

WHAT THE SUPREME COURT DID NOT DO DURING THE 1950 TERM

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This article is an encore to last year's survey of the denials of certiorari over the preceding term—not so much because of the applause, but because it is thought that the by-product of the Court's work may be as significant for the national interest as the "work" itself. It is, of course, misleading to contrast the 114 cases "decided" by the Court, with the more than 1000 cases which it refused to decide. If an efficiency expert took a look at the business of our highest tribunal, he might very well come away with the notion that more time is devoted to deciding *not* to decide a case than to the disposition of those which get from one to four or five opinions from the Justices. But it is also true that the Court's effect on national policy cannot accurately be appraised without prying into that portion of its work which is buried in a statistic of the office of the Administrator.

In last year's feeble effort to penetrate the purple curtain of certiorari it was emphasized how difficult it was to get at the facts with regard to the cases checked up on the Miscellaneous Dockets. Most of these are *in forma pauperis*, with but one home-made petition, often in long-hand. There is no way for an investigator to discover anything about such cases except to go to the Supreme Court building to study the originals. Once in a while, such a case can be discovered by accident or because of newspaper publicity or some other equally fortuitous circumstance, as for example, recognition of the name of a well known warden. For the most part, however, under present Court practices and records, as a practical matter, most of these cases can never be brought to light. As a matter of fact, except in rare instances, there is no compelling reason why they should be brought to light because they have no conceivable merit.

The Appeals Docket is another matter. A good bit can be learned about the cases so listed by the simple device of reading the decisions in the lower courts. But this, in itself a task of considerable magnitude, does not tell the entire story. To understand the total situation would require the same study of the records and briefs which the Justices and

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their staff have made. Even such a study would often fail to record just *why* the Court refused to review the case other than that four Justices failed so to vote, and we know that before we start.

Indeed, that is about the only thing we do know about denial of certiorari. There are many reasons why the writ may be denied and it is seldom that any is given. Once in a while, as in the *Agoston* case¹ during the 1950 term, a hint as to the basis for the action is given, but ninety-nine out of a hundred cases are left to pure speculation. The Federal Rules set forth the formal reasons for granting certiorari. But neither the Rules nor the decisions reveal the reasons for adverse action.

Not only are we not told why certiorari is denied, but it is the exceptional case in which we know how many Justices, if any, less than four, favored review. Occasionally, a Justice will "note" his dissent but even when he does, he will not say *why*. During the past term there were actually 29½ cases in which there were dissents. The fraction case was *Dennis*,² in a dissenting opinion to which Mr. Justice Black made the unusual revelation that he had dissented from the limitation imposed by the majority on the scope of review. Presumably he was prepared to consider more of the many problems involved than the constitutionality of the Smith Act. When one considers the enormous importance of the case, his position is not hard to understand.

In the 1949 term, Mr. Justice Frankfurter wrote a thirteen page opinion in connection with a denial of certiorari to reiterate the oft-repeated admonition that the bar can make no inferences as to the merits of a case merely because the Court declines to review it.³ He followed up with another warning during the past term.⁴ The Court is not deciding a case one way or the other. This, of course, is technically true, but the guess might be ventured that not one person in a hundred thousand realizes it. Indeed, a lot of people who ought to know better, assume the contrary.⁵ When the Court denied certiorari in the *Hiss* case, there was a wide-spread understanding that the denial was tantamount to affirmance,⁶ and so far as Hiss was concerned, of course, it

1. *Agoston v. Pennsylvania*, 364 Pa. 464, 72 A.2d 575, *cert. denied*, 340 U.S. 844 (1950), discussed *infra* note 91 and text.

2. *Dennis v. United States*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

3. *Maryland v. Baltimore Radio Show*, 67 A.2d 497 (Md. 1949), *cert. denied* 338 U.S. 912 (1950).

4. See *Agoston v. Pennsylvania*, *supra* note 1, in which he said: "The denial of the petition seeking to bring here the decision of the Supreme Court of Pennsylvania carries with it no support of the decision in that case, nor of any of the views in the opinion supporting it." 340 U.S. at 845.

5. "It is not merely the laity" who regard a denial of certiorari as support for the decision in the lower court. See Justice Frankfurter in *Agoston v. Pennsylvania*, *Id.* at 844.

6. *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), 340 U.S. 948 (1951). In Bert Andrews' story in the *Herald-Tribune* of March 12, 1950, after the denial of certiorari in the *Hiss* case, Senator Nixon, a lawyer, was quoted as saying; "This

was true. Actually the case presented little more than the mystery of a missing typewriter and one man's word against another under circumstances where it was pretty obvious that one of them was lying. It is hardly a plausible proposition that the Supreme Court should review a jury's findings as to the credibility of witnesses. Actually, if the Court had reviewed *Hiss*, it is incredible that anything other than an affirmance would have resulted. But that is beside the point so far as an understanding of the Court's action is concerned.

From the outside, with no chance to look in, there will be many cases which appear important in the sense that a reasonable lawyer might think a review by the Court is indicated, but which may have a perfectly valid disposition. Many times it is impossible to hazard a safe guess as to the basis for the Court's action. Others will disclose a straw in the wind. Take, for example, a diversity case, involving an action for wrongful death.

An airplane disaster in Utah presented the simple facts and complicated legal problem as follows:⁷ Petitioner's testator was killed in the crash of respondent's DC-6 airliner in Utah. Suit was brought in a Federal District Court of Illinois under the Utah death statute against respondent, a Delaware corporation. One of the defenses presented was the Illinois Injuries Act which provides that "no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."⁸ The defense was held valid as against a motion to strike and a petition for certiorari was sought before judgment in the court of appeals.⁹

decision by the highest court of the land, should resolve any lingering doubt which may have existed as to the guilt of Alger Hiss." Why should this decision resolve anything unless it was on the merits? We are told, however, that the only thing it resolves is that for some reason or another which will never be known, less than four justices voted to review it.

Again in a letter written to the editor of the Herald-Tribune praising the work of Andrews in bringing about the Hiss prosecution and conviction, Senator Nixon began by saying: "Now that the Supreme Court has finally written the decision in the case of Alger Hiss, I should like to take this opportunity to give due credit. . . ."

Even the Justices themselves slip up occasionally: "We may have been right or we may have been wrong in these repeated denials of review. But what the Court of Appeals has now done is to try to effectuate a judgment that we, by refusal to review, in effect have *confirmed*." (Emphasis supplied). Justice Jackson in *Sawyer v. Dollar*, 341 U.S. 737, 748 (1951). To be sure, the Justice carefully used the word "confirmed" instead of "affirmed", but the distinction may not be noticed even by many lawyers.

7. *First National Bank of Chicago v. United Air Lines, Inc.*, 190 F. 2d 493, *cert. denied*, 341 U.S. 903 (1951).

8. Ill. Laws 1949, § 1, ILL. STAT. ANN., c. 70, § 2 (Smith-Hurd, Supp. 1950).

9. 28 U.S.C. § 1254(1) (Supp. 1950); REV. RULES SUP. CT. 39.

The case was regarded as raising the principle involved in the confused and highly controversial case of *Angel v. Bullington*¹⁰ which, it has been predicted, will plague the bar and the Court for a long time to come.¹¹ May the legislatures of the states circumscribe the limits of the jurisdiction of the federal courts in diversity cases? The federal district court in the *United Air Lines* case found: "(a) The Illinois statute deprives a Federal District Court in Illinois of jurisdiction to entertain a suit for a wrongful death occurring in Utah; * * * (c) Said statute does not violate the full faith and credit clause of the Federal Constitution." *Erie v. Tompkins*¹² was intended to make effective a policy of one law for the States, without regard to whether action was brought in a state or federal court. To be sure procedure was not affected; that is, the federal rules were to prevail in federal courts while the state rules would naturally govern procedure in the state courts. This made the distinction between "substance" and "procedure" vital for the application of the rule of *Erie v. Tompkins*. But what of the question of jurisdiction? It is not easy to regard jurisdiction—the power to hear and determine—as a question either of substance or procedure. The usual dichotomy seems inadequate here. The problem was glossed over in *Angel v. Bullington* and of course no further light is shed on the subject by the refusal of the Court to consider it in the instant case. *Angel v. Bullington* was decided by a divided Court and none of the opinions was satisfactory and none of them put in proper focus the real issues involved.

The district court in *United Air Lines* followed two court of appeals decisions¹³ which held that the Illinois statute was a jurisdictional bar in the federal courts. These holdings were thought to be required by *Angel v. Bullington* and *Woods v. Interstate Realty Co.*¹⁴ Petitioner in *United Air Lines* sought to explain *Angel* as merely adopting state policy, expressed by statute, as a defense or substantive bar to a cause of action created by another state reflecting a contrary policy,¹⁵ a theory which would make some sense.

Petitioner further argued that the Illinois statute was void as offending the full faith and credit clause rule. While petitioner's case was pending, there was also pending before the Court for full review

10. 330 U.S. 183 (1947).

11. See the criticism of this case by Harper, *Mr. Justice Rutledge and Full Faith and Credit*, 25 *IND. L.J.* 480, 490 (1949-1950).

12. 304 U.S. 64 (1938).

13. *Trust Co. of Chicago v. Pennsylvania R. Co.*, 183 F.2d 640 (7th Cir. 1950); *Munch v. United Air Lines, Inc.* 184 F.2d 630 (7th Cir. 1950), the latter case involving the same accident as that in which decedent of the instant case was killed.

14. 337 U.S. 535 (1949).

15. Brief for Petitioner, p. 17, *First National Bank of Chicago v. United Air Lines*, 341 U.S. 903 (1951).

the case of *Hughes v. Fetter*¹⁶ from Wisconsin. Here, the decedent had been killed in Illinois and action for wrongful death was brought in Wisconsin. There was a Wisconsin statute¹⁷ which the supreme court of that state had interpreted as effecting the same result as the Illinois statute, viz., that the action under a foreign wrongful death act could not be maintained in Wisconsin, on the theory that the public policy of the state forbade such suit.¹⁸ The Court heard the case and, on the last day of the term, reversed; holding by a five to four decision that the full faith and credit clause rule required Wisconsin to allow the action under the Illinois death statute.

Here is obviously a snarled situation. To be sure, there are differences between these cases and *Angel*. But are they significant? The Court of Appeals for the 7th Circuit thought not. The crazy-quilt combination of *Erie* and *res judicata* of *Angel*¹⁹ is the source of the trouble. Neither the majority opinion nor the dissent written by Justice Frankfurter in *Hughes* throws light on the confusion created by the majority opinion in *Angel*, written by Justice Frankfurter.

As to the question of the denial of certiorari in *United Air Lines* and the review and reversal in *Hughes* of the identical issue, there may be a valid explanation. In *United Air Lines*, petitioner sought to bypass the court of appeals and obtain an immediate review by the Supreme Court at a time when the *Hughes* case was already pending.²⁰ Even after the denial of certiorari, presumably petitioner will obtain a review in the court of appeals, the court taking into account the decision in the *Hughes* case. If this is a correct analysis of the situation, it would have required but a few sentences to explain the denial of

16. 257 Wis. 35, 42 N.W.2d 452, *reversed*, 341 U.S. 609 (1951); commented upon, 100 U. OF PA. L. REV. 126 (1951).

17. WIS. STAT. § 331.03 (1947).

18. *Hughes v. Fetter*, 257 Wis. 35, 42 N.W.2d 452 (1950).

19. Rutledge, J., dissenting, *Angel v. Bullington*, 330 U.S. 183, 201 (1947).

20. In his Brief, p. 6, petitioner stated: "The writ is sought here *before judgment or decision* of the Court of Appeals. The reason is apparent. Two substantial constitutional questions are involved. The first has been adversely determined by the Court of Appeals for the Seventh Circuit in *Trust Company of Chicago v. Pennsylvania R. Co.*, 183 Fed. (2) 640, (July 1950), and *Munch v. United Airlines, Inc.*, 184 Fed. (2) 630 (Nov. 1950). These holdings were thought to be compelled by the decisions of this Court. For this reason it would be a useless gesture for Petitioners to ask that Court to reconsider, absent further expression by this Court. The second of these questions [Full Faith and Credit] (not raised before the Court of Appeals in the two cases above) is already before this Court, viewed from a different aspect, in *Hughes, Adm. v. Fetter*, Docket 355, this Term."

Petitions for certiorari may issue to the Courts of Appeal before judgment when there are questions of pressing public interest which require prompt Supreme Court review. REV. RULES SUP. CT. 39 ROBERTSON AND KIRKHAM, JURISDICTIONS OF THE SUPREME COURT OF THE UNITED STATES §§ 131, 410 (Wolfson & Curland 1951). It is necessary that notice of appeal be filed, but whether the record must also be filed is not altogether clear. Cf. Rule 73 (a) and STERN AND GRESSMAN, SUPREME COURT PRACTICE, § 13 (1950).

certiorari by the Supreme Court, surely not a prohibitive demand on the Court's time. Justice Frankfurter, however, is one of the most vociferous defenders of the Court in its refusal to give reasons for its denial of certiorari.

AN OVER-ALL VIEW OF WHAT THE COURT DID AND DID NOT DO

For the 1950 term, there were 1,335 cases on the dockets as compared to 1,448 for the 1949 term. The 1950 figure includes 13 cases on the Original Dockets, 783 on the Appellate and 539 on the Miscellaneous Dockets. In its efforts to clear these dockets, the Court wrote 91 opinions, four more than last year, taking care of 114 cases. In addition, 77 cases, all but three from the Appellate Dockets, were disposed of by per curiam orders or opinions. Four more cases were disposed of on the merits either on motion to dismiss or per stipulation of the parties. Thus 195 cases out of 1,335 were disposed of on the merits, 14.6 per cent as contrasted with 15.4 per cent during the 1949 term.

The Court declined to review 495 cases on the Appellate Dockets and 386 on the Miscellaneous Dockets. Furthermore, there were 121 applications for other relief, such as habeas corpus or mandamus, denied or withdrawn from the Miscellaneous Dockets. Thus 1,002 cases were simply listed as denied review or application withdrawn. These figures, however, are too charitable; they do not constitute an accurate guide to what the Court actually chose not to do. In addition to the 1,002 cases, the Court disposed of 65 cases by per curiam order without hearing argument on the merits and dismissed four others, as mentioned above, on motion or per stipulation of the parties. The more reliable figure, therefore, is 1,071 out of 1,216, with 119 cases carried over to next term.

Of the 74 appeals filed, the Court noted probable jurisdiction or postponed that question to a hearing on the merits in 28. In 32 cases the appeal was dismissed; in another it was dismissed in part and affirmed in part. In 11 others, the Court affirmed or reversed without hearing argument on the merits. In one case, the judgment was reversed per curiam after argument and in another the appeal was dismissed but certiorari was later granted.

The Court's 77 per curiam orders covered 46 appeal cases, all but two of which, as noted above, were disposed of without argument on the merits. The 31 orders which covered certiorari petitions include 21 in which the Court reversed, remanded, dismissed on motion, or denied certiorari without first hearing argument on the merits.

Thus of the 77 cases disposed of through per curiam orders—commonly thought, perhaps, to represent decisions going to the heart of the controversies—65 were disposed of (some, undoubtedly, for good reason) without hearing argument on the merits. The Court actually heard argument in only 11.7% of the cases before it, whereas it disposed of 14.6% by opinions or orders, as opposed to flat denials of review.

Following is a statistical summary of the 1950 term which gives a general view of how the Court performed its high functions.

1. *Disposition of Cases by Dockets*

I. Appellate Dockets	
Total Cases	783
Cases Disposed of:	
By ninety-one written opinions	114
By per curiam opinions or orders	74
By motion to dismiss or per stipulation (merit cases) ..	4
By denial or dismissal of petitions for certiorari	495
Remaining on Dockets	96
II. Miscellaneous Dockets	
Total Cases	539
Cases Disposed of:	
By transfer to Appellate Docket	14
By per curiam order or opinion	3
By denial or dismissal of certiorari	386
By denial or withdrawal of other applications	121
Remaining on Dockets	15
III. Original Dockets	
Total Cases	13
Cases disposed of	5
Remaining on Dockets	8
IV. Total All Dockets	
Total Cases	1335
Cases Disposed of	1216
Remaining on Dockets	119

2. *Disposition of Appeals*

Total Appeals filed	74
Jurisdiction noted or postponed to argument on merits ...	28

Dismissed per curiam	33
Disposed of by other per curiam orders	13

3. *Per Curiam Orders or Opinions*

I. Total orders or opinions (including Miscellaneous Dockets)	77
II. Merits actually argued—certiorari cases:	
Affirmed after argument	5
Reversed after argument	2
Certiorari granted, continued to next term	2
Motion for reconsideration continued	1
Merits actually argued—Appeal cases:	
Reversed after argument	1
Dismissed, but certiorari later granted	1
Total cases in which merits actually argued	12
III. Disposed of without argument—Certiorari cases:	
Reversed, remanded, dismissed on motion, or denied in conjunction with dismissal of an appeal	21
Disposed of without argument—Appeal cases:	
Dismissed	32
Dismissed in part, affirmed in part	1
Affirmed	9
Reversed	2
Total cases in which merits were not argued	65

4. *Some Realistic Statistics*

I. Cases disposed of after argument as to the merits:	
By written opinions	114
By per curiam opinions or orders	12
Total	126
II. Cases disposed of without hearing argument as to merits:	
Denied certiorari, Appellate Dockets	495
Dismissed on motion or per stipulation, Appellate Dockets	4
Denied certiorari, Miscellaneous Dockets	386
Denied or withdrew other applications, Miscellaneous Dockets	121
Disposed by per curiam orders or opinions	65
Total	1071
III. Of all cases disposed of, the percentage in which the merits were actually argued	10.5%
Of cases disposed of by per curiam order, the percentage in which the merits were actually argued	15.6%

5. *Some Comparative Statistics*

	Terms	
	1949	1950
All cases on the Appellate Dockets	867	783
Disposed of on merits	201	192
Disposed of by denial of certiorari	556	495
Remaining on dockets at term end	110	96
Percentage cases disposed on merits	23%	25%
Percentage cases denied certiorari	64%	64%
Percentage work left un-done	13%	11%
All cases on the Miscellaneous Dockets	568	539
Disposed on the merits	7	17
Disposed of by denial of certiorari	436	386
Disposed of by denial or withdrawal of other applications	108	121
Remaining on dockets at term end	17	15
Percentage cases disposed on merits	1.2%	3.1%
Percentage cases denied certiorari	77%	72%
Percentage cases disposed by denial or with- drawal of other applications	18.9%	22%
Percentage work left un-done	2.9%	2.9%
Review denied, all categories		
Certiorari denied, Appellate Dockets	556	495
Certiorari denied, Miscellaneous Dockets..	436	386
Appeals dismissed	41	33
Total	1033	914
Percentage review denied, all cases on Ap- pellate and Miscellaneous Dockets ...	72%	69%

FOOTNOTE ON DISSENTS "NOTED"

The dissents "noted" where certiorari is denied are interesting. As usual, Justices Douglas and Black were the most frequent dissent "noters." Professor Frank, who keeps a running score on such matters, has pointed out that these two Justices are by far the most out-of-step of all members of the Court, as determined by their agreement or lack of agreement with the majority in important cases accorded full review. Professor Frank's calculations indicate Justice Black voting with the majority in 54% of such cases, Justice Douglas in 48% as against the Chief Justice's score of 95%, Justice Jackson 89%, Justice Clark 83%, Justice Reed 82%, Justice Burton 78%, Justice

Minton 75%, and Justice Frankfurter 65%, for whatever such statistics are worth.

Perhaps they are worth a little more, in an appraisal of the attitudes of the Justices on certain important policy issues, when equated with the dissents "noted" in certiorari denials. Of 29 cases in which the dissenting Justice or Justices recorded their disapproval of the Court's action, Justice Black spoke up in 22, Justice Douglas in 21, Justice Reed in 4, Justice Burton in 1. The other members of the Court either agreed that all 914 petitions and appeals should not be heard or were content to leave the purple curtain impenetrable. Justices Black and Douglas were companions in "noting" their dissents in 13 cases, in 2 of which they were joined by Justice Reed. In the cases decided by the Court, after hearing and argument, Justices Black and Douglas were together in dissent in 24 cases, each dissenting in 12 others for a total of 36 apiece.²¹

Since dissents to denials of certiorari are notations rather than opinions, it is difficult to make much of a guess as to the reasons for them. Justice Black's long interest in Indian Affairs can hardly explain why he wanted to review the decision of the Court of Claims in *United States v. Rogue River Tribe of Indians*.²² The case merely involved the right to and the amount of compensation due certain tribes for treaty lands, occupied by them before their removal from their reservation. Whether it was the method of calculating the amounts due or something else which attracted his interest will probably never be known. Perhaps it is a good thing that there is one Justice on the Supreme Court who has not forgotten the most forgotten of all Americans.

*Moffett v. Arabian American Oil Co.*²³ involved a fantastic claim under an alleged contract between the parties wherein the plaintiff was to undertake to persuade the United States government to require the British government, as a condition to a loan to the latter, to "take care of" the budget requirements of the King of Saudi Arabia. The plaintiff got a verdict in the trial court for \$1,115,000 which was set aside by the trial judge on two grounds: (1) there was no proof that the plaintiff performed the services for which he claimed compensation; (2) the agreement was against public policy. The court of appeals affirmed in an odd opinion in which Judge Frank said that the court agreed with the trial judge on the first ground and thus found it un-

21. Total dissenting opinions of all the Justices are: Vinson 6, Clark 9, Reed 12, Minton 12, Burton 13, Jackson 18, Frankfurter 22, Douglas 36, Black 36.

22. 89 F. Supp. 798 (1950), *cert. denied*, 341 U.S. 902 (1951).

23. 184 F.2d 859 (2d Cir.), *cert. denied*, 340 U.S. 948 (1950).

necessary to consider the second. Justice Black "noted" his dissent. It seems unlikely that Justice Black would seriously consider upholding so brazen an agreement. It is a good guess, therefore, that he would review the case, reverse the court of appeals on its first ground but uphold the judgment on the second, thus establishing what he would regard as a good precedent rather than a bad one.

Dissents by Justices Black and Douglas in three F.E.L.A. cases²⁴ may also be explained by their notions of the respective functions of judge and jury. All involved the recovery by the injured employee of a jury verdict and a reversal, in two cases by a state court, in the other by the United States court of appeals, on grounds of insufficiency of evidence of negligence, contributory negligence or causal connection, all being traditionally jury questions. Only Justice Black dissented in a case originating in Oklahoma in which the supreme court of the state reversed after the plaintiff had recovered in an action for damages for trespass.²⁵

Justices Black and Douglas again dissented in *Pohl v. Acheson*²⁶ which involved petitions for writs of habeas corpus on behalf of seven German nationals held in American military prisons in Germany awaiting execution after conviction by United States military tribunals. The petitions were dismissed by summary judgment, the court of appeals affirming on the authority of *Johnson v. Eisentrager*²⁷ and *Flick v. Johnson*.²⁸ The petitioners had contended in their efforts to obtain a review by the Supreme Court that (1) the speed and undue haste with which the proceedings below were conducted deprived them of any semblance of due process of law, (2) since a state of war no longer existed between the United States and Germany, the cases relied upon by the court of appeals were no longer controlling, (3) the consolidation of the proceedings by the court below was error,²⁹ (4) the court

24. *Ottley v. St. Louis-San Francisco R.R. Co.*, 360 Mo. 1189, 232 S.W.2d 966, *cert. denied*, 340 U.S. 948 (1951); *Healy v. Pennsylvania R. Co.*, 184 F.2d 209 (3d Cir. 1950), *cert. denied*, 340 U.S. 935 (1951); *Roberts v. Mo.-Kans.-Tex. R. Co.*, 225 S.W.2d 198 (Tex. Civ. App. 1950), *cert. denied*, 340 U.S. 832 (1951).

25. *Rosencrans v. Edmond Salt Water Disposal Assn.*, 204 Okla. 9, 226 P.2d 965, *cert. denied*, 340 U.S. 924 (1951). Plaintiff claimed that salt water from an abandoned well on adjoining property had percolated into the underground stratum of salt water and thence into a portion of stratum under plaintiff's land. The evidence, however, did not show that plaintiff had been deprived of possession, use or enjoyment of his land or that he had been in any way restricted in its use.

26. 19 U.S.L. WEEK 3272 (1951), *cert. denied*, 341 U.S. 916 (1951), commented on in Note, 51 COL. L. REV. 368 (1951); 36 CORN. L.Q. 303 (1951); comment, 49 MICH. L. REV. 870 (1951).

27. 339 U.S. 763, (1950), in which Justices Black and Douglas had dissented.

28. 174 F.2d 983 (D.C. Cir.) *cert. denied*, 338 U.S. 879 (1949), to which Justice Black noted his dissent.

29. The seven petitions involved four separate trials. Five petitions concerned two Nurnberg trials and two petitions concerned two Dachau proceedings.

below erred in failing to appoint counsel to represent petitioners on filing of their petitions *in propria persona*. Justice Jackson, of course, disqualified himself.

On its face, *California-Oregon Power Co. v. Beaver Portland Cement Co.*³⁰ would appear to dispose of the petition for certiorari in *Dority v. Bliss*.³¹ Both cases seemed to present a claim based on the common law rights of riparian proprietors alleged to have attached to the lands when the patent issued to the first predecessor in title. To Justices Douglas and Reed, however, the similarity was not so obvious or they thought the precedent should be reexamined. Whatever "importance" the case may have presented to the "dissent noters," does not appear to the present writers. Other cases, most of which are discussed later, in which one or more of the Justices "noted" dissent are: *James v. Washington*³² (contempt conviction for refusal to answer questions before a state Un-American Activities Committee); *Wenning v. Peoples Bank*³³ (effect of bankruptcy proceedings on mortgage foreclosure proceedings in state court); *Sacher v. United States*³⁴ and *Hallinan v. United States*³⁵ (both involving contempt of court by lawyers, the one in the Communist trial, the other in the Bridges case); *Kemp v. South Dakota*³⁶ (alleged conflict between state statute and treaty); *Simmons v. Birmingham*³⁷ (constitutionality of ordinance, facts not disclosed); *Prudence Bonds Corp. v. Silbiger*³⁸ (allowances for attorney in corporate reorganization proceedings); *Agoston v. Pennsylvania*³⁹ (prisoner confessed after prolonged questioning before magistrate's hearing); *Hendricks v. Smith*⁴⁰ (validity of state tax in property leased from tax-exempt university); *Shotkin*

30. 295 U.S. 142 (1934).

31. 55 N.M. 12, 225 P.2d 1007, *cert. denied*, 341 U.S. 924 (1951).

32. 36 Wash.2d 882, 221 P.2d 482, *cert. denied*, 341 U.S. 911 (1951), Justices Black, Douglas and Reed dissenting.

33. 153 Ohio St. 583, 92 N.E.2d. 689, *cert. denied*, 340 U.S. 858 (1950). Justices Black, Douglas and Reed would hear argument on the merits, postponing further argument on the jurisdictional issue.

34. 182 F.2d 416 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1951), Justices Black and Douglas dissenting.

35. 182 F.2d 880 (9th Cir.), *cert. denied*, 341 U.S. 952 (1951), Justices Black and Douglas dissenting.

36. 44 N.W.2d 214 (S.D. 1950), *appeal dismissed*, 340 U.S. 923 (1951), Justice Douglas dissenting.

37. 49 So.2d 927 (Ala. App. 1950) *appeal dismissed*, 341 U.S. 945 (1951), Justices Black and Douglas would note probable jurisdiction.

38. 180 F.2d 917 (2d Cir.), *cert. denied*, 340 U.S. 831 (1950), Justice Douglas dissenting.

39. 364 Pa. 464, 72 A.2d 575, *cert. denied*, 340 U.S. 844 (1950), Justices Black and Douglas dissenting.

40. 153 Ohio St. 500, 92 N.E.2d 393, *cert. denied*, 340 U.S. 801 (1950), Justice Douglas dissenting.

*v. People of Colorado*⁴¹ (contempt conviction by summary procedure for acting as counsel *pro se* in violation of state supreme court order); *Westinghouse Radio Stations v. Felix*⁴² (liability of radio station for libel in political broadcast); *Santangelo v. Santangelo*⁴³ (validity of Nevada divorce and liability for alimony); *Lyon v. Compton Union High School*⁴⁴ (denial to Jehovah's Witnesses of use of school buildings); *Goo v. United States*⁴⁵ (denial of motion to withdraw plea of guilty before sentence pronounced); *RD-DR Corp. v. Smith*⁴⁶ (movie censorship); *Turner v. Alten Banking, etc. Co.*⁴⁷ (validity of judgment taken on cognovit notes after expiration of statute of limitations); *Dowdy v. Louisiana*⁴⁸ (adequacy of court-appointed counsel in murder trial); *Brown v. North Carolina*⁴⁹ (admissibility of confession while held in custody without warrant); *Marelia v. Burke*⁵⁰ (habeas corpus where relator challenged his detention incommunicado for more than 112 hours); *Pennsylvania ex rel. Johnson v. Dye*⁵¹ (fugitive from a Georgia chain gang); *Rowland v. Chesapeake & Ohio R. Co.*⁵² (presumably an F.E.L.A. case; a Miscellaneous Docket case which the authors could not find).

SOME OF THE HEADLINERS

Among the relatively few cases actually decided by the Court, there were a proportionally large number of sensational ones. The denials, too, had an inordinately large number of cases at the headline

41. 212 P.2d 1007 (Colo. 1949), *cert. denied*, 340 U.S. 832 (1950), Justices Black and Douglas dissenting.

42. 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951), Justice Black dissenting.

43. 137 Conn. 404, 78 A.2d 245, *cert. denied*, 341 U.S. 927 (1951), Justice Black dissenting.

44. 19 U.S.L. WEEK 3273 (Cal. App. 1951), *appeal dismissed*, 341 U.S. 913 (1951). (Justices Reed and Burton would note probable jurisdiction). See also *Halvajian v. Bd. of Education of City of Inglewood*, *appeal dismissed*, 341 U.S. 913 (1951), a companion case to which Justices Reed and Burton noted the same dissent.

45. 187 F.2d 62 (9th Cir. 1950), *cert. denied*, 341 U.S. 916 (1951), Justice Black dissenting.

46. 183 F.2d 562 (5th Cir.), *cert. denied*, 340 U.S. 853 (1950), Justice Douglas dissenting.

47. 181 F.2d 899 (8th Cir.), *cert. denied*, 340 U.S. 833 (1950), Justices Black and Douglas dissenting.

48. 217 La. 773, 47 So.2d 496, *cert. denied*, 340 U.S. 856 (1950), Justices Black and Douglas dissenting.

49. 233 N.E. 202, 63 S.E.2d 99, *cert. denied*, 341 U.S. 943 (1951), Justices Black and Douglas dissenting.

50. 366 Pa. 124, 75 A.2d 593, *cert. denied*, 341 U.S. 911 (1951), Justices Black and Douglas dissenting.

51. *Cert. denied*, 341 U.S. 911 (1951), Justice Douglas dissenting.

52. *Cert. denied*, 341 U.S. 923 (1951), Justice Black dissenting.

level. What with Hiss,⁵³ Mellish,⁵⁴ Maragon,⁵⁵ the Dollar Line,⁵⁶ the lawyer contempt victims of Judge Medina,⁵⁷ and the several objects of the wrath of the House Un-American Activities Committee,⁵⁸ the inactivity of the Supreme Court gave the newspapers as well as the law reviews a field day.⁵⁹

Of the 495 cases on the Appellate Docket which the Court declined to review, however, only 31 were selected as of sufficient importance to the national interest, in the authors' judgment, to merit review. This is to be contrasted with 64 cases so classified in the 1949 term. Of the 386 cases on the Miscellaneous Docket, the authors unearthed 6 which they listed in this category. A breakdown of the 31 cases discloses: 17 cases involving some aspect of civil liberties; 2 tax cases; 2 cases in conflict of laws; 1 each involving labor, treaties, admiralty, statutory interpretation, criminal law and procedure,

53. *Hiss v. United States*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

54. *Melish v. Rector, Church Wardens & Vestrymen*, 301 N.Y. 679, 95 N.E.2d 43, *cert. denied*, 340 U.S. 936 (1951).

55. *Maragon v. United States*, 187 F.2d 79 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 932 (1951).

56. Although the Court twice denied, during the term, petitions for certiorari on aspects of the bitterly fought Dollar Steamship Lines litigation, it granted certiorari at its final session to two petitions not previously before it and, at the same time, continued on its docket a motion for leave to file motion for reconsideration of the cases earlier denied review. It also issued a stay order on the conviction of Secretary of Commerce Charles Sawyer for being in civil contempt of the Court of Appeals for the District of Columbia. Thus, despite indications early in the term that a review of the merits of this controversy would not be given, the Court appears ready now to consider all the litigation, undoubtedly including a certiorari petition by Secretary Sawyer, in one bundle next term. See *Land v. Dollar*, 341 U.S. 737 (1951), and related cases.

57. *Sacher v. United States*, 182 F.2d 416 (2d Cir. 1950), *cert. denied*, 341 U.S. 952 (1951).

58. *Fleischman v. United States*, 183 F.2d 996 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 866 (1950); *Morford v. United States*, 184 F.2d 864 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 878 (1950). See *United States v. Fleischmann*, 393 U.S. 349 (1949).

59. In addition to several of the cases cited above, the Communist witch hunt accounted for several other cases in which the Court denied certiorari: *Potter v. Estes*, 183 F.2d 865 (5th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951), and *United States v. Kasinowitz*, 181 F.2d 632 (9th Cir. 1950), *cert. denied*, 340 U.S. 920 (1951), involving the privilege against incrimination in connection with a refusal to answer questions the answer to which might associate the witnesses with the Communist Party; *Cole v. Loew's, Inc.*, 185 F.2d 641 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951), in which the Court of Appeals reversed a judgment in favor of plaintiff against a movie producer who had terminated a contract between them after plaintiff, a screen writer, had been convicted of contempt of the Un-American Activities Committee.

The Court upheld the privilege against self incrimination in *Blau v. United States*, 340 U.S. 159 (1950), as applied to questions concerning association with the Communist Party, but imposed severe limitations on it in *Rogers v. United States*, 340 U.S. 367 (1951), by holding that the privilege may be lost ("waived") by answering some questions with incriminatory implications. Thus, as Justice Black pointed out in his dissent, the witness may be caught in the dilemma of premature assertion or waiver of the privilege. It must be timed exactly right. For a case involving conviction of contempt of a little Un-American Activities Committee in which certiorari was denied, see *James v. Washington*, 36 Wash.2d 882, 221 P.2d 482 (1950), *cert. denied*, 341 U.S. 911 (1951).

and 5 miscellaneous cases of one sort or another involving constitutional issues. In making this selection, the authors have tried to restrict the list to what appeared to be cases of far-reaching public interest so far as the legal issues were concerned. The mere fact that a case attracted wide-spread public attention was not enough. Thus the *Hiss* and the *Maragon* cases were not included. Indeed, several cases in which one or more of the Justices noted their dissents were excluded because the authors were not persuaded that they were "important" in the sense here intended. So too, a case in the Court of Appeals for the District of Columbia which drew comment in 16 different law reviews was omitted because it was not thought to merit review by the highest policy determining court of the nation.⁶⁰

The Court's record for the term of decisions in civil rights cases was almost if not quite matched by its denials in such cases. The *Dennis* decision,⁶¹ upholding the validity of the Smith Act, is probably the worst blow to democratic liberties in several decades. Together with the *Garner* case⁶² upholding the Los Angeles loyalty oath, it has made Red hunting, as Professor Frank has pointed out, a respectable national sport with the disastrous results that many who are not Reds are caught in the net. Just why a miserable group of political fanatics, with utterly unmarketable ideas, should close the democratic market place to all but the most conventional ones, is the tragic riddle of our times. But equally serious results may be apprehended from some of the decisions below which the Court silently let stand as the law of the land.

Perhaps heading the list of important cases turned down by the Court was Judge Medina's "unfinished business"⁶³ in which he finished off the legal careers of the five⁶⁴ lawyers who defended the eleven Communist leaders prosecuted under the Smith Act. The citation came from the bench on the same day that the verdict was returned and covered a long series of incidents which had occurred throughout the trial, some of them months before. All together there were forty specifications. The court of appeals, Judges Augustus Hand,

60. *Argonne Co. v. Hitaffer*, 183 F.2d 811 (D.C. Cir. 1950) (wife may recover for loss of consortium), *cert. denied*, 340 U.S. 852 (1950).

61. *Supra* note 2.

62. *Garner v. Board of Public Works*, 341 U.S. 716 (1951).

63. In the trial of the eleven Communist leaders, Judge Medina, after the verdict had been entered on October 14, 1949, addressed the defendants' lawyers, saying, "Now I turn to some unfinished business." He then read a contempt certificate and sentenced the lawyers to prison in addition to the imposition of a fine.

64. Actually, there were six contempt convictions. In addition to lawyers Sacher, Isserman, McCabe, Gladstein and Crocket, defendant Dennis, who had acted as counsel *pro se*, was sentenced.

Jerome Frank and Charles Clark sitting, by a divided court upheld Judge Medina's decision on thirty-seven specifications.⁶⁵

The Federal Rules of Criminal Procedure⁶⁶ provide for summary disposition in contempt cases, as follows: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." The Rule further provides that "a criminal contempt except as provided in sub-division (a) of this rule [quoted above] shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense . . ." The same Rule further provides that "if the Contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

There was no question that most if not all the specifications involved "disrespect to or criticisms of" Judge Medina. Indeed, so much so that he himself occasionally behaved in a manner hardly distinguishable from that of the defendants. The Judge did not disqualify himself but proceeded under Rule 42 (a) to punish the lawyers without notice or hearing. One question raised on appeal was whether the case was properly handled in summary manner.

In the preamble of Judge Medina's certificate of contempt he made the following statement:

"By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bound of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

"I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and willful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct

65. *Supra* note 57. [Editor's note: After this article had been prepared, the Supreme Court, in the present term reversed itself and granted review in the *Sacher* case.]

66. FED. R. CRIM. P. 42.

of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the courtroom, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

"Accordingly, I adjudge the following guilty of the several criminal contempts described below. . . ." ⁶⁷

Unless one insists on cutting through the substance to the form, it is almost impossible to disassociate the conspiracy charge from the forty specifications. If the conspiracy, without which the judge says he would have at most merely reprimanded the lawyers, is considered a part of the crime, it defies imagination that the lawyers got together in open court and conspired in the judge's presence so that he "saw or heard the conduct constituting contempt." Unless something like this was done, the case is outside Rule 42(a) dealing with summary disposition.

Aside from construction of the Rules, grave issues of statutory construction and even constitutional doubts were involved,⁶⁸ and the case is important, on any showing, for the bar and indeed for the entire nation. It not only involves the right and the extent of the right of advocacy but the right to *have* an advocate. How far this high-handed manner of dealing with criminal contempt has and will deter lawyers from representing clients with unpopular political beliefs is something no one can determine. There is little doubt, however, of its tendency to do so. The guilt or innocence of these lawyers is irrelevant. If guilty lawyers can be dealt with in this manner, then innocent ones can be handled in the same way, with no chance whatever to show their lack of guilt. To justify Judge Medina's action on the ground that the lawyers were patently contemptuous is to forget the whole history of the slow and painful development of safe-guards for persons accused of crime.

So far as the deterring effect of this decision goes, it is known that these very five lawyers had the greatest difficulty in securing

67. *United States v. Sacher*, 182 F.2d 416, 430 (2nd Cir. 1950).

68. For a detailed analysis of these issues, see Harper and Haber, *Lawyer Troubles in Political Trials*, 60 *YALE L.J.* 1 (1951).

counsel on the appeal of their own case, and the group of "second string" Communists who are under a Smith Act indictment approached more than one hundred and fifty attorneys in New York, Washington and New Haven in an effort to recruit satisfactory advocates. No doubt the reluctance of lawyers to take such cases cannot be attributed entirely to this single case, but Judge Medina's decision, the acclaim and promotion which it got him and affirmance by the Court of Appeals are not calculated to clear an atmosphere inflamed by disbarment proceedings against Sacher and others,⁶⁹ American Legion vigilante committees⁷⁰ and the fulminations of the House Un-American Activities Committee against lawyers who are on the "wrong" side in political trials.⁷¹ "For," as Max Lerner has said,⁷² "when fear develops in the problem of defending the most hated men, like the Communists, it spreads all down the line. . . . We shall present a shabby image of democracy to the world unless we have a legal profession courageous and public spirited enough to take the risks involved." The courts have an obligation to keep the risks to a minimum. It is unusual when the President of the United States shows more solicitude in such matters than the bar and the bench.⁷³ This case was important by anybody's standard but the Supreme Court does not tell us why it refused to review it.^{73a} *Hallinan v. United States*⁷⁴ raised similar issues, although the facts were not identical.⁷⁵ There defense counsel in the Bridges perjury prosecution got into trouble with the trial judge and drew a contempt citation and conviction which was affirmed by the court of appeals. Justices Black and Douglas noted their dissents from the denial of certiorari in both the *Sacher* and *Hallinan* cases.

69. Disbarment proceedings are now pending against Sacher and Isserman in the Federal Court for the Southern District of New York and against Isserman in the State Court of New Jersey.

70. See George N. Craig, Ex-Commander of the American Legion, in the American Legion Magazine, July, 1950, p. 14, and the Chicago Sun-Times, June 21, 1950, p. 20.

71. Committee on Un-American Activities, *Report on the National Lawyers Guild—Legal Bulwark of the Communist Party*, H.R. REP. No. 3123, 81st Cong., 2d Sess. (1950). For an answer, pointing out errors and inaccuracies, see National Executive Board of the National Lawyers Guild, *The National Guild: Legal Bulwark of Democracy*, 10 LAWYERS GUILD REVIEW 93 (1950).

72. The New York Post, Aug. 21, 1951, p. 20. See also Joughin, *The Legal Defense of Hated Men*, The Nation, June 13, 1951, p. 30.

73. In his message to the American Bar Association at its annual convention in New York, President Truman emphasized the obligation of the bar to defend Communists accused of crime. See New York Times, Sept. 19, 1951, p. 1, col. 2.

73a. See editor's note in note 65 *supra*

74. 182 F.2d 880 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1951).

75. The judge waited only until the following day to make his contempt finding and sentence, and postponed execution until the termination of the trial.

For the second straight year⁷⁶ the Court brushed aside an opportunity to meet squarely the growing demand that motion pictures be granted freedom from arbitrary and inconsistent censorship.⁷⁷ *RD-DR Corp. v. Smith*⁷⁸ arose when *Lost Boundaries*, a story of current relationships between Negroes and whites, was banned in Atlanta on the ground that it would "adversely affect the peace, morals and good order of the City."⁷⁹ The court of appeals affirmed the censor's decision, focusing its holding on the narrow issue of whether movies are to be accorded the freedom of speech protection of the First Amendment. The question was disposed of on the basis of the Supreme Court's 37-year old decision in *Mutual Film Corp. v. Industrial Commission*.⁸⁰ In that case the Court had labelled the movies "business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion."⁸¹ The decision, rendered several years before the addition of speech to the screen, characterized movies as mere shadows on the wall.⁸²

The decision in the *RD-DR* case was consistent with the manner in which courts have dealt with this problem ever since *Mutual*.⁸³ But if the courts have felt compelled by this comparatively ancient holding, numerous writers have almost unanimously felt more compelled by the facts.⁸⁴ Motion pictures have clearly matured to the point where 1915 reasoning, founded on the currently insupportable spectacle doctrine, is off key. The conclusion that motion pictures are not media for the expression of opinion and so need not be accorded First Amendment protection sounds strangely discordant today. The motion pic-

76. In its 1949 term the Supreme Court refused to review *United Artists Corp. v. Board of Censors*, 189 Tenn. 397, 225 S.W.2d 550 (1949), *cert. denied*, 339 U.S. 952 (1950), involving the Memphis Board's banning of *Curley* because "the South does not permit Negroes in white schools nor recognize social equality between the races even in children."

77. For a comprehensive analysis of this problem, see Note, 60 *YALE L.J.* 696 (1951).

78. 183 F.2d 562 (5th Cir.) *affirming*, 89 F. Supp. 596 (N.D. Ga.), *cert. denied*, 340 U.S. 853 (1950).

79. The Censor Board thought the showing of inter-racial relations in the picture might provoke disturbance. Atlanta's vague breach of peace ordinance is typical of many throughout the country which permit the banning of films on the basis of discretionary judgments. Without more specific criteria, and without scrutiny by the courts (which might, for example, apply the clear and present danger test) local boards are virtually uninhibited.

80. 236 U.S. 230 (1915).

81. *Id.* at 244.

82. *Ibid.*

83. See, e.g., *Fox Film Corp. v. Trumbull*, 7 F.2d 715 (D. Conn. 1925); *Eureka Productions, Inc. v. Byrne*, 252 App. Div. 355, 300 N.Y. Supp. 218 (3d Dept. 1937).

84. See, e.g., Comment, 49 *YALE L.J.* 87 (1939).

ture can be an effective, and may be a deliberate, device for the formation of public opinion.

The doctrine to which the Supreme Court continues to give its silent blessing was set forth ten years before the Court decided, in *Gitlow v. New York*,⁸⁵ that the First Amendment is a restraint on State action. It is arguable, therefore, that *Mutual* should not be considered pertinent authority that movies are not included in the Federal Bill of Rights. By permitting state courts to adhere to the *Mutual* reasoning, the Court sanctions the anomaly that the protection accorded newspapers and books from censorship⁸⁶ must be withdrawn when the same expression of opinion is reformed as a scenario.

The appellant in the *RD-DR* case limited his contentions to the post-*Mutual* extension of the First Amendment by interplay with the Fourteenth. It is difficult to understand why the Court might have felt such a contention unworthy of a hearing. There is no reason to fear that modernization of the law in this regard would abolish censorship of movies entirely. Neither emotionalism nor obscenity should be permitted unrestrained in movies any more than in books, magazines or newspapers. It may be true that the picture-sound combination is more stimulating than written matter and so demands tighter restraint. But whatever broad criteria may be deemed appropriate, the censorship of movies should be subject to the constitutional limitations applicable to freedom of speech and press. The Supreme Court, by refusing to listen, has re-emphasized its peculiar doctrine that movies are isolated from such protection.

The censorship evil was at least not compounded when the Court denied certiorari in *Allen B. DuMont Laboratories v. Carroll*,⁸⁷ a decision which barred local censorship in Pennsylvania of movies broadcast over television. In a well-reasoned opinion Judge Biggs of the Third Circuit held a regulation of the State Censor Board requiring all films shown over television to be submitted for scrutiny invalid because Congress has occupied the entire field of communication by radio and television by the Communications Act of 1934. Judge Biggs observed that the Act embraced all electrically transmitted sounds and pictures and that television pictures, whether "live" or on film, inevitably crossed state lines and were within the purview of the Act.⁸⁸

85. 268 U.S. 652 (1925).

86. See *Near v. Minnesota*, 283 U.S. 697 (1931).

87. 184 F.2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

88. States may, of course, exercise certain types of indirect control over television. It is interesting to note, in this context, the Court's denial of certiorari in *Cavanaugh v. Gelder*, 364 Pa. 361, 72 A.2d 85 (per curiam), *cert. denied*, 340 U.S. 822 (1950). This was a suit to enjoin the State Liquor Control Board from enforce-

It may be that the Court will have a third chance to review the legal schizophrenia involved in the prevailing situation. The banning of *Pinky* in Marshall, Texas, is now being challenged before the Texas Court of Criminal Appeals and seems to represent a clear-cut case.⁸⁹ Justice Douglas, who voted to grant certiorari in the *RD-DR* case, may prevail upon the Court to recognize his emphatic dictum of four years ago in *United States v. Paramount Pictures*, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."⁹⁰

The Court's denial of certiorari in *Agoston v. Pennsylvania*⁹¹ from the Miscellaneous Docket, a case which apparently flew in the face of the Court's own position adopted in 1949, was accompanied by considerable sound and a little fury. The Pennsylvania Supreme Court had upheld a murder conviction over protests that a confession used in evidence was obtained without due process of law. The accused had been taken into custody and questioned extensively until he signed a full confession. But not until he had confessed was he given a hearing before a magistrate and arraigned.

The 1949 case, *Turner v. Pennsylvania*,⁹² in which the Court had written an opinion reversing the same Pennsylvania court, was very close on its facts to the *Agoston* case. Justice Frankfurter, who wrote the majority opinion in the *Turner* case, felt constrained to file a memorandum urging that the denial of *Agoston's* petition "carries with it no support of the decision in [the] case nor of any of the views in the opinion supporting it."⁹³ Justice Douglas, who had written a concurring opinion in the *Turner* case,⁹⁴ filed a written dissent from the denial of *Agoston's* petition and was joined by Justice Black.⁹⁵

ing a regulation requiring liquor licensees to obtain amusement permits as prerequisites to using television in bars or taverns, and to pay one-fifth the annual liquor license fee for such permits. The State Court held that the regulation was not confiscatory. The petitioner for a writ of certiorari contended that Congress had occupied the field under the Federal Communications Act thus precluding the state from regulating or supervising. The petitioners had cited as controlling the District Court's opinion in *Dumont v. Carroll*, 86 F. Supp. 813 (E.D. Pa. 1949), which the Circuit Court had not yet affirmed, but the State Supreme Court did not mention the case in its opinion.

89. See Kupferman and O'Brien, *Motion Picture Censorship—the Memphis Blues*, 36 CORNELL L.Q. 273, 286 n.84.

90. 334 U.S. 131, 166 (1948).

91. 364 Pa. 464, 72 A.2d 575, cert. denied, 340 U.S. 844 (1950).

92. 338 U.S. 62 (1949).

93. 340 U.S. 844, 845 (1950).

94. See 338 U.S. 62, 66 (1949). Justices Murphy and Rutledge joined Justice Frankfurter, while Justice Black concurred in their judgment and Justice Douglas filed a written concurrence. Justice Jackson filed a written dissent and Justices Vinson, Reed and Burton noted their dissent.

95. See 340 U.S. 844, 845 (1950).

In the *Turner* case the accused had been arrested on suspicion and held for five days without aid of counsel while he was interrogated by relays of police officers until he confessed to murder. It was admitted that arraignment was purposely delayed until the confession was obtained. The Pennsylvania Supreme Court affirmed a conviction, holding that the accused's objection in the trial court to admission of the confession as evidence was properly overruled. But the Supreme Court reversed the conviction, holding that the use of the confession at the trial was a violation of the due process clause of the Fourteenth Amendment.

The Pennsylvania Supreme Court upheld Agoston's conviction despite very similar circumstances and despite the reversal of its *Turner* decision. The police, suspicious that Agoston was involved in a disappearance, took him into custody three days after the disappearance was reported. He was questioned for two hours, taken out for dinner, taken to his home so that the police could get his automobile, and questioned some more. The next afternoon and evening the questioning continued until Agoston frantically accused his brother of being responsible for the disappearance. Meanwhile the police were accumulating evidence which seemed to indicate Agoston was involved in foul play.⁹⁶ Finally, the night of the second day, Agoston signed a written confession of murder, after being informed of his right to counsel and that the confession could be used against him. The next day he was arraigned.

On the facts, it would appear that the *Turner* case involved a more flagrant violation of due process than the *Agoston* case. But Justice Douglas, in his dissent to denial of certiorari, was unwilling to indulge in comparatives. Calling the cases "close on the facts," he felt "the principle basic to the *Turner* decision is that the police may not be allowed to substitute their system of inquisition or protective custody

96. The murdered man was employed by a used car dealer. Returning from a trip, his employer found him and \$1525 missing with the notation that the money had been withdrawn to purchase a car. Since there had been negotiations with Agoston to purchase his car at that amount, the employer called him but was told he didn't know where the man or the money were. Witnesses were found to testify that they had seen Agoston with the unfound employee late the night he disappeared. It was then that Agoston was picked up. While he was being questioned, the police found new seat covers and a new windshield had been put on his auto. Removing the seat covers, they found a bullet hole and some blood stains. They also discovered Agoston had paid several debts between the time of the disappearance and his arrest with bills of the denomination which had been withdrawn. All of this evidence was accumulated during the questioning period. Agoston explained the bullet hole at the trial by saying he had been fishing, had found a turtle stealing his bait, had gone to the car for his pistol and had accidentally fired it. He explained the blood stains by saying he had cut his hand while changing a tire. And the windshield had been broken, he said, by some young boys throwing stones.

It would appear from the record that there was enough evidence before the jury without the confession for it to weigh the case wisely.

for the safeguards of a hearing before a magistrate. My conviction is that only by *consistent* application of that principle can we uproot in this country the third-degree methods of the police."

When it is considered that the case denied review came from the same court previously reversed, and that that court relied on the dissent in the Supreme Court's *Turner* decision, it is easy to understand that Justice Frankfurter might feel the need for speaking out. But what he says, far from clarifying the Court's apparently inconsistent position, merely obfuscates whatever reason there may have been for its refusal to protect Agoston as it did *Turner*. Emphasizing that the Court "has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean,"⁹⁷ Justice Frankfurter suggests "it is not merely the laity" that seems to think such denials lend support to the opinion below.

Accepting Justice Frankfurter's comment, we have no right to guess what the Court really thought in three other criminal cases from the miscellaneous dockets, in which certiorari was denied over the dissents of Justices Black and Douglas. But each case—one involving an attempted burglary,⁹⁸ one a rape,⁹⁹ and one a murder¹⁰⁰—presented issues similar to those of the *Agoston* case. In another case, *Johnson v. Pennsylvania*,¹⁰¹ the Court reversed the Pennsylvania Supreme

97. It has been stated often that such a denial "imports no expression of opinion on the merits of the case." *United States v. Carver*, 260 U.S. 482, 490; and *see, e.g., House v. Mayo*, 324 U.S. 42, 48; *Sunal v. Large*, 332 U.S. 174, 181.

98. *Marelia v. Burke*, 366 Pa. 124, 75 A.2d 593 (1950), *cert. denied*, 341 U.S. 911 (1951), was a habeas corpus proceeding by the Commonwealth of Pennsylvania, on the relation of Marelia, against the state warden. The state court held that habeas corpus was not a proper remedial substitute for a motion for a new trial or for an appeal, and that Marelia's contention that he was held incommunicado for 112 hours in violation of his state and federal constitutional rights was not established by the evidence. Marelia, accused of attempted burglary and of possessing burglary tools, was not given a preliminary hearing before a magistrate until 38 hours after his arrest. The state court cited the *Agoston* case, *supra* note 91.

99. *Brown v. State of North Carolina*, 233 N.C. 202, 63 S.E.2d 99, *cert. denied*, 341 U.S. 943 (1951). Brown, convicted of raping a sixteen year old girl who worked in a radio shop, appealed to the Supreme Court of North Carolina from a judgment of death by asphyxiation. He had confessed while he was under arrest and in custody without a warrant having been issued. His argument that such a confession was legally involuntary under the circumstances was rejected by the state court.

100. *Dowdy et al. v. State of Louisiana*, 217 La. 773, 47 So.2d 496, *cert. denied*, 340 U.S. 856 (1950) involved an appeal taken after sentencing of a father and his son, both convicted of murdering a neighbor by dynamiting his cabin. The son was found guilty, the father guilty without capital punishment after an eleven day trial. Early in the trial they had been represented by private counsel, but later, when counsel withdrew, the Court appointed four lawyers. Only one of these had had five years' experience, and that one had been absent quite frequently during the trial. The appellants argued they had been inadequately represented, but the state court held that whether counsel were private or court appointed they had been accepted, and their lack of experience could not later be raised in issue. The court felt the absence of the one experienced lawyer had not been damaging. The claim that there had been a deprivation of due process was rejected.

101. 340 U.S. 881 (1950). Johnson, Turner and one other were accused of taking part in a robbery during which the murder was committed. Johnson was held

Court's decision upholding the conviction of Johnson, allegedly an accomplice of Turner in the crime which lead to *Turner v. Pennsylvania, supra*. Johnson had confessed before hearing, and both his confession and that of Turner were used against him at trial. The Supreme Court granted certiorari, but reversed per curiam on the basis of the *Turner* case. Justices Reed and Jackson dissented to the per curiam reversal, stating their dislike for a reversal of a state's highest court without a hearing.

Even if the bar cannot expect the Court to state its reasons for denying review in all cases, it would seem that both the bar and the laity might reasonably expect the Court to meet the minimum demands of consistency in setting its standards of what it will review and what it will tolerate from courts below. The questions in this connection raised by Justices Black and Douglas regarding the *Agoston* case—questions which they emphasize by their dissents in the three similar criminal cases—shout for an answer which Justice Frankfurter's memorandum does not give. When cases such as these appear to be very close on the facts, a bland denial of certiorari seems in effect to give inferior courts a *carte blanche* to disregard explicit (and in this case recent) Supreme Court precedent. Unless the Court wishes to give this impression, it seems mandatory that it grant review of such cases and in an opinion, no matter how brief, either reverse in harmony with its own precedent, affirm on the stated basis that it distinguishes the cases involved or reverse itself. Furthermore, the Court's action in granting certiorari in the *Johnson* case and reversing on the *Turner* precedent merely compounds the confusion in the present situation because there was no hearing and because it had failed to grant review of the other, strikingly similar cases.

If, as Justice Frankfurter says, the denial of certiorari suggests no opinion by the Supreme Court, no one has a right to assume that the Court has made a judgment distinguishing the cases. Yet, if it has not, what possible basis might there be for such apparently inconsistent handling of six cases, five in a single term? We are told not to guess; but it is to be presumed that certain lawyers and lower courts will be called upon to guess, and certainly, in this situation, the police

by the police for the same length of time between his arrest and the magistrate's hearing as Turner had been. But the majority of the Pennsylvania Supreme Court held that he had been interrogated less intensely than Turner, and thus they distinguished the cases. 365 Pa. 303, 74 A.2d 144 (1950). The fact that the Supreme Court had ordered a new trial for Turner, excluding his alleged confession, and that Turner's confession as well as his own had been used against Johnson, undoubtedly influenced the Supreme Court to reverse the state court. But a reversal without hearing or more than a short *per curiam* reversal order does not cast much light on the Court's position in all these cases.

will find it difficult to know what they may and may not do in their sometimes misguided zeal to preserve law and order.

The denial of certiorari in *Klapprott v. United States*,¹⁰² brought to a disquieting climax the petitioner's ten-year struggle to get a hearing on the merits of denaturalization proceedings instituted against him as a member of the German-American Bund and a pre-war contributor to pro-German literature.

Klapprott originally petitioned to set aside a default judgment cancelling and revoking his citizenship on the ground of fraud in its procurement. The allegation had been that he had fraudulently sworn allegiance to the United States. The judgment had been entered without proof of the charges, Klapprott not having been represented. The Third Circuit affirmed a dismissal of his petition but the Supreme Court reversed and remanded to the district court with directions to hear evidence of the truth or falsity of the allegation in Klapprott's petition to vacate the default judgment.¹⁰³ The district court found that Klapprott had knowingly, voluntarily and intentionally permitted entry of the default judgment cancelling the certificate of citizenship, and dismissed the petition a second time. Once again, the Third Circuit affirmed, and once again review was sought, but this time denied, by the Supreme Court.

The facts leading to Klapprott's failure to contest the denaturalization proceeding make uncomfortable reading. It was found by the district court that he had been critically ill, and confined to a hospital, during the spring of 1942. Released from the hospital on March 26, 1942 and advised to live in a place where he could receive proper rest, Klapprott went to Camp Nordland, a recreation camp operated by the German-American Bund at Andover, New Jersey. Financially destitute, he took advantage of his Bund affiliation. Eight days before an answer was due to the denaturalization complaint, Klapprott was arrested at Camp Nordland on a charge of conspiracy to violate the Selective Service Act. He was removed to New York City and arraigned under \$25,000 bond. From July 2, 1942, when he was arrested, until July 10, 1942, when the default judgment was entered, the evidence indicates Klapprott was too busy to be expected to prepare his answer. After a grilling in Newark, New Jersey, the day of his arrest, he spent two nights in the Hudson County Jail and then was removed to New York, chained to two other defendants in the conspiracy case. He was then incarcerated in the Federal Detention House, New York City, after being arraigned. He was still in the

102. 183 F.2d 474 (3d Cir.), cert. denied, 340 U.S. 896 (1950).

103. 335 U.S. 601 (1949).

New York jail when the default judgment was entered in Newark. Thus a man, found as a matter of fact to have been a convalescent, was torn from his family, shunted about and jailed in the eight-day period before his answer was to be filed to the serious accusation of fraud in procuring naturalization. Although Klapprott might have had an answer prepared before his arrest, he did not.

There was evidence before the district court that Klapprott had never intended to defend the denaturalization charge. He had little money and claimed that he could not find a lawyer to defend him for the \$200 he had been able to scrape together. Moreover, he appeared to have been obsessed with the idea that his pre-war pro-German leanings and writings had so prejudiced his case that it would be useless to defend. But the fact remained that he never got a full, unobstructed period in which to answer the complaint.

In his petition to the Supreme Court, Klapprott merely urged that the complete transcript of the record and proceedings be obtained from the Third Circuit to be reviewed to see whether a hearing on the merits of his defense of his citizenship should not be held. After Klapprott's long struggle and after the Supreme Court's earlier action in the case, the denial of this request seems hard to justify.

Two decisions denying review which involved the deportation of aliens contribute to the growing list of cases tending to strengthen the Government's hand.

*Visic v. Denver*¹⁰⁴ was a habeas corpus proceeding instigated by an alien seaman whom the Attorney General sought to deport without a hearing on the ground that his admission would be prejudicial to the interests of the United States. Visic had been in and out of the country since 1925 until, in 1943, the immigration authorities detained him at Ellis Island as an alien seaman. To avoid deportation, Visic signed onto a merchant ship and served until honorably discharged. Having gained preferential status through his service, he obtained an immigration visa and got as far as Miami before the Attorney General caught up with him. Visic got a show cause order to which the government merely stated the antecedent facts, arguing vehemently that to be more specific would be prejudicial to the United States and a dangerous precedent. The district court entered a final order that the proceedings against Visic should be dropped, but was reversed by the court of appeals on the basis of *United States ex rel. Knauff v. Shaughnessy*¹⁰⁵ which had supervened the district court holding and had characterized exclusion as a "fundamental act of sovereignty" which the

104. 180 F.2d 924 (5th Cir.), cert. denied, 340 U.S. 831 (1950).

105. 338 U.S. 537 (1950).

courts may not review absent express authorization by law. Visic, seeking review by the Supreme Court, did not challenge the *Knauff* case directly. He argued that an immigrant alien not an enemy of the United States is entitled to a fair hearing and that, since Congress cannot confer on the President or any executive office power to enact laws or issue regulations which take away liberties guaranteed under the Constitution, the regulation was illegal as applied to him. In refusing to entertain these arguments, the Supreme Court permitted the *Knauff* doctrine to be extended a little and, not incidentally, it denied Visic a chance to face the charges which cost him his chance to live in the United States.

The Court had a chance to review a rather unusual situation in *Steffner v. Savoretti*.¹⁰⁶ Steffner, after sixteen years in this country as a permanent resident, was deported in 1936 because he had been a member of an organization (the Communist party) believing in the overthrow of the government by force or violence. In 1945 he managed to get back into the United States, but without permission from the Attorney General and without a valid immigration visa. In a subsequent re-deportation proceeding, Steffner sought to show that the 1936 proceedings had been void *ab initio* because the law had been misapplied.

Steffner's case came close to being a strong one. At the time of his original deportation, the prevailing interpretation of the law was a Second Circuit decision¹⁰⁷ that past membership in the Communist party would support deportation. In 1939 the Supreme Court held otherwise in *Kessler v. Strecker*,¹⁰⁸ ruling that the statute required present membership in such a subversive organization.

The Fifth Circuit actually refused to review Steffner's earlier deportation, observing that many aliens must be deported more than once and that review of earlier proceedings would over-burden administrative agencies. The court's opinion was that a gross miscarriage of justice would have to be shown if review were to be granted. But whatever the court's reasoning, Steffner—who apparently could not be deported today—has been denied a chance to defend.

The final outcome of *Mastrapasqua v. Shaughnessy*¹⁰⁹ emphasized that the courts will give, if any, only a limited review of the Attorney General's discretion in deportation cases. *Mastrapasqua* was

106. 183 F.2d 19 (5th Cir.), *cert. denied*, 340 U.S. 829 (1950).

107. *Yokinen v. Comm'r*, 57 F.2d 707 (2d Cir. 1933).

108. 307 U.S. 22 (1939).

109. 186 F.2d 717 (2d Cir.), *cert. denied*, 341 U.S. 930 (1951).

an Italian alien who had been detained in this country when the vessel on which he was a seaman was held in port early in the war. Given several opportunities to leave the country voluntarily, he decided to stay and seek citizenship. The immigration authorities instituted deportation proceedings, and the Board of Immigration Appeals denied his applications, at various junctures, for each of the three types of discretionary relief: voluntary departure, suspension of deportation, and pre-examination. The Board felt itself bound by the Attorney General's decision in *Matter of Logomarsino*,¹¹⁰ refusing pre-examination in similar circumstances.

Mastrapasqua finally began habeas corpus proceedings. His petition was dismissed and an appeal taken to the Court of Appeals for the Second Circuit. There Judge Frank, with whom Judge A. Hand concurred, reversed and directed the Board to use its discretion one way or the other respecting Mastrapasqua's application.¹¹¹ Judge Frank's decision was that the Board had denied relief because of its general policy to do so toward those who were in the country as a result of conditions arising from the war. This amounted to a policy of refusing to consider whether or not to give discretionary relief of pre-examination to persons coming within a fixed category. Judge Chase, dissenting, said that the court in effect was reviewing the *actual* exercise of discretion and was holding that the Board's reason was not good enough.¹¹²

On remand, the Board again denied Mastrapasqua's application, holding that it would be arbitrary and capricious to grant to him what had been denied many others, where action was taken under the *Logomarsino* ruling implementing the general policy of refusing to consider whether or not to give discretionary relief to aliens so situated.

It would appear that the Board, in its second denial, did again what the court had said it might not do by denying relief essentially because Mastrapasqua was in a certain category. Nevertheless, the Second Circuit panel, this time consisting of Judges A. Hand, Chase and Clark, dismissed the petition per curiam, in open court and without opinion.¹¹³

When the Court denied certiorari in *Taylor v. Birmingham*,¹¹⁴ it ducked an important issue which should have been decided. Police

110. *Matter of Logomarsino*, No. A-5955999 (Feb. 8, 1946).

111. 180 F.2d 999 (2d Cir. 1950).

112. *Id.* at 1010.

113. For a concise discussion of this and other cases regarding the exercise of discretion by the Attorney General in proceedings involving aliens, see Note, 60 *YALE L.J.* 152 (1951).

114. 253 Ala. 369, 45 So.2d 60, *cert. denied*, 340 U.S. 832 (1950).

arrested Glen Taylor, for what was subsequently charged as disorderly conduct, when he attempted to push his way past an officer who was blocking the Negro entrance to a southern church where the vice-presidential candidate was to address a meeting of Negro youths. A city ordinance made it an offense for a white person to enter by the Negro entrance or vice versa. The Alabama courts used the same dodge that the Court of Appeals of Maryland used in a case¹¹⁵ in which the Supreme Court denied certiorari in the 1949 term. In that case, police stopped an interracial tennis game in a public park and thereafter arrested several of the participants for a breach of the peace.

In the *Taylor* case, the police testified that they had been instructed to prevent white persons from entering through the Negro entrance.¹¹⁶ The question is raised whether the City of Birmingham can enforce a segregation order of this kind in this way. If the ordinance is invalid, then Taylor had a right to enter the building as he desired, and the police had no right to stop him. If they had no such right, *he* had a right to resist their efforts to block his passage. The hollow character of the state proceedings is clear when the trial court's statement that "it clearly appears that the police did not use force to prevent defendant's entry to the Tabernacle" is contrasted with the undisputed facts that the police (1) physically blocked the doorway, (2) seized the defendant around the waist and arrested him when he tried to enter, (3) dragged him away from the building, (4) ordered him into a police car, and (5) drove him off to jail.¹¹⁷ The case raises a question which the Supreme Court has never passed upon unless, possibly, it was in *Plessy v. Ferguson*.¹¹⁸

If *Taylor* falls within the *Plessy* case, then the Court should have overruled the latter for the reasons assigned by Justice Harlan in his memorable dissent in that case. In fact the *Taylor* case presents much the type of situation which Justice Harlan regarded as the *reductio ad absurdum* of the position of the majority. "If a state," he said, "can prescribe as a rule of civil conduct, that white and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other?"¹¹⁹ Why not, indeed? The kind of segregation ordinance involved in the *Taylor* case is but one step removed. As pointed out in

115. *Winkler v. Maryland*, 69 A.2d 674 (Md.), *cert. denied*, 339 U.S. 919 (1949).

116. Transcript of Record, p. 208, *Taylor v. Birmingham*, *supra* note 114.

117. Brief for Petitioner on certiorari, p. 16, *Taylor v. Birmingham*, *supra* note 114.

118. 163 U.S. 537 (1896).

119. *Id.* at 557.

petitioner's brief, "this form of segregation is an integral part of the pattern of discrimination against the Negro people. It is, if anything, more pernicious—because it is, perhaps, more pervasive—than those forms of discrimination with which the Court has had occasion to deal. It enforces a caste system against every Negro; it brands him with the stigma of racial inferiority, not only when he seeks education, or attempts to vote, or is charged with crime, or acquires real estate, but almost every day of his entire life."¹²⁰

In addition to the issue under the equal protection clause, the exertion of state power to compel compliance with racial segregation as a condition to the right to speak and assemble presents a question of great public importance under the due process clause. Glen Taylor has repeatedly made it known that he rejects the theory of racial inferiority which is manifested by segregation laws. When the city of Birmingham refused to let him enter a church through the same door that Negroes use, it sought to compel him to negate the principles which he profoundly believed, and acquiesce in the exact opposite of his beliefs. Whether a state may do so under the Constitution is an important question which should be decided.¹²¹

An Ohio case, *Wenning v. Peoples Bank*,¹²² presents a situation which suggests, on its face, one law for Wisconsin and another for Ohio.¹²³ It arose out of a farmer-debtor proceeding under section 75 of the Bankruptcy Act,¹²⁴ instituted on October 2, 1934, the very same day that the farmer-debtor case of *Kalb v. Feurstein*¹²⁵ was filed. While the farmer-debtor proceedings were pending in the federal court, a foreclosure decree and order of sale was rendered in the state court of Ohio. The property was sold and the sale confirmed after the bank-

120. Brief for Petitioner on certiorari, p. 25, *Taylor v. Birmingham*, *supra* note 114.

121. In four other cases, the Court denied certiorari where the lower courts had given relief against state discriminatory action. *Birmingham v. Monk*, 185 F.2d 859 (5th Cir.), *cert. denied*, 341 U.S. 940 (1951), involved a municipal zoning ordinance which forbade Negroes from occupying property in white residential areas and vice versa. In *Byrd v. McCready*, 73 A.2d 8 (Md.), *cert. denied*, 340 U.S. 827 (1950), the Court of Appeals of Maryland held that the University of Maryland had to admit a qualified Negro to its School of Nursing. In *Atlantic Coast Line v. Chance*, 186 F.2d 879 (4th Cir.), *cert. denied*, 341 U.S. 941 (1951), the Court of Appeals invalidated a segregation rule of an interstate carrier, permitting a passenger to recover damages for ejection. In *Carmichael v. McKissick*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 952 (1951) the court required the University of North Carolina to accept a Negro applicant to the Law School although the State maintained a Jim Crow law school which, it was contended, was "substantially equal."

122. 153 Ohio St. 583, 92 N.E.2d 689, *appeal dismissed*, 340 U.S. 858 (1950).

123. See *Davis v. Packard*, 8 Peters 312, 323 (U.S. 1834).

124. 49 STAT. 943 (1935), 11 U.S.C. § 203(s) was held constitutional in *Wright v. Vinton*, 300 U.S. 440 (1937) after its predecessor had been held unconstitutional in *Louisville v. Radord*, 295 U.S. 555 (1935).

125. 308 U.S. 433 (1940).

ruptcy proceedings had been dismissed. This case was a collateral attack upon these decrees. The common pleas court held against the petitioner. No opinion was published. The Court of Appeals of Ohio affirmed. No opinion was published. The Supreme Court of Ohio dismissed the appeal. No opinion was rendered. The Supreme Court of the United States denied certiorari and dismissed an appeal. Of course, no opinion was given. *Kalb*, of Wisconsin, in a similar collateral attack regained possession of his land. *Wenning* of Ohio is still out of possession of his.

In the *Kalb* case, Mr. Justice Black, speaking for an unanimous Court, declared that the "language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was pending."¹²⁶ Presumably, Justice Black and Justices Reed and Douglas thought the Act has a similar effect on the courts of Ohio. There is no way of knowing why their six brethren felt otherwise.

Quotations in petitioner's brief, from the unpublished opinion of the Court of Appeals of Ohio, suggest that the decision turned on the doctrine of *res judicata*: ". . . if the acts of the sheriff in the respects mentioned had been wholly void, the action of the court in confirming said sale was within its jurisdiction and power, and was not void but merely voidable, and subject to attack only through error proceedings prosecuted from said judgment, and not by separate action such as plaintiff seeks to maintain."¹²⁷ As against this position, the Court in the *Kalb* case had said: "Because that state [Wisconsin] had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property to the extent based upon the court's actions—were all without authority of law."¹²⁸ Again, the Court said: "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor."¹²⁹ In the face of this interpretation, it is hard to find an argument to defend the Ohio court's position.

It is true that the final order of the Ohio court confirming the sale was rendered after the dismissal of the bankruptcy proceedings.

126. *Id.* at 440.

127. Brief for petitioner on certiorari, p. 42.

128. 308 U.S. 433, 443 (1940).

129. *Id.* at 444.

But a petition for rehearing was still pending and a decision denying this petition was not rendered for almost a month after the confirmation order. Whether this slight difference between the case and the *Kalb* case is sufficient to distinguish it would at least appear to be an important, if nice, question. No doubt Wenning feels that he is a very unfortunate man to lose his 18-year fight to save his farm. It is still more unfortunate that the lawyers and farmers of the nation don't know whether *Kalb v. Feuerstein* has been overruled or not.¹³⁰

*Johnson v. Mathews*¹³¹ reflects what has become almost a major judicial scandal¹³² for which it is impossible to find even a superficially plausible excuse. The Court of Appeals for the District of Columbia held that the asylum state, in extradition proceedings, need not afford a hearing to a petitioner for a writ of habeas corpus upon uncontroverted allegations that officials of the demanding state in violation of the Fourteenth Amendment, had held petitioner in jail for ten months without preliminary hearing, indictment or trial, during which time he had been "the victim of cruel, barbaric and inhuman treatment, in that he was most severely beaten, starved, denied clothing and bedding by his jailors, thus placing his life and health in grave jeopardy."

The court of appeals recognized that its two-to-one decision was in direct conflict with the decision of the Third Circuit Court of Appeals in *Johnson v. Dye*.¹³³ The Supreme Court had reversed the Third Circuit in the 1949 term in a one sentence per curiam opinion, citing *Ex parte Hawke*,¹³⁴ on the ground that the petitioner must exhaust his remedy in the state courts before appealing to the federal courts. But *which* state courts? The courts of the demanding state or of the asylum state? In *Johnson v. Dye*, the question was whether the petitioner must exhaust his remedies in the asylum state. In *Johnson v. Mathews*, the question was whether he must exhaust his remedies in the demanding state. The conflict is clear and was recognized by the

130. On the merits for respondents, it should be pointed out that petitioner had filed motions for a new trial and a rehearing in the foreclosure proceedings in the state court but prosecuted no appeal from adverse rulings. Nor did he appeal from the dismissal of his bankruptcy petition. He thus may be caught in the net of res judicata of *Baldwin v. American Surety Co.*, 287 U.S. 156 (1932); *Trienies v. Sunshine Mining Co.*, 308 U.S. 66 (1939) and *Angel v. Bullington*, 330 U.S. 183 (1947). But an arguable answer is Justice Black's opinion in *Kalb* where he said: "The protection of farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act." 308 U.S. 433, 444 (1940).

131. 86 U.S. App. D.C. 376, 182 F.2d 677, cert. denied, 340 U.S. 828 (1950).

132. See Harper and Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. OF PA. L. REV. 293, 300 (1950).

133. 175 F.2d 250, rev'd, 338 U.S. 864 (1949).

134. 321 U.S. 114 (1944).

majority and by the dissenting judge and, for that matter, by anyone who took the trouble to look into the question. It was ignored by the Supreme Court.

Aside from the question of conflict, the basic issues in these cases are important. Under the law of extradition, as developed by the Court, the range of issues which courts in the asylum state may examine is narrow. They may, of course, determine whether the detaining papers are in proper order,¹³⁵ whether the petitioner was present in the demanding state when the alleged crime was committed,¹³⁶ whether a crime has in fact been charged by the demanding state,¹³⁷ and the identity of the petitioner as the person so charged.¹³⁸ But the courts in the asylum state may not consider defenses,¹³⁹ the statute of limitations,¹⁴⁰ former jeopardy¹⁴¹ or the constitutionality of a statute under which the petitioner is charged in the demanding state.¹⁴² Whether the courts in the asylum state may consider that the petitioner has been and presumably will continue to be deprived of his constitutional rights to a speedy and fair trial, has not been determined and the courts of appeals are in conflict on the question. It is clear that this is important regardless of what the Supreme Court does or does not do about it.

In *Friedman v. New York*¹⁴³ the Court dismissed an appeal, thus squandering an opportunity to review a so-called Sunday Blue Law which seemed to discriminate unfairly against a religious minority. The appeal arose out of a prosecution for selling un-cooked Kosher meat on Sunday in violation of the New York Sabbath Law¹⁴⁴ which prohibits that and certain other specified activities on Sunday. The defendants, orthodox Jews, regularly observe Saturday as their holy day, and do not trade or labor on that day. They argued that the statute was an unconstitutional aid to the establishment of a religion and that it had been discriminatorily administered against them and others.

The Supreme Court dismissed the appeal because it did not present a "substantial" federal question. It could hardly be argued, however,

135. *Compton v. Alabama*, 214 U.S. 1 (1909).

136. *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917).

137. *In re Strauss*, 197 U.S. 324 (1905).

138. *Rafferty ex rel. Huie Fong v. Bligh*, 55 F.2d 189 (1st Cir. 1932).

139. *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917); *Drew v. Thaw*, 235 U.S. 432 (1914).

140. *Pelley v. Colpoys*, 122 F.2d 12, *cert. denied*, (for whatever that means) 314 U.S. 622 (1941).

141. *In re Bloch*, 87 Fed. 981 (W.D. Ark. 1898).

142. *Pearce v. Texas*, 155 U.S. 311 (1894).

143. 302 N.Y. 75, 96 N.E.2d 184, *appeal dismissed*, 341 U.S. 907 (1951).

144. N.Y. PENAL LAW c. 40, § 2147. *Cf.*, *ibid.*, § 2144, exception for persons observing another day than Sunday as the Sabbath.

that the question was insubstantial if the statute could be considered religious. The New York court held that it was not, but in fact the statute is obviously religious in origin. There is another New York statute, a section of which provides for one day's rest in every seven.¹⁴⁵ The only different function of the Sabbath law is to specify Sunday as the day of rest, which so clearly favors one religion over another that it is difficult to understand a rational argument to the contrary. The New York court justified the statute as a valid exercise of the police power.

The validity of state "Sunday" laws has been upheld by the Supreme Court.¹⁴⁶ But the substantial conflict between "Sunday" Laws as an exercise of the police power and a law which affects the beliefs and practices of a substantial religious minority would seem to demand authoritative pronouncement from the nation's highest tribunal.

New York's serious efforts to deal with the housing crisis within New York City in an equitable manner which would tend to inhibit inflationary pressures ended in failure when the Court denied review of a very doubtful New York Court of Appeals decision undercutting the state's rent control legislation. That court, in the test case,¹⁴⁷ held both the Sharkey Law¹⁴⁸ and section 13A of the New York State Emergency Rent Control Law¹⁴⁹ in violation of the supremacy clause of the Federal Constitution, the former because it sought to override provisions of the Federal Housing and Rent Act,¹⁵⁰ and the latter because it deprived the landlord (plaintiff) of a right granted under that Act.

The case arose when the plaintiff landlord was granted an increase in his rent ceiling, pursuant to the federal law, by the Federal Housing Expeditor, an increase purportedly barred by the New York legislation. The local New York City (Sharkey) Law set up machinery for fixing maximum rents in the City area within the ceilings allowed by the Federal Law; when maximum rents were increased by the federal authority, the Sharkey Law continued the former ceilings in effect subject to the right of the landlord, under locally prescribed circumstances, to apply for an increase. Before final determination of various attacks on the Sharkey Law in the New York Courts, the State Rent Control

145. N.Y. LABOR LAW c. 31, § 161.

146. *Hennington v. Georgia*, 163 U.S. 299 (1896); *Petit v. Minnesota*, 177 U.S. 164 (1900).

147. *Teeval Co. v. Stern*, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950).

148. ADMIN. CODE OF THE CITY OF NEW YORK § U.41-9.0(c) (Supp. 1949).

149. N.Y. Laws 1950, c. 250 § 4(1) (a).

150. 63 STAT. 21 (1949), 50 U.S.C. App. § 1894(b) (1) (1950).

Law was enacted terminating and superseding federal control within the state in accordance with section 204(j) of the Federal Law. Section 13A of the State Law perpetuated the Sharkey Law for New York City. The court of appeals' determination struck down the Sharkey Law and held section 13A unconstitutional.¹⁵¹

With the court's decision increases in rent ceiling affecting 40,000 to 50,000 tenants in New York City became payable immediately. Some of these increases, retroactive more than a year, amounted to considerable sums and affected persons of small means. Accordingly, when the Chief Judge of the Appeals Court refused a stay of execution, application was made to Mr. Justice Jackson. On August 14, 1950, Justice Jackson granted the stay in an order which recognized that there appeared to be a "question of conflict between State and Federal Authority which will require settlement by this Court."¹⁵²

The petition for certiorari argued that the Federal Act's general and specific provisions for increases in maximum rents as authorized by federal authorities were permissive only and did not create rights or confer mandates directing payment if such were barred by state legislation. It was further argued that section 13A could not involve a question of conflict because it did not operate retroactively but became effective only after federal relinquishment of authority under section 204(j) of the Federal Act. The practical effect of the decision was to outlaw rent ceilings lower than those established by federal authority. This in effect means that the legal maximum is also to be the legal minimum.

In light of the numbers of tenant-families affected by the decision and of Justice Jackson's earlier concession that the questions involved probably called for review,¹⁵³ it is not easy to explain the Court's failure to issue the writ. The questions are as novel as they are important, and are such as will probably arise again whenever the federal government, in time of war, takes over functions ordinarily subject to the exclusive control of the states.

151. The court's emphasis on Sec. 204(b) (1) and the policy of providing positive relief for landlords in case of hardship afforded a logical basis for negating the Sharkey Law provisions. But the narrow view of the court failed to consider the over-all policy of the Federal Act, which was the imposition of ceilings to inhibit inflationary pressures resulting from the emergency housing situation throughout the nation. See Note, 51 *COL. L. REV.* 234, 236 (1951), citing 61 *STAT.* 196 (1947), 50 *U.S.C. APP.* 1891(b) (1950); *SEN. REP.* No. 127, 81st Cong., 1st Sess., *U.S.C. CONG. SERV.* 332 (1949), "When this main policy is read into 204(b)(1), the subsidiary policy of that section may be said to be, not the granting of a right to the increase, but the mere removal of the federal inhibition upon the bargaining for rentals in excess of the old ceiling by the imposition of a new ceiling."

152. Petitioner's brief, pp. 4, 5.

153. None of the Justices, including Jackson, noted his dissent to the denial of certiorari, although some may have voted to grant the writ.

That litigious religious organization, Jehovah's Witnesses, made four attempts to carry their grievances to the Supreme Court during the past term, all without avail. Their complaint in three cases was that they were denied the use of public school buildings in which to hold their meetings.¹⁵⁴ By writs of mandamus in Pennsylvania, Ohio and California, the society sought vindication of what they regarded as their constitutional rights. It had been refused the use of a school in Ohio because the Board of Education rules that it was not a "responsible organization" under an Ohio statute granting discretion in the Board to allow the use of school buildings for religious meetings. In Pennsylvania, the Board was authorized to grant permission for the use of schools for "social, recreational and other purposes" under such rules as it might adopt. It had adopted a rule against allowing the use of its buildings for religious or sectarian purposes. The Pennsylvania Supreme Court held this not to be an abuse of discretion. The third case arose in California. Use of school buildings was limited under a statute to "recreational, educational, political, economic, artistic or moral activities". The Supreme Court denied certiorari in the Ohio case and dismissed appeals in the other two. Justices Reed and Burton would have noted probable jurisdiction in the California case. In the fourth case, a California *ad valorem* tax on Jehovah literature was challenged as an unconstitutional invasion of freedom of religion and the press.¹⁵⁵ Only the California school building case could possibly be classified as "important" in the sense that it deserved review by the High Court.

If the Jehovah's Witnesses are litigious, what is one to think of Bernard M. Shotkin, of Denver, Colorado? Shotkin operated a business in Colorado, and, it appears, successfully. But he had a passion for litigation and indulged it freely, almost invariably acting as his own counsel. It seems that he knew enough procedure to get into court and harass both the court and his opponent even if his knowledge of substantive law or the merits of his causes was not such as to enable him to prosecute them successfully. In any event, the Supreme Court of Colorado, in exasperation, finally issued a final order: "(4) that thenceforth Shotkin, appearing other than by counsel, shall desist from instituting actions in Colorado state trial courts, and from pros-

154. *McKnight v. Public Bd. of Education*, 365 Pa. 422, 76 A.2d 207, *appeal dismissed*, 341 U.S. 913 (1951); *Greisiger, State of Ohio ex rel. v. Grand Rapids Bd. of Education*, 153 Ohio St. 474, *cert. denied*, 340 U.S. 820 (1950); *Lyon v. Compton Union High School, etc.*, 19 U.S.L. WEEK 3273 (1951), *appeal dismissed*, 341 U.S. 913 (1951).

155. *Watchtower Bible and Tract Soc. v. County of Los Angeles*, 181 F.2d 739 (9th Cir.), *cert. denied*, 340 U.S. 820 (1950).

cuting writs of error here; (5) that all cases pending at *nisi prius*, or here, in which Shotkin is plaintiff or plaintiff in error, and appears *pro se*, and in which he does not proceed reasonably to employ counsel to represent him, shall be subject to dismissal."¹⁵⁶

That the Supreme Court of Colorado did not act capriciously might be inferred from its recital of some of Shotkin's legal antics. The court observed: "Bernard M. Shotkin is a business man, active, and seemingly successful. Moreover, there is every evidence that he is possessed of ample means with which to indulge his desire for litigation. It appears that he goes in for it 'wholesale'. He has a multitude of cases pending in the district court of Denver, some half dozen in the Denver county court, several here, some in the United States District Court for Colorado, as well as in the United States Court of Appeals for the Tenth Circuit, and, until recently, a case in the Supreme Court of the United States which originated in Denver. For the most part, he has appeared *pro se*. Some of the cases grew out of previous ones in which he has been unsuccessful, and in which he frequently includes as parties defendant, lawyers who have opposed him in his fruitless attempt in earlier litigation, and sometimes those judges who have found it compatible with their judgment to rule adversely to him. In short, Shotkin, proceeding largely *sans* lawyers, and otherwise more or less irregularly, interferes with the functioning of all the courts within the jurisdiction of Colorado, including ours, and materially impedes judicial progress. Much of our time in the last several months has been taken up with the consideration of features of writs of error obtained by him, which, for the most part, have no semblance of merit."¹⁵⁷

It seems quite obvious that Shotkin had made such a judicial nuisance of himself as to justify drastic action. And the Supreme Court of Colorado took it. Thereafter, objecting to the imposition of a sales tax on his business, he took steps, again *pro se*, to recover the taxes he alleged were illegally imposed. For this, he was convicted by the Supreme Court of Colorado of contempt of court. From this conviction, he petitioned the Supreme Court of the United States for a writ of certiorari.

In his petition, Shotkin asserted that he had appeared *pro se* in his tax suit only after he had sought counsel from 150 attorneys, the Denver Bar Association and the Denver Legal Aid. He thought, or purported to think that his difficulty in obtaining counsel was to be

156. Shotkin v. Kaplan, 116 Colo. 296, 299 (1947).

157. *Id.* at 297.

attributed to the opinion of the Colorado Supreme Court, quoted above. As a matter of fact, if his allegation is true, it does not speak very well for the lawyers of Denver, the Denver Bar Association or the Denver Legal Aid because his tax problems appear to present a legal issue of some merit. He objected to a sales tax imposed on wholesale transactions outside the state with reference to articles never within the state. Moreover, the trial court took the position that Shotkin's appearance in his own behalf did not violate the order of the Supreme Court inasmuch as, although he was a nominal plaintiff, he was actually "appearing to defend against" what he claimed to be an illegal tax.

Regardless of the merits of his tax case or his contempt of court, Shotkin was convicted and sentenced by the Supreme Court of Colorado without a hearing and without argument and without counsel, notwithstanding his request for counsel. Shotkin informed the court that he was unable to obtain counsel and asked that counsel be appointed at a reasonable fee. It thus appears that the petitioner was, in effect, denied counsel in a contempt proceeding in which he was convicted because he appeared in a lower court without counsel. It is by no means obvious that this aspect of the case is unimportant.

The liability of radio stations for political defamation has for many years been clouded in a fog of speculation and contradictory decision.¹⁵⁸ In the first place, it is not even clear whether a defamatory speech over the air is libel or slander unless the defamatory matter is included in a script.¹⁵⁹ The *ad libbed* defamation over the air is still up in the air and it is well known that political speakers, from the President on down, will not infrequently depart from their manuscript. Moreover, the basis for liability of a radio station, whether strict¹⁶⁰ or based on negligence¹⁶¹ is in dispute. At first glance, the radio station appears to be in much the same position as the newspaper or publishing house as a disseminator of matter frequently composed by persons not in its

158. A few articles on these problems are: Vold, *The Basis of Liability for Defamation by Radio*, 19 MINN. L. REV. 611 (1935); Haley, *The Law on Radio Programs*, 5 GEO. WASH. L. REV. 157 (1937); Newhouse, *Defamation by Radio; A New Tort*, 17 ORE. L. REV. 314 (1938); Donnelly, *Defamation by Radio; A Reconsideration*, 34 IOWA L. REV. 12 (1948); Berry and Goodrich, *Political Defamation: Radio's Dilemma*, 1 U. OF FLA. L. REV. 343 (1948); Peterson, *Political Broadcasts*, 9 FED. COMM. BAR ASS. J. 20 (1948); Notes, 58 YALE L.J. 787 (1949); 21 So. CAL. L. REV. 292 (1948).

159. RESTATEMENT, TORTS § 568, comment f; PROSSER, TORTS 796; Meyer, *Radio Defamation; Neither Fish nor Foul*, 2 LAWYER AND LAW NOTES 7 (1948).

160. See Vold, *op. cit. supra* note 158. Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Miles v. Wasmer, 172 Wash. 466, 20 P.2d 847 (1933).

161. Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

employ but nonetheless subject to absolute liability.¹⁶² On the other hand, there are significant differences between them, both as to the opportunity for detecting defamatory matter in advance of publication and in the public control exercised over the two enterprises. There is a good argument that the radio station is more nearly comparable in position to the news vendor or circulating library than to the newspaper. No one would seriously argue that the newsboy who sells papers should be held to a strict liability. He probably would not even be treated as a "publisher."¹⁶³ In any event a library is held only on a showing of negligence¹⁶⁴ and the analogy to the radio station is fairly close.

But the public control over radio stations authorized by the Federal Communications Act¹⁶⁵ raises special problems to some of which nobody knows the answers, and the Supreme Court declined to throw any light on the subject when it denied certiorari in *Felix v. Westinghouse Radio Stations, Inc.*¹⁶⁶ In this case, the defendant had afforded time for political broadcasts which were made by the chairman of a campaign committee, duly authorized by his candidates to campaign for them. A federal district court held for the defendant¹⁶⁷ on the ground that, although section 315 of the Federal Communications Act, prohibiting the censorship of political speeches, was applicable to authorized spokesmen for candidates as well as to candidates themselves, the Act forbade censorship even of obviously defamatory material in a political speech and hence the defendant was not guilty of fault which, under Pennsylvania law, is a condition to the liability of a radio station.¹⁶⁸ The Court of Appeals for the Third Circuit reversed on the ground that the Act did not apply to persons other than candidates and thus did not prohibit censorship in this case.

There are at least three ambiguities in section 315 which are of the greatest importance to broadcasters. One is whether the Act affords an indefeasible privilege against liability for defamation under state law on the ground that Congress intended to occupy the field, a position

162. *Morrison v. Ritchie & Co.*, 39 Scottish L.R., 432 (1902); *Jones v. Hulton*, 2 K.B. 444 (1909), A.C. 20 (1910); *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392 (1895). RESTATEMENT, TORTS § 580 (1934).

163. The argument could also be made that the radio station which leases its facilities to an advertising agency or a political organization is no more a publisher than are the lessors of an auditorium who lease it to a political party, all equipped with loud speakers. It is, however, apparently too late to push the analogy.

164. *Vizetelly v. Mundies Select Library, Ltd.*, 2 Q.B. 170 (1900); *Staub v. Van Benthuysen*, 36 La. Ann. 467 (1884) RESTATEMENT, TORTS § 581 (1934).

165. 48 STAT. 1088 (1934), 47 U.S.C. § 315 (1946)

166. 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

167. 89 F. Supp. 740 (E.D. Pa. 1950).

168. *Summit Hotel Co. v. National Broadcasting Co.*, *supra* note 161.

for which there is some authority.¹⁶⁹ Another is whether the prohibition against censorship is applicable to matter defamatory on its face.¹⁷⁰ The third is whether the prohibition applies to authorized representatives of candidates or only to the candidates themselves.

If the Supreme Court had reviewed the case and reversed the court of appeals on the latter point, then the case could turn on either the second or the first. From a policy point of view, there is a good bit to be said for the holding of the district court on the third point. The purpose of section 315 is to encourage discussion of political issues for the benefit of the public. To be sure the Act provides that "No obligation is hereby imposed upon any licensee to allow the use of his station by any such candidate." Nevertheless, all stations are required, as a practical matter, to allot certain time in the public interest and political discussion during a campaign is a common way of doing so. It is common knowledge that a candidate cannot successfully conduct a one-man campaign and public interest may be aroused as much through debate among spokesmen for the candidates as among candidates personally.¹⁷¹ In any event, this case raised questions of federal law of far-reaching importance to the public as well as to the radio industry. Justice Black "noted" his dissent from the denial of certiorari.

The full significance of the Court's failure to act does not always appear in the mere fact of denial of a writ of certiorari or the dismissal of an appeal. An unusually vivid example of this is the background of *Shub v. Simpson*,¹⁷² an appeal from the Maryland Court of Appeals which was dismissed per curiam on November 23rd, 1950, because the question had become moot.

In August, 1950, Shub was nominated by the Progressive Party for the office of governor of Maryland. In September, however, the Secretary of State refused to certify his nomination on the ground that he had failed to file an affidavit, as required by the Maryland Subversive Activities Act, that he was not a subversive person as defined in the Act.¹⁷³ At the same time, the Secretary of State similarly refused to certify the certificate of Thelma Gerende, who was to run for the United States House of Representatives. Later in the month, the Secretary of State demurred to a petition in the Circuit Court of Anne

169. This appears to be the view taken by the Federal Communications Commission. *In re Port Huron B. Co.*, F.C.C. Doc. No. 6987, File No. B. 2-R-976 (1948).

170. The Court in *Sorenson v. Wood*, *supra* note 160, thought that it was not.

171. See Note, 24 So. CAL. L. REV. 216, 219 (1950).

172. 75 A.2d 842 (Md.), *appeal dismissed*, 340 U.S. 881 (1950).

173. Md. Laws 1949, c. 86, § 15. Generally the affidavit must state that the candidate is not in any way engaged in an attempt to overthrow the government by force or violence, and that he is not knowingly a member of any organization so engaged.

Arundel County for an order to show cause why a writ of mandamus should not be issued to compel him to accept the certificates. On October 9th, after a hearing, that court sustained the demurrer and dismissed the petition.

On appeal to the Maryland Court of Appeals, argument was heard and the judgment affirmed per curiam, two judges dissenting, against Shub, but reversed for Gerende.¹⁷⁴ The Court stated that an opinion would thereafter be filed. On October 18th, Shub appealed to the Supreme Court. At the same time, the state Attorney General petitioned for a writ of certiorari to seek reversal of the judgment for Gerende.

In the ordinary course of the Court's procedure Shub's appeal would not be considered—and was not considered—until after the election on November 7th. For this reason, on October 19th he filed a motion to advance and expedite the hearing. The Court, Justices Vinson, Black and Douglas dissenting, denied this motion¹⁷⁵ with a written order which stated the background of the case in some detail and concluded, "In this situation the motion to advance and expedite is denied." It is not clear what in "this" situation dictated the denial. The Court also, referring to the court of appeals' promise to file a written opinion, stated that it "obviously" deemed "an exposition of the statute necessary." What seems more "obvious" is that the state court, sensitive to its responsibilities, had disposed of the case by a per curiam order for the very purpose of getting the case before the Supreme Court in time to be heard before the election. It did not want to delay announcing its decision until the opinion could be written. While the Court was about it, it denied certiorari the same day in *Simpson v. Gerende*.¹⁷⁶

The written dissent by Justices Vinson, Black and Douglas to the order in the *Shub* case was particularly vigorous. They pointed out quite correctly that the order deprived Shub of an "opportunity to have a final decision on the grave constitutional questions which he presents."¹⁷⁷ They anticipated correctly that the controversy would become moot, dictating a dismissal of the appeal, by dint of the election's having been held, before it would return to the Court's attention.

174. *Simpson v. Gerende*, 75 A.2d 842 (Md.), cert. denied, 340 U.S. 861 (1950).

175. 340 U.S. 861 (1950).

176. Gerende had argued that the affidavit requirement was an unconstitutional extension, addition and modification of the requirements for membership in the House of Representatives as prescribed by the Federal Constitution. The State of Maryland contended in its petition for a writ of certiorari that it was none of these.

177. Shub contended that the Act was an unconstitutional interference with freedom of thought and speech; that it was repugnant to the due process clause as being too broad, vague and indefinite; that it provided, unconstitutionally, for guilt by association; and that it was an unconstitutional bill of attainder.

There is only a limited time for judicial review of the typical election law. This fact has presented difficulties for the Court before, as pointed out by the three dissenting Justices, and has meant generally that advancement has had to be requested.¹⁷⁸ "Where, as here, a justiciable controversy and a substantial federal question co-exist," the dissent points out, "the Court can and should advance a determination of the case. There is no showing of a lack of diligence on Appellant's part. Under the present circumstances the absence of an opinion by the Maryland Court of Appeals is no reason for refusing consideration here. Whatever the Maryland Court may later say, Appellant has been deprived of his opportunity to become a candidate in the election."

Perhaps we can understand the majority's position in the Shub situation by the Court's short per curiam opinion, on April 12th, 1951, in *Gerende v. Board of Supervisors of Elections of Baltimore City*.¹⁷⁹ This was an appeal from a decision of the Maryland Court of Appeals in a substantially similar situation regarding a municipal election in Baltimore. The Supreme Court decided that neither the First nor Fourteenth Amendment was violated by the statute, and it based its decision on the Maryland court's opinion in *Shub v. Simpson*: "We read this decision to hold . . . a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt." The Supreme Court went on to say that the Maryland Attorney General had advised it that he would instruct the proper authorities to accept an affidavit in such terms as satisfying the full statutory requirement. "Under these circumstances and with this understanding the Maryland Court of Appeals is affirmed."¹⁸⁰ In other words, if the legislature of Maryland can not write a loyalty oath that is constitutional, the Supreme Court will write one for it.

But whether the written opinion of the Maryland court was as significant as is implied in this or not, the fact remains that Shub lost his place on the ballot without a hearing before the Court in his case, and that the serious constitutional questions he raised, whether considered by the Court or not, were not decided as such by it in written opinion. It might be argued that if the Court is going to protect such

178. *Colegrove v. Green*, 328 U.S. 549, 565 (1946); *MacDougall v. Green*, 335 U.S. 281, 285 (1947); *Cook v. Fortson*, *Turman v. Duckworth*, 329 U.S. 675, 677 (1946); and, where advancement has had to be requested, *MacDougall v. Green*, *supra*; *Cook v. Fortson*, *Turman v. Duckworth*, *supra* *South v. Peters*, 339 U.S. 276 (1949).

179. 78 A.2d 660 (Md.), *affirmed*, 341 U.S. 56 (1951).

180. Mr. Justice Reed noted his concurrence in the result.

provisions as that in the Maryland Subversive Activities Act it should, in these times, state its reasons.

GARDEN VARIETY OF "IMPORTANT" CASES

The first judicial test of state authorized and regulated insurance rate-making combinations, as approved in the McCarran Act,¹⁸¹ was *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*,¹⁸² a questionable decision which the Court refused to review.

When insurance was declared interstate commerce in 1944,¹⁸³ the practice of inter-firm collaboration in insurance rate-making, for which there are persuasive reasons,¹⁸⁴ came within the scope of the price-fixing regulations of the Sherman Act.¹⁸⁵ Impressed both with the necessity for exempting joint rate-making from the anti-trust laws and with the importance of inhibiting private abuses, Congress chose to delegate to the states authority to supervise the practice. The McCarran Act of 1945, accordingly, provided that the insurance business would be subject to the Sherman Act only "to the extent that such business is not regulated by State law."¹⁸⁶ The states quickly adopted bills authorizing rate-making combinations and supposedly regulating them.¹⁸⁷

The *North Little Rock* test case arose when plaintiff, a taxicab company, sought insurance from the Aetna Surety Co., one of the defendants. The premium was set by the National Bureau of Casualty Underwriters, co-defendant, and was the same as would have been charged by any other of the more than fifty members of that Bureau. Plaintiff paid one premium, then brought a treble damages action under the Sherman Act alleging that the defendants' joint rate-making was illegal price-fixing despite the McCarran Act and the Arkansas regulatory statute. The district court granted the defendants' motion for summary judgment, and the Court of Appeals for the Eighth Circuit affirmed unanimously; all rate-making was unhampered by the Sherman Act simply by the existence of the state regulatory statute.

The decision deprived the plaintiff company of an opportunity to demonstrate that there was in fact inadequate regulation of private rate-making, as required by the McCarran Act, under the terms and

181. 59 STAT. 33 (1945), 15 U.S.C. § 1011-15 (Supp. 1946).

182. 181 F.2d 174 (8th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950).

183. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

184. See Note, 60 YALE L.J. 160, 161 and n.4 (1951).

185. 26 STAT. 209 (1890), 15 U.S.C. §§ 1 *et seq.* (1946).

186. 59 STAT. 33, 34 (1945), 15 U.S.C. § 1013 (Supp. 1946).

187. See Gardner, *Insurance and the Anti-trust Laws*, 61 HARV. L. REV. 246, 247-9, 260-65 (1948) for thorough analysis of these bills.

enforcement of the Arkansas statute. One writer has suggested that there is "doubt whether the degree of supervision provided by Arkansas meets the congressional test, since either statutory flaws or inadequate enforcement may negate effective regulation. If, on a trial of the issues, the plaintiff could have shown that the congressional standard was not met, the Sherman Act would have been held applicable."¹⁸⁸

The decision, which seems clearly to have been one which required scrutiny by the Supreme Court, may encourage the reappearance of the rate-making abuses which helped bring about governmental assertion of anti-trust jurisdiction.

The Federal Trade Commission's attempt to require an advertiser of a drug to tell what it *wouldn't* cure as well as what it *would*, in an effort to prevent misrepresentation, was shackled when the Court denied review of *Alberty v. Federal Trade Commission*.¹⁸⁹ Defendant had advertised "Oxorin Tablets" as a tonic, curative of that "weary, run-down feeling." The Commission found that the product was indeed beneficial when lassitude resulted from an iron deficiency which it did less often than from other causes. It ordered defendant to include such a statement in its advertising. The Court of Appeals for the District of Columbia, by a divided court, held that the Commission had no power to require an affirmative, derogatory statement by the advertiser, and the decision stands.

If the Justices would listen to the radio for a few hours and hear the endless parade of commercials and the fantastic claims made by advertisers, it might emphasize to them the importance, for the protection of the public, of what the Commission was trying to do. A subtle form of deception is to make claims for products which are literally true but which carry inferences and implications having little or no relation to the truth. Here is a case where the advertised drug was represented as beneficial for a certain type of ailment. It was true only if the ailment resulted from one of many causes, and an infrequent one at that. Whether the Commission has the power to require the advertiser to emphasize the truth of his claims by spelling them out in such detail as to avoid false implications is a question of great importance to the public.¹⁹⁰ The Supreme Court did not think so or there

188. Note, 60 YALE L.J. 160, 168 (1951). The writer discusses the background of the McCarran Act thoroughly, and the instant case in terms of that background, concluding, "If the McCarran Act lends itself to the construction placed upon it by the court, that statute stands in need of legislative clarification and strengthening." *Id.* at 169.

189. 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950), commented on in 64 HARV. L. REV. 163 (1950).

190. See American Dietads Co., 44 F.T.C. 667 (1948) for another effort in this direction.

was some technical reason which does not meet the eye for refusing to hear the case. The case also has significance from the point of view of administrative review.¹⁹¹

In a Second Circuit case,¹⁹² the admiralty jurisdiction of the United States as well as the doctrine of unseaworthiness was extended to include recovery by a longshoreman against the shipowner when the former was hurt as a result of the unseaworthiness of rigging supplied by the latter. The injury took place on the dock and the accident occurred before the enactment of the Navigation Act of 1948¹⁹³ which extends admiralty jurisdiction to injuries to person or property on land when caused by a ship in navigable waters. Previously the Court had afforded longshoremen the same remedy against the shipowner as seamen when injury was caused by unseaworthiness, notwithstanding there is no contractual relationship between them.¹⁹⁴ Although the Court had held that under the Jones Act,¹⁹⁵ seamen had a remedy when injured ashore if the injury arose in the course of employment,¹⁹⁶ no case had arisen in which a seaman had sought recovery for injuries sustained ashore as a result of unseaworthiness.¹⁹⁷

The extension of Admiralty jurisdiction in cases such as these is important because, among other reasons, it raises questions of the applicability of the states' workmen's compensation acts.¹⁹⁸ When problems of such complexity arise, it is questionable whether the courts of appeal should make the extension, as Judge Swan pointed out in his dissent,¹⁹⁹ but if they do not and the Supreme Court denies certiorari, how will the law grow? Of course, if the court of appeals had declined to take the step, the Supreme Court *might* have granted certiorari. But we cannot forget the frequent warnings that no such inference safely can be made, so we cannot tell whether the Court, in this case, is letting the Second Circuit do its work for it or not.

*Sokol Brothers Furniture Co. v. Commissioner of Internal Revenue*²⁰⁰ arose on a petition for review of the Tax Court's decision up-

191. See 64 HARV. L. REV. 163 (1950).

192. *Netherlands Ministry of Traffic v. Strika*, 185 F.2d 555 (2d Cir. 1950), *cert. denied*, 341 U.S. 904 (1951).

193. 62 STAT. 496 (1948), 46 U.S.C. § 740 (Supp. 1951).

194. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), in which there was a vigorous dissent.

195. 38 STAT. 1185 (1915), as amended, 41 STAT. 1007 (1920), 46 U.S.C. 688 (1946).

196. *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36 (1943).

197. See 64 HARV. L. REV. 996 (1951).

198. See *The Betsy Ross*, 145 F.2d 688 (9th Cir. 1944). See also *Occidental Indemnity Co. v. Industrial Accident Commission*, 124 Cal.2d 310, 149 P.2d 841 (1944).

199. See 185 F.2d 555, 562 (2d Cir. 1950).

200. 185 F.2d 222 (5th Cir. 1950), *cert. denied*, 340 U.S. 952 (1951).

holding the Commissioner's determination of a deficiency in excess profits taxes for 1944 and 1945. The Tax Court had held that in computation of excess profits taxes imposed by section 710 of the Internal Revenue Code,²⁰¹ the election by the taxpayer to compute its income from installment sales on the accrual basis in lieu of the installment basis²⁰² applied not only to the computation of adjusted excess profits net income but also in the computation of corporation surtax net income.²⁰³

The taxpayer argued that it could compute its surtax net income for the purposes of the so-called 80 percent limitation provided in section 710 (a) (1) (B) of the Internal Revenue Code by the installment basis is used in computing its income. Although argument was centered on a direct holding to that effect, *Basalt Rock Co. v. Commissioner of Internal Revenue*,²⁰⁴ the court in the instant case agreed that a decision of another circuit must be given "great weight," but "after full consideration we are unable to follow the decision. . . ." ²⁰⁵ By denying certiorari in this case, the Supreme Court places itself in the position of having refused to review either of two decisions acknowledged to be directly contradictory.

In *Commissioner of Internal Revenue v. Treganowan*,²⁰⁶ the Court refused to review a decision that death benefits received by the widow of a New York Stock Exchange member are includible in the member's estate as life insurance proceeds under section 811 (g) of the Internal Revenue Code. The decision by Judge Clark (Judge L. Hand dissenting in part) was reached despite the fact that the decedent had no right to designate beneficiaries and was never required to make a contribution to the fund after his admission to the Exchange.

The importance of this case, aside from the immediate decision, is that it passed on the phrase "incidents of ownership," occurring in both section 811 (g) of the Internal Revenue Code and section 404 (c) of the Revenue Act of 1942, an important phrase in the administration of tax statutes and one which has never been defined by the Supreme Court. Judge Clark's decision gave the phrase a basic and sweeping

201. INT. REV. CODE § 710.

202. If eligible under the statute, the taxpayer "may elect, in its return for the taxable year, for the purposes of the tax imposed by this subchapter, to compute, in accordance with the regulations prescribed by the Commissioner with the approval of the Secretary, its income from installment sales on the basis of the taxable period for which such income is accrued, in lieu of the basis provided by section 44(a) . . ." INT. REV. CODE § 736(a).

203. INT. REV. CODE § 710(a) (1) (A).

204. 180 F.2d 281 (9th Cir.), *cert. denied*, 339 U.S. 996 (1949).

205. 185 F.2d 222, 224 (5th Cir. 1950).

206. 183 F.2d 288 (2d Cir.), *cert. denied*, 340 U.S. 853 (1950).

interpretation. Under the plan, new members of the Exchange paid \$15 into the fund, and thereafter were pledged to make a gift of \$15 to the family of a deceased member on his death.²⁰⁷ The money collected, up to \$20,000 was passed on to the member's family. But there was no right to designate beneficiaries; there was no choice on the member's part to participate or not; all members, regardless of age or health, were included; and the member, when he sold his seat on the exchange, lost all his privileges and duties under the plan.

Under section 811(g), "insurance" is includible only if the insured either paid premiums or had incidents of ownership. Judge Hand objected to finding an incident of ownership in the proceeds of the gratuity fund plan, arguing that a relatively unimportant incidental effect of the sale of something else was not the equivalent of a power to surrender or cancel a life insurance policy. Such a right suggests the power to give up the policy independent of anything else and to receive a surrender value.

Judge Clark's decision necessarily required a definition of the word "insurance," at least by implication, and in finding the gratuity plan to amount to insurance the court suggested a definition broader than the common understanding of the word's meaning and probably broader than existing Supreme Court definitions. In this case there were no premiums based in amount on the risk involved or on life expectancy; there was no provision for sharing the risk on any equitable basis; there was not (with 1,375 members of the Stock Exchange) a sufficiently wide distribution of the risk to invoke the law of averages; and there was not, in the usual sense, provision for risk sharing and risk distributing. In addition, there was nothing which could be called a "policy," though the statute calls for inclusion of amounts receivable "under policies upon the life of the decedent."

This general construction of the term "insurance" may become very significant in the administration of federal tax statutes, and the application of the term to the facts actually involved directly affected more people than the single taxpayer involved.

In *Rospigliosi v. Clogher*,²⁰⁷ the Florida Supreme Court decided a question of considerable importance regarding the effectiveness of stock exchange rules designed to protect investors. Review was sought of the Florida court's affirmance of a money judgment against petitioner based on a contract between the parties to share profits on investments made for the petitioner by the respondent, a registered employee of the New York Stock Exchange. Petitioner, who at the time of the

207. 46 So.2d 170 (Fla.), cert. denied, 340 U.S. 853 (1950).

contract was living with respondent in the supposed relationship of common law wife, was to supply the funds, her "husband" (who in another part of the action got a judgment invalidating the marriage) was to supply the experience. It was argued, and conceded by the Florida court, that no exchange may operate without the sanction of the Securities and Exchange Commission and that to obtain that privilege it must submit copies of rules governing its transactions. Among the rules must be provisions designed to protect customers against conduct not consistent with principles of fair trade as well as provisions declaring positively that the wilful violation of any provision of the chapter²⁰⁸ will be considered such conduct.

The New York Stock Exchange has a rule against contracts between customers and members to share profits and petitioner argued that the SEC regulations are transgressed whenever that rule is violated. But the Florida court held that merely because the SEC regulations call for such a rule does not mean that it becomes a rule under the statute. The regulation, to be enforced by the courts, would have to be precisely embodied in the SEC provisions.

The decision was one of substance not previously decided by the Supreme Court or any United States court. The question involved the effectiveness of rules of stock exchanges as they are made by federal law a prerequisite to registration of an exchange with the SEC. The effectiveness of such rules, designed to protect investors, depends on the risks involved in violating them; and this may depend in large measure upon the applicability of the SEC regulations to their violation.

In *Consumer-Farmer Milk Co-Operative, Inc. v. Commissioner of Internal Revenue*,²⁰⁹ a non-stock milk distributing co-operative was dealt a tax blow which may seriously threaten other co-operatives and similar ventures of various kinds. Review was denied even though there was an apparent conflict with *United States v. Pickwick Electric Membership Corp.*²¹⁰ In the instant case, the tax court was upheld in its determination of deficiencies in the declared value excess profits tax and the excess profits tax for 1943 of the New York corporation. The taxpayer, which gives rebates to both its producer and consumer members, claimed exemption under section 101(8) of the Internal Revenue Code.²¹¹

Section 101(8) exempts from income tax "Civic leagues or organizations not organized for profit but operated exclusively for the pro-

208. 48 STAT. 881 (1934), 15 U.S.C. § 78 (1946).

209. 186 F.2d 68 (2d Cir. 1950), cert. denied, 341 U.S. 931 (1951).

210. 158 F.2d 272 (6th Cir. 1949).

211. INT. REV. CODE § 101(8).

motion of social welfare . . .” In the *Pickwick* case a cooperative membership corporation organized to provide low cost electricity in rural communities was allowed exemption although its members received benefits in the form of patronage refunds or reduced rates. But in the instant case, the court ruled the other way, endorsing the Commissioner’s argument that the distribution of patronage dividends was a distribution of profits to members who received them. “We think that the petitioner’s self-regarding purpose, as evidenced by payments of patronage dividends to its members, so far over-shadows its incidental charitable and educational purposes as to make relief from taxation unjustifiable.”²¹²

It is possible that the two cases, as the Commissioner argued, are distinguishable. The court in the *Pickwick* case had found the profit a tentative one “so closely related to a readjustment of rates that it was not an actual profit in the real meaning of the word over the longer period of time.”²¹³ But the same observation might be made regarding the Milk Co-Operative, and the court rested its decision, as had the Sixth Circuit in the *Pickwick* case, solely on the profit-nature of the distributed dividends. Judge Swan was unwilling to argue that the cases were not in conflict. Describing the *Pickwick* case, he says, “Unless these differences are sufficient to distinguish it from the case at bar we must respectfully decline to follow it.”

The extent of the effect of the Second Circuit’s decision on cooperative ventures cannot be foretold accurately, but in light of the apparent conflict in the Circuits it is safe to guess that such organizations in the New England area will be burdened with federal taxes to a greater extent than elsewhere.

*Santangelo v. Santangelo*²¹⁴ is important only because it points up the half century old anomaly of our law on recognition of foreign divorces. Plaintiff, an alien, obtained in Connecticut a divorce with alimony and counsel fees and a lump sum judgment to reimburse herself for moneys spent the preceding six years for her support. The spectacular facts out of which this controversy arose are as follows.

The defendant left his wife and his home in Italy thirty years ago to find his fortune in America. He was moderately successful. He also got a Reno divorce and found a second wife, in 1936. In due course, he acquired three children by the second Mrs. Santangelo. More than ten years after the divorce, his first wife, learning of his financial success, came to Connecticut and prosecuted the present action.

212. 186 F.2d 68, 71 (2d Cir. 1950).

213. 158 F.2d 272, 277 (6th Cir. 1949).

214. 137 Conn. 404, 78 A.2d 245, cert. denied, 341, U.S. 927 (1951).

The second Mrs. S now finds that she has been a bigamous wife for sixteen years and that her three children are illegitimate. Justice Black "noted" his dissent.

The Supreme Court could quite properly deny certiorari if it is content to leave the law on this subject in the mess that the Court has got it into. Santangelo had left his Connecticut home to go to Nevada where he lived just long enough to satisfy the residence requirement. Under the second *Williams* case,²¹⁵ of course, the tough²¹⁶ Connecticut court could easily find that no domicile had been acquired in Nevada to support the decree. Considerable point was made, in argument by counsel, of the ten-year delay on plaintiff's part. But what with the war and one thing and another, the Connecticut court brushed off the laches contention and bastardized, at least for the time being, three innocent children. Nor was the court acting to protect its own citizen. The successful plaintiff was not a resident of Connecticut although the defendant and his second "wife" were.

This sort of thing is bound to happen, over and over again, so long as the Court adheres to the antiquated rule of domicile as the essential jurisdictional fact. In many instances there will be strong equities on the side of an abandoned spouse and indeed, there may have been some in the present case. A man should not be permitted to change wives as he changes his clothes. Financial obligations might well be imposed although the validity of the divorce is left unquestioned. There appears no reason, but a conceptual block, to prevent the law from requiring a man to support his ex-wife even though the duty is imposed by a decree of a different court after a divorce has been granted. Certainly the reasons are not compelling that alimony be granted at the exact time of the divorce and by the same court. The "divisible divorce" is no longer shocking.²¹⁷

In *Joseph v. Ohio*,²¹⁸ petitioner was convicted of subornation of perjury. After the jury had deliberated for two hours, the trial judge

215. *Williams v. North Carolina*, 325 U.S. 226 (1945).

216. In *Rice v. Rice*, 134 Conn. 440, 58 A.2d 523 (1948), *aff'd*, 336 U.S. 674 (1950) the court invalidated a Reno divorce on the ground that the plaintiff had not lost his Connecticut domicile although he had left the state and never returned before he died in California. See Rheinstein, *Domicile as Jurisdictional Basis for Divorce Decrees*, 23 CONN. B.J. 280 (1949).

217. *Estin v. Estin*, 334 U.S. 343 (1948); *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279 (1944), per Justice Douglas. "The personal obligation of the husband to support his wife, which devolves upon him at the time of the marriage, can survive divorce and oftentimes does, as, for example, in those divorce actions wherein permanent alimony is awarded. It is not a particularly novel—certainly not an awe-inspiring step to add that the power to adjudicate the former wife's right to permanent alimony . . . also survives a divorce when the divorce is granted without a consideration of the defendant wife's right to alimony and in an ex parte proceeding bottomed only on constructive service." *Pawley v. Pawley*, 46 So.2d 464, 473 (Fla. 1950).

218. 154 Ohio St. 374, 96 N.E.2d 3 (1950), *cert. denied*, 341 U.S. 935 (1951).

accompanied the jury to a private dining room for dinner and conversed with the jurors without the knowledge or consent of the petitioner or his counsel. The intermediate appellate court affirmed the conviction, remarking that the conduct of the trial judge was "unusual," indeed "unprecedented" but, in the absence of an affirmative showing of prejudice to the accused, there was no reversible error. The Ohio Supreme Court upheld the ruling and the Supreme Court denied certiorari.

The *Melish* case²¹⁹ raised the issue whether the principle of separation of church and state is violated by a decree of a profane court to enforce compliance with the sacred judgment of a bishop which dissolved the pastoral relation between a rector and one of the churches of his diocese. The reverend Mr. Melish had been an outstanding spokesman for leftist causes and a critic of the conduct of foreign relations of our country. For his political activities, he was relieved of his pastorate, but both he and his congregation refused to accept the bishop's ruling. In the courts, it was contended that the sole method of enforcement provided by the rules and canons governing the church is to deprive the congregation of representation to the diocesan convention until it submits to the bishop's judgment, and that intervention by the courts of the state offends the principle of separation of church and state. The New York Courts found otherwise. The question looks like an important one.

In *Vieni v. New York*,²²⁰ petitioner had been convicted in a state court of unlawful possession of narcotics. Federal officers had found the drug after unlawfully searching him without a warrant. It was introduced in evidence and admitted under the state rule whereas it would clearly have been excluded in a federal court. Whether federal law enforcement officers can evade the federal rule in this manner is an important question. Moreover, it will be noted here that the prosecution's entire case depended on the unlawful discovery and seizure of the drug. In the usual case, the evidence unlawfully obtained is merely a supporting part of the government's case.

In *McKillop v. Iowa*²²¹ the accused had pleaded guilty, without benefit of counsel, and was sentenced to prison the same day. Nine days later, he filed notice of appeal and, while the same was pending, filed a motion in the trial court to set aside judgment, to withdraw his plea of guilty which he alleged he had made as a result of misrepresenta-

219. *Melish v. Rector, Church Wardens and Vestrymen of the Church of the Holy Trinity*, 301 N.Y. 679, 95 N.E.2d 43 (1950), cert. denied, 340 U.S. 936 (1951).

220. 301 N.Y. 535, 93 N.E.2d 345, cert. denied, 340 U.S. 830 (1950).

221. 241 Iowa 988, 42 N.W.2d 381 (1950), cert. denied, 340 U.S. 932 (1951).

tion and duress, and for a new trial, all of which were denied. The Supreme Court of Iowa affirmed, finding that there was no error up to the time of conviction and appeal, that this prevented it from considering questions concerning his constitutional rights and that, under Iowa law, an application for a new trial could not be made after judgment had been entered against him, all against the petitioner's contention that he had had no attorney until he was in the penitentiary and that the trial court had not informed him of his rights.

The question presented in *Goo v. United States*²²² was whether an accused may as a matter of right, withdraw a plea of guilty at any time before entry of judgment and sentence under the Federal Rules of Criminal Procedure.²²³ The court of appeals had held it a matter for the trial court's discretion, finding there had been no abuse of discretion in this case when permission to withdraw the plea had been denied. Mr. Justice Black noted his dissent from the denial of certiorari.

Justices Black and Douglas thought certiorari should have been granted in *Turner v. Alton Banking and Trust Co.*,²²⁴ which involved an action in Missouri on an Illinois judgment on a cognovit note. Petitioner had argued that the warrant of attorney had expired because the statute of limitations had run on the note. But it appeared that the statute had not run. Petitioner also attacked the validity of a judgment entered, without notice, on the authority of a warrant of attorney. The trial court and court of appeals held against her.

EXAMPLES OF HOW THE SUPREME COURT'S TIME IS WASTED

As usual, there were scores of petitions for certiorari which no responsible attorney of reasonable competence would file.

*Vahlsing v. Harrell*²²⁵ is an example of a case which never should have been taken to the Supreme Court. It involved merely the construction of an exchange of letters which resulted in the acquisition by a Water District in Texas of an easement for drainage. Petitioner had installed a pump on his own land and, through pipes running beneath the surface of respondent's adjoining land through which the drainage ditch ran, brought water from the Water District. He claimed the right to maintain the pipes under respondent's land through the drainage easement. The court of appeals held that he had no such right. Here was a litigation involving the purely private rights of two adjoining landowners. Nothing of public importance under federal

222. 187 F.2d 62 (9th Cir. 1950), *cert. denied*, 341 U.S. 916 (1951).

223. FED. R. CRIM. P. 32(d).

224. 181 F.2d 899 (8th Cir.), *cert. denied*, 340 U.S. 833 (1950).

225. 178 F.2d 622 (5th Cir.), *cert. denied*, 340 U.S. 812 (1950).

or state law could possibly be involved. The effort to obtain Supreme Court review was ridiculous and a waste of the Court's time as well as petitioner's money, as his own brief clearly disclosed.

In *Pawley v. Pawley*,²²⁶ the Supreme Court of Florida held that a Cuban divorce decree after constructive service on defendant wife severed the bonds of matrimony but did not necessarily terminate the wife's right to support. Accordingly, the latter was entitled, in an appropriate action, to litigate the adequacy of the sum of \$141,304.70 which the ex-husband had paid her for the support of herself and children over a five year period. She maintained that she couldn't live in the style to which she was accustomed on less than \$60,000 a year. The only conceivable excuse for a petition for certiorari in this case was the wealth of the parties.

*Argonne Co. Inc. v. Hitaffer*²²⁷ is a good example of a case which is extremely important in the sense that it is a revolutionary opinion which may have great influence on the law but nevertheless one which makes a weak claim for the high court's attention. It was an action by a wife against her husband's employer for loss of consortium caused by the defendant's negligence. The court of appeals, in a long and scholarly opinion which reads more like a law review article than anything else, reversed the district court's decision dismissing the complaint. The case is almost without precedent and will certainly become a landmark in the law. Save for a minor point, involving the Longshoremen and Harbor Workers Compensation Act, the case is private law, pure and simple. The Supreme Court, as a public law court, has no business dealing with such a case, even though it did come up from the District of Columbia.

A few other examples of cases in which no petition should have been filed:

*DuBan v. Federal Deposit Ins. Corp.*²²⁸ (a purely procedural matter of no merit); *Holly Stores, Inc. v. Judie*,²²⁹ (interpretation of an utterly unambiguous term in a contract); *Oro Fino Consolidated Mines, Inc. v. United States*,²³⁰ (an absurd action to recover damages resulting from an order of the War Production Board); *Lyons v. Baker*,²³¹ (a libel action challenging a rule of law that has been settled for a century); *Wilcox v. Woods*,²³² (purely factual issue with conflict-

226. 46 So.2d 464 (Fla.), *cert. denied*, 340 U.S. 866 (1950).

227. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

228. 183 F.2d 429 (3d Cir.), *cert. denied*, 340 U.S. 917 (1950).

229. 179 F.2d 730 (7th Cir.), *cert. denied*, 340 U.S. 814 (1950).

230. 92 F. Supp. 1016 (Ct. Cl. 1950), *cert. denied*, 341 U.S. 948 (1951).

231. 180 F.2d 893 (5th Cir. 1949), *cert. denied*, 340 U.S. 828 (1950).

232. 181 F.2d 1012 (9th Cir. 1949), *cert. denied*, 340 U.S. 920 (1951).

ing evidence); *Geneva Metal Wheel Co. v. O'Donnell*,²³³ (objection by defendant that issues in a negligence case had been left to jury) and *cf. Lydon v. Carney*,²³⁴ (malpractice); *Texas etc. R. R. Co. v. Fletcher L. Yarbrough*,²³⁵ (risk of loss of goods in transit depending on completion of delivery); *El Rio Oils v. Pacific Coast Asphalt Co.*,²³⁶ (measure of damages for breach of contract); *Mobley v. Bethlehem Supply Co.*,²³⁷ (whether evidence supported verdict in a negligence case); *West v. Eastern Transp. Co.*,²³⁸ (same); *Consumers Coop. Assoc. v. Chicago, etc. R. Co.*,²³⁹ (same—with the quirk that the railroad here sued the truck owner); *Reily v. Reily*,²⁴⁰ (marital squabble in the District of Columbia involving limited divorce and property distribution between spouses).

CONCLUSION

As pointed out last year, the long and dreary list of denials and dismissals constitute a highly unsatisfactory situation in the administration of justice in the nation. Of course the Court cannot be required to review every case in which the litigant wants to go all the way. There must be rules of limitation and the Court must be vested with wide discretion. The petition for a writ of certiorari cannot be turned into an appeal as of right.

But something is wrong. Proceedings in courts of justice must be open. There is, however, little point in open and public proceedings if important decisions are made and no reasons given. Here are cases involving life, liberty and property. Men have been executed, others have been sent to prison and still others deported and denaturalized, against serious claims that their rights under the Constitution of the United States have been infringed. The Court, without stating why, declines to hear them. Leon Johnson, who escaped from a Georgia prison camp shortly after his conviction has been held for eight years in a Pennsylvania jail pending final decision as to whether he must be returned to serve out his life sentence. The Supreme Court refuses to hear his case and won't even tell him what state remedies he must exhaust first.²⁴¹ Jews are prevented from selling kosher meats in New

233. 183 F.2d 733 (6th Cir. 1950), *cert. denied*, 341 U.S. 903 (1951).

234. 36 Wash.2d 881, 224 P.2d 634 (1950), *cert. denied*, 340 U.S. 951 (1951).

235. 226 S.W.2d 287 (Tex.), *cert. denied*, 340 U.S. 820 (1950).

236. 95 Cal.App.2d 186, 213 P.2d 1 (1949), *cert. denied*, 340 U.S. 850 (1950).

237. 186 F.2d 23 (5th Cir. 1950), *cert. denied*, 341 U.S. 941 (1951).

238. 179 F.2d 478 (4th Cir. 1949), *cert. denied*, 340 U.S. 810 (1950).

239. 180 F.2d 900 (10th Cir. 1949), *cert. denied*, 340 U.S. 813 (1950).

240. 182 F.2d 108 (D.C. Cir.), *cert. denied*, 340 U.S. 865 (1950).

241. *Johnson v. Mathews*, discussed *supra* at note 131.

York on Sunday,²⁴² and Negro workers on dining cars complain that their employers discriminate against them in favor of whites in carrying out collective bargaining agreements.²⁴³ Lawyers go to prison for alleged contempts committed months before they are accused and are summarily convicted without a hearing by the very judge they are alleged to have treated with contempt.²⁴⁴ At the same time, the Supreme Court gives a full review to a contention that a toy pig designed to encourage Junior to eat his cereal was an invention and that a similar device in the form of a puppy was an infringement.²⁴⁵

Like the previous term,²⁴⁶ the 1950 term disclosed the largest number of denials in "important" cases to involve civil liberties. In view of the preferred place in our system of government enjoyed by the Bill of Rights, it might be supposed that the Court would give the petitioner the benefit of the doubt, in the determination of what is a question of important public concern when claims are made under the First, Fifth, Sixth, Ninth, Thirteenth and Fourteenth Amendments. Actually, the opposite appears to be the case. If it is not, the bar and the public might feel much better about it if the Court would lift the purple curtain and give us some assurances in the form of reasons for denial.

As to this matter of reasons for denial of certiorari, we have been told that "practical considerations preclude . . . If the Court is to do its work, it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive . . ." ²⁴⁷ The first time you hear it, this argument sounds convincing. But when one takes the trouble to look into the cases, read the opinions below and the contentions in the petition and briefs on certiorari, it becomes somewhat less persuasive.

What, then is the answer? Some modest suggestions were made in last year's article,²⁴⁸ one of which seems to be worth repeating here. Would it not be better for the Court to give its reasons briefly, when it denies certiorari, and try to reduce its work to manageable limits by cutting off at the courts of appeal all diversity cases and all F.E.L.A. and bankruptcy cases except perhaps where there are conflicts in the

242. *Friedman v. New York*, discussed *supra* at note 143.

243. *Hayes v. Union Pacific Railroad Co.*, 184 F.2d 337 (9th Cir. 1950), *cert. denied*, 340 U.S. 942 (1951).

244. *Sacher v. United States*, discussed *supra* at note 63.

245. *Crest Specialty v. Trager*, 184 F.2d 577, 340 U.S. 928 (1951).

246. See 99 U. of P.A. L. Rev. 293 (1950).

247. Justice Frankfurter in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950).

248. Harper and Rosenthal, *supra* note 132, at 324.

circuits? To this might be added the suggestion that the Court of Appeals for the District of Columbia might well be made the court of last resort for all cases involving purely municipal functions. In any event, a good case can be made that something should be done about the Court's certiorari jurisdiction or the way it is exercised. Again to repeat from the 1949 article: "In 1928 (then) Professor Frankfurter commented on the Judiciary Act of 1925: 'A change so drastic as that wrought by the new Act in the discretionary powers of the Court must await its vindication from actual practice.'" ²⁴⁹ The comment was then made that such vindication did not appear from the "actual practice" during the 1949 term.

The same comment may be made about the 1950 term.

249. *Id.* at 325.