NINTH CIRCUIT REVIEW

PREFACE

To the Editorial Board of the Arizona Law Review:

This issue begins the first of annual reviews of the work of the United States Court of Appeals for the Ninth Circuit. Is it really worthwhile?

I would think it decidedly worthwhile. Lawyers ought to find it very useful to have someone's objective appraisal of what the court is doing and where it is going. And, the judges themselves might find it good reading too.

There are still too many good lawyers who have only limited experience in the federal district court and are puzzled by our procedures in the court of appeals. Perhaps your review will be of substantial assistance to them.

I do express the hope that when we seem to nod, you will have a little gentle charity. We cannot control our intake which now runs over 1,200 cases a year. About 800 go to issue and decision. We sit in panels of three, constantly reconstituted. We have nine active judges and there are five retired judges who average at least half a load apiece.

Our load has swollen from the growth of the West. More people make more litigation. And, the ever increasing scope of federalism doubles our load. For example, 20 years ago the post conviction business, federal and state, was almost unknown to the federal courts. Such business could be handled then by mailing the prisoner's complaint back to him. And, now we have many, many more criminal appeals because of the Criminal Justice Act of 1964. (I would not repeal it.) The Civil Rights Acts provide a stream. Federal taxes are so burdensome that people come to court to test them. Others with tax troubles are brought to us unwillingly. These are some of the sources of our new volume of business.

We are proud that for over 12 years the court was "current." We are just beginning to fall behind, but we shall do our best until more help arrives. The quality of our work would be better if each of us had only half as many cases. But we think that people should have justice now. If we could take more time, losers would be no better satisfied, but a law review would be.

My associates know of your plans and I assure you that they welcome your undertaking.

Richard H. Chambers
Chief Judge
United States Court of Appeals
for the Ninth Circuit

INTRODUCTION

With this issue the Arizona Law Review introduces the *Ninth Circuit Review*, the first in a series of annual features devoted to treating the case law of the United States Court of Appeals for the Ninth Circuit. The Law Review staff hopes that this undertaking will be of significant interest and aid to members of the judiciary, the practicing bar and the academic community.

Our reasons for initiating this feature are three-fold. First, there presently exists no readily-available source of federal law which may be referred to as a guide in treating problems either uniquely federal in nature or important because they arise in the federal court system. Moreover, those existing sources which do treat federal law and practice make little, if any, attempt to differentiate between the substantive law and procedural practices which prevail in each circuit of the Court of Appeals. The Law Review hopes that in time the *Ninth Circuit Review* will provide an accessible source for Ninth Circuit law and practice.

The second purpose for undertaking this project is our recognition that the Ninth Circuit has long been in the forefront in its treatment of important legal issues. To some extent, this characteristic is attributable to its size; it is the largest circuit, encompassing nine states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) and the territory of Guam. In addition, the geographical location of the states comprising the Ninth Circuit has resulted in a surfeit of cases involving narcotic drugs and marijuana, aliens and naturalization, which have forced the circuit to assume the lead in developing the rules of substantive and procedural law for treating these important areas of federal jurisdiction.

Third, the Ninth Circuit is geographically "our" circuit and the Law Review staff recognizes that its decisions are, and ought to be, of particular interest to Arizona lawyers. For these reasons, the Law Review believes that the Ninth Circuit is an ideal subject for this undertaking.

The Ninth Circuit Review will primarily cover cases handed down within the preceding calendar year (January 1 to December 31). However, important cases decided after the first of the year will be treated whenever possible — especially where they are related to the subject matter of other cases already under discussion.

Because of limitations on time, space and personnel, this initial *Ninth Circuit Review* is of limited scope. Treatment has been limited to cases in the areas of Criminal Law and Procedure, Civil Procedure and Selective Service. In future issues, the *Review* will be expanded to include the entire spectrum of cases dealt with by the Ninth Circuit.

The members of the Law Review felt that merely to summarize the cases involved would be of significant, but somewhat limited, interest to practitioners and scholars and to the student writers themselves. Therefore, an attempt has been made to explore the reasoning of the decisions in the light of existing law in the Ninth Circuit and in other jurisdictions.

The Law Review wishes to acknowledge its deep appreciation to Professors David B. Wexler and Winton D. Woods, of the University of Arizona College of Law, for their invaluable assistance in developing the idea and format of this project and for the time and effort they devoted to advising the contributors.

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NINTH CIRCUIT REVIEW

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CIVIL PROCEDURE

Applicability of State Statutes of Limitations to United States

Two cases decided during 1967 in the Ninth Circuit present unusual approaches to a difficult procedural problem. In *United States v. Tacoma Gravel and Supply Co.*[1] and *Austad v. United States*[2] the court faced the *Summerlin*[3] problem: whether a state statute of limitations may bar a claim by the United States. In *Summerlin*, the United States Supreme Court reaffirmed the position taken by Justice Story in a very early case,[4] and held that a state statute barring actions against an estate brought more than eight months after the administrator gave notice to file proof of claims was not applicable to the United States.[5] The Supreme Court stated its holding generally:

> It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing is rights .... The same rule applies whether the United States brings its suit in its own courts or in a state court.[6]

The Ninth Circuit seems reluctant to apply the doctrine, and in *Tacoma Gravel and Supply*,[7] distinguished it almost out of existence.

A Washington state statute[8] provided that a judgment lien should expire six years after entry of judgment, and that:

> [N]o suit, action or other proceeding shall ever be had on any judgment rendered in this state by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than *six years* from the date of the entry of the original judgment ....[9]

The United States brought an action, not to enforce a lien, but to renew a Washington judgment, *ten years* after a deficiency judgment had been entered in its favor. The court considered Washington Supreme Court decisions to be controlling, and those decisions consistently regarded the statute, not as one of limitations, but as of extinguishment. (None of the cases cited by the court, however, considered the statute's effect upon actions brought by the state.) It therefore held that the general rule rendering statutes of limitations ineffective to bar a claim by the United States was inapplicable, and that the statute did bar the action to renew the judgment. *Summerlin*, the court said, was distinguishable because

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[1] 376 F.2d 343 (9th Cir. 1967).
[2] 386 F.2d 147 (9th Cir. 1967).
[3] United States v. Summerlin, 310 U.S. 414 (1940).
[4] United States v. Hoar, 26 F. Cas. 329 (No. 15,373) (C.C. Mass. 1821).
[5] The statutory period for actions against administrators and the notice requirements are different in *Hoar* and *Summerlin*, but the principles discussed are identical.
[6] United States v. Summerlin, 310 U.S. 414, 416 (1940).
[7] United States v. Tacoma Gravel & Supply Co., 376 F.2d 343 (9th Cir. 1967).
[8] WASH. REV. CODE ANN. § 4.56.210 (1962).
[9] *Id.* (emphasis added).

it held only that states may not invalidate *claims* of the United States, whereas the provisions of the Washington statute invoked by the defendant barred actions on *judgments.*

Authority is divided on the effect of state statutes limiting the duration of judgment liens.[10] The Fourth and Fifth Circuits have adopted the view that such statutes have no effect on the right of the United States to levy execution to enforce the lien even if the lien has been extinguished by the passage of time.[11] On the other hand, the Second Circuit and the United States Supreme Court have taken the position that a judgment lien is a right created only by statute, and therefore limitable by statute, even against the United States.[12]

However, no federal court has held that the right of the United States to revive a judgment (as opposed to the right to enforce a judgment lien) is extinguishable by such a statute. Dictum indicating that this right of the United States would *not* be thus extinguishable is to be found in the Supreme Court's opinion in *Custer v. McCutcheon.*[13] Although finding the lien extinguishable, the Court went on to say:

> [T]he plaintiff [the United States] *is not precluded from bringing an action upon the judgment,* but merely from having an execution in the form provided by state law.[14]

One federal case directly in point is contrary to the new Ninth Circuit decision. A district court in *United States v. Houston*[15] refused to interpret a Kansas statute limiting the period of revival of a judgment against executors as a bar to an action by the United States. Since the rationale of the *Custer* decision is not applicable in a mere action to revive judgment, and since the Washington decisions cited by the Ninth Circuit Court of Appeals as determining state law did not involve actions by the sovereign, it is difficult to see why the *Summerlin* principle should not be extended to the present case. If the United States is not barred by state statutes of limitations despite the policies they supposedly effectuate (preventing the dispersion and fading memories of witnesses, and preventing fraud, lack of diligence and unsettling of titles), it would seem it should not be barred by a statute of extinguishment that effectuates only some of those policies (encouraging diligence and certainty of title).

In the later case, *Austad v. United States,*[16] the court declined to rest its decision squarely on the *Summerlin* principle, although the facts came within the rule. The United States brought an action in the Ari-

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[10] *See* Annot., 118 A.L.R. 929 (1939).
[11] United States v. Minor, 235 F. 101 (4th Cir. 1916); United States v. Noojin, 155 F. 377 (C.C.S.D. Ala. 1907), *aff'd,* 164 F. 692 (5th Cir. 1908).
[12] Custer v. McCutcheon, 283 U.S. 514 (1931); United States v. Harpootlian, 24 F.2d 646 (2d Cir. 1928).
[13] 283 U.S. 514 (1931).
[14] *Id.* at 519 (emphasis added).
[15] 48 F. 207 (C.C. Kan. 1891).
[16] 386 F.2d 147 (9th Cir. 1967).

zona district court against the guarantors of an unpaid note more than five years after default. The defendants pleaded that they had conformed with the demand provisions of an Arizona statute providing for the surety's discharge if the creditor did not bring an action against the principal within sixty days after demand, and that the United States had brought no action within the statutory period. The defendants also contended that the plaintiff was guilty of laches. The court found no merit in either defense.

However, rather than squarely holding the state sixty-day limitation inapplicable to the United States, the court held that the defendant had waived that defense in the guarantee agreement. Moreover, instead of holding that the defense of laches was similarly inapplicable, the court held that any damage the defendant guarantor suffered occurred, not because of plaintiff's alleged laches, but because of the defendant's own neglect in not pursuing alternative remedies against the principal debtor. It can be seen, then, that the Ninth Circuit has refused to apply the hitherto well-settled *Summerlin* doctrine in decisions both against and in favor of the United States.

Summary Judgment — Rule 56(c)

Tarantino v. Eggers[1] indicates that the Ninth Circuit will give more weight to the spirit of the Federal Rules of Civil Procedure than to the restrictive letter of local court rules. Tarantino, a California state prisoner proceeding in propria persona and in forma pauperis, brought a civil rights action against defendants, municipal police officers, alleging illegal search and seizure. The defendants answer denied the critical allegations and presented defenses of probable cause and reasonable force. The defendants subsequently filed a motion for summary judgment,[2] based upon records and affidavits tending to show that the action "ha[d] no merit."[3] In California, a local federal court rule[4] provides that the response to such a motion must be filed within five days after service. When the plaintiff filed no response within that time, the district court, nine days after the motion was originally filed, entered summary judgment in favor of the defendants. A week later, the plaintiff-prisoner filed a response to the motion for summary judgment, which was "overruled and denied."

The court of appeals held that where the response, as here, was as prompt "as may be reasonably expected under the circumstances, the strict time limits of the local rule ought not to be insisted upon,"[5]

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[1] 380 F.2d 465 (9th Cir. 1967).
[2] FED. R. CIV. P. 56(c).
[3] Tarantino v. Eggers, 380 F.2d 465, 466 (9th Cir. 1967).
[4] U.S. D. Ct., S.D. CAL. R. 3(d)
[5] Tarantino v. Eggers, 380 F.2d 465, 468 (9th Cir. 1967).

ordering the district court to vacate the ruling, and fix a date for a new hearing.

Whether or not the local five-day rule should be strictly interpreted had not been previously decided, but this decision is not surprising. A negative inference supporting the decision arises from an earlier Ninth Circuit case, *Engelhard Industries Inc. v. Research Instrumental Corp.*[6] In reviewing a patent controversy, the court of appeals said that it was not an abuse of discretion for the district court to refuse to grant a rehearing on a summary judgment entered against the petitioner, despite presentation of affidavits containing new evidence, when the petitioner could "with reasonable diligence have discovered and produced"[7] it at the original hearing. This statement might imply that if, as in the present case, the petitioner for rehearing could *not* have "with reasonable diligence discovered and produced" evidence raising a genuine issue of fact in time for the original hearing, then a new hearing should have been granted.

The decision is also in harmony with those in other circuits. In *Bowdidge v. Lehman*,[8] the Sixth Circuit considered the effect of the provision in Rule 56(c) that a motion for summary judgment requires service "at least ten days before the time fixed for the hearing," in the situation where a court dismisses a case on its own motion. The court concluded:

> We think the spirit of the rule requires the same notice and hearing where the court contemplates summary dismissal on its own motion. Since attorney for appellant was given neither notice nor opportunity to be heard upon the question of summary dismissal the judgment was erroneous.[9]

The Fifth Circuit came to a similar conclusion in *Enochs v. Sisson*,[10] a tax refund case. Here the motion for summary judgment was filed, and there was service on the appellant (the taxpayer), but no time for hearing was fixed. The district court granted summary judgment in favor of the appellee (the District Director of Internal Revenue) some months later, but without notice to the taxpayer of the time fixed. The court of appeals, speaking per curiam and relying on *Bowdidge v. Lehman*,[11] vacated the summary judgment.[12]

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[6] 324 F.2d 347 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

[7] Engelhard Indus. Inc. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied*, 371 U.S. 923 (1964).

[8] 252 F.2d 366 (6th Cir. 1958).

[9] *Id.* at 368.

[10] 301 F.2d 125 (5th Cir. 1962). In this case, the problem is not whether sufficient notice was given, but that no notice at all was given of the hearing. However, the principle of fairness is the same as that evoked in the instant case.

[11] 252 F.2d 366 (6th Cir. 1958).

[12] United States v. Miller, 318 F.2d 637 (7th Cir. 1963), is superficially out of harmony with these decisions. However, here the appellant, although not formally served, had twenty-three days notice of the pending motion. Moreover, the appellant was actually present at the hearing.

The hearing in the principal case, like that in *Bowdidge* and *Enochs,* was held less than ten days after notice of the time of hearing. More important, it was held in contravention of Rule 56(c), less than ten days after notice of the motion. However, the Ninth Circuit Court of Appeals did not mention these issues, but rather rested its decision on the broader ground of the need for flexibility and reasonableness in the interpretation of procedural rules.

Motions to Amend Pleadings — Rule 15(b)

Slavitt v. Kauhi[1] is a decision in harmony with the spirit of prior Ninth Circuit law, and with federal law generally, but perhaps contrary to one of the court's earlier decisions. It is noteworthy because of the great liberality shown in allowing amendment of the pleadings to conform with the evidence.[2] The first amended complaint alleged that either the doorkeeper or manager of a second-story cocktail lounge "violently, wantonly and maliciously"[3] assaulted the plaintiff, a patron at the lounge, apparently by throwing him down the stairs. The evidence, however, clearly showed that the plaintiff was belligerent and very drunk, that only the manager was involved, and that the manager had not pushed the plaintiff down, but had merely led him to the top of the stairs and left him there alone. The plaintiff, being too drunk to descend safely, then fell down the stairs.

The plaintiff asked leave to amend his complaint to include an alternative ground of negligence. The district court granted leave, but subsequently reversed itself, and refused to allow instructions concerning a bar operator's duty of reasonable care to his patrons, or giving a definition of negligence. The court of appeals held that, although leave to amend is normally within the discretion of the trial court, Rule 15(a) requires that leave be "freely given," and that refusal in the circumstances of this case was an abuse of discretion.

The cases cited in the court's opinion indicate that the Ninth Circuit has previously followed a liberal policy, but none of them is

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[1] 384 F.2d 530 (9th Cir. 1967).

[2] FED. R. CIV. P. 15(b):
Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[3] Slavitt v. Kauhi, 384 F.2d 530, 532 (9th Cir. 1967).

directly in point.[4] The only case among those cited that allowed amendment in a negligence action is *Stiles v. Gove*,[5] and it is different from the principal case in two important respects. *Stiles* was apparently brought in negligence in the first place, and the complaint was amended only to "greatly enlarge the issues."[6] Moreover, it is not a case in which the court of appeals reversed the district court's refusal to give leave to amend, but rather one in which the appellate court approved the trial court's granting of leave.

In *Heay v. Phillips*,[7] a case not cited by the court, a more significant amendment (from contract theory to negligence theory) was allowed. Again, however, the amendment was allowed by the trial court, and the result merely affirmed by the court of appeals.

United States v. Cushman[8] and *Shelley v. Union Oil Co.*[9] were not, strictly speaking, "amendment of pleadings" cases, but were decided under the provision of Rule 15(b) that "failure . . . to amend does not affect the result of the trial of issues" raised by evidence presented without objection. However, the principle is obviously the same. These two cases allowed the issues of fraud and contributory negligence to be tried, although those issues were not raised in the pleadings. Although the courts' rulings were as liberal as the decision in the instant case, it should be noted that the court merely affirmed rulings made within the discretion of the trial court.

Moreover, *Slavitt* is probably in harmony with *Foman v. Davis*,[10] the United States Supreme Court decision most nearly in point. The district court, when an allegedly breached contract was shown to be unenforceable under the Statute of Frauds, refused leave to amend and assert a right of recovery in quantum meruit. The Court of Appeals for the First Circuit affirmed.[11] The Supreme Court reversed, holding that the district court had abused its discretion in refusing to permit the plaintiff to amend its complaint.

Although this action was originally in contract, rather than in tort, the *Foman* and *Slavitt* cases have at least three elements in common. In both, the holdings allowed the plaintiff to change his theory of recovery; in both, the defendant would have to produce different evidence

[4] Stiles v. Gove, 345 F.2d 991 (9th Cir. 1965); Rosenberg Bros. v. Arnold, 283 F.2d 406 (9th Cir. 1960); Northwest Orient Airlines v. Gorter, 254 F.2d 652 (9th Cir. 1958); Kirk v. United States, 232 F.2d 763 (9th Cir. 1956); Glens Falls Indem. Co. v. United States, 229 F.2d 370 (9th Cir. 1955); Shelley v. Union Oil Co., 14 Alas. 287, 203 F.2d 808 (9th Cir. 1953); United States v. Cushman, 136 F.2d 815 (9th Cir.), *cert. denied*, 320 U.S. 786 (1943).

[5] 345 F.2d 991 (9th Cir. 1965).

[6] The opinion does not quote or refer directly to the original complaint.

[7] 14 Alas. 132, 201 F.2d 220 (9th Cir. 1952).

[8] 136 F.2d 815 (9th Cir), *cert. denied*, 320 U.S. 786 (1943).

[9] 14 Alas. 287, 203 F.2d 808 (9th Cir. 1953).

[10] 371 U.S. 178 (1962).

[11] 292 F.2d 85 (1st Cir. 1961).

to contest the amended complaint; and in both, an actual abuse of discretion was found. However, *Foman* was decided under Rule 15(a), which provides that leave to amend "shall be freely given when justice so requires." Clearly, justice required that the quantum meruit count be allowed. Slavitt, on the other hand, was decided under Rule 15(b), which does not precisely cover the facts of the case. The relevant portion of Rule 15(b) reads:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended, and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

The defendant did not object to the introduction of evidence of negligence, but apparently the district court was itself satisfied "that the admission of such evidence would prejudice [the defendant] in maintaining his . . . defense upon the merits." Evidence of the manager leading the drunken plaintiff to the top of the stairs would clearly be prejudicial in a negligence action. It is equally clear that the defendant gave the evidence without notice of a negligence claim against him. In holding that the district court's decision was an abuse of discretion, the Ninth Circuit Court of Appeals has applied Rule 15(b) very liberally in favor of the plaintiff.

Jurisdiction in Dual Territorial Court System and Pretrial Procedure — Rule 16

Untalan v. Calvo[1] presents theoretical problems concerning the sources of jurisdictional power in territorial courts, and also the practical question of the limits of a judge's discretion in pretrial proceedings. Unfortunately, neither the record before the court on appeal nor the reported opinion are complete enough to facilitate full understanding of what was decided. Because of this incompleteness, and because of space limitations, the broad theoretical problem of the nature of "legislative" as opposed to "constitutional" courts, and the possibility of "hybrid" courts will not be discussed.[2]

The administrator of two estates filed a complaint in the district court for Guam for a dissolution of two partnerships, and for account-

[1] 381 F.2d 228 (9th Cir. 1967).

[2] If the Ninth Circuit were to consider whether the district court of Guam is a "legislative" or "hybrid" court, its past decisions indicate that it would hold the Guam court to be "legislative." The former District Court of the Territory of Alaska which, like the Guam court had a dual capacity as a court of general jurisdiction and as administrator of federal laws, was held to be a "legislative" court. Carscadden v. Territory of Alaska, 105 F.2d 377 (9th Cir. 1939); *In re* Annexation of Slaterville, 83 F. Supp. 661 (D. Alas. 1949).

ings.[3] One intestate had been a partner in the first partnership,[4] and the second intestate had been a partner in another partnership. The circumstances of both partnerships were set forth in separate counts in the complaint. Other original partners were also deceased and the only survivor, who was an inactive partner in both, refused to take any action on the dissolution and accounting. Both businesses were being managed by defendants, the heirs and administrators of one of the other original partners. The assets of each partnership were alleged to be more than the $2,000 necessary to give the district court jurisdiction.[5]

The defendants moved to dismiss both Count I, concerning the first partnership, and Count II, concerning the second partnership. The trial judge ruled that since the partnership agreement of the first partnership specified that in the event of death each party "bequeaths and assigns" his interest to his wife and children, the first partner's heirs must be joined as parties plaintiff. He gave leave to amend Count I and denied the motion to dismiss Count II.

Defendants answered Count II, pleading laches and the statute of limitations.[6] Plaintiffs amended Count I by joining the additional plaintiffs. Before defendants had answered Count I, and before plaintiffs had served the involuntary plaintiffs,[7] defendants moved for summary judgment on both counts, on the ground that the statute of limitations had run. At the hearing on the motion, the court made no ruling, but ordered a pretrial conference at a later date. Before the conference, defendants answered the amended Count I, again pleading "laches and limitations."

The record did not contain a transcript of the pretrial conference but the court of appeals thought it clear that the involuntary plaintiffs were not represented by counsel. The court nevertheless stated in its pretrial order that laches and the statute of limitations barred their claim. The court then ordered the action transferred to the Island Court sitting in probate, with provision for re-transfer to the district court if the Island Court should authorize a claim for dissolution and accounting.

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[3] Since the fact situation is very complicated, only those facts directly relevant to the issues discussed here will be given.

[4] Possibly he was also a partner in the second partnership. Untalan v. Calvo, 381 F.2d 228, 229 (9th Cir. 1967).

[5] The Island Court of Guam has original jurisdiction "In actions for dissolution of partnership where the total assets of the partnership do not exceed $2,000." GUAM CODE CIV. PROC. § 82(5) (1953). The Island Court, and the limits of its jurisdiction were established by the Legislature of Guam pursuant to 48 U.S.C. § 1424 (1964). This statute provides:

> The District Court of Guam shall have the jurisdiction of a district court of the United States . . . [and] shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it . . . .

[6] GUAM CIV. CODE §§ 2424, 2425(4), 2437 (1953).

[7] They had moved to the United States.

The court of appeals reversed, holding that the district court did have jurisdiction, and that it had the duty to render a decision in a case properly before it. It stated further:

> Nothing appears in the record or Code of Civil Procedure of Guam which can justify the action of the district court in arbitrarily transferring the case to the Probate Court of Guam, nor can there be any condonation of such disposition before the involuntary plaintiffs were served with process and allowed to answer in the action.[8]

If it were entirely clear that the district court had jurisdiction of the claim, the court of appeal's holding would be inescapable. Precedent is ample for such propositions as: the pretrial conference may not take the place of a regular trial;[9] the pretrial conference is not intended to serve as a substitute for a regular trial and no determination of factual issues should be made;[10] and, the pretrial conference is not appropriate before disposition of all motions directed to amended pleadings.[11] There is also district court authority within the Ninth Circuit for another proposition more closely in point: the pretrial conference should not dispose of jurisdictional issues, since they are always before the court and may be ruled upon at the trial.[12]

Nevertheless, examination of Guam's Code of Civil Procedure and Probate Code reveals that the district court's transfer of the action to the Island Court was not as "arbitrary" as it first appears. Although the Guam legislature gave the Island Court original jurisdiction in actions for dissolution of partnership only where the assets do not exceed $2,000,[13] it gave that court *probate* jurisdiction in plenary terms. The Island Court has exclusive original jurisdiction:

> In all proceedings under the laws of Guam for the probate of wills, . . . and the *administration*, settlement and distribution of estates of decedents . . . .[14]

The district court could have considered this provision to be controlling, and exclusive original jurisdiction to be in the Island Court.

If the two statutory sub-sections stood alone, there might be some difficulty deciding which provision were "narrower," and therefore, under the well-known rule of statutory construction, controlling. If there were no other considerations, the district court's discretion could be questioned. However, to decide the issue, the provisions must be read

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[8] Untalan v. Calvo, 881 F.2d 228, 231 (9th Cir. 1967).
[9] Berger v. Brannan, 172 F.2d 241 (10th Cir.), *cert. denied*, 337 U.S. 941 (1949).
[10] Lynn v. Smith, 281 F.2d 501 (3d Cir. 1960).
[11] Spampinato v. M. Breger & Co., 176 F. Supp. 149 (E.D.N.Y. 1958), *aff'd*, 270 F.2d 46 (2d Cir. 1959), *cert. denied*, 361 U.S. 944 (1960).
[12] Delzell v. Raver, 97 F. Supp. 893 (D. Ore. 1946).
[13] GUAM CODE CIV. PROC. § 82(2) (1953).
[14] GUAM CODE CIV. PROC. § 82(3) (1953) (emphasis added).

in conjunction with detailed provisions of the Probate Code.[15] This Code clearly shows that the Guam legislature intended administrators' actions for dissolution of partnership (where the decedent had been a partner) to be brought in the local Island Court sitting in probate. Section 571 of the Probate Code provides specifically:

> Upon application of the . . . administrator, the court or a judge thereof, whenever it appears necessary, may order the surviving partner to render an account, and in case of neglect or refusal may, after notice compel it by attachment . . . .

The Probate Code also provides other more generally applicable procedures to facilitate the administrator's enforcement of a claim of this type: a procedure for inventory and appraisal,[16] a procedure for presentation of claims,[17] a procedure for partition before distribution,[18] and procedures for ratable and final distribution.[19] Moreover, rights of parties not before the court in these proceedings are protected: at any time before the estate is closed, persons claiming to be heirs may petition the court and ask for a determination of those entitled to distribution of the estate.[20] As a final safeguard, orders issuing as a result of all procedures mentioned above are appealable to the district court.[21]

If these were the only relevant Guam statutes, it is arguable that the district court should have simply dismissed for lack of jurisdiction. However, another statute is certainly relevant to, and possibly determinative of the proper procedure. After stating that the district court has federal jurisdiction, and original jurisdiction over all other causes not "transferred" to the Island Court,[22] the Code also provides:

> If it appears that an action or proceeding brought in the District Court is actually within the jurisdiction of the Island Court the District Court shall transfer it to the Island Court for hearing and determination.[23]

If this transfer provision is binding on the district court, and if the pretrial conference is a proper occasion for a ruling on the jurisdictional issue, then the district court's disposition of the case was not only not arbitrary, but entirely proper.

The transfer provision probably is binding on the district court. A similar certification procedure is binding on the District Court for the

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[15] GUAM PROB. CODE (1953).
[16] *Id.* §§ 600-611.
[17] *Id.* §§ 700-719.
[18] *Id.* §§ 1100-1106.
[19] *Id.* §§ 1010-1025.
[20] *Id.* §§ 1080-1082. It will be seen, therefore, that the plaintiffs unrepresented by counsel would not be unduly prejudiced by a transfer of the action to the Island Court.
[21] *Id.* § 1240.
[22] GUAM CODE CIV. PROC. § 62 (1953).
[23] *Id.*

District of Columbia.[24] This District of Columbia court is analogous to the Guam district court because it possesses both federal and general jurisdiction, and because its general jurisdiction is limited by local legislation embodied in the District of Columbia Code.[25] Such local legislation governs when the court is sitting as a court of general jurisdiction.[26] If local legislation can govern the procedure of a "constitutional" district court of the United States when it is sitting as a "legislative" court of general jurisdiction,[27] a fortiori local legislation should be able to govern what is probably a purely "legislative" court.[28]

It might be argued, in opposition to this conclusion, that the local legislation providing for limited jurisdiction and transfer of claims from the District of Columbia court is Congressional legislation, having equal force with the legislation creating the district court itself.[29] On the other hand, the argument would continue, the transfer provision for the Guam district court is only local Guam legislation, and the Congressional legislation provides only for creation of the court and power in the Guam legislature to limit its jurisdiction.[30] There is no *Congressional* legislation authorizing transfer.

To this argument the answer must be, first, that when Congress gave authority to the Guam legislature to "transfer" jurisdiction to "other . . . courts established by it,"[31] this autority could reasonably be construed as implying the power to provide for "transfer" of cases when jurisdiction was lacking. Secondly, the Guam legislature did so construe the Congressional authorization,[32] and Congress impliedly ratified the construction by twice amending the authorizing statute[33] *after* the Guam legislature had provided for transfer without repudiating the legislature's power to create the provision.[34]

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[24] D.C. CODE ANN. § 11-962 (1967). The immediate precursor of this section was D.C. CODE ANN. § 11-756 (1961), of which the essential elements date back to 1942, D.C. CODE ANN. § 11-756 (1942). The current statute provides for transfer to the District of Columbia Court of General Sessions:

> where it appears to the satisfaction of the court *at or subsequent to any pretrial hearing* but prior to trial thereof that the action will not justify a judgment in excess of $10,000, the court may certify the action to the District of Columbia Court of General Sessions for trial. D.C. CODE ANN. § 11-962 (1967).

The italicized language was not included in earlier versions of the statute, but a decided case had held the pretrial hearing to be a suitable proceeding at which to rule on jurisdiction and to order transfer. Gray v. Evening Star Newspaper Co., 277 F.2d 91 (D.C. Cir. 1960).

[25] D.C. CODE ANN. § 11-961 (1967).

[26] Fehlhaber Pile Co. v. Tennessee Valley Authority, 155 F.2d 864 (D.C. Cir. 1946).

[27] O'Donoghue v. United States, 289 U.S. 516 (1933); Glidden v. Zdanok, 370 U.S. 530 (1962) (dictum).

[28] *See* p. 243 & n.2 *supra.*

[29] 28 U.S.C. § 88 (1964).

[30] 48 U.S.C. § 1424 (1964).

[31] *Id.*

[32] GUAM CODE CIV. PROC. § 62 (1953).

[33] 48 U.S.C. § 1424 (1964).

[34] 48 U.S.C. § 1424 was amended Aug. 2, 1954, ch. 1017, § 1, 68 Stat. 882, and June 4, 1958, Pub. L. 85-444, §§ 1, 2, 72 Stat. 178.

If this argument is accepted, the only reason to reverse the transfer order would be a finding that a pretrial conference is not the proper occasion to rule on jurisdictional matters. As noted previously, one case has held that such a ruling would be improper.[35] More closely analogous, since the issue was whether to transfer from the District of Columbia district court to the municipal court, is *Gray v. Evening Star Newspaper Co.*[36] The Court of Appeals for the District of Columbia Circuit held that although the district court could not *weigh* evidence at the pretrial conference, if the court was nevertheless satisfied the action could not justify a judgment in excess of the jurisdictional amount, it was not an abuse of discretion to transfer it to the municipal court. What the Guam district court apparently decided, that the provision for probate jurisdiction in the Island Court[37] governs over the provision for district court jurisdiction in certain actions for the dissolution of partnerships, is a matter of law rather than of evidence. Therefore the Guam district court's decision to transfer to the Island Court should not be an abuse of discretion.

ENTRAPMENT

Burden of Proof

In *Sorrells v. United States*[1] the Supreme Court held, *inter alia,* that the issue of entrapment was for the jury rather than the court. The federal courts have been faced with the difficult problem of determining the quantum and allocation of the burden of proof applicable in entrapment cases, and of formulating suitable jury instructions.[2]

It is difficult to ascertain any generally accepted rule concerning allocation of the burden of production and persuasion in entrapment cases.[3] Several circuits follow the view that once inducement to commit the crime is shown, the government has the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the crime.[4] Other circuits, although placing the burden upon the govern-

[35] Delzell v. Ravel, 97 F. Supp. 893 (D. Ore. 1946).
[36] 277 F.2d 91 (D.C. Cir. 1960).
[37] GUAM CODE CIV. PROC. § 82(3) (1953).

[1] 287 U.S. 435 (1932). A five-to-four majority in *Sherman v. United States,* 356 U.S. 369 (1958), adhered to the position that entrapment should be an issue for the jury.

[2] *See generally* DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application,* 1 U. SAN. FRAN. L. REV. 243 (1967); Comment, *Entrapment in the Federal Courts,* 1 U. SAN. FRAN. L. REV. 177 (1966); Note, *Entrapment,* 73 HARV. L. REV. 1333 (1960).

[3] *See* Note, *Entrapment,* 73 HARV. L. REV. 1333, 1344 (1960); 45 TEX. L. REV. 578, 580 (1967).

[4] Martinez v. United States, 373 F.2d 810, 812 (10th Cir. 1967) (when the defense of entrapment is raised the burden is on the government to prove beyond a reasonable doubt that the entrapment did not occur); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966); Waker v. United States, 344 F.2d 795, 796 (1st Cir. 1965) (once inducement is shown the burden is on the government to prove predisposition

ment, fail to specify the quantum of proof required.[5] The Model Penal Code requires the defendant to prove entrapment by a preponderance of the evidence.[6] The rationale for placing the entire burden on the defendant is that the accused is assuming the role of plaintiff when he asks to be relieved of the consequences of his guilt by objecting to police tactics.[7] One commentator advocates the intermediate position of requiring the defendant to plead and prove the improper inducement (invitation to criminal activity) and requiring the prosecution to prove by a preponderance of the evidence the defendant's predisposition to commit the offense.[8] Forcing the government to disprove inducement would be forcing it to demonstrate a negative.[9]

In *Notaro v. United States*[10] the Ninth Circuit concluded that the defense of entrapment requires a two step approach. First, the issue of entrapment must fairly arise either by presentation of the prosecution's case or by testimony that defendant was induced to commit the offense. The defendant is not required to prove inducement and may meet his minimal burden by showing that the issue of entrapment exists in the case. Second, if the trial judge determines that the issue of entrapment has arisen, the issue is submitted to the jury and it becomes the prosecutor's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense. The prosecution may show by an inquiry into the defendant's record of past conduct that he was predisposed to commit the crime and was not an otherwise innocent person who would not have committed the crime but for the inducement. Alternatively, the prosecution may attempt to prove that no inducement occurred. However, in proving non-inducement the prosecution faces the difficult task of demonstrating a negative. A preferable approach would be to require the defendant to plead and prove the inducement.[11]

Allocating the burden of proof of entrapment in instructions to the jury has recently raised issues in the Ninth Circuit. In *Notaro*,[12] the jury instructions on entrapment were held to be defective because they were so vague and ambiguous as to permit the jury to misinterpret the

beyond a reasonable doubt); United States v. Armstrong, 339 F.2d 1015 (7th Cir. 1964); United States v. Cooper, 321 F.2d 456 (6th Cir. 1963); United States v. Landry, 257 F.2d 425 (7th Cir. 1958).

[5] United States v. Jones, 360 F.2d 92, 96 (2d Cir. 1966); United States v. Pugliese, 346 F.2d 861 (2d Cir. 1965); Hansford v. United States, 303 F.2d 219, 224 (D.C. Cir. 1962); United States v. Sherman, 200 F.2d 880 (2d Cir. 1952).

[6] MODEL PENAL CODE § 2.13 (2) (Proposed Official Draft, 1962).

[7] MODEL PENAL CODE § 2.10 (2), Comment (Tent. Draft No. 9, 1959).

[8] Note, *Entrapment*, 73 HARV. L. REV. 1333, 1344 (1960).

[9] *Id.*

[10] 363 F.2d 169 (9th Cir. 1966).

[11] *See* Note, *Entrapment*, 73 HARV. L. REV. 1333, 1344 (1960). *But see* 45 TEX. L. REV. 578, 584 (1967) (the possibility of abusive police tactics and governmental control of the evidentiary situation lead to the conclusion that the government should bear the entire burden).

[12] 363 F.2d 169 (9th Cir. 1966).

allocation of the burden and quantum of proof. The court ruled that general instructions which properly informed the jury of the prosecution's burden of proof did not remedy the defect. *Notaro* does not require that the jury instruction on the entrapment issue contain an allocation of the burden of proof but rather that an instruction on allocation, if given, must be clear and not subject to misinterpretation.

In *Robinson v. United States*[13] the Ninth Circuit upheld the trial court's refusal to give an instruction specifically allocating the burden of proof on entrapment. The court concluded that the instructions on entrapment, although in most respects substantially the same as in *Notaro*, contained no suggestion of possibly different standards of proof with respect to the entrapment issue and that the jury had been adequately advised in general terms of the prosecutor's burden. In *Pratti v. United States*[14] the court struck down an instruction on entrapment which was substantially the same instruction that was given in *Notaro* except that it did not refer to the burden of proof, because as in *Notaro*, the instruction may have confused the jury as to the allocation of burden of proof. In *Nordeste v. United States*,[15] the Ninth Circuit ruled that the trial court's instruction was correct and sufficient although it lacked allocation of the burden of proof, because the court had instructed the jury generally on burden of proof as part of the over-all instructions. The decision was based partially on the fact that since entrapment was the only issue, the general instructions on burden of proof could have applied only to that issue. It is significant that the court also concluded that specific burden of proof instructions on entrapment are required only when the record presents a close question on that particular issue. *Nordeste* indicates that in the future the Ninth Circuit may *require* specific instruction on burden of proof where the entrapment issue presents a close question.

The Ninth Circuit has indicated,[16] in accordance with most commentators,[17] that the issue of entrapment *should* be resolved by the court as part of its supervisory authority over the administration of criminal justice in the federal courts.[18] However, unless the Supreme Court alters its present position, entrapment will remain as an issue for the jury in the federal courts. An alternative solution might be to apply the test utilized in Massachusetts to determine voluntariness of con-

[13] 379 F.2d 338 (9th Cir. 1967), *vacated on other grounds*, 88 S. Ct. 903 (1967).
[14] 389 F.2d 660 (9th Cir. 1968).
[15] No. 21,294 (9th Cir. April 4, 1968).
[16] Robison v. United States, 379 F.2d 338, 346 (9th Cir. 1967).
[17] *See, e.g.*, MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962); Comment, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967); Comment, *Entrapment in the Federal Courts*, 1 U. SAN. FRAN. L. REV. 177 (1966). *But see* Comment, *Entrapment*, 73 HARV. L. REV. 1333, 1344 (1960) (widely divergent versions of the facts as is usually the case in entrapment can best be weighed by twelve jurors).
[18] *See* McNabb v. United States, 318 U.S. 332 (1943).

fessions.[19] This test requires the trial judge to consider conflicting evidence regarding the voluntariness of the confession, to draw a conclusion as to voluntariness, and to admit only those confessions which he deems voluntary. The jury then makes its own determination of voluntariness. By analogy, the trial judge would make a preliminary determination of entrapment. The issue would be submitted to the jury only if the trial judge determined that there had not been an entrapment.

The suggested approach would allow the court to formulate standards for police conduct without depriving the defendant of a jury determination of his claim. The difficulty with the approach is that in close cases judges may leave the determination of the entrapment issue with the jury by routinely finding no entrapment.

Inconsistent Defenses

Where the defendant maintains that he did not commit the crimes charged, the defense of entrapment is not available. In *Rios-Ramirez v. United States,*[20] a per curiam opinion, the Ninth Circuit reaffirmed this rule, one which it has consistently followed.[21] The court reasons that it is logically inconsistent to say, "I didn't do it, but if I did, I was entrapped."[22] The Ninth Circuit is the most avid proponent of this rule. The court has not, however, attempted to support its position except to say the defenses are inconsistent. Some circuits agree with the Ninth,[23] but at least three allow the accused to put the government to its proof and still rely on the defense of entrapment,[24] and a few more appear ready to adopt this position.[25] The Supreme Court has not ruled on this specific point.

The dilemma is obvious: the defendant must relinquish his right to have the government meet its burden of proof if he decides to rely on entrapment. Conversely, if the defendant denies committing the crimes charged, he is precluded from establishing a violation of his right to be

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[19] *See* Jackson v. Denno, 378 U.S. 368 n.8 (1964).

[20] 386 F.2d 831 (9th Cir. 1967).

[21] *E.g.*, Ortiz v. United States, 358 F.2d 107 (9th Cir. 1966); Ortega v. United States, 348 F.2d 874 (9th Cir. 1965); Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961).

[22] Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961).

[23] United States v. Carter, 326 F.2d 351 (7th Cir. 1963); Sylvia v. United States, 312 F.2d 145 (1st Cir. 1963). *But see* McCarty v. United States, 379 F.2d 285 (5th Cir. 1967); Scriber v. United States, 4 F.2d 97 (6th Cir. 1925).

[24] Sears v. United States, 343 F.2d 139, 143 (5th Cir. 1965) ("A criminal defendant should not forfeit what may be a valid defense, nor should the court ignore what may be improper conduct by law enforcement officers merely because the defendant elected to put the government to its proof."); Hansford v. United States, 303 F.2d 219, 221 (D.C. Cir. 1962) ("It was consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment."); Crisp v. United States, 262 F.2d 68, 70 (4th Cir. 1958) ("We think it perfectly proper to allow a criminal defendant to submit to a jury alternative defenses.").

[25] *See* Kibby v. United States, 372 F.2d 598 (8th Cir. 1967); United States v. Bishop, 367 F.2d 806 (2d Cir. 1966).

free from illegal police activity.[26] Moreover, if the defendant does raise entrapment as a defense, the prosecution is entitled to introduce evidence of a very prejudicial character in order to show his predisposition to commit the crime.[27]

The Supreme Court has acted in other areas where the exercise of one right was conditioned on the relinquishment of another.[28] Since the real basis for the defense is that reprehensible conduct of the police in inducing the commission of a crime cannot be rewarded,[29] such conduct should not escape scrutiny merely because a defendant exercises his right to be presumed innocent and require the prosecution to prove its case beyond a reasonable doubt.

HABEAS CORPUS

Discovery

In *Wilson v. Harris*[1] the Ninth Circuit held that discovery interrogatories provided for by Rule 33 of the Federal Rules of Civil Procedure are not available in habeas corpus proceedings. Although the *Harris* opinion is limited to the use of discovery interrogatories, a broad interpretation of its language might represent a serious impediment to the use of *any* of the Federal Rules in such proceedings. By its holding the court overruled sub silentio the prior Ninth Circuit district court decision in *Knowles v. Gladden*,[2] which had reached an opposite result.

In *Harris* the prisoner applied for a writ of habeas corpus, alleging that his conviction had been based upon illegally seized evidence. Pursuant to Rules 26 and 33, his attorney served interrogatories on the warden of the state prison, seeking to discover information concerning

[26] *See generally* DeFeo, *Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U. SAN. FRAN. L. REV. 243 (1967); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, And Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Orfield, *The Defense Of Entrapment In The Federal Courts*, 39 DUKE L.J. 39 (1967); Comment, *Entrapment In The Federal Courts*, 1 U. SAN. FRAN. L. REV. 177 (1966).

[27] *E.g.*, Demos v. United States, 205 F.2d 596 (5th Cir. 1953) (prior federal convictions); Carlton v. United States, 198 F.2d 795 (9th Cir. 1952) (prior misdemeanor convictions in a felony prosecution); Strader v. United States, 72 F.2d 589 (10th Cir. 1934) (statements of other addicts).

[28] *E.g.*, Simmons v. United States, 88 S. Ct. 967 (1968) (a defendant's right against self-incrimination forbids use at trial of his testimony given in support of a pre-trial motion to suppress evidence seized in violation of his rights against unreasonable search and seizure); Jones v. United States, 362 U.S. 257 (1960) (where possession establishes the crime charged, the defendant does not have to claim an interest in the property to have standing to object to an illegal search and seizure).

[29] The theoretical basis for the entrapment defense is a matter of dispute. The leading cases on the subject, *Sherman v. United States*, 356 U.S. 369 (1958) and *Sorrells v. United States*, 287 U.S. 435 (1932) did not adopt the "police conduct" basis for the entrapment defense. *But see* Mr. Justice Frankfurter's concurring opinion in *Sherman*, the separate opinion of Mr. Justice Roberts in *Sorrells*, and the authorities cited note 26 *supra*.

[1] 378 F.2d 141 (9th Cir. 1967).

[2] 254 F. Supp. 643 (D. Ore. 1965).

the reliability of the state's informant. The district court overruled the warden's objection that the interrogatories were not authorized in habeas corpus proceedings. The warden then successfully brought a petition, in the nature of prohibition or mandamus,[3] to have the order of the district court set aside.

The Ninth Circuit stated that the Federal Rules apply in habeas corpus proceedings only to the extent permitted by Rule 81(a)(2),[4] which provides that the Rules are applicable in enumerated proceedings, including habeas corpus, only if *both* of the following conditions are met: (1) the procedure sought to be applied is not otherwise provided for by statute, and (2) the procedure conforms to procedures allowed in either law or equity prior to the Rules. The prisoner contended that since habeas corpus proceedings are civil in nature and since interrogatories were available in civil proceedings prior to the Rules, they must have been available in habeas corpus proceedings. The court dismissed this argument, saying that nothing short of a showing that interrogatories had *actually* been used in habeas corpus proceedings prior to the effective date of the Rules[5] would serve to satisfy the second condition of 81(a)(2).

Although failure to meet either of the two conditions in 81(a)(2) would be sufficient to decide the case, the court also considered whether the use of interrogatories would satisfy the first condition. The only applicable statute is 28 U.S.C. § 2246,[6] which authorizes the use of depositions in habeas corpus proceedings for the purpose of obtaining evidence. The court stated that it was reasonable to assume that Congress meant "depositions" to include written interrogatories. However, the court concluded that it was clear that the depositions authorized therein may be used only for obtaining admissible evidence and not for general discovery purposes.

There are three other relatively recent cases that consider whether discovery interrogatories are available in habeas corpus proceedings;[7]

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[3] 28 U.S.C. § 1361 (1964).

[4] Rule 81(a)(2) reads:

> (2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus and quo warranto.

[5] September 16, 1938.

[6] Section 2246 reads:

> On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

[7] Schiebelhut v. United States, 318 F.2d 785 (6th Cir. 1963) (held that a proceeding under 28 U.S.C. § 2255 was a civil proceeding, with Rules 33 and 37(d) applicable); Knowles v. Gladden, 254 F. Supp. 693 (D. Ore. 1965) (allowed interrogatories in habeas corpus proceeding); Sullivan v. United States, 198 F. Supp. 624 (S.D.N.Y. 1961) (did not allow interrogatories in 28 U.S.C. § 2255 proceeding).

with the decision in *Harris* the cases are now evenly divided, two holding that discovery rules are applicable and two holding that they are not. The statute relied on, 28 U.S.C. § 2246, provides that upon application for habeas corpus evidence may be taken orally or by deposition. Both *Harris* and *Sullivan vs. United States*[8] construed the statute narrowly, concluding that it could not have been Congress' intent to allow the use of depositions for general discovery purposes in habeas corpus proceedings and that they could be used only for obtaining evidence.

This construction is contrary to the general meaning given "depositions" by the Rules themselves,[9] which provide that depositions are available for either evidentiary or discovery purposes. This broad interpretation of the word deposition was recognized by the Oregon district court in *Knowles*, which reached the opposite result in applying the same statute. *Knowles* held that since the term "deposition" has a well-defined technical meaning under the Rules it is reasonable to assume that Congress had this technical meaning in mind when it enacted § 2246. Since the Rules do not distinguish depositions for trial and depositions for discovery, the *Knowles* court felt that no differentiation should be imputed to Congress' use of the word.[10]

In light of the reasoning in *Knowles*, it is not at all clear that discovery depositions are not statutorily authorized in habeas corpus proceedings. Perhaps the reason the *Harris* court did not cite *Sullivan* although it relied on the identical reasoning, is that the arguments of *Sullivan* were persuasively rebutted in *Knowles*. Moreover, the recognition of the weakness of *Sullivan* may have prompted the court to go further by demonstrating petitioner's inability to comply with the second requirement of Rule 81(a)(2).

It is its unique interpretation of the second condition of 81(a)(2) that makes *Harris* noteworthy. In holding that there must be a showing that interrogatories *actually* had been used in habeas corpus proceedings prior to the effective date of the Rules, the court does more than preclude the use of interrogatories. It also places a restriction on the availability of any of the Rules in habeas corpus proceedings. Some courts have applied the Rules to habeas corpus, and other proceedings enumerated in 81(a)(2), by stating that the proceedings were civil in nature and therefore the Rules were applicable.[11] Another court applied the Rules simply by citing Rule 81(a)(2),[12] but without discussing its two re-

[8] 198 F. Supp. 624 (S.D.N.Y. 1961).

[9] FED. R. CIV. P. 26; *see* Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); 4 J. MOORE, FEDERAL PRACTICE ¶ 26.05 (2d ed. 1948); 4 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE ¶ 641 (Wright ed. 1960).

[10] 254 F. Supp. 643, 644 (D. Ore. 1965).

[11] Lyles v. Beto, 32 F.R.D. 248 (D. Tex. 1963); Estep v. United States, 251 F.2d 579 (5th Cir. 1958).

[12] United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962).

quirements. The question of satisfying the second condition was not mentioned in *Knowles*, perhaps because the court considered it a foregone conclusion that the Rules were applicable once the first condition had been met.

None of the cases which have previously applied the Rules to habeas corpus proceedings have mentioned the requirement of showing that the practice in question actually had been used in habeas corpus proceedings prior to promulgation of the Rules.[13] It is improbable that such a showing could have been made in most cases. For example, in *United States ex rel. Seals v. Wiman*[14] the court allowed the use of Rule 36, Requests for Admissions, in a habeas corpus proceeding even though, because of the nature of the Rule, it probably could not have been shown that such procedure had been employed prior to 1938. One reason for the lack of evidence of prior usage is that the majority of habeas corpus proceedings are reported per curiam; another reason is that many of the Rules relate to pre-trial practice and are rarely alluded to in reported cases. Although *Harris*, because of its novel approach to the second condition of 81(a)(2), is a stronger case than *Sullivan*, it is possible that its holding could seriously restrict the future use of any of the Rules in habeas corpus proceedings.

Although the reasoning of *Knowles* is persuasive on the narrow problem of the availability of discovery devices in habeas corpus proceedings, perhaps the result is impractical. If unlimited discovery were allowed in habeas corpus proceedings, law enforcement officials might be inundated with demands for information. Thus, while the reasoning in *Harris* is less compelling than that in *Knowles*, the result pragmatically may be correct. One solution might be to amend the deposition and discovery Rules to clearly delineate their applicability to habeas corpus proceedings.[15] While such an amendment to the discovery rules would solve the narrow issue presented by *Harris*, the Ninth Circuit's strict interpretation of the second condition of 81(a)(2) poses a more difficult problem. As pointed out above, if the court's strict reading of this condition is correct, the availability of many of the Rules would be in doubt. Perhaps one reason that the problem has not been presented before is that most courts seem to ignore 81(a)(2).[16] A

[13] Rule 15 (amendments), United States v. Harpole, 249 F.2d 417 (5th Cir. 1957); Rule 36 (request for admissions), United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962); Rule 45 (subpoenas), Lyles v. Beto, 32 F.R.D. 248 (D. Tex. 1963); Rule 56 (summary judgment), *In re* McShane's Petition, 235 F. Supp. 262 (D. Miss. 1964); Rule 59 (application of deposits), Hunter v. Thomas, 173 F.2d 810 (10th Cir. 1949).

[14] 304 F.2d 53 (5th Cir. 1962).

[15] The amendments to the deposition and discovery Rules as currently proposed do not consider this problem.

[16] The availability of the Rules under 81(a)(2), while by no means clearly established, is recognized in *Bodie v. Weakley*, 356 F.2d 242 (4th Cir. 1966). One

possible solution would be to amend Rule 81 to state exactly which Rules are available in the enumerated proceedings, and to what extent.

JOINT TRIALS

Co-defendant's Confession

In three cases decided during 1967, the Court of Appeals for the Ninth Circuit upheld the use of joint trials for co-defendants in instances where a confession or admission made by one defendant, admissible as evidence against him but not against the others, was admitted in evidence.[1]

In *Amsler v. United States* and *Bates v. Wilson* there were confessions by co-defendants which implicated the respective defendants. In both cases the trial court instructed the jury that the confession could be considered only in determining the guilt or innocence of the declarant, and that any statements implicating another defendant were to be disregarded.[2] *Morgan v. United States* involved a guilty plea of a co-defendant made during the trial in the presence of the jury. The court instructed the jury that they should not consider the fact that the confessing co-defendant was no longer on trial when determining the guilt or innocence of the other defendant.[3] In all three cases the Ninth Circuit upheld the action taken by the trial court on the grounds that the court's exercise of its discretion to grant or deny a severance under Federal Rule of Criminal Procedure 14 would not be disturbed unless an abuse of such discretion was shown,[4] or there was evidence that the jury failed to follow the court's instructions.[5]

Beginning in the Fifth Circuit,[6] and becoming more pronounced in the Supreme Court[7] and Second[8] and District of Columbia[9] Circuits, there has been an acknowledgment in recent years that the efficacy of limiting instructions, such as those given in these three cases, is

writer has suggested, with apparent seriousness, that, since the applicability of the Rules to habeas corpus proceedings varies so much from circuit to circuit, the best and safest course to follow is always to check with the clerk of the court. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 96 (1965).

[1] Amsler v. United States, 381 F.2d 37 (9th Cir. 1967); Bates v. Wilson, 385 F.2d 771 (9th Cir. 1967); Morgan v. United States, 380 F.2d 686 (9th Cir. 1967).

[2] *See* Amsler v. United States, 381 F.2d 37, 43 (9th Cir. 1967); Bates v. Wilson, 385 F.2d 771, 774 (9th Cir. 1967).

[3] Morgan v. United States, 380 F.2d 686, 694 (9th Cir. 1967).

[4] Amsler v. United States, 381 F.2d 37, 43 (9th Cir. 1967).

[5] Bates v. Wilson, 385 F.2d 771, 774 (9th Cir. 1967); Morgan v. United States, 380 F.2d 686, 694 (9th Cir. 1967).

[6] Barton v. United States, 263 F.2d 894, 897-98 (5th Cir. 1959); Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955).

[7] Delli Paoli v. United States, 352 U.S. 232, 238-43 (1957).

[8] United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); United States v. Wilkins, 367 F.2d 990 (2d Cir. 1966).

[9] Oliver v. United States, 335 F.2d 724 (D.C. Cir. 1964); Kramer v. United States, 317 F.2d 114 (D.C. Cir. 1963).

questionable, and that a jury should not be permitted to be influenced by evidence against a defendant which, as a matter of law they could not consider, but as a matter of fact they could not disregard.

On May 20, 1968, the Supreme Court ended the controversy over this practice, overruling the foundation case of *Delli Paoli v. United States*[10] and holding that

> because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements [of a co-defendant] in determining petitioner's guilt, admission of [the co-defendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.[11]

The Court's holding is founded on the premise that the consequences of the jury's failure to follow the court's instructions may be so serious "that the practical and human limitations of the jury system cannot be ignored."[12]

This decision will require a change in the Ninth Circuit's procedure for trying co-defendants. The Court does not spell out an alternative method, but in this situation the California supreme court,[13] and perhaps the Second[14] and Fifth[15] Circuits, have adopted a policy that the court *must* grant a severance of trials unless it receives assurance prior to trial that the portions of a confession which implicate the nondeclarant can and will be deleted effectively.[16]

PRESUMPTIONS

Presumption of Knowledge of the Law

There is a well-known presumption that every man knows the law. In most criminal cases the presumption is conclusive.[1] However, if by definition a particular crime requires the element of knowledge of statutory prohibition, then ignorance of the law is a defense.[2] If ignorance of the law constitutes a defense to a crime, the defendant is

[10] Delli Paoli v. United States, 352 U.S. 232 (1957).
[11] Bruton v. United States, 36 U.S.L.W. 4447, 4448 (U.S. May 20, 1968).
[12] *Id.* at 4451. *See also* Jackson v. Denno, 378 U.S. 368, 386-91 (1963); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).
[13] People v. Aranda, 47 Cal. Rptr. 353, 407 P.2d 265, 272-73 (1965).
[14] The New York Supreme Court comments in *People v. LaBelle*, 18 App. Div. 2d 405, 222 N.E.2d 727, 729 (1966) that the Second Circuit has adopted a rule similar to the *Aranda* rule in *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966), and that the rule is based on constitutional grounds.
[15] Barton v. United States, 263 F.2d 894 (5th Cir. 1966).
[16] *See also* Bruton v. United States, 36 U.S.L.W. 4447, 4450 n.10 (U.S. May 20, 1968).

[1] *See generally* Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 38-39 (1939).
[2] Lambert v. California, 355 U.S. 225 (1957). *See generally* R. PERKINS, CRIMINAL LAW 812-22 (1st ed. 1957).

ordinarily presumed to have known the law until he presents evidence which will rebut the presumption.[3]

In *Cohen v. United States*,[4] appellant was convicted of having knowingly utilized interstate telephone facilities for the transmission of wagers and wagering information in violation of a federal statute.[5] The district court instructed the jury that there was a rebuttable presumption that appellant knew what the law prohibited.[6] Appellant objected to the instruction on the grounds that the statute had been "enacted so closely to the time of the alleged offense" that he could not be charged with knowledge of its provisions.

The Court of Appeals for the Ninth Circuit affirmed the decision of the lower court, holding that knowledge of the statutory prohibition was an element of the offense,[7] and "that the district court properly instructed the jury that there is a rebuttable presumption that the accused in fact had knowledge of the law."[8] The decision of the court is in accord with a number of cases in which courts, faced with similar statutes requiring knowledge of statutory prohibition, have instructed the jury to presume that the defendant had knowledge of the law which he was charged with violating.[9]

Most criminal presumptions are created by statute and establish a presumption of the existence of an element of the crime if certain basic facts are established. There seems to be little difference between a statutory presumption and the presumption of knowledge of the law when knowledge is an element of the crime. Both presumptions allow

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[3] *See* W. MATHES & E. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10.04 (1965).

[4] 378 F.2d 751 (9th Cir. 1967).

[5] 18 U.S.C. § 1084(a) (1964). This statute states:

> Whoever being engaged in the business of betting or wagering *knowingly* uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both. (emphasis added).

[6] The court's instruction to the jury was taken verbatim from FEDERAL JURY PRACTICE AND INSTRUCTIONS, *supra* note 3, at § 10.04. This section provides:

> It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with a specific intent, as charged.

[7] *See generally* Dubin, *Mens Rea Reconsidered*, 18 STAN. L. REV. 322, 358-65, 380-83 (1966); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109, 127.

[8] Cohen v. United States, 378 F.2d 751, 757 (9th Cir. 1967).

[9] *E.g.*, Ingram v. United States, 360 U.S. 672 (1959); Edwards v. United States, 334 F.2d 360 (5th Cir. 1964); Blumenthal v. United States, 88 F.2d 522 (8th Cir. 1937).

the jury to presume that one or more elements of the crime have been established by the state until the defendant offers evidence to the contrary. A presumption of knowledge, like a presumption created by statute, relieves the state of the burden of proving an element of the crime and will result in a guilty verdict if the accused admits performing the unlawful act and refuses to or is unable to present evidence to rebut the presumption of knowledge of illegality.[10]

The primary theoretical bases which have been advanced for presumptions created by statute are probability, fairness, procedural convenience, and social and economic policy.[11] Until *Tot v. United States*, the Supreme Court apparently recognized these concepts as alternative standards in determining the constitutionality of statutory criminal presumptions.[12] In *Tot* the Court ruled that the probability test is constitutionally required,[13] by holding that a statutory presumption cannot be constitutionally sustained if in common experience there is no rational connection between the basic facts proven and the ultimate fact presumed.[14]

> [T]he due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.[15]

Since both types of presumptions have the same effect on the burden of proof the state must bear in establishing the defendant's guilt, it seems that they should be subject to the same constitutional safeguard (*i.e.*, a showing of rational connection between the facts found and the fact presumed). If so, the decision in the instant case rests on an inadequate basis. In *Cohen*,[16] the court justified its application of the presumption by relying on *Edwards v. United States*.[17] This infects *Cohen* with an infirmity present in *Edwards* — the failure to apply the rational connection test.[18] In *Edwards*, the court did not attempt to establish a rational connection between the basic facts proven and the presumption that the defendant knew the law; rather, the court disposed of the issue by reasoning that the matter was peculiarly within the knowledge of the defendant and therefore rebuttable by him. Whether the

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[10] *Compare* Edwards v. United States, 334 F.2d 360 (5th Cir. 1964), *with* United States v. Romano, 382 U.S. 136 (1965). *See also* Brown, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141, 155 (1966).

[11] C. MCCORMICK, EVIDENCE § 309 (1st ed. 1954).

[12] *See* Morrison v. California, 291 U.S. 82 (1934).

[13] 319 U.S. 463, 467-68, 472; *see* MCCORMICK, *supra*, note 11, at 654-63.

[14] *See also* United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965).

[15] 319 U.S. 463, at 467 (1943).

[16] 378 F.2d 751, 757 (9th Cir. 1967).

[17] 334 F.2d 360 (5th Cir. 1964).

[18] *See* Edwards v. United States, 334 F.2d 360, 366-67 (5th Cir. 1964).

court could have found a "rational connection" in *Cohen* is questionable,[19] but *Edwards* is, at best, poor support for the use of the presumption under any fact situation.

Once a presumption is established, there is also confusion among the courts as to the impact of the presumption on the admissibility of evidence, the burden of going forward with evidence, and the burden of persuasion.[20] The presumption may mean that establishment of the basic fact shifts the burden of persuasion as to the presumed fact to the defendant.[21] In *Cohen*, the district court charged that the presumption of knowledge of the law would operate "unless and until *outweighed* by evidence . . . to the contrary."[22] (emphasis added). This instruction is recognized to shift not only the burden of going forward with evidence but also the burden of persuasion.[23] Shifting the ultimate burden of persuasion is not objectionable once the prosecution has sustained its burden of presenting evidence which establishes all elements of the crime. However, the use of a presumption without requiring a "rational connection" between the basic fact proven and the ultimate fact presumed relieves the prosecution of the necessity of establishing at least one element of the crime. In effect, it predicates guilt on the defendant's refusal or inability to present evidence to the contrary. To that extent the presumption operates as an encroachment upon the defendant's right to refuse to take the stand. The procedure allows the state to place upon the defendant the burden of establishing his innocence, with conviction being the penalty for his failure to do so.

Restricting the use of this presumption by the "rational connection" test would not foreclose the government from successfully prosecuting under statutes which make specific intent to violate the law an element of the offense. Inferences of knowledge upon proof of involvement in the proscribed activity may be made by the jury if the evidence is sufficient.[24] The "rational connection" test would require that the government present a "minimum quantum" of evidence to establish the

[19] The defendant specifically raised the objection that the law was new and enacted close to the time of the alleged offense, indicating perhaps that he might not have been aware of it. On the other hand, evidence was introduced which the court found to support its use of the presumption. *See* 378 F.2d 756, 759.

[20] There are at least four possible impacts of the presumption: (a) as creating a mere inference of the presumed fact; (b) as prima facie evidence of the presumed fact which, if the basic fact is found to exist, is sufficient to support a verdict of guilty; (c) as transferring to the defendant the burden of going forward with the evidence; (d) as shifting the burden of persuasion. For an excellent discussion of this question see Brown, *supra* note 10, at 141-42.

[21] *E.g.*, Morrison v. California, 291 U.S. 82, 96 (1934); Yee Hem v. United States, 268 U.S. 178 (1925).

[22] 378 F.2d at 756 n.5.

[23] Edwards v. United States, 334 F.2d 360, 367-68 (5th Cir. 1964); *see* 33 GEO. WASH. L. REV. 790, 794 (1965).

[24] For a discussion of the practical difference between an inference and a presumption, see *Edwards v. United States*, 334 F.2d 360, 366 (5th Cir. 1964).

existence of any and all facts before the burden of going forward with evidence of the non-existence of these facts is shifted to the defendant.[25]

RIGHT TO APPEAL

Plain Error Test in 28 U.S.C. § 2255 Proceeding

There is a clear right to appeal from a criminal conviction in a federal district court.[1] The appeal is taken by filing a notice of appeal in the district court within ten days after the entry of the judgment or order appealed from.[2] Courts have taken different approaches in resolving situations where a convicted defendant has allowed the ten day period to expire without filing a notice of appeal and later alleges, in a motion to vacate sentence,[3] that he did not *knowingly* forfeit his right to appeal. The usual reason alleged for non-forfeiture is that his counsel failed to file timely notice of appeal because of fraud, deceit or neglect. Some courts follow the harsh rule that failure to appeal is not excused merely because of counsel's neglect or fraud.[4] A greater number of courts do not refuse relief entirely, but require a showing of plain error in the trial as a prerequisite to determination of whether the right to appeal should be reinstated.[5]

The Ninth Circuit adopted this "plain error" test in *Dodd v. United States*[6] and has adhered to it in subsequent decisions.[7] In *Dodd* the appellant contended that his trial attorney failed to file a timely notice of appeal although he had been instructed to do so; the court remanded the case to the district court for a hearing upon the issue of whether petitioner had intentionally relinquished his right to appeal. If no intentional relinquishment was found, the trial court was instructed to determine whether petitioner suffered any prejudice because there had been no appellate review of his trial and sentence. After *Dodd* the Ninth Circuit altered the plain error test to require a showing of plain error *before* a hearing could be had on the issue of the

[25] Brown, *supra* note 10, at 145. *See also* Imholte v. United States, 226 F.2d 585 (8th Cir. 1955).

[1] Coppedge v. United States, 369 U.S. 438, 441-42 (1962).

[2] FED. R. CRIM. P. 37(a)(1),(2) (1966). *See* United States v. Robinson, 361 U.S. 220 (1960).

[3] 28 U.S.C. § 2255 (1965), which provides for a motion to vacate sentence, is often characterized as habeas corpus for federal prisoners.

[4] Dennis v. United States, 177 F.2d 195 (4th Cir. 1949); Crowe v. United States, 175 F.2d 799 (4th Cir. 1949).

[5] *E.g.*, Mitchell v. United States, 254 F.2d 954 (D.C. Cir. 1958); Dodd v. United States, 321 F.2d 240 (9th Cir. 1963); Fennell v. United States, 339 F.2d 920 (10th Cir. 1965).

[6] 321 F.2d 240, 245 (9th Cir. 1963).

[7] Rodriquez v. United States, 387 F.2d 117 (9th Cir. 1967); McGarry v. Fogliani, 370 F.2d 42 (9th Cir. 1966); Watkins v. United States, 356 F.2d 472 (9th Cir. 1966); Miller v. United States, 339 F.2d 581 (9th Cir. 1964); Wilson v. United States, 338 F.2d 54 (9th Cir. 1964).

deprivation of the right to appeal.[8] Although *Dodd* liberalizes the older view that failure to appeal may not be excused merely by showing neglect of counsel, the invocation of the test in its present form imposes a condition upon the reinstatement of the right to appeal. In *Fennell v. United States,*[9] the Tenth Circuit followed this form of the plain error test and recognized that there *is* thereby imposed a prerequisite to an appeal which is not present when application for appeal is timely made but concluded that the plain error test is "a reasonable requirement to the consideration of an application for a variation from the rules . . . as it should first be determined whether the remedy sought has any practical use [as opposed to] abstract value."

The latest in this line of decisions is *Rodriquez v. United States,*[10] where the Ninth Circuit affirmed the district court's denial of appellant's petition under 28 U.S.C. § 2255, requesting that his judgment of conviction be set aside and his right to appeal be reinstated. Relying on its earlier decisions, the Ninth Circuit held that petitioner was not entitled to relief because he had failed to allege the plain error which he proposed to correct upon appeal.

Several circuits do not follow the plain error test. In *Desmond v. United States,*[11] the First Circuit concluded that the appellant who had alleged facts showing deprivation by fraud of his right to appeal did not need to show plain error in his trial before he could obtain relief on a motion to vacate sentence;[12] to defeat the requested relief the prosecution must show that appellate review would be unavailing. However, the appellant must still prove, upon a hearing in the district court, that he lost his right because of his counsel's deception. The Seventh Circuit, in *Calland v. United States,*[13] did not require the petitioner to show plain error, and in *Dillane v. United States,*[14] the District of Columbia Circuit tacitly abandoned the plain error test.[15] It is arguable that *Boruff v. United States*[16] also represents a departure from the plain error requirement.[17]

It has been urged that the decisions which do not follow the plain error test are limited to situations where facts showing *fraud* or *deceit* by the defendant's attorney are alleged.[18] However, such a limitation

[8] Cases cited note 7 *supra.*
[9] 339 F.2d 920 (10th Cir. 1965).
[10] 387 F.2d 117 (9th Cir. 1967).
[11] 333 F.2d 378 (1st Cir. 1964).
[12] 28 U.S.C. § 2255 (1965).
[13] 323 F.2d 405 (7th Cir. 1963).
[14] 350 F.2d 732 (D.C. Cir. 1965).
[15] *Compare* Dillane v. United States, 350 F.2d 732 (D.C. Cir. 1965), *with* Mitchell v. United States, 254 F.2d 954 (D.C. Cir. 1958).
[16] 310 F.2d 918 (5th Cir. 1962).
[17] *See* Fennell v. United States, 339 F.2d 920, 923 (10th Cir. 1965) (the court regarded *Boruff* as a plain error test case).
[18] Fennell v. United States, 339 F.2d 920, 922 (10th Cir. 1965).

seems unfounded because the issue of whether deprivation of right to appeal occurred by fraud, neglect of counsel, or a lack of understanding upon petitioner's part, is entirely unrelated to the issue of whether plain error occurred at trial.

Two decisions of the United States Supreme Court indicate that the requirement of showing plain error as a prerequisite for relief where deprivation of the right to appeal is alleged might be struck down as an unconstitutional condition upon the right to appeal. In *Douglas v. California*[19] the Court held that the California procedure of appointing appellate counsel for indigent defendants only after the appellate court had made an independent investigation of the record and determined that appointment of counsel would be helpful to the defendant or the court was a violation of the equal protection clause of the fourteenth amendment. The Court stated:

> When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.[20]

Anders v. California[21] established that state court appointed appellate counsel could not withdraw from a case simply by writing a letter to the court stating that the appeal had no merit. Appointed counsel must act as an active advocate and, specifically, must file a brief in support of his client's appeal. Both *Douglas* and *Anders* are relevant to the plain error test because they indicate that the requirement of a preliminary showing of merit before the right to appeal will be allowed does not comport with constitutional standards.

Two 1966 amendments to the Federal Rules of Criminal Procedure have reduced the area in which involuntary deprivation of the right to appeal can be claimed. Federal Rule of Criminal Procedure 32(a)(2) now requires that where a case has gone to trial on a not guilty plea, the court *must* advise the defendant of his right to appeal and, if the defendant so requests, the clerk must prepare and file the notice of appeal for defendant. Thus a defendant may not now cavalierly claim that he was not aware of his right to appeal; of course he can still attempt to show that he did not waive it. Federal Rule of Criminal Procedure 37(a)(2) also mitigates the problem by allowing the trial court, upon a showing of excusable neglect by petitioner or his counsel, to extend the time within which notice of appeal may be filed by thirty days.[22]

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[19] 372 U.S. 353 (1963). *See also* Griffin v. Illinois, 351 U.S. 12 (1956) (state cannot grant appellate review in a way that discriminates against some convicted defendants on account of their poverty).

[20] Douglas v. California, 372 U.S. 353, 357 (1963).

[21] 386 U.S. 738 (1967).

[22] *See* United States v. Bujese, 371 F.2d 120 (3d Cir. 1967); United States v. Brown, 263 F. Supp. 777 (E.D.N.C. 1966).

SEARCH AND SEIZURE

Announcement and Unlawful Entry

A policeman is inside your home, having entered silently through a closed but unlocked door. An arrest is made, either with or without a warrant, and incident to that arrest a search of the entire premises is conducted. Is the officer's method of entry such that it vitiates the arrest and subsequent search? While the prohibitions of the fourth amendment have been enforceable against the states through the due process clause of the fourteenth amendment since 1949,[1] it was not until *Mapp v. Ohio*[2] that the potential impact of those restraints was recognized. Then in *Ker v. California*[3] it was made clear that the standard of reasonableness under the fourth and fourteenth amendments is identical.

What law sets the standards for entry into a dwelling to effectuate an arrest for federal offenses? In the absence of an applicable federal statute, the law of the state where an arrest without a warrant takes place determines its validity.[4] However, a federal statute, 18 U.S.C. § 3109, provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a *search warrant*, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. (emphasis added).

In *Miller v. United States*,[5] the Supreme Court held that the provisions of § 3109 were applicable to an entry to effectuate an *arrest* without a warrant. The Court recognized the general principle above as to which law governs,[6] but since the law of the District of Columbia[7] was substantially identical to the federal statute, and since the parties agreed, federal law was applied. Mr. Justice Brennan, writing for the majority, pointed out that his interpretation of the statute was not confined in operation to the District of Columbia.[8] In *Wong Sun v. United States*,[9]

[1] "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause." Wolf v. Colorado, 338 U.S. 25, 27-8 (1949).

[2] 367 U.S. 643 (1961) (holding that use in a state court of unconstitutionally seized evidence violates due process of law and vitiates a conviction in such trial).

[3] 374 U.S. 23 (1963).

[4] Johnson v. United States, 333 U.S. 10, 15 n.5 (1948); United States v. Di Re, 332 U.S. 581, 589 (1948).

[5] 357 U.S. 301 (1958).

[6] *Id.* at 305.

[7] *See* Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

[8] Miller v. United States, 357 U.S. 301, 306 (1958). Mr. Justice Clark, in dissent at 315, objected to the establishment of a federal standard as subversive of existing local law.

[9] 371 U.S. 471 (1963).

another opinion by Mr. Justice Brennan, *Miller* was interpreted as establishing a federal standard for entry when attempting to arrest without a warrant.[10]

In *Ker v. California*,[11] where an entry was accomplished through use of a pass key, the Supreme Court rejected a claimed violation of § 3109, and held that the resultant arrest and search were legal, since the arrest was by state officers for a state offense, so general constitutional standards would govern. The state law was a statute similar to § 3109,[12] specifically applicable to arrests, but with a judicial gloss of an "exigent circumstances" exception — the possible destruction of evidence.[13] Mr. Justice Clark's opinion carefully distinguished evidence held inadmissible because of the Court's supervisory powers over federal courts from that held inadmissible because prohibited by the Constitution.[14] *Ker* can be read as holding that the rule of announcement which protects the right of privacy has its roots in the Constitution and that the constitutional standard has at least one exception for exigent circumstances — destruction of evidence. The court, while ruling on the constitutional basis, noted, in reference to its supervisory powers, that whether § 3109 admits of an exigent circumstances exception has not been decided, citing *Miller* and *Wong Sun*.[15]

Last year the Ninth Circuit, in *Sabbath v. United States* (a deci-

[10] *Id.* at 482. Mr. Justice Clark again objected, at 502, and argued that *Miller* was based on the law of the District of Columbia. Early Ninth Circuit decisions read *Miller* as an interpretation of District of Columbia law, so that where an entry pursuant to an *arrest* was questioned, state law governed. *E.g.*, Williams v. United States, 273 F.2d 781 (9th Cir. 1959); Hopper v. United States, 267 F.2d 904 (9th Cir. 1959). Later cases, however, held that federal law would govern. *E.g.*, Ng Pui Yu v. United States, 352 F.2d 626 (9th Cir. 1965); Dickey v. United States, 332 F.2d 773 (9th Cir. 1964); Leahy v. United States, 272 F.2d 487 (9th Cir. 1960). The District of Columbia, since *Miller*, has applied federal law. *E.g.*, Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961); Williams v. United States, 276 F.2d 522 (D.C. Cir. 1960).

[11] 374 U.S. 23 (1963).

[12] CAL. PENAL CODE ANN. § 844 (West 1956).

[13] Ker v. California, 374 U.S. 23, 38-39 (1963). What constitutes exigent circumstances to excuse an announcement prior to an entry? California excuses compliance with its announcement statute when an officer believes in good faith that it would increase the possibility of peril, facilitate an escape, or result in the destruction of evidence which would otherwise be seized. *E.g.*, People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956). Mr. Justice Brennan in dissent in *Ker* sets out three sets of circumstances in which an unannounced police intrusion into a private home does not violate the fourth amendment: 1) where the persons within already know of the officers' authority and purpose, 2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, 3) where those within, made aware of the presence of someone outside, are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted. 374 U.S. 23, 47. The majority upheld non-compliance based upon the third exception but with fewer restrictions on its use.

[14] Ker v. California, 374 U.S. 23, 33 (1963).

[15] *Id.* at 40 n.11. On certiorari the Supreme Court in *Sabbath v. United States* pointed out that "[T]here is little reason why those limited exceptions [the constitutional ones] might not also apply to § 3109 . . . ." 36 U.S.L.W. 4502, 4503 n.8 (U.S. June 3, 1968).

sion recently reversed by the Supreme Court)[16] held that a federal officer making an arrest without a warrant on probable cause, who knocked, waited a few seconds and then entered defendant's apartment through a closed but unlocked door, without identifying himself or requesting permission to enter, was not in violation of section 3109, and that the evidence seized pursuant to the arrest was admissible since such entry did not constitute a "breaking" under the statute. The court specifically rejected the position adopted by the Court of Appeals for the District of Columbia in *Keiningham v. United States.*[17] There the court said, "We think that a person's right to privacy in his own home . . . is governed by something more than the fortuitous circumstance of an unlocked door and that the word 'break,' as used in 18 U.S.C. § 3109 means '[to] enter without permission'." The court in *Sabbath* also reaffirmed its position that an entry gained by ruse or deception unassociated with force is not a breaking.[18] This holding is consistent with the District of Columbia Circuit.[19]

The Ninth Circuit however, does consider entry accomplished by means of a pass key a breaking.[20] In *Sabbath* the court said that the word break "has been taken far enough from the connotations of force which usually accompany it," but did not explain the rationale behind

[16] 380 F.2d 108 (9th Cir. 1967), *rev'd,* 36 U.S.L.W. 4502 (U.S. June 3, 1968). One Jones was searched at the Mexican border and narcotics were discovered. He said that defendant had taken him to Mexico to buy drugs for defendant. Jones had a card with defendant's phone number on it. When Jones called, defendant asked if he had any trouble and whether he still had his "thing." A meeting between Jones and defendant was then arranged. Jones was outfitted with a radio transmitter device but due to interference from a phonograph in defendant's apartment only parts of the conversation were heard. It was shortly after Jones' entry into the apartment and after the agent realized that the transmitter was not working that he made his unannounced entry.

[17] 287 F.2d 126, 130 (D.C. Cir. 1960). The Second Circuit holds that "break" means forcible entry, *United States v. Conti,* 361 F.2d 153, 157 (2d Cir. 1966), as does the Sixth Circuit, *United States v. Williams,* 351 F.2d 475, 477 (6th Cir. 1965). The Eighth Circuit, while not reaching the question of announcement and its possible exceptions, has cited *Miller* and *Keiningham* with approval in *Robinson v. United States,* 327 F.2d 618, 622 (8th Cir. 1964). The district court in Delaware has followed *Keiningham* in *United States v. Poppitt,* 227 F. Supp. 73, 79-80 (D. Del. 1964) (the opening of an unlocked screen door in the process of executing a search warrant considered a "breaking").

[18] Sabbath v. United States, 380 F.2d 108, 111 (9th Cir. 1967), *rev'd on other grounds,* 36 U.S.L.W. 4502 (U.S. June 3, 1968); *accord,* Dickey v. United States 382 F.2d 773, 778 (9th Cir. 1964); Leahy v. United States, 272 F.2d 487, 490 (9th Cir. 1959).

[19] Jones v. United States, 304 F.2d 381 (D.C. Cir. 1962); *accord,* Smith v. United States, 357 F.2d 486 (5th Cir. 1966). This method of entry, while firmly established, is not consonant with the goals of civilized society. Support for attacking the doctrine might be found in *Wong Sun v. United States,* 371 U.S. 471 (1963). There an officer misrepresented his identity when he knocked on the door, and although he later identified himself, after which the defendant shut the door and fled, his failure to dispel the misimpression was held to render his entry illegal. Cf. Gouled v. United States, 255 U.S. 298 (1921) (overruled on another point in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967)); Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953).

[20] Munoz v. United States, 325 F.2d 23 (9th Cir. 1963); *accord,* United States v. Sims, 231 F. Supp. 251 (D. Md. 1964).

the different treatment of entry by pass key and entry through an unlocked door, except to say that the difference "may be slight."[21] This distinction is tenuous, particularly in light of the court's view of the purpose of § 3109, *i.e.*, to prevent violent unannounced entry.[22]

On certiorari, the Supreme Court in *Sabbath v. United States* reversed,[23] and held that entry through a closed but unlocked door without prior announcement of authority and purpose violates § 3109. The government argued presence of exigent circumstances, and while the Court again did not decide whether § 3109 had exceptions, it could find no evidence that would excuse noncompliance. However, a footnote to the opinion indicates that the court will allow exceptions to § 3109, as they did to the constitutional rule promulgated in *Ker v. California*.[24]

Standing to Object

Defendant Hill organized a corporation of which he was president and owner. When the Corporation Commissioner issued a "Desist and Refrain Order," Hill turned the corporation files over to a third party. The files were later moved to the home of Hill's brother. These records were then illegally seized and used to convict Hill of mail fraud.

The Ninth Circuit held that since the papers belonged to the corporation, since Hill had no interest in the premises from which they were taken, and since his conviction was in no way based on possession, he was without standing to object to the illegal search and seizure.[25] The court relied on *Jones v. United States*[26] to support its conclusion; Hill was not the one against whom the search was directed, but was "one who claims prejudice only through the use of evidence gathered as a consequence of a search directed at someone else."[27]

To allow the government to profit from its illegal activity through use of the corporate entity doctrine is unrealistic.[28] The defendant was the sole shareholder of the corporation and the company was no longer in operation. Defendant was the only object of the police activity, clearly the victim of the seizure, the one against whom the search was directed.

Before *Jones*, a claim of ownership or possession of the seized property, or a substantial possessory interest in the premises searched, was

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[21] Sabbath v. United States, 380 F.2d 108, 111 (9th Cir. 1967), *rev'd*, 36 U.S.L.W. 4502 (U.S. June 3, 1968).

[22] *Id.*

[23] 36 U.S.L.W. 4502 (U.S. June 3, 1968).

[24] *Id.* at 4503 n.8.

[25] Hill v. United States, 374 F.2d 871 (9th Cir. 1967).

[26] 362 U.S. 257 (1960).

[27] Hill v. United States, 374 F.2d 871, 873 (9th Cir. 1967).

[28] It appears that the court might have decided differently had the records been seized from the *personal* premises of the accused. Presumably, the result would be the same had they been removed from corporate premises. *But see* Mancusi v. De Forte, 88 S. Ct. 2120 (1968) (defendant union official has standing to object to unlawful seizure of documents from union office).

required to establish standing to object. *Jones*, the most recent Supreme Court discussion of standing, held that when possession of the seized evidence is itself an essential element of the offense, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Alternatively, the defendant need have no possessory interest in the searched premises in order to object; it is sufficient that he be legitimately on those premises when the search occurs.

California, which adopted the exclusionary rule[29] before *Mapp v. Ohio*[30] because other remedies had failed to stop police transgressions, abolished the "standing" prerequisite in 1955.[31] Justice Traynor stated that

> Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights.[32]

The California position, which is based on the "general deterrence" theory of the exclusionary rule,[33] is clearly preferable to the limited (although much needed) relaxation of the standing requirements in *Jones*. *Jones*, however, does contain a third position, one which has largely been ignored. This is understandable, since its adoption would eliminate the type of police activity which the narrower reading of *Jones* now permits.

Mr. Justice Frankfurter, before announcing the alternative rules of *Jones*, stated

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search . . . directed at someone else. (emphasis added).[34]

Adoption of this position would result in conferring standing on third persons whenever it appears that the police are directing their efforts toward obtaining evidence against them even though the illegal search

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[29] People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[30] 367 U.S. 643 (1961).

[31] People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

[32] *Id.* at 761, 290 P.2d at 857.

[33] Since *Linkletter v. Walker*, 381 U.S. 618 (1965), it would seem that the Court has adopted a "deterrence" rationale for the exclusionary rule. *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967); Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488. If deterrence is the basis for the exclusionary rule, and it would seem that it is, anyone against whom such unconstitutionally obtained evidence is used should be able to object.

[34] Jones v. United States, 362 U.S. 257, 261 (1960).

and seizure is ostensibly made against another. At least two circuit courts[35] and one district court[36] have adopted this construction of *Jones*.

The police can often predict when a search will yield evidence against someone other than the immediate victim. The present law encourages the police to engage in illegal conduct to obtain just such evidence. Consequently, the purpose of the exclusionary rule is avoided.

The court's ruling in the instant case, based on a distinction between a sole stockholder and his corporation, a distinction developed for an entirely different set of legal relations, violates the clearly and often repeated mandates of the Supreme Court:

> The Government cannot violate the Fourth Amendment . . . and use the fruits of such unlawful conduct to secure a conviction. Nor can the Government make indirect use of such evidence for its case, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men. (citations omitted).[37]

Adoption of an approach which focuses on the purpose of the search in order to allow the "real" victim to object, would eliminate the majority of illegal police activity.[38]

Use of Evidence Obtained From Unlawful Search and Seizure by Mexican Police

Before 1914 the fourth amendment was not interpreted as forbidding the use of evidence which had been wrongfully obtained by the federal

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[35] *See* United States v. Fay, 344 F.2d 625 (2d Cir. 1965) (X and Y were suspected of burglary. The police thought X had the proceeds and would be disposing of them to Y. X and Y were arrested; the jewels were found on Y and unlawfully seized. The court said the Government could not prosecute X for possession and then say he has no standing to object to the search since "under these circumstances the search which brought the jewels to light was *directed against* X as well as Y." (emphasis added)); Henzel v. United States, 296 F.2d 650 (5th Cir. 1961) (The defendant was the president and sole stockholder of a corporation charged with mail fraud. The sheriff levied on the corporate assets to satisfy a judgment obtained by a creditor. A United States postal inspector accompanied the sheriff and seized books and records without a warrant. The court stated that "there is nothing in the corporate status . . . which would prevent appellant from attacking the unlawful search and seizure of the corporation's property." *Id.* at 652. The court went on, however, and pointed out that the defendant was the "one against whom the search was directed," citing *Jones*); *Peel v. United States*, 316 F.2d 907 (5th Cir. 1963), sometimes cited as limiting *Henzel*, did not reach the question of standing.

[36] United States v. Kanan, 225 F. Supp 711, 714 (D. Ariz. 1963). The court without much discussion on the point said "Defendants [officers of the corporation] are entitled to move to suppress the corporate records as evidence against them. They have the requisite standing and are 'aggrieved' by the search and seizure."

[37] Walder v. United States, 347 U.S. 62, 64-65 (1954).

[38] The Supreme Court decisions in *Katz v. United States*, 88 S. Ct. 507 (1967) (freeing search and seizure analysis from traditional property concepts) and *Simmons v. United States*, 88 S. Ct. 967 (1968) (forbidding use at trial of inculpatory testimony given in support of a motion to suppress) should be considered in assessing the attitude of the court were it to hear a standing question today.

government through an unlawful search and seizure.[39] The Supreme Court altered this interpretation in *Weeks v. United States*, where it held that evidence acquired by federal government officials in violation of the fourth amendment was inadmissible in the federal courts.[40] However, the Court also ruled that its decision did not prohibit the use of evidence in federal courts which had been obtained by an unlawful search and seizure carried out by state officers.[41] In subsequent cases the Supreme Court limited the circumstances under which evidence seized by state officials in violation of fourth amendment standards could be used in federal courts; such evidence was held inadmissible when the seizure was a result of an unlawful search jointly conducted by state and federal officials[42] and when state officials conducted the unlawful search and seizure solely on behalf of the federal authorities.[43] Recently, in two closely related decisions, the Court overruled its earlier holding that allowed state officials to turn unlawfully seized evidence over to the federal authorities on a "silver platter" for use in federal prosecutions and also held the exclusionary rule to be constitutionally required in state as well as federal courts.[44]

Two related questions which remain unsettled are the possible applicability of the exclusionary rule to unlawful searches by private individuals[45] and foreign governments[46] which disclose evidence that is turned over to the United States authorities for use in a criminal prosecution.

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[39] C. MCCORMICK, EVIDENCE § 137 (1954); 8 J. WIGMORE, EVIDENCE § 2183 (McNaughton rev. 1961).

[40] 232 U.S. 383 (1914). Earlier, in *Boyd v. United States*, 116 U.S. 616 (1886), the Court struck down a federal order directing the defendant to produce certain self-incriminating papers. The Court viewed the compulsory production of such papers as the equivalent of an unreasonable search and seizure, but the Court's opinion rested on the fifth amendment.

[41] 232 U.S. at 398. *See also* Wolf v. Colorado, 338 U.S. 25 (1949). This holding became known as the "silver platter" doctrine, a term coined by Mr. Justice Frankfurter. Lustig v. United States, 338 U.S. 74, 79 (1949).

[42] Byars v. United States, 273 U.S. 28 (1927).

[43] Gambino v. United States, 275 U.S. 310 (1927).

[44] In 1960 the "silver platter" doctrine was abolished by the Court in *Elkins v. United States*, 364 U.S. 206. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court held that the exclusionary rule is "an essential part of both the Fourth and Fourteenth amendments" and imposed the exclusionary rule on criminal actions in state courts. 367 U.S. at 657. In so holding the court expressly overruled *Wolf v. Colorado*, 338 U.S. 25 (1949).

[45] The only Supreme Court case dealing with the admission of evidence acquired illegally by private parties is *Burdeau v. McDowell*, 256 U.S. 465 (1921). The extensive changes in the law of search and seizure since that decision probably qualify the decision. For an excellent discussion of this question see Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967).

[46] At the present time the Supreme Court has not considered the applicability of the exclusionary rule to evidence unlawfully seized by foreign governments. Prior to the instant case the question had only been raised on one occasion in the United States Court of Appeals. Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1965).

In *Brulay v. United States*[47] the Court of Appeals for the Ninth Circuit held that neither the fourth nor the fourteenth amendment compelled the exclusion of evidence illegally seized in Mexico by Mexican officials who were not acting at the instigation of United States authorities.[48] The items of evidence involved were amphetamine tablets discovered in a search which followed an arrest by Mexican police without a warrant.[49] Although customs agents of the United States had alerted Mexican federal police to the defendant's activities, the Tijuana municipal policemen who made the seizure were found not to be acting at the instigation of United States authorities. Defendant was not held in violation of any Mexican law, but the American customs officials were immediately called in and the confiscated evidence was turned over to them. Petitioner was then convicted of conspiring to smuggle amphetamine tablets into the United States.

On first impression it appears that the practice followed in *Brulay* would be subject to the same objection that led to the abrogation of the "silver platter" doctrine in *Elkins v. United States* (*i.e.*, the encouragement of unlawful searches by persons not bound by the exclusionary rule). However, there are substantial differences between the two situations. The Supreme Court has emphasized that

> The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.[50]

Consequently, it has been suggested that application of the rule would serve no function in situations where the sanction would not deter improper searches in the future.[51] This reasoning was applied in *Brulay*:

> The Fourth Amendment does not, by its language, require the exclusion of evidence and the exclusionary rule announced in Weeks is a court-created prophylaxis designed to deter federal officers from violating the Fourth Amendment. Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico.[52]

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[47] 383 F.2d 345 (9th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3228 (U.S. Dec. 5, 1967).

[48] *Id.* at 348.

[49] The police stopped the defendant when they noticed that the car he was driving looked heavily loaded; his nervous appearance prompted the police to arrest him. At the police station petitioner was ordered to open the trunk of his car, in which the officers found a large quantity of the tablets. Questioning disclosed that the petitioner had stored other tablets in the area. He then took the officers to a private home in Tijuana where additional amphetamine was seized by the Mexican police.

[50] Elkins v. United States, 364 U.S. 206, 217 (1960).

[51] *See* Note, *Seizures by Private Parties*, *supra* note 45, at 611.

[52] 383 F.2d at 348.

Exclusion of evidence obtained through searches such as this probably would not change search tactics in Mexico. But it is possible that the United States is a silent partner in such searches by Mexican police. When federal authorities *induce* unlawful searches and seizures by private parties, the exclusionary rule seems clearly appropriate.[53] In such cases the party making the search appears to be acting as a mere agent for the government. Application of the exclusionary rule in these situations would discourage similar conduct in the future. The rationale appears to apply equally well to officers of a foreign government whose actions, like those of private citizens, are not limited by the fourth and fourteenth amendments. In *Birdsell v. United States*,[54] cited as authoritative in *Brulay*, the Court of Appeals for the Fifth Circuit held that the fourth amendment did not apply to Mexican searches which were incident to a prosecution for a violation of Mexican law.[55] In the instant case there had been no violation of Mexican law and the activity of the Mexican police, after they discovered the items of evidence, was directed toward making the evidence available to the United States Government. Perhaps the continued efforts by the Mexican police to obtain evidence from the defendant after they realized there was no violation of Mexican law is indicative of the normal procedure followed when they discover a possible violation of American law. If so, a continuing relationship might be shown, indicating significant federal government involvement in instigating such searches, despite the absence of a specific request. The inherent difficulty in this theory is in establishing, on a case by case basis, that particular searches resulted from a request from or agreement with the United States.

In *Birdsell* the court suggested that searches by foreign police, which have been induced by federal officials, might be subjected to the "shock the conscience test"[56] which was set forth in *Rochin v. California*.[57] This would mean that, although searches by these officials would not be subject to the standards of the fourth amendment, evidence would be inadmissible if obtained by methods so crude that they violate some vague concept of basic due process. It is difficult to see how it is possible to find the fourth amendment inapplicable to such evidence and on the other hand apply some other constitutional measure to judge acceptibility of that same evidence.

If the exclusionary rule is bottomed *solely* on the notion that it will effectively deter future improper searches and seizures, failure to ex-

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[53] M. FORKOSCH, CONSTITUTIONAL LAW § 337, at 307 (1963); Note, *Seizures by Private Parties, supra* note 45, at 611. *See also* Burdeau v. McDowell, 256 U.S. 465, 475 (1921); People v. Fierro, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (1965).
[54] 346 F.2d 775 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1965).
[55] *Id.* at 782.
[56] *Id.* at 782 n.10.
[57] 342 U.S. 165 (1952).

tend the rule to searches by foreign governments seems justifiable, absent a showing of United States instigation or participation. It may be, however, that the *admission of evidence* seized in violation of fourth amendment standards is *itself* unconstitutional, regardless of who obtains it.

In *Mapp v. Ohio*,[58] the majority opinion was based on the reasoning that the right of privacy is no less a "basic right" than freedom from conviction by a coerced confession and that the two "enjoy an intimate relation" in their common concern with maintaining the inviolability of personal privacy.[59] The most important feature of this constitutional right of privacy was said to be the "exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure."[60] *Mapp's* reliance on the confession cases raises the question of the degree to which the exclusionary rule of the fourth and fifth amendments share the same rationale.[61] The fifth amendment exclusionary rule originated in the common law's rejection of untrustworthy evidence.[62] Recently the Supreme Court has viewed the rule differently, however; the test is now voluntariness, and the fact that an involuntary confession is corroborated does not make it admissible.[63] The basis for the rule has come to be the guaranty of an accusatorial criminal procedure — a system which requires the state to establish guilt by evidence freely secured through constitutionally permissible methods.[64] If the two exclusionary rules *do* rest on the same rationale, the fourth amendment's exclusionary rule may serve a dual purpose of protection of privacy and protection of the individual against compulsory production of incriminating evidence regardless of the source.[65] This result is reached by recognition that the fourth amendment is violated in two ways. First, the search and seizure violates the Constitution if carried out by an individual acting on behalf of the government. Second, the admission of the evidence also violates the amendment on the principle that "conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts."[66]

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[58] 367 U.S. 643 (1961).
[59] *Id.* at 657.
[60] *Id.* at 656.
[61] This question may be the heart of the dispute which divided the court in *Mapp*. *See* 367 U.S. at 683-85 (dissenting opinion).
[62] *E.g.*, Lisenba v. California, 314 U.S. 219, 236 (1941). *See generally* Note, *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 155 (1961).
[63] *See* Rogers v. Richmond, 365 U.S. 534, 544 (1961); Watts v. Indiana, 338 U.S. 49, 55 (1949).
[64] *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 541 (1961).
[65] *See* Stanford v. Texas, 379 U.S. 476, 485 (1964); Linkletter v. Walker, 381 U.S. 618, 646-50 (1964) (dissenting opinion); Davis v. United States, 328 U.S. 582, 587 (1945). *But see* Schmerber v. California, 384 U.S. 757 (1966).
[66] Weeks v. United States, 232 U.S. 383, 392 (1914) [repeated in *Mapp v. Ohio*, 367 U.S. 643, 648 (1960)]. This rationale is not unlike the reasoning in *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court in *Shelley* held that although private citizens were not prohibited from entering into restrictive racial covenants, enforcement

What is suggested is that a combination of the specific language of the fourth amendment and the *Mapp* rule creates a broad right of privacy which compels the exclusion of any evidence gathered in violation of that right regardless of who makes the search. Therefore, evidence secured by means of a search and seizure in a foreign country would be inadmissible in either federal or state courts unless the search conformed to fourth amendment standards. This would elevate the fourth amendment right to be free from unlawful searches and seizures to the same constitutional stature that the fifth amendment prohibition against coerced confessions presently enjoys.[67]

Brulay is also significant because it is one of the few decisions dealing with the question of extraterritorial application of federal criminal laws. Although extensive treatment of this subject is beyond the scope of this note, two points made by the court are notable. First, it is well settled that the United States can punish its citizens for acts which are directly injurious to the government even though they are committed outside the country.[68] The question raised here is whether the conduct of the defendant was directly injurious to the government or whether it was only harmful to private individuals, in which case the government may punish only if the act is committed within the United States.[69] The court did not state whether this point was considered, but it would seem that illegal importation of amphetamine tablets could be regarded as an offense against the nation because it would result in a loss of customs revenues.

A second significant point is the finding by the court that Congress intended the provisions of the statute in question to be given extraterritorial application because of the nature of the crime.[70] It is uncertain what this means, but if *United States v. Bowman*[71] and other similar cases[72] are controlling, it seems that acts which are injurious to the government and which are *capable* of perpetration without regard to a particular locality would automatically fall within the jurisdiction of the United States, an express declaration to that effect being unnecessary.

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by the court would involve the court in the discrimination. In the instant case, although the federal authorities may not have participated in the unlawful search, admitting the evidence would be a sanction of the violation of the rights guaranteed by the fourth amendment.

[67] *See* Brulay v. United States, 383 F.2d 345, 348-49 (9th Cir. 1967).

[68] *E.g.*, United States v. Bowman, 260 U.S. 94 (1922); American Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909).

[69] *See* United States v. Bowman, 260 U.S. 94, 98 (1922).

[70] 383 F.2d at 350.

[71] 260 U.S. 94, 98 (1922).

[72] Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941); Blackmer v. United States, 49 F.2d 523 (D.C. Cir. 1931). *But see* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

DOUBLE JEOPARDY

Successive Municipal-State Prosecutions

One problem facing courts confronted with double jeopardy problems is whether or not a single fact occurrence results in the commission of two distinct offenses.[1] The generally adopted test[2] was set forth in *Blockburger v. United States*:[3]

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of fact which the other does not.[4]

Where different offenses do arise out of the same occurrence it has been established that a state may prosecute them in separate trials.[5]

In affirming the denial of a habeas corpus petition in *Barnett v. Gladden*,[6] the Ninth Circuit applied the *Blockburger* test[7] to find there was no double jeopardy where petitioner had been convicted of immoral practices under a municipal ordinance and was later prosecuted under an Oregon statute for another offense arising out of the same act that had been the basis of the municipal prosecution. In *Blockburger* the identity of offenses test was applied where consecutive sentences were imposed after conviction for several offenses at one trial;[8] but, as in *Barnett*, the test has been applied to multiple prosecutions for offenses arising out of the same transaction.[9] In his separate concurring opinion in *Abbate v. United States*,[10] Justice Brennan said:

> [N]either this "same evidence" test nor a "separate interests" test has been sanctioned by this Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses at one trial.[11]

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[1] *See generally* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

[2] *E.g.*, United States v. Bruni, 359 F.2d 807 (7th Cir.), *cert. denied*, 385 U.S. 826 (1966); Smith v. United States, 337 F.2d 450 (7th Cir. 1964); Henry v. United States, 215 F.2d 639 (9th Cir. 1954); Pereira v. United States, 202 F.2d 830 (5th Cir. 1953), *aff'd*, 347 U.S. 1 (1954).

[3] 284 U.S. 299 (1932). In *Gore v. United States*, 357 U.S. 386 (1958), a 5-to-4 majority reaffirmed *Blockburger*.

[4] 284 U.S. 299, 304 (1932).

[5] Hoag v. New Jersey, 356 U.S. 464 (1958). The Court recognized that at some point multiple prosecutions will violate the fundamental fairness concept of the fourteenth amendment. No formula is possible but rather the analysis must be on a case by case basis.

[6] 375 F.2d 235 (9th Cir. 1967).

[7] In *Sanchez v. United States*, 341 F.2d 225, 227 (9th Cir. 1965), the court found that the test was merely a guide and no more than that.

[8] In *Blockburger*, the petitioner who was charged in a five count indictment with violating provisions of the Harrison Narcotics Act was convicted on three counts at a single trial.

[9] *E.g.*, Louisiana v. Middlebrooks, 270 F. Supp. 295 (E.D. La. 1967); United States v. Farwell, 76 F. Supp. 35 (D. Alas. 1948).

[10] Abbate v. United States, 359 U.S. 187 (1959).

[11] *Id.* at 197-98.

Multiple prosecution harassment[12] which constitutes a violation of fundamental fairness should be struck down under the due process clause of the fourteenth amendment,[13] regardless of whether the same evidence test defined in *Blockburger* can be applied to find different offenses arising out of the same act.

Barnett v. Gladden has served to clarify the doubt surrounding the availability of federal courts to test the validity of a state conviction in a habeas corpus proceeding.[14] Since the double jeopardy clause of the fifth amendment has not yet been applied to the states by the Supreme Court,[15] the Ninth Circuit relied upon the fourteenth amendment's limitation upon the state's power to reprosecute individuals as the basis of federal habeas corpus inquiry.

The court did not find it necessary to reach the issue of whether the defendant was placed in double jeopardy by a combination of municipal and state prosecutions. Although successive state-federal[16] or federal-state[17] prosecutions have been permitted, the municipal-state prosecution is distinguishable on the ground that a municipality is merely a creation of the state and not an independent sovereign. This distinction results from the concept that the state must either delegate the power of punishment or retain it, and that in prosecuting crimes the municipality is acting under delegated authority and is an agent of the state.[18] Federal courts have allowed successive municipal-state prosecutions, relying upon a variety of grounds[19] including: (1) reliance by analogy upon the federal-state separate sovereignties concept, (2) classification of municipal prosecutions as exercises of the police power or corporate regulation as opposed to the regular judicial powers of the state, and (3)

[12] *See generally* Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

[13] *See* United States v. American Honda Motor Co., 271 F. Supp. 979, 987 (N.D. Cal. 1967).

[14] The Ninth Circuit had previously held that the question of double jeopardy could not be raised by habeas corpus. Crapo v. Johnston, 144 F.2d 863 (9th Cir.), *cert. denied*, 323 U.S. 785 (1944).

A number of circuits refuse to treat double jeopardy as grounds for habeas corpus. *See* Barker v. Ohio, 328 F.2d 582 (6th Cir. 1964). *See generally* Annot., 8 A.L.R.2d 285, 286 (1949).

[15] For a good historical study and analysis of due process clause limitations on a state's power to reprosecute an individual, see United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

[16] Abbate v. United States, 359 U.S. 187 (1959). In *Abbate* the petitioners, who were convicted and sentenced to three months' imprisonment under an Illinois statute for conspiring to dynamite telephone company facilities, were held not to have been twice in jeopardy when they were tried and convicted in a federal court for the federal offense of conspiring to injure or destroy communication facilities operated or controlled by the United States.

[17] Bartkus v. Illinois, 359 U.S. 121 (1959). *Bartkus* held that due process was not violated where defendant was convicted of robbery in a state court after having been acquitted in a federal court prosecution under the federal bank robbery statute for the same robbery.

[18] *See generally* Kneier, *Prosecution Under State Law and Municipal Ordinance As Double Jeopardy*, 16 CORNELL L.Q. 201 (1931).

[19] *See* cases cited note 9 *supra*.

characterization of the municipal action as being in the nature of a civil action.

An alternative solution which might be applied in such cases would be to bar successive prosecutions only where the applicable statutes reflect substantially the same policies.[20] Thus in *Barnett* no double jeopardy would arise from the mere fact of municipal-state prosecution for the same act because arguably, the purpose of the municipal ordinance is to preserve dignity and order in the streets while the purpose of the applicable state statute is to provide more severe penalties to deter and punish sex offenders. It is clear that from the accused's point of view, double punishment is no less existent because the second prosecution is carried out to effectuate a different policy than the first prosecution. However, the practical function and necessity of the municipal prosecution, and the limits that necessarily have been imposed upon the double jeopardy concept,[21] support the "different policy" approach in distinguishing the offenses.

Double Jeopardy After Mistrial

It is well established that where a mistrial results from the jury's inability to agree on a verdict, a retrial of the case does not place the defendant in double jeopardy.[22]

In *Howard v. United States*[23] a mistrial was declared after the jury was unable to reach a verdict on twelve counts in an indictment. Each count charged fraud by the defendant in preparing the income tax returns of different private individuals. The government subsequently obtained a new indictment containing eight of the counts in the original indictment and seven new counts relating to the tax returns of other individuals. The Ninth Circuit held that the government's tactic did not constitute harassment or unfairness which contravened the due process or double jeopardy clauses of the fifth amendment because retrial of the first indictment was proper and the government could have subsequently indicted and tried defendant on the seven new counts. Furthermore, under the Federal Rules of Criminal Procedure,[24] the trial court could have simultaneously tried both indictments by joining the first indictment with a new indictment on the seven added counts. If

[20] *See* Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 W. RES. L. REV. 700 (1963).

[21] One important limitation is that the state may retry a defendant whose conviction was reversed on appeal. *See generally* Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

[22] *E.g.*, United States v. Tateo, 377 U.S. 463 (1964); Gori v. United States, 367 U.S. 364 (1961).

There are limits to retrial. Where a jury was selected and later discharged because the presence of a key witness had not been secured, the Supreme Court held that retrial two days later violated the defendant's fifth amendment guarantee against double jeopardy. Downum v. United States, 372 U.S. 734 (1963).

[23] 372 F.2d 294 (9th Cir. 1967).

[24] FED. R. CRIM. P. 13.

restricted to its facts, the result in *Howard* seems to be correct. As the court recognized,[25] the retrial on the new indictment did not constitute harassment by the government and had the government merely retried the original indictment and separately tried the new counts, defendant may well have been subjected to a greater burden in defending.

If the result in *Howard* were to occur after the defendant had successfully appealed from his conviction, the consideration would be raised of whether the procedure of adding new counts to the indictment upon which defendant is to be retried would place an unconstitutional condition upon the right to appeal.[26] The Supreme Court has held that the double jeopardy clause forbids retrial by the federal government of a defendant for first degree murder after he secured a reversal of his conviction of second degree murder.[27] The imposition of harsher sentences upon retrial is a practice condemned by increasing numbers of courts.[28] In a recent case,[29] the Ninth Circuit recognized that the imposition of a harsher sentence upon retrial is an issue which is dividing the circuits, but refrained from deciding the issue. The Court of Appeals for the Fourth Circuit recently concluded[30] that the imposition of a harsher sentence upon retrial exacted an unconstitutional condition upon defendant's fourteenth amendment right to a fair trial by placing the threat of a heavier sentence solely upon those who utilize the post-conviction procedures provided by the state and by violating the prohibition against multiple punishment aspect of double jeopardy.

Admittedly *Howard* does not involve the imposition of a harsher sentence upon retrial. However, the considerations which mitigate against the imposition of harsher sentences[31] should be applicable to the imposition of added counts to an indictment. Although a judge is subject to restrictions in imposing a harsher sentence, the power of the prosecutor to indict the defendant on additional counts presents the possibility that the "added indictment" approach may be just as useful a penalty on the right of appeal as the harsher sentence device.[32]

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[25] Howard v. United States, 372 F.2d 294, 300 (9th Cir. 1967).

[26] *See generally* Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 292-96 (1965).

[27] Green v. United States, 355 U.S. 184 (1957). *See* United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

[28] Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3298 (U.S. Jan. 23, 1968); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963). *See* Marano v. United States, 374 F.2d 583 (1st Cir. 1967). *See generally* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965). *But see* United States v. White, 382 F.2d 445 (7th Cir. 1967); United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir.), *cert. denied*, 389 U.S. 889 (1967).

[29] Jack v. United States, 387 F.2d 471 (9th Cir. 1967).

[30] Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967).

[31] *See generally* Van Alstyne, *supra* note 28.

[32] *See* Kircheimer, *The Act, The Offense And Double Jeopardy*, 58 YALE L.J. 515, 525 (1949).

The Justice Department has recently recognized the undesirability of adding new counts after a successful appeal.

In *United States v. Ewell*[33] the federal government indicted the defendants under only one of three statutes applicable to a single narcotics sale. After the defendants successfully attacked their sentences, the government reindicted them on all three statutory offenses. In sustaining the new indictment the majority of the court did not reach the issue of the validity of reindictment for additional offenses because the government acquiesced in the dismissal of all but one count. However, the dissent concluded that the government ought not, following vacation of a conviction, reindict a defendant for additional offenses arising out of the same transaction which were not charged in the original indictment; the necessary effect would be to violate due process by burdening and penalizing the exercise of the right to seek review of a criminal conviction. The reasoning of the dissent in *Ewell* may be inapplicable to a situation where the additional offenses in the new indictment did not arise out of the transaction that was the subject of the original indictment. For example, in *Howard* the preparation of each fradulent tax return may be characterized as a separate transaction and thus reindictment for additional transactions is permissible. Nevertheless, even where the added offenses arose from separate transactions the question should remain whether the reindictment constituted a penalty upon the right to appeal.

DISCOVERY

Jencks Act Proceedings

Two Ninth Circuit cases dealing with discovery or disclosure in criminal proceedings concerned applications of the Jencks Act.[1] In

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The addition of counts to a new indictment after a conviction has been reversed on appeal is undesirable as a matter of policy and questionable as a matter of law. . . . The addition of counts . . . is unwarranted except in those situations where it is intended that the defendant be permitted to plead to an offense with a lower minimum penalty or that the Judge be afforded an opportunity to take account of the time already spent in prison. 15 U.S. ATTORNEY'S BULL. No. 15 at 411-12 (July 21, 1967).

[33] 383 U.S. 116 (1966).

[1] 18 U.S.C. § 3500 (1964). In substance the Act provides as follows:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness . . . to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination. . . .

(b) After a [government] witness . . . has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant. . . .

(c) If the United States claims that any statement ordered to be produced . . . contains matter which does not relate to . . . the testimony of the witness, the court shall order the United States to deliver such

Lugo v. United States[2] the court held, *inter alia,* that the fact that a government agent who overheard a conversation in Spanish could not remember on direct examination all the Spanish words he heard, and that his notes of the conversation, written in Spanish and English, were destroyed after a report written in English had been filed, did not require either his testimony or the report to be stricken from the record under subsection (d) of the Jencks Act.[3] The court followed settled doctrine in ruling that the destruction of the agent's notes of the conversation did not compel the imposition of subsection (d) sanctions where the notes were later incorporated into a written report. However, the court covered new ground when it inferentially determined that an agent's report is a producible "statement"[4] although it was written entirely in English, because it incorporated English notes made by the agent who overheard a conversation spoken in both English and Spanish.

This result in *Lugo*[5] appears to be in line with analogous cases, although no reported case deals with the specific problem of whether a partial translation of a recorded conversation qualifies as a "substantially verbatim" account of such conversation required by subsection (e)(2) of the Jencks Act. The crux of the problem is definitional; precisely what is a "substantially verbatim" recital of an oral statement?

In determining whether a particular recording is substantially verbatim the overall purpose of the Act itself must be considered. It is well-settled that § 3500 was designed primarily to restrict defense counsel's access to statements of government witnesses for impeachment purposes only.[6] Accordingly, it must be found that the statement is the witness' own so that it would not be unfair to allow the defense to use it to

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statement for the inspection of the court in camera. [T]he court shall excise the portions of such statement which do not relate to . . . the testimony of the witness. [T]he court shall then direct delivery of such statement to the defendant. . . .

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof . . . the court shall strike from the record the testimony of the witness, . . . unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" . . . means —

(1) a written statement made by said witness and signed or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

[2] 370 F.2d 992 (9th Cir. 1967).

[3] *See* note 1 *supra.*

[4] As defined in § (e)(2), note 1 *supra.*

[5] 370 F.2d 992 (9th Cir. 1967).

[6] United States v. Lamma, 349 F.2d 338 (2d Cir.), *cert. denied,* 382 U.S. 947 (1965); Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964), *cert. denied,* 380 U.S. 984 (1965); United States v. Johnson, 337 F.2d 180 (4th Cir. 1964), *aff'd,* 383 U.S. 169 (1966).

impeach the witness.[7] Under subsection (e)(1),[8] if the witness adopts or approves the statement in some manner, its accuracy is assured. Under subsection (e)(2),[9] although there is no approval, accuracy is supposedly guaranteed by the use of a means of transcription that lends itself to a high degree of exactness[10] and the recital actually must be "substantially verbatim."

"Substantially verbatim" does not mean "precisely verbatim,"[11] or "word for word;"[12] the witness' exact words need not be used,[13] nor need they be in their exact gramatical phrasing.[14] But the recital must not contain interpretations, impressions, summaries, or evaluations of the person recording it.[15] A "substantially verbatim" recital has been construed to include a fairly comprehensive reproduction of the witness' words,[16] a continuous narrative statement of the witness recorded verbatim or "nearly so."[17] In short, it should contain the substance of what the witness said.[18]

United States v. Aviles[19] is factually similar to *Lugo*. *Aviles* held that the notes of an interview with a government witness were not substantially verbatim recitals and were not producible under the Jencks Act where the witness spoke rapidly, using poor English and the interviewer put the witness' oral statements into a more recognizable form. But *Aviles* presented more extensive problems in understanding and translating what was said than are found in *Lugo*.[20] Since the primary purpose of the Jencks Act is to afford defense counsel impeachment material, a variance between an oral statement and the recorded recital should be significant only so far as it affects the suitability of the statement for impeachment purposes. The very fact that in *Lugo* the statement was translated means that the words in the recital were not the

[7] Palermo v. United States, 360 U.S. 343 (1959); Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964); United States v. Aviles, 337 F.2d 552 (2d Cir. 1964), *cert. denied*, 380 U.S. 906, 918 (1965).

[8] *See* note 1 *supra*.

[9] *Id.*

[10] Campbell v. United States, 296 F.2d 527, 532 (1st Cir. 1961), *modified*, 303 F.2d 747 (1962), *rev'd on other grounds*, 373 U.S. 487 (1963).

[11] Williams v. United States, 338 F.2d 286, 288 (D.C. Cir. 1964).

[12] United States v. Waldman, 159 F. Supp. 747, 749 (D.N.J. 1958).

[13] *Id.*

[14] *Id.*

[15] Palermo v. United States, 360 U.S. 343, 353 (1959), *aff'g* 258 F.2d 397 (2d Cir. 1958); United States v. Aviles, 337 F.2d 552 (2d Cir. 1964); United States v. Lev, 258 F.2d 9 (2d Cir. 1958), *aff'd per curiam by an equally divided court*, 360 U.S. 470 (1959).

[16] United States v. Thomas, 282 F.2d 191, 194 (2d Cir. 1960).

[17] United States v. West, 170 F. Supp. 200, 210 (N.D. Ohio 1959), *aff'd per curiam*, 274 F.2d 885 (6th Cir. 1960).

[18] United States v. Waldman, 159 F. Supp. 747, 749 (D.N.J. 1958).

[19] 315 F.2d 186 (2d Cir. 1963), *vacated per curiam*, 375 U.S. 32 (1963).

[20] For example, another witness to the *Aviles* interview testified that the person interviewed spoke in poor English, ungrammatically, and indistinctly, and that it was impossible for the interviewer to keep up with the speaker in his note taking. 315 F.2d at 186, 192.

words used by the witness and there was a variance; but such a variance seems clearly immaterial for impeachment purposes.[21]

With respect to the second question decided in *Lugo* (whether destruction of an agent's notes of an overheard conversation, which were incorporated into a written report, compels the imposition of subsection (d) sanctions), the court quoted a prior Ninth Circuit case, *Ogden v. United States.*[22] *Ogden* held that if the original notes are destroyed in accordance with normal administrative procedures,[23] and the same material as that contained in the notes is otherwise available to defense counsel, the sanctions of subsection (d) will not be invoked.[24] In *Lugo* a written report was available for production and the court found that it contained the same material as the destroyed notes; there was no indication that the notes were destroyed in bad faith or in a manner other than in accordance with normal administrative practices. There is little doubt that this aspect of the case was correctly decided.

In *Kaplan v. United States,*[25] the court held, *inter alia,* that the perusal by the trial court, sitting as the trier of fact, of a witness' statement produced for defense counsel's use before such witness testified and before any motion for production of the statement was tendered by defense counsel, was necessary and proper in view of a pending motion to suppress.[26] The court ruled defense counsel inferentially waived any objections to such examination by the court when no protest, objection, or motion to strike was made at the time, no mistrial was urged, and no record of any kind was made.

No authority is cited for the conclusion which the court reached in *Kaplan.* The exact issue before the court was whether the trial court, in its capacity as trier of fact, may peruse a government witness' statement which the government freely delivered to defense counsel in the absence of a motion for production under the Jencks Act and without any objection from the government that the statement con-

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[21] *Compare* Campbell v. United States, 373 U.S. 487 (1963), *with* United States v. Aviles, 337 F.2d 552 (1964), *cert. denied,* 380 U.S. 906, 918 (1965).

[22] 323 F.2d 818 (9th Cir. 1963), *cert. denied,* 376 U.S. 973 (1964).

[23] The requirement for determining whether the destruction was in compliance with established administrative procedures is sometimes stated as "good faith."

[24] In accord with *Ogden* are: Killian v. United States, 368 U.S. 231 (1961); United States v. Hibrich, 341 F.2d 555 (7th Cir.), *cert. denied,* 381 U.S. 941 (1965); United States v. Comulada, 340 F.2d 449 (2d Cir.), *cert. denied,* 380 U.S. 978 (1965).

Ogden does not cover the situation where a producible statement has been destroyed in good faith and the information in the destroyed document is not otherwise available. The First Circuit has indicated that subsection (d) sanctions do not apply in such circumstances. Campbell v. United States, 296 F.2d 527 (1st Cir. 1961), *modified,* 303 F.2d 747 (1962), *rev'd on other grounds,* 373 U.S. 487 (1963).

[25] 375 F.2d 895 (9th Cir.), *cert. denied,* 36 U.S.L.W. 3144 (U.S. Nov. 10, 1967).

[26] The court refers in the opinion to a footnote which supposedly will explain the history of the motion to suppress. However, neither that footnote, (found in 375 F.2d at 899) nor any other, mentions the motion to suppress, nor is any such motion mentioned again in the opinion except when the court holds as it does "in view of the pending motions."

tains material unrelated to the witness' testimony. The trial court followed a procedure which does not seem to be authorized by the specific provisions of the Jencks Act. The Act provides that

> (b) After a witness . . . has testified on direct examination, the court shall, *on motion of defendant,* order the United States to produce any statement . . . of the witness . . . which relates to the subject matter as to which the witness has testified. *If* the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered *directly to the defendant* . . . .
>
> (c) *If the United States claims* that any statement . . . contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection *of the court* in camera.[27] (emphasis added).

The clear language of the Act appears to prescribe the following as the correct procedure to be observed when defense counsel seeks the production of a statement under the Act:

(1) After the government witness has testified, the defense counsel *must move for production* of the statement.[28]

(2) Thereupon, the court shall order the government to produce the statement, and the government shall deliver it *directly to defense counsel* if satisfied that the entire contents of the statement relate to the witness' testimony.

(3) If the government is not satisfied that the entire contents of the statement relate to the witness' testimony, it may thereupon *claim that the statement contains unrelated material.*

(4) When the government so claims, and not before, *the court may then order the statement to be delivered to the court* for inspection *in camera.*

The Ninth Circuit upheld the trial court's handling of this matter

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[27] 18 U.S.C. § 3500 (1964). For the substance of the remainder of the Act see note 1 *supra.*

[28] Without such a motion, the government's retention of statements otherwise producible under the Act will not be deemed wrongful. United States v. Grabina, 295 F.2d 792 (2d Cir. 1961), *remanded,* 369 U.S. 426 (1962). In *Mims v. United States,* 332 F.2d 944 (10th Cir.), *cert. denied,* 379 U.S. 888 (1964), defense counsel's inquiry *to the witness* whether he objected to production of a report filed by the witness was held not to be a motion to produce the report which was in fact, and to the court's knowledge, producible under the Act. The important point of these cases is that, as prescribed by the Act, a motion by defense counsel is required to initiate the process of production, otherwise there can be no production; likewise a claim of unrelatedness from the government should be required in order for there to be an examination by the court of the document then in question, or otherwise there can be no such examination. In short, the court is not to take it upon itself either to order production of a statement for the defense without an appropriate motion, or to examine *in camera* such a statement without a claim by the government that it contains unrelated matter.

in this case by stating that the perusal of the statement was proper, and even necessary, in view of a motion to suppress which was pending at the time.[29] To bolster its conclusion, the court noted that defense counsel's silence and inaction at the time the trial court was examining the statements amounted to an "inferential waiver" of any objections which might have been raised.[30]

No case dealing with the functions of a trial judge in connection with § 3500 indicates that the procedure outlined here as being implicit in the Act's language is the only correct interpretation of the statute. It is frequently said that it is no part of the trial judge's function to determine whether or not a statement before him for inspection *in camera*[31] is consistent with the government witness' testimony or whether it will be useful to the defense for impeachment purposes.[32] When defense counsel requests the production of a statement under the Act,[33] the trial judge, acting as arbiter,[34] has an affirmative duty to determine whether any such statement exists and is in the government's possession, and, if so, to order production of the statement.[35] If necessary, he may conduct a hearing to aid him in discharging these duties,[36] and he may receive and consider extrinsic evidence to determine various fact questions relevant to the production of a statement.[37] But the cases are silent on the question of the judge's duties when, as in *Kaplan*, a statement is volunteered by the government to the defense, before any defense motion for production of such a statement is made and where the government does not claim that unrelated matter is contained in the statement. Nor is there any case law dealing with the situation where there has been a defense motion for production, followed by a court order to produce the specified statements, but where the government does not claim that the statements ordered to be produced contain

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[29] See note 26 *supra*.

[30] No indication is given as to what those objections might have been.

[31] Necessarily, then, defense counsel must have already made the appropriate motion for production, note 28 *supra;* hence this is beyond *Kaplan* where no such motion was ever made.

[32] Scales v. United States, 367 U.S. 203 (1961); Palermo v. United States, 360 U.S. 343 (1959); Banks v. United States, 348 F.2d 231 (8th Cir. 1965); Lewis v. United States, 340 F.2d 678 (8th Cir. 1965).

[33] See note 31 *supra*.

[34] Bary v. United States, 292 F.2d 53 (10th Cir. 1961).

[35] Campbell v. United States, 365 U.S. 85 (1961), *modified*, 303 F.2d 747 (1962), *rev'd on other grounds*, 373 U.S. 487 (1963); Hilliard v. United States, 317 F.2d 150 (D.C. Cir. 1963); Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 935 (1964).

[36] Hilliard v. United States, 317 F.2d 150 (D.C. Cir. 1963); Ogden v. United States, 323 F.2d 818 (9th Cir. 1963). *Ogden* also decided that, being a mere procedural step, there was no right to a jury determination during such hearing.

[37] For example, whether statements exist in addition to those delivered to the court by the government, or whether a statement once in existence is still in the possession of the government or has been destroyed. Ogden v. United States, 323 F.2d 818 (9th Cir. 1963); United States v. Chrisos, 291 F.2d 535 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

unrelated matter. In both these situations it seems that the court is not entitled to inspect the statements because the procedure implicit in the Act requires that there first be a claim by the government that the statement contains some unrelated matter.

SELECTIVE SERVICE

Due to the involvement in Vietnam and the increased manpower requirements of the armed forces, draft quotas have been greatly increased in the past two or three years. With this increase in the number of men drafted there has been a corresponding increase in the number of cases in which the actions of the Selective Service System have been contested.[1] There has also been widespread criticism of our present conscription policy, including several mass demonstrations against the draft, as well as numerous incidents of attempts by individuals to thwart it.[2]

Most of the criticism of our present Selective Service System is not directed at the basic right of Congress to compel citizens to serve in the nation's armed forces, but at the inequalities in the present method of deciding who shall be called to serve.[3] This problem of *who* serves has its origin in the policy behind our existing draft system, which is one of *selection*.[4] Although the title of the Selective Service Act was changed by a 1951 amendment[5] to the "Universal Military Training and Service Act" and subsequently to the "Military Service Act of 1967,"[6] the policy is still *selective* since only a small number of those eligible for military service are actually inducted.[7]

Congress has declared that the system of selection should be one "which is fair and just, and which is consistent with the maintenance of an effective national economy,"[8] and that "the selection of persons for training and service shall be made in a fair and impartial manner."[9] The present act specifies that certain groups shall be exempt from military

[1] Comment, *The Selective Service System in 1966*, 36 MILITARY L. REV. 147 (1967); Comment, *Selective Service in 1965*, 33 MILITARY L. REV. 115 (1966).

[2] *See, e.g., Evading the Draft: Who, How and Why*, LIFE, Vol. 61, Dec. 9, 1966, at 40-49; *Gone with the Draft?*, NEWSWEEK, Vol. 71, Apr. 15, 1968, at 86; *Hell No! at Harvard*, NEWSWEEK, Vol. 71, Jan. 29, 1968, at 26; *Growing Concern: Is the Draft Unfair?*, U.S. NEWS AND WORLD REPORT, Vol. 61, July 11, 1966, at 10.

[3] *See* Davis & Dolbeare, *Selective Service: Present Impact and Future Prospects*, 1967 WIS. L. REV. 892.

[4] 50, App. U.S.C. § 451(c) (1964).

[5] 65 Stat. 75 (1951).

[6] 81 Stat. 100 (1967).

[7] Of over 32 million men registered with the Selective Service System as of July 1, 1966, nearly 16 million were of draftable age and classified as qualified for military service. Only 312,700 were inducted in the first 10 months of 1966 and this number exceeded the number called in 1963, 1964, and 1965 combined. Comment, *The Selective Service System in 1966*, 36 MILITARY L. REV. 147, 148 (1967).

[8] 50, App. U.S.C. § 451(c) (1964).

[9] 50, App. U.S.C. §455(a) (1964).

service,[10] including conscientious objectors[11] and ministers,[12] and provides that the President shall make rules and regulations prescribing the specific methods of selection.[13]

Under the existing system all male citizens are required to register with the Selective Service System when they reach their eighteenth birthday.[14] Registrants are classified by their local draft board,[15] which is composed of civilians.[16] A government appeal agent with legal training advises the local board and the registrants,[17] since they are not allowed to be represented before the board by an attorney.[18] If the registrant is dissatisfied with his classification he has 30 days in which to notify the local board in writing that he desires a personal appearance before them.[19] If he is still dissatisfied he has 30 days to appeal to a five man state appeal board which will give him a *de novo* classification.[20] If there is a dissenting vote on the state appeal board or if the State or National Director of the Selective Service System is willing to take an appeal for him, the registrant can resort to the President's Appeal Board.[21]

In 1967 the Ninth Circuit decided four Selective Service cases.[22] Three of these decisions involved the conscientious objector and ministerial exemptions.[23] This is consistent with the experience of federal courts throughout the country; these two exemptions have been at issue in a majority of the cases decided under the Selective Service Act since its enactment in 1940.[24]

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[10] *See* 50, App. U.S.C. § 456 (1964).
[11] 50, App. U.S.C. § 456(j) (1964).
[12] 50, App. U.S.C. § 456(g) (1964).
[13] 50, App. U.S.C. § 460(b)(1) (1964).
[14] 50, App. U.S.C. § 453 (1964); *see* 32 C.F.R. §§ 1611.1, 1613 (1968).
[15] 32 C.F.R. §§ 1622, 1623 (1967).
[16] 50, App. U.S.C. § 460(b)(3) (1964); *see* 32 C.F.R. § 1604.52 (1968).
[17] 32 C.F.R. § 1604.71 (1968). Writers contend that these government appeal agents do not adequately protect the rights of the registrants. *See* Comment, *The Selective Service*, 76 YALE L.J. 160, 168 (1966). *See also* Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2147 (1966); Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1030-34 (1966).
[18] 32 C.F.R. § 1624.1(b) (1968). This denial of the right to legal council is criticized in 114 U. PA. L. REV. 1014, 1029-34 (1966), and in 54 CALIF. L. REV. 2123, 2146-51 (1966).
[19] 32 C.F.R. § 1624.1(a) (1968).
[20] 32 C.F.R. § 1626.2 (1968).
[21] 32 C.F.R. § 1627.3 (1968).
[22] Wills v. United States, 384 F.2d 943 (9th Cir. 1967); Lingo v. United States, 384 F.2d 724 (9th Cir. 1967); Gatchell v. United States, 378 F.2d 287 (9th Cir. 1967); Daniels v. United States, 372 F.2d 407 (9th Cir. 1967).
[23] Lingo v. United States, 384 F.2d 724 (9th Cir. 1967); Gatchell v. United States, 378 F.2d 287 (9th Cir. 1967); Daniels v. United States, 372 F.2d 407 (9th Cir. 1967).
[24] Comment, *The Selective Service System in 1966*, 36 MILITARY L. REV. 147, 152 (1967); Comment, *Selective Service in 1965*, 33 MILITARY L. REV. 115, 120 (1966); Comment, *Selective Service Ramifications in 1964*, 29 MILITARY L. REV. 123, 127-34 (1965).

In the fourth 1967 draft case,[25] the Ninth Circuit was concerned with a portion of the present Selective Service Act which has been of special interest to both the public and the Congress in the last few years,[26] the 1965 amendment prohibiting a registrant's burning of his draft card.[27]

Conscientious Objector and Ministerial Exemptions

In two of the three Ninth Circuit cases which involved the conscientious objector and ministerial exemptions — *Gatchell v. United States*[28] and *Lingo v. United States*[29] — the court was asked to review the classifications which the registrants had received. The I-A classification given Lingo by his appeal board was upheld, as was his conviction for refusing to be inducted.[30] Gatchell's conviction for failing to report for civilian work, however, was reversed since the court found that he was entitled to be exempted as a minister and thus should have been classified IV-D rather than I-O as a conscientious objector.[31] Gatchell sought the IV-D rather than the I-O classification because when classified IV-D he would not be subject to two years of civilian work as he was under the I-O classification.[32]

Scope of Judicial Review

In analyzing these two decisions it is necessary to understand what the court says about the scope of judicial review which can be exercised over classification rulings of the local draft boards or boards of appeal. First, it is necessary to examine Supreme Court decisions dating back to an earlier time when the issue was whether or not there could be *any* judicial review of Selective Service classifications.

Under the 1917 Act registrants were considered to be subject to military jurisdiction from the moment the induction notice was mailed;[33] therefore judicial review of classification could be sought only through habeas corpus proceedings and would be granted only if the classification was found to be clearly arbitrary.[34]

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[25] Wills v. United States, 384 F.2d 943 (9th Cir. 1967).

[26] *E.g., Warning to Card Burners,* Time, Vol. 91, Feb. 21, 1968, at 64; L. Wainwright, *Serious To-Do about a Silly Law,* Life, Vol. 60, Mar. 4, 1966, at 17; *Card is not for Burning,* Time, Vol. 88, Oct. 21, 1966, at 56. *See* Forkosch, *Draft Card Burning — Effectuation and Constitutionality of the 1965 Amendment,* 32 Brooklyn L. Rev. 303 (1966); Rachlin, *Draft Cards and Burning the Constitution,* 32 Brooklyn L. Rev. 334 (1966); 16 De Paul L. Rev. 485 (1967).

[27] 79 Stat. 586 (1965).

[28] 378 F.2d 287 (9th Cir. 1967).

[29] 384 F.2d 724 (9th Cir. 1967).

[30] *Id.* at 727.

[31] Gatchell v. United States, 378 F.2d 287, 292 (9th Cir. 1967).

[32] 50, App. U.S.C. §§ 456(g), 456(j) (1964); *see* 32 C.F.R. §§ 1622.2, 1622.14, 1622.43 (1968).

[33] Act of May 18, 1917, ch. 15, § 2, 40 Stat. 78.

[34] *See* Arbitman v. Woodside, 258 F. 441 (4th Cir. 1919). Cases arising through habeas corpus proceedings under the 1917 Act are collected in 10 Geo. Wash. L. Rev. 827, 829 n.7 (1942). *See also* Bell, *Selective Service and the Courts,* 28 A.B.A.J. 164, 167 (1942).

The 1940 Act provided that the registrant was not subject to military jurisdiction until actually inducted,[35] but there was no provisions for review and the act specified that decisions of the local boards and boards of appeal were *final* except for remedies provided within the system itself.[36] In the 1944 case of *Falbo v. United States*[37] the Supreme Court avoided the question of whether judicial review was possible under the 1940 Act. They based their decision, that the registrant, a Jehovah's Witness, was not entitled to review, on the ground that he had failed to exhaust the administrative remedies available within the Selective Service System by refusing to report for induction.[38]

Two years later, however, the Court finally faced the issue of judicial review in the case of *Estep v. United States.*[39] In *Estep* the facts were similar to those in *Falbo* — a Jehovah's Witness who had been denied a IV-D classification refused to be inducted. However, in *Estep* the registrant had reported to the induction center and had been accepted before he refused to be inducted. The Supreme Court said that *Estep* had thus exhausted all remedies available in the Selective Service System.[40] The Court, turning to the issue of judicial review, avoided the "finality" provision of the Act as well as its lack of provision for appeal by saying that it refused to believe "that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction,"[41] or that "Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law had designed for the protection of the accused."[42]

After finding that judicial review was available in *Estep,* the Court went on to define the scope of such review:

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is *no basis in fact* for the classification which it gave the registrant. (emphasis added).[43]

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[35] Act of Sept. 16, 1940, ch. 720, § 11, 54 Stat. 894.
[36] Act of Sept. 16, 1940, ch. 720, § 10(a)(2), 54 Stat. 893.
[37] 320 U.S. 549 (1944).
[38] *Id.* at 553.
[39] 327 U.S. 114 (1946).
[40] *Id.* at 123.
[41] *Id.* at 121.
[42] *Id.* at 122.
[43] *Id.* at 122-23.

This limited scope of review is a departure from the *substantial evidence* test set forth in the Administrative Procedure Act,[44] which is the rule applied by courts in reviewing virtually all administrative decisions[45] other than those of the Selective Service System.[46] The *basis in fact* test has been referred to as the narrowest range of review known to the law,[47] and is unanimously stated by the courts to be the rule applicable in Selective Service cases.[48] Legal writers in this area, however, contend that while the courts voice the *basis in fact* test, they often actually apply a more liberal rule to many of the draft cases.[49]

Both *Lingo* and *Gatchell* set forth the *basis in fact* test as the rule. The results of these cases, in light of this test, can perhaps best be explained by examining the Supreme Court cases they relied on. *Gatchell* relied on *Dickinson v. United States,*[50] while *Lingo* follows *Witmer v. United States.*[51] *Dickinson* and *Witmer* each started with the doctrine of the *Estep* case and went from there. These three cases now constitute the leading cases concerning the scope of review of Selective Service classifications.

Dickinson involved a Jehovah's Witness whose draft board had refused to grant him exemption as a minister. He was prosecuted for refusing to be inducted. The Supreme Court said that the *basis in fact* test was controlling, but they appear to have applied a standard more like the *substantial evidence* test.[52] Two Selective Service boards as well as the District Court and the Court of Appeals had sustained the classification of the local board but the Supreme Court set aside the conviction because they said that after searching the record they could find no affirming evidence to support the local board's findings.[53] The dissent in *Dickinson* pointed out that the majority was requiring the board to build a record.[54]

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[44] 5 U.S.C. § 1006(c) (1964). *See* Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951).

[45] 4 K.C. DAVIS, ADMINISTRATIVE LAW § 29.01, at 114 (1958) [hereinafter referred to as DAVIS].

[46] Dickinson v. United States, 346 U.S. 389, 396 (1953); *see* DAVIS at § 29.07. The Selective Service Act excludes itself from all Administrative Procedure Act provisions other than the requirement of publication. 50, App. U.S.C. § 463(b) (1964).

[47] Keefer v. United States, 313 F.2d 773, 776 (9th Cir. 1963); Blalock v. United States, 247 F.2d 615, 619 (4th Cir. 1957).

[48] Witmer v. United States, 348 U.S. 375 (1955). *See* Dickinson v. United States, 346 U.S. 389 (1953); DAVIS at § 29.07.

[49] DAVIS at § 29.07; Jaffe, *Judicial Review: Question of Fact,* 69 HARV. L. REV. 1020, 1050 (1956). *See also* Comment, *Fairness and Due Process Under the Selective Service System,* 114 U. PA. L. REV. 1014, 1020 (1966); Comment, *The Selective Service System: An Administrative Obstacle Course,* 54 CALIF. L. REV. 2123, 2140 (1966).

[50] 346 U.S. 389 (1953).

[51] 348 U.S. 375 (1955).

[52] 346 U.S. 389, 394 (1953).

[53] *Id.* at 396; *see* DAVIS § 29.04, at 134-35.

[54] 346 U.S. 389, 399 (1953).

In *Gatchell* the Ninth Circuit quotes *Dickinson*:

> [W]hen the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.[55]

The court had little trouble bringing *Gatchell* under what it called the "Dickinson rule" since the facts in the two cases are similar in many respects and since there was no evidence in the record to uphold the classification made by the draft board.[56]

Witmer v. United States, which is relied on by the court in *Lingo,* was factually similar to *Lingo* in that it involved a Jehovah's Witness who was denied a I-O classification though he claimed to be a conscientious objector.[57] The Supreme Court, apparently attempting to retreat somewhat from the broad implications of *Dickinson,*[58] upheld the local board and affirmed Witmer's conviction saying:

> It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgment on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations.[59]

In *Lingo* the court referred to the above quotation from *Witmer* and said, "Applying the guidelines enunciated in Witmer to the record before us, we must conclude that there was basis in fact for the Board's determination in classifying appellant as I-A."[60]

The Unequal Treatment Objection

Comparing *Lingo* with *Gatchell,* it seems easier to obtain the reversal of a conviction where there has been a denial of a IV-D or "ministerial" classification than where a I-O or "conscientious objector" classification has been denied. One reason for this appears to be that the Supreme Court in *Dickinson* (involving the ministerial exemption) applied a broad standard of review and reversed the local board while in *Witmer* (involving the conscientious objector exemption) they retreated to the narrow *basis in fact* standard.[61] This is unfortunate, since it makes the more desirable IV-D classification easier to get than the lower I-O classification.[62] The result is that a person having personal religious

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[55] 378 F.2d 287, 292 (9th Cir. 1967).
[56] *Id.*
[57] 348 U.S. 375, 376 (1955).
[58] *See* DAVIS § 29.07, at 150-51.
[59] 348 U.S. 375, 380-81 (1955).
[60] 384 F.2d 724, 727 (9th Cir. 1967).
[61] *See* DAVIS § 29.07, at 150-51; Comment, *The Selective Service System: An Administrative Obstacle Course,* 54 CALIF. L. REV. 2123, 2139 (1966).
[62] 50, App. U.S.C. §§ 456(g), 456(j) (1964); *see* 32 C.F.R. §§ 1622.2, 1622.14, 1622.43 (1968).

convictions against war and killing has a greater chance of being forced to choose between military service and prison than does a minister who has nothing against war. This seems inequitable since the conscription of a minister is comparable to that of a doctor, for whom the draft is even more likely than it is for the average registrant.[63] It seems that when a minister is drafted his flock would be inconvenienced little more than are a doctor's patients.

The reason behind this inequity between the two classifications is implied in *Witmer* where the Court pointed out that evidence supporting a I-O classification is more subjective in nature than that supporting a IV-D exemption, thus precluding the conscientious objector from making a prima facie case from objective facts alone, as can a minister.[64] Despite the holdings of *Dickinson* and *Witmer*, there is nothing to indicate that Congress intended that a stricter standard be applied to the exemption of conscientious objectors than to the exemption of ministers.[65] It would seem that the courts would do well to apply as broad a standard of review to conscientious objector cases as they do to ministerial cases.

Confusing the Exemptions

One of the problems the courts seem to encounter in these cases is the difficulty of keeping separate the language and reasoning concerning the conscientious objector exemption and that concerning the ministerial exemption. One probable reason for this is that the most common type of draft case in recent years has involved a registrant classified I-O who has sought a IV-D exemption so he would not be subject to assignment to civilian work.[66] The confusion between these two exemptions is apparent in *Lingo v. United States.*

In reading the *Lingo* decision it is difficult to determine which exemption the court is concerned with. While there is reference to the fact that a I-O classification was sought,[67] there was also a contention by the registrant during his personal appearance before the local board that he was preparing for the ministry and this would entitle him to a IV-D exemption.[68] Most of the reasoning in *Lingo* seems to be directed against

[63] Comment, *The Selective Service System in 1966*, 36 MILITARY L. REV. 147, 168 (1967); *see* Comment, *Selective Service in 1965*, 33 MILITARY L. REV. 115, 119 (1966).

[64] 348 U.S. 375, 381-2 (1955).

[65] *Compare* 32 C.F.R. § 1622.14 (1968), *with* 32 C.F.R. § 1622.43 (1968). *See also* Comment, *Selective Service in 1965*, 33 MILITARY L. REV. 115, 124 (1966) (indicating that the ministerial exemption is to be strictly construed against the claimant).

[66] *E.g.*, United States v. Petiach, 357 F.2d 171 (7th Cir. 1966); United States v. Norris, 341 F.2d 527 (7th Cir. 1965); United States v. Kenstler, 250 F. Supp. 833 (W.D. Pa. 1966); Comment, *The Selective Service System in 1966*, 36 MILITARY L. REV. 147, 152 (1967); *see* Comment, *Selective Service in 1965*, 33 MILITARY L. REV. 115, 120 (1966).

[67] 384 F.2d 724, 726 (9th Cir. 1967).

[68] *Id.*

his right to be classified as a conscientious objector but there is emphasis placed on the recentness and extent of his activity in his church.[69] This participation in activities seems to be more the objective type of evidence which *Witmer* refers to as the kind of evidence which supports a claim of exemption as a minister.[70] It would seem that a member could believe fervently in the teachings of his church, including those against war and killing, without being involved in all of its various activities or putting in any particular number of hours per week. Therefore one problem with the *Lingo* decision is that it is impossible to determine whether the appellant's lack of activity is used to refute his claim that he is a conscientious objector or whether the court uses this reasoning to decide he is not exempt as a minister.

The Late Conscientious Objector Claim

In *Lingo* the appellant contended that the board wrongfully based its denial of a I-O classification on the ground that his belief opposing war arose at the same time he received his I-A classification.[71] The court made quick disposition of this defense, saying that this factor could be considered by the board along with the other evidence on the record in determining appellant's sincerity.[72] In a recent decision the Second Circuit held that the claims of a registrant that he was a conscientious objector could not be disregarded even when made after he was notified to report for induction.[73] The Second Circuit reasoned that a realization that he may soon be required to kill may be the catalyst which crystalizes the registrant's once vague feelings into clearcut conscientious objection to war.[74] It would seem that this reasoning is also applicable to *Lingo's* request for exemption as a conscientious objector since it came only after he was classified I-A. If this Second Circuit rule were to be applied to *Lingo*, along with the broad *Dickinson* standard of review, reversal of the conviction would be proper if it were found that the Selective Service boards had denied the I-O classification because of *when* it was requested.

Treatment of the Findings of the Board

Turning to the *Gatchell* case, another area which should be examined is the Ninth Circuit's treatment of the findings of the board of appeals. The court recognized that the board was not required to make any findings nor give any reasons for its decision.[75] The court said, however, that when such reasons or findings were given, the determination of

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[69] *Id.* at 726-27.
[70] 348 U.S. 375, 381-82 (1955).
[71] 384 F.2d 724, 725 (9th Cir. 1967).
[72] *Id.* at 727.
[73] United States v. Gearey, 368 F.2d 144 (2d Cir. 1966).
[74] *Id.* at 149-51; *see* Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1026-29 (1966).
[75] 378 F.2d 287, 291 (9th Cir. 1967).

whether the classifications had any basis in fact could best be made in light of these reasons.[76] The court pointed out that the two findings given were erroneous and said that it would not search the record further since these reasons had been set forth, although it admitted that the board had said it was basing its decision on "these reasons among others."[77] Thus the court found it easier to hold "no basis in fact" because findings had been given which they were able to refute.

Since the giving of reasons for their decisions is solely within the discretion of the Selective Service boards,[78] the *Gatchell* decision will tend to make the boards reluctant to list such reasons. Many writers have urged that draft boards list more reasons for the classifications they make, so that registrants and reviewing tribunals can better understand the basis of their classifications.[79] Few of the board members have legal training,[80] and the practical result of using findings of these boards as an excuse to overturn their classifications will be to cause them to abstain from giving reasons for their decisions. Considering the advantages of having more reasons given, it would be preferable for the courts to adopt an attitude of willingness to search the record, even when reasons are given, and to consider the findings of the board only in *addition* to all other available evidence.

Exhaustion of Administrative Remedies

In the remaining two 1967 Ninth Circuit draft cases, the court did not discuss the standard of review but was concerned with the issue of *when* in the selective process review could be obtained. In both *Daniels v. United States*,[81] a conscientious objector and ministerial exemptions case, and in *Wills v. United States*,[82] which involved draft card burning, the government claimed the registrant was not entitled to have his classification reviewed by the courts because he had failed to exhaust his administrative remedies.

The doctrine of exhaustion of administrative remedies is based on the requirement of a final administrative decision as a prerequisite to judicial review.[83] This rule is intended to preserve the autonomy of

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[76] *Id.*
[77] *Id.* at 292-93.
[78] Gatchell v. United States, 378 F.2d 287, 291 (9th Cir. 1967); *see* 32 C.F.R. §§ 1623.4(d), 1626.27 (1968); United States v. Greene, 220 F.2d 792, 794 (7th Cir. 1955).
[79] *E.g.*, Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 Calif. L. Rev. 2123, 2153-56 (1966); Comment, *The Selective Service*, 76 Yale L.J. 160, 188 (1966).
[80] *See* Comment, *The Selective Service*, 76 Yale L.J. 160, 167 (1966).
[81] 372 F.2d 407 (9th Cir. 1967).
[82] 384 F.2d 943 (9th Cir. 1967).
[83] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (the leading case requiring exhaustion).

administrative agencies in the areas over which they have been given control because of their special expertise. Many exceptions to the rule have developed;[84] some of the foremost authorities in administrative law feel that this rule has been substantially undermined and no longer necessarily controls.[85]

Despite any weaking of the exhaustion requirement in other areas, the courts have consistently refused to review Selective Service cases before all available administrative remedies have been tried. The leading case for this is *Falbo v. United States*,[86] where the Supreme Court denied review because the registrant had failed to comply with all the prescribed steps in the selective process before resorting to the courts. The theory behind the *Falbo* rule is that in the interest of an efficient induction system, the validity of the classification of the registrant should not be examined until he has taken all the prescribed steps within the system and eliminated all chance that he may be rejected.[87] The *Falbo* rule clearly controls in Selective Service cases, although most courts, when applying it, claim that they are only requiring the exhaustion of administrative *remedies*.[88] However, not all of these steps can be classified as legal remedies, as is pointed out by the Ninth Circuit in *Daniels*;[89] therefore the *Falbo* requirement actually goes beyond the exhaustion doctrine.

In *Daniels*, the registrant who had been classified I-O requested a IV-D classification in both his personal appearance before the local board and in his appeal to the state board of appeals.[90] When ordered to report for civilian work, he refused to do so, and on appeal of his conviction for this refusal, he contended that he should have received a IV-D exemption. The only issue decided by the Ninth Circuit was whether the appellant had sufficiently complied with the steps prescribed in the selective process to be entitled to have his classification reviewed in the courts. The court, sitting en banc, was unable to distinguish this case from *Bjorson v. United States*,[91] which had been decided eight years earlier. They therefore had to overrule *Bjorson* when they decided to reverse Daniel's conviction. *Bjorson* was based on *Falbo*, and therefore had to be distinguished from it. Although the facts of the two cases were essentially the same, it was pointed out in *Daniels* that Congress had changed the selective process one week after *Falbo*, and some time before *Bjorson*, so that now the Selective Service System

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[84] *See* DAVIS §§ 20.01-20.10.
[85] *Id.*
[86] 320 U.S. 549 (1944).
[87] *See* Daniels v. United States, 372 F.2d 407 (9th Cir. 1967).
[88] *See* Estep v. United States, 327 U.S. 114 (1946); Woo v. United States, 350 F.2d 992 (9th Cir. 1965).
[89] 372 F.2d 407, 414 (9th Cir. 1967).
[90] *Id.* at 408-09.
[91] 272 F.2d 244 (9th Cir. 1959).

has no opportunity to reject the registrant after he has been ordered to report for civilian work.[92] In *Daniels* the judges agreed that since there is no further chance to reject the registrant, the selective process should be considered at an end, and no further steps need be taken before judicial review is sought. They argued that the appellant had reached the brink in the selective process and held that he was entitled to have his classification reviewed by the courts without the formality of reporting for civilian work.[93]

In *Wills v. United States* the issue was not what constituted compliance with the *Falbo* requirement but rather whether this requirement was applicable at all.[94] The registrant had sent a letter to his draft board indicating that he had burned his draft card and that he refused to carry another one. He requested neither a personal appearance nor an appeal after being reclassified I-A as a delinquent, but refused induction. The district court, disregarding his claim that the attempt to induct him was a violation of his first amendment right of free speech, affirmed his conviction on the procedural ground that he had failed to exhaust his administrative remedies.[95] Although the Ninth Circuit upheld the conviction, it did so on the merits,[96] because they found the exhaustion requirement to be inapplicable. The grounds given for not requiring exhaustion were (1) the appellant's defense to the conviction that his constitutional rights had been violated "was not addressed to an area of administrative judgment," and (2) although the local board had immediately notified appellant, they failed to send him the required "delinquency notice" within the time allowed for the administrative appeal, thereby possibly misleading him.[97]

The court, in concluding that exhaustion should not be required where first amendment rights were involved, reasoned that this was not an area in which the Selective Service had special expertise nor where its determination would be final. The court went on to say that they felt the exhaustion rule had lost much of its force in this area and cited the Second Circuit case of *Wolff v. Selective Service Local Board No. 16*[98] as authority for not requiring exhaustion.

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[92] 372 F.2d 407, 411 (9th Cir. 1967).
[93] *Id.* at 414.
[94] 384 F.2d 943, 945 (9th Cir. 1967).
[95] *Id.*
[96] *Id.* at 947. In *Wills* the court avoided the question of the constitutionality of the 1965 amendment designed to prevent draft card burning. They followed the example of the First Circuit in *O'Brien v. United States*, 376 F.2d 538 (1967) and held that the defendant violated the requirement of being in possession of his draft card at all times. Since the penalty for the two violations was the same, the determination of guilt was left undisturbed. The Supreme Court, after *Wills* was decided, granted certiorari in the *O'Brien* case, considered the issue of the constitutionality of the 1965 amendment, and upheld it. 36 U.S.L.W. 4469 (U.S. May 27, 1968).
[97] 384 F.2d 943, 945 (9th Cir. 1967).
[98] 372 F.2d 817 (2d Cir. 1967).

The holding of the Ninth Circuit in *Daniels* as to the requirement of exhaustion seems to be consistent with the decisions of other courts.[99] However, there is serious question as to the validity of the court's conclusion in *Wills* that exhaustion should not be required where first amendment rights are raised as a defense. The only case squarely supporting this view is the *Wolff* case cited by the court. *Wolff* based its holding on the reasoning of the civil rights case of *Dombrowski v. Pfister*,[100] where the Supreme Court held an injunction against a criminal prosecution proper where the threat of such prosecution had a "chilling effect" on the exercise of first amendment freedoms.[101] *Wolff* indicated that no Selective Service cases supported its holding, but said that the policy of preventing serious threats to the exercise of first amendment rights must prevail when it conflicts with the policy of requiring exhaustion.[102]

In June, 1967, Congress enacted an amendment to the Selective Service Act which included the provision:

> No judicial review shall be made of classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . .[103]

The amendment precludes the *Wolff* result by specifically taking away jurisdiction to review draft classifications except when the question is raised as a defense in a criminal trial for refusal to be inducted. The report to the Armed Services Committee of the House of Representatives of May 18, 1967, clearly spells out the intent behind this amendment:

> (4) The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System.[104]

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[99] *See* Gibson v. United States, 329 U.S. 338 (1946).
[100] 380 U.S. 479 (1965). For a further development of the narrow distinctions drawn in *Dombrowski*, see *Zwickler v. Koota*, 88 S. Ct. 391 (1967).
[101] 380 U.S. 479, 487 (1965).
[102] 372 F.2d 817, 825-26 (2d Cir. 1967).
[103] 81 Stat. 104.
[104] H.R. REP. No. 267, 90th Cong., 1st Sess. 30 (1967).

One result of this amendment, which precludes any declaratory relief as to draft classifications, is to require a registrant to refuse induction before his classification can be reviewed. This places him in an unfortunate position, since if his contention that he has been wrongfully classified is rejected at this stage, he is subject to both a fine and a prison term.[105] If he could obtain review earlier, he would be able to accept induction if he lost his court battle, thus avoiding the criminal conviction. Congress has control of the jurisdiction of the federal courts,[106] and this amendment would therefore seem on its face to be within its power to enact. However, whether, consistently with due process, Congress can force an individual to choose between a potential criminal conviction and his wrongful induction into the armed forces, without allowing him any review in the federal courts, has not been decided by the Supreme Court.[107]

Clearly, the *intent* behind this 1967 amendment was to require exhaustion of all administrative remedies. The amendment was in effect in October of 1967 when *Wills* was decided, though the court failed to mention it, but the amendment does not squarely cover the facts in *Wills*. Although *Wills* did not exhaust his administrative remedies, the *wording*

[105] Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2136-37 (1966). *See* Petitioner's Brief for Certiorari at 16-19, Oestereich v. Selective Service System Local Board No. 11, *cert. granted*, 36 U.S.L.W. 3443 (U.S. May 20, 1968) (No. 1246).

[106] *Ex Parte* McCardle, 7 Wall. 506 (1869).

[107] *See* Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962); Estep v. United States, 327 U.S. 114 (1946).

Two arguments, in addition to that of the due process objections which seem to have been an underlying consideration in the *Estep* decision, can be made on habeas corpus and constitutional fact grounds.

The privilege of the writ of habeas corpus is constitutionally protected, and cannot be removed by statute, except in cases of rebellion or invasion. U.S. CONST. art I, § 9. Habeas corpus relief is not necessarily dependent upon exhaustion of all other remedies. Fay v. Noia, 372 U.S. 391 (1963).

The traditional prerequisite for habeas corpus relief has been physical custody over the person of the petitioner. In *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952), the district court found that the habeas corpus power of the federal courts extended to a person *subject to* induction although not yet inducted. Although the case stands alone, it, strangely enough, has been cited by the Supreme Court as a case demonstrating that the lower federal courts have consistently regarded habeas corpus "as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service." Jones v. Cunningham, 371 U.S. 236, 240 (1963). *Jones* held that a state prisoner on parole was sufficiently in the "custody" of the members of the state parole board to sustain the issuance of a writ of habeas corpus.

In the very recent case of *Peyton v. Rowe*, 88 S. Ct. 1549 (1968), the Supreme Court further liberalized the concept of "custody," holding that a prisoner sentenced to consecutive prison terms could attack the second sentence even though he was not then serving under it.

The continuing trend of the Supreme Court to liberalize the "custody" requirement, and the recent reliance on *Ex parte Fabiani*, provide a possible basis for federal habeas corpus relief *prior* to induction.

In addition, the "constitutional fact" doctrine of *Crowell v. Benson*, 285 U.S. 22 (1932) and *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) may have applicability in this area, where first amendment issues of freedom of speech and freedom of religion are involved.

of the statute does not expressly require exhaustion as such. His request that his classification be reviewed was raised as a defense to a criminal prosecution for refusal to be drafted and this is allowed under the language of the 1967 amendment, even though not all administrative remedies had been used.

Most cases which have construed the 1967 amendment seem to support the contention that exhaustion is required in *all* draft cases. Three district court opinions have held that action to obtain declaratory relief from draft board classifications is barred by this amendment.[108] The Fifth Circuit case of *DuVernay v. United States*,[109] factually similar to *Wills*, also raised a claim of violation of constitutional rights as a defense to a prosecution for refusing induction. The Fifth Circuit, however, affirmed that conviction, holding that the 1967 amendment required exhaustion. The only distinction between these two cases is that *Wills* involved a claimed first amendment guarantee, while DuVernay claimed that his fifth amendment right of due process had been violated.

One recent case raises several questions. In *Oestereich v. Selective Service System Local Board No. 11*, both the district court[110] and the Tenth Circuit[111] cited the amendment requiring exhaustion as their chief reason for refusing to review the plaintiff's classification. The facts of the case do not appear clearly in either report. Oestereich petitioned the Supreme Court for certiorari, and it was granted.[112] One reason for this seems to be that the Solicitor General in his Memorandum for the Respondent urged the Supreme Court to reverse the court below.[113] Although he argued that the exhaustion requirement should not be dispensed with, even where first amendment rights are involved, he contended that it should not be applicable where the administrative action terminated an exemption which Congress had granted by statute.[114] The Solicitor General pointed out, however, that this issue did not necessarily involve the constitutional validity of the 1967 amendment, since it could be construed so as not to cover the situation.[115]

In the case of *Kimball v. Selective Service Local Board No. 15*,[116] the Southern District of New York quoted extensively from the Memorandum for the Respondent in the *Oestereich* case. The court extended

[108] Breen v. Selective Service Local Board No. 16, No. 12422 (D. Conn., Mar. 13, 1968); Carpenter v. Hendrix, 277 F. Supp. 660 (N.D. Ga. 1967); Moskowitz v. Kindt, 273 F. Supp. 646 (E.D. Pa. 1967).
[109] 23 PIKE & FISCHER, ADMIN. LAW 2d 142 (5th Cir., Feb. 7, 1968).
[110] 280 F. Supp. 78 (D. Wyo. 1968).
[111] 390 F.2d 100 (10th Cir. 1968).
[112] 36 U.S.L.W. 3443 (U.S. May 20, 1968) (No. 1246).
[113] Respondent's Brief on Certiorari at 13, Oestereich v. Selective Service System Local Board No. 11, *cert. granted*, 36 U.S.L.W. 3443 (U.S. May 20, 1968) (No. 1246).
[114] *Id.* at 11-12.
[115] *Id.* at 12.
[116] No. 67 Civ. 4733 (S.D.N.Y., Apr. 23, 1968).

the Solicitor General's reasoning by holding that the requirement of exhaustion should be dispensed with not only where there has been a termination of an exemption, but also where there has been a termination of a statutory student deferment by administrative action. This holding would also apply to the facts in *Wills*, since a II-S student deferment was terminated by his local board when the registrant notified them that he had burned his draft card.[117]

In a memorandum on behalf of the Selective Service System prepared for filing in the *Oestereich* case it is argued that the Solicitor General's view would affect almost all Selective Service cases and "hinder severely the efforts of the Government to provide itself with the military manpower required for its defense."[118]

The result in *Kimball* seems to support the Selective Service's argument in *Oestereich*. If the rule advocated by the Solicitor General is adopted by the Supreme Court, the result sought by Congress in passing the 1967 amendment will be almost completely thwarted. The effect on our Selective Service System of substantially eliminating the exhaustion requirement is uncertain, but it does seem that this result is exactly contrary to the expressed intent of Congress. However, the narrow reading of the amendment, perhaps including its complete circumvention by the courts, may be required by constitutional considerations, or may be resorted to in order to avoid confronting the substantial questions involved.[119] If the amendment is read narrowly or found to be unconstitutional, this will be one of the most significant developments in the Selective Service law since the 1940 Act, and could require Congress to completely revise the present selection method.

[117] 384 F.2d 943, 944 (9th Cir. 1967).
[118] Selective Service Memorandum against Certiorari at 4, Oestereich v. Selective Service System Local Board No. 11, *cert. granted*, 36 U.S.L.W. 3443 (U.S. May 20, 1968) (No. 1246).
[119] *See* note 107, *supra*.

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