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WHAT THE SUPREME COURT DID NOT DO DURING THE 1951 TERM

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This is the third [1] of somewhat laborious examinations of the cases which the Supreme Court declined to review during a term by exercising its discretionary power to deny petitions for the writ of certiorari or by dismissing appeals, a procedure but slightly less summary.[2] A survey of the hundreds of cases which the Court disposed of in this way indicates three major problems: 1) What are the criteria used by the Court in granting or denying certiorari? 2) Why does the Court refuse to give its reasons for a denial and is it justified in such refusal? 3) What is the meaning, theoretically and functionally, of a denial of certiorari?

As to the criteria, the bare outline of the certiorari process is to be found in the Rules of the Supreme Court, especially Rule 38.[3] But

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1. The two previous articles were: Harper and Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term*, 99 U. OF PA. L. REV. 293 (1950); Harper and Etherington, *What the Supreme Court Did Not Do in the 1950 Term*, 100 U. OF PA. L. REV. 354 (1951).

2. See Frank, *The United States Supreme Court: 1950-51*, 19 U. OF CHI. L. REV. 165, 231 (1952), and *infra* p. .

3. Rule 38, paragraph 5, provides:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor measuring the Court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

this Rule is not very helpful; in fact it is practically useless to the lawyer trying to evaluate his chances of getting his case before the Court or trying to understand why he failed in the attempt. The Court has succeeded in cloaking its certiorari behavior in such a shroud of mystery that any explanation of what happens is the sheerest guesswork.

Justice Frankfurter is the most vocal member of the Court in connection with its discretionary jurisdiction, but what he says from time to time is not very helpful. In 1950 he purported to throw some light on the subject. His comments did little more than suggest that the Court sometimes has denied certiorari because the record was "cloudy" or because the time was not "ripe" for decision.[4] He apparently believes that it is impractical or unnecessary to inform the bar of the nation as to what makes the certiorari machinery tick.

On the other hand, Professor Frankfurter took a different view of the matter. Some eighteen years ago when the problem was far less acute, at least quantitatively, than it is now, he stated that an occasional clarification was highly desirable:

> "Accumulated explanations would make familiar the canons which guide the Court; and an essential aspect of its processes would be driven in, as it should be driven in, upon the conciousness of the bar. . . . In a process so extraordinary, entailing so wide a range of power, the Court itself must be especially anxious to appear, as well as actually to be, guided in the exercise of its discretion by standards intelligible to the profession as consistent solely with its responsibilities as the Supreme Court of the Nation." [5]

About the only "familiar canon" which has been "driven in, upon the consciousness of the bar" is that when certiorari is denied, less than four of the justices voted to grant the writ. As a "standard", this is no doubt "intelligible" so far as it goes, but it does not go very far.

"(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of federal law which has not been but should be decided by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

"(c) Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court." U.S. Sup. Ct. Rule 38, ¶ 5, 28 U.S.C. pp. 3190-1 (1946).

4. Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

5. Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1933,* 48 HARV. L. REV. 238, 276 (1934).

During the past term, Justice Frankfurter made three attempts [6] at clarification, pointing out that each of the three cases was an example of the "kind of question that did not commend itself to at least four Justices as appropriate for review by this Court." [7] He then proceeded to describe the issues presented by the three cases. But in none did he give any suggestion as to why less than four justices—or for that matter even one of them—thought the case was unworthy of the Court's consideration.

This sort of thing is worthless. Any member of the bar can find hundreds of cases each term with issues which do not commend themselves to as many as four justices for review. So too, any member of the bar can discover the issues in such cases by the simple device of reading the decisions below. These occasional memoranda by Justice Frankfurter completely miss the mark set forth by Professor Frankfurter in 1934. They are little more than a rehash of the issues already available and adequately presented elsewhere to the bar.

Why does the Court persist in this hide-and-go-seek game of certiorari? In the 1949 term, Justice Frankfurter said that lack of time makes it impractical to give reasons for denying certiorari:

> "[I]t has been suggested from time to time that the Court indicate its reasons for denial. Practical considerations preclude. . . . During the last three terms the Court disposed of 260, 217, 224 cases, respectively, on their merits. For the same three terms the Court denied, respectively, 1,260, 1,105, 1,189 petitions calling for discretionary review. 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, apart from the fact . . . that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable." [8]

During the past term, he twice reasserted and elaborated these views in explaining why he does not record his dissent to denials of certiorari when he thinks the writ should be granted:

> "On more than one occasion I have indicated the inherent bars to stating, however briefly, the reasons for denying petitions for certiorari. See, *e.g., Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917-918. The practical administration of justice, not any interest of secrecy, precludes. Since the denials of petitions for certiorari cannot be accompanied with explanations, a public

6. Bondholders, Inc. v. Powell, 342 U.S. 921 (1952); Leviton v. United States, 343 U.S. 946 (1952); Chemical Bank & Trust Co. v. Group of Institutional Investors, 343 U.S. 982 (1952).

7. Leviton v. United States, *supra* note 6.

8. Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

> recording of a dissent from such a denial cannot, without more, fairly disclose to what such dissent is directed. The ambiguous and unrevealing information afforded by noting such dissent is rendered still more dubious if dissent is not noted systematically, but only in selected cases. For these and reinforcing reasons it has been my unbroken practice not to note when I have dissented from the denial of petitions by the Court." [9]

And again:

> "Reference to the opinion in *Maryland v. Baltimore Radio Show,* 338 U.S. 912, makes it unnecessary to indicate the reasons which preclude the Court from stating, however briefly, the grounds for denial of petitions for certiorari. Selective notations of dissent from such denials would not correctly reflect the operation of the certiorari process. That would require notation not only of all dissents when petitions are denied. It would equally require public recording of dissents from the granting of petitions. Due regard for all these factors touching the administration of our certiorari jurisdiction has determined my unbroken practice not to note dissent from the Court's disposition of petition for certiorari." [10]

But sometimes the Court *does* give reasons. It happened four times during the past term. In two cases [11] it was "for the reasons that application . . . was not made within the time provided by law. 28 U.S.C. § 2101(c)." In another [12] it was "for want of final judgment." In still a fourth,[13] it was "that the judgment of the court below is based upon a nonfederal ground adequate to support it." To be sure, these are technical reasons, easily stated. But it does not take any longer to state that certiorari is denied because, in the judgment of six or more of the justices, the case is not one of importance in the administration of justice. Then the bar and the public can pass judgment on the wisdom of the Court's exercise of its discretion. It is not easy to make a case for the Court's immunity to such judgment.

Of course, no lawyer would suggest that the Court should give elaborate reasons, or for that matter any reasons at all, for denying certiorari in a thousand more or less odd cases each term. But there were 25 cases the past term, 31 the previous term and 64 in the 1949 term in which at least more than two lawyers would have liked reasons

9. Bondholders, Inc. v. Powell, 342 U.S. 921 (1952).

10. Chemical Bank & Trust Co. v. Group of Institutional Investors, 343 U.S. 982 (1952).

11. Delphi Frosted Foods Corp. v. Illinois Central R.R., 342 U.S. 833 (1951) and Hope Basket Co. v. Product Advancement Corp., 342 U.S. 833 (1951).

12. Florida *ex rel.* Hawkins v. Board of Control, 342 U.S. 877 (1951).

13. Rice v. Arnold, 342 U.S. 946 (1952).

for denial. It may very well be that the reasons were adequate in every case, but it would have been enlightening to the bar to have known them.

But, assuming that it is impractical to give reasons in 25 or 31 or 64 cases during a term, what of Professor Frankfurter's suggestion of a fairly complete explanation occasionally so that the "accumulated explanations would make familiar the canons which guide the Court. . . ."? Such an explanation would take little, if any, more time, and would be far more enlightening than repeated memoranda setting forth the issues in a case with an explanation why dissents are not recorded. As a matter of fact, an educational process of the kind suggested might well result in such a better understanding of the operation of the Court's discretionary jurisdiction as to reduce materially the number of applications for certiorari, thus decreasing the work load of the Court. As it is now, no one knows why petitions are denied and, working in the dark, a lawyer sees nothing to lose by taking an outside chance. A possible practice might be a classification of denials in functional groups, with an occasional opinion explaining each group.

Now, the old question, what is the meaning of a denial? To quote Justice Frankfurter again:

> "Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.
>
> "The one thing that can be said with certainty about the Court's denial of [the petition in this case] is that it does not remotely imply approval or disapproval of what was said by [the lower court]." [14]

Once in the 1950 term [15] and twice during the past term [16] these views were reasserted. Justice Frankfurter's most recent effort to explain the lack of significance of a denial of certiorari was his memorandum of November 17, 1952, on the denial of a rehearing on the petition in the *Rosenberg* case [16a] to which Justice Black noted his dissent. Again Justice Frankfurter sought to clear up the "misconception"

14. Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950).

15. Agoston v. Pennsylvania, 340 U.S. 844 (1950).

16. Koehler v. United States, 342 U.S. 852, 854 (1951); Remington v. United States, 343 U.S. 907 (1952).

16a. Rosenberg v. United States, 21 U.S.L. WEEK 3138 (U.S. Nov. 18, 1952).

concerning a denial of the writ. "It means," he said, "and all that it means is, that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari." Reduced to simple language, the result of Justice Frankfurter's position seems to be as follows: For the first time in American history, two persons have been condemned to death for espionage in what is legally regarded as "peace" time—an offense comparable to that for which Klaus Fuchs got fifteen years. Even though all nine members of the Supreme Court may regard this conviction and sentence as contrary to law, it may be that this case was not reviewed on the merits for reasons which it is not "practical" to reveal to the bar and the public.

Perhaps denials *do not* imply the way the Court feels about the decision or the opinion below. But, the opinion below stands as law. And whether the justices like it or not, lawyers and judges *do* attach significance to such denials. During the past year a man was executed because the Court of Criminal Appeals of Texas regarded a denial of certiorari as *approval* by the Supreme Court of a local practice of doubtful constitutionality. In Galveston County, Texas, Negroes are effectively barred from sitting on juries in capital trials of other Negroes by the action of the local prosecutor in preemptorily challenging the Negro members of the jury panel. On appeal to the Court of Criminal Appeals, one Ross, convicted of murder, challenged the constitutionality of this practice. In answer, the Texas court said:

> "The identical question was decided adversely to the appellant in McMurrin v. State, Tex. Cr. App., 239 S.W. 632. This was also a case from Galveston county. . . . The Supreme Court of the United States refused a writ of certiorari. 342 U.S. 874, 72 S. Ct. 115, 96 L. Ed. ——. *In our view their holding is conclusive against the contention in the instant case.*" [17]

After this decision, Ross petitioned for Supreme Court review of the constitutionality of this technique for excluding Negroes from juries. In the face of the statement by the Texas court that the Supreme Court had *held* this practice to be constitutional, the petition was denied,

17. Ross v. State, 246 S.W.2d 884, 886 (Tex. 1952), *cert. denied; application for stay of execution also denied,* 343 U.S. 969 (1952). Justice Douglas dissenting. (Italics added). The Court of Appeals for the Ninth Circuit expressed a similar view in MacInnis v. United States, 191 F.2d 157, 161 n.3 (9th Cir. 1951): "We recognize that admonishment has followed admonishment, that refusal of the Supreme Court to grant certiorari is not a holding as to any point presented in the petition for certiorari. But where two important theories clash we, as an intermediate court, can take some comfort at least from the fact that the denial is not inconsistent with our views."

Justice Douglas alone recording his dissent as he had also done in the *McMurrin* case.[18]

It is bad when the public views a denial of certiorari as a decision on the merits; it is worse when the bar does the same. But when the judiciary also takes the same view, an observer is entitled to question where the trouble lies and whether the Court is properly discharging its obligations by an occasional admonition from one justice that such denials mean only that a bare minority of the Court did not want to review the case. The real meaning of a denial of certiorari is not what the justices *say* it is. It is to be found in the reactions of the public, the bar and especially the judiciary. Law is not what is said in memoranda essays; it is the behavior of judges, lawyers, and of prosecuting attorneys in Galveston County, Texas.

The following tables are presented for whatever they may be worth on this problem:

Decisions of the Court after Granting Certiorari

	1949	1950	1951	3 year total	3 year percentage
Cases from Federal Courts:					
Affirmed	32	28	45	105	38%
Reversed	52	61	55	168	62%
Total	84	89	100	273	
Cases from State Courts:					
Affirmed	10	3	5	18	32%
Reversed	7	17	15	39	68%
Total	17	20	20	57	
Cases from both Federal and State Courts:					
Affirmed	42	31	50	123	37%
Reversed	59	78	70	207	63%
Total	101	109	120	330	

These figures present the other side of the certiorari process, *i.e.*, how the Court disposes of the cases in which it grants review. In theory, the Court grants certiorari in those cases which present issues of general importance.[19] Neither the merits of a case nor the actual decision

18. McMurrin v. Texas, 239 S.W.2d 632 (Tex.), *cert. denied*, 342 U.S. 874 (1951), Justice Douglas dissenting.

19. See Hughes, *Address before the American Law Institute*, 20 A.B.A.J. 341 (1934); Justice Frankfurter's comments in United States v. Shannon, 342 U.S. 288, 294 (1952); Layne & Bowler Corp. v. Western Well Workers, Inc., 261 U.S. 387, 393 (1923).

in the court below is in itself supposed to affect the Court's decision to grant or deny certiorari except, perhaps, when the decision below is in conflict with past decisions of the Supreme Court. Yet, during the last three years the Court *reversed* the decision below in 207 of its certiorari cases, while it *affirmed* in only 123 cases—69% more reversals than affirmances. As to certiorari cases coming up from the state courts, there was an even greater difference, the Court having reversed 39 cases and affirmed only 18—more than twice as many reversals as affirmances.

In view of these facts, one wonders about Mr. Justice Frankfurter's repeated admonitions that denials of certiorari carry no indication of the Court's opinion on the merits of the cases. In any particular case that may be true. But if the cases are viewed as a whole, it would seem that, since the grants of certiorari came most often in cases where the Court disapproved of the decisions below, the denial of certiorari may imply at least some degree of approval of the decision below.

FOOTNOTE ON APPEALS DISMISSED

Recently, my colleague, John Frank, called attention to the trend in the Court's practice of handling appeals in a manner which is almost indistinguishable from petitions for certiorari.[20] An appeal is, to be sure, a matter of right.[21] But the Court may dismiss an appeal if it is "insubstantial." [22] The Court, of course, has the last word as to what is "insubstantial" and sometimes the justices are in disagreement on the last word. In Frank's words:

> "If the Court treats truly arguable questions as 'insubstantial,' or if it summarily affirms appeals, it has for all practical purposes obliterated the very difference between certioraris and appeals which Congress meant to preserve. The Court has for some years been in the process of interpreting away the difference between appeals and certioraris, reducing the appeals also to a matter of its own discretion; and it seems probable that within a few years there will be little practical difference between the two methods of review." [23]

In the second of this series of review of certiorari denials,[24] it was pointed out that in the 1950 term there had been 74 appeals filed. The

20. Frank, *The United States Supreme Court: 1950-51,* 19 U. OF CHI. L. REV., 165, 231 (1952).

21. 28 U.S.C. § 1257 (Supp. 1950).

22. Zucht v. King, 260 U.S. 174 (1922).

23. Frank, *supra* note 20.

24. Harper and Etherington, *What the Supreme Court Did Not Do During the 1950 Term,* 100 U. OF PA. L. REV. 354 (1951).

Court noted probable jurisdiction or postponed to a hearing on the merits 28 of them. In 32 cases the appeal was dismissed; in another it was dismissed in part, affirmed in part. In 11, the Court affirmed or reversed without hearing on the merits. Forty-four appeal cases were disposed of without argument on the merits. This year, of 104 appeals filed, 41 were dismissed, and probable jurisdiction was noted in 35. In all, it appears that 62 cases were disposed of without argument on the merits.

It is this manner of handling appeals which many members of the bar do not understand. Here is an example. *Riss & Co. v. United States and Interstate Commerce Commission*[25] involved an appeal from a per curiam judgment of a three-judge district court, in which appellant demanded opportunity to have a hearing on the merits in an action to enjoin certain orders of the Interstate Commerce Commission. Without written or oral argument on the merits, the Court, in a per curiam order, affirmed the judgment below. Justices Black, Reed, and Douglas dissented, not on the merits, but from the Court's action in deciding the case without oral argument.

In 1913, the Urgent Deficiencies Act[26] required a three-judge district court to hear bills to enjoin the Interstate Commerce Commission. The Act provided further that "appeals may be taken in like manner as appeals are taken under existing law in equity cases." Title 28 of the United States Code[27] provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."[28]

Here is the argument, as presented to the Court in Appellants' Petition for Rehearing of Per Curiam Order Affirming Judgment Below. It speaks for itself:[29]

> "The manner of appeal to which Appellant is entitled, therefore, must be determined by reference to 'existing law in equity cases' in 1913.
>
> "The Rules of this Court provided in 1913 that appeal cases would not be heard until a complete record and plenary briefs were

25. 342 U.S. 937 (1952).

26. 28 U.S.C. §§ 43-48 (1946).

27. 28 U.S.C. § 1253 (1949).

28. The Reviser's Notes to 28 U.S.C. § 1253 state that § 1253 consolidates § 47(a) with other sections of the 1940 Code and cite the Urgent Deficiencies Act of 1913 as a source.

29. Appellant's Petition for Rehearing, pp. 5, 8-9.

received covering the merits of the factual and legal controversy. 222 U.S., App'x 12-15 (1911); 226 U.S. 671 (1912). In the 1910, 1911, 1912, and 1913 terms, cases on appeal were decided only after receipt of briefs and opportunity for oral arguments on law and facts.

"The Rules of this Court and its treatment of appeals in equity cases, therefore, shows that the 'manner of appeal' provided by Congress in the Urgent Deficiencies Act of 1913 included the right to submit plenary argument on the merits.

"In the interests of affording the Court a manageable docket and in allowing the Court to give greater attention to cases deemed of most importance, Congress has divided the appellate jurisdiction of this Court into two categories. Certiorari was chosen as a means of permitting this Court discretion in selecting cases for review from most of the type of cases decided by inferior courts. Appeal, on the other hand, included only cases where review was not discretionary. Congressional definition of these categories produced the Judiciary Act of 1925, 43 Stat. 936, in which Congress provided for an extremely limited class of cases where appeal to this Court was of right. Frankfurter & Landis, The Business of the Supreme Court 280 (1928).

"Within the category of cases coming to this Court on appeal Congress carefully has established jurisdictional requirements. The sole jurisdictional requirement established for an appeal of the type here involved is whether the case is within the jurisdiction of the statutory three-judge District Court. 28 U.S.C. §§ 1253, 2325. In this case the jurisdiction of the three-judge District Court has never been questioned.

"Congress provided in the Urgent Deficiencies Act for a direct appeal to this Court from a statutory three-judge District Court. The reason being, as stated by Mr. Justice Brandeis in United States v. Griffin, 303 U.S. 226, at 233 (1938):

> 'In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof.'

"Despite the mandate of the Urgent Deficiencies Act, and despite the fact that no one ever has doubted the jurisdiction of the three-judge District Court, this Court has, nevertheless, affirmed this appeal without affording Appellant an opportunity to present full argument on the merits. As a practical matter, the affirmance of the judgment in this case is little different from denial of a petition for a writ of certiorari, though the operative papers bear different names."

It is not surprising that responsible members of the bar question the responsibility of the Court which can so cavalierly deny an appeal with-

out an opportunity to present the merits of a case which, if any, is within its obligatory jurisdiction.

The Work of the Term

Table I

Disposition of Cases by Dockets

	1950	1951
1. Appellate Docket		
Total cases	783	827
Cases disposed of:		
By written opinions	114	98
By per curiam orders or opinions	74	94
By motion to dismiss or per stipulation	4	4
By denial or dismissal of petitions for certiorari	495	518
Total disposed of	687	714
Remaining on docket	96	113
2. Miscellaneous Docket		
Total cases	539	532
Cases disposed of:		
By transfer to appellate docket	14	15
By per curiam order or opinion	3	5
By denial or dismissal of certiorari	386	386
By denial or withdrawal of other applications	121	102
Total disposed of	524	508
Remaining on docket	15	24
3. Original Docket		
Total cases	13	9
Cases disposed of	5	0
Remaining on docket	8	9
4. All Dockets		
Total cases	1335	1368
Cases disposed of	1216	1222
Remaining on dockets	119	146

The statistics presented in Table I reveal the bare outlines of the work of the Supreme Court during the 1951 term. For purposes of comparison, corresponding figures for the 1950 term are also given. Standing alone, these figures do little more than indicate the great volume of business disposed of by the Court. Further breakdown of the figures reveals the manner of disposition of this work.

Table II

Per Curiam Orders or Opinions

	1949	1950	1951
1. Total orders or opinions	92	77	99
2. Merits actually argued:			
Certiorari cases:			
Affirmed after argument	5	5	7
Reversed after argument	4	2	7
Certiorari granted, continued to next term	0	2	2
Motion for reconsideration continued	0	1	0
Appeal cases:			
Affirmed after argument	5	0	4
Reversed after argument	3	1	3
Dismissed after argument	0	0	2
Dismissed but certiorari later granted	0	1	0
Total—merits argued	17	12	25
3. Disposed of without argument:			
Certiorari cases:			
Reversed, remanded, or dismissed on motion	13	21	12
Appeal cases:			
Dismissed	38	32	41
Dismissed in part, affirmed in part	0	1	0
Affirmed	23	9	15
Reversed	1	2	6
Total—merits not argued	75	65	74

Table III

Disposition With and Without Argument on Merits

	1950	1951
1. Cases disposed of after argument on the merits:		
Original Docket	5	0
Signed opinions	114	98
Per Curiam opinions or orders	12	25
Total	131	123
2. Cases disposed of without hearing argument on the merits:		
Denied certiorari, Appellate Docket	495	518
Dismissed on motion or per stipulation, Appellate Docket	4	4
Denied certiorari, Miscellaneous Docket	386	386

Denied or withdrew other applications, Miscellaneous Docket	121	102
Disposed of by per curiam orders or opinions	65	74
Total	1071	1084
3. Total cases disposed of [30]	1202	1222
4. Of all cases disposed of, the percentage in which the merits were actually argued	10.9%	10.2%

Per curiam orders and opinions of the Court are much misunderstood. Many lawyers regard such an order as a decision going to the heart of the controversy. Per curiam orders are considered a "disposition on the merits" by the Clerk of the Supreme Court, who includes them as such in his Official Statistics, but, this inclusion is misleading. Of the 99 per curiam orders and opinions issued by the Court this term, only 25 came after argument on the merits; 33 vacated, reversed, or affirmed the judgment below without hearing arguments; 41 dismissed appeals, all but 4 "for the want of a substantial federal question."

Even if the 33 decisions entered without argument be regarded as grants of review,[31] the 37 orders which dismissed appeals "for want of a substantial federal question" cannot be so regarded. These appeals are dismissed on the basis of the jurisdictional statements alone. Although some jurisdictional statements are in the nature of briefs, many are not. In the latter cases counsel presumably follow the rules of the Court and present a statement of grounds for jurisdiction, expecting to file a full brief on the merits after probable jurisdiction has been either "noted" or "postponed." However, the great majority never get the opportunity to file briefs.

Table IV

Analysis of the rulings of the Court during the 1951 term granting and denying review [32]

1. Cases granting review:	
Appellate Docket:	
Appeals:	
Probable jurisdiction noted and jurisdiction postponed	35

30. The difference between these figures and the "total disposed of" in Table I is accounted for by the double inclusion in the Official Statistics (Table I) of the Miscellaneous Docket cases transferred to the Appellate Docket upon the granting of certiorari.

31. In four cases Justices noted nine dissents to the action of the Court in rendering decisions per curiam without hearing oral argument. Justice Black so dissented three times; Justices Reed and Douglas twice each; Justices Jackson and Burton once each. For an example of such a case, see text at note 25 *supra*.

32. When a case is taken to the Supreme Court in the hope of obtaining review, generally three possible fates await it. (a) It may be denied review outright

Per curiam affirmed	15
Per curiam reversed	6
Total appeals granted review	56
Certioraris:	
Per curiam orders	8
Certiorari granted	78
Total certioraris granted review	86
Total cases granted review	165
2. Cases denying review:	
Appellate Docket:	
Appeals:	
Dismissed for want of a substantial federal question	37
Dismissed for want of jurisdiction	4
Total appeals dismissed	41
Certiorari denied	518
Miscellaneous Docket:	
Certiorari denied	386
Total cases denied review	945
3. Total applications for review (not withdrawn)	1110

These figures serve as background to explain the more significant results indicated in the following tables, which present a comprehensive, three-year picture of grants and denials of review.

Table V-A

Comparative Statistics

	1949	1950	1951
All cases on the Appellate Docket	867	783	827
Disposed of on the merits [33]	201	192	196
Disposed of by denial of certiorari	556	495	518
Remaining on docket at term end	110	96	113
Percentage cases disposed on merits	23%	25%	24%
Percentage cases denied certiorari	64%	64%	62%
Percentage work left undone	13%	11%	14%

(certiorari denied or appeal dismissed). (b) It may be given a "limited review"—*i.e.,* the Court may per curiam vacate, reverse or affirm the judgment without ever hearing argument on the merits. (c) It may be given "full review"—*i.e.,* oral argument plus an opinion or order. Occasionally, a case is "dismissed" after oral argument because on the closer examination permitted by oral argument the Court becomes convinced that it does not present issues of sufficient importance to warrant a decision.

33. This is the official figure, and it includes, as pointed out in connection with Table III, *supra,* the per curiam dismissals of appeals, which the present writers maintain are not decisions on the merits, but rather are denials of review.

All cases on the Miscellaneous Docket	568	539	532
Disposed of on the merits	7	17	20
Disposed of by denial of certiorari	436	386	386
Disposed of by denial or withdrawal of other applications	108	121	102
Remaining on docket at term end	17	15	24
Percentage cases disposed on merits	1.2%	3.1%	3.9%
Percentage cases denied certiorari	77%	72%	72.6%
Percentage cases disposed by denial or withdrawal of other applications	18.9%	22%	19%
Percentage work left undone	2.9%	2.9%	4.5%

Table V-B

Comparative Statistics on Denials of Review

	1949	1950	1951
Total rulings on review	1179	1057	1110
Denials of review:			
Certiorari denied, Appellate Docket	556	495	518
Certiorari denied, Miscellaneous Docket	436	386	386
Appeals dismissed	41	33	41
Total denials of review	1033	914	945
Of total rulings, percentage denials	87.6%	86.5%	85.6%

Of 1110 applications for review acted upon by the Supreme Court during the recent term (this figure does not include the miscellaneous docket applications for mandamus, habeas corpus and other forms of relief), the Court denied review in 945 cases or 85.6% and granted review in only 165 cases or 14.4%. In the 1950 term 86.5% of the applications for review were denied, while in the 1949 term 87.6% of such requests were denied.

If the "other applications for relief" on the Miscellaneous Docket which were refused by the Court without explanation are added to the above figures, the percentage of cases in which review or relief were denied increases to 86.4% in 1951, 87.8% in 1950, and 89% in 1949.

	1949	1950	1951	3 year total
Total rulings on review	1179	1057	1110	3346
Rulings on applications for other relief (Miscellaneous Docket)	108	121	102	331
Total rulings on review or relief	1287	1178	1212	3677

Total denials of review	1033	914	945	2892
Refusals of other relief (Miscellaneous Docket)	108	121	102	331
Total denials of review or relief	1141	1035	1047	3223
Percentage of total rulings that are denials of review or relief	89%	87.8%	86.4%	87.7%

From the above figures it can be seen that over the last three years the Supreme Court has in silence disposed of 87.7% of the cases presented to it.

Dissents Noted

Occasionally one or more Justices will note his dissent to the Court's action in denying certiorari or in dismissing an appeal. Since the Justices seldom give their reasons for dissenting and since they presumably do not note their dissents systematically, these indications of disagreement are of little help to the student of the certiorari process. In the 1951 term only Justice Minton did not go on record at least once in connection with a denial of review. Justice Frankfurter did not dissent from denials of review in the usual form. During the past term he twice repeated his policy not to record his disagreement with the Court's action in denials of review.[34] Yet in those same cases and in a few others [35] he commented on one or more aspects of the certiorari process. Why he selected these particular cases for his remarks is a mystery, unless they were indirect indications of strongly felt disagreement.

Dissents were noted during the term in a total of 41 cases. Justice Black, as usual, was the most frequent dissenter with 35 cases, followed by Douglas with 20 cases. These two joined their dissents in 15 cases. Compared to them, the rest of the Court presents an insignificant number of dissents for the record—Reed and Burton three each, Jackson two, and Vinson and Clark one each. Black and Douglas were the only Justices who dissented alone, the others having recorded their dissents in various combinations. The following table gives a numerical analysis of the dissents both for this term and for the preceding two terms.

34. Bondholders, Inc. v. Powell, 342 U.S. 921 (1952) and Chemical Bank & Trust Co. v. Group of Institutional Investors, 343 U.S. 982 (1952).

35. Leviton v. United States, 343 U.S. 946 (1952); Koehler v. United States, 342 U.S. 852, 854 (1951); Remington v. United States, 343 U.S. 907 (1952).

Dissent Statistics

A. By Individual Justices

	1949	1950	1951	3 year total
Total cases	34	33	41	108
Black	30	22	35	87
Douglas	15	21	20	56
Reed	3	4	3	10
Burton	1	1	3	5
Jackson	1	0	2	3
Vinson	0	0	1	1
Clark	0	0	1	1
Minton	0	0	0	0
Frankfurter	0	0	0	0
Total justices dissenting	50	48	65	163

B. Combinations of Justices by Cases

	1949	1950	1951	3 year total
Black alone	15	9	18	42
Douglas alone	2	8	3	13
Reed alone	1	2	0	3
Burton alone	1	1	0	2
Black and Douglas	12	11	14	37
Black, Douglas and Reed	1	2	1	4
Black, Douglas and Burton	0	0	1	1
Black and Burton	0	0	1	1
Black and Jackson	1	0	0	1
Black and Reed	1	0	0	1
Douglas and Reed	0	0	1	1
Jackson, Burton and Vinson	0	0	1	1
Jackson, Reed and Clark	0	0	1	1
Total cases in which dissents were noted	34	33	41	108

Of the 945 cases which the Court declined to review during the past term, the authors have selected 25 cases which, in their judgment, presented questions of sufficient importance to merit review. This number compares with 37 cases so selected from the previous term and 64 from the 1949 term. Thus, during the three terms covered by these studies, the Court, in carrying out its duties as supervisor of law and justice in this nation, has sidestepped 126 cases which, on their face, appeared worthy of its attention. In most of the 25 cases from the 1951

term, one or more members of the Court agreed with the authors that the case was entitled to review. As usual, the largest single group of these cases involved some phase of civil or political rights.

SUPERVISION OF CIVIL RIGHTS

(a) *Discrimination Cases.* Discussing possible reasons which led the Court or more than five of the justices to vote against granting certiorari, the authors of the first of this series [36] quoted Justice Frankfurter [37] as follows: "Pertinent considerations of judicial policy here come into play. . . . Wise adjudication has its own time for ripening." The authors then observed: [38] "During the past term, the Court reviewed several segregation cases of great importance.[39] It will be interesting to observe the grants and denials in other segregation cases during the next few terms."

Interesting it has been, indeed. In the 1949 term, the Court avoided facing the segregation problem in connection with the use of tennis courts in a public park.[40] At the following term, it avoided the issue raised by Glen Taylor when he was forceably prevented by the police from entering a church through a Negro entrance.[41] In both cases, the State courts were allowed to circumvent the real issue by finding a "nonfederal" ground for the decision.

During the last term, the Court veered away from two more cases involving this problem. In *Rice v. Arnold,* a writ of mandamus was sought to compel an administrative official to permit a Negro to play golf on a municipal course on the same basis as white persons. Under prevailing rules, the course was allocated to Negroes one day each week and to whites six days. Negroes, of course, could not play on "white" days and *vice versa,* even though the course was empty. The allocation was based on the proportional number of Negro and white golfers wanting to use the course. The writ was denied and the Supreme Court of Florida affirmed.[42] In a per curiam opinion, at the 1950 term, the Supreme Court of the United States ordered the judgment vacated and reconsidered in the light of the *Sweatt* and *McLaurin* cases.[43] The

36. Harper and Rosenthal, *supra,* note 1, at 299.

37. From his opinion on the occasion of the denial of a writ of certiorari in Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

38. Harper and Rosenthal, *supra,* note 1, at 299-300.

39. These were Sweatt v. Painter, 339 U.S. 629 (1950) (law school); McLaurin v. Oklahoma, 339 U.S. 637 (1950) (graduate school); Henderson v. United States, 339 U.S. 816 (1950) (dining cars).

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

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

42. Rice v. Arnold, 45 So.2d 195 (Fla. 1950).

43. 340 U.S. 848 (1950).

Florida Supreme Court reaffirmed the judgment, finding no unconstitutional discrimination.[44] The Supreme Court of the United States denied certiorari on the ground that it could be supported on a non-federal ground.[45] Justices Black and Douglas dissented.

In its "reconsideration," the Florida court thought the case fell outside the *Sweatt* and *McLaurin* cases because the facilities offered the Negro golfer were the identical facilities enjoyed by white golfers. It did not deal adequately, however, with the proposition that in both cases, the alleged discrimination had to do with the *use* of the facilities rather than with the facilities themselves. In addition, the Court did not discuss the argument that a part of the value of recreation derives from the pleasure, stimulation and skill developed from friendly competition with players of one's own choosing[46] nor the fact that any particular white golfer had a choice of six days to play as against a Negro's one. The Florida court further found that the "circuit court clearly indicated to relator that he could pursue another remedy. Relator has not seen fit to do so. Rights under the Federal Constitution as well as other rights must be enforced by orderly processes of the courts and in accordance with established rules."

A second case from Florida involved the recurring problem of segregation in education.[47] It appears that a group of Negroes had applied for admission to the University of Florida. One Hawkins wanted to attend the Law School. On rejection of his application, he sought a writ of mandamus to compel the Board of Control to admit him. The Board had set up a paper Law School at the State Negro College and instructed its administrative officer to get a faculty, library, and whatever else was necessary to make it an "equal" facility. The writ was refused with the proviso that the court would retain jurisdiction until it be shown to the court's satisfaction that the Board either has furnished or has failed to furnish substantially equal facilities to Negroes as to white law students. Ten months thereafter the Negro filed another motion renewing his request for mandamus and alleging the failure of the Board to provide him with equal educational opportunities. The Supreme Court of Florida again denied the motion on the ground that there was no showing that the relator was entitled to relief. The Supreme Court of the United States denied certiorari, Justices Black and Douglas dissenting, on the ground that there had been no final judgment.

44. Rice v. Arnold, 54 So.2d 114 (Fla. 1951).

45. 342 U.S. 946 (1952).

46. See 35 MINN. L. REV. 399, 401 (1951).

47. Florida *ex rel.* Hawkins v. Board of Control, 53 So.2d 116 (Fla. 1951), *cert. denied,* 342 U.S. 877 (1951), Justices Black and Douglas dissenting.

This Negro instituted his original mandamus proceeding in the summer of 1949 when he sought admission to the University of Florida. If he had been admitted and successfully pursued his studies, he would have been graduated and launched on his professional career by this time. As it is, he has not even begun his legal education but is still in the state courts where he started.[48]

Of the many possible explanations for the denial of certiorari in these cases, it may be that less than four justices thought the time "ripe for decision." Action by the Court at the end of the past term and the beginning of the present term tends to confirm this guess. On June 9, 1952, probable jurisdiction was noted in two cases,[49] one from South Carolina and one from Kansas, both involving segregation in schools. On October 13, 1952, the Court noted probable jurisdiction in a similar case from Virginia;[50] it granted certiorari in a school segregation case in the District of Columbia on November 10,[51] and in the same type of case in Delaware on November 24.[52] These cases, of course, have now been argued jointly and are awaiting decision.

Just why the time is "ripe" for tackling this problem after the election when it was not before is a matter for speculation. The arguments in the Kansas and South Carolina cases were originally scheduled for the week of October 13, three weeks before elections. On the first day of the 1952 term, the Court by per curiam order noted probable jurisdiction in the Virginia case. At the same time it took judicial notice of the case then pending in the Court of Appeals for the District of Columbia, and postponed the argument of the three cases until the time when, if ever, certiorari was applied for in it. Justice Douglas dissented from the postponing of argument and decision in the cases already in the Supreme Court.[52a]

In a Texas mandamus proceeding,[53] an attempt was made to compel a school district to provide equal facilities for Negro children within

48. Again on June 2, 1952, Hawkins filed a third motion for a writ of mandamus without submitting evidence that the Negro Law School was not "equal" in facilities. This time, the motion was denied and the cause dismissed. State *ex rel.* Hawkins v. Board of Control, 60 So.2d 162 (Fla. 1952). Petition for certiorari is now pending in the present term.

49. Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) and Brown v. Board of Education, 98 F. Supp. 797 (D. Kan. 1951), *probable jurisdiction in both noted,* 20 U.S.L. WEEK 3325 (U.S. June 9, 1952).

50. Davis v. County School Board, 103 F. Supp. 337 (E.D. Va. 1952), *probable jurisdiction noted,* 21 U.S.L. WEEK 3086 (U.S. Oct. 13, 1952).

51. Bolling v. Sharpe, *cert. granted in advance of judgment,* 21 U.S.L. WEEK 3128 (U.S. Nov. 10, 1952).

52. Gebhart v. Bolton, 91 A.2d 137 (Del. 1952).

52a. See 21 U.S.L. WEEK 3095 (U.S. Oct. 14, 1952).

53. Trustees of Pleasant Grove Ind. School Distr. v. Bagsby, 237 S.W.2d 750 (Tex. 1950), *cert. denied,* 342 U.S. 821 (1951).

the district where no facilities whatever were available to them. The district had arranged with an adjoining school district for facilities about which there was no complaint. The children, however, had to be transported three and one-half miles to get to school. The Texas court held that this situation was not in conflict with the State's constitutional obligations. Certiorari was denied with no recorded dissent.

What looks like an important question was sidestepped when the Court denied certiorari in *Bates v. Batte*[54] in which Negro schoolteachers in Mississippi complained of unconstitutional discrimination in the fixing of salaries for teachers in the public schools. They sought the aid of a Federal court to enjoin such discrimination in accordance with the Civil Rights Act.[55] The district court found that the Negro teachers were being discriminated against, but denied relief on the grounds that plaintiffs had not exhausted their administrative remedies. The Court of Appeals affirmed.

It seems that the requirement that a complainant must have exhausted administrative remedies prior to a resort to a federal court is a rule that the Supreme Court has applied where Congress had indicated a design to confer on an administrative agency exclusive primary jurisdiction to determine certain matters and afford a remedy.[56] It is by no means clear that the same requirement obtains when there is no such Congressional intent.[57] Obviously the Civil Rights Act does not fit into this pattern and if there were any doubt, it would be removed by the Judicial Code,[58] which confers jurisdiction on district courts in such cases without any conditions. The substantive question involved in the case was whether there had been an unconstitutional discrimination in teacher's salaries. This is not the type of question peculiarly susceptible of administrative determination.[59] It is an important question of policy whether the exhaustion of remedies doctrine is properly applicable—especially when it is altogether unlikely that any relief would be forthcoming.

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54. 187 F.2d 142 (5th Cir.), *cert. denied,* 342 U.S. 815 (1951).

55. 17 STAT. 13 (1871), 8 U.S.C. § 43 (1946).

56. SEC v. Otis, 338 U.S. 843 (1949); FPC v. Arkansas P. & L. Co., 330 U.S. 802 (1947).

57. United Public Workers v. Mitchell, 330 U.S. 75 (1947); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945).

58. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 28 U.S.C. § 1343(3) (Supp. 1950).

59. See Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction,* 28 TEX. L. REV. 168, 402 (1949).

Failure to exhaust administrative remedies was also fatal to petitioners in *Peay v. Cox*,[60] where a number of Negro citizens of Mississippi, several of them college-trained, were deprived of their vote on the ground that they could not understand the Mississippi Constitution. State law provided for an appeal from the Register to the County Election Commissioners and thence to the courts. In this case, however, petitioners, on refusal of the Register to qualify them as voters, filed their cause in the district court asking for injunctive relief. There were several thousand Negro residents of Forrest County. If every one of them had been required to go to the Supreme Court of Mississippi to get relief, it is obvious that several elections would have gone by before most of them would have been declared eligible to vote. Moreover, the aggregate expense would be enormous. The undisputed facts indicated that there were almost as many Negro citizens in Forrest County as there were white citizens. During the period in question, thousands of white citizens had been registered whereas less than 50 Negroes were able to "qualify." Cost bonds on appeal to the state circuit court in individual proceedings were $100; on appeal to the Supreme Court of Mississippi $500. It looks as though every Negro in Forrest County who wants to vote must dig up $600 in addition to attorney's fees.

(b) *Freedom of Religion Cases.* In *Heisler v. Board of Review, Bureau of Unemployment Compensation*,[61] an appeal was dismissed as presenting no substantial federal question. An Ohio statute had been construed to require an Orthodox Jew either to accept a job which required her to work on Saturday or to forfeit all rights to unemployment compensation. Although a similar question had been raised in Ohio by a previous case [62] in which the Supreme Court of Ohio took the same position, another ground for the decision was specifically mentioned by the Supreme Court of the United States in dismissing the appeal in that case.[63] It appears that here the freedom of religion issue is presented in this context for the first time. Presumably a denial to a worker of compensation benefits interferes with the free exercise of religion more seriously than a license tax on preaching.[64] Of course, the Fourteenth Amendment makes applicable to the states the establishment of religion clause of the First Amendment.[65] This

60. 190 F.2d 123, (5th Cir.) *cert. denied,* 342 U.S. 896 (1951).
61. 156 Ohio St. 395, 102 N.E.2d 601, *appeal dismissed,* 343 U.S. 939 (1952).
62. Kut v. Albers Super Market, Inc., 146 Ohio St. 522, 66 N.E.2d 643, *appeal dismissed sub nom.* Kut v. Bureau of Unemployment Compensation, 329 U.S. 669 (1946).
63. 329 U.S. 669 (1946).
64. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
65. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948).

clause limits what a state or the Federal government can do in the way of penalizing the citizen for religious beliefs. "Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." [66] It looks as if the Ohio statute, as interpreted, preferred one religion over another. The Unemployment Compensation Bureau of Ohio can require a person to work on Saturday or lose his benefits, but it may not require a person to work on Sunday.

Justice Douglas dissented from the dismissal of the appeal in another of those perennial Jehovah's Witnesses cases.[67] Two preachers of this sect were arrested in Allentown, Pa., for operating a sound truck in the business district of the city which had been zoned by city ordinance to exclude sound trucks altogether. The Witnesses argued that their freedom of speech and freedom of worship had been abridged contrary to the First and Fourteenth Amendments:

> "In this day of supersonic airplanes, hydrogen bombs and electronic developments, a loud-speaking apparatus has become a common convenience. Sound-amplifying devices used by speakers bear a necessary relationship to freedom of speech and religion exercised by a preacher acting faithfully and seriously as an obedient servant of his Master (Isaiah 12:6; Matthew 10:27) which must not be prohibited or censored." [68]

The Supreme Court of Pennsylvania, apparently more impressed with the relevancy of *Kovacs v. Cooper* [69] than Isaiah and Matthew, held otherwise. Nevertheless, there is *Saia v. New York,*[70] and it does not appear just how "loud and raucous" the "noises" were which this sound truck emitted. There may have been, on the whole record, a plausible case for clarification by the Court. The previous opinions by the various justices do not make the sound truck situation entirely lucid.

Supervision of Political Rights

A curious twist to the discrimination problem was raised in a Georgia case [71] in which a white voter sued officers of the State Executive Committee of the Democratic party for damages. Plaintiff claimed that the application of the county unit system in the 1950 primary

66. Everson v. Board of Education, 330 U.S. 1, 15 (1946).

67. Commonwealth v. Guess, 168 Pa. Super. 22, 76 A.2d 500 (1950), *cert. denied,* 342 U.S. 912 (1952).

68. Brief for Petitioners, p. 16.

69. 336 U.S. 77 (1949).

70. 334 U.S. 558 (1948) (in which an ordinance requiring a permit for the use of a sound device was held unconstitutional).

71. Cox v. Peters, 208 Ga. 498, 67 S.E.2d 579 (1951), *appeal dismissed,* 342 U.S. 936 (1952), Justices Black and Douglas dissenting.

reversed his vote for the losing gubernatorial candidate and that under that system his "white" vote was given less effect than "Negro" votes in the state, thus depriving him of the equal protection of the law. The Georgia supreme court held that the Democratic primary was not an "election" under the laws of Georgia and that the right to participate therein was not protected by the Fourteenth and Fifteenth Amendments. The appeal to the Supreme Court was dismissed "for want of a substantial Federal question." Justices Black and Douglas dissented.

This sort of thing has been going on since 1946.[72] It appears that the Supreme Court just is not going to upset the Georgia unit system. In their dissent in the *Peters* case,[73] Justices Black and Douglas pointed out that "there is a heavy Negro population in the large cities" who were "heavily disenfranchised by the county unit system." Indeed, voters in Fulton county, largest in the state, contended that a vote in the smallest rural county was given 120 times as much weight as one of theirs. The current contention by a white voter is probably correct in some parts of the state. This system undoubtedly works out inequitably in many respects, perhaps discriminating here against a Negro voter, there against a white one. But it is a curious logic that would regard two discriminations as eliminating both. The Georgia system has been under fire now for several years, and four Supreme Court Justices have recorded serious doubts as to its constitutionality. It is true that Justices Murphy and Rutledge are no longer on the Court, but that does not diminish the importance of the question. But again, it may be that more than five Justices thought the time "not ripe for decision."

Again the Supreme Court has declined to rule on that chronic ailment of the American democratic process, the apportionment of legislative districts. In *Anderson v. Jordan*,[74] petitioner claimed the

72. In Cook v. Fortson, 68 F. Supp. 624 (M.D. Ga. 1946), an action for a declaratory judgment challenging the Georgia county unit system as applied to a congressional primary was dismissed. A similar suit directed at the gubernatorial primary was also dismissed. Turman v. Duckworth, 68 F. Supp. 744 (N.D. Ga. 1946). The Supreme Court dismissed both appeals, 329 U.S. 675 (1946), on the authority of Colegrove v. Green, 328 U.S. 549 (1946) in which Justices Black and Douglas dissented, as did Justice Murphy. The per curiam order cited only a case involving mootness. Justices Black and Douglas thought that probable jurisdiction should have been noted. Justice Rutledge thought the question of jurisdiction should have been postponed to a hearing on the merits.

In 1950, much the same thing happened. The District Court again dismissed the suit, South v. Peters, 89 F. Supp. 672 (N.D. Ga. 1950). The Supreme Court this time affirmed per curiam, saying, "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." South v. Peters, 339 U.S. 276 (1946). Justices Black and Douglas again dissented.

73. See note 72 *supra*.

74. Cal. Sup. Ct., no opinion, judgment entered Nov. 15, 1951, *appeal dismissed*, 343 U.S. 912 (1952), Justices Black and Douglas dissenting.

unequal reapportionment and redistricting of California assembly and congressional districts violated the equal protection and privileges and immunities clauses of the Fourteenth Amendment. The Civil Rights Act [75] was the basis of plaintiff's suit to compel reapportionment in *Remmey v. Smith*,[76] where only the apportionment of the state assembly districts was called into question.

Both Justices Black and Douglas dissented from the dismissal of the appeal in the *Anderson* case; but when it came to the *Remmey* case, involving only state assembly districts, Black alone recorded a dissent. The express reason for the dismissal of the *Remmey* appeal was "want of a substantial federal question." Apparently, then, either Justice Douglas feels that reapportionment among state assembly districts is exclusively a state problem, involving no question of federal rights, or he did not deem the denial of review significant enough to warrant the noting of his disagreement.

Much has been written on the reapportionment problem,[77] most of it condemning the state legislatures for their selfish manipulation of election districts to achieve a party advantage and the Supreme Court for its consistent refusal to intervene. Nothing would be contributed here by a rehash of the merits of the problem. It is generally agreed by the commentators on the subject that the Supreme Court should compel reasonable equality in state apportionments; but from the refusals to review these two cases as well as *Cox v. Peters*[78] it appears that no solution will be forthcoming in the near future.[79]

SUPERVISION OF FEDERAL CRIMINAL LAW

MacInnis v. United States,[80] like *Hallinan v. United States*,[81] is an aftermath of the conviction in the *Bridges* case.[82] During the trial, the court announced that the conduct of one of Bridges' attorneys had been contemptuous and that the certificate and order pursuant to Federal Rule 42 and the fixing of punishment would be deferred to the end

75. 17 STAT. 13 (1871), 8 U.S.C. § 43 (1946); 28 U.S.C. § 1343 (1950).

76. 102 F. Supp. 708 (E.D. Pa. 1951), *appeal dismissed*, 342 U.S. 916 (1952), Justice Black dissenting.

77. See EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 336-338 (1952); Bowman, *Congressional Redistricting and the Constitution*, 31 MICH. L. REV. 149 (1932); Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 YALE L.J. 127 (1946).

78. Note 71 *supra*.

79. See Justice Rutledge's concurring opinion in Colegrove v. Green, 328 U.S. 549, 564 (1946).

80. 191 F.2d 157 (9th Cir. 1951), *cert. denied*, 342 U.S. 953 (1952), Justices Black and Douglas dissenting.

81. 182 F.2d 880 (9th Cir. 1950), *cert. denied*, 341 U.S. 952 (1951).

82. United States v. Bridges, 87 F. Supp. 14 (N.D. Cal. 1949).

of the trial. After the jury's verdict had been returned, the judge sentenced the lawyer to three months imprisonment, without notice or hearing or an opportunity to defend against the contempt charge.

Of course, the judge's behavior was well within the decision of the Second Circuit in *United States v. Sacher*,[83] which by a two to one vote [84] affirmed Judge Medina's contempt finding at the end of the lengthy trial of the eleven top Communist leaders. The issues in all these cases are difficult, technical and of the greatest national significance, involving as they do the extent to which a trial judge may protect the dignity of the court by summary punishment, the individual's right to counsel, and the problems faced by counsel as an advocate for his client's cause. These issues have been elaborately explored elsewhere.[85] Justices Black and Douglas noted their dissents here, as in previous cases involving the same or kindred problems.[86]

In *Koehler v. United States*,[87] a county police officer committed an outrageous assault on a motorist who had accidentally run over the officer's dog. The officer was prosecuted under the Civil Rights Act.[88] The evidence clearly showed that he acted "under color of law." He used his police siren while pursuing his victim; he placed the motorist "under arrest," demanding of the latter, "Didn't you know that I am the law?" He then lodged the hapless fellow in jail. The trial court instructed the jury that "the intent is presumed and inferred from the result of the action" and that "the color of the act determines the complexion of the intent."

As Justice Jackson pointed out in his dissent to the denial of certiorari, the section of the Civil Rights Act involved is full of vagueness, as "attested by the fact that this Court cannot decide most issues of

83. 182 F.2d 416 (2d Cir. 1950), *cert. denied*, 341 U.S. 851, 952 (1951), *cert. granted*, 342 U.S. 858, *aff'd*, 343 U.S. 1 (1952).

84. Judge Clark dissented from the decision by Judges A. Hand and Frank.

85. Harper and Haber, *Lawyer Troubles in Political Trials*, 60 YALE L.J. 1

86. In two other cases of contempt, Hammett v. United States, 342 U.S. 894 (1951); Field v. United States, 342 U.S. 894 (1951), the Court denied certiorari over dissents by Justices Black and Douglas. These cases involved the Communist bail episodes. Sureties on forfeited bonds refused to answer questions concerning their acquaintance and last contact with missing Smith Act violators who failed to appear for sentence. Notwithstanding a plea of self-incrimination, they were held in contempt, as was a witness who admitted he was a trustee of the Communist bail fund but refused to produce his books and records, and refused to testify as to their contents or to matters "auxiliary" to the production of such records.

87. 189 F.2d 711 (5th Cir.), *cert. denied*, 342 U.S. 852 (1951), Justices Black and Jackson dissenting, Justice Frankfurter commenting.

88. 18 U.S.C. § 242 (Supp. 1952): "Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishment, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined. . . ."

deprivation of constitutional right without dissent, and often divides five to four." There is great difficulty, therefore, in the determination of whether a given act was done "willfully" to deprive a person of his constitutional rights. The Court in the *Screws* case [89] held that there must be some sort of specific intent to deprive the victim of his constitutional rights and that the mere intention to do the act which resulted in such deprivation is not enough.

Now, whatever this mystic "specific intent" might be, it is hard to find any recognition of it in the trial court's charge in the *Koehler* case. To quote again from Justice Jackson's dissent:

> "Under the trial court's construction, the Government may merely prove the act and rest—the presumption does the work of evidence. Under the *Screws* case, no such presumption was authorized—the Government would have to produce evidence, circumstantial in most cases, to be sure, from which the jury could reasonably infer the specific intent."

This problem is clearly important in the administration of the criminal law, in the light of the heavy burden of proof which the Government is required to satisfy in criminal cases. It is to be noted that Justice Jackson is going much further than merely noting a dissent to the denial of certiorari, as did Justice Black. In substance, he is pronouncing the lower court in error, at least insofar as the *Screws* case is law.[90] What Justice Frankfurter meant by his short paragraph is difficult to surmise.[91]

William Remington, like Alger Hiss, Whitaker Chambers and Elizabeth Bentley, has been a headline name for several years. His conviction of perjury was reversed and remanded, and certiorari denied by the Supreme Court.[92] Remington wanted the indictment quashed, among other reasons, because of improprieties in the grand jury investigation by the foreman, one Brunini, who allegedly had a financial interest in Bentley's book. Elizabeth Bentley, of course, was the government's chief witness against Remington. The court of appeals stated that it would not deal with this charge, presumably since the court was reversing for a new trial. But if the indictment were quashed, there would be no new trial. The charge that a man had been indicted

89. Screws v. United States, 325 U.S. 91 (1945).

90. Referring to the trial court's charge, the Justice said: "This is wrong even by the test in the *Screws* decision" (to which he had dissented). 342 U.S. 852, 853 (1951).

91. "In not joining this dissent, Mr. Justice Frankfurter wishes to refer to his views as to the meaning of a denial of certiorari. See Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912." (342 U.S. 852, 854 (1951). What is this merry-go-round? Did the Justice dissent or didn't he?

92. Remington v. United States, 191 F.2d 246 (2d Cir. 1951), *cert. denied,* 343 U.S. 907 (1952), Justices Black and Douglas dissenting.

to further a juror's financial gain is not trivial. Justices Black and Douglas, departing from custom, noted their dissent to the denial of certiorari in a memorandum opinion.

To be sure, the Government had indicted Remington a second time on the ground that he lied in his perjury trial when he swore he had never been a Communist (a technique, which presumably could go on forever, to get around double jeopardy). But it is not at all clear that both prosecutions might not be possible, although perhaps not simultaneously. If so, it is also not clear that the Government might not initiate two prosecutions, as the Bridges' litigation suggests.[93]

Richards v. United States[94] raises the question whether, to attack the credibility of a defendant charged with a felony, the prosecution may cross-examine him on conviction of a previous crime for which he had been pardoned. Defendant was so cross-examined, convicted and the conviction affirmed by a divided court of appeals.

The question has never been decided by the Supreme Court although there have been cases involving the legal effect of a pardon in other contexts,[95] and there is some discussion in the literature.[96] There is broad language ranging from Blackstone (a pardon gives a "new credit and capacity")[97] to the Supreme Court (a pardon "blots out of existence the guilt")[98] suggesting a contrary result, although there are also analogies to support the decision.[99] It is to be observed that the law is well-settled that a pardon wipes out the incompetency of the convicted person to testify,[100] and it may be thought inconsistent to permit the pardoned conviction to be used as a weapon to attack his honesty.[101] To be sure, the pardon does not change or alter the fact of conviction,

93. In 1934 Harry Bridges, an alien, was cleared by the Immigration Service of subversive activities or connections. In 1936, he was again cleared by the Service. Subsequently, Dean Landis, acting for the Secretary of Labor, after extended hearings producing a 7700 page transcript, cleared him a third time. But the clearance would not stick and hearings were again held by Judge Sears on a new warrant. This time the findings were against Bridges, but the Supreme Court reversed with two blistering opinions. Thus the Government failed to make good charges that Bridges was or had been a Communist. But in 1949, he was indicted for conspiracy to defraud the Government—by lying when he swore in his naturalization proceedings that he had never been a Communist. He was convicted, United States v. Bridges, 90 F. Supp. 973 (N.D Cal. 1950), and the Court of Appeals affirmed. 21 U.S.L. WEEK 2134 (U.S. Sept. 6, 1952). The petition for certiorari is now pending.

94. 192 F.2d 602 (D.C. Cir. 951) *cert. denied,* 342 U.S. 946 (1952); 50 MICH. L. REV. 1106 (1952); 32 B.U.L. REV. 231 (1952); 25 So. CALIF. L. REV. 231 (1952); 38 VA. L. REV. 235 (1952); 40 GEO. L.J. 145 (1951).

95. *Ex parte* Garland, 4 Wall. 333 (U.S. 1866); United States v. Klein, 13 Wall. 128 (U.S. 1871); Carlesi v. New York, 233 U.S. 51 (1914).

96. Weihofen, *The Effect of a Pardon,* 88 U. OF PA. L. REV. 177 (1939); Williston, *Does a Pardon Blot Out Guilt?,* 28 HARV. L. REV. 647 (1915).

97. 4 BL. COMM. *152.

98. *Ex parte* Garland, 4 Wall. 333, 380 (U.S. 1866).

99. Carlesi v. New York, 233 U.S. 51 (1914).

100. Boyd v. United States, 142 U.S. 450 (1892).

101. See 50 MICH. L. REV. 1106, 1107 (1952).

but that, as Judge Fahy points out in his dissenting opinion, is not the question. The issue is whether the fact of conviction may be introduced after a pardon to attack the credibility of the witness. Judge Fahy thought that to permit such an attack was inconsistent with the policy which gives the President the exclusive power to grant a "full" pardon. This would appear to be an important issue.

Supervision of Federal Economic Regulation

The reorganization of the Seaboard Air Line Railway, employing the usual basis of adjusting the financial structure and valuation of the road to an estimate of future earnings as approved by the Supreme Court,[102] wiped out the junior securities. The actual earnings since the reorganization in 1943 have been double the estimate. On these facts, the holders of the junior securities sought a reopening of the proceedings with a view to modifying the plan. The senior security holders had not yet received more in value than the amount of their claims, as provided by the plan. The court of appeals affirmed the district court's refusal to re-examine the plan even though it had not been fully executed.[103]

In his "dissent" to denial of certiorari, Justice Frankfurter attached an opinion raising serious questions as to the soundness of the principles and "guesswork" on which railroad reorganizations have been allowed. However, he offers no alternative basis for dealing with the problem, no such basis, of course, being called for by the occasion. He is merely "dissenting" from the Court's refusal to consider the matter. If, indeed, as some economists appear to think,[104] the present level of national income is here to stay and will probably rise, perhaps some attention to this problem is indicated. But if we may assume that the high earnings of the railroads during the war and post war years is as temporary as high earning periods in the past, the matter of predicting future earnings is about the same as it ever was and the need for reconsidering the wisdom of experience is less pressing.

By dismissing the appeals in two California cases[105] the Court turned its back on the growing problem[106] of state regulation of the

102. See Ecker v. Western Pac. R.R., 318 U.S. 448 (1943).

103. Bondholders, Inc. v. Powell, 190 F.2d 74 (4th Cir. 1951), *cert. denied,* 342 U.S. 921 (1952).

104. My colleague Eugene Rostow so testified in connection with the Missouri Pacific reorganization. See I.C.C. Finance Docket 9918, Nov. 30, Dec. 1, 1951.

105. United Air Lines Inc. v. Public Utilities Commission of California, and Western Air Lines Inc. v. Public Utilities Commission of California, 49 Cal. P.U.C. 494 (1951), *appeals dismissed,* 342 U.S. 908 (1952), Justices Black and Burton dissenting.

106. Since these two cases, California has asserted jurisdiction over the rates on United Air Lines' run from Los Angeles to Santa Catalina Island. The Civil Aeronautics Board has intervened in this proceeding, entitled United Air Lines v. Public Utilities Commission of California (not yet reported).

aviation industry. Acting upon an informal letter from the Director of the Civil Aeronautics Board recommending that the air lines increase the air coach passenger rate on the Los Angeles-San Francisco run from $9.95 to $11.70, United and Western air lines filed an application for rate increase with the California Public Utilities Commission. About a month later, on March 1, 1951, both raised their rates to the level recommended by the CAB, no action having been taken by the state agency.

On April 24, 1951, after a hearing, the state Commission approved the rate increase prospectively, but ordered Western and United to refund $1.75 where possible to all passengers who had paid the advanced price on that run during the period when the increased rate was being charged but before its approval by the Commission (March 1 to April 24). The Supreme Court of the State of California denied without opinion the air lines' petitions for writs of review of the Commission's order. From that denial the air lines appealed to the Supreme Court of the United States, where the appeals were dismissed "for the want of a substantial federal question." Justices Black and Burton expressed the opinion that "probable jurisdiction should be noted."

The issue which presented no "substantial federal question" was: Are the states as well as the federal government to be permitted to regulate economic activities of commercial air lines? No one would deny the importance of the commercial aviation industry to the nation. Its indispensability to mail transportation and its importance to national security are alone enough to show that its efficient operation is a matter of national concern. Since there is potential confusion inherent in state economic regulation of *any* interstate transportation or communication agency, a case which challenges state authority to regulate as large and growing an industry as aviation would seem to present a question both federal and substantial.

The Civil Aeronautics Act of 1938 [107] is ambiguous as to whether Congress intended to pre-empt the field of aviation, or whether it intended to leave some room for state regulation of intrastate aviation.[108] A decision whether Congress in this Act pre-empted economic regulation is necessary for the continued efficiency and welfare of the air transportation industry. Should the Court decide in favor of state regulation, then some indication of the proper line between state and

107. 52 STAT. 977 *et seq.* (1938), as amended, 49 U.S.C. § 401 *et seq.* (Supp. 1952).

108. The Act is clear that Congress intended to pre-empt the field as to safety devices, but it is not clear as to economic regulation. The statement of policy is that the Act is intended to control "domestic aviation" not "inter-state aviation." The significance of this language has not yet been decided. See 17 J. AIR L. & COM. 107 (1950).

federal regulation is equally necessary to the industry. The first or both questions might have been considered in this case.

In *Tom's Express, Inc. v. Ohio,*[109] two interstate trucking concerns sought to enjoin the enforcement of an Ohio statute [110] requiring all trucks operating within Ohio, including those operating interstate, to carry protector flaps on the rear-most wheels "to prevent . . . such wheels from throwing dirt, water or other materials on the windshields of following vehicles." A three-judge district court upheld the statute against plaintiffs' claim that it conflicted with federal law: "The federal government has not pre-empted the field of motor carrier regulations in connection with mud guards." [111] Plaintiffs appealed directly to the Supreme Court, claiming that the statute invaded a field of regulation wholly occupied by the Interstate Commerce Act [112] and the regulations promulgated thereunder by the Interstate Commerce Commission.[113]

Two cases were cited by the lower court in support of its order: *Atlantic C.L.R.R. v. Georgia* [114] and *Kelly v. Washington.*[115] The Washington statute was one requiring inspection and had nothing to do with the installation of an accessory of the type required by the Ohio statute. The Georgia statute required installation of headlights on locomotives, but the statute did not conflict with any regulation of the I.C.C. nor did it invade any field of authority conferred on it by Congress.

In the district court, plaintiffs contended that their trucks were fully equipped in accordance with the detailed requirements and standards of the Commission, and that no state could require of them different or additional safety equipment. Viewing the problem narrowly, the lower court was quite correct in concluding that the mudguard statute did not overlap or conflict with any of the ICC Motor Carrier Safety Regulations. But when it held that the federal government has not pre-empted this field of regulation, it was ruling on a question not previously decided by the Supreme Court. The important problem, then, was not the conflict with federal authority, but the invasion of it.

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109. Tom's Express, Inc. v. Division of State Highway Patrol, 105 F. Supp. 916 (S.D. Ohio), *appeal dismissed,* 343 U.S. 944 (1952), Justices Reed and Douglas dissenting.

110. OHIO GEN. CODE ANN. § 7250-3 (Ann. Supp. 1951).

111. 105 F. Supp. 916, 917 (S.D. Ohio 1952).

112. 49 STAT. 546 (1935), as amended, 49 U.S.C. § 304(a)(1) (1946) providing: "(a) It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle . . . and to that end the Commission may establish reasonable requirements with respect to . . . safety of operation and equipment."

113. Motor Carrier Safety Regulations, pt. 193, ICC Order, 17 F.R. 4430 (1952).

114. 234 U.S. 280 (1914).

115. 302 U.S. 1 (1937).

Plaintiffs' brief on appeal stressed the need for uniformity in this field of safety equipment, arguing that Congress not only had intended to occupy the entire field but also had rejected the proposition that the power of the Interstate Commerce Commission over safety devices and appliances was to be shared with the states.

A much needed uniformity of safety equipment requirements throughout the nation has been provided by the Interstate Commerce Commission's regulations. If the lower court's decision is correct, it would seem that the regulations of the Commission are only minimum standards of equipment, upon which the states may elaborate at will so long as there is no outright conflict. Whether these regulations were intended to be minimum standards or whether they pre-empt the field would seem to be an important question of national policy. This case clearly presented that issue, but the Supreme Court declined to review. Two justices, Reed and Douglas, apparently felt that the Congressional policy behind the Commission's safety equipment regulations was sufficiently "substantial" to warrant examination by the Supreme Court.

By refusing to review an important NLRB case[116] the Court passed over an opportunity to contribute some needed clarification of the legal effect of agreements made in settlement of labor disputes. The employer, Poole Company, had bargained in good faith with the International Association of Machinists for over two years, when in May, 1949, the Union filed charges with the NLRB, claiming several unfair labor practices. The Board investigated the charges, but filed no complaint. In December, 1949, six months after the Union's charges, the employer and the Union entered into a Board-approved settlement of the dispute.

Thereafter, while Poole and the Union were bargaining, but before an agreement had been reached, 64 of Poole's 66 employees petitioned the Board to decertify the Union because it no longer represented the employees. Poole refused to bargain with the Union until it furnished proof that it actually represented a majority of the employees. The Board rejected the decertification petition, and issued an order directing Poole to cease and desist from its refusal to bargain. This order was upheld by the court of appeals, one judge dissenting.

Both the Board and the court of appeals reasoned as follows: If Poole and the Union had gone through to a full hearing and a decision by the Board finding Poole guilty of an unfair labor practice as charged, Poole would have had a duty to bargain with the Union for a "reasonable time" notwithstanding a decertification petition or a loss of

116. Poole Foundry & Machine Co. v. NLRB, 192 F.2d 740 (4th Cir. 1951), *cert. denied,* 342 U.S. 954 (1952).

majority by the Union. In the absence of any labor dispute Poole would have been well within its rights in refusing to bargain after the Union lost its majority. The question presented here is whether the duty of Poole after a settlement agreement is the same as after such a full hearing and decision by the board, or the same as its duty in the absence of a labor dispute. Apparently this was a novel question, no authority being cited by either side. Both the Board and the court of appeals decided that a settlement agreement was to have the same legal effect as an order by the Board in an unfair practice suit.

Perhaps the court of appeals was correct in its policy argument that, if the employer could challenge the union's majority status immediately after a settlement agreement, unions would be forced to refuse settlement and to push all their claims to final determination by the Board in order to prevent the employer's use of the dispute as a means of destroying the union. On the other hand, the decision in effect makes a settlement by the employer an admission of the truth of the charges against him—a result contrary to the usual view of settlements and one which may tend to discourage employers from settling..

The evil to be avoided is the employer's abuse of the settlement procedure by creating dissatisfaction with the union and then refusing to deal with it because it does not represent a majority; the goal to be sought is a maximum use of the settlement procedure; the solution is to remedy the specific evil without sacrificing the benefit. This solution might be attained more readily by investigating the unfair practices charges whenever the employer challenges the union's majority status shortly after a settlement agreement. If the Board should find that the charges were well-founded and that the employer's actions had in part caused the union's fall from majority approval, the employer would have to continue bargaining for a reasonable time. But if the employer's actions had nothing to do with the disfavor of the union, as appeared to be the case with Poole, he might properly refuse to bargain.

This decision appears to subvert one of the fundamental purposes of the National Labor Relations Act, the right of employees to be represented by bargaining agents of their own choosing. Poole was forced to bargain with a union which represented only 2 of its 66 employees. Its good faith was conceded; the union was thoroughly repudiated; and the only issue raised by the parties was the legal effect of the agreement. Here, then, was a clear cut issue on an important [117] aspect of national policy; yet the Court refused review.

117. In recent years, more than one-third of all labor disputes have been disposed of through such settlement agreements. N.L.R.B., TWELFTH ANNUAL REPORT 86-87 (1947).

SUPERVISION OF OTHER FEDERAL QUESTIONS

(a) *The Judicial System.* The Court denied certiorari in *Mogis v. Lyman-Richey Sand & Gravel Corp.*,[118] a case arising out of a 1945 Nebraska statute [119] providing that to be valid, all "rules" of administrative agencies must be filed with the Secretary of State of Nebraska. The term "rules" was defined as "any rule, regulation, standard or policy of general application." Plaintiff brought suit in a federal district court to recover an amount by which the rates prescribed by the Nebraska Railway Commission for hauling gravel exceeded the amounts paid under contract by defendant to plaintiff for the latter's trucking services between 1945 and 1949. The defendant maintained that the rates were invalid because they had not been filed with the Secretary of State.

In the district court, the plaintiff demonstrated: (1) that for many years prior to the 1945 act the rates of the Railway Commission had been effective upon promulgation by the Commission; (2) that immediately following passage of the act the Railway Commission obtained a ruling from the Attorney General of Nebraska to the effect that its rates need not be included within the statutory term "rules"; (3) that in reliance upon the opinion of the Attorney General, the Commission has never filed its rates with the Secretary of State; and (4) that two subsequent legislative sessions had failed to amend the act so as to require the Railway Commission to file its rates.

The district court held, on narrow grounds of statutory interpretation, that "rules" in the statute included the rates of the Railway Commission, and that, therefore, the rates under which plaintiff sued were invalid for not having been filed pursuant to the statutory requirements. In reaching its decision the court rejected the opinion of the Attorney General and ignored the subsequent administrative practice which had been accepted tacitly by the legislature. The court of appeals, one judge dissenting, affirmed on the grounds that no clear error appeared in the decision of the district court.

Here was a federal district court deciding an important question of state law and policy in direct conflict with the only state authority available: an opinion of the attorney general plus several years of administrative practice unaltered by legislative amendment. Does this present a question worthy of review by the Supreme Court?

One of the more vexing problems created by the decision in *Erie R.R. v. Tompkins* [120] is: How does a federal court in a diversity case

118. 189 F.2d 130, (8th Cir.) *cert. denied,* 342 U.S. 877 (1951).
119. NEB. REV. STAT. c. 84 § 902 (1950).
120. 304 U.S. 64 (1938).

know what the state law is? Under existing decisions, federal judges are to find state law in the decisions of the highest state court [121] and of lower state courts.[122]

Two views of the *Erie* rule have been developed. One holds that if there is an applicable state court decision the federal judge is rigidly compelled to follow it regardless of how poor or deviant the state decision may be.[123] If there is no state court decision in point, then under this view the federal judge has a free hand in applying what law he chooses. The other view looks to the policy behind *Erie* and commands the federal judge to decide the case the way he thinks the highest state court would decide it.[124]

Here, the federal court rejected the available state authority and reached a conclusion almost without question contrary to what the Nebraska Supreme Court would have decided.[125] With so clear an issue, the Court could have clarified the *Erie* decision. It could have adhered to the letter of the *Erie* "law," that only state *judicial* rulings are to apply; it could have affirmed *Erie's* policy basis and given the federal judges power to decide and interpret state law and policy; or it could have expanded the "state authority" concept to make binding on federal judges such matters as state administrative practice and opinions of the attorney general.

There are two additional reasons why the Court might have granted certiorari in this case.

1. Conflict in the circuits. The court of appeals, after indicating it would be inclined to grant a stay of proceedings, refused to do so apparently on the grounds that it lacked power to do so in an action for damages. This is in direct conflict with a decision in the Seventh Circuit where the proceedings in a damage action were stayed in order to obtain a state court ruling on the important question of law.[126]

2. Decision contrary to state law. In a Nebraska court an opinion of the Attorney General on the proper construction of a statute plus an administrative practice based thereon have great influence, especially when the statute is unaltered at later legislative sessions. The district

121. *Ibid.*

122. Fidelity Trust Co. v. Field, 311 U.S. 169 (1940).

123. *Ibid.* For a discussion of this view and the problem in general, see Clark, *State Law in Federal Courts,* 55 YALE L.J. 267 (1946); Keeffe, Gilhooley, Bailey and Day, *Weary Erie,* 34 CORNELL L.Q. 494 (1949).

124. West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Cooper v. American Airlines, Inc., 149 F.2d 355 (2d Cir. 1945).

125. See dissent in Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F.2d 130, 143 (8th Cir. 1951).

126. Yellow Cab Co. v. City of Chicago, 186 F.2d 946 (7th Cir. 1951).

court failed to give these factors the consideration required by Nebraska law.

It may be that, as between the parties to the action, the result was a just one. It looked very much as if the plaintiff, as an afterthought, was seeking a windfall. But it may also be that a denial of certiorari is not a very good stick to beat a dog with.

Erie Forge Co. v. United States[127] was an action in a district court by the Commissioner of Internal Revenue under section 291 of the Internal Revenue Code[128] to collect *delinquency* penalties because of the taxpayer's late filing of his return. In a previous suit in the Tax Court, the taxpayer had contested unsuccessfully the Commissioner's notice of *deficiency* in tax for the same years. In that suit the Tax Court had denied the Commissioner's motion to amend his answer (made six months after the close of the evidence) so as to include the delinquency penalties, the denial being based on the grounds that the issue had not been properly raised by the Commissioner.

Before the close of the Tax Court proceedings, the Commissioner began this action in the district court. The district court found for the taxpayer on two grounds. (1) The Tax Court's decision was res judicata of all issues between the taxpayer and Commissioner for the years in question, and the Commissioner could not now reassert in the district court a claim which had been rejected in the Tax Court. (2) A "delinquency penalty" is a "deficiency" within the meaning of section 272(a),[129] and therefore cannot be collected from the taxpayer without going through the procedure provided in section 272(a), which procedure the Commissioner had not employed.

Reversing the district court on both grounds, the court of appeals held that a delinquency penalty was not a "deficiency" and that the issue of the delinquency penalty in this case had never been within the Tax Court's jurisdiction and therefore could not be barred by res judicata. Justices Douglas and Jackson dissented from the denial of certiorari.

In its petition for certiorari, the taxpayer presented a strong argument in favor of review of this case. First there was the statutory problem of interpretation of "delinquency penalties" and "deficiency" as employed in the Internal Revenue Code. More fundamental was the policy underlying the jurisdiction of the Tax Court—was it meant to have exclusive jurisdiction of all matters relating to the taxpayer's return for a given year? Or could the Commissioner, after losing in

127. 93 F. Supp. 192 (W.D. Pa. 1950), 191 F.2d 627 (3d Cir. 1951), *cert. denied,* 343 U.S. 930 (1952), Justices Douglas and Jackson dissenting.

128. 53 STAT. 88 (1942), as amended, 26 U.S.C. § 291 (1946).

129. 53 STAT. 82 (1942), as amended, 26 U.S.C. § 272 (1946).

the Tax Court, turn to the district courts to collect delinquency penalties? If the Commissioner may assert delinquency penalties in a district court, as the court of appeals held in this case, certain results follow which are contrary to the general principles of tax administration. The basic issue of this case—one of importance to the general public as well as to the administration of the tax law—is whether the Tax Court is to be a forum affording the taxpayer a partial and incomplete determination or remedy, or whether it is to be a forum where all rights and liabilities of the parties with respect to the period or year in question can be definitively and finally determined. Under this decision, the Tax Court can render only an incomplete determination, the issue of liability for delinquency penalties being subject to the jurisdiction of a district court at the Commissioner's option.

(b) *Miscellaneous Federal Questions.* Three Justices,[130] all previously associated with the Department of Justice, thought *Moore-McCormack Lines v. Foltz*[131] sufficiently important to warrant review by the Court. This case involved an action for libel and slander against a former employer for giving allegedly false and defamatory information to the Federal Bureau of Investigation which cost the plaintiff his federal job. The suit was defended by the United States. The district court granted defendant's motion to dismiss on the ground that the communication was absolutely privileged.[132] The court of appeals reversed, holding that such communications to the FBI were protected only by a qualified privilege which is defeasible on proof of malice.

The decision fits into the usual pattern. Statements from a previous employer to a present or potential employer have long enjoyed a qualified immunity conditioned on reasonable and honest belief in their truth. It appears that in no case has a court granted the extraordinary protection of absolute immunity. But here, the Government itself, through its top civilian security agency, is the recipient. It is a plausible argument, especially in these times of acute international tension, that the utmost protection should be accorded persons interviewed by the FBI as to the loyalty of present and prospective employees. Such protection would undeniably tend to encourage persons thus interrogated to tell all. It is not surprising that the Department of Justice displayed such interest in the case and that two former Attorneys General and a former Solicitor General, now Justices, should dissent from the denial of certiorari. On the other side, of course, is the risk

130. Reed, Clark and Jackson.

131. 189 F.2d 537 (2d Cir.), *cert. denied,* 342 U.S. 871 (1951), Justices Reed, Clark and Jackson dissenting.

132. Decision not reported.

that such sweeping protection would tempt malevolent interviewees to tell more than all. Federal employees would be sitting ducks for unscrupulous and malicious enemies, protected first by anonymity and second, if discovered, by absolute privilege. In a period when the similar privilege of members of Congress has been abused so outrageously that serious proposals have been made to curtail it, the dangers of extending it to everyone outside Congress as well are frightening. The individual rights of the citizen are still entitled to some consideration even if he is a Government employee.

To meet the threatened Japanese invasion of Alaska in the first half of 1942, United States military authorities ordered the evacuation of all natives from the Aleutian Islands. Plaintiff kept extensive flocks of sheep on the island of Umnak. As part of the general evacuation, plaintiff's employees were removed from the island, the military remaining in exclusive possession and control in order to operate an air field and radio station situated there. During the six months period in which plaintiff was excluded from Umnak, no care of any sort was given to its flocks. As a result, plaintiff lost some 800 head of sheep worth approximately $200,000.

Plaintiff's suit in the Court of Claims,[133] based on the theory it was entitled to just compensation under the Fifth Amendment, was dismissed on the grounds that the Government did not take possession of plaintiff's sheep—it only made it impossible for plaintiff to care for them. "Such losses are an incident to the exercise of the sovereign power and duty to protect the people from attack by a hostile power. For losses occasioned by such enterprises the sovereign is immune." [134] As authority for this statement the court cited *United States v. Pacific R.R.*[135] Plaintiff distinguished that case on the grounds that the "taking" there occurred under conditions of actual combat, whereas here, no actual combat having occurred, plaintiff's loss came from the government's occupying plaintiff's property and requiring plaintiff to vacate. The principle that no single person should be forced to suffer in order to benefit the whole nation would seem to require a judgment in plaintiff's favor. However, even if the Court of Claims had decided for the plaintiff, the case involves a question fully worthy of review by the Supreme Court.

The underlying problem is the just and equitable allocation of private losses arising out of modern warfare. In previous wars the

133. Aleutian Livestock Co. v. United States, 96 F. Supp. 626 (Ct. Cl.), *cert. denied,* 342 U.S. 875 (1951).

134. 96 F. Supp. 626, 628 (1951).

135. United States v. Pacific R.R., 120 U.S. 227 (1887).

geographical scale of operation has been sufficiently restricted to make useful the rule that compensation shall be denied when property is destroyed in emergency conditions of actual combat. In modern warfare, however, where potentially any and every spot in the country could be "in actual combat," this rule becomes meaningless. In case of an atomic attack on Chicago, it is quite conceivable that "military necessity" would require the evacuation not only of Chicago and its suburbs, but also of neighboring cities or even of New York and San Francisco. The rules and policies which would allocate losses resulting from the use of private property by the government and from enforced neglect because of such evacuations are unquestionably matters of national concern.

We have here, then, a case presenting a problem of widespread interest, the existing rules for the solution of which are outmoded by nearly half a century of technological development. Further, in the present precarious situation of international politics, this problem threatens to become one of increased and perhaps critical importance. Yet the Court dismissed the case with the usual unexplained "certiorari denied." [136]

Justice Black dissented in *Ancich v. Borcich,*[137] an action in admiralty in which seamen sought to recover wages and maintenance from a negligently operated vessel which collided with their craft. The owners were also parties, seeking recovery for damages to the ship. Both prevailed in the district court but the court of appeals reversed as to the seamen. The Supreme Court denied motions by two labor unions [138] to file briefs amici curiae and denied the petition for certiorari. Justice Black, in "noting" his dissent, also "noted" his view that the decision of the court of appeals should be reversed—uncommon behavior on denial of certiorari.

The crewmen in this case were employed on a fishing vessel under what, in the trade, is called a "lay plan," which is an agreement whereby the men get as compensation a share in the proceeds or profits of the venture. In the instant case, their collective share was to be 68%, that of the owners 32%.[139] The craft was out of operation for repairs for about two and one-half months as a result of the accident. The trial

136. A petition for rehearing was denied, 342 U.S. 907 (1952), despite petitioner's contention that the Court of Claims had reached an opposite result in Caltex, Inc. v. United States, 100 F. Supp. 970 (Ct. Cl. 1951), in which recovery was allowed for claimant's Philippine property, which was destroyed to prevent its falling into enemy hands. If recovery was proper there, then it would also seem proper in the Alaska case.

137. 191 F.2d 392 (9th Cir. 1951), *cert. denied,* 342 U.S. 905 (1952).

138. Atlantic Fisherman's Union and Fisherman and Allied Workers Division, International Longshoremen's and Warehousemen's Union.

139. See 6 MIAMI L.Q. 505 (1952).

judge found that the crew's share of anticipated profits amounted to $9,180, which would give them a little over $900 apiece. He found the owners were entitled to $4,320 in anticipated profits and to $14,678.61 for damages to their boat. The court of appeals let the judgment in favor of the owners stand. Its denial of recovery to the crew was based on the Supreme Court's decision in *Robbins Dry Dock & Repair Co. v. Flint.*[140]

The *Robbins* case is a controversial one. There, a time charterer sought to recover for loss of future profits from the use of the vessel when a dry dock company, under contract with the owners, negligently damaged the ship's propeller, thus delaying her return to service. The Court denied recovery because the defendant had contracted with the owners, not the charterer, and "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." [141] Since the great English case of *Lumley v. Gye,*[142] this proposition does not apply to intentional and unjustified interferences with other persons' contractual relations, even where plaintiff's loss is caused by injury to "person or property." [143] The present case could be distinguished from the *Robbins* case if anyone wanted to do so. Justice Holmes, in *Robbins,* seemed to think that the fact that the dry dock company had no knowledge of the charter party was important. The "lay plan" of employment for men on small fishing craft off the California coast is so common that it could hardly be said that damage to such a vessel would not foreseeably cause loss of income to the crew, either by loss of wages or a share in future catches.[144] There is a substantial argument that the problem is an important one and that the decision in the *Robbins* case is of such dubious soundness that it ought to be reconsidered.

SILENCE

It is the position taken in this as well as in the two preceding articles that the certiorari jurisdiction of the Supreme Court and the manner of its exercise is a major problem which requires some kind of solution. The position is that these 900 or 1000 annual denials of certiorari and dismissals of appeals have a significance for the administration of justice far out of proportion to the casual comments made

140. 275 U.S. 303 (1927).

141. *Id.* at 309.

142. 2 E. & B. 216 (1853).

143. See United States v. Laflin, 24 F.2d 683 (9th Cir. 1928) (master was permitted to recover on behalf of the crew for anticipated profits).

144. See 6 MIAMI L.Q. 505, 506 (1952).

from time to time by a single justice. There is no suggestion here that the Court is not industrious, that it should necessarily take more cases, that it is not conscientious. There is a suggestion, however, that it is laboring under a serious misapprehension of what it is doing and of the effect of its behavior on the profession. It is the position of these articles that the Supreme Court is making important decisions of public law and public policy in its handling of its discretionary jurisdiction. These decisions always are made behind a baffling and impenetrable curtain of silence.

These articles have been, for the most part, critical and destructive. Some feeble efforts have been made to be constructive; some suggestions for improvement have been made. Most, perhaps all, of them have probably been of no value. But the fact still remains that here is a major problem. Primarily it is the Court's problem, not the problem of the writers of these articles. There is some evidence that one of the justices is concerned about it. There is not much evidence that the Chief Justice is bothered, even though he has a responsibility for the operation of his Court somewhat beyond that of his brethren. In any event, it becomes with each term increasingly clear that the situation cries aloud for something other than the silence with which it is met.