L. 25 (1973); Note, Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law, 72 Mich. L. Rev. 1087, 1110 (1974).

97. See notes 27-30 supra and accompanying text.

98. 500 F.2d at 276 (citation omitted).

99. Id.

100. See note 69 supra and accompanying text.

101. Inasmuch as the court could have reached the same result on a non-constitutional basis as on a constitutional basis, it should have avoided deciding the question of the rights of aliens abroad to the protection of the Bill of Rights. See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

because of its very broad and mandatory rule respecting remedies for unconstitutional apprehensions of criminal defendants, undoubtedly will be invoked as authority in other cases, some presently pending, involving claimed rights of aliens in foreign countries.[102] More generally, the court's treatment of the *Rochin* rule and the device of prohibiting prosecution when serious constitutional claims are proved may produce a rigid *Rochin*-derived principle that will be applied in domestic as well as in international settings as an ordinary remedy rather than as exceptional and drastic relief.[103]

As Judge Anderson observed, concurring in the result in *Toscanino*, the majority's holding as to the extraterritorial application of the Bill of Rights

> would make unreasonable demands on our foreign agents, whether in law enforcement or national security, who by following the law of the country in which they are staying, could at the same time find themselves in defiance of United States constitutional safeguards.[104]

Perhaps with this in mind, a recent Second Circuit case has taken pains to limit *Toscanino*. In *United States ex rel. Lujan v. Gengler*,[105] the court refused to apply *Toscanino* where the petitioner, although kidnapped, did not allege any "cruel, inhuman and outrageous treatment" at the hands of his captors.[106] While approving the *Toscanino* reliance on due process standards, the court found no due process violation. "Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process."[107] Judge Anderson, again concurring, viewed *Toscanino* as only a narrow exception to *Ker-Frisbie*, "resting solely and exclusively upon the use of torture and other cruel and inhumane treatment . . . ."[108]

Nevertheless, it is not impossible that other courts, relying on *Toscanino*, will find that due process applies to aliens abroad in entirely unrelated situations. Accordingly, the *Toscanino* decision should be limited to the

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102. Several cases now pending in the Southern District of New York involve Chileans under indictment for narcotics-related offenses who are seeking dismissal of charges on the ground that they were abducted or otherwise apprehended illegally in Chile at the instigation of United States agents and transported to the United States for trial. N.Y. Times, Sept. 28, 1974, at 1, col. 8. See also id., Jan. 5, 1974, at 25, col. 6; id., Dec. 13, 1973, at 2, col. 5; id., Oct. 17, 1973, at 14, col. 5.

103. A similar rigid rule has evolved from McNabb (discussed in notes 27-29 supra and accompanying text) which contemplated analysis of the specific facts of each case: the Mallory rule, barring use of confessions obtained during illegal detentions, which is based, like the McNabb rule, on the supervisory power of courts. See Mallory v. United States, 354 U.S. 449, 453-56 (1957).

104. 500 F.2d at 281 (Anderson, J., concurring). It is not clear in Toscanino whether the American agents were complying even with the local law of the jurisdictions involved.

105. No. 74-2084 (2d Cir., Jan. 8, 1975).

106. Id. at 1204.

107. Id.

108. Id. at 1210-11 (Anderson, J., concurring); accord, United States v. Herrera, 504 F.2d 859 (5th Cir. 1974).

bizarre facts and the legal context from which it arose,[109] and the Supreme Court should be encouraged to clarify the status of both the remedy of prohibiting prosecutions and the law respecting nationality and geographical location as factors restricting the application of constitutional guaranties.

Peter J. Corcoran

Criminal Law—Misdemeanor Indictment Cannot Be Constructively Amended.—On April 13, 1972 Louis Goldstein was indicted by a grand jury for, *inter alia,* willful failure to file his 1965 tax return by April 15, 1966. Such willful failure was a misdemeanor.[1] The evidence at trial revealed that Goldstein filed a Form 2688 on April 15, 1966, requesting an extension of time to file his 1965 tax return, and that form, signed by the District Director of Internal Revenue and dated April 27, 1966, was returned to Goldstein as incomplete.[2] Goldstein failed to comply with the applicable law[3] which gave him until May 7, 1966, ten days after the date of the denial of the request for an extension, to file his return.[4] The district court charged the jury that "the question involved [was the defendant's] state of mind on and during the period of time leading up to May 7, 1966."[5] Such a charge amounted to a constructive amendment of the misdemeanor indictment to make it conform to a material variance between matter alleged in the indictment (failure to file by April 15) and the matter proved at trial (failure to file by May 7). Since an indictment is not necessary on a misdemeanor charge,[6] the district court

109. "[W]e are forced to recognize that, absent a set of incidents like that in Toscanino, not every violation by prosecution or police is so egregious that Rochin and its progeny requires nullification of the indictment." United States ex rel. Lujan v. Gengler, No. 74-2084, at 1205 (2d Cir., Jan. 8, 1975). Judge Kaufman further indicated that Toscanino did not "eviscerate the Ker-Frisbie rule . . . ." Id. at 1203.

1. Count II of the indictment stated "[t]hat Louis Goldstein during the calendar year 1965 . . . had received a gross income of $25,954.05, that by reason of such income he was required by law following the close of the calendar year 1965 and on or before April 15, 1966 to make an income tax return . . . and . . . he did willfully and knowingly fail to timely make said income tax return . . . in violation of Section 7203, Title 26, United States Code." United States v. Goldstein, Cr. No. 2222, at 1-2 (D. Del. Sept. 10, 1973) [hereinafter cited as District Slip Opinion], rev'd, 502 F.2d 526 (3d Cir. 1974) (en banc). Goldstein was also indicted on two other counts, both of which carried prison terms in excess of one year. 502 F.2d at 527. It is not unusual to present a grand jury with a misdemeanor charge when other serious charges are being presented to them. See note 23 infra.

2. District Slip Opinion at 3.

3. Rev. Rul. 64-214, 1964-2 Cum. Bull. 472; Treas. Reg. § 1.6081-1 (1973).

4. District Slip Opinion at 3. It is likely that the jury was influenced by the fact that Goldstein did not file his 1965 tax return until August 14, 1969, after the government began investigating him. Id. at 3-4.

5. Id. at 7.

6. Fed. R. Crim. P. 7(a) provides: "An offense which may be punished by imprisonment for a term exceeding one year . . . shall be prosecuted by indictment . . . . Any other offense may be prosecuted by indictment or by information."

reasoned that such a constructive amendment was permissible.[7] The Third Circuit reversed, refusing to allow even a misdemeanor indictment to be constructively amended. *United States v. Goldstein*, 502 F.2d 526 (3d Cir. 1974) (*en banc*).

The grand jury, a traditional investigatory and accusatory instrument at English common law, was incorporated into our legal system by the fifth amendment.[8] It is the instrument adopted by the Constitution as the sole method for bringing charges in serious criminal cases—cases of "capital or otherwise infamous crimes."[9] A grand jury indictment has both an apprisal function, based on the sixth amendment right to fair notice of criminal charges, and a protective function, based on the fifth amendment right against double jeopardy.[10] In addition to this two-fold function,

> there is a third and very important aspect of the indictment process, and that is the duty of the grand jury to shield a citizen from unfounded charges and to require him to appear in court in defense, only if probable cause has been found by that independent body.[11]

This screening function is based on the fifth amendment protection against being "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[12] The proper standard for judging whether an indictment is fulfilling its screening function was dis-

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7. District Slip Opinion at 17-18.

8. See Costello v. United States, 350 U.S. 359, 362 (1956). Grand juries existed as early as the twelfth century. S. Milsom, Historical Foundation of the Common Law 357-58 (1969); B. Schwartz, The Roots of Freedom 65-66 (1967).

9. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. An infamous crime is one punishable by imprisonment in a state prison or penitentiary. Mackin v. United States, 117 U.S. 348, 354 (1886). Confinement to a penitentiary is limited to any term in excess of one year. 18 U.S.C. § 4083 (1970).

10. United States v. Anderson, 447 F.2d 833, 835 (8th Cir. 1971), cert. denied, 405 U.S. 919 (1972); United States v. Edwards, 443 F.2d 1286, 1290 (8th Cir.), cert. denied, 404 U.S. 944 (1971). Both cases quoted United States v. Debrow, 346 U.S. 374, 376 (1953). See also F. Heller, The Sixth Amendment to the Constitution 101-04 (1951); J. Joyce, Treatise on the Law Governing Indictments § 39 (2d ed. 1924) [hereinafter cited as Joyce on Indictments]; Comment, Twice in Jeopardy, 75 Yale L.J. 262 (1965). See generally United States v. Skelley, 501 F.2d 447, 452-53 (7th Cir. 1974).

11. United States v. Goldstein, 502 F.2d 526, 529 (3d Cir. 1974) (en banc); District Slip Opinion at 12-13; see Russell v. United States, 369 U.S. 749, 763-64, 770 (1962); Van Liew v. United States, 321 F.2d 664, 669 (5th Cir. 1963) (grand jury function is, inter alia, to protect citizens against unfounded charges). It is interesting to note that a recent Supreme Court case, Hamling v. United States, 418 U.S. 87, 117-18 (1974), in setting out the functions of an indictment, failed to mention the screening function explicitly.

12. See note 9 supra; Russell v. United States, 369 U.S. 749, 770-71 (1962); Stirone v. United States, 361 U.S. 212, 215-18 (1960); Ex parte Bain, 121 U.S. 1, 10-14 (1887); United States v. De Cavalcante, 440 F.2d 1264, 1272 (3d Cir. 1971); United States v. Silverman, 430 F.2d 106, 111 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). See generally 8 J. Moore, Federal Practice ¶ 7.04, at 7-14 (2d ed. 1974).

cussed in *United States v. De Cavalcante.*[13] There the court found the proper test to be whether there is reasonable assurance from the face of the indictment that the grand jury found probable cause on each of the essential elements which underlie the verdict of the petit jury.[14]

A violation of these constitutional protections results when there is an express or constructive amendment to an indictment. "An amendment of the indictment occurs when the charging terms of the indictment are altered [either expressly or constructively] by prosecutor or court after the grand jury has last passed upon them."[15] Thus, in *United States v. Figurell,*[16] the defendant was convicted of violating the Selective Service Act "on or about January 12, 1967."[17] The trial judge noted that under the relevant statute the alleged felony could not have occurred until eleven days after the date charged in the indictment.[18] This effected an impermissible constructive amendment created by a material variance between the indictment and the

13. 440 F.2d 1264 (3d Cir. 1971) (felony indictment).

14. Id. at 1271-72. The De Cavalcante court relied on Stirone v. United States, 361 U.S. 212 (1960); Ex parte Bain, 121 U.S. 1 (1887); and United States v. Silverman, 430 F.2d 106 (2d Cir. 1970); see note 12 supra. "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." Ex parte Bain, supra at 10.

15. Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969) (italics omitted). "An amendment is thought to be bad because it deprives the defendant of his right to be tried upon the charge in the indictment as found by the grand jury and hence subjected to its popular scrutiny." Id. at 1071-72. See generally United States v. Hutcheson, 312 U.S. 219, 229 (1941) (designation of statute immaterial); United States v. Norris, 281 U.S. 619, 622 (1930) (stipulation may not add particulars to indictment); Ford v. United States, 273 U.S. 593, 602 (1927) (ignoring surplusage does not amend indictment); Salinger v. United States, 272 U.S. 542, 548-49 (1926) (withdrawal of parts of indictment unsupported by evidence is not amendment); United States v. Curtis, No. 74-1098, at 8 (10th Cir., Dec. 10, 1974) (valid trial court instructions will not remedy insufficient indictment); United States v. Savard, 493 F.2d 490, 492 (5th Cir. 1974), cert. denied, 43 U.S.L.W. 3226 (U.S. Oct. 22, 1974) (indictment, plus bill of particulars, constitutes sufficient notice); United States v. Musgrave, 483 F.2d 327, 338 (5th Cir.) (as modified on denial of rehearings), cert. denied, 414 U.S. 1023 (1973) (withdrawal of portion of indictment which was not supported by evidence is not impermissible amendment); United States v. Walters, 477 F.2d 386, 388 (9th Cir.), cert. denied, 414 U.S. 1007 (1973) (withdrawal of portions of charge is not impermissible amendment); United States v. Williams, 412 F.2d 625, 628 (3d Cir. 1969) (altering an indictment to allege a violation of tax payment in place of original charge of lack of registration is impermissible amendment); Palumbo v. New Jersey, 366 F.2d 826, 828 (3d Cir. 1966) (change in statutory reference is not impermissible amendment); Overstreet v. United States, 321 F.2d 459, 461 (5th Cir., cert. denied, 376 U.S. 919 (1963) (withdrawing part of the charge from jury was not impermissible amendment); Masi v. United States, 223 F.2d 132, 133 (5th Cir. 1955) (statutory reference in indictment held immaterial); J. Byrne, Federal Criminal Procedure § 112 (1916); L. Orfield, Criminal Procedure From Arrest to Appeal 234-38 (1947).

16. 462 F.2d 1080 (3d Cir. 1972) (felony indictment).

17. Id. at 1081.

18. Id. at 1082-83 n.5.

proof.[19] However, even a material variance justifies dismissal only if there has been substantial prejudice to the accused.[20]

The Third Circuit in *Goldstein* found that the notice and protective functions of the sixth and fifth amendments had been met,[21] and that the variance between the indictment and the proof was material.[22] It concentrated on the screening function of the grand jury in attempting to determine whether a misdemeanor indictment could be constructively amended. While admitting that "[t]he constitutional guarantee [did] not apply,"[23] since no infamous crime was involved, the majority, analogizing to *Russell v. United States*,[24] nevertheless held the constructive amendment to be impermis-

19. The court concluded that "conviction for a breach of his duty in some period later than a week or two beyond [the date in the indictment] would constitute, at the least, an impermissible constructive amendment of the indictment." Id. at 1083 n.5. The government in Goldstein correctly noted that the defendant stipulated he knew he had a duty to file his return on or before April 15, 1966. Appellee's Answering Brief at 22, United States v. Goldstein, 502 F.2d 526 (3d Cir. 1974) (en banc) [hereinafter cited as Appellee's Brief]. But the defendant, under relevant regulations, had until May 7, 1966 to file.

20. Gaither v. United States, 413 F.2d 1061, 1072 (D.C. Cir. 1969). See also Stirone v. United States, 361 U.S. 212, 215 (1960) (evidence of exportation constructively amends indictment on importation); Berger v. United States, 295 U.S. 78, 82 (1935) (variance between conspiracy alleged and that proved only fatal if substantial rights affected); United States v. Silverman, 430 F.2d 106, 111 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971) (indictment read to include necessarily implied facts); Jackson v. United States, 359 F.2d 260, 263 (D.C. Cir., cert. denied, 385 U.S. 877 (1966) (omission of language alleging a forceful seizure in robbery indictment did not result in a denial of a substantial right); United States v. Critchley, 353 F.2d 358, 361 (3d Cir. 1965) (evidence of solicitation of bribe impermissible to prove charge of extortion); United States v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965) (variance between proof and bill of particulars not reversible error unless prejudicial); McClintock, Indictment by a Grand Jury, 26 Minn. L. Rev. 153, 175-76 (1942); Perkins, Short Indictments and Informations, 15 A.B.A.J. 292, 296 (1929); Perkins, Absurdities in Criminal Procedure, 11 Iowa L. Rev. 297, 304 (1926); 19 Iowa L. Rev. 628 (1934); 3 Memphis St. L. Rev. 390 (1973). See generally United States v. Lambert, 501 F.2d 943, 947-48 (5th Cir. 1974) (en banc).

21. 502 F.2d at 529; District Slip Opinion at 13-14.

22. 502 F.2d at 529-30. The district court noted that "it becomes apparent that [Goldstein] differs substantially from the multitude of cases in which the government has properly been permitted to go to the jury on a charge that proof of the commission of the offense charged on any date reasonably close to the date alleged will suffice." District Slip Opinion at 16.

23. 502 F.2d at 530. The fifth amendment right to a grand jury indictment refers only to capital or infamous crimes. See notes 6 and 9 supra. Usually a misdemeanor is presented to the grand jury "where a felony is also charged against the same defendant and the prosecutor wishes to join both classes of offenses in one indictment." 8 J. Moore, Federal Practice ¶ 7.02, at 7-7 (2d ed. 1974) (footnote omitted). See also Sharp, Grand Juries—An Investigative Force, 9 Trial 10 (1973); Note, Indictment Sufficiency, 70 Colum. L. Rev. 876, 883 (1970).

24. 369 U.S. 749 (1962) (lower court conviction for refusing to answer certain questions before a congressional subcommittee). "In each case the indictment returned by the grand jury failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated. The indictments . . . [stated] only that the questions to which answers were refused 'were pertinent to the question then under inquiry' by the subcommittee." Id. at 752 (footnote omitted). The Russell court held that the indictment must state the questions under inquiry which were unanswered. Id. at 771.

sible.[25] This reasoning is questionable, since that case involved a misdemeanor statute which *required* a grand jury indictment.[26] Also, *Russell* rested on a finding that the indictment did not adequately apprise the defendants of the charge against them.[27] The *Goldstein* majority found that the defendant could not claim "prejudice"[28] on this ground. Moreover, the statutory violation in *Goldstein* did not require a grand jury indictment.

While two other courts have held that a misdemeanor indictment cannot be constructively amended when a material variance has occurred,[29] neither advanced any reason for their holding.[30] Hence, *Goldstein* sought to advance its own rationale. First, the court found that

> there is that subtle, though undeniable, stigma attached to a defendant who has been indicted by an impartial grand jury. An information, which is merely an accusation by the prosecuting attorney, an obvious partisan in the trial proceeding, would have less effect on the petit jury.[31]

Yet the court offered no support for this conclusion, and it is arguable that a petit jury does not make such fine distinctions regarding the origin of the prosecution.[32]

Second, the court reasoned that when rights of the accused are at stake, doubt "should be resolved in favor of the defendant."[33] Yet the court had already concluded that no constitutional right was at stake,[34] and thus it is difficult to determine the rights to which the court was referring.

Finally, the majority observed that the government obtained some benefits from getting a grand jury indictment, and that "fair dealing [requires] that the government assume the burdens as well as the benefits."[35]

The dissent argued that a conviction on a misdemeanor indictment should not "be reversed unless the constructive amendment to the indictment substantially affected [defendant's] right to a fair trial."[36] *Russell* was viewed as

25. 502 F.2d at 531.

26. 369 U.S. at 753; see 2 U.S.C. § 194 (1970).

27. 369 U.S. at 767-68; see Note, Indictment Sufficiency, 70 Colum. L. Rev. 876, 894-97 (1970). The test for sufficiency of an indictment "ought to be whether it is fair to defendant to require him to defend on the basis of the charge as stated in the particular indictment . . . ." 1 C. Wright, Federal Practice and Procedure § 125, at 233-34 (1969).

28. 502 F.2d at 529.

29. United States v. Fischetti, 450 F.2d 34 (5th Cir. 1971), cert. denied, 405 U.S. 1016 (1972); United States v. Lippi, 190 F. Supp. 604 (D. Del. 1961).

30. See 502 F.2d at 534 n.11 (Hunter, J., dissenting); United States v. Fischetti, 450 F.2d 34, 39 (5th Cir. 1971), cert. denied, 405 U.S. 1016 (1972).

31. 502 F.2d at 531.

32. It is clear, at least, that the indictment process is controlled by the prosecutors. See Johnston, The Grand Jury—Prosecutorial Abuse of the Indictment Process, 65 J. Crim. L.C. 157, 160-61 (1974); Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 295, 363 (1931). It is interesting to note that England has abolished the grand jury system. Administration of Justice (Miscellaneous Provisions) Act of 1933, 23 & 24 Geo. 5, c. 36, § 1, at 578-79.

33. 502 F.2d at 531.

34. See notes 21-23 supra and accompanying text.

35. 502 F.2d at 531.

36. Id. at 533 (Hunter, J., dissenting).

holding only that when a statute requires indictment for a misdemeanor offense, modification of that indictment "is impermissible when it would violate the defendant's right to be convicted only as charged by the grand jury."[37] Finding no constitutional basis to reverse, the dissent rejected the majority's "per se rule of prejudice."[38] While not seeking to minimize the possibility that prejudice could result from the benefits of the indictment and the stigma which could attach to the defendant,[39] the dissent nevertheless reasoned that a balancing test was preferable and that Goldstein's conviction should be affirmed.[40]

The dispute between the majority on the one hand, and the dissent and the trial court on the other, also focused upon differing interpretations of rule 7(e)[41]—dealing with amendments to informations—and rule 52(a)[42]—the harmless error rule—of the Federal Rules of Criminal Procedure. The majority stated:

> Subdivision [7](e) which provides for amendments is limited to informations, and we follow the rule as it reads.
>
> Rights of an accused in a criminal proceeding which are valuable to him should not be limited or taken away by construction.[43]

The dissent and the trial court disputed reading a negative inference into rule 7(e). They both viewed rule 7 as deferring to case law and refused to construe the rule as barring all amendments to indictments.[44]

Even assuming the majority's reading of rule 7 was correct, the district court[45]

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37. Id.

38. Id. at 534 (Hunter, J., dissenting).

39. Id.

40. Id. at 534-35 (Hunter, J., dissenting).

41. "The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Fed. R. Crim. P. 7(e).

42. "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a).

43. 502 F.2d at 531 (footnote omitted). Note to subdivision (e) of rule 7 reads: "This rule continues the existing law that, unlike an indictment, an information may be amended . . . ." Fed. R. Crim. P. 7(e), Note of Advisory Comm. on Rules, citing Muncy v. United States, 289 F. 780 (4th Cir. 1923).

44. 502 F.2d at 533-34 (Hunter, J., dissenting); District Slip Opinion at 19. The dissent in Goldstein noted that Muncy v. United States, 289 F. 780 (4th Cir. 1923), cited in the note to subdivision (e) (see note 43 supra), is limited strictly to informations. 502 F.2d at 533 n.6; see Russell v. United States, 369 U.S. 749, 761-62 (1962). The dissent also points out that insubstantial amendments to indictments have been permitted. 502 F.2d at 533-34 n.7; cf. United States v. Fruchtman, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849 (1970) (non-prejudicial amendment of indictment is permissible under rule 7(c)). The district court noted that "prior case law dealing with express amendments deemed 'matters of form' rather than 'matters of substance' is still followed." District Slip Opinion at 19 n.*, citing United States v. Buble, 440 F.2d 405 (9th Cir.), cert. denied, 404 U.S. 829 (1971); Stewart v. United States, 395 F.2d 484 (8th Cir. 1968).

45. District Slip Opinion at 20.

and the dissent[46] could not agree that a reversal was required. Rather, they would have applied rule 52(a)[47]—the "harmless error" rule. Both the district court and the dissent discussed the constitutional framework in which to view the amendment of a misdemeanor indictment. There are different classifications of constitutional rights. Violations of certain rights may be viewed as per se prejudicial; violations of other rights are disregarded where such violations are harmless beyond a reasonable doubt.[48] Here, at best, Goldstein's right under rule 7(e) was that there be no amendments to the indictment once the prosecutor chose to proceed by indictment.[49] Even assuming a violation of this procedural right, the general view is that such violations of the federal rules are disregarded whenever it appears to the court that the defendant has not been substantially prejudiced.[50] The dissent found that the constructive amendment of the misdemeanor indictment amounted to a harmless error which did not prejudice the defendant.

In *Goldstein*, the dissent's reasoning is more persuasive. The majority might very well argue that there is a subtle influence upon the petit jury through the use of indictments in misdemeanor cases.[51] But the majority view is neither constitutionally required,[52] nor does it seem required under the Federal Rules of Criminal Procedure.[53] The majority's adoption of a "per se" approach no doubt will foster judicial economy, in that appellate courts will not have to deal with allegations of prejudice resulting from amendments to misdemeanor indictments on a case by case basis. It also will encourage the government to frame such indictments properly. But the dissent's advocacy of balancing "prejudice against the weight of guilt" is in line with consistent judicial recognition of differing degrees of constitutional protection.[54] This constitutional tradition favors allowing amendment of misdemeanor indictments, absent impairment of substantial rights of the accused.

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46. 502 F.2d at 534 (Hunter, J., dissenting). The dissent noted that rule 52(a) unquestionably applied to indictments. Id. at 534 n.10.

47. See note 42 supra.

48. See generally Chapman v. California, 386 U.S. 18, 23-24 (1967); McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974), noted in 43 Fordham L. Rev. 310 (1974).

49. 502 F.2d at 534 (Hunter, J., dissenting); District Slip Opinion at 21.

50. See, e.g., Hamling v. United States, 418 U.S. 87, 134-35 (1974) (automatic reversal for violation of rule 30 and other relevant rules inconsistent with rule 52(a)); United States v. Delay, 500 F.2d 1360, 1367 (8th Cir. 1974) (improper closing argument found "harmless"); Sullivan v. United States, 414 F.2d 714, 715 (9th Cir. 1969) (error under Fed. R. Crim. P. 29(b) not prejudicial); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968) (impermissible joinder under Fed. R. Crim. P. 8 held harmless by virtue of rule 52); Bayless v. United States, 381 F.2d 67, 75 (9th Cir. 1967) (procedural errors held harmless); United States v. Mills, 366 F.2d 512, 514 (6th Cir. 1966) ("A variance is not to be regarded as material . . . where it does not affect substantial rights," citing rule 52(a)).

51. See notes 31 and 32 supra and accompanying text.

52. See note 23 supra. See also United States v. Cirami, No. 74-1492, at 6050-53 (2d Cir., Jan. 24, 1975).

53. See notes 44 and 50 supra and accompanying text.

54. See notes 47-49 supra and accompanying text.

Environmental Law—Eighth Circuit Applies Reasonableness Standard to Review Agency Decision Not to File Environmental Impact Statement.—Minnesota Public Interest Research Group (MPIRG), an association of Minnesota college students, filed suit requesting preliminary and permanent injunctions against logging activities in the Boundary Waters Canoe Area of the Superior National Forest. The complaint alleged a failure of the Forest Service to prepare and file an Environmental Impact Statement (EIS)[1] as required by the National Environmental Policy Act of 1969 (NEPA).[2]

The Forest Service, a federal agency which administers the Canoe Area as a Wilderness Area,[3] entered into contracts with private defendants for logging of timber prior to January 1, 1970, the effective date of NEPA. Since that date, the Forest Service has been involved in various activities relating to eleven timber sales[4] including contract extensions, modifications and general administrative activities required by the contracts. The Forest Service negotiated changes in the area where cutting was to take place in seven of the timber sales for environmental reasons and continuously acted in a supervisory capacity by approving roads, camps and the use of mechanized equipment, and by marking the exact boundaries of the sales.[5]

The government defendants[6] claimed that the Forest Service activities which occurred after the effective date of NEPA[7] did not constitute a major federal action significantly affecting the quality of the human environment within the meaning of NEPA and therefore no EIS was required. The district court, in requiring preparation of an EIS, held that there was a major federal action and enjoined further logging in all or part of seven timber sales where

1. Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1316-17 (8th Cir. 1974) (en banc) [hereinafter cited as MPIRG].

2. 42 U.S.C. §§ 4321-47 (1970) (effective January 1, 1970).

3. Pursuant to the Wilderness Act, 16 U.S.C. §§ 1131-36 (1970), the Canoe Area was designated a wilderness area. 498 F.2d at 1316 n.1.

4. A timber sale is the right to remove timber during the period of the contract. 498 F.2d at 1317 n.8.

5. Id. at 1318.

6. The government defendants were the Secretary of Agriculture, the Chief of the United States Forest Service, the Regional Forester, and the Supervisor of the Superior National Forest. Id. at 1317 n.4. The private defendants were the owners of the eleven timber sales active at the time suit was filed. Id.

7. Id. at 1317. NEPA has been held not to have retroactive application. However, where the project is of a continuous nature or commenced prior to NEPA but requires further major action before completion, the EIS requirements have been held applicable. Jones v. Lynn, 477 F.2d 885, 888 (1st Cir. 1973) (urban renewal by HUD in Boston; NEPA held not per se inapplicable to projects underway before passage of the Act); San Francisco Tomorrow v. Romney, 472 F.2d 1021, 1024 (9th Cir. 1973) (HUD loan agreement with local redevelopment agency contained renegotiation provision; NEPA applies if subsequent to the effective date there was further major federal action); Ragland v. Mueller, 460 F.2d 1196, 1198 (5th Cir. 1972) (sixteen miles of twenty mile disputed highway were completed as of passage of NEPA; Congress did not intend that construction should be halted and an EIS prepared). See generally Note, Retroactive Application of the National Environmental Policy Act of 1969, 69 Mich. L. Rev. 732 (1971).

the logging represented an intrusion into virgin forest.[8] The Court of Appeals for the Eighth Circuit, applying a "reasonableness" standard of review of the agency decision rather than the traditional "arbitrary or capricious" standard, affirmed. *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974) (*en banc*).

NEPA has been described as "more than an environmental full-disclosure law"; it was enacted by Congress to force federal agencies to consider the environmental consequences of their activities.[9] Section 102(2)(C) of NEPA requires the preparation of an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[10]

An EIS is a detailed statement on the effects of and alternatives to the proposed agency action which is to be transmitted to the Council on Environmental Quality and made available to the public. Section 102(2)(C) of NEPA sets forth five specific areas of information which must be included in an EIS.[11]

A federal agency considering implementation of a project must make a

8. Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584, 623, 630 (D. Minn. 1973), aff'd, 498 F.2d 1314 (8th Cir. 1974) (en banc); cf. Sierra Club v. Lynn, 502 F.2d 43, 57-58 (5th Cir. 1974).

9. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973). Moreover, the same court noted that NEPA also was intended to force substantive changes in the administrative decisionmaking process. Id.

10. 42 U.S.C. § 4332 (1970).

11. Id. "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . ." The section goes on to require all federal agencies to

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

For a discussion of the implementation of section 102(2)(C) in the decisionmaking process of federal agencies see Comment, The National Environmental Policy Act Applied to Policy-Level Decisionmaking, 3 Ecology L.Q. 799 (1973).

threshold decision as to NEPA's applicability.[12] This decision may be informal, as there is no provision for a hearing in the statute. If the agency decision is against preparation of an EIS, there is no statutory requirement that a record or formal findings be made. If the decision is challenged, however, the absence of a record can, of course, be a source of difficulty.[13]

The initial question faced upon judicial review of an agency's threshold decision not to file an EIS is what standard to apply. The general reviewing standard for agency actions is found in section 10(e) of the Administrative Procedure Act (APA), which provides, in part: "[T]he reviewing court shall— . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[14] The APA provides other reviewing standards: the substantial evidence test[15] and review de novo.[16] The substantial evidence test is applied to an agency factual determination which will be upheld if supported by substantial record evidence. The de novo standard applies to an agency determination of a question of law. The reviewing court is free to reexamine the question and substitute its judgment for that of the agency.[17]

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12. E.g., Grand Canyon Dorries, Inc. v. Walker, 500 F.2d 588, 590 (10th Cir. 1974); MPIRG, 498 F.2d at 1319 & n.15 (citing cases); Morningside Renewal Council, Inc. v. AEC, 482 F.2d 234, 238 (2d Cir. 1973), cert. denied, 417 U.S. 951 (1974).

13. In a recent case, Grand Canyon Dorries, Inc. v. Walker, 500 F.2d 588 (10th Cir. 1974), the court affirmed—due to lack of an environmental record—the denial of plaintiff's request for injunctive relief based upon the National Park Service's failure to prepare an EIS for the operation of the Glen Canyon dam. The court held that the matter was not yet ripe for judicial determination as there was no indication in the record that the federal agency had ever considered preparation of an EIS. The court noted that the informal conversations by plaintiffs with the Department were insufficient to establish the Department's position vis-à-vis NEPA. Id. at 590.

Without a record prepared by the involved agency the reviewing court has difficulty ascertaining whether the federal agency has observed the procedural requirements of NEPA. The District of Columbia Circuit has held: "The minimum requirement for compliance with the 'action-forcing' provisions of NEPA is for the agency to supply a statement of reasons why it believes that an impact statement is unnecessary." Arizona Pub. Serv. Co. v. Federal Power Comm'n, 483 F.2d 1275, 1282 (D.C. Cir. 1973). The Second Circuit has interpreted NEPA as requiring federal agencies "to affirmatively develop a reviewable environmental record." Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir.), cert. denied, 409 U.S. 990 (1972). In a later appeal in the same suit, the Second Circuit went even further in this area and required that "before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

14. 5 U.S.C. § 706(2)(A) (1970). See, e.g., South Terminal Corp. v. EPA, 504 F.2d 646, 655 (1st Cir. 1974) (APA standards applied).

15. 5 U.S.C. § 706(2)(E) (1970).

16. Id. § 706(2)(F).

17. Id. On the question of reviewing standards for agency actions see 4 K. Davis, Administrative Law Treatise §§ 29.01-30.14 (1958); notes 23-24 infra and accompanying text.

The Supreme Court has created a standard of review of mixed questions of law and fact—the rational basis test. See note 51 infra and accompanying text.

In the landmark case of *Citizens to Preserve Overton Park, Inc. v. Volpe,*[18] the Supreme Court reviewed an informal threshold decision by the Department of Transportation which permitted construction of an interstate highway through Overton Park in Memphis, Tennessee. Petitioners contended that the agency had failed to comply[19] with the provision of the Department of Transportation Act of 1966[20] which required that the "Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ."[21] The petitioners argued that there were in fact such alternatives to the route approved by the agency.[22] Hence, at issue was the interpretation of the statutory phrase "feasible and prudent" as applied to the particular facts.

The Court examined the various standards of review provided by the APA. The Court held that the "substantial evidence" test of section 706(2)(E) is applied only to actions where the agency is either engaged in a rule-making function and a hearing is held to form a record which then is used as the basis of the agency's decision, or where the agency bases its action on a public adjudicatory hearing.[23] The test was not applicable to the case at issue. The Court further held that de novo review was inappropriate. Such review is proper only in two instances: where the agency action is adjudicatory and the fact-finding procedures are inadequate; or in a non-adjudicatory action where issues which were not before the agency are raised in a proceeding to enforce the agency action. The Court did, however, hold that "the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry."[24]

The Court formulated a two-step test for review of a threshold decision. The initial determination is what range of choices are available to the Secretary and whether the "decision can reasonably be said to be within that range." Then the reviewing court must find that "the Secretary could have reasonably believed" that there were no feasible alternatives or alternatives without unique problems. After this inquiry, the Court stated that the facts must be scrutinized to determine that the actual decision reached was not " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' . . . To make this finding the court must consider whether

18. 401 U.S. 402 (1971).

19. Id. at 406.

20. 49 U.S.C. §§ 1651-59 (1970).

21. Id. § 1653(f) (1970).

22. 401 U.S. at 408.

23. The two concepts of rule-making and adjudication are elusive and difficult to define with precision. Professor Davis suggests that rule-making be considered analogous to the legislative process while adjudication be considered analogous to the judicial process. 1 K. Davis, Administrative Law Treatise § 5.01 (1958); see 5 U.S.C. §§ 553-54, 556-57 (1970). For the substantial evidence test to be applicable there must be a hearing which forms the basis of the agency action. 401 U.S. at 414.

24. 401 U.S. at 415.

the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[25]

With the passage of NEPA, a broad environmental statute that affects all federal agencies, and the Supreme Court's relaxation of standing requirements under NEPA by its decision in *United States v. SCRAP*,[26] many suits have been commenced to forestall unwanted federal actions on the grounds that the EIS requirements have not been met. While the federal agency must, of necessity, make the threshold decision as to the necessity for an EIS,[27] the courts of appeals can review that decision. In doing so they have applied two different standards of review: the arbitrary or capricious standard of the APA[28] and a judicially created reasonableness standard. The difference between the two was most succinctly put by the Fifth Circuit: "To best effectuate the Act [NEPA] this decision should have been court-measured under a more relaxed rule of reasonableness, rather than by the narrower standard of arbitrariness or capriciousness."[29] Apparently, an agency action might be unreasonable without being arbitrary or capricious.[30] In practical terms, a reasonableness standard means less deference to the agency's action and more receptivity to the plaintiff's challenge. Further articulation of the difference between the two standards is difficult because decisions applying the newer reasonableness standard are few. The courts that have applied the newer standard indicate that there should be a more liberal standard than arbitrariness or capriciousness to measure an agency's decision not to prepare an EIS.[31]

The arbitrary or capricious standard is most often applied in litigation arising under NEPA. It was not until 1973 that the reasonableness standard

25. Id. at 416.

26. 412 U.S. 669 (1973). On the question of standing conferred by the APA (5 U.S.C. § 702 (1970)), the Supreme Court held that judicial review could be obtained only by those with "injury in fact," where the alleged injury affected an interest "arguably within the zone of interests" to be protected or regulated by the statute. Sierra Club v. Morton, 405 U.S. 727, 733 (1972). In SCRAP, the Court explained that harm to a use or enjoyment of natural resources was sufficient to give plaintiffs standing under NEPA. The Court noted that it was undisputed that the plaintiffs' environmental interest was within the zone of interests to be protected by NEPA and therefore plaintiffs had standing under the APA standard. 412 U.S. at 686 & n.13. See also Coalition for the Environment v. Volpe, 504 F.2d 156, 168 (8th Cir. 1974) (an identifiable trifle suffices for standing).

27. See note 12 supra and accompanying text.

28. E.g., Natural Resources Defense Council, Inc. v. EPA, No. 72-2145, at 17 (9th Cir., Nov. 11, 1974); Pennsylvania v. EPA, 500 F.2d 246, 254 (3d Cir. 1974); cf. Natural Resources Defense Council, Inc. v. TVA, 502 F.2d 852 (6th Cir. 1974) (per curiam); Amoco Oil Co. v. EPA, 501 F.2d 722, 746 & n.63 (D.C. Cir. 1974). See also text accompanying note 14 supra.

29. Save Our Ten Acres v. Kreger, 472 F.2d 463, 465 (5th Cir. 1973).

30. Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1248-49, 1251 (10th Cir. 1973).

31. Id. at 1249; Save Our Ten Acres v. Kreger, 472 F.2d 463, 465-66 (5th Cir. 1973). But see Air Transport Ass'n of America v. Federal Energy Office, 382 F. Supp. 437, 453 (D.D.C. 1974) (test for arbitrariness or capriciousness is whether the agency's decision had a rational or reasonable basis).

was applied to review an agency threshold decision not to prepare an EIS. In *Save Our Ten Acres v. Kreger (SOTA)*,[32] the plaintiffs challenged a General Services Administration (GSA) decision to construct a federal office building in downtown Mobile, Alabama, without preparation of an EIS. The GSA argued that on review the arbitrary or capricious standard should be used based on the general rule that administrative findings of fact are conclusive if supported by any substantial evidence of record.[33] While the court seemed to agree that the agency decision was one of factual determination, it held that the arbitrary or capricious standard was not sufficient to test the "basic jurisdiction-type conclusion involved here." The court reasoned that "[t]he spirit of the Act [NEPA] would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review."[34] As a result, the court announced a more flexible standard for review: the test of reasonableness.[35]

The Fifth Circuit based its decision on two factors: the congressional intent underlying NEPA and the Supreme Court's reasoning in the *Overton Park* case. The *SOTA* court cited the language of section 102(2) of NEPA as evincing a congressional intent favoring the preparation of an EIS in all close cases. That section directs that the environmental factors and effects of an agency action are to be considered to the fullest extent possible. Clearly, an agency threshold decision not to prepare an EIS precludes such full consideration.[36] The court noted that the statutory language at issue in *Overton Park* differed from that in *SOTA* and while it conceded that the Supreme Court had endorsed the arbitrary or capricious standard, it concluded, "a thorough study of *Overton Park* teaches that a more penetrating inquiry is appropriate for court-testing the entry-way determination of whether all relevant factors should ever be considered by the agency."[37]

By the time *MPIRG* reached the Eighth Circuit for determination, the Tenth Circuit, in *Wyoming Outdoor Coordinating Council v. Butz*,[38] had joined the Fifth Circuit in holding that the reasonableness standard should govern review of threshold decisions under NEPA.[39] The *MPIRG* court, citing both the Fifth and Tenth Circuit decisions, also held that the reasonableness standard should be applied.[40]

The Eighth Circuit majority also emphasized the effect of an agency decision not to prepare an EIS. The court stated: "[W]ithout the full disclosure required by NEPA for major federal actions, there exists no sound basis

32. 472 F.2d 463 (5th Cir. 1973).

33. Id. at 464-66.

34. Id. at 466.

35. Id.

36. See 7 Ga. L. Rev. 785 (1973).

37. 472 F.2d at 466.

38. 484 F.2d 1244, 1249 (10th Cir. 1973) (clearcutting of 670 acres in Teton National Forest held to require preparation of an EIS where the area was basically undeveloped and only removed from its natural state by the presence of jeep roads).

39. Id.

40. 498 F.2d at 1320.

to evaluate the environmental aspects of a project. And without this basis for evaluation, the [sic] is no way to determine whether a substantive decision to proceed is arbitrary and capricious."[41] The court went on to point out that, when applying the reasonableness standard, a reversal of the agency decision will not automatically occur: it would still be necessary for plaintiffs to show that the project could significantly affect the quality of the human environment.[42]

The court rejected the analysis and conclusion of the Second Circuit in *Hanly v. Kleindienst (Hanly II)*,[43] probably the best reasoned decision choosing the arbitrary or capricious standard. There, the GSA had prepared a twenty-five page "Assessment of Environmental Impact" which comprehensively analyzed the potential impact of a proposed prison project[44] on the neighborhood.[45] Although they concluded that an EIS was not required,[46] the Second Circuit again[47] held that the GSA's evaluation did not meet the minimum level of consideration required by NEPA. GSA was therefore ordered to receive additional evidence and redetermine whether an EIS was required.[48]

The court also addressed itself to the question of the proper reviewing standards under NEPA, a question held in abeyance initially in *Hanly I*.[49] The Second Circuit characterized the agency's action as one involving both a determination of law (the meaning of the word "significantly" as used in NEPA) and a question of fact (whether the center would have a significant adverse effect upon the human environment). The court noted that the traditional reviewing standards for these questions differ—questions of law are determined de novo while questions of fact are reviewed by applying the

41. Id.

42. Id.

43. 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) [hereinafter cited as Hanly II].

44. Id. at 827. For a more complete discussion of the facts see Hanly v. Mitchell, 460 F.2d 640, 642-43 (2d Cir.), cert. denied, 409 U.S. 990 (1972) [hereinafter cited as Hanly I].

45. The Hanly II panel noted that the Assessment "closely parallels in form a detailed impact statement." 471 F.2d at 832. However, it is clear that the Assessment was prepared and submitted to fulfill the directive of the Hanly I panel that the agency must "affirmatively develop a reviewable environmental record." 460 F.2d at 647. The GSA concluded that no EIS was necessary based upon its Assessment. 471 F.2d at 828.

46. 471 F.2d at 828.

47. In Hanly I, the GSA evaluation was contained in a short memorandum. The memorandum failed to consider or discuss the impact the jail would have on local residents. The court held that the conclusory statements contained therein were insufficient to meet the detailed consideration requirements of NEPA and remanded for further determination and consideration by the GSA. 460 F.2d at 645-47. The Assessment presented in Hanly II was the result of the GSA's additional study. 471 F.2d at 827.

48. 471 F.2d at 836. The Hanly II panel went further than the Hanly I panel when it required that the agency give notice to the public of the proposed major federal action and that the public must have an opportunity to submit relevant facts prior to the agency's threshold determination. Id.

49. 471 F.2d at 828; 460 F.2d at 648.

arbitrary or capricious standard.[50] *Hanly II* observed that where mixed questions of law and fact are presented, the Supreme Court has created a "rational basis" standard of review. In applying a rational basis test an agency action will be upheld if it has a "warrant in the record" and "reasonable basis in law."[51] Despite this analysis, the Second Circuit, following *Overton Park,* chose the arbitrary or capricious standard, reasoning that "the APA standard permits effective judicial scrutiny of agency action and concomitantly permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise."[52]

Having determined the question of the proper reviewing standard, the Second Circuit turned to the problem of analyzing NEPA in the factual situation presented. This proved to be more difficult than deciding the proper reviewing standard. The court was unable to devise a satisfactory resolution of what it called the "amorphous term 'significantly.' "[53] Noting the absence of congressional or administrative interpretation of the term, the court chose to establish a two-step test for agencies (and the courts) to use when making a threshold determination as to NEPA's applicability. The test created directs the agency to consider the proposed action in the light of:

> (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.[54]

The Eighth Circuit, when presented with the same problem as the *Hanly II* court, analyzed the question of statutory interpretation differently. The defendants in *MPIRG* argued that NEPA created two separate tests for applicability: is the action major; and if so, does it significantly affect the human environment? This was precisely the interpretation adopted in *Hanly II* by the Second Circuit.[55] However, the Eighth Circuit majority disagreed

50. 471 F.2d at 828-29.

51. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944). The rational basis standard has been applied rarely in litigation arising under NEPA. The standard was used in Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 789 (D. Me. 1972).

This standard was discussed in Scientists' Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) (federal research project ripe enough to require EIS), noted in 87 Harv. L. Rev. 1050 (1974). The court indicated that in the factual situation presented, the rational basis and arbitrary or capricious standards merged into one. 481 F.2d at 1095-96 n.68.

Professor Davis suggests that the rational basis and reasonableness tests are the same. 4 K. Davis, Administrative Law Treatise § 30.01 (1959). However, it should be noted that this work was written prior to the passage of NEPA and that the courts applying the reasonableness standard under NEPA seem to intend that it be more liberal than the rational basis test. See notes 29-31 supra and accompanying text.

52. 471 F.2d at 829-30.

53. Id. at 830.

54. Id. at 830-31.

55. In the Hanly litigation, the government conceded that the project was a major federal action within the meaning of NEPA. Id. at 826-27. The MPIRG court noted that "there is little

with this reading of NEPA. The court held that separation of the magnitude and impact measurements would be contrary to the overall plan of NEPA. It reasoned that:

> By bifurcating the statutory language, it would be possible to speak of a 'minor federal action significantly affecting the quality of the human environment,' and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA . . . .[56]

Clearly, the effect of this construction of NEPA is that the reviewing court need only find that a federal action[57] significantly affects the quality of the human environment to require preparation of an EIS.

Proceeding to a consideration of the significance of the timber sales at issue, the court noted at the outset that in the district court it clearly had been established that the operation had a significant effect on the Canoe Area itself.[58] The defendants argued, however, that there was no such effect on the *human* environment and that plaintiffs did not have standing to litigate in any event. The court summarily disposed of both contentions. Relying on the authority of *United States v. SCRAP*[59] and *Sierra Club v. Morton*,[60] the court held that MPIRG had standing because some of its members used the Canoe Area for wilderness recreational purposes which would be curtailed when the logging changed the wilderness character of the area.[61]

Considering the effect on the human environment, the court noted that merely examining the present human use of a facility is too restrictive a view of NEPA's scope. It held that NEPA is concerned with both the direct and indirect effects on the human environment. Such factors as the "existence

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question that when the federal government commits millions of dollars to build dams, nuclear power plants, or highways that there is a major federal action. The question presented by the instant case is not so clear-cut; these actions of the Forest Service cannot be quantified in terms of dollars to be spent or tons of earth to be moved." 498 F.2d at 1319.

56. 498 F.2d at 1321-22.

57. There has been litigation arising under NEPA about the meaning of the statutory term "federal." E.g., Citizens for Balanced Environment & Transp., Inc. v. Volpe, 503 F.2d 601 (2d Cir. 1974) (state funded 4.7 mile segment of interstate Route 7 held not to require EIS despite allegations that state remained eligible for federal funds and that federal funds were used in the planning stage; construction allowed to continue despite prior order requiring preparation of an EIS for the entire Route 7 corridor from Connecticut to Vermont); Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 362 F. Supp. 627, 636 (D. Vt. 1973), aff'd, No. 73-2629 (2d Cir., Dec. 11, 1974) (federal highway officials' knowledge of overall planning process and use of federal funds for planning sufficient federal involvement to require EIS). See also Ely v. Velde, 451 F.2d 1130, 1137-38 & n.22 (4th Cir. 1971) (20% federal funding was a major action within the meaning of NEPA).

58. 358 F. Supp. at 609-617.

59. 412 U.S. 669 (1973).

60. 405 U.S. 727 (1972); see note 26 supra.

61. 498 F.2d at 1324; cf. Natural Resources Defense Council, Inc. v. EPA, No. 72-2145 at 3-6 (9th Cir., Nov. 11, 1974). But cf. Coalition for the Environment v. Volpe, 504 F.2d 156 (8th Cir. 1974).

value,"[62] potential for erosion, visibility of the facility and the destruction of virgin forest must be considered. If the facility will no longer be available for recreational, educational or scientific use in its natural state then there is a significant impact on the human environment. The court found all of these factors to be present and held that there was a significant impact on the human environment.[63]

Although the court held that this impact alone was sufficient to trigger the EIS requirement of NEPA, it did discuss the extent of the Forest Service's involvement. Even though the logging activities had been contracted for prior to the effective date of NEPA, the court found two bases for holding them to be significant following passage of the Act. The opinion noted that the Council on Environmental Quality guidelines[64] provided for a retroactive review of federal programs commenced prior to NEPA, "[t]o the maximum extent practicable."[65] Alternatively, the court found the continuing activities of the Forest Service after January 1, 1970, constituted a significant involvement. The key factors in this decision were the supervisory and administrative actions required by the contracts and agency regulation and the fact that revenue received from the sales was insufficient to support a reforestation program.[66] The court by a five to three majority affirmed the result in the district court and required preparation and filing of an EIS.[67]

The three dissenters took issue with the majority on the question of whether the actions complained of were major within the meaning of NEPA. The dissent obviously accepted the *Hanly II* argument for a "bifurcated" reading of NEPA's applicability requirements.[68] The dissent argued that the Forest Service activities were not major: "We think that common sense dictates that this decision [by the agency] was correct . . . . [T]he only 'major' federal action involved continued supervision of the contracts or a *reduction* in the area to be logged."[69]

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62. The existence value is the feeling that people have knowing that somewhere there is a wilderness, even though they have never seen it. MPIRG, 498 F.2d at 1322 n.27; see Conservation Soc'y of S. Vt., Inc. v. Volpe, 343 F. Supp. 761, 767-68 (D. Vt. 1972).

63. 498 F.2d at 1322.

64. 40 C.F.R. § 1500.13 (1974).

65. 498 F.2d at 1321. The guidelines provide in pertinent part: "The section 102(2)(C) procedure shall be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970." 40 C.F.R. § 1500.13 (1974). See also note 7 supra and accompanying text.

66. 498 F.2d at 1321-23; see note 9 supra.

67. 498 F.2d at 1323.

68. See notes 55-56 supra and accompanying text.

69. 498 F.2d at 1325. The dissent specifically cited the following six district court cases where no EIS was required. Kisner v. Butz, 350 F. Supp. 310, 322-23 (N.D. W. Va. 1972) (construction of 4.3 mile single lane gravel road; the forest was already "honeycombed" with similar roadways); Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 349 F. Supp. 1212, 1214 (D.D.C. 1972), remanded with directions, 487 F.2d 1029 (D.C. Cir. 1973) (construction of bulk mail center in industrial park, detailed environmental assessment concluded project

The dissenters focused on the opening clause of section 102(2)(C) for their definition of "major." They would hold that the actions here are not on the same level as a proposal for legislation and therefore are not major[70] within the meaning of NEPA. Thus, the dissent would not have required preparation of an EIS.[71]

The dissent's review of the cases interpreting NEPA lead them to the conclusion that "it is primarily a matter of judgment as to what is major federal action, and what constitutes a significant effect on the human environment."[72] This conclusion is unfortunately inescapable. Despite over four years of litigation no workable definition of the NEPA standards has been devised.

It is submitted that the majority's holding is a necessary attempt to cope with this problem. By reviewing agencies' decisions as to the applicability of NEPA to proposed actions under a reasonableness test, the court implicitly recognized that although agencies possess expertise in their substantive fields, they do not necessarily have the same technical expertise in the environmental area. Furthermore, by not attempting to devise an all-inclusive definition of

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was neither major nor significant; moreover, the project was over one-third complete and a delay of four months would have cost more than $400,000); Julis v. City of Cedar Rapids, 349 F. Supp. 88, 89-90 (N.D. Iowa 1972) (widening of street from two to four lanes for a length of fourteen city blocks not a major federal action because only $300,000 of federal funds were used; no property owner was displaced from his land, no parkland was disturbed and the area represented a "bottleneck" as the road elsewhere was already four lanes wide); Morris v. TVA, 345 F. Supp. 321, 324 (N.D. Ala. 1972) (fluctuation of water level in dam operated by the TVA since 1933 not a major federal action); Virginians for Dulles v. Volpe, 344 F. Supp. 573, 577-78 (E.D. Va. 1972) (use of slightly larger jet planes, commenced in 1968, was not a major federal action where difference with predecessor model was minimal so far as the environment was concerned and the evidence tended to show that the newer model was quieter and safer); Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 788 (D. Me. 1972) (marine amphibious assault exercises; extensive planning by involved officials resulted in stringent restrictions on marine activities and ensured that there would be no unavoidable permanent or long-term environmental damage and the short-term impact would be minor).

Although the dissent noted that it had reviewed the cases cited by the majority, it failed to distinguish or discuss Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973), wherein the Tenth Circuit held on facts very similar to those presented in MPIRG that clearcutting of timber (removal of all standing timber in an area) was an action requiring an EIS. Id. at 1249. Indeed the forest area in MPIRG was more unique than that in Wyoming Council in that the MPIRG forest area was the only canoe wilderness area in the world. 498 F.2d at 1316. Hence the facts in MPIRG presented a more compelling need for an EIS than those in Wyoming Council where an EIS also was required.

70. 498 F.2d at 1325.

71. Id. at 1325-26.

72. Id. at 1326. The dissent rejected the majority's alternative holding that retroactive NEPA application would be appropriate in the factual context presented. The dissent stated: "[T]he routine extension of several timber sales and the continued supervision of the others cannot logically be considered to be on the same level with 'proposals for legislation.'" Clearly, by considering only the factual occurrences after January 1, 1970, the dissent adopts the view that these were continuing activities and that such activities after the effective date of NEPA were not major. Id. at 1325-26. See generally note 7 supra.

each of the terms used in section 102(2)(C), the Eighth Circuit avoided creating more confusion in this area.

The decision rendered in *MPIRG* directs agencies to examine their projects while considering the spirit of NEPA and, if in doubt, to prepare an EIS.[73] The approach of the court to the facts of this case suggests that this examination should be made as to the totality of the project and its long range consequences. If the action will significantly affect the environment when considered in this respect then an EIS is required. This type of approach will allow both the agency and reviewing court sufficient flexibility to reach decisions that truly reflect the spirit of NEPA without unduly burdening the courts with litigation. After all, NEPA at its most basic level is merely a directive to consider the environment when engaging in federal actions.

John J. Kearns, III

Federal Procedure and Constitutional Law—Three-Judge Court Required to Decide Constitutional Challenge to Delegate Apportionment at Republican Party Nominating Conventions.—Plaintiffs, four registered Republican voters residing in suburban New Castle County, Delaware, brought a class action for themselves and other Republican voters in their convention district[1] claiming dilution of their constitutional voting rights in the Republican Party nominating processes.[2] The challenge was made to the Delaware Republican Party's apportionment of delegates to the Republican National and State Conventions, and named as defendants the Delaware Republican State Committee and its chairman who administered the apportionment system. Plaintiffs sought declaratory relief and relief enjoining defendants from allocating delegates within the state in a manner inconsistent with the one person, one vote principle.[3] The formula used by the state

73. By preparing an EIS in all doubtful cases, the agency will avoid delay in its projects and save litigation expense. The judicially required reviewable environmental record ("mini-impact statement," see note 13 supra) can result in much unnecessary litigation while the sufficiency of the record is being tested. The Hanly litigation itself spanned three reviews by the Second Circuit and three petitions for certiorari. It was finally laid to rest in a per curiam opinion. Hanly v. Kleindienst, 484 F.2d 448 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974).

The mini-impact statement requirement has been criticized as being unduly burdensome upon both the agencies and the courts. Hanly II, 471 F.2d at 837 (Friendly, C.J., dissenting). However, some commentators indicate that this requirement will result in both an avoidance of protracted litigation and more complete compliance with the spirit of NEPA. Note, NEPA, Environmental Impact Statements and the Hanly Litigation: To File or Not to File, 48 N.Y.U.L. Rev. 522, 545 (1973); 51 Texas L. Rev. 1016, 1021 (1973). The federal agencies' compliance with the requirement will determine which view is correct in practice.

1. Relief was sought pursuant to 42 U.S.C. § 1983 (1970) and Fed. R. Civ. P. 23(a) and (b)(1).

2. Redfearn v. Delaware Repub. State Comm., 362 F. Supp. 65, 66-67 (D. Del. 1973), reversed & remanded, 502 F.2d 1123 (3d Cir. 1974).

3. Redfearn v. Delaware Repub. State Comm., 502 F.2d 1123, 1125 (3d Cir. 1974).

committee gave an equal number of delegates to the state nominating convention to districts with very unequal Republican populations. The state nominating convention nominated Republican candidates for national and statewide offices to be filled at the next general election. In presidential election years, the convention also selected delegates and alternates to the Republican National Convention.[4]

The allocation system was controlled by the rules of the Delaware Republican Party. Under that system, 220 delegates were to attend the state convention. The state was divided into four convention districts: each received a minimum 30 delegates, plus one delegate for each one percent of the statewide Republican vote cast by voters in that district during the past presidential election.[5] By operation of this system, the plaintiffs' convention district, the Second District, was seriously underrepresented. Their district had 64 percent of the state's Republican voters but only 41 percent of the 1972 state convention delegates.[6]

On plaintiffs' motion for summary judgment, a single-judge district court held that the delegate allocation formula used by the state committee, under color of state law, was an unconstitutional violation of the equal protection clause of the fourteenth amendment and issued an injunction.[7] The Court of Appeals for the Third Circuit reversed the issuance of the injunction and remanded.[8] The appellate court held that it was beyond the power of a single district judge to issue an injunction in this case since the case fell within the purview of 28 U.S.C. § 2281[9] which requires a district court of three judges to hear any injunctive constitutional challenge to a state statute or administrative order. If, on remand, the plaintiffs continued to demand injunctive relief[10] the case would have to be heard by a three-judge district

4. 362 F. Supp. at 71.

5. Id. at 67-68. Selection of the allotted delegates was made pursuant to Convention District Committee rules and if more than one person filed as a candidate for the same delegate position, a preconvention primary election would be held by state election officials. Del. Code Ann. tit. 15, §§ 3102, 3107 (Supp. 1972). Even at this level of the selection system, each delegate apparently did not represent an equal number of Republican voters. See 362 F. Supp. at 72.

6. 362 F. Supp. at 69-70. The allocation of a minimum of 30 delegates to each district was the offensive part of the formula: it resulted in overrepresentation for the First, Third and Fourth Districts and underrepresentation for the plaintiffs' Second District. Id.

7. Id. at 74.

8. 502 F.2d at 1129.

9. Id. at 1125. 28 U.S.C. § 2281 (1970) provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

10. The question whether section 2281 is applicable to declaratory judgments that are injunctive in nature has recently been raised in Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973), cert. denied, 416 U.S. 992 (1974) (prison inmate sought judgment declaring unconstitutional the procedural safeguards promulgated under state regulations governing prison discipli-

court.[11] Finally, the court indicated that the lower court must consider adequately the extent to which the Republican Party would sacrifice its right to free association should an injunction issue.[12] *Redfearn v. Delaware Republican State Committee*, 502 F.2d 1123 (3d Cir. 1974).

To hold the case within the purview of section 2281, the court of appeals had to decide two difficult questions. First, were the defendants state officers within the meaning of the statute? Second, was a state statute or administrative order under attack?[13]

In *Dahl v. Republican State Committee*,[14] plaintiffs directly attacked the constitutionality of a state statute which expressly defined the composition of the state party central committees. The challenge was rejected by a three-judge district court. On direct appeal to the Supreme Court,[15] the Court vacated the lower court's decision and remanded the case for entry of a fresh decree which could be appealed to the court of appeals if plaintiffs desired.[16] While the Court's memorandum opinion in *Dahl* did not fully explain its rationale, the district judge on remand opined that the defendants—the Republican State Committee and its chairman—were not state officers as required by section 2281.[17] Therefore, the convention of a three-judge court

nary proceedings.) The Fifth Circuit ordered the convention of a three-judge court on the basis that the impact of the declaratory judgment was injunctive and, therefore, that the declaratory judgment was an injunction for the purposes of section 2281. This extension of section 2281 has been questioned, 45 Miss. L.J. 808, 815-17 (1974), and seems contrary to the traditional strict construction given the section by the Supreme Court, see Phillips v. United States, 312 U.S. 246, 251 (1941). See also Board of Regents v. New Left Educ. Project, 404 U.S. 541, 542 (1972); Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969); Swift & Co. v. Wickham, 382 U.S. 111 (1965). The Third Circuit, in Redfearn, apparently rejected the notion that application for a declaratory judgment might be equivalent to application for an injunction for purposes of section 2281: a three-judge court would be required on remand only if the plaintiffs continued to seek an injunction. 502 F.2d at 1128-29.

11. 502 F.2d at 1128-29.

12. Id. at 1127-28.

13. The district judge had rejected the defendants' suggestion that a section 2281 three-judge court was required because he felt the case presented no challenge to any state statute. "In the present case, the plaintiffs simply challenge the constitutionality of the delegate apportionment formula utilized by the Republican State Committee, under color of state law. The immediate source of this unconstitutional result is Rule 2 of the State Committee, not any statute of the State of Delaware." 362 F. Supp. at 74; see Smith v. State Exec. Comm., 288 F. Supp. 371, 373 (N.D. Ga. 1968) (attack on party rules under color of state law). See also Chapman v. Meier, 43 U.S.L.W. 4199, 4203 (U.S. Jan. 27, 1975).

14. Civil No. 7557 (W.D. Wash. 1968), vacated, 393 U.S. 408 (1969) (per curiam).

15. 28 U.S.C. § 1253 (1970) provides for direct appeal to the Supreme Court from all decisions of three-judge district courts granting or denying injunctions.

16. 393 U.S. 408 (1969) (per curiam). In effect the Court was saying the case must not be heard before a three-judge court; a three-judge court decree would be appealable only to the Supreme Court.

17. Dahl v. Republican State Comm., 319 F. Supp. 682, 683-84 (W.D. Wash. 1970). This conclusion seems to be in accord with the conclusions of several other federal courts. See Seergy v. Kings County Repub. County Comm., 459 F.2d 308, 312-13 n.6 (2d Cir. 1972) (committee and its members probably not state officers) (dictum); Todd v. Oklahoma State Dem. Cent. Comm.,

in the first instance was improper. It might be argued that, since the defendants in *Redfearn* were also a party state committee and its chairman, the requirement of a state officer as a party defendant was not met. Judge Gibbons considered, but rejected, the argument. "It seems unlikely, however, that the Supreme Court, construing § 2281 even as narrowly as it does, would permit the frustration of the Congressional policy behind that section by the device of an injunction which effectively dismantles a state statute by nominally enjoining others than state employees."[18]

Viewing the complaint in *Redfearn* on its face, certain provisions of the Delaware Election Law,[19] state statutes, might be said to be under attack, thereby necessitating a three-judge court. This apparently was Judge Gibbons' view. However, as dissenting Judge Rosenn pointed out, the plaintiffs, upon motion for summary judgment, "expressly disclaimed any challenge to the constitutionality of Delaware statutes, directing their attack solely to the party rule."[20] Judge Rosenn felt, therefore, that no state statute was under attack.[21] Judge Aldisert apparently agreed, but felt that the party rule itself, because it "relates to statewide application" and "has all force and efficacy of an official regulation promulgated by a state agency,"[22] rose to the level of an administrative order for purposes of section 2281. Thus, Judge Aldisert agreed with Judge Gibbons that the requirement of a "state statute or administrative order" was satisfied, and that a three-judge court was required on remand.

Plaintiffs' major contention in *Redfearn* was that the allocation formula

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361 F. Supp. 491, 494 (W.D. Okla. 1973) (committee members and committee chairman not public officers within compass of § 2281); Smith v. State Exec. Comm., 288 F. Supp. 371, 374 (N.D. Ga. 1968) (neither state committee nor chairman are state officers).

18. 502 F.2d at 1128.

19. The statutes discussed are Del. Code Ann. tit. 15, §§ 101, 3301(c) (Supp. 1972). The former defines a party as "any political party, organization or association which elects delegates to a national convention, nominates candidates for electors of president and vice-president, United States senator, representative in congress, governor and other offices, and elects a state committee and officers of a state committee by a state convention composed of elected members from each representative district . . . ." Section 3301(c) provides that no candidate for the statewide office of elector or office as described in § 101 may be deemed nominated for the general election unless he has either received more than 50% of the eligible delegate vote at a state party nominating convention or has received a majority of votes cast in a party primary election. The party primary is provided in the case where one candidate receives more than 50% of the delegate vote on the final convention poll and another candidate receives at least 35% of the votes on the same polling. Del. Code Ann. tit. 15, § 3116 (Supp. 1972). The constitutionality of § 3116 was not challenged by plaintiffs' complaint.

20. 502 F.2d at 1132.

21. This was the basis of the district court's decision to continue to hear the case with one judge. 362 F. Supp. at 74. Since § 2281 is a jurisdictional rule conferring power on a three-judge court to hear the case, loss of one of the requirements precludes a three-judge court from continuing to sit. See Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 76-77 (1964); C. Wright, Federal Courts § 50 (2d ed. 1970).

22. 502 F.2d at 1129 (Aldisert, J., concurring); see Harper v. Vance, 342 F. Supp. 136, 139 (N.D. Ala. 1972) (party rule constitutes order of state administrative board).

used by the Delaware Republican State Committee violated the equal protection clause of the fourteenth amendment. A determination by the court of such violation would ensure the plaintiffs an equal voice in the selection of convention delegates and raise their level of political power within the party to that of every other member of the party.[23]

Two issues were framed in *Redfearn*. Does the equal protection clause apply to a political party rule which, on undisputed facts, discriminates against certain party voters according to geographic location?[24] If so, are there legitimate considerations incident to the effectuation of a rational state policy which permit deviation from absolutely proportional representation?[25]

The history of the equal protection clause's applicability to the political arena anticipates at least one threshold problem, viz., whether a justiciable question has been presented. The district court in *Redfearn* acknowledged that justiciable questions are presented by challenges to delegate allocation systems used by political parties.[26]

The complaint in *Redfearn* was brought under the Civil Rights Act.[27] That statute is enacted pursuant to the fourteenth amendment and, to prevail under it, a plaintiff must establish state action.[28] The practices complained of cannot be purely private; the state must be involved. The selection and apportionment of delegates to state and national party conventions has been

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23. A discussion of the challenges to apportionment of political party delegates at the national level, that is, by the national parties to each state party organization, is not within the scope of this Case Note. It is, however, the subject of several recent cases and commentary. See O'Brien v. Brown, 409 U.S. 1 (1972) (Democratic Party); Ripon Soc'y, Inc. v. National Repub. Party, 369 F. Supp. 368 (D.D.C. 1974), appeal pending, No. 74-1337 (D.C. Cir., filed Mar. 13, 1974); Kester, Constitutional Restrictions on Political Parties, 60 Va. L. Rev. 735 (1974); Note, Mandates of the National Political Party Clash with Interests of the Individual States as the Party Executes Its Policy by Abolition of State Delegate Selection Results: Legal Issues of the 1972 Democratic Convention and Beyond, 4 Loyola U. Chi. L.J. 137 (1973); Comment, One Man, One Vote and Selection of Delegates to National Nominating Conventions, 37 U. Chi. L. Rev. 536 (1970); 60 Geo. L.J. 1331 (1972).

24. 362 F. Supp. at 70.

25. Id. at 73.

26. Id. at 72-73. The question seems to have been resolved in Georgia v. National Dem. Party, 447 F.2d 1271 (D.C. Cir.), cert. denied, 404 U.S. 858 (1971) and followed in Bode v. National Dem. Party, 452 F.2d 1302 (D.C. Cir. 1971), cert. denied, 404 U.S. 1019 (1972); see Note, Bode v. National Democratic Party: Apportionment of Delegates to National Political Conventions, 85 Harv. L. Rev. 1460 (1972); Note, Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions, 78 Yale L.J. 1228, 1230-32 (1969) [hereinafter cited as Selection of Delegates]. See also Note, Judicial Intervention in National Political Conventions: An Idea Whose Time Has Come, 59 Cornell L. Rev. 107, 111-12 (1973); Note, One Man-One Vote in the Selection of Presidential Nominating Delegates By State Party Conventions, 5 U. Richmond L. Rev. 349, 357-58 (1971) [hereinafter cited as One Man-One Vote]; 60 Geo. L.J. 1331, 1334-38 (1972). But see Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119, 121 (8th Cir. 1968).

27. 42 U.S.C. § 1983 (1970).

28. See Civil Rights Cases, 109 U.S. 3, 11-15 (1883).

held by most courts[29] and commentators[30] to constitute state action within the meaning of the equal protection clause of the fourteenth amendment. This principle[31] flows from efforts to use the equal protection clause to promote fairness in the nomination process by combining the one person, one vote principle of the *Reapportionment Cases*[32] with the concept of state action in the *White Primary Cases*.[33] The district court and the court of appeals in *Redfearn* both agreed that state action was present.[34] The lower court reasoned that the party nominating process was simply a substitute for direct primaries, which are an integral part of state elections,[35] and thus that the party convention nominating process was state action.[36] The Third Circuit expressly approved this thinking.[37]

State action having been established, the question to be faced is whether the one person, one vote principle enunciated and followed in the *Reapportionment Cases* applies to the selection of delegates to a state party nominating convention. In *Gray v. Sanders*,[38] a qualified voter sought to enjoin the Georgia State Democratic Committee from using Georgia's county unit system[39] as a basis for counting votes in a direct primary election for the

29. See Bode v. National Dem. Party, 452 F.2d 1302, 1304-05 (D.C. Cir. 1971), cert. denied, 404 U.S. 1019 (1972); Georgia v. National Dem. Party, 447 F.2d 1271, 1276 (D.C. Cir.), cert. denied, 404 U.S. 858 (1971); MacGuire v. Amos, 343 F. Supp. 119, 121 (M.D. Ala. 1972); Doty v. Montana State Dem. Cent. Comm., 333 F. Supp. 49, 51 (D. Mont. 1971); Maxey v. Washington State Dem. Comm., 319 F. Supp. 673, 678 (W.D. Wash. 1970). Contra, Smith v. State Exec. Comm., 288 F. Supp. 371 (N.D. Ga. 1968). See generally Seergy v. Kings County Repub. County Comm., 459 F.2d 308 (2d Cir. 1972).

30. See Note, Bode v. National Democratic Party: Apportionment of Delegates to National Political Conventions, 85 Harv. L. Rev. 1460, 1463 (1972); Comment, One Man, One Vote and the Political Convention—The Case Law and the Constitution: A Legal Analysis, 40 U. Cin. L. Rev. 32, 36-37 (1971); One Man-One Vote 353-55; Selection of Delegates 1234; cf. Comment, One Man, One Vote and Selection of Delegates to National Nominating Conventions, 37 U. Chi. L. Rev. 536, 538-45 (1970). Contra, Kester, Constitutional Restrictions on Political Parties, 60 Va. L. Rev. 735 (1974).

31. See Note, Freedom of Association and the Selection of Delegates to National Political Conventions, 56 Cornell L. Rev. 148, 151 (1970).

32. Avery v. Midland County, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

33. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944), overruling Grovey v. Townsend, 295 U.S. 45 (1935); United States v. Classic, 313 U.S. 299 (1941); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948).

34. 362 F. Supp. at 71; 502 F.2d at 1127.

35. See Gray v. Sanders, 372 U.S. 368 (1963).

36. See note 33 supra.

37. 502 F.2d at 1127.

38. 372 U.S. 368 (1963).

39. The candidate for nomination who received the highest vote for the position sought was said to have carried the county. He controlled all of the county's unit votes. Each county received two unit votes for each representative it had in the lower house of the General Assembly. Id. at 371.

nomination of national and statewide officers. The lower court indicated that due to this system "the vote of each citizen counts for less and less as the population of the county of his residence increases."[40] The Supreme Court held this system unconstitutional because it failed to conform to the one person, one vote standard.[41] Thus *Gray* established the general principle that where a state has adopted the primary as a part of the public election machinery, the right to vote held by a qualified voter cannot be diluted by any action of the state.[42] Yet at the same time, *Gray* expressly reserved the questions which would be presented were a nominating convention used in lieu of the primary system.[43]

In 1970, the District Court for the Western District of Washington addressed this question in *Maxey v. Washington State Democratic Committee*.[44] An action was brought by several Democratic party members challenging the constitutionality of apportionment in a state party convention which chose delegates to the Democratic National Convention.[45] It was alleged that the state committee which apportioned the convention[46] pursuant to a general grant of authority from the state[47] had denied those living in the more populous areas of the state equal participation in the presidential nomination process. In holding the formula unconstitutional the district court stated that the concept of political equality in state elections enunciated in *Gray* could not be avoided "by simply substituting a weighted-voting or unit-voting convention for the primary elections system of nominations under consideration in *Gray*. Such an evasion of so important a principle could not long be tolerated."[48]

By applying the *Gray* concept of political equality in state elections to political bodies which had theretofore been thought outside the pale of state involvement, the court in *Maxey* set a new standard for judicial review of political party affairs. The court apparently was employing a functional approach to apportionment,[49] not only to establish state action, but also to

40. 203 F. Supp. 158, 170 n.10 (N.D. Ga. 1962), aff'd, 372 U.S. 368 (1963).

41. "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." 372 U.S. at 379.

42. Id. at 374-75; accord, Chapman v. King, 154 F.2d 460, 464 (5th Cir.), cert. denied, 327 U.S. 800 (1946) (Georgia primary part of public election machinery; racial discrimination in primary violates fifteenth amendment).

43. 372 U.S. at 378 n.10.

44. 319 F. Supp. 673 (W.D. Wash. 1970).

45. Id. at 675.

46. An equal number of basic delegate votes were allotted to each county in Washington. Additional votes were allotted on the basis of the number of state senatorial districts within each county and on the number of votes cast for the party's presidential nominee at the last presidential election. Id.

47. Wash. Rev. Code Ann. § 29.42.010 (1965).

48. 319 F. Supp. at 679.

49. This analysis asks what function does this body serve. If the function is inexorably

establish the party's public function in sending delegates to the national nominating convention.[50] This approach recognized that the nomination process is the foundation of the election system.[51] "Considering the strength of party associations, any alternatives in the choice of candidates are very often denied to the party member if he is refused a voice in nomination."[52]

The importance of the nominating convention as it affects the general election is highlighted by the Delaware statute which requires that every candidate for the general election come up through the convention structure of his party.[53] This requirement supports the conclusion in *Redfearn* that since *procedures* used by the party are an integral part of the election machinery, the one person, one vote principle is applicable to those procedures.[54]

As necessary as it is to promote and preserve political equality in state elections, it also is necessary to define the scope of judicial intervention into party internal affairs. In *Maxey's* companion case, *Dahl v. Republican State Committee,*[55] the same court refused to apply the one person, one vote principle to the election of the party state committee. The court held that the election process had not yet begun at this point and thus the political involvement at this level was not subject to constitutional standards.[56] "A vital distinction was made between the functions of the primarily administrative state committees and the representative, governmental nature of the state party conventions."[57] The court in *Dahl* relied on *Sailors v. Board of Education*[58] in which the Supreme Court held that the selection of members to a county school board was not subject to the requirements of one person, one vote:[59] "Since the choice of members of the county school board did not

intertwined in a "public" practice, e.g., elections, then that body must become subject to certain standards—here one person, one vote. This functional approach has been criticized as creating too difficult a task. See Note, Judicial Intervention in National Political Conventions: An Idea Whose Time Has Come, 59 Cornell L. Rev. 107, 120 (1973).

50. See One Man-One Vote 358-59.

51. 319 F. Supp. at 678.

52. See One Man-One Vote 359.

53. Del. Code Ann. tit. 15, § 3301(c) (Supp. 1972); see note 19 supra. If a party member's elected representative on the convention delegation to the state convention comes from a disproportionately larger district, then the individual member's ability to affect the result at the convention, through the convention district delegation, has been diluted, and he has been denied equal protection of the law. See Selection of Delegates 1240.

54. 362 F. Supp. at 71.

55. 319 F. Supp. 682 (W.D. Wash. 1970).

56. Id. at 684.

57. One Man-One Vote 360.

58. 387 U.S. 105 (1967).

59. In Sailors, elections were held for local school boards from which members were appointed to the county school board. No question was raised as to the constitutionality of the elections.

In Irish v. Democratic-Farmer-Labor Party, 287 F. Supp. 794 (D. Minn.), aff'd, 399 F.2d 119 (8th Cir. 1968), the district court and the Eighth Circuit found that, provided the lowest level in the process of choosing delegates to the state convention was conducted according to the one

involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."[60] The nonelective and primarily administrative character of the party's state committee was held in *Dahl* to be similar to the nonelective, nonlegislative character of the school board, precluding, therefore, plaintiffs' claim of denial of equal protection.[61]

The district court in *Redfearn* considered that the electoral process had begun when the Republican State Committee allocated delegates to the convention districts.[62] The delegates allotted by the Convention District Committees to the Representative Districts within each Convention District were also malapportioned. The court ordered this procedure likewise brought into conformity with the one person, one vote principle.[63]

The parameters of the one person, one vote principle as applied to the *Redfearn* situation require some analysis. The Supreme Court in recent years has made several departures from strict adherence to the one person, one vote principle enunciated in *Reynolds v. Sims*.[64] These have included special-

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person, one vote principle, subsequent levels involving various county conventions selecting delegates to the state convention, which would in turn elect delegates to the national convention, need not conform to the requirements of the equal protection clause. The rationale in Irish has been criticized for failing to recognize that the processes leading to the selection of the state's delegates to the national convention were but a single continuing procedure. Also the district court appears to have misplaced reliance on Sailors by misconstruing the importance of distinguishing an administrative body and a representative convention. See Selection of Delegates 1244. Finally, relief was sought in Irish only days before the Democratic National Convention was to be held. This has been cited as a factor in the decision. See One Man-One Vote 357 n.48.

60. 387 U.S. at 111.

61. 319 F. Supp. at 685. The Third Circuit in Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965) affirmed the dismissal of a complaint challenging as a denial of the equal protection of the laws the method of selecting the Pennsylvania Democratic County Chairman. The court found a lack of state action in the normal role of party leaders in conducting internal affairs of their party. It expressly did not decide what decision it might reach should a party leader exercise his power to choose a substitute party nominee when a ballot position becomes vacant as a result of death or disqualification of a party nominee between the primary and general elections. Id. at 372. The Second Circuit in Seergy v. Kings County Repub. County Comm., 459 F.2d 308 (2d Cir. 1972) ruled on a complaint challenging the system by which Republican county committeemen's votes were counted. The court held that when the committee conducts internal party management and business, there is no constitutional duty to weigh committee member's votes according to the number of constituents represented. The court, citing Maxey, noted, however, that where the committee performs public electoral functions, e.g., filling vacancies of nominated candidates, it must apply the one person, one vote principle since such a function plays an integral role in the state scheme of public elections. Id. at 314.

62. 362 F. Supp. at 72. The statutory scheme here refers to requirements that candidates file for positions at certain times and places, and other procedural requirements. See Del. Code Ann. tit. 15, §§ 3101 et seq. (Supp. 1972).

63. 362 F. Supp. at 72.

64. 377 U.S. 533 (1964). Reynolds reaffirmed that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." Id. at 560-61.

purpose units[65] and appointive bodies with essentially nonlegislative duties.[66] The Court has also made an exception where the underlying state aim is the preservation of the political integrity of a geographic unit. In *Abate v. Mundt,*[67] the Court held that the particular circumstances and needs of a local community when viewed as a whole may sometimes justify departures from the goal of strict representational equality.[68] In that case, the historical and practical connection between the towns in Rockland County, New York and the county legislature were sufficient to permit a total deviation from population equality of 11.9 percent. The Court held specifically that in the absence of any built-in bias tending to favor particular political interests or geographic areas, and in the presence of longstanding tradition, the need for flexibility in local governmental arrangements and the interest in preserving the integrity of political subdivisions "may justify an apportionment plan which departs from numerical equality."[69]

Two years after *Abate,* in *Mahan v. Howell,*[70] the Court held that the Virginia legislature's plan for reapportionment which resulted in approximately a 16 percent maximum deviation could be said "to advance the rational state policy of respecting the boundaries of political subdivisions."[71] Recognizing that the deviation in *Mahan* was substantially less than deviations found unconstitutional in previous decisions, the Court noted that the policy of maintaining political subdivision lines can justify divergence in apportionment only within tolerable limits. "For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality."[72] Recently, in *Chapman v. Meier,*[73] the Court unanimously held that a 20 percent maximum deviation was impermissible under *Mahan.*

The *Redfearn* case is distinguishable from *Abate* and *Mahan* on two grounds. First, *Redfearn* involved a political party; *Abate* and *Mahan* involved state legislatures. Second, the latter cases involved historical elements not present in *Redfearn.* In those cases, the states involved were legitimately concerned with maintaining the political integrity of historically established units. In *Redfearn,* the Delaware convention districts had been in use for less

65. E.g., Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973) (per curiam); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); see Martin, The Supreme Court and Local Reapportionment: Voter Inequality in Special-Purpose Units, 15 Wm. & Mary L. Rev. 601 (1974).

66. E.g., Sailors v. Board of Educ., 387 U.S. 105 (1967).

67. 403 U.S. 182 (1971).

68. Id. at 185.

69. Id.

70. 410 U.S. 315, modified, 411 U.S. 922 (1973).

71. 410 U.S. at 328; see Note, A Flexible Standard for State Reapportionate Cases, 42 Fordham L. Rev. 641 (1974).

72. 410 U.S. at 326.

73. 43 U.S.L.W. 4199, 4207 (U.S. Jan. 27, 1975). See also Kilgarlin v. Hill, 386 U.S. 120 (1967) (maximum deviation of 26.4%); Swann v. Adams, 385 U.S. 440 (1967) (maximum deviation of 26%).

than a decade. Because it is distinguishable, it would appear that *Redfearn* need not be controlled by *Abate* and *Mahan* and, perhaps, given the public nature of the nomination function, should be controlled by the earlier cases emphasizing strictly proportional representation.

The cases emphasizing strictly proportional representation involved legislatures, not parties. Since legislatures are *wholly* public bodies and political parties are not, an argument might be made that deviation from strictly proportional representation is more justifiable in the case of parties. But even if some deviation were justifiable generally in the case of parties, the particular deviation in *Redfearn* would appear unjustifiable. The deviation from strictly proportional representation in *Redfearn* was quite large. As the district court pointed out, under the *Mahan* rule, "the present allocation formula is so disproportionate that it cannot stand."[74] Any state policy in favor of such deviation could not stand in the face of the goal articulated in *Mahan* of substantial equality.

Another issue in *Redfearn* involved the associational rights of the party. The balancing of two constitutionally protected interests—freedom of association and the right to vote—takes on unique dimensions in the context of the party as a public functionary. If *Gray v. Sanders* is the applicable rationale today, it is clear that the collective right to achieve desired political ends must be subsumed by the individual rights of the party members to have their votes weighed equally. However, if the courts are recognizing a new rationale which permits the political integrity of the party as a whole or as a geographic unit to be preserved in the allocation of political power in a state, then the rights of the individual in this context will be subsumed by the collective rights of the party.

The associational rights cited by the Third Circuit in *Redfearn* apply to the right to form and join pressure groups.[75] Those rights may be further divided into two categories: the association's own rights or group personality, and the associational rights of individual members. In *NAACP v. Alabama ex rel. Patterson,*[76] Alabama sought to force the NAACP to disclose its membership lists in conformity with a foreign corporation disclosure statute. In denying the demand for such information, the Supreme Court relied upon the protection of the individual members' rights to associate freely and allowed the association to assert the rights of its members. The Court did however allude to a recognition of the association's *own* rights to protect itself from unjust and detrimental attack by adverse parties.[77]

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74. 362 F. Supp. at 73. The voting power of a Third Convention District registered Republican was nearly three times that of a Second District Republican (plaintiffs' district) in voting for delegates to the 1972 State Convention and approximately five times greater with respect to delegates to the Republican National Convention. Id. at 69-70.

75. NAACP v. Button, 371 U.S. 415 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1959); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); see Cousins v. Wigoda, 43 U.S.L.W. 4152 (U.S. Jan. 15, 1975).

76. 357 U.S. 449 (1958).

77. "The reasonable likelihood that the Association itself through diminished financial

Whatever constitutional protections political parties may derive from the rights of pressure groups,[78] the courts should not lose sight of the unique character of political parties. The modern political party is a hybrid, functioning at times as a private association and at times as a branch of the state. In its associational function a party should not be subject to judicial supervision. "But where the party's action is predominantly governmental in nature and affects the right to vote, courts should have little reluctance in finding that the associational freedom of political parties does not make all of their actions private in nature."[79] It is in this context that the Constitution has been applied directly to nullify the actions of a private association, "but more often it is used as a source of standards which the courts will apply in the name of public policy."[80]

In many respects, the ultimate question presented by *Redfearn* is, given the necessity for some judicial supervision of party public functions, how best to safeguard the private associational aspect of political parties in order not to inhibit unjustifiably the group's performance of its primary and socially desirable purposes. The freedom of association issue is both real and complex.

> There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. . . .
>
> To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections . . . the States may not infringe upon basic constitutional protections. . . . [U]nduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.[81]

The Third Circuit suggested that an overturning of the party rule, in effect requiring an at large election or equalization of the districts delegate strength in proportion to party membership in each district, would impinge upon the right of association.

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support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members." Id. at 459-60.

78. See generally C. Rice, Freedom of Association 111-19 (1962).

79. Comment, MacGuire v. Amos: Application of Section 5 of the Voting Rights Act to Political Parties, 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 199, 205 (1973) (footnote omitted).

80. Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 998 (1963). See D. Fellman, The Constitutional Right of Association 34 (1963). V. O. Key discusses the political reality of the party system from an historical perspective. From party caucuses of the 18th and 19th centuries to conventions to direct primaries which predominate today, there has been a theoretical move towards greater party democratization. But each phase has disclosed the familiar pattern of party leadership versus the mass of partisans, with the former smartly in control of party affairs and nominees. V. O. Key, Politics, Parties, and Pressure Groups 394-95 (5th ed. 1964). Judicial notice of this political reality is essential if the courts are to assess properly the impact party conventions actually have on the electoral process.

81. Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (citations and footnotes omitted).

If a given party chooses to organize by districts, but to allocate delegate strength to a district in which it has fewer numbers but a greater opportunity to achieve the practical advancement of the political ideas for the pursuit of which the association was formed, state action which frustrates that choice is highly suspect. Yet the effect of the district court's ruling is that the Delaware statutes under attack have been construed to prohibit that choice. The statute under which the state intrudes its action into the party continues to operate, but at the expense of the freedom of association of the party.[82]

The district court apparently viewed the party process as so intertwined with the state as to make the right of the party to control its internal affairs of secondary importance.[83] Since the application of the one person, one vote principle is so firmly entrenched even as regards primary politics,[84] it appears too late in the day to reverse this trend on associational grounds. However, the district court recognized that the Republican State Committee is in the best position to determine upon what basis the delegate apportionment formula should be grounded in order to ensure compliance with the one person, one vote principle.[85] This determination appears consonant with the delicate but firm approach required of judicial intervention into the public aspects of political parties.

Craig Landy

Securities—Section 16(b)—Initial Purchase of Ten Percent of a Class of Equity Securities Is Not a Section 16(b) Purchase.—In the fall of 1968 Provident Securities Co. (Provident) decided to liquidate its assets. On September 25, 1969, Provident and Foremost-McKesson Inc. (Foremost) executed a purchase agreement which provided that Foremost would buy two-thirds of Provident's assets for $49,750,000 in Foremost convertible debentures and a small amount of cash. The closing took place on October 15, 1969; at that point Provident became a beneficial owner of more than ten percent of a class of Foremost equity securities. On October 21 Provident executed an underwriting agreement providing for the sale of a $25,000,000 Foremost debenture*[1] to an underwriting group for $25,366,666. On October

82. 502 F.2d at 1127-28.

83. 362 F. Supp. at 70.

84. See notes 38-63 supra and accompanying text.

85. 362 F. Supp. at 74. Total population, total registered Republican voters, or total Republican vote in previous presidential elections are viable bases. The relative merits of each are discussed in Note, Bode v. National Democratic Party: Apportionment of Delegates to National Political Conventions, 85 Harv. L. Rev. 1460, 1468-75 (1972). See generally Selection of Delegates 1238 n.42.

* As this Case Note went to press, Provident was reported in 506 F.2d 601, as indicated in text. Footnote citations are to CCH Fed. Sec. L. Rep.

1. Foremost delivered to Provident a $40,000,000 debenture; this was subsequently split into

24 Provident distributed debentures to its shareholders in the aggregate principal amount of $22,250,000; at this point Provident was no longer a ten percent beneficial owner of Foremost's equity securities. The underwriting agreement was closed on October 28. Ultimately, Provident was dissolved and its remaining assets transferred to a liquidating trust.

Provident recognized that the gain realized on its sale to the underwriting group might be considered a short-swing transaction within section 16(b) of the Securities Exchange Act of 1934,[2] which allows an issuer of a security, *inter alia,* to recover profits realized by ten percent owners from their purchase and sale of any equity security of the issuer made within a period of less than six months. Provident sought a declaratory judgment of non-liability under this statute. Foremost counterclaimed to recover this profit. Provident successfully moved for summary judgment in district court.[3] On appeal the Ninth Circuit affirmed, holding that since Provident was not a ten percent beneficial owner at the time of purchase (October 15), the transaction did not violate section 16(b). *Provident Securities Co. v. Foremost-McKesson, Inc.,* 506 F.2d 601 (9th Cir. 1974), cert. granted, 43 U.S.L.W. 3446 (U.S. Feb. 18, 1975) (No. 74-742).

Under section 16(b) of the Securities Exchange Act of 1934[4] the issuer of non-exempt securities may recover from a director, officer, or beneficial owner of ten percent of its outstanding stock (an insider) any profits realized[5]

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two debentures in the principal amounts of $25,000,000 and $15,000,000. Provident Sec. Co. v. Foremost-McKesson, Inc., [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,811, at 96,704 (9th Cir., Sept. 19, 1974), cert. granted, 43 U.S.L.W. 3446 (U.S. Feb. 18, 1975) (No. 74-742).

2. Section 16(b), 15 U.S.C. § 78p(b) (1970), provides in pertinent part: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved . . . ."

3. 331 F. Supp. 787 (N.D. Cal. 1971), aff'd, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,811 (9th Cir., Sept. 19, 1974), cert. granted, 43 U.S.L.W. 3446 (U.S. Feb. 18, 1975) (No. 74-742). The district court based its decision on the finding that the Provident-Foremost transaction was "unorthodox" and did not involve the potential for speculative abuse of inside information condemned by the Act. The court noted that Foremost had dictated the form of the "purchase" in a manner frequently contrary to Provident's wishes, so that to apply § 16(b) to the transaction would be a "mindlessly literal" interpretation of the statute. Id. at 792. It would require the application "of an extremely crude rule of a most deformed and misshapen thumb." Id. For a discussion of the orthodox-unorthodox distinction see note 9 infra and accompanying text.

4. 15 U.S.C. § 78p(b) (1970); see note 2 supra.

5. "Profits realized" has been interpreted broadly. See Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir.), cert. denied, 320 U.S. 751 (1943); Deitz, A Practical Look at Section 16(b) of the Securities Exchange Act, 43 Fordham L. Rev. 1, 31 (1974); Munter, Section 16(b) of the

from the purchase and sale, or sale and purchase,[6] of the issuer's stock within a six-month period. The six-month period was established to avoid the difficulties inherent in attempting to prove that the insider intended, at the time he bought, to sell soon thereafter; it creates a presumption of "short-swing" intent.[7] Insider status, combined with the presumed short-swing intent, creates a further presumption of abuse of inside information.[8] The courts have carved out an exception to this automatic statutory liability when the transaction is determined to be unorthodox.[9] An unorthodox transaction is not considered a section 16(b) purchase or sale unless the court determines that it may have served as a vehicle for the realization of short-swing profits

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Securities Exchange Act of 1934: An Alternative to "Burning Down the Barn in Order to Kill the Rats," 52 Cornell L.Q. 69, 84 (1966).

6. The Act defines "purchase" as any contract to buy, purchase or otherwise acquire, and "sale" as any contract to sell or otherwise dispose of securities. 15 U.S.C. §§ 78c(13)-(14) (1970). These terms are interpreted broadly. See generally Deitz, A Practical Look at Section 16(b) of the Securities Exchange Act, 43 Fordham L. Rev. 1 (1974). Hereinafter, reference to "purchase and sale" will be used to embrace a "sale and purchase."

7. See Hearings on S. Res. 84, S. Res. 56 & S. Res. 97 Before the Senate Comm. on Banking and Currency, 73d Cong., 1st Sess., pt. 15, at 6557 (1934) [hereinafter cited by part as Senate Hearings].

8. See Blau v. Max Factor & Co., 342 F.2d 304, 308 (9th Cir.), cert. denied, 382 U.S. 892 (1965); W. Painter, Federal Regulation of Insider Trading 12-13 (1968).

9. While the exact meaning of "unorthodox" is unclear, any transaction which is not a straight cash-for-stock purchase or sale is arguably unorthodox. In Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973), the Supreme Court described mergers, stock reclassifications, and dealings in options, rights and warrants as unorthodox transactions. Id. at 593 n.24.

The orthodox-unorthodox transaction distinction apparently grew out of the courts' reluctance to include within § 16(b)'s ambit transactions which, while technically purchases or sales (see note 6 supra), presented no opportunity for the unfair insider speculation against which Congress directed § 16(b). See Petteys v. Butler, 367 F.2d 528, 533 (8th Cir. 1966), cert. denied, 385 U.S. 1006 (1967). See also American Standard, Inc. v. Crane Co., [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,921 (2d Cir., Dec. 20, 1974) (if defeated tender offeror's nonvolitional exchange pursuant to defensive merger is not a § 16(b) sale, then it cannot be a § 16(b) purchase).

For further analysis, see Bateman, The Pragmatic Interpretation of Section 16(b) and the Need for Clarification, 45 St. John's L. Rev. 772 (1971); Gadsby & Treadway, Recent Developments Under Section 16(b) of the Securities Exchange Act of 1934, 17 N.Y.L.F. 687 (1971); Note, A Reinspection of "Purchase" and "Sale" Under Section 16(b), 41 Brooklyn L. Rev. 91 (1974); Note, Section 16(b) of the Securities Exchange Act of 1934: The Question of Applicability in Determining Insider Liabilities, 24 Syracuse L. Rev. 811 (1973); Comment, Section 16(b): An Alternative Approach to the Six-Month Limitation Period, 20 U.C.L.A.L. Rev. 1289 (1973). A number of articles examine § 16(b)'s application to mergers, acquisitions and other unorthodox transactions. See Deitz, A Practical Look at Section 16(b) of the Securities Exchange Act, 43 Fordham L. Rev. 1 (1974); Hemmer, Insider Liability for Short-Swing Profits Pursuant to Mergers and Related Transactions, 22 Vand. L. Rev. 1101 (1969); Lang & Katz, Section 16(b) and "Extraordinary" Transactions: Corporate Reorganizations and Stock Options, 49 Notre Dame Law. 705 (1974); Comment, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?, 117 U. Pa. L. Rev. 1034 (1969).

based on access to inside information.[10] The section continues to apply automatically to an orthodox purchase or sale.[11]

Before a court determines that section 16(b) applies to a transaction —whether orthodox or unorthodox—the court first, in the case of a ten percent beneficial owner, must ascertain whether he was such "both at the time of the purchase and sale" of the security involved.[12] Courts are divided on the construction of this language. The majority view was expressed in *Stella v. Graham-Paige Motors Corp.*[13] In this landmark decision, the defendant, the owner of less than ten percent of Kaiser-Frazer's outstanding stock, purchased additional shares which raised its total to 21 percent.[14] Defendant sold part of its holdings within six months. The court ruled that the purchase had a double effect; it made the defendant an insider and also constituted a section 16(b) purchase.[15] Thus the defendant was liable for the profit realized on its sale. The court conceded that the legislative history of section 16(b) failed "to afford a clue as to the precise meaning of the words 'at the time, ..."[16] However, the court reasoned that the congressional purpose of preventing speculative abuse would be subverted if the section were construed to allow an individual to purchase a large block of stock, reduce his ownership to less than ten percent, and then repurchase without incurring liability.[17] The court did not consider a flexible approach to the statute which would fix liability in a repurchase situation, but not in the purchase and sale pattern presented in *Stella*.[18] The transaction was clearly orthodox because it was cash-for-stock.[19]

The Eighth Circuit reached a similar conclusion in another orthodox pur-

10. Makofsky v. Ultra Dynamics Corp., 383 F. Supp. 631, 637 (S.D.N.Y. 1974).

11. Id.; Schur v. Salzman, 365 F. Supp. 725, 728-29 (S.D.N.Y. 1973). Why the possibility-of-abuse test should not apply to orthodox transactions is unclear. In many instances the orthodox purchaser or seller may be able to show the same lack of access to inside information or lack of control over the transaction as did Occidental in Kern. See note 9 supra. The courts have attempted to distinguish the two situations by arguing that an unorthodox transaction is not what one ordinarily describes as a purchase or sale, though it may fit within the statutory definition of purchase and sale. The argument appears to be superficial. For example, the Supreme Court in Kern described options as unorthodox. 411 U.S. 582, 593 n.24 (1973). However Congress clearly intended that section 16(b) cover options. "Many of the most flagrant abuses upon stock exchanges would not be possible without the aid of options." S. Rep. No. 792, 73d Cong., 2d Sess. 9 (1934).

12. 15 U.S.C. § 78p(b) (1970); see note 2 supra.

13. 104 F. Supp. 957 (S.D.N.Y. 1952) (summary judgment denied); see Stella v. Graham-Paige Motors Corp., 132 F. Supp. 100 (S.D.N.Y. 1955) (on merits), aff'd in part & remanded in part, 232 F.2d 299 (2d Cir.), cert. denied, 352 U.S. 831 (1956).

14. 104 F. Supp. at 958.

15. Id. at 960.

16. Id. at 959; see Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 424-25 (1972).

17. 104 F. Supp. at 959-60.

18. This approach was advocated by W. Painter, Federal Regulation of Insider Trading 41-42 (1968); see 70 Harv. L. Rev. 1312 (1957); 9 Stan. L. Rev. 582, 588 (1957).

19. See 2 L. Loss, Securities Regulation 1072 (2d ed. 1961).

chase case, *Emerson Electric Co. v. Reliance Electric Co.*[20] The court extended *Stella* in that the defendant in *Emerson* held *no* stock in the issuer prior to the purchase. The court felt that to do otherwise would allow an individual to buy 51 percent of a company's outstanding stock, obtain inside information and sell within six months without incurring liability.[21]

In *Newmark v. RKO General, Inc.*,[22] the Second Circuit held that the purchase of over ten percent of the issuer's stock was a section 16(b) transaction,[23] though the defendant, as in *Emerson Electric,* held no stock prior to the purchase.[24] The court noted that although the statutory presumption would not justify the conclusion that the ten percent purchase was made on the basis of inside information, "the presumed access to such information *resulting from* this purchase provides [defendant] with an opportunity, not available to the investing public, to sell his shares at the moment most advantageous to him."[25] Thus the *Newmark* court recognized that the *Stella* interpretation of the language "at the time of" necessitates the view that presumed abuse of inside information prior to either of the two section 16(b) transactions is sufficient to create liability. The "sale" in *Newmark,* an exchange of securities pursuant to a merger, was expressly treated by the court as "unorthodox,"[26] a factor not present in earlier cases following the *Stella* view.

In *Allis-Chalmers Manufacturing Co. v. Gulf & Western Industries, Inc.*,[27] the district court ruled that an initial purchase of more than ten percent of plaintiff's outstanding stock, via an exchange offer, constituted a section 16(b) purchase.[28] As in *Newmark* and *Emerson Electric,* the defendant held less than ten percent of plaintiff's stock prior to the purchase.[29] Although the court did not expressly classify the exchange offer as unorthodox, it applied *Kern* and held that the exchange was a section 16(b) purchase.[30] Thus the court appeared to extend the *Stella* view to an unorthodox initial purchase.

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20. 434 F.2d 918 (8th Cir. 1970), aff'd, 404 U.S. 418 (1972).

21. Id. at 924. In support of this conclusion the court cited congressional consideration of controlling shareholders who sold to less than ten percent, then repurchased. Id. at n.17. It has been argued that legislative intent to cover a sale and repurchase does not necessarily imply an intent to reach the purchase and sale situation. See W. Painter, Federal Regulation of Insider Trading 41-42 (1968).

22. 425 F.2d 348 (2d Cir.), cert. denied, 400 U.S. 854 (1970), noted at 84 Harv. L. Rev. 1012 (1971).

23. 425 F.2d at 355-56.

24. Id.

25. Id. at 356 (emphasis added).

26. "Whether certain 'unorthodox' transactions, well illustrated here . . . are 'purchases' or 'sales' . . . cannot be resolved by mere reference to the words of the statute. . . . [T]he determination of the statute's relevance must rest, initially, on whether there exists the potential for evil against which the statute was intended to guard." Id. at 351.

27. 372 F. Supp. 570 (N.D. Ill. 1974).

28. Id. at 576-77.

29. Id. at 575-76.

30. Id. at 578-79; see note 42 infra and accompanying text.

While the *Stella* construction of the controversial statutory language clearly enjoys strong support, it has not gone unchallenged. The minority view was first enunciated by Judge Hincks in his dissent from the Second Circuit decision in *Stella*.[31] He stated that Congress intended section 16(b) to reach completed swing transactions, where the motivation for the swing was created by inside information possessed *prior* to the initial transaction.[32] Under Judge Hincks' analysis, the statutory presumption of access to inside information could not attach to a ten percent beneficial owner until he became such.[33] Thus, unless the beneficial owner held ten percent prior to the initial transaction, that transaction would not constitute a section 16(b) purchase or sale. Judge Hincks recognized that his rationale

> makes it possible for one who actually had advance information but was not a beneficial owner at the time of his purchase, to evade the Act . . . .
>
> . . . Congress . . . obviously thought it better, at least for the time being, to leave in the Act a loophole for some who, under the basic rationale, deserved to be held to accountability, than to suck into a suffocating dragnet many who, under the same rationale, could not justly be so held.[34]

Judge Hincks' analysis was adopted in an isolated district court decision, *Arkansas Louisiana Gas Co. v. W.R. Stephens Investment Co.*[35] The Hincks view had been endorsed by some commentators;[36] however, others reject it on the ground that it robs section 16(b) of its effectiveness.[37]

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31. 232 F.2d at 302-05 (Hincks, J., dissenting).

32. Id. at 305 (Hincks, J.. dissenting). Speculative insider trading has been defined as the purchase of the issuer's shares with the intention of reselling at a later date, where the sole motive is the belief, based on inside information possessed at the time of the initial transaction, that the price of the share will rise shortly. Wu, An Economist Looks at Section 16 of the Securities Exchange Act of 1934, 68 Colum. L. Rev. 260, 262 (1968).

33. 232 F.2d at 304-05 (Hincks, J., dissenting).

34. Id. at 305 (Hincks, J., dissenting).

35. 141 F. Supp. 841 (W.D. Ark. 1956). The court adopted Judge Hincks' analysis and applied it to an orthodox purchase, but without a detailed evaluation of the issues. Id. at 847. But cf. Gold v. Sloan, 486 F.2d 340 (4th Cir. 1973), cert. denied, 95 S. Ct. 134 (1974) (court passed over, in silence, the fact that the defendants were not insiders at the time of the initial transaction). The case is discussed in Note, Securities Exchange Act Section 16(b): Fourth Circuit Harvests Some Kernels of Gold, 42 Fordham L. Rev. 852 (1974).

36. One of the first books analyzing the Act read the section exactly as Judge Hincks did. "Let us assume a case where a stockholder owns somewhat less than 10% of the stock. He buys additional stock, which gives him more than 10%. Without buying any more he subsequently sells some of his stock at a profit. He is not liable to the corporation, because he was not a 10% stockholder at the time of purchase." C. Meyer, The Securities Exchange Act of 1934, at 112 (1934). Others agree with this early reading of the section. W. Painter, Federal Regulation of Insider Trading 41 (1968); Munter, Section 16(b) of the Securities Exchange Act of 1934: An Alternative to "Burning Down the Barn in Order to Kill the Rats," 52 Cornell L.Q. 69, 74-75 (1966); Comment, Stock Exchanges Pursuant to Corporate Consolidation: A Section 16(b) "Purchase or Sale"?, 117 U. Pa. L. Rev. 1034, 1041-42 n.39 (1969); 70 Harv. L. Rev. 1312, 1313 (1957); 9 Stan. L. Rev. 582, 588 (1957).

37. 2 L. Loss, Securities Regulation 1060-61 (2d ed. 1961); Cook & Feldman, Insider Trading

The Supreme Court has never faced the issue of whether one must actually own ten percent at the time of the initial section 16(b) purchase. However, the Court arguably intimated that it might adopt the minority view. In *Reliance Electric Co. v. Emerson Electric Co.*,[38] the Court strictly construed the "time of" language, and refused to impose section 16(b) liability on the second part of a two-step sale where the first sale reduced the insider's holdings to less than ten percent.[39] In *Kern County Land Co. v. Occidental Petroleum Corp.*,[40] the Court left open the question of whether liability could be imposed only on purchases in excess of ten percent made by the tender offeror.[41] *Kern* has been read as supporting both views of the "time of purchase" language.[42]

The rationale underlying the minority view is persuasive. It is based on the supposition that section 16(b) was directed at "completed swing transactions."[43] Thus, the six-month provision creates a presumption that the initial and terminal transactions were part of one scheme united by the speculative intent present prior to the initial transaction.[44] "The initial transaction . . . is an anticipatory action . . . [while] the terminal transaction is the profit-taking action."[45] The purpose of the statute was not to deter all speculative activity, but speculative activity by insiders[46] because it was considered unfair for some to profit where others could not.[47] The access to inside information presumptively provided by insider status provides the opportunity for speculative activity.[48] Access to inside information *prior* to the initial section 16(b) transaction is crucial, because it is at the time of the

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Under the Securities Exchange Act, 66 Harv. L. Rev. 612, 631 (1953); Seligman, Problems Under the Securities Exchange Act, 21 Va. L. Rev. 1, 19-20 (1934); 57 Colum. L. Rev. 287, 289 (1957).

38. 404 U.S. 418 (1972).

39. Id. at 419-20. In Reliance the Court considered a defendant's purchase of 13% of the issuer's stock, sale of four percent, and final sale of nine percent, the three transactions taking place within six months. It construed the language "both at the time of purchase and sale" to exclude the second sale from the purview of the statute. Id. Thus the defendant was liable only for the profits realized on the first sale. Id. at 421-27. The Court refused to vary what it saw as the clear meaning of the disputed statutory language, "simply on the ground that it may be inconsistent with our assessment of the 'wholesome purpose' of the Act." Id. at 424.

40. 411 U.S. 582 (1973).

41. See id. at 591 & n.20. The only question before the Court was whether a section 16(b) sale had taken place. Id. at 590-91.

42. Provident Sec. Co. v. Foremost-McKesson Inc., [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,811, at 96,708, 96,712 (9th Cir., Sept. 19, 1974), cert. granted, 43 U.S.L.W. 3446 (U.S. Feb. 18, 1975) (No. 74-742) (must own 10% at time of purchase). Contra, Allis-Chalmers Mfg. Co. v. Gulf & W. Indus., Inc., 372 F. Supp. 570, 576 (N.D. Ill. 1974).

43. See text accompanying note 36 supra and notes 49-56 infra.

44. See Comment, Section 16(b): An Alternative Approach to the Six-Month Limitation Period, 20 U.C.L.A.L. Rev. 1289, 1299 (1973).

45. Id. at 1295.

46. See Wagman v. Astle, 380 F. Supp. 497, 501 (S.D.N.Y. 1974); Wu, An Economist Looks at Section 16 of the Securities Exchange Act of 1934, 68 Colum. L. Rev. 260, 262 (1968).

47. See Wagman v. Astle, 380 F. Supp. 497, 501 (S.D.N.Y. 1974).

48. Wu, An Economist Looks at Section 16 of the Securities Exchange Act of 1934, 68 Colum. L. Rev. 260, 262 (1968).

initial section 16(b) transaction that the speculative intent is supposedly formed. Therefore, unless a beneficial owner holds over ten percent of the issuer's stock prior to the initial transaction, it is not a section 16(b) purchase or sale. A terminal transaction presumptively based on inside information does not of itself violate the statute.

The legislative history of the Act appears to support the minority analysis of section 16(b). Congress apparently intended to reach double event abuse[49] by speculators intending to get into and out of the market in a short period of time.[50] One of the earlier House bills[51] made it unlawful for any "director, officer, or owner of securities, *owning as of record and/or beneficially* more than 5 per centum . . . [t]o purchase any such registered security *with the intention or expectation* of selling the same security within six months . . . ."[52] Thomas Corcoran, who assisted in drafting the statute,[53] commented that an early Senate version of section 16(b),[54] containing language identical to that quoted above, was intended "to prevent directors receiving the benefits of short-term speculative swings on the securities of their own companies, because of inside information."[55] He specifically noted that the six-month provision was needed in order to obviate the necessity of proving that the *insider* intended "at the time he bought, to get out on a short swing."[56]

Citing much legislative history, the Ninth Circuit adopted the minority view in *Provident Securities Co. v. Foremost-McKesson, Inc.*[57] At the outset the court held the Provident-Foremost transaction to be orthodox, because it considered the assets-for-stock purchase to be essentially a cash-for-stock transaction.[58] However, the court then stated that even if the transaction were considered unorthodox, it involved the potential for speculative abuse of

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49. Double event abuse is created when the insider engages in two transactions both of which are based on inside information. Single event abuse would occur where the first transaction makes the individual an insider but only the second is based on inside information. See Note, Insider Liability for Short-Swing Profits: The Substance and Function of the Pragmatic Approach, 72 Mich. L. Rev. 592, 604 (1974).

50. See S. Rep. No. 792, 73d Cong., 2d Sess. 9 (1934); S. Rep. No. 1455, 73d Cong., 2d Sess. 55-68 (1934).

51. H.R. 7852, 73d Cong., 2d Sess. (1934).

52. Id. § 15(b) (emphasis added). Congress never explained the deletion of some of this language from the final version of the section.

53. Senate Hearings, pt. 15, at 6465.

54. S. 2693, 73d Cong., 2d Sess. § 15(b) (1934).

55. Senate Hearings, pt. 15, at 6557; see Hearings on H.R. 7852 & H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 133 (1934).

56. Senate Hearings, pt. 15, at 6557.

57. [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,811 (9th Cir., Sept. 19, 1974), cert. granted, 43 U.S.L.W. 3446 (U.S. Feb. 18, 1975) (No. 74-742) [hereinafter cited as Current Binder].

58. Id. at 96,704-05; accord, Marquette Cement Mfg. Co. v. Andreas, 239 F. Supp. 962, 966 (S.D.N.Y. 1965); Stella v. Graham-Paige Motors Corp., 132 F. Supp. 100 (S.D.N.Y. 1955), aff'd in part & remanded in part, 232 F.2d 299 (2d Cir.), cert. denied, 352 U.S. 831 (1956); see 2 L. Loss, Securities Regulation 1072 (2d ed. 1961).

inside information and therefore was subject to section 16(b) scrutiny.[59] The court based this ruling on the fact that Provident conferred with the Foremost management prior to the transaction and thus had access to inside information,[60] and that Provident entered into the transaction voluntarily.[61] Furthermore, the court found that Provident may have had access to inside information after the purchase but prior to the sale.[62]

The court then considered whether the sale was complete on October 21, the date the underwriting agreement was executed, or on October 28, the closing date. This was crucial since Provident had distributed the remaining Foremost convertibles by October 24, and no longer was a ten percent beneficial owner. If the section 16(b) sale took place on October 28, Provident would not be liable for profits realized on the underwriting agreement.[63] However, the court held that the sale was complete on October 21, because at that time Provident became legally bound to sell and the price was fixed.[64]

This brought the court to the dispositive question, whether Provident was a statutory insider "at the time of" purchase. The court relied on *Kern*,[65] interpreting that opinion as requiring that a section 16(b) transaction by a ten percent shareholder be based on inside information obtained from substantial holdings.[66] Since Provident held no stock prior to the purchase, it was not liable.[67] The court found support for this construction of "at the time of" in the legislative history surrounding the enactment of section 16(b),[68] because the section apparently was directed at completed swing transactions[69] and not at "outsiders."[70] Thus the court held that one who increases his holdings to

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59. Current Binder at 96,705.

60. Id.

61. Id.

62. Id. at 94,705-06.

63. See text accompanying note 38 supra.

64. Current Binder at 94,705-07. A sale is complete under § 16(b) when the insider has relinquished his ability to control the transaction so that he no longer can manipulate its terms to his advantage, based on inside information. Stella v. Graham-Paige Motors Corp., 232 F.2d 299, 301 (2d Cir.), cert. denied, 352 U.S. 831 (1956); Blau v. Ogsbury, 210 F.2d 426, 427 (2d Cir. 1954); cf. Champion Home Builders Co. v. Jeffress, 490 F.2d 611, 616 (6th Cir.), cert. denied, 416 U.S. 986 (1974). This control power is relinquished when the insider is bound to purchase or sell a specific number of shares at a fixed price. See Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 598-602 (1973). For example, in Booth v. Varian Associates, 334 F.2d 1 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965), the court ruled that the purchase was not complete until the defendants actually received their shares, despite the fact that they were contractually committed to an exchange of shares for three years, because the contract had not fixed the purchase price. Id. at 4.

65. See notes 9 and 40-41 supra and accompanying text.

66. Current Binder at 96,708, 96,712.

67. Id. at 96,713.

68. Id. at 96,708.

69. Id. See notes 48-55 supra and accompanying text.

70. Current Binder at 96,711; see S. Rep. No. 792, 73d Cong., 2d Sess. 9 (1934); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13-14 (1934). In fact, the statute was designed to protect outside

ten percent of a corporation's outstanding shares is an "outsider" at the time he makes his investment decision and, therefore, does not fall within the class of persons to which the conclusive presumption of abuse of inside information should apply.[71]

The court then refused in dictum to extend this holding to cases where the outsider purchase is in fact a repurchase by one who was a statutory insider when he sold less than six months previously.[72] Thus reaching the same hypothetical which had troubled Judge Kaufman in *Stella*,[73] the *Provident* court stated that a shareholder owning ten percent prior to his initial transaction (sale) and after his terminal transaction (repurchase) should be presumed to have abused inside information.[74] The court here adopted a more flexible approach[75] to the statutory language; in effect "at the time of" means "prior to" in the case of an initial (purchase) transaction but "simultaneously with" in the case of a terminal (repurchase) transaction.[76] The court considered this inconsistent construction of the language to be consistent with the rationale of section 16(b)—the statutory presumption should apply only to those who, "at the time they make the decision to purchase or to sell, are within the class of persons who can reasonably be expected to have access to inside information by reason of their relationship to the corporation."[77] The court may be saying that the repurchaser does not lose the inside information he presumptively possessed when he sold. If so, then this is not in conflict with the *Provident* court's holding, which proceeds from a presumed absence of inside information prior to the initial transaction by a statutory outsider.

The Ninth Circuit's conclusion that section 16(b) was aimed at double event abuse of inside information, and that access to inside information must therefore exist prior to the initial transaction, appears to comport with section 16(b)'s legislative history.[78] The crucial portion of the court's opinion is its attempt to define what "access to inside information" means in this context. The court here concludes that access equals insider status; unless one is an insider as defined by the statute, there is no "access to inside information" for section 16(b) purposes.[79] Therefore, unless an individual holds over ten percent of the issuer's outstanding stock *before* the initial purchase or sale, it is simply a transaction by an "outsider"[80] at whom section 16(b) was not aimed.[81] However, while the statute presumes access to inside information

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shareholders. See Wagman v. Astle, 380 F. Supp. 497, 501 (S.D.N.Y. 1974); 2 L. Loss, Securities Regulation 1041 (2d ed. 1961).

71. Current Binder at 96,712.
72. Id.
73. See notes 13-19 supra and accompanying text.
74. Current Binder at 96,712.
75. See note 18 supra and accompanying text.
76. Current Binder at 96,712.
77. Id.
78. See notes 49-56 supra and accompanying text.
79. Current Binder at 96,711-12.
80. Id. at 96,712.
81. See note 70 supra.

from statutory insider status, in practice it would seem that an individual who owns less than ten percent of the outstanding stock of a corporation may well have "access to inside information" sufficient to provide the opportunity for short-swing speculation. Similarly, one who purchases more than ten percent of a corporation's outstanding stock, having no prior holdings, may well have had access to inside information before making such a large investment. *Provident* ignored the practicalities of these situations and concluded that only statutory insider status provides the requisite access to inside information.

The court's conclusion runs counter to the express or implied conclusions of countless prior cases. Its approach will lead to evasion of the section by some deserving of its sanctions. Yet, the result appears to be in accord with what Congress apparently intended. Thus faced with what it conceived to be a choice between statutory efficiency and fidelity to the legislative mandate, the court chose the latter—as had Judge Hincks two decades before.[82] Until courts are deemed to possess superlegislative powers, this must be considered the better view.

Timothy Dowd

82. See note 32 supra and accompanying text.