



2-1-1981

Case Comments

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Recommended Citation

Notre Dame Law Review Editors, *Case Comments*, 56 Notre Dame L. Rev. 508 (1981).

Available at: <http://scholarship.law.nd.edu/ndlr/vol56/iss3/5>

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CASE COMMENTS

Administrative Law—PASSPORTS MAY NOT BE REVOKED FOR NATIONAL SECURITY AND FOREIGN POLICY REASONS WITHOUT CONGRESSIONAL AUTHORIZATION—*Agee v. Muskie*, 629 F.2d 80 (D.C. Cir. 1980)*

Judicial recognition of a constitutional right to travel abroad is a relatively recent development. Not until 1958 did the Supreme Court of the United States indicate that an individual's freedom to travel abroad was a cognizable liberty interest protected by the fifth amendment.¹ Since that time federal courts have struggled to determine the limits of the government's power to regulate international travel. Although the issue has arisen in a variety of settings,² the conflict is most clearly presented in cases involving the validity of passport regulations.

In *Agee v. Muskie*,³ the United States Court of Appeals for the District of Columbia held that the Secretary of State lacked authority to revoke the passport of an individual who had been determined to be causing or likely to cause serious damage to the national security and foreign policy of the United States.⁴ The court reasoned that since the right to travel was protected by the Constitution, any restrictions on this right must be made by the legislative rather than the executive branch of the federal government. Thus, according to the court, only those State Department passport regulations explicitly or implicitly approved by Congress are valid. Since the regulation used to revoke passports for national security and foreign policy reasons had not received this necessary congressional approval, the court held the regulation invalid.

Philip Agee is a self-proclaimed critic of the Central Intelligence Agency (CIA) and has announced his intention to expose American intelligence activities throughout the world.⁵ In December 1979, the Secretary of State revoked Agee's passport⁶ under the authority of 22 C.F.R. Section 51.70(b)(4) (1979), which pro-

* *Cert. granted*, 101 S. Ct. 69 (1980).

1 In *Kent v. Dulles*, 357 U.S. 116 (1958), Justice Douglas wrote: "The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Id.* at 125. See also *Califano v. Aznavorian*, 439 U.S. 170 (1978); *United States v. Laub*, 385 U.S. 475 (1967); *Zemel v. Rusk*, 381 U.S. 1 (1965).

2 See, e.g., *Califano v. Aznavorian*, 439 U.S. 170 (1978) (Social Security restrictions on recipients travelling abroad); *Zemel v. Rusk*, 381 U.S. 1 (1965) (State Department regulation restricting travel to certain areas); *Berrigan v. Sigler*, 499 F.2d 514 (D.C. Cir. 1974) (parolees restricted from travelling abroad); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (submission to airport search as condition of foreign travel). See generally *Annot.*, 58 L.Ed.2d 904 (1978).

3 629 F.2d 80 (D.C. Cir. 1980), *cert. granted*, 101 S. Ct. 69 (1980).

4 629 F.2d at 87.

5 See P. AGEE & L. WOLF, *DIRTY WORK: CIA IN WESTERN EUROPE* (1978).

6 The State Department letter to Agee reads:

The Department's actions are predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970s it has been your stated intention to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

629 F.2d at 82.

vides that "[a] passport may be refused in any case in which . . . [t]he Secretary determines that the national's activities abroad are causing or likely to cause serious damage to the national security or foreign policy of the United States."⁷

Agee rejected the opportunity for an administrative hearing on the passport revocation⁸ and sought declaratory and injunctive relief in federal district court.⁹ On a motion for summary judgment, Agee conceded that his activities had caused serious damage to the nation's security, but argued that the passport revocation should be enjoined because the regulation had not been authorized by Congress.¹⁰ Persuaded by this argument, the district court ordered Agee's passport restored.¹¹ The District of Columbia Circuit affirmed on the same basis, leaving unresolved Agee's constitutional arguments regarding the right to travel and procedural due process.¹²

The majority opinion, written by Judge Robb,¹³ derived the test of a passport regulation's validity from two Supreme Court cases, *Kent v. Dulles*¹⁴ and *Zemel v. Rusk*.¹⁵ The court extracted from *Kent* the principle that freedom to travel abroad is protected by the fifth amendment and that such liberty could be regulated only pursuant to the law-making functions of Congress.¹⁶ The court thus held that passport regulations must be explicitly or implicitly authorized by Congress and that the Secretary of State does not have unlimited discretion to deny or revoke passports.¹⁷

The *Agee* court derived its test for determining the existence of implicit congressional authorization of passport regulations from *Zemel*. *Zemel* held that a passport regulation was valid if an administrative practice existed sufficiently substantial and consistent to warrant the finding that Congress had implicitly approved it.¹⁸ Applying the *Kent-Zemel* test, the court determined that the Pass-

7 Since the Secretary's action was a revocation and not a refusal, 22 C.F.R. § 51.71(a) (1979) was also invoked. This regulation provides that a "passport may be revoked, restricted, or limited where: (a) The national would not be entitled to issuance of a new passport under § 51.70." For purposes of this comment, passport refusals and passport revocations will be treated alike.

8 The procedures developed by the State Department for such a hearing are contained in 22 C.F.R. §§ 51.80-105 (1979).

9 *Agee v. Vance*, 483 F. Supp. 729 (D.D.C. 1980).

10 Agee also argued that (1) 22 C.F.R. § 51.70(b)(4) (1979) is impermissibly vague and overbroad; (2) the revocation prior to a hearing violated his fifth amendment right to procedural due process; (3) the revocation violated his fifth amendment right to travel; and (4) the revocation was intended to suppress his criticism of government policy in violation of the first amendment. 629 F.2d at 82.

11 *Agee v. Vance*, 483 F. Supp. 729 (D.D.C. 1980).

12 629 F.2d at 87 n.9.

13 Judge Wald also voted to restore Agee's passport.

14 357 U.S. 116 (1958). At issue in *Kent* was the validity of State Department regulations prohibiting the issuance of passports to Communist Party members and persons believed to be going abroad to support the Communist movement. The Court held the regulations to be invalid because they lacked congressional authorization.

15 381 U.S. 1 (1965). At issue in *Zemel* was the validity of a State Department restriction on all travel to Cuba. The Court upheld such area restrictions as having been implicitly approved by Congress in light of the prior administrative practice of imposing such area restrictions.

16 629 F.2d at 83 (citing *Kent v. Dulles*, 357 U.S. at 125, 129).

17 629 F.2d at 83 (citing *Kent v. Dulles*, 357 U.S. at 127-28). The *Agee* court also noted that the power to restrict an individual's freedom to travel is not part of the President's inherent foreign affairs powers. 629 F.2d at 85-86. The court also construed *Kent* as indicating the only grounds for passport refusals which Congress had implicitly approved involved questions of citizenship or allegiance or of criminal or unlawful conduct. 629 F.2d at 83 (quoting *Kent v. Dulles*, 357 U.S. at 127).

18 629 F.2d at 84 (citing *Zemel v. Rusk*, 381 U.S. at 8-12). The District of Columbia Circuit had previously applied the *Kent-Zemel* test in two other cases. In *Lynd v. Rusk*, 389 F.2d 940 (D.C. Cir. 1967), the court held that Congress had not authorized a passport refusal based on the applicant's failure to

port Act of 1926¹⁹ did not explicitly authorize passport revocations for national security reasons.²⁰ The court also noted that Congress had previously declined to confer upon the Secretary of State explicit authority to revoke passports for national security reasons.²¹

Having found no explicit authorization for national security passport revocations, the court next addressed the question whether Congress had approved the regulation implicitly. The majority found no substantial and consistent administrative practice of denying passports for national security reasons.²² The court conceded that various statutes, regulations, proclamations, orders and advisory opinions purported to give the Secretary of State power to refuse or revoke passports for national security reasons. It nevertheless found that, while some of these laws might be applicable in wartime or emergency situations, most were mere unexercised assertions of power.²³ The majority concluded that, because the regulation lacked congressional approval, it was invalid and could not be invoked by the Secretary of State to revoke Agee's passport.²⁴

In his lengthy dissent, Judge MacKinnon argued that revocation of Agee's passport was justifiable on numerous grounds. He contended that Agee's relationship to the Iranian hostage crisis²⁵ was such that the Secretary of State could properly revoke Agee's passport under the authority of the Hostage Law.²⁶ Judge MacKinnon also maintained that Agee's passport could be revoked because his activities were criminal.²⁷ Disputing the majority's finding, the dissent argued that there existed a 150-year precedent of national security passport refusals, and that the Supreme Court had authorized such refusals in *Kent* and

assure the State Department he would not travel to restricted areas. In *Woodward v. Rogers*, 344 F. Supp. 974 (D.D.C. 1972), *aff'd mem.*, 486 F.2d 1317 (D.C. Cir. 1973), the court affirmed the district court's finding that there was no explicit or implicit congressional authorization for a passport refusal to an applicant who declined to sign an oath of allegiance. *See* 629 F.2d at 8-10.

19 22 U.S.C. § 211(a) (1976) (as amended in 1978) provides in part:

The Secretary of State may grant and issue passports . . . under such rules as the President shall designate . . . Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

20 629 F.2d at 85.

21 *Id.* at 85 n.4. Such legislation was introduced in apparent reaction to the *Kent* and *Zemel* decisions.

22 *Id.* at 86. The court found only one previous use of the regulation and only five passport refusals even "tenuously related" to national security and foreign policy concerns. *Id.* at 86 and nn.6 & 7.

23 *Id.* at 86-87.

24 *Id.* at 87.

25 *Id.* at 89-91 (MacKinnon, J., dissenting).

26 22 U.S.C. § 1732 (1976) provides in part:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government. . . the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release.

27 629 F.2d at 104-07, 110-18 (MacKinnon, J., dissenting). Noting that passport refusals for criminal activities were approved in *Kent*, the dissent offered draft indictments of Agee on the following charges:

- (1) transmitting injurious defense information in violation of 18 U.S.C. § 793(d) (1976);
- (2) having unlawful intercourse with a foreign government in violation of 18 U.S.C. § 953 (1976);
- (3) committing treason in violation of 18 U.S.C. § 2381 (1976);
- (4) aiding and abetting the kidnap of the American hostages in Iran in violation of 18 U.S.C. § 1201 (1976); and
- (5) seditiously conspiring to commit extortion in violation of 18 U.S.C. § 2384 (1976).

Id.

Zemel.²⁸

The vehemence of Judge MacKinnon's dissenting opinion indicates the controversial nature of the issues involved in this case. The conflict of individual liberties and national security concerns usually arouses strong emotional reactions.²⁹ Many will find it outrageous that Philip Agee, an avowed opponent of American intelligence activities, cannot be denied a passport for national security reasons, even after he has admitted the damage he has done.³⁰ However, a close analysis of *Agee* indicates that the case was properly decided. By limiting its decision to the issue of congressional authorization for passport regulations, the *Agee* majority avoided the overbreadth of analysis found in the dissent. However, the majority's analysis of the prior practice of denials for national security reasons is brief (consisting of a single textual paragraph)³¹ and is not altogether convincing.

The dissent amassed an impressive amount of precedent purporting to authorize passport refusals for national security reasons. This authority can be grouped into three categories: (1) wartime and emergency legislation;³² (2) State Department regulations, instructions, proclamations and opinions;³³ and (3) statistics and individual cases of alleged national security passport refusals.³⁴

The majority termed the first category of wartime and emergency legislation "inapposite" to the question of peacetime restrictions on the right to travel abroad.³⁵ The dissent would not distinguish between wartime and peacetime restrictions, arguing that national security is always a matter of major governmental concern.³⁶

The majority was correct in distinguishing between wartime and peacetime travel limitations. Travel restrictions necessitated by the exigencies of war should not be considered in determining the validity of a peacetime restriction. The war power of the executive is extremely broad, and permits restrictions on individual liberties which would be "wholly inadmissible in time of peace."³⁷ In *Kent*, the Supreme Court refused to equate the government's power to deny passports to Communists during peacetime with its powers during wartime.³⁸ Although the *Agee* dissent correctly noted that the Supreme Court considered both wartime and peacetime travel restrictions in *Zemel v. Rusk*,³⁹ the *Zemel* decision was chiefly supported by precedents involving peacetime restrictions.⁴⁰

28 *Id.* at 95-102 (MacKinnon, J., dissenting).

29 For a comprehensive discussion of the issues involved in such situations, see *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

30 Even the *Agee* majority was not altogether pleased with its decision. The court pointed out that had Agee been charged with a crime his passport could have been validly revoked. 629 F.2d at 87. There seems to be a trace of regret in the court's conclusion: "We are bound by the law as we find it." *Id.*

31 *Id.* at 86 and nn.6 & 7.

32 *Id.* at 98-99 (MacKinnon, J., dissenting).

33 *Id.* at 99-101 (MacKinnon, J., dissenting).

34 *Id.*

35 *Id.* at 86-87.

36 *Id.* at 99 (MacKinnon, J., dissenting).

37 *United States v. Macintosh*, 283 U.S. 605, 622 (1931). Even restrictions necessitated by war have long been held subject to constitutional limitations. See, e.g., *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).

38 *Kent v. Dulles*, 357 U.S. at 127.

39 381 U.S. 1 (1965).

40 *Id.* at 7-11. It is important to note that the specific restriction at issue in *Zemel* involved travel to Cuba, and that the Cuban missile crisis of October 1962 preceded the appellant's complaint by less than

The majority in *Agee* was not persuaded by the dissent's second category of authority—the numerous State Department regulations, proclamations, orders and advisory opinions which purport to authorize passport refusals on national security grounds. These it considered “mere assertions of power”⁴¹ which should not be considered in determining the validity of the power asserted. The court noted that the Supreme Court, in verifying implicit congressional authorization of a passport regulation, has demanded specific instances of restrictions being imposed, and not mere claims of the authority to impose such restrictions.⁴²

The cornerstone of the *Agee* decision is the analysis of the dissent's third category of authority—actual passport refusals allegedly based on national security grounds. The majority opinion cursorily dismissed these refusals as “only tenuously related”⁴³ to concern for the national security and foreign policy of the United States. This dismissal is unfortunately supported by only scant analysis of the passport cases presented by the dissent.⁴⁴ Nevertheless, more thorough analysis reveals no substantial or consistent history of passport refusals to individuals determined to be causing or likely to cause serious damage to national security.

The first case cited by the dissent involved a 1906 passport refusal to a notorious promoter of gambling and prostitution.⁴⁵ The State Department justified this refusal on the ground that the applicant was “likely to embarrass the United States.”⁴⁶ There is no evidence indicating the threatened embarrassment was likely to cause serious damage to the national security or foreign policy of the United States.

A second case cited by the dissent involved a 1907 refusal to a blackmailer who was “disturbing or endeavoring to disturb, the relations of this country with representatives of foreign countries.”⁴⁷ Although this refusal seems to be based on foreign policy considerations, it has elsewhere been treated as based on “unlawful activities,”⁴⁸ which has been held to justify passport refusals.⁴⁹

two months. *Id.* at 16. The Supreme Court may have been more willing to consider wartime restrictions in light of the situation existing between Cuba and the United States.

41 629 F.2d at 87.

42 *Id.* The *Zemel* Court did mention that the executive had openly asserted the power to impose such restrictions, but its decision turned on the finding of specific examples of area restrictions that had been imposed. In *Kent*, the Court wrote: “[T]he key . . . is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.” 357 U.S. at 125.

43 629 F.2d at 86 n.7.

44 In the other two decisions in which the District of Columbia Circuit applied the *Kent-Zemel* test for passport regulation validity, the absence of prior administrative practice was found without an examination of specific cases. See *Lynd v. Rusk*, 389 F.2d 940 (D.C. Cir. 1967); *Woodward v. Rogers*, 344 F. Supp. 974 (D.D.C. 1972), *aff'd mem.* 486 F.2d 1317 (D.C. Cir. 1973). This failure to analyze specific cases may be partly due to the paucity of official State Department records concerning passport practices in the early part of this century. The most comprehensive attempts to list specific individuals whose passport applications were denied are found in Note, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L. J. 170 (1952) (hereinafter cited as *Passport Refusals*); 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 498 (1942); 3 J. MOORE, DIGEST OF INTERNATIONAL LAW 919 (1906). In *Passport Refusals*, the difficulties faced by modern researchers of past passport practices are made evident.

45 629 F.2d at 99 (MacKinnon, J., dissenting) (citing 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 498-99 (1942)).

46 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 498-99 (1942).

47 629 F.2d at 99 (MacKinnon, J., dissenting) (citing *1907 Foreign Relations of the United States, Part 2* at 1076, 1080, 1082-83).

48 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 500-01 (1942).

49 *Kent v. Dulles*, 357 U.S. at 127. Another of the cases cited by the dissent, in which a Col. Hubert Julian was denied a passport for gun-running, appears to fall into this illegal activity category. 629 F.2d at

The dissent also offered several passport denials to individuals whose acts were considered inimical to the interests of the United States.⁵⁰ Three of these individuals were denied passports because of their affiliation with the Communist movement,⁵¹ a practice invalidated in *Kent v. Dulles*⁵² and *Aptheker v. Secretary of State*.⁵³ A fourth individual was denied a passport because he had been convicted in a Swiss court of having spied for Senator Joseph McCarthy on Communists and American diplomatic personnel.⁵⁴ A fifth individual was denied a passport for allegedly discussing confidential information with a Soviet official.⁵⁵ Of these five cases, only the last supports the contention that passports have been denied for legitimate national security reasons.⁵⁶

The State Department's sporadic history of denying passports on alleged national security grounds cannot be characterized as a substantial and consistent practice. Indeed, the cases cited are most accurately categorized as four refusals based on unlawful activities, three refusals based on political beliefs and associations, and only three refusals based on national security considerations.

The statistical authority presented by the dissent is similarly unconvincing. In 1955, six passports were denied to "participants in political affairs abroad whose activities were deemed harmful to good relations."⁵⁷ Although the standards used to define this category are unclear, a 1955 State Department memorandum listed persons planning to fight in the Spanish Civil War as examples of previous use of this category.⁵⁸ The memorandum continued:

Formerly there were many cases in which Americans residing abroad took part in political activities in foreign countries without losing their American citizenship. These were denied the protection of this Government while carrying on such activi-

101 (MacKinnon, J., dissenting) (citing *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1150 n.76 (1972)).

50 629 F.2d at 101 (MacKinnon, J., dissenting) (citing *Passport Refusals*, *supra* note 44, at 174-77).

51 The first, one Isaacson, was a member of the American Labor Party who was refused a passport to attend a Paris conference as an observer for the American Council for Aid to Democratic Greece. *Passport Refusals*, *supra* note 44, at 176. The second, Paul Robeson, was a noted Black statesman, athlete and entertainer whose political beliefs were well-known, and whose association with the Communist Party made him infamous in America. Robeson later challenged the passport refusal in federal court, but his case was dismissed for failure to exhaust administrative remedies. *See Robeson v. Dulles*, 235 F.2d 810 (D.C. Cir.), *cert. denied*, 352 U.S. 895 (1956). The third, one Lamont, was a left-wing writer whose passport was refused as not in the "best interest" of the United States. *Passport Refusals*, *supra* note 44, at 177.

52 357 U.S. 116 (1958).

53 378 U.S. 500 (1964). In *Aptheker*, the Supreme Court held that § 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 was unconstitutionally overbroad in its attempt to prohibit the issuance of passports to Communists and Communist sympathizers.

54 *Passport Refusals*, *supra* note 44, at 178. Again, this case falls into the category of passport restrictions validly based on criminal activities.

55 This individual, an atomic scientist named Kamen, was accused of passing secret information unwittingly to the Soviets. It is interesting to note that Kamen was issued a passport by the State Department in 1955. *See Passport Legislation, Hearings before the Senate Committee on Foreign Relations* 85th Cong., 2d Sess. 193 (1958).

56 The final case cited by the dissent involved the single previous use of the regulation. In September 1970, the passports of attorney C. Luke McKissack and his assistant were revoked under § 51.70(b)(4). 629 F.2d at 101 (MacKinnon, J., dissenting). Mr. McKissack was attempting to escort the mother of Sirhan Sirhan to Jordan to seek the release of 180 airline passengers held hostage by Palestinian terrorists. *See N.Y. Times*, Sept. 9, 1970, § 1, at 10, col. 3. Attempts to enjoin the revocations failed. *Sirhan v. Rogers*, No. 70-3965 (S.D.N.Y. Sept. 11, 1970), *aff'd*, No. 35364 (2d Cir. Oct. 5, 1970). The passports were restored when the crisis passed.

57 629 F.2d at 100 (MacKinnon, J., dissenting) (citing *Hearings on H.R. 9991, Subcommittee No. 1, House Judiciary Committee* 84th Cong., 2d Sess. 12-13 (1956)).

58 *Hearings on the Right to Travel, Part 2, Subcommittee on Constitutional Rights, Senate Judiciary Committee* 85th Cong., 1st Sess. 266 (1957) (hereinafter cited as *1957 Senate Hearings*).

ties, rather than denied passports to go abroad.⁵⁹

One committee studying passport procedures characterized this "political affairs" criterion for passport refusals as "nebulous,"⁶⁰ noting that no passport denials had been "based specifically upon the danger that an individual applicant's travel would interfere with foreign relations."⁶¹

The State Department's inconsistency concerning passport refusals is evident in other statistical authority cited by the dissent. A 1957 State Department report stated that passports had been denied to "participants in political affairs abroad whose activities were deemed harmful to good relations and persons whose previous conduct abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulty with police, etc.)."⁶² The grouping of these apparently disparate classes of refusals does not support the contention that the State Department has consistently denied passports for national security reasons. To place such different types of cases within a single category indicates little concern for consistent administration of passport restrictions for national security reasons.

The Burger Court has never passed on the validity of a passport regulation or, indeed, of the *Kent-Zemel* test itself. If this test is the proper one for determining the validity of national security passport revocations, the *Agee* case was decided correctly. Although there is no case law defining the terms "substantial and consistent," the history of administrative passport restrictions on national security grounds does not clearly indicate that Congress has implicitly authorized such passport controls.

The law, as the District of Columbia Circuit found it in *Agee*, is designed to protect an individual's liberty against unauthorized governmental restrictions. Whether State Department regulations should be used to implement foreign policy objectives is an issue not addressed by the majority opinion in *Agee*.⁶³ Yet, implicit in *Agee* is the determination that the often nebulous national security rationale should not be used by the executive branch to restrict an individual's freedom to travel abroad.

Thomas M. Terry

⁵⁹ *Id.*

⁶⁰ ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL, REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES 45 (1958).

⁶¹ *Id.* at 47.

⁶² 1957 Senate Hearings, *supra* note 58, at 129.

⁶³ A number of commentators have urged that the passport regulatory process should not be used to implement foreign policy objectives. The basic rationale of such arguments is that because freedom to travel is constitutionally protected, and because there exist other means to control individuals who might damage national security, the State Department should not be allowed to restrict travel on any grounds other than citizenship or nationality. See, e.g., Ehrlich, *Passports*, 19 STAN. L. REV. 129 (1966); Comment, *Judicial Review of the Right to Travel: A Proposal*, 42 WASH. L. REV. 873 (1967). But see Comment, *Executive Restriction on Travel: The Passport Cases*, 5 Hous. L. REV. 499 (1968); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM TO TRAVEL, REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES (1958).

Administrative Law—SUBPOENA POWER—DEPARTMENT OF ENERGY NEEDS NO EXPRESS GRANT OF SUBPOENA POWER TO STUDY OIL COMPANY FUEL SALES SUBSIDIZATION—*United States v. Exxon Corp.*, 628 F.2d 70 (D.C. Cir. 1980)*

Title III of the Petroleum Marketing Practices Act (PMPA)¹ directs the Secretary of Energy to conduct a study of motor fuel sales subsidization by vertically integrated oil companies.² The Secretary is instructed to give interested parties an opportunity to present data and opinions concerning the subject but is not expressly provided subpoena power to compel parties to do so.³ However, when Congress passed the Department of Energy Organization Act (DOEOA) in 1977,⁴ the Secretary of Energy was given the same subpoena power as the Federal Trade Commission (FTC).⁵ The FTC's subpoena power is subject only to the requirements of definiteness and relevancy to the agency's legitimate purpose.⁶ The DOEOA explicitly provided subpoena power with respect to "all functions vested in, or transferred or delegated to, the Secretary" by that Act.⁷

The tension between the broad subpoena power granted by the DOEOA and the PMPA's silence on subpoena power left the exact scope of the Department of Energy's (DOE) power uncertain. In *United States v. Exxon Corp.*,⁸ the United States Court of Appeals for the District of Columbia approved the enforcement of subpoenas issued as part of the study required by Title III.⁹ The court's per curiam opinion upheld the district court's decision that the DOE's subpoena power under the DOEOA extended to the subsidization study.¹⁰

On January 22, 1979, subpoenas duces tecum were served on Exxon Corpo-

* *Cert. denied*, 446 U.S. 964 (1980).

1 15 U.S.C. §§ 2801-2841 (Supp. 1978).

2 The study was conducted in consultation with the FTC, the Department of Justice and other agencies designated by the Secretary and covered: (1) the role of vertically integrated operations in the subsidization of wholesale or retail motor fuel sales; (2) the effect of subsidization on competition; (3) the profitability of various segments of the petroleum industry; and (4) the impact of prohibiting subsidization on competition, consumer prices and the health of the industry. *Id.* § 2841(b).

3 *Id.* § 2841(c).

4 42 U.S.C. §§ 7101-7352 (Supp. 1978).

5 *Id.* § 7255 states:

For the purpose of carrying out the provisions of this . . . [Act], the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under § 49 of Title 15 with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this . . . [Act].

The FTC's subpoena power is granted by 15 U.S.C. § 49 (1976):

For the purposes of . . . this [Act, the FTC] shall at all reasonable times have access to . . . any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and . . . shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation.

6 *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *accord*, *Adams v. FTC*, 296 F.2d 861 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1961); *FTC v. Rockefeller*, 441 F. Supp. 234 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2d Cir. 1977); *FTC v. Stanley H. Kaplan Educ. Center*, 433 F. Supp. 989 (D. Mass. 1977). In *Moore Business Forms, Inc. v. FTC*, 307 F.2d 188 (D.C. Cir. 1962), the court ordered the defendant to produce all records not plainly irrelevant to the FTC's charges. The *Rockefeller* court held compliance necessary where the specific requests "may be relevant" to the FTC's legitimate inquiry, provided the request does not unduly burden the respondents. 441 F. Supp. at 241.

7 42 U.S.C. § 7151(b) (Supp. 1978). The oil companies contended that the Title III study could not be considered a function vested in the Secretary by the DOEOA and that as a result the DOEOA's general subpoena power was not available.

8 628 F.2d 70 (D.C. Cir. 1980).

9 The court also issued an order protecting the confidentiality of information released by the companies. *Id.* at 78-80.

10 *Id.* at 73.

ration, Shell Oil Company and Marathon Oil Company for various documents related to the subsidization study.¹¹ When the oil companies refused to produce the requested documents, the DOE sought enforcement in the District Court for the District of Columbia. That court held that the subpoenas were within the DOE's authority and were not burdensome or unreasonable.¹²

The oil companies raised five principal contentions on appeal:

- (1) The DOE's subpoena power for the subsidization study could derive only from Title III of the PMPA, the legislative history of which showed an implied congressional decision to withhold that power from the Title III study.
- (2) The DOE could not rely on the DOEAO's general subpoena power since the study stood outside of and was mandated after that Act.¹³
- (3) Even if the DOE's general subpoena power could apply to later-mandated agency functions, it applied only to investigations of specific legal violations, not general studies.¹⁴
- (4) The subpoenas should not be enforced because the DOE violated its own regulations,¹⁵ the Administrative Procedure Act¹⁶ and the due process clause¹⁷ by denying administrative review of the subpoenas.
- (5) The subpoenas required overly broad and burdensome disclosure.¹⁸

The District of Columbia Circuit began by analyzing Congress's purposes in creating the DOE. The court stated that Congress sought effective energy resource management, ample and reasonably priced supplies of energy, and the economic health of small businesses engaged in energy production.¹⁹ These goals were to be achieved in part by promoting, and regulating, competition in the energy industry.

The DOEAO required the Secretary of Energy to create the Energy Information Administration (EIA) within the DOE to collect, evaluate and disseminate data relevant to energy reserves, production, demand and technology.²⁰ The EIA also maintains information on "the institutional structure of the energy supply system, including patterns of ownership and control of mineral fuel and . . . the production, distribution and marketing of mineral fuels."²¹ The

11 Subpoenas were also served on six other oil companies, all of which agreed to produce the documents sought by the DOE. 628 F.2d at 77.

12 *United States v. Exxon Corp.*, 487 F. Supp. 19, 23 (D.D.C. 1980).

13 See notes 5 and 7 *supra* and accompanying text.

14 The oil companies contended that the language "any person, partnership or corporation being investigated or proceeded against" of 15 U.S.C. § 49 (1976) limited the FTC's subpoena power to cases of specifically alleged violations. 628 F.2d at 73.

15 10 C.F.R. § 205.8 (1980) sets forth DOE regulations for review of agency subpoenas.

16 5 U.S.C. §§ 500-576 (1976).

17 U.S. CONST. amend. V.

18 Marathon contended that a subpoena's reasonableness should be tested by balancing the DOE's need for information against the company's burden in producing it. Brief for Appellant Marathon Oil Co. at 31, *United States v. Exxon Corp.*, 628 F.2d 70 (D.C. Cir. 1980).

19 628 F.2d at 73. The DOEAO's stated purposes also included "improv[ing] the effectiveness of a central energy data collection and analysis program within the DOE." 42 U.S.C. § 7112 (Supp. 1978).

20 42 U.S.C. § 7135(a) (Supp. 1978).

21 15 U.S.C. § 790a(b)(1) (1976). This function, formerly performed by the Office of Energy Information under the Federal Energy Administration Act, 15 U.S.C. §§ 761-790h (1976), was transferred by the DOEAO to the EIA. 42 U.S.C. § 7135(c) (Supp. 1978). The EIA is independent of the DOE with regard to this function. *Id.* § 7135(d). The DOEAO also delegates to the EIA Administrator responsibility for gathering, analyzing and disseminating energy information formerly held by the Federal Energy Adminis-

DOEOA delegates subpoena power to the EIA for obtaining this information.²² The court thus concluded that the subsidization study fell within the range of administrative inquiry already permitted by the DOEOA.²³

The court was not persuaded by the oil companies' contention that Congress had impliedly withheld subpoena power, reasoning that the PMPA only reinforced the DOE's existing power to conduct the study.²⁴ Title III's silence on subpoena power was found inconsequential.²⁵ Similarly, the court found that the PMPA's status as a later act did not affect the availability of subpoena power since "Title III specifically *instructs* [the] DOE to conduct a study which the agency would in any event *be permitted* to conduct under its broad general DOEOA mandate."²⁶

The court dealt only briefly with the oil companies' other contentions. It held that: (1) the verb "investigate" in the statute creating the FTC's subpoena power describes broad administrative functions, including "studies" such as that required by Title III; (2) the companies' administrative review argument was without merit; and (3) the subpoenas were reasonably relevant to the DOE's purpose.²⁷

Judge Wilkey dissented. Without elaborating on his reasoning, he accepted the oil companies' main contentions and concluded that subpoena power was not available.²⁸ The contrast between the majority's and the dissent's analysis points out the dilemma posed by *United States v. Exxon Corp.* The majority assumed that the broad DOEOA mandate allowed the DOE to conduct the subsidization study without the PMPA and decided that subpoena power was available for the study. The dissent emphasized the language and legislative history of Title III and found the subpoena power unavailable.

Nothing in the PMPA's legislative history explicitly demonstrates Congress's intention to provide subpoena power for the Title III study.²⁹ Rather, the Senate debate indicates that the PMPA's sponsor, Senator Bumpers, believed that the power would not exist. He stated:

The Justice Department has subpoena powers. If they are sure that something is going on that is wrong among major oil companies, they can subpoena the information. *They do not have to ask for . . . [the oil companies'] cooperation. Here we do . . .* I believe there will be enough cooperation to get the information to determine whether or not the practice we are trying to cure here is going on.³⁰

trator under 15 U.S.C. § 796(a) (1976), and transferred to the Secretary of Energy by 42 U.S.C. § 7151(a) (Supp. 1978). *Id.* § 7135(b).

22 The functions delegated by 42 U.S.C. § 7135(b) (Supp. 1978) include the power to issue subpoenas to gather information. 15 U.S.C. § 796(b)(1) (1976).

23 628 F.2d at 74.

24 *Id.*

25 *Id.*

26 *Id.* at 72 (emphasis in original).

27 628 F.2d at 76-77.

28 628 F.2d at 80 (Wilkey, J., dissenting). Judge Wilkey stated:

On the face of the statute there is no subpoena power under Title III, there is admittedly not one word in the legislative history implying there is such a power, and there are words from two of the legislators most active . . . saying flatly that no subpoena power exists . . . a repeated assertion which was . . . uncontradicted.

Id.

29 See 124 CONG. REC. S7149-56 (1978). Since Title III was added to the PMPA on the Senate floor there are no relevant committee reports.

30 124 CONG. REC. S7155 (1978) (emphasis added).

Later, in response to a proposed amendment, the Senator stated that the DOE "will get no more information under . . . [this] amendment than under mine. They will not have the right to get the information under subpoena powers either way. . . . [The amendment] does not require the oil companies to divulge one iota of information they do not want to give."³¹ But the court discounted Senator Bumpers's statements,³² citing the Supreme Court's remark in *Chrysler Corp. v. Brown*³³ that "the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."³⁴ The *Exxon* court, however, did not quote the next sentence in *Brown*: "Congressman Moss's statement must be considered with the reports of both Houses and the statements of other Congressmen."³⁵ Since Senator Bumpers's statements on subpoena power for the Title III study are the only ones found in the PMPA's legislative history,³⁶ *Brown*'s language is thus misapplied by the *Exxon* court. The legislative history's lack of any assertion of subpoena power for the study is conspicuous, and the court's dismissal of Senator Bumpers's statements as "unnecessary to his argument" is speculative at best.

The District of Columbia Circuit found that a comparison of Title III's failure to mention subpoena power with the express grant of such authority in Title II of the same Act provided "some evidence" of congressional intent, but was "hardly decisive."³⁷ Comparisons with other legislation were equally unrevealing.³⁸ The court distinguished Title II from Title III on the ground that the former was primarily a directive to private parties, while the latter was directed to a government agency. The court stated that since Title II only secondarily established the FTC as the enforcing agency, Congress "may have felt a need to spell out the FTC's enforcement powers in some detail."³⁹ In contrast, it found that "Congress may reasonably have understood" Title III to incorporate the DOE's enforcement powers under the DOEOA.⁴⁰ Yet Title III's lack of an express grant of subpoena power together with its legislative history indicates that the court's interpretation of what Congress intended stands on a weak foundation.

The court's attempt to distinguish other legislation cited by the oil companies is also suspect. For example, the Powerplant and Industrial Fuel Use Act⁴¹ and the Emergency Energy Conservation Act⁴² both direct the DOE to gather energy-related information, and expressly provide subpoena power for those activities.⁴³ Citing *National Refiners Association v. FTC*,⁴⁴ the court stated that such

31 *Id.* The proposed amendment would have made information acquired by the Title III study available to other federal agencies.

32 628 F.2d at 74.

33 441 U.S. 281 (1979).

34 *Id.* at 311.

35 *Id.*

36 See 124 CONG. REC. S7149-56 (1980).

37 628 F.2d at 75.

38 Invoking the principle *expressio unius est exclusio alterius*, the oil companies contrasted Title III's failure to mention subpoena power with Title II's express grant of such power. The companies also argued that when Congress intended to provide subpoena power to the DOE under other acts, it had done so specifically. *Id.*

39 *Id.*

40 *Id.*

41 42 U.S.C. §§ 8301-8438 (Supp. 1978).

42 Pub. L. No. 96-102, 93 Stat. 768 (1979) (to be codified in 42 U.S.C. §§ 8501-8541).

43 The Powerplant and Industrial Fuel Use Act of 1978 sought to reduce U.S. petroleum imports by encouraging the use of coal as a primary energy source. 42 U.S.C. § 8301(b) (Supp. 1978). The Secretary

express grants "may well have been the product of uncertainty, understandable caution, and a desire to avoid litigation."⁴⁵ But the *National Refiners Association* decision recognized that this theory was speculative.⁴⁶ Thus, the distinction made by the *Exxon* court between Title III and similar legislation is not compelling.

The majority stated that to accept the oil companies' arguments would be to find an implied partial repeal of the DOEEOA.⁴⁷ The court reasoned that the rule disfavoring implied repeals as applied by the Supreme Court in *TVA v. Hill*⁴⁸ was especially appropriate in this instance, since the inference "would be based not on any language in Title III itself, but on a stray remark in the legislative history and questionable references to other statutes."⁴⁹ Yet without the prior assumption that the study was within the DOEEOA's mandate, Senator Bumpers's statements and a comparison with Title II and other legislation would strongly indicate a contrary congressional intent.

The *Exxon* court could have made use of another argument supporting a broad interpretation of the DOEEOA's language providing subpoena power with respect to "all functions vested in, or transferred or delegated to, the Secretary."⁵⁰ In *Menzies v. FTC*,⁵¹ the Fourth Circuit held that the Federal Trade Commission Act did not preclude the use of subpoena power granted "for the purpose of"⁵² that Act in proceedings under the Clayton Act. The court stated that finding such a preclusion would require

an unreasonable and forced construction of the language used, the manifest purpose of which was to give the Commission the power of subpoena and examination in connection with any investigation or proceeding which it was authorized by law to conduct. . . . When duties of investigation or enforcement are imposed . . . by another act or acts, the reasonable intentment is that it shall exercise the power conferred upon it by law in the discharge of such duties.⁵³

The Fourth Circuit emphasized the similarity in purpose of the Clayton and Federal Trade Commission Acts.⁵⁴ Its reasoning is useful in determining the scope of

of Energy was authorized to require submission of information necessary to implement the Act. 42 U.S.C. § 8421(a) (Supp. 1978). The Emergency Energy Conservation Act of 1979 required that a study of commercial and industrial gasoline storage be undertaken. Pub. L. No. 96-102, §§ 241, 242, 93 Stat. 768 (1979). Enforcement powers are delegated by the Act in § 251.

44 482 F.2d 672 (D.C. Cir. 1973).

45 628 F.2d at 75.

46 482 F.2d at 696. The court in *National Refiners* supported its "understandable caution" theory with references to specific statutes and their legislative histories. The *Exxon* court made no comparable analysis.

47 628 F.2d at 75.

48 437 U.S. 153 (1978). In *Hill*, the Supreme Court stated that "the intention of the legislature to repeal must be clear and manifest," and that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." 437 U.S. at 190. See also *Toilet Goods Ass'n v. Finch*, 419 F.2d 21 (2d Cir. 1969), and *Callanan v. United States*, 364 U.S. 587 (1961). *Finch* held that a court cannot impute to Congress an intent to make basic changes in regulatory procedures unless Congress has used plain language or clearly manifested such intent. In *Callanan*, the Supreme Court attributed to Congress, in the absence of any inconsistent expression, an intent to maintain an established judicial distinction between substantive criminal offenses and conspiracy.

49 628 F.2d at 75. Compare the dissent's emphasis on the same facts, note 28 *supra*.

50 42 U.S.C. § 7151(b) (Supp. 1978).

51 242 F.2d 81 (4th Cir.), cert. denied, 355 U.S. 823 (1957).

52 15 U.S.C. § 49 (1976).

53 242 F.2d at 83.

54 *Id.* It is well established that statutes pertaining to the same general subject matter are *in pari materia* and should be construed together. *United States v. Freeman*, 44 U.S. (3 How.) 556 (1845); accord,

the DOE's subpoena power, since the DOE's and the FTC's powers are coextensive. *Menzies* indicates by analogy that the most reasonable construction of Title III's language would allow the use of enforcement powers provided by the DOE's subpoena power in the discharge of duties imposed by the PMPA, due to the close connection between the purposes of those two acts.⁵⁵ This analysis allows enforcement of the subpoenas even if the Title III study stands outside the DOE's original mandate.

United States v. Exxon Corp. clarifies the extent of the DOE's subpoena power and may have significant implications for any agency whose subpoena power incorporates that of the DOE or the FTC. Even when this broad power is not used, its availability should engender greater levels of voluntary compliance with DOE information requests. When energy is among the nation's important concerns and suspicions of oil industry activities are high, the accuracy of DOE studies is critical. But without subpoena power, their chances for accuracy are small. Since the Supreme Court has held that a construction should not be adopted which defeats an act's stated purposes,⁵⁶ there are both legal and policy arguments favoring effective implementation of the subsidization study. Thus, despite the weaknesses of the District of Columbia Circuit's analysis, the *Exxon* holding is a sound one.

Bruce D. Peterson

Administrative Law—TITLE VII—A CONSENT ORDER IS NOT A "WRITTEN INTERPRETATION OR OPINION" OF THE EEOC—*Eirhart v. Libbey-Owens-Ford Co.*, 616 F.2d 278 (7th Cir. 1980)*

Title VII of the Civil Rights Act of 1964¹ was enacted by Congress to eliminate employment practices that discriminate on the basis of an individual's race, color, religion, sex, or national origin.² Section 713(b)(1)³ of Title VII immunizes from liability any employer who has established an employment practice in reliance on a "written interpretation or opinion" of the Equal Employment Oppor-

Erlenbaugh v. United States, 409 U.S. 239 (1972); *Selfway, Inc. v. Travelers Petroleum, Inc.*, 579 F.2d 75 (C.C.P.A. 1978). Title III and the DOE's subpoena power seem to be *in pari materia*. Both Acts, passed by the same Congress within a one year period, concern the same general subject matter.

55 Compare note 2 with notes 19-22 and accompanying text.

56 *New York State Dep't of Social Serv. v. Dublino*, 413 U.S. 405 (1973). The subsidization study's purpose was to provide information to Congress. 15 U.S.C. § 2841(d) (Supp. 1978). Statistical data that is inaccurate due to the DOE's inability to compel the production of necessary information would defeat the purpose of Title III.

* *Cert. denied*, 101 S.Ct. 93 (1980).

1 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. 1978) (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972) [hereinafter referred to as Title VII].

2 42 U.S.C. § 2000e-2(a) (1976).

3 42 U.S.C. § 2000e-12(b) (1976) (section 713(b) of Title VII). The section provides in relevant part: (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission

tunity Commission (EEOC). In *Eirhart v. Libbey-Owens-Ford Co.*,⁴ the United States Court of Appeals for the Seventh Circuit held that a consent order is not a written interpretation or opinion of the EEOC within the meaning of section 713(b)(1).⁵

In 1968, the EEOC received a complaint charging Libbey-Owens-Ford Company (LOF) with discriminatory employment practices at one of its plants in Toledo, Ohio. The charges focused on LOF's seniority and transfer practices but did not deal with hiring standards. After investigating the complaint, the EEOC issued a reasonable cause letter and attempted to negotiate a settlement with LOF. When negotiations failed the EEOC referred the matter to the Justice Department.⁶ After making its own investigation, the Department filed suit against LOF, alleging *inter alia* that the plant's hiring standards were discriminatory. Negotiations between LOF and the Department produced a settlement and the district court entered a consent order in February, 1971 embodying the terms of this settlement.⁷ In addition to changing seniority and transfer practices in the Toledo plants, the order reduced the minimum weight requirement for employees to 110 pounds and retained the minimum height requirement of 5 feet 4 inches.

In December 1970, an LOF plant located in Ottawa, Illinois instituted hiring standards which included a minimum weight requirement of 110 pounds and a minimum height requirement of 5 feet 4 inches. These requirements were challenged in separate suits filed by Sherry Eirhart in 1976 and the EEOC in 1978. After the suits were consolidated, the district court granted LOF's motion for summary judgment. The court held that the Ohio consent order qualified as a "written interpretation or opinion of the Commission" within the meaning of section 713(b)(1), and that while the consent order was binding only on the Toledo plants, it could properly be relied upon by the Ottawa plant.⁸

The Seventh Circuit reversed. Noting that the Supreme Court of the United States had characterized a consent decree as an agreement normally embodying a compromise,⁹ the court rejected the contention that a consent order constituted an opinion of the EEOC.¹⁰ The court referred to EEOC regulation 1601.33,¹¹ which defines "written interpretation or opinion of the Commission,"

4 616 F.2d 278 (7th Cir. 1980), *cert. denied*, 101 S.Ct. 93 (1980).

5 616 F.2d at 280-82.

6 Before the Equal Employment Opportunity Act of 1972 was enacted, the EEOC lacked authority to file suit. Civil Rights Act of 1964, § 706, 78 Stat. 259-60 (1964). Instead, the Attorney General filed the suit. *Id.* § 707, 78 Stat. 261-62 (1964). See 616 F.2d at 280 n.1.

7 *United States v. Libbey-Owens-Ford Co.*, 3 Empl. Prac. Dec. 8052 (N.D. Ohio 1971).

8 *Eirhart v. Libbey-Owens-Ford Co.*, 482 F. Supp. 357, 361-63 (N.D. Ill. 1979), *rev'd*, 616 F.2d 278 (7th Cir. 1980).

9 *United States v. Armour & Co.*, 402 U.S. 673 (1971): "Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* at 681-82 (emphasis in original).

10 616 F.2d at 281.

11 29 C.F.R. § 1601.33 (1979). The regulation states:

Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of Section 713 of Title VII:

(a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or

(b) Matter published and specifically designated as such in the Federal Register, including the Commission's Guidelines on Affirmative Action

and concluded that the consent order did not meet the regulation's requirements.¹²

What constitutes a "written interpretation or opinion" is often the central issue in section 713(b)(1) litigation.¹³ Invariably, the issue then becomes whether to apply EEOC regulation 1601.33.¹⁴ EEOC regulations generally do not have the force of law,¹⁵ and courts are not required to follow them.¹⁶ The weight to be accorded a regulation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with later pronouncements, and all those factors which give it power to persuade, if lacking power to control."¹⁷

Some district courts have questioned regulation 1601.33, stating that the EEOC cannot promulgate written interpretations and then restrict their legal effect when they are relied on by the public.¹⁸ Three appellate courts, however, including the Seventh Circuit, have relied upon regulation 1601.33 in interpreting section 713(b)(1). In *Local 189, United Papermakers & Paperworkers v. United States*,¹⁹ the First Circuit declared that regulation 1601.33 gave "reasonable scope" to section 713(b)(1), and that a broader reading of the statute might bind the EEOC to informal or unapproved opinions volunteered by EEOC staff members.²⁰ In *Robinson v. Lorillard Corp.*,²¹ the Fourth Circuit stated that application of regulation 1601.33 would insure that all EEOC opinions are based upon either a solid factual foundation or the most thorough consideration of the potential

¹² 616 F.2d at 282.

¹³ Courts have found the following to be written interpretations or opinions: an opinion letter signed by the General Counsel on behalf of the EEOC, *Williams v. New Orleans Steamship Ass'n*, 341 F. Supp. 613, 615-16 (E.D. La. 1972) (citing 29 C.F.R. § 1601.33); guidelines published in the Federal Register, *Vogel v. Trans World Airlines*, 346 F. Supp. 805, 817 (W.D. Mo. 1971); a consent decree accompanied by opinion letters of the EEOC, *EEOC v. American Tel. & Tel. Co.*, 419 F. Supp. 1022, 1055 n.34 (E.D. Pa. 1975), *aff'd*, 556 F.2d 167 (3d Cir. 1977); and a letter from the Acting General Counsel which was released for publication, *Yott v. North Am. Rockwell Corp.*, 428 F. Supp. 763, 768 (C.D. Cal. 1977) (Supplementary Opinion), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

Courts have denied status as written interpretations to: a statement by the Chairman of the EEOC, *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 997 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); a letter from the EEOC Executive Director, *Id.*; an EEOC internal agency memorandum from the General Counsel to the Director of Compliance, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1200 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); and a "no reasonable cause" determination, *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

¹⁴ *Williams*, *Local 189*, *Sprogis*, and *Robinson* applied regulation 1601.33. The *Yott* court said it applied the regulation using "objective standards"; however, it really appears to have refused to strictly apply the language of 1601.33. *See* 428 F. Supp. at 768. *Vogel* questions the ability of the EEOC to restrict what is a "written interpretation" when the EEOC publishes an interpretation which is relied upon by the public. 346 F. Supp. at 817. *AT&T* made no mention of regulation 1601.33. 419 F. Supp. at 1055 n.34.

¹⁵ *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (Title VII does not confer upon the EEOC authority to promulgate rules or regulations).

¹⁶ *See id.* at 141-43. The Court in *General Electric* noted that a regulation may be considered in determining legislative intent, but less weight may be accorded to it then to one carrying the force of law. In a dissenting opinion, Justice Brennan suggested that the majority failed to give the EEOC guideline the "great deference" it was entitled to under the holdings of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975), and *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1970).

¹⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *quoted in* *General Electric Co. v. Gilbert*, 429 U.S. at 141-42.

¹⁸ *See* *Yott v. North Am. Rockwell Corp.*, 429 F. Supp. at 768 ("Standing to assert the defense is granted by § 2000e-12(b), and the EEOC cannot by regulation or otherwise put a limitation on who can claim the section's benefits"); *Vogel v. Trans World Airlines*, 346 F. Supp. at 817; *Air Transport Ass'n of America v. Hernandez*, 264 F. Supp. 227 (D.D.C. 1967).

¹⁹ 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

²⁰ 416 F.2d at 997.

²¹ 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

factual situations.²² In *Sprogis v. United Air Lines, Inc.*,²³ the Seventh Circuit applied regulation 1601.33 in rejecting United Air Lines' attempt to assert section 713(b)(1) immunity by claiming reliance on an EEOC opinion letter. The court noted that the letter lacked the EEOC letterhead, did not reveal the addressee, was not entitled "opinion letter," and was not signed by the EEOC's General Counsel.²⁴ Because regulation 1601.33 confines reliance justified under section 713(b)(1) to official expressions of opinion taking one of two specifically defined forms²⁵ and because this letter fit neither form, the court rejected the airline's defense.

The Seventh Circuit in *Eirhart* relied upon *Sprogis* in following regulation 1601.33. Because the consent order was not entitled "opinion letter," signed by the EEOC's General Counsel, or published in the Federal Register, the court found that the order did not satisfy the regulation's requirements and therefore was not a "written interpretation or opinion" under section 713(b)(1).

Until *Eirhart*, no case had presented the precise situation of a minority employee attacking the provisions of a consent order. In a series of cases involving the telephone industry, however, courts had to decide whether a defendant who had complied with a consent decree was entitled to section 713(b)(1) immunity.

In 1973, American Telephone & Telegraph Company (AT&T), representing itself and associated telephone companies in the Bell System, entered into a consent decree with the EEOC under which AT&T agreed to create an affirmative action program to eliminate discriminatory employment practices.²⁶ On the day the decree was entered, the EEOC's General Counsel sent a letter to AT&T and the associated Bell companies stating that the decree and letter could be considered a "written interpretation or opinion" of the EEOC.²⁷ In *EEOC v. American Telephone & Telegraph Co. (AT&T)*,²⁸ the EEOC and AT&T sought a supplemental court order to correct deficiencies in the original decree. Three labor unions intervened in the proceeding, objecting to the decree and proposed supplemental order on the grounds that they conflicted with prior collective bargaining agreements between the unions and AT&T and amounted to a program of reverse discrimination. The court nevertheless entered the supplemental order and upheld the decree.²⁹ In so doing, the court declared that the decree and its "accompanying documents" constituted a "written interpretation or opinion" within the meaning of section 713(b)(1).³⁰ The EEOC's General Counsel later confirmed

22 444 F.2d at 801 (EEOC interpretation termed "eminently reasonable"). See also *Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 1141 (5th Cir. 1971) (EEOC finding of no reasonable cause held not a complete defense to an action, in part because of the EEOC's inability to conduct "in depth" investigations in every case).

23 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

24 444 F.2d at 1200.

25 The prior version of the regulation, 29 C.F.R. § 1601.30 (1977), confined a "written interpretation or opinion" to either an opinion letter or matter published in the Federal Register designated as an EEOC opinion. The regulation now appears at 29 C.F.R. § 1601.33 (1979), and includes in the definition the Commission's Guidelines on Affirmative Action.

26 8 LAB. REL. REP. (BNA) 431:73 (1973).

27 Letter from William A. Carey, General Counsel, EEOC, to Thompson Powers, counsel for AT&T and the associated Bell Companies (January 18, 1973), cited in *Belfield v. Chesapeake & Potomac Tel. Co.*, 22 Empl. Prac. Dec. 14423, 14426 n.5 (D.D.C. 1980).

28 See *EEOC v. American Tel. & Tel. Co.*, 419 F. Supp. 1022, 1029 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978).

29 419 F. Supp. at 1053-56, 1060.

30 *Id.* at 1055 n.34.

by letter that the decree and supplemental order constituted a written opinion of the EEOC.³¹ Since then, several suits involving various Bell companies have arisen.

In *Stastny v. Southern Bell Telephone & Telegraph Co.*,³² female employees brought a class action against Southern Bell, alleging discriminatory practices. Because it had acted pursuant to the AT&T decree, Southern Bell raised section 713(b)(1) as a defense. The court rejected the defense on the ground that the employees sought recovery not for acts done in compliance with the AT&T decree, but for employment practices not remedied by the decree. The court also stated that the AT&T decree did not constitute a "written interpretation or opinion," apparently overlooking the opinion letters from the EEOC's General Counsel which confirmed that the decree was indeed a written opinion.

In *Telephone Workers Union v. New Jersey Bell Telephone Co.*,³³ a labor union and an employee who had been passed over for promotion due to hiring quotas established in the AT&T decree brought suit against New Jersey Bell, seeking specific performance of an arbitration award granted pursuant to a collective bargaining agreement. Among its defenses, New Jersey Bell asserted the section 713(b)(1) immunity and argued that the AT&T decree took precedence over any conflicting arbitration award.³⁴ The court treated the AT&T decree as "a fully litigated decree" which had priority over a collective bargaining agreement. The court found for New Jersey Bell and vacated the arbitration award but did not mention the section 713(b)(1) immunity in its holding.

The most recent case concerning section 713(b)(1) and a consent decree is *Belfield v. Chesapeake & Potomac Telephone Co.*³⁵ In *Belfield*, a non-minority employee brought suit against Chesapeake & Potomac (C&P), claiming that the promotion standards in the company's affirmative action program were discriminatory and therefore prohibited by Title VII. One of C&P's defenses was that it enjoyed a section 713(b)(1) immunity based on the AT&T decree. The court upheld the immunity defense and, in dicta, suggested that the AT&T decree might have barred plaintiff's action even without the opinion letters. However, the court found it unnecessary to reach this "somewhat more difficult issue."³⁶

The plaintiffs in *AT&T*, *Belfield*, and *New Jersey Bell* represented non-minority employee interests³⁷ and attacked the provisions of the consent decree. The plaintiffs in *Stastny* represented minority employee interests and did not attack the consent decree; instead, they sought relief not adequately rendered through the decree's affirmative action program. *Eirhart* differs from both situations. The EEOC in *Eirhart* did not ratify the Ohio consent order with opinion letters as it had in AT&T's situation—a circumstance the *Eirhart* court cited as distinguishing *AT&T*.³⁸ The plaintiff in *Eirhart* represented minority employee interests and

31 See *Belfield v. Chesapeake & Potomac Tel. Co.* at 14426 n.5.

32 458 F. Supp. 314 (W.D.N.C. 1978).

33 450 F. Supp. 284 (D.N.J. 1977).

34 The EEOC intervened as a party defendant to protect its interest in the AT&T decree.

35 22 Empl. Prac. Dec. 14423 (D.D.C. 1980).

36 *Id.* at 14426.

37 Although the plaintiff in *New Jersey Bell* was a female representing minority interests, the quota she challenged called for additional males in her particular department. Plaintiff was thus in the position of a non-minority employee, and males were in the position of minority employees. 450 F. Supp. at 293-94.

38 616 F.2d at 282.

attacked provisions of the consent order—a circumstance distinguishing *Eirhart* from *Slatsny*. A claimant may seek relief not adequately rendered in a consent decree regardless of whether he represents minority or non-minority interests.³⁹ Where the claimant attacks the provisions of the consent decree, however, the type of interest represented by the claimant becomes important. If the claimant is a non-minority employee he loses, since his claim is controlled by the “make whole” policy of Title VII—eradication of the discriminatory practice and placement of the aggrieved individual in a position he would have been in but for the discrimination.⁴⁰ But if the claimant is a minority employee, as in *Eirhart*, his interest is one the decree presumably seeks to protect, and new considerations emerge.

One difficulty lies in determining what employment practices discriminate against minorities. The minority claimant in *Eirhart* attempted to define discriminatory practice differently than had the parties and the court involved in the consent order. Arguably, in such a case an employer who faithfully follows the decree’s provisions should not thereafter be liable for retroactive relief. On the other hand, a subsequent suit for prospective relief might well be appropriate since the passage of time might reveal that a practice created by the consent order is discriminatory. The data available at the time an order is entered can be insufficient to form an infallible prospective employment practice.

When a consent decree fails to eradicate discriminatory practices, one solution is to modify the consent decree. In *AT&T*, the EEOC and AT&T agreed to modify the original consent decree with a supplemental order after several years of experience had uncovered deficiencies in the decree. In *Eirhart*, the EEOC had little to do with negotiating the Ohio consent order⁴¹ and never ratified the order with opinion letters. While the EEOC admitted it was bound by the order within Ohio,⁴² it refused to recognize any binding effect outside that state. Indisputably, regulation 1601.33 renders section 713(b)(1) immunity unavailable in this situation. Title VII immunity, however, is not the only defense available to an employer.

The Seventh Circuit suggested in *Eirhart* that if the consent order were to have any legal effect on LOF’s Ottawa plant, it would not be that provided by section 713(b)(1). The only conceivable effect would be res judicata or collateral estoppel.⁴³ Consent orders, however, are not generally given res judicata or collateral estoppel effect when the court has made no determination on questions of law or fact,⁴⁴ or when to give such effect would violate important public policy.⁴⁵

39 For example, if employment practices other than those covered in the decree prove discriminatory, section 713(b)(1) is clearly inapplicable to them. The EEOC recently issued a regulation which provided: “[These Guidelines] do not apply to, and the section 713(b)(1) defense is not available for the purpose of, determining the adequacy of an affirmative action plan or program to eliminate discrimination.” 29 C.F.R. § 1608.11 (1979).

40 *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763-64 (1976).

41 See 482 F. Supp. at 362; 616 F.2d at 283. Although the EEOC performed the initial investigation of LOF, the Justice Department negotiated the consent order’s provisions. In light of this, Judge Castle questioned whether the order could be considered a “written interpretation or opinion of the Commission.” 616 F.2d at 282 (emphasis added).

42 482 F. Supp. at 362 n.8.

43 616 F.2d at 282-83. LOF argued that the consent order operated as an adjudication on the merits and thus was binding on both the EEOC and *Eirhart*.

44 See *United States v. International Bldg. Co.*, 345 U.S. 502, 506 (1953); *Lawlor v. National Screen*

The decree in *AT&T* was given res judicata effect only because all parties had been provided full opportunity to intervene in the litigation, the decree's provisions had been the product of extensive negotiation, government agencies had approved the settlement, and judicial sanction had been given the decree. In light of these circumstances, the court's overriding interest in "the finality and repose of judgments" demanded that the consent decree be considered a final adjudication.⁴⁶

The *Eirhart* court ruled out the possibility that the EEOC was bound by a consent order, both because the order was geographically limited and because the order's height and weight provisions did not appear to have been carefully considered in the negotiations. The court stated that Sherry Eirhart also was not bound since she was not a party to the original consent order.⁴⁷

Eirhart makes clear that an employer subject to Title VII obtains very limited protection from suit by following the provisions of a consent order. An employer who on his own initiative changes his employment practices to improve employment opportunities and eliminate discriminatory practices does not thereby remove the possibility that he will be sued for discriminatory practices. Minority employees may still bring suit if they feel the employment practices continue to discriminate, and non-minority employees may still bring suit if they feel the affirmative action plan has a "reverse discrimination" effect.

In January 1979, the EEOC issued a new procedural regulation to deal with this problem.⁴⁸ Regulation 1608 encourages employers subject to Title VII to examine their employment practices in light of EEOC guidelines and modify them to the extent necessary to effect compliance. In return for good faith compliance, the EEOC will extend section 713(b)(1) immunity to the employer.⁴⁹ Under the new regulation, an employer who follows an approved affirmative action program will be immune from suits by employees adversely affected by the program. The employer is, however, still subject to suits by employees claiming that the program has not remedied the employment discrimination.⁵⁰

Serv. Corp., 349 U.S. 322, 326-27 (1954) (discusses the distinction between res judicata and collateral estoppel). See generally *Developments in the Law: Res Judicata*, 65 HARV. L. REV. 818, 835-36 (1952).

In *Texas & Pac. Ry. v. Southern Pac. Co.*, 137 U.S. 48, 55-56 (1890), the Supreme Court stated that where a state trial court merely performed an administrative function in binding the parties to a consent order, the state supreme court may determine that the validity of a provision in the order was not in controversy or passed upon in the original action. No res judicata or collateral estoppel effect was given to the consent judgment in *Fruehauf Trailer Co. v. Gilmore*, 167 F.2d 324, 330 (10th Cir. 1948), where the judgment was the product of a compromise and was not based on findings of fact or any determination on the merits.

⁴⁵ See *Addressograph-Multigraph Corp. v. Cooper*, 60 F. Supp. 697, 699-700 (D.C.N.Y. 1945), *aff'd*, 156 F.2d 483 (2d Cir. 1946). See also Langsam, *Res Judicata Effects of Consent Judgments in Patent Infringement Litigation*, 36 FED. B.J. 171 (1977).

⁴⁶ 450 F. Supp. at 293 (citing *Mayberry v. Maroney*, 558 F.2d 1159, 1164 (3d Cir. 1977)). The *Belfield* court adopted this approach when it suggested that an employer's compliance with a consent decree might bar a later action by an employee. 22 Empl. Prac. Dec. at 14426. The court found unpersuasive the employee's argument that the consent decree could not bar his action in light of *McAleer v. AT&T*, 416 F. Supp. 435 (D.D.C.), *vacated*, 13 EMPL. PRAC. DEC. 7336 (1976), where a claim by a non-party employee of the non-minority class was allowed even though AT&T properly followed the provisions of a consent order. The *Belfield* court found *McAleer* undercut by *EEOC v. AT&T*, 556 F.2d 167 (3d Cir. 1977). 22 Empl. Prac. Dec. at 14427 n.8. See Note, *Remedies For Nonminority Employees Under Title VII*, 46 GEO. WASH. L. REV. 251, 268-70 (1978).

⁴⁷ 616 F.2d at 283.

⁴⁸ 29 C.F.R. § 1608 (1979).

⁴⁹ *Id.* § 1608.1(a)-(d).

⁵⁰ *Id.* § 1608.11(a).

Recognizing the importance of court orders in Title VII cases, the EEOC has included in regulation 1608 a section dealing with issues arising from such orders, including orders issued by consent.⁵¹ With respect to adherence to a court order, "[t]he Commission interprets Title VII to mean that action taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII."⁵² The question remains, however, whether a company in LOF's position acts "pursuant to the direction of a Court Order." Certainly, LOF's Ottawa plant relied upon the consent order issued against the Toledo plants, but it was not bound by it. While the first sentence of section 1608 uses the term "[p]arties are entitled to rely," the phrase "action taken pursuant to" seems not to include plants located outside the geographical reach of the consent order.

It appears, then, that employers in LOF's position may avail themselves of neither the section 713(b)(1) immunity nor the *res judicata* defense. Possibly, courts will begin to take into account such factors as employers' good faith reliance upon prior consent orders at the remedial stage of Title VII litigation. By considering good faith, courts can mitigate the "all or nothing" nature of section 713(b)(1) immunity.

As the Supreme Court has noted, section 713(b)(1) is "a complete, but very narrow, immunity."⁵³ The defense is complete in that it protects qualifying employers from all liability, including back pay and other damages, injunctive and declaratory relief, and court costs and attorneys' fees.⁵⁴ The defense is narrow in that good faith by itself does not entitle employers to the immunity. In fact, the Supreme Court has said that equitable considerations such as an employer's good faith should never be considered in determining the relief to be granted aggrieved employees. The "make whole" purpose of Title VII prevails despite the employer's good faith or absence of discriminatory intent.⁵⁵

Justice Rehnquist, however, has suggested that while a court may not expand the section 713(b)(1) defense beyond the bounds intended by Congress, it may take ameliorating factors such as good faith into account when fashioning an equitable remedy.⁵⁶ This approach seems especially appropriate when the employer makes a good faith decision to follow a judicially sanctioned employment practice.⁵⁷

Employers hoping to avoid LOF's predicament should undertake the systematic review of present employment practices prescribed by regulation 1608.

51 *Id.* § 1608.8.

52 *Id.*

53 *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 423 n.18 (1975).

54 *See Vogel v. Trans World Airlines*, 346 F. Supp. at 817. *But see Rosenfeld v. Southern Pac. Co.*, 519 F.2d 527, 529 (9th Cir. 1975) (section 713(b)(1) immunized a qualifying individual only as to liability for back pay and other damages, but did not bar injunctive and declaratory relief, court costs and attorneys' fees).

55 422 U.S. at 417-22.

56 *Id.* at 444-45 (Rehnquist, J., concurring) (see cases cited therein). In *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), the court applied a "balancing of the equities" test in determining whether to award back pay where the defendant had relied on a state female protective statute. *But see Stryker v. Register Publ. Co.*, 423 F. Supp. 476 (N.D. Conn. 1976), in which *Albemarle Paper* was interpreted as rejecting any "balancing of the equities" in the statutory reliance situation. *Id.* at 478-79 nn.2-7. The *Stryker* court suggested, however, that section 713(b)(1) immunity would be available to a defendant who relied upon an EEOC interpretation. *Id.* at 480.

57 The *Stryker* court did not give Southern Bell the 713(b)(1) immunity; nevertheless, it stated: "To the extent that the defendant has performed pursuant to the Consent Decrees, it is given full credit for such performance in the Court's formulation of an appropriate remedy." 458 F. Supp. at 336-37.

When potential discriminatory practices are discovered, the employer should make modifications in conformity with EEOC guidelines.⁵⁸ If the employer desires to implement an employment practice not strictly conforming to the guidelines, he should follow the procedures set forth in regulation 1601⁵⁹ and obtain a written interpretation or opinion from the EEOC on the proposed practice.

Eirhart is the most recent in a line of cases limiting section 713(b)(1) immunity. The court's interpretation of section 1601.33 is sound insofar as it supports the principle that the immunity should not be used to perpetuate unfair employment practices. Unfortunately, *Eirhart* could also be interpreted to mean that an employer who has relied on a consent order is nevertheless left unprotected. Such a result would undermine Congress's intent to encourage voluntary affirmative action. The solution is to allow courts in Title VII cases to consider equitable factors, including an employer's good faith reliance on a consent decree, in fashioning a remedy.

Jonathan D. Zischkau

Civil Rights—SEX DISCRIMINATION—REGULATIONS UNDER TITLE IX PROHIBITING SEX DISCRIMINATION IN EDUCATION-RELATED EMPLOYMENT HELD VALID—*North Haven Board of Education v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980)*

In recent years, Congress has passed legislation prohibiting sex discrimination against women.¹ Title IX of the Education Amendments of 1972² prohibits sex discrimination in education. The statute, commonly interpreted to protect student beneficiaries,³ provides in part, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal assistance"⁴ Pursuant to that statute, the Department of Health, Education, and Welfare (HEW)⁵ issued regulations⁶ prohibiting discrimination on the basis of sex in education-related programs and activities and in education-related employment, recruitment, compensation, and job classifica-

⁵⁸ 29 C.F.R. § 1608.1(c).

⁵⁹ *Id.* § 1601.31-.32.

* *Cert. granted*, 49 U.S.L.W. 3596 (U.S. 1981) (No. 80-986).

¹ *See, e.g.*, Civil Rights Act of 1964 § 703, 42 U.S.C. §§ 2000e-1 to 2000e-15 (1976); Equal Pay Act of 1963, 29 U.S.C. § 206 (1976); Equal Credit Opportunity Act of 1974, § 701, 15 U.S.C. §§ 1691-1691e (1976); Women's Educational Equity Act of 1978, § 802, 20 U.S.C. §§ 3341-3348 (Supp. 1978).

² 20 U.S.C. §§ 1681-1682 (1976).

³ 629 F.2d at 776. *But cf.* *Dougherty County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980). In *Dougherty*, a suit challenging the Title IX regulations, the court held that HEW exceeded its authority by enacting general regulations prohibiting sex discrimination in employment without limiting their effect to specific programs that receive federal assistance. 622 F.2d at 738.

⁴ *Id.* 20 U.S.C. § 1681(a) (1976).

⁵ HEW's jurisdiction was transferred to the Department of Health and Human Services and the Department of Education on May 4, 1978. The Department of Education has reissued the regulations enacted by HEW. *See* note 6 *infra*.

⁶ 45 C.F.R. §§ 86.51-.61 (1975), now reissued in 34 C.F.R. §§ 106.51-.61 (1980).

tion. In *North Haven Board of Education v. Hufstедler*,⁷ the United States Court of Appeals for the Second Circuit upheld the validity of those regulations.

Like the majority of school systems in the United States, the school system of Trumbull, Connecticut, receives federal financial assistance. As a result, it was subject to the discrimination regulations promulgated by HEW under Title IX.⁸ In 1978, a former guidance counselor in the Trumbull public school, Linda Potz,⁹ filed an administrative complaint with HEW alleging that she had been discriminated against because of her sex. HEW determined that the school system had violated Title IX by requiring Ms. Potz to perform clerical tasks not required of male counselors, moving her office to a smaller, poorly heated space, asking her to misrepresent the number of students she had counseled so as to appear more in line with the male counselors, and refusing to renew her contract because of her sex.¹⁰ On September 20, 1977, HEW notified the Trumbull Board of Education (the Board) that the school district's treatment of Ms. Potz violated Title IX and ordered the Board to take corrective action.¹¹ The Board refused to take the requested action and brought suit in federal court for declaratory and injunctive relief. The United States District Court for the District of Connecticut granted the Board's motion for summary judgment, holding that the regulations allegedly violated exceeded the statutory authority granted HEW under Title IX.¹² The court concluded from the legislative history of Title IX that the statute was intended to protect only students and other direct beneficiaries. In addition, the court considered the statutory remedy of fund termination too severe when more effective and less costly methods of prohibiting employment discrimination were available.¹³

On appeal, the Second Circuit reversed the decision of the trial court, holding that HEW has authority under Title IX to enact employment discrimination regulations governing education.¹⁴ Writing for the unanimous court, Judge Oakes noted that even though four other courts of appeals and a number of district courts had held otherwise,¹⁵ "extreme care and consideration" had convinced the Second Circuit that the HEW regulations did not exceed the statutory grant of authority.¹⁶ The court found that the statute was ambiguous as to

7 629 F.2d 773 (2d Cir. 1980).

8 *Id.* at 775.

9 The *North Haven* court heard two cases combined for one appeal. Ms. Potz and the Department of Education were the defendants-appellants in the second of these cases, *Trumbull Bd. of Educ. v. United States Dep't of Educ.*

10 629 F.2d at 775.

11 *Id.*

12 *Id.* See text accompanying notes 47-54 *infra*.

13 *Id.* at 776.

14 *Id.* at 786. See note 15 *infra*.

15 *Id.* at 774. *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir.), *cert. granted*, 49 U.S.L.W. 3409 (1980) (No. 80-493); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist. of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979), (*aff'g* *Brunswick School Bd. v. Califano*, 449 F. Supp. 866 (D. Me. 1978)); *Grove City College v. Harris*, No. 78-1293 (W.D. Pa. March 10, 1980); *Auburn School Dist. v. HEW*, No. 78-154 (D.N.H. March 29, 1979), *appeal dismissed*, No. 79-1261 (1st Cir. 1980); *Board of Educ. of Bowling Green City Dist. v. HEW* No. C78-177, 19 Fair Empl. Prac. Cas. 457 (N.D. Ohio March 14, 1979); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979). *Contra*, *Dougherty County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980).

16 629 F.2d at 774.

whom it applied.¹⁷ Faced with this ambiguity, the court examined the statute's legislative history to determine Congressional intent.¹⁸

In 1971, Senator Birch Bayh of Indiana introduced an amendment to the Higher Education Act,¹⁹ stating that its purpose was to prohibit sex discrimination in employment at certain educational institutions.²⁰ Although the amendment never came to a vote, the remarks demonstrated Senator Bayh's intention to prohibit discrimination in employment of educators under what later became Title IX. In 1972, Senator Bayh introduced a new version of his amendment,²¹ and again made statements manifesting his intention to prohibit employment discrimination in education.²² At the same time, the House was considering a bill similar to the amendment Bayh had proposed in the Senate.²³ The House version, however, included an additional section specifically excluding discrimination in employment from the scope of the amendment.²⁴ After the bill went to the conference committee of the House and Senate, this additional section was deleted.

The conference committee's deletion convinced the Second Circuit that Congress had intended Title IX to include a prohibition against employment discrimination.²⁵ The court found its conclusion buttressed by the fact that, after the passage of Title IX, Congress had failed to disapprove the HEW regulations²⁶ or to exclude employment discrimination from the statute's scope when

17 HEW argued in *North Haven* that the "persons" protected by Title IX were not limited to any particular class, but instead included both students and employees discriminated against in federally funded education programs. 629 F.2d at 777. On the other hand, the First Circuit has stated that "person" refers only to students attending institutions receiving federal funds and to teachers engaged in special research funded by the United States. *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1979), *cert. denied*, 444 U.S. 972 (1979).

18 629 F.2d at 778.

19 Amendment No. 398 to S. 659, 92d Cong., 1st Sess. (1971), recorded in 117 CONG. REC. 30404 (1971).

20 Senator Bayh remarked:

While over 50 percent of our population is female, there is no effective protection for them as they seek admission *and employment* in educational facilities. The anti-discrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning. . . .

Today, women seeking *employment* in higher education face an array of obstacles almost as insuperable as those which used to face blacks.

629 F.2d at 779 (quoting 117 CONG. REC. 30155-56 (1971) (emphasis added)). The amendment applied to educational institutions which received federal financial assistance.

21 629 F.2d at 779 (quoting 118 CONG. REC. 5802-03 (1972)).

22 *Id.* at 779-83 (quoting 118 CONG. REC. 5804-05, 5807, 5812-13 (1972)). See text accompanying notes 36-38 *infra*.

23 H.R. 7248, 92d Cong., 2d Sess. (1972).

24 "Section 1004 provides that nothing in this title may be taken to authorize action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." 629 F.2d at 783 (quoting H.R. REP. NO. 554, 92d Cong., 1st Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2566). This provision parallels § 604 of Title VI of the Civil Rights Act of 1964, the statute on which Title IX was modeled.

25 629 F.2d at 783.

26 *Id.* at 784. A special statutory review procedure provided that any regulation would become effective not less than 45 days after transmission unless the Congress passed a concurrent resolution disapproving the regulations as inconsistent with the enabling act. 20 U.S.C. § 1232(d)(1) (1976). Senator Helms introduced a concurrent resolution to disapprove all HEW regulations issued under 45 C.F.R. §§ 86.51-61 (1975). S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17301 (1975). No action was taken on the resolution. Representatives Quie and Erlenborn introduced a similar amendment in the House, but it was never passed. *Unpublished Amendment to H.R. Con. Res. 330, Hearings Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975), on file with that committee.

presented with an opportunity to do so.²⁷ This inactivity, the court declared, indicated that Congress intended the statute to cover employees as well as students in federally funded education-related programs.²⁸ The court found unpersuasive two arguments that four other courts of appeals²⁹ had found compelling—first, that both the Equal Employment Opportunity Commission and the Department of Labor already had jurisdiction over sex discrimination in employment; and second, that fund terminations affecting students were an unreasonable sanction to apply in cases of sex discrimination against teachers.³⁰

The *North Haven* ruling is a carefully researched decision. Despite its thorough historical analysis, however, the Second Circuit failed to distinguish between two closely related questions: 1) Was Title IX intended to apply equally to employees and to students? 2) If so, were HEW's sex discrimination regulations consistent with the enabling statute of Title IX, section 902? Although the first question may be answered in the affirmative, the second question requires a negative response.

The Second Circuit in *North Haven* analyzed the validity of the Title IX regulations more thoroughly than had any previous court.³¹ *Romeo Community Schools v. HEW*³² and *Brunswick School Board v. Califano*,³³ the most comprehensive of the prior decisions, failed to examine Senator Bayh's remarks concerning his initial proposed amendment. At this early stage, Senator Bayh had included education-related employment as an area in which the amendment would prohibit sex discrimination.³⁴ His early remarks are significant: They make clear that what was eventually to become Title IX had always included a prohibition against sex discrimination in employment. Although later additions to the amendment more explicitly prohibited discrimination in employment,³⁵ they served only to reinforce the original intent of Senator Bayh's proposal.

Furthermore, preceding cases, which relied heavily on the analyses of *Romeo* and *Brunswick*, failed to consider the entirety of Senator Bayh's prepared remarks accompanying his second proposed amendment:

Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and *employment resulting from those programs*. . . . More specifically, the *heart of this amendment* is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment*. . . . *Other important provisions* would extend the equal employment op-

27 In 1975 Senator Helms introduced S. 2146, 94th Cong., 1st Sess. (1975), proposing to amend § 901 of Title IX to exclude employees of educational institutions. 121 CONG. REC. 23845-47 (1975). His bill was not adopted. In 1976 Senator McClure offered another amendment to limit the coverage of § 901 to graduation requirements of the institutions receiving federal aid. 122 CONG. REC. 28136 (1976). The amendment was not adopted either. *Id.* at 28147.

28 629 F.2d at 784.

29 *See, e.g.*, the cases at note 15 *supra*.

30 629 F.2d at 786.

31 *See* note 15 *supra*.

32 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

33 449 F. Supp. 866 (D. Me. 1978), *aff'd sub nom.* *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

34 *See* note 19 *supra*.

35 Later additions to Senator Bayh's amendment were designed to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-15 (1976), and the Equal Pay Act of 1963, 29 U.S.C. § 206 (1976), to prohibit sex discrimination in employment.

portunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.³⁶

As the Second Circuit noted, Senator Bayh's remarks distinguished the "heart of the amendment," dealing in part with faculty employment, from "other provisions," relating to Title VII and the Equal Pay Act.³⁷ In later formal remarks summarizing the various portions of his proposed amendment, Senator Bayh explained again that the first part of his amendment (sections 901 and 902) included employment: "This portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational educational classes, and so forth."³⁸ Previous decisions construing Title IX had ignored the importance of these remarks which highlighted Senator Bayh's intent to prohibit employment discrimination through his amendment.

The Second Circuit in *North Haven* concluded its analysis of the history of Title IX by examining the floor debates concerning sections of Senator Bayh's proposed amendment which exempted religious and military institutions from compliance.³⁹ Since the debate makes clear that these exclusions related to the employment aspect of these organizations, the Second Circuit concluded that "the exclusions . . . would make no sense if employment practices were not included . . . to begin with."⁴⁰

The reasoning used by the Second Circuit has been criticized in other contexts.⁴¹ Those opposed to the HEW regulations point out that sufficient remedies already exist for education-related employees confronted with sex discrimination.⁴² Indeed, such remedies appear elsewhere in Title IX itself: section 906 of that statute amended Title VII and the Equal Pay Act to include coverage for education employees.⁴³

These critics fail to realize, however, that the remedy of fund termination provided in Title IX presents a unique means for combating sex discrimination. That remedy is especially effective, for example, in cases of sex discrimination on a large scale. Instead of many suits brought by aggrieved individuals, all of whom would receive merely individual remedies, Title IX allows agency-instituted sanctions to correct some instances of institution-wide sex discrimination.⁴⁴

The Second Circuit's application of Title IX to employees as well as to student beneficiaries takes on even greater significance when considered in light of the recent decision of the Supreme Court of the United States in *Canon v. Univer-*

36 118 CONG. REC. 5803 (1972) (emphasis added).

37 See note 35 *supra*.

38 118 CONG. REC. 5807.

39 20 U.S.C. §§ 1681(a)(3) and (4) (1976) state that the sex discrimination prohibitions of § 1681(a) do not apply to educational institutions of religious organizations and of the military services. See the debate between Senators Bayh and Pell, 629 F.2d at 781-82.

40 629 F.2d at 781-82.

41 HEW advocated a similar position in the cases cited at note 15 *supra*.

42 See, e.g., *Romeo Community Schools v. HEW*, 438 F. Supp. at 1034; Kuhn, *Title IX: Employment and Athletics Are Outside H.E.W.'s Jurisdiction*, 65 GEO. L.J. 49, 60-61 (1976).

43 See note 35 *supra*.

44 The Title IX remedy offers an additional advantage over that of Title VII: its speed of implementation. Title IX has fewer administrative steps than Title VII has. Compare 20 U.S.C. §§ 1682-1683 (1976) with 42 U.S.C. § 2000e (1976).

sity of Chicago.⁴⁵ In *Canon*, the Supreme Court held that a student in a federally assisted program had a private cause of action under Title IX. Arguably, *North Haven* extends this class of potential private plaintiffs to include teachers and administrators as well as students: Under *Canon* each beneficiary has a cause of action, and under *North Haven* "beneficiary" includes some teachers; therefore, some teachers have a private cause of action under Title IX. This new cause of action for employment discrimination is distinct from those already existing under Title VII and the Equal Pay Act. Such overlapping jurisdiction for employment discrimination is well recognized⁴⁶ and insures that the aggrieved plaintiff will have a suitable remedy.

Although the Second Circuit was correct in determining that Title IX applies to education-related employees who benefit from federal money, the court appears to have been mistaken in upholding the validity of HEW's employment discrimination regulations. Despite its thorough analysis of the statutory history, the court gave only superficial consideration to the language of the regulations at issue.

In authorizing an administrative agency to promulgate rules and regulations, Congress exercises its power to delegate authority. The agency itself lacks legislative powers; its function is limited to drafting regulations subordinate to and consistent with the statute under which the regulations are promulgated.⁴⁷ The agency may neither enlarge its powers beyond those intended by the legislature nor create substantive rights or duties not otherwise existing.⁴⁸

The validity of regulations will be sustained if the regulations are "reasonably related to the purposes of the enabling legislation."⁴⁹ In considering the purpose of enabling legislation, courts are required to show "great deference" to the interpretation of the act by the agency charged with its enforcement.⁵⁰ The agency may not, however, so overextend its regulations as to "bootstrap itself into an area in which it has no jurisdiction."⁵¹

These interpretive guidelines are helpful in evaluating the regulations at issue in *North Haven*:

- (1) No person shall, on the basis of sex, be . . . subjected to discrimination in employment, or recruitment, consideration, or selection therefor . . . under *any* education program or activity *operated by a recipient which receives or benefits from Federal financial assistance*.
- (2) A recipient shall make *all* employment decisions in *any* education program or activity operated by such recipient in a non-discriminatory manner . . .⁵²

Thus, the regulations prohibit sex discrimination by an educational institution against any employee in any education program, regardless of whether the particular program receives federal money, if *any* program at the institution receives

45 441 U.S. 677 (1979).

46 See *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975) (Title VII remedies consistent with 42 U.S.C. § 1981 (1976) remedies); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) (Title VII remedy not intended to be exclusive).

47 See, e.g., *Duncan v. A.R. Krull Co.*, 57 Ariz. 472, 114 P.2d 888 (1941).

48 See, e.g., *NLRB v. John S. Barnes Corp.*, 178 F.2d 156 (7th Cir. 1949).

49 *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 280-81 (1969).

50 *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

51 *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

52 34 C.F.R. § 106.51 (1980) (emphasis added). See notes 5-6 *supra*.

federal financial aid. These regulations clearly exceed the limitations of the enabling legislation for three reasons.

First, section 901 of Title IX limits its coverage by specifying that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination *under any education program* or activity receiving federal financial assistance . . ."⁵³ The statute prohibits sex discrimination only in programs receiving federal aid. The statute makes no provision for discrimination in other, non-federally funded programs that are part of the same institution.

Second, section 902 directs HEW to effectuate the provisions of Title IX "with respect to such program or activity [*i.e.*, ones receiving federal assistance] by issuing rules, regulations, or orders. . . ."⁵⁴ The statute specifically limits fund termination "to the particular program, or part thereof, in which such non-compliance has been found . . ."⁵⁵ The regulations enacted by HEW, embracing all persons affected under any program, exceed these bounds.

Finally, the portion of the regulations providing for sanctions similarly exceeds legislative authority. Title IX regulations⁵⁶ refer to the Title VI regulations⁵⁷ for the procedure to be used in enforcing Title IX. The Title VI regulations, like section 902 of Title IX, state that termination shall be limited in its effect to the particular discriminatory program involved. Thus, HEW's own regulations do not permit the agency to terminate aid in some of the situations it purports to regulate—where the employment discrimination occurs in a non-federally aided program.

In addition, Title IX's legislative history makes clear that Congress considered an amendment similar to the broad, institution-wide regulations of HEW, but opted instead for the more limited version which became sections 901 and 902 of the statute. In 1971, Senator Bayh's proposed amendment prohibited sex discrimination "under any program or activity conducted by a public institution of higher education . . . which is a recipient of Federal financial assistance for any program or activity . . ."⁵⁸ Under this proposal, HEW could terminate aid for any violation in any program and would thus have power over all education programs, whether or not federally funded. Congress, however, did not pass this amendment. The termination provision in the enacted statute was instead limited to the specific programs in which discrimination had been shown.

The anti-discrimination language of section 901 is parallel to similar language in other statutes dealing with federal appropriations. Regulations have been enacted under two such statutes involving volunteer services⁵⁹ and the energy commission.⁶⁰ Interpreting language virtually identical to that of Title IX, these two sets of regulations specifically address discrimination under programs receiving federal aid. These regulations, which could have been drafted like the

53 20 U.S.C. § 1682 (1976) (emphasis added).

54 20 U.S.C. § 1682 (1976).

55 20 U.S.C. § 1682(1) (1976).

56 34 C.F.R. § 106.71 (1980).

57 34 C.F.R. §§ 100.6-.11 (1980).

58 See note 19 *supra*.

59 Domestic Volunteer Service Act of 1973, § 417, 42 U.S.C. § 5057 (1976). The relevant regulations begin at 45 C.F.R. § 1203.1 (1979).

60 Energy Reorganization Act of 1974, § 401, 42 U.S.C. § 6891 (1976). The relevant regulations begin at 10 C.F.R. § 4.11 (1979).

Title IX regulations to include all employees of institutions receiving such aid, include only employees of federally assisted programs. These narrow interpretations of phrases more widely construed in the Title IX regulations suggest that the Title IX regulations are excessively broad.

The language of another statute addressing sex discrimination further strengthens the argument that Congress distinguished between "program-specific" statutes and broader, institution-wide statutes. A federal statute dealing with fiscal aid to state and local governments⁶¹ prohibits sex discrimination "under any program or activity of a State government or unit of local government, which government or unit receives funds made available under subchapter I of this chapter." The statute suggests that aid may be terminated for sex discrimination in any program, regardless of whether the particular program receives federal aid. Under such a statute, regulations as broad as those promulgated under Title IX would be appropriate. Congress has not, however, legislated as expansively in Title IX.

The *North Haven* court, in upholding the validity of the Title IX regulations, circumvented the program-specificity requirement by suggesting that in some situations an entire educational system could be considered one "program" for purposes of Title IX. Although it is possible that all of an institution's programs could be tainted with sex discrimination, any termination of funds must still occur on a program-by-program basis. Contrary to the court's suggestion, the programs and activities of an entire school system may not collectively be referred to as one "program."⁶² When the words "program" and "activity" are used at other places within Title 20 of the United States Code,⁶³ they invariably refer to particular programs and projects, such as remedial instruction, school health programs, vocational guidance, and the like. Similarly, when Title VI, the act on which Title IX was based, was adopted, Congress made clear which programs were to be included in the Title VI termination provision.⁶⁴ As these examples illustrate, "program or activity" is never used in the United States Code to refer to entire school systems.

A case dealing with racial discrimination under Title VI, *Board of Public Instruction v. Finch*,⁶⁵ elaborated on the statutory meaning of "program or activity." The Fifth Circuit in *Finch* emphasized that the phrase did not include "the col-

61 State and Local Fiscal Assistance Act of 1972, § 122, 31 U.S.C. § 1242, as amended by State and Local Fiscal Assistance Amendments of 1976, § 8(a), 31 U.S.C. § 1242 (1976).

62 629 F.2d at 785.

63 *See, e.g.*, 20 U.S.C. § 241d-1 (1976) (programs designed to meet special needs of "educationally deprived" children); 20 U.S.C. § 843(b)(3) (1976) (numerous programs listed for education centers); 20 U.S.C. § 1606(a) (1976) (list of programs); 20 U.S.C. § 1866(d) (1976) (grants for various educational activities).

64 The Minority Report of H.R. REP. NO. 914, 88th Cong., 2d Sess. (1963), reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2391, 2470-73, contains lists of included programs; see also Title VI regulations at 45 C.F.R. §§ 80.2, 80.13 (1979). Among the programs mentioned in the Title VI regulations are the following: grants for training in librarianship (20 U.S.C. §§ 1031-1033 (1976)); higher education students loan program (20 U.S.C. §§ 421-429 (1976)); college work-study program (42 U.S.C. §§ 2751-2756 (1976)); grant programs for advanced and undergraduate international studies (20 U.S.C. §§ 1171-1176 (1976)); bilingual educational programs (20 U.S.C. §§ 880b to 880b-5 (1976)); grants to agencies and organizations for Cuban refugees (22 U.S.C. § 2601(b)(4) (1976)); grants for construction and initial staff of treatment facilities for narcotic addicts (42 U.S.C. § 2688m (1976)).

65 414 F.2d 1068 (5th Cir. 1969). The Board had implemented a "freedom of choice" desegregation plan, but HEW was not satisfied with the Board's progress. HEW thus terminated payment of federal funds to the school district. The court of appeals reversed HEW's decision.

lectivization of all school subventions under the single rubric, 'program or part thereof.'"⁶⁶ The court observed that Congress did not intend for the unaffected programs to "suffer for the sins of others."⁶⁷ It is in this "condemning by association"⁶⁸ that the regulations enacted under Title IX by HEW and at issue in *North Haven* exceed statutory authority.

The *North Haven* decision significantly extends the class of protected persons under Title IX of the Education Amendments of 1972. Through its in-depth survey of the relevant legislative history, the Second Circuit correctly concluded that Title IX protects teachers whose pay is subsidized with federal funds. The court went astray, however, in upholding regulations purporting to give HEW authority over employment discrimination in all education-related programs, whether or not federally funded. Future decisions should limit HEW's regulatory power to situations in which the employee discriminated against is paid with federal money.

Jonathan W. Anderson

Constitutional Law—FOURTH AMENDMENT—CONSENT TO SEARCH IS NOT VIOLATED BECAUSE IT IS GRANTED SUBSEQUENT TO SERVICE OF A SUBPOENA DUCES TECUM—*United States v. Allison*, 619 F.2d 1254 (8th Cir. 1980).

In reviewing search and seizure situations, courts must often decide whether slight deviations from the established procedure amount to an unconstitutional practice.¹ In *United States v. Allison*,² the United States Court of Appeals for the Eighth Circuit addressed the appropriateness of gaining consent for a search and seizure subsequent to service of a subpoena duces tecum.³ The Eighth Circuit recognized that the average person could easily confuse a subpoena duces tecum with a search warrant, and assume as a result that the agent who served the subpoena had the authority to conduct a lawful search.⁴ Nevertheless, the court ruled that the agent who served the subpoena duces tecum need not inform the recipient of his legal rights regarding the subpoena,⁵ and that the agent's apparent but not actual authority to conduct a search did not itself vitiate consent.⁶ Rather, the court held that an effective consent to search, after service of a subpoena duces tecum, was to be judged by a totality of the circumstances test.⁷

⁶⁶ *Id.* at 1077.

⁶⁷ *Id.* at 1078.

⁶⁸ *Id.* "Condemning by association" refers to HEW's attempt to regulate all education programs because of federal financial assistance to some.

1 *Boyd v. United States*, 116 U.S. 616 (1886).

2 619 F.2d 1254 (8th Cir. 1980).

3 A subpoena duces tecum is a writ by which the court requires the production before it of documents, papers, or tangible things. *Vaughn v. Broadfort*, 267 N.C. 691, 149 S.E.2d 37 (1966); FED. R. CRIM. P. 17(c).

4 619 F.2d at 1264.

5 *Id.* at 1260.

6 *Id.* at 1264.

7 *Id.* at 1260.

In *Allison*, Federal Bureau of Investigation (FBI) special agents investigated the possible embezzlement and misappropriation of funds of the Laborers International Union of North America, Local 1282.⁸ The agents requested the United States Attorney to issue a grand jury subpoena duces tecum for the production of certain records of the local.⁹ There was some doubt as to whether a proper showing of probable cause for a search warrant could have been made at this time.¹⁰

The subpoena was addressed to Allison, a union official who was the supposed custodian of the records. It directed him to appear before the grand jury at 9:30 a.m. on February 10, 1978, and to bring with him the local's files containing certain records and documents which pertained to the investigation.¹¹ The agents were aware that the local had ignored a previous state subpoena which had been served 24 hours prior to a fire that destroyed some of the records.¹² Determined to secure the documents, they arranged for evidence boxes to be brought to the local's headquarters.¹³ The U.S. Attorney had advised them to gain permission to box the records and to remain at the local until the boxes could be transported to the Federal Building.¹⁴ Upon arrival at the union headquarters on the morning of the tenth, the FBI agents were informed that Allison was not there; nevertheless, they served the subpoena shortly after 8:00 a.m. to defendant Greer, the actual custodian of the records.¹⁵

The agents told Greer that they were there to pick up the records requested in the subpoena. Greer gave permission to box the records, saying, "[F]ine. We do not have anything to hide."¹⁶ Uncertain whether he could gather all the records himself, Greer led the agents to the records room, where the agents searched through the files with Greer helping them to identify the pertinent records. The agents gathered the records and placed them in the evidence boxes. Greer acquiesced when the agents offered to transport the boxed documents.¹⁷ During the search, Allison arrived, read the subpoena, indicated Greer to be in charge of the records, and left.¹⁸

Allison, Greer and defendants Spires and Robinson¹⁹ were indicted by a federal grand jury on October 2, 1978, eight months after the records were secured.²⁰ At their trial, the defendants moved to suppress the admission into evidence of the union records.²¹ After a hearing, the motion was denied but a mistrial was declared on other grounds. At a subsequent hearing, prior to the new trial, the district court reversed its previous ruling and granted the motion to suppress.²²

The court first found that the defendants had standing to assert their fourth

8 *Id.* at 1256.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 1257.

17 *Id.*

18 *Id.* at 1257 n.2.

19 See text accompanying note 33 *infra*.

20 *Id.* at 1256.

21 *Id.*

22 *Id.*

amendment rights.²³ The court then decided the consent to search was invalid as a matter of law, on the following grounds: (1) there was improper service of the subpoena²⁴ and (2) the voluntariness of Greer's consent was negated because the consent was not "knowing and informed."²⁵ The court found Greer to have consented to the search. The court speculated that the consent would have been given even if Greer had known his rights.²⁶ The court found, however, that neither Allison nor Greer knew of their rights when served with a subpoena duces tecum, specifically their right to object to a search by the agents.²⁷ The court concluded, therefore, the search and seizure subsequent to service of the subpoena duces tecum was unreasonable and an abuse of the grand jury process.²⁸ The United States appealed.²⁹ The court of appeals reversed.³⁰

Judge Ross, writing for the unanimous panel of the Eighth Circuit, first addressed the issue of the defendants' standing to attack the search.³¹ Relying on the reasoning in *Mancusi v. DeForte*,³² the court determined that only Allison and Greer could expect fourth amendment protection against unreasonable searches and seizures in the union office. Accordingly, only Allison and Greer had standing to object to the evidence at trial.³³

While acknowledging that the issue of consent is usually factual, the court was concerned with the finding of the district court that, as a matter of law, the government should have proved a knowing and informed consent.³⁴ The district court felt that without such proof, there was no legally sufficient consent.³⁵

The appellate court rejected the district court's conclusion that where a subpoena duces tecum is used to gain consent to search by law enforcement officers, the knowing and informed standard of consent is applicable.³⁶ The appellate court determined there was no need for the government to show that the consenting party was informed by the officers, or that he was otherwise aware of his rights with respect to a subpoena duces tecum.³⁷

The court held that the voluntariness or coerced nature of consent should be judged in accordance to the totality of circumstances test adopted in *Schneckloth v.*

23 *Id.* at 1258.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

24 619 F.2d at 1258.

25 *Id.* at 1257.

26 *Id.*

27 *Id.*

28 *Id.* at 1255.

29 18 U.S.C. § 3731 (1976).

30 619 F.2d at 1258.

31 *Id.* The court followed *Rakas v. Illinois*, 439 U.S. 128 (1978), limiting its inquiry to those defendants whose expectation of privacy had been infringed upon. The court recognized a labor union's lowered expectation of privacy with respect to labor department investigations but rejected the government's assertion that the union was a federally regulated business similar to a firearms dealer. 619 F.2d at 1259 n.3.

32 392 U.S. 364 (1968). In that case, the Court determined a Teamster Union Local vice president, who shared an office with other officials, nevertheless had a reasonable expectation of freedom from governmental intrusion with respect to his custody of certain union records. *Id.* at 368-69.

33 619 F.2d at 1260.

34 *Id.* at 1262.

35 *Id.*

36 *Id.* at 1260, 1262.

37 *Id.* at 1261.

Bustamonte.³⁸ The court reasoned that the government need not prove knowing and informed consent just because the consent followed the service of a subpoena duces tecum.³⁹ The knowing and informed consent doctrine was based on the waiver of trial rights and not the right of a person to be free from unreasonable invasions of privacy.⁴⁰ The court, in rejecting any specific requirement for assuring that the recipient knows his rights after he has been served a subpoena duces tecum, concluded that "a mechanistic approach which involves a reading of fourth amendment rights or which places an undue burden on the government at trial is not only cumbersome, but also offers an incomplete guarantee of protection against coercion."⁴¹

The court also rejected the district court's comparison of the consent to search, gained pursuant to service of a subpoena duces tecum, to consent given after law enforcement officers claim to have a search warrant or where they possess an invalid search warrant. The consent in the latter situations, the appellate court conceded, was mere acquiescence and not voluntary, and there could be no effective consent to search after such false presentation of lawful authority.⁴² But

38 412 U.S. 218 (1973). The issue before the Court was what must be proven to demonstrate that a "consent" to search was voluntarily given. The case arose when the defendant moved to suppress evidence taken from his car which he had given police permission to search. The police did not inform the defendant, who was not in custody, that he had a right to refuse the search. The Court held that the "voluntariness" of a consent search is a question of fact from the totality of circumstances. The determination is whether a consent to search is in fact "voluntary" or was the product of duress or coercion, express or implied. Although a defendant's knowledge of the right to refuse consent is one factor to be considered, the government is not required to show such knowledge as the *sine qua non* of an effective consent. *Id.* at 226-27. For a further discussion of the Court's decision, see the text accompanying note 91 *infra*.

39 619 F.2d at 1262.

40 For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. . . . The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning.

Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.

412 U.S. at 231, 231, 237. *Cf.* *Boykin v. Alabama*, 395 U.S. 238 (1969) (unconstitutional for trial judge to accept guilty plea without an affirmative showing that it was intelligent and voluntary); *Miranda v. Arizona*, 384 U.S. 486 (1966) (warnings prior to custodial interrogation); *United States v. Wade*, 388 U.S. 218 (1967) (standard of knowing and intelligent waiver applied to right to counsel at each critical stage of a criminal proceeding); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (knowing and intelligent waiver of right to counsel at a federal criminal trial).

41 619 F.2d at 1262.

42 *Id.* at 1264. This principle was affirmed in *Bumper v. North Carolina*, 391 U.S. 543 (1968). In that case the government sought to justify a search based upon consent given after the officers falsely stated that they had a warrant. The prosecution relied not on the untested validity of the warrant but on the consent given to search. *Id.* at 548-49. For a further discussion of *Bumper*, see text accompanying notes 87-89 *infra*. See also *Amos v. United States*, 255 U.S. 313 (1921) (implied coercion invalidating consent).

The cases offered by Allison and Greer in support of the district court's conclusion likening this case to *Bumper* were readily distinguished. In *In re Nwamu*, 421 F. Supp. 1361 (S.D.N.Y. 1976), the district court rejected the government's claim of a consented-to search and held that the "consent" was actually mere acquiescence to apparent lawful authority as a result of the service of a "forthwith" subpoena duces tecum coupled with enforcement of the subpoena, over the objection of the recipient, by threats of contempt. The subsequent search and seizure was determined to be unreasonable because of a non-effectual consent to search. For a further discussion of the court's reasoning, see text accompanying notes 75-78 *infra*. In *Consumer Credit Ins. Agency v. United States*, 599 F.2d 770 (6th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), the evidence removed by FBI agents from the defendant's office building after service of a "forthwith" subpoena duces tecum was not suppressed. The court determined the consent to search was voluntarily given after the recipients of the writ consulted with an attorney. But see text accompanying note 71 *infra*. Each of these cases, the appellate court in *Allison* reasoned, depended solely upon a factual determination of consent and not on the presumed authority of the subpoena duces tecum and its affect on

the appellate court determined:

[T]here is a great difference in the degree of coercion involved in serving a subpoena duces tecum as opposed to asserting the possession of a search warrant. A search warrant indicates . . . no right to object to a search. A subpoena duces tecum requires only that certain records must be produced and brought before the grand jury issuing the subpoena.⁴³

The appellate court further distinguished the present case from the implied coercion cases. There was no misrepresentation of legal authority, they noted, but only a misunderstanding of the legal compulsion attached to a subpoena duces tecum.⁴⁴ They dismissed the argument of the district court which contended that law enforcement officers used unlawful coercion by serving the subpoena duces tecum to gain permission to search.⁴⁵ The court did not believe the officers had surrounded themselves with the "authority of the grand jury" or had given the impression of there being "no right to refuse the search."⁴⁶

The court also decided that because the search was not conducted upon the authority of the subpoena, but rather by consent, it was immaterial whose name appeared on the subpoena so long as the consenting party was the legal custodian of the records.⁴⁷

The opinion in *United States v. Allison* leaves unanswered the question of whether a subpoena duces tecum with "forthwith" qualities⁴⁸ may be served when there is some doubt as to the availability of a search warrant and it is likely that the recipient of the subpoena duces tecum will as a result give consent for a search and seizure which goes beyond the authority provided by the subpoena. The appellate court based its judgment on two determinations: (1) the consent to search the union records was given after a misunderstanding of the legal authority of the subpoena duces tecum⁴⁹ and (2) the subpoena is considerably less coercive than a false claim of possessing a search warrant.⁵⁰ Neither of these determinations, the court concluded, was sufficient to vitiate consent.⁵¹ The court failed to address the threshold inquiry, however, concerning the propriety of even requesting permission to search following service of a subpoena duces

that consent. 619 F.2d at 1263. The appellate court found support in *United States v. Re*, 313 F. Supp. 442, 448 (S.D.N.Y. 1970). That case compared an accountant's consent to deliver records, after the "forthwith" nature of the subpoena duces tecum was excused, to a voluntary compliance to the subpoena in light of the compelling awareness of the severe penalties which may be imposed for willful resistance. *Id.* That case does not seem particularly apposite to the present situation since the "forthwith" quality of the subpoena was not used and the accountant himself delivered the subpoenaed papers, to the office of the SEC agent who had served the subpoena, during the evening following the morning service of the writ. *Id.* at 446.

43 619 F.2d at 1264 n.5.

44 *Id.* at 1264. See text accompanying notes 60-69 *infra*.

45 *Id.* at 1262.

46 *Id.* at 1263.

47 *Id.* at 1265. Since Greer had mutual control over the records with Allison, the consent was a valid third party consent to search. *Id.* See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

48 Although the subpoena duces tecum in this case was not designated as requiring "forthwith" production, nevertheless Greer was given only an hour and a half to comply and the agents specifically stated the documents were to be immediately produced. In effect the writ demanded "forthwith" production. See notes 12-16 *supra*.

49 See note 44 *supra*.

50 See note 43 *supra*.

51 619 F.2d at 1265.

tecum. The opinion does not give adequate weight to the possible violations of the right to privacy secured by the fourth amendment.

The basic judicial interpretation of the fourth amendment is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."⁵² For enforcement, the courts have adhered to the "exclusionary rule" making the illegally seized evidence inadmissible as to the guilt of the wronged defendant.⁵³ The purpose of the rule is to deter law enforcement officers from making illegal searches and seizures and to maintain the imperative of judicial integrity.⁵⁴ In reversing the district court, the appellate court neglects this judicial interpretation and blurs the distinction between a non-coercive consent to search, and consent granted pursuant to service of a "forthwith" subpoena duces tecum. By failing to make this distinction, the court has effectively approved a non-exigent search and seizure, undertaken without the authorization of a search warrant. The *Allison* decision allows an officer in the field to use a "forthwith" subpoena duces tecum to gain a consent to search he might not have obtained without the writ.⁵⁵ By approving this method, the court affords the officer who serves the writ an opportunity to avoid having to establish probable cause for the search.

The subpoena duces tecum requiring the production of the union records could, under no circumstances, qualify as a valid search warrant, within the meaning of the fourth amendment.⁵⁶ A subpoena lacks the requirement of a warrant that it "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."⁵⁷ A search warrant may not properly be issued to a federal officer or government attorney unless a showing of probable cause can be made from the facts and circumstances presented to the court under oath or affirmation.⁵⁸ There must be probable cause that the property to be seized constitutes evidence of the commission of a criminal offense, or contraband, or fruits of a crime, or property intended for use to commit a criminal offense.⁵⁹

A subpoena, however, is issued to an officer of the court by the court clerk without a court order, and without passing upon the materiality of the desired evidence.⁶⁰ As in this case, it is the prosecutor who has the initiative and power

52 *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). See also *Stoner v. California*, 367 U.S. 483 (1964); *McDonald v. United States*, 335 U.S. 451 (1948). But see *Chimel v. California*, 395 U.S. 752 (1969) (search incident to an arrest); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Chambers v. Maroney*, 399 U.S. 42 (1970) (mobile vehicle); *Schmerber v. California*, 384 U.S. 757 (1966) (imminent destruction of evidence).

53 *Weeks v. United States*, 232 U.S. 383 (1914). There is every indication in *Allison* that the evidence contributed to the conviction of the defendants. Therefore any error from admitting evidence obtained through an illegal search and seizure would probably not be harmless. See *Fahy v. Connecticut*, 275 U.S. 85 (1963).

54 *Elkins v. United States*, 364 U.S. 206 (1960).

55 The appellate court acknowledged the district court's conclusion that Greer believed the subpoena duces tecum empowered the agents to obtain and to take the records. 619 F.2d at 1263.

56 See *Mancusi v. DeForte*, 329 U.S. at 371; accord, *In re Nwamu*, 421 F. Supp. at 1365. Compare *FED. R. CRIM. P. 17* with 41.

57 *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

58 *Nathanson v. United States*, 290 U.S. 41, 47 (1933); *FED. R. CRIM. P. 41(c)*.

59 *FED. R. CRIM. P. 41(b)*.

60 *FED. R. CRIM. P. 17(a)*; *Southern Pac. Co. v. Superior Court*, 15 Cal. 2d 206, 100 P.2d 302. Cf.

by subpoena to bring proof before the grand jury.⁶¹ The subpoena duces tecum, appropriately used, is valuable in assisting the grand jury in its essential function—ascertaining probable cause upon which to base an indictment.⁶² However, unlike a search warrant where probable cause is previously determined and a seizure authorized, the records to be produced under subpoena are not subject to seizure. The recipient of the writ, by right, prior to compliance, can subject the subpoena to judicial scrutiny in a post-service test of “reasonableness.”⁶³ The search warrant, on the other hand, necessitates compliance prior to any face value test of its validity.⁶⁴

The appellate court acknowledges the compelling nature of a subpoena duces tecum.⁶⁵ Although it does not authorize any seizure, failure to comply with its terms, if found to be reasonable, subjects the offender to the possibility of a contempt charge.⁶⁶

The ease of issuance, apparent judicial authority commanding production, breadth of material to be produced, and the sanction for enforcement necessitate a continuing scrutiny of the procedural use of a subpoena.⁶⁷ Appropriate service by FBI agents is completed by delivering a copy to the person named in the subpoena.⁶⁸ However, the power to quash, alter, or enforce the subpoena is not entrusted to any government agent but to the court, so that all rights of the witness prior to any indictment will be scrupulously upheld.⁶⁹

Yet the potential for the misuse of a subpoena, especially one with “forth-with” qualities, has caused an undercurrent of discontent in two other Circuits.

United States v. Dionisio, 410 U.S. 1, 9-10 (1973) (comparison of criteria for issuance of a subpoena duces tecum and a search warrant).

61 See *United States v. Thompson*, 251 U.S. 407 (1920).

62 See, e.g., *Blair v. United States*, 250 U.S. 273 (1919); *Hendricks v. United States*, 223 U.S. 178, 184 (1912).

63 “The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.” FED. R. CRIM. P. 17(c). The requirement of “reasonableness” with respect to books and records is stated as: (1) there must not be too much indefiniteness or breadth in the description of the matter sought; (2) the inquiry must be which the demanding agency is authorized by the law to make; (3) the material specified must be pertinent; (4) the request is adequate but not excessive for the relevant inquiry. See *Oklahoma Press Pub. Co. v. Walling*, 372 U.S. 186, 209 (1946); accord, *Hale v. Henkel*, 201 U.S. 43 (1906) *disapproved on other grounds*, *Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964); *United States v. Calandra*, 414 U.S. 338, 346 (1973).

64 See, e.g., *Franks v. Delaware*, 438 U.S. 154 (1979).

65 *United States v. Allison*, 619 F.2d at 1264.

66 FED. R. CRIM. P. 17(g). The judicially approved breadth of a reasonable grand jury subpoena duces tecum proscribes a union’s record custodian, called upon to personally produce the union records, to assert any constitutional privilege protecting production. *United States v. White*, 322 U.S. 694 (1944). Despite the Court’s ruling in *White*, it does not necessarily follow that there would be inevitable discovery of the records. Cf. *United States v. Ternullo*, 407 F. Supp. 1172 (E.D.N.Y. 1976) (seizure of copies of mechanics liens even if unreasonable would not be an unconstitutional intrusion since original liens were on file and would have been discovered by investigators). In *Allison*, the appropriate officials, once proper service had been made, would still have had a choice to comply, challenge, or risk a civil contempt charge while lawfully refusing to answer questions regarding the whereabouts of the subpoenaed records. See *Curcio v. United States*, 354 U.S. 118 (1957). See generally *Vaira, Use of the Grand Jury to Obtain Business Records*, 59 CHI. B. REC. 32 (1977).

If there were a successful motion to vacate or modify the subpoena duces tecum at a proceeding subsequent to their initial exclusion because of an unreasonable search and seizure, a warrant to seize the remaining records might be inadmissible as “fruit of the poisonous tree.” See *Wong Sun v. United States*, 371 U.S. 471 (1963).

67 Cf. *Boyd v. United States*, 116 U.S. at 633-35 (grand jury may not compel a person to produce his own strictly private books and papers that would incriminate him).

68 FED. R. CRIM. P. 17(d).

69 FED. R. CRIM. P. 17(c). See *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960); accord, *United States v. Birrell*, 242 F. Supp. 191, 204 (S.D.N.Y. 1965).

Judge Weick of the Sixth Circuit, in his dissenting opinion in *Consumer Credit Insurance Agency v. United States*,⁷⁰ commented upon the government agents remaining to supervise collection of subpoenaed documents:

The obvious purpose of their remaining at the plaintiff's place of business was for duress and coercion, to enforce compliance with the forthwith subpoenas. This was not their function, and they had no lawful right to engage in such activity. In this context the use of the forthwith command itself became coercive.⁷¹

The Third Circuit also has expressed concern on this issue in a case involving a forthwith grand jury subpoena duces tecum, issued when in fact, no grand jury was presently sitting.⁷² Although the court determined that the defendant lacked the appropriate standing to object, it nevertheless commented:

[W]e must express grave disquietude with respect to . . . the issuance and "forthwith" production provisions of the subpoena.

. . . . Under these circumstances, the grand jury subpoena is no substitute for a proper application before a judicial officer for a search warrant. It was this egregious circumvention of Fourth Amendment procedures that probably led the district court, in denying . . . [defendant's] suppression motion—solely on the issue of standing—to observe, that "in doing so we do not rid ourselves of a chill at the base of the spine. We are old enough to remember how other democratic constitutional systems were brought to destruction by the use of their own legal processes."⁷³

Although the appellate court distinguished the *Allison* decision from the cases involving a lack of factual consent, one such case, *In Re Nwamu*,⁷⁴ did not limit its discussion to that determination:

The circumstances surrounding the employee's surrender of documents and other objects to agents of the Federal Bureau of Investigation, upon service of "forthwith" subpoenas upon them, raise substantial questions of unlawful search and seizure, as well as frustration of the power of the court . . . to modify or quash a subpoena⁷⁵

The *Nwamu* court reasoned, prior to its determination of non-effecutal consent, that the agents had no authority by virtue of the subpoena to "execute" its provisions.⁷⁶ It determined that the methods used to obtain possession precluded the witness's protection by the court, "including the right to challenge the subpoena . . . by compelling instant surrender by threats of contempt and claim or color, of authority."⁷⁷ This was an unlawful search and seizure, "however broad the subpoena power of the grand jury."⁷⁸

The appellate court in *Allison*, however, uses the government's argument in *Nwamu* by asserting the search was not conducted on the authority of the sub-

70 599 F.2d 770 (3d Cir. 1979), cert. denied, 445 U.S. 903 (1980).

71 *Id.* at 776 (Weick, J., dissenting). Judge Weick tempers his remark in circumstances where there is imminent danger of the destruction of the documents. "Forthwith" return is then justified. However, he limits this exception to voluntary compliance commenting that "[R]eviewing courts should be cautious where it appears that the forthwith requirement may have been used to preclude any review." *Id.* at 776-77 n.1.

72 *United States v. Hilton*, 534 F.2d 556 (3d Cir.), cert. denied, 429 U.S. 828 (1976).

73 *Id.* at 565.

74 421 F. Supp. 1361 (S.D.N.Y. 1976). See note 42 *supra*.

75 421 F. Supp. at 1362.

76 *Id.* at 1365.

77 *Id.* at 1365-66.

78 *Id.* at 1366.

poena.⁷⁹ Rather, the court relies upon the consent of Allison and Greer. That consent, says the court, need only meet the totality of circumstances test decided upon in *Schneekloth v. Bustamonte*.⁸⁰ The court might better have focused on the effect on the average person of being served with a "forthwith" subpoena duces tecum. This analysis would have served to highlight a profitable comparison between the use of a subpoena duces tecum under these circumstances and the claimed possession of a search warrant in *Bumper v. North Carolina*.⁸¹ The court dismissed this latter comparison by noting the differences in the degree of coercion between a search warrant and a subpoena duces tecum.⁸² To the average person, however, the subpoena duces tecum has, to a significant degree, the same coercive characteristics as a search warrant.⁸³ The "forthwith" subpoena is served by a government agent, it is under the seal of the court, and it commands the immediate production of documents to be brought before the grand jury.⁸⁴ Service of this type of subpoena, coupled with words of authority to obtain the records, surrounds the law enforcement agent with the color of authority.⁸⁵ But the subpoena is not a search warrant, and gives no more authority to search than a false claim of possessing a warrant or serving an improper warrant.⁸⁶ As the court noted in *Bumper*: "[T]he situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."⁸⁷ The Court came to this determination despite the factual finding that the words and actions of the consenting party in *Bumper* indicated voluntary consent. The nature of the consent was remarkably similar to the words and actions of Allison and Greer.⁸⁸

Bumper survived the Court's later decision in *Schneekloth* because the earlier case was not decided upon any mention of the words knowing or informed consent. The mere procedural use of an improper warrant or a claim of a warrant tainted the subsequent consent regardless of the recipient's knowledge of his rights.⁸⁹ Analogously, the initial misrepresentation of apparent court authority to gather evidence in *Allison* improperly influenced Greer's consent, and a better result would have been to exclude the seized records and documents from the trial in accordance with the decision in *Bumper*.⁹⁰

This is not inconsistent with the view in *Schneekloth*. The appellate court in *Allison*, adhering to the principles of the *Schneekloth* decision, ignores the effect of

79 619 F.2d at 1265.

80 See notes 38-40 *supra*.

81 391 U.S. 543 (1968). See note 42 *supra*.

82 See text accompanying note 43 *supra*.

83 Cf. *United States v. Mara*, 410 U.S. 19, 44 (1972) (Marshall, J., dissenting) (members of the public treat their appearance before a grand jury to be as compelling as being brought to the police station as part of a criminal investigation; the former because of its gravity is usually more damaging).

84 See text accompanying note 66 *supra*.

85 Cf. *Bumper v. North Carolina*, 391 U.S. at 548-49.

86 *Id.* at 548.

87 *Id.* at 550.

88 *Id.* at 547 n.8.

89 391 U.S. at 548. See generally Note, *Consent and the Constitution After Bumper v. North Carolina*, 6 CAL. W. L. REV. 316 (1970).

90 Compare "The legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant, rather than an invitation to search," 391 U.S. at 549 n.14 (quoting *Bull v. Armstrong*, 254 Ala. 390, 394, 48 So. 2d 467, 470 (1950)), with "Greer, upon being handed the subpoena under the circumstances stated, believed that the subpoena empowered the agents to obtain and take the records," 619 F.2d at 1263.

its own determination that the coercion of a subpoena differs from that of a search warrant. That coercive effect of the subpoena, albeit different, nonetheless shifts the determination of consent from a post-search examination of the totality of the circumstances to the threshold inquiry into the misuse of the procedural process regarding issuance and service of a subpoena duces tecum. The *Schneckloth* Court balanced these perspectives by noting:

The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity.⁹¹

The inherent coercive effect of serving a subpoena duces tecum under the circumstances in *Allison* is more appropriately viewed as being beyond the scope of authority delegated to the subpoena process despite any ultimate right of the court to enforce production.⁹² In balancing the desire for an effective investigation with the expectations of the average person, mere efficiency cannot justify disregarding the fourth amendment and the requirement of establishing probable cause.⁹³ Moreover, precisely because of the necessarily broad personal subpoena powers of the grand jury, it is necessary that this power be exercised only in a reasonable fashion.⁹⁴ The agents in *Allison* had legitimate concerns that their investigative efforts would be thwarted by some action of the local. The court recognizing these concerns, however, must necessarily weigh them against the Bill of Rights so that "minor seemingly innocuous intrusions don't over the course of time result in significant erosion of those rights."⁹⁵ Nothing would have prevented the agents from appearing at the union headquarters and asking to search through the records. As the court noted, Greer "was in a consenting frame of mind."⁹⁶

Nor did the court authorize the search on the exigent circumstances exception to the search warrant requirement, despite the previous destruction of some records. That exception remains limited to situations where there is probable cause to search and but for the exigency a warrant could be obtained.⁹⁷ This was not the case in *Allison*. Nonetheless, if the records were destroyed after service of the subpoena, there would have been some recourse in the normal judicial process by bringing an action for obstruction of justice.⁹⁸ Perhaps that alternative

⁹¹ 412 U.S. at 229 (emphasis added). The Court further stated:

But the fourth and fourteenth amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the fourth amendment is directed.

Id. at 228.

⁹² See *In re Nwamu*, 421 F. Supp. at 1365. Cf. *United States v. Biswa Overseas Co.*, No. 78 Cr. 937 (S.D.N.Y. June 4, 1979) (customs officials sought to enforce a citation requiring that defendant appear to testify and produce documents, by demanding the files, threatening penalties, and conducting a search; the court held the officials were acting outside their authority).

⁹³ See *Mincey v. Arizona*, 437 U.S. 385, 393 (1977).

⁹⁴ See *United States v. Mara*, 410 U.S. 19, 45 (1972) (Marshall, J., dissenting).

⁹⁵ 421 F. Supp. at 1366; accord, *United States v. Mara*, 410 U.S. at 44.

⁹⁶ 619 F.2d at 1257.

⁹⁷ Compare *United States v. Pino*, 431 F.2d 1943 (2d Cir. 1970) with *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968).

⁹⁸ See *United States v. Simmons*, 444 F. Supp. 500 (E.D. Pa. 1978); accord, *United States v. Solow*, 138

would not result in a penalty comparable to the eventual convictions obtained in this case.⁹⁹ But "if the government breaks the law to obtain evidence of private wrongdoing and the courts permit such evidence to be used in judicial proceedings, the courts themselves become accomplices in willful disobedience of the law."¹⁰⁰

The court's decision in *Allison* encourages prosecutors to exploit the grand jury process by disregarding an individual's constitutional expectation of privacy and the traditional neutrality of the grand jury. The principle established in this case would allow a law enforcement officer to conduct a search and seizure unhindered by the requirement of showing probable cause to obtain a warrant or by the fear that the suspect might obtain a protective order quashing the subpoena. A better rule would be to proscribe the procedural use of a "forthwith" subpoena duces tecum to gain consent for a search. This would preserve judicial integrity by not sanctioning official coercion. It would deter inappropriate law enforcement expediency at the expense of an individual's rights without restricting the use of truly voluntary consensual searches to support effective law enforcement investigations.

Edward B. Koehler

Constitutional Law—STANDING—VOLUNTARY MEMBERSHIP ASSOCIATION HAS STANDING TO SUE SOLELY IN ITS CAPACITY AS REPRESENTATIVE OF ITS HARMED MEMBERS—*NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980).

A litigant seeking to bring suit in federal court must meet certain threshold requirements before the court will hear the case on its merits. Although these requirements arise independently from three distinct sources,¹ they act collectively to ensure that only litigants deemed proper to bring the lawsuit² may invoke a court's jurisdiction. The various constitutional, statutory, and discretionary limitations on the exercise of federal jurisdiction have been discussed in legal treatises and judicial opinions under the general rubric of standing.³

F. Supp. 812 (S.D.N.Y. 1956). See generally Fedders & Guttenplan, *Document Retention and Destruction: Practical Legal and Ethical Considerations*, 56 NOTRE DAME LAW. 7 (1980).

99 The penalty for a violation of 18 U.S.C. § 1503 (1976 & Supp. II 1978) is \$5,000 and/or 5 years in prison. The defendants were convicted under 18 U.S.C. § 1962(c) (\$25,000 and/or 20 years) and (d) (\$25,000 and/or 20 years); 18 U.S.C. §§ 1622 (\$2,000 and/or 5 years) and 1623 (\$10,000 and/or 5 years); and 29 U.S.C. § 501(c) (\$10,000 and/or 5 years).

100 *Elkins v. United States*, 364 U.S. 206, 222 (1960).

1 The three sources are the United States Constitution, legislative enactments, and the Supreme Court of the United States. Article III of the Constitution requires a "case or controversy" for federal jurisdiction over a claim. Federal statutes, such as the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1976), grant a right of judicial review to certain individuals. Prudential limitations, a collection of rules established by the Supreme Court, deal with questions of justiciability: mootness, ripeness, standing and political question. 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE, Jurisdiction* § 3531 (1975).

2 *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975).

3 *Scott, Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973). See *Flast v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 186 (1962); *Doremus v. Board of Educ.*, 342 U.S. 429

For many years one standing limitation has been that a litigant is not ordinarily permitted to assert the rights of absent third parties.⁴ This rule, however, has not been imposed on third-party litigants as a strict constitutional restriction on their access to the federal courts. Instead, the Supreme Court of the United States has viewed the rule as a discretionary or policy restraint on the exercise of jurisdiction.⁵ The Court has thus been free in recent years to loosen the bonds of representational standing.⁶ The effect has been a warmer reception of third-party litigants in the federal courts.

In *NCAA v. Califano*,⁷ the United States Court of Appeals for the Tenth Circuit held that a voluntary membership association has standing to sue solely in its capacity as the representative of its harmed members.⁸ In granting standing to a litigant that had demonstrated "interest"⁹ but no direct injury to itself, the court liberally construed the various policy limitations which delineate the scope of representational standing.

Title IX of the Education Amendments of 1972¹⁰ prohibits sex discrimination in educational programs or activities receiving federal financial assistance.¹¹ The regulations promulgated by the Department of Health, Education and Welfare (HEW)¹² under Title IX interpret "educational programs" to include athletic programs, and require equal treatment of the sexes in intercollegiate sports.¹³ Many colleges and universities, fearing that their athletic programs would be adversely affected by HEW's regulations, criticized the regulations and contemplated legal recourse.¹⁴

With hundreds of educational institutions affected by the controversial regulations, the adequacy of the litigant attempting to represent the rights of others became most important. As a bona fide athletic organization with decades of experience and great public recognition, the National Collegiate Athletic Association (NCAA) would appear to satisfy the primary standing requirement that a litigant be "entitled to have the court decide the merits of the dispute."¹⁵ In seeking injunctive relief from regulations which in no way directly touched it,

(1952); *Frothingham v. Mellon*, 262 U.S. 477 (1923). The Supreme Court's use of the term "standing" as a "shorthand expression for all the various elements of justiciability," Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433, 453 (1962), has at times "caused policy considerations to blend into constitutional limitations," *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Consequently, standing has been called one of "the most amorphous concepts in the entire domain of public law." *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 465, 498. (1966).

4 *Flast v. Cohen*, 392 U.S. 83, 99 n.20. The Article III case or controversy requirement forms the basis of this restriction on federal court jurisdiction.

5 *Singleton v. Wulff*, 428 U.S. 106 (1976); *Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953).

6 *See* *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973).

7 622 F.2d 1382 (10th Cir. 1980).

8 *Id.* at 1385.

9 "Interest" in this sense means a genuine desire to resolve a particular dispute. The desire must be consistent with the association's stated goals and purpose. Interest as it relates to standing takes on definite connotations of litigating expertise and adequacy of representation.

10 20 U.S.C. §§ 1681-1686 (1976).

11 *Id.*; [1972] U.S. CODE CONG. & AD. NEWS 2462, 2671-79.

12 The Department of Health, Education, and Welfare was renamed the Department of Health and Human Services on October 17, 1979. Pub. L. No. 96-88, § 601.

13 45 C.F.R. § 86(d) (1979).

14 Title IX has spawned extensive litigation in other areas as well. *See, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (sex discrimination in the admission policies of educational institutions).

15 622 F.2d at 1385 (quoting *Warth v. Seldin*, 422 U.S. at 498 (1975)).

however, the association met procedural obstacles which demonstrate the perplexities of the modern law of standing.¹⁶

The NCAA, an organization dedicated to the improvement of intercollegiate athletic programs, consists of several hundred voluntarily affiliated colleges and universities.¹⁷ One of its stated purposes is to "uphold the principle of institutional control of, and responsibility for, all intercollegiate sports."¹⁸ The NCAA brought suit on behalf of itself and its members, alleging that the HEW regulations relating to sex discrimination in athletics were arbitrary and capricious under the Administrative Procedure Act,¹⁹ violated the Fifth Amendment²⁰ and Title IX,²¹ and were unconstitutionally vague.²² The district court refused to hear the case on the merits, holding that the NCAA did not establish standing either on its own behalf or as a representative of its member colleges and universities.²³ On appeal the Tenth Circuit reversed, holding that the complaint did allege facts which conferred standing on the NCAA as representative of its harmed members.²⁴

The requirements of standing apply to associations, such as the NCAA, as well as to individuals.²⁵ In general, a plaintiff must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues"²⁶ Normally, mere "interest" is not enough to confer standing. In *Sierra Club v. Morton*,²⁷ the Supreme Court denied standing to an association which had not alleged harm either to itself or to its members from the challenged conduct, even though the association had shown sufficient concern for the dispute's disposition as well as its adequacy as a representative in court. Later, in *Linda R. S. v. Richard D.*,²⁸ the Court reiterated the principle that the complaining party must allege "some threatened or actual injury resulting from the putatively illegal action."²⁹

This strict requirement was relaxed somewhat in subsequent cases, however. In *Warth v. Seldin*³⁰ the Court construed the various standing requirements as

16 For analyses of specific aspects of the standing question, see, e.g., Culp, *Standing 1976*, 72 NW. L. REV. 69 (1977) (review of 1976 Supreme Court term); Note, *Implying Standing to Sue from Statutory Authority: Applicability of a "Fair Reading" Standard*, 54 NOTRE DAME LAW. 102 (1978); *Recent Developments*, 23 VILL. L. REV. 580 (1977-78) (reviewing standing in tax cases).

17 622 F.2d at 1385.

18 *Id.*

19 5 U.S.C. § 702 (1976). The Act provides in pertinent part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

20 U.S. CONST. amend. V.

21 20 U.S.C. §§ 1681-1686. Title IX directs agencies to "effectuate" the statute with regulations which "shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682 (1976).

22 622 F.2d at 1382.

23 NCAA v. Califano, 444 F. Supp. 425 (D. Kan. 1978).

24 622 F.2d at 1382.

25 Warth v. Seldin, 422 U.S. 490, 511 (1975).

26 Baker v. Carr, 369 U.S. 186, 204 (1962).

27 405 U.S. 727 (1972).

28 410 U.S. 614 (1973).

29 *Id.* at 617. The invasion of a "legal right" may be considered a "distinct and palpable injury" sufficient to satisfy one aspect of Article III's requirement. Warth v. Seldin, 422 U.S. 490, 500 (1975). A later case construed "injury in fact" to include a forced compliance with unlawful regulations. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

30 422 U.S. 490 (1975).

they applied to litigants asserting the rights of absent third parties. The Court stated:

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.³¹

Two additional requirements for representational standing have recently been added: a "fairly traceable" causal nexus between the alleged injury and the challenged conduct,³² and a reasonable certainty that the remedy requested will "inure to the benefit of those actually injured."³³

The Tenth Circuit in *NCAA* found that although the association itself had not been directly harmed by the challenged regulations,³⁴ its member institutions had incurred a change in the status quo as a result of the "arbitrary demands"³⁵ imposed by the regulations. According to the court, this constituted "harm in fact" sufficient, when combined with findings of causation and remedial certainty, to confer Article III standing upon members if they were to bring suit.

The court next considered the NCAA's representational standing under the criteria of *Hunt v. Washington State Apple Advertising Commission*.³⁶ In *Hunt*, the Supreme Court devised a test applicable to an association suing on behalf of its harmed members where the association itself has not sustained direct injury:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.³⁷

31 *Id.* at 511. The Court continued:

So long as this can be established and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id.

32 *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 261 (1977). This causal connection has been subsequently construed as a "but for" relationship. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

33 *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

34 To satisfy the requirements for harm in fact, an injury must not be speculative. The Tenth Circuit, following *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973), declared that the only reasonable possibility of harm to the NCAA itself was indirect (the result of actions taken by members in response to the regulations) and not certain to happen. Without a "distinct and palpable injury to itself" the NCAA could assert a claim only as a representative of the harmed members. *NCAA v. Califano*, 622 F.2d at 1387. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977); *cf. Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (members bringing suit along with association).

35 622 F.2d at 1388. The court likened athletic program expenditures to business investments. Any federally mandated control over the investments would be an unwelcome change, thought the court, because a restrictive investment environment prevents member colleges from "developing intercollegiate sports programs as they see fit." *Id.* at 1387-89.

36 432 U.S. 333 (1977).

37 *Id.* at 343. *Hunt* does not simply collect previous holdings of the Supreme Court. Rather, it presents new requirements that an association must satisfy to achieve standing in the federal courts. The judicial concerns represented in the *Hunt* test are two-fold: an interest in assuring adequate adversary representation and a desire for the proper allocation of judicial resources. Comment, *Associational Third-Party Standing and Federal Jurisdiction under Hunt*, 64 IOWA L. REV. 121 (1978). The first prong of the test particularly reflects the second of these concerns. The members of an association, having been denied

The Tenth Circuit found that the NCAA's complaint had shown that the members were adversely affected by the HEW regulations promulgated under Title IX, and thus had suffered the requisite "legal wrong."³⁸ The first prong of the *Hunt* test was thus satisfied.³⁹

The second requirement of *Hunt*, that the association seek to protect interests germane to its purpose, is intended to ensure that the injured members are adequately represented.⁴⁰ An association established to advance its members' interests in a given area would, under *Hunt*, normally be deemed a competent representative of those specific interests.⁴¹ The complaint in *NCAA* attacked "only those regulations that affect or pertain to intercollegiate sports programs."⁴² Because these sports programs were a vital part of the NCAA's stated purpose, the court found that the association satisfied the second prong of the *Hunt* test.⁴³

The final requirement of *Hunt* concerns the type of relief sought by an association on behalf of its members. To determine the need for individual members' participation in the litigation, the court must ascertain whether individualized showings of proof will be required.⁴⁴ The NCAA sought no damages for individual members, asking instead for declaratory and injunctive relief.⁴⁵ Since the case presented issues of law common to all members, the Tenth Circuit held that the association satisfied the third prong of the *Hunt* test and should be allowed standing to assert the claims of its member institutions.⁴⁶

Although *NCAA* appears to correctly apply the various rules governing representational standing, the decision fails to deal adequately with two important problem areas: the application of the *Hunt* test to a voluntary membership organization, and the possibility that an association not truly representative of its members could be granted standing.⁴⁷

The Supreme Court in *Hunt* relied upon five cases⁴⁸ as authority for the proposition that a voluntary membership association⁴⁹ may attain standing to sue on behalf of its members without alleging its own injury. Based on that au-

standing through their representative, might bring suits on their own behalf. These suits would effectively cause a duplication of the judicial effort required in the association's suit. Therefore, no judicial resources would have been saved by denying the association standing in its representational capacity. *Id.* at 130.

38 622 F.2d at 1389-91.

39 The first prong of the test was complicated in *NCAA* because the members had to also satisfy the jurisdictional requirement of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1976). The Act allows one who has suffered a "legal wrong" from putatively illegal regulations to challenge those regulations.

40 There is danger that a representative with no real interest in the outcome of litigation may not adequately represent the rights of its constituents. In general, courts have required that a litigant have a sufficient stake in the outcome of a suit to ensure "adequacy of representation." Comment, *supra* note 37 at 122 n.11. See *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Baker v. Carr*, 369 U.S. 186, 204 (1962).

41 432 U.S. at 344-45.

42 622 F.2d at 1391.

43 *Id.* See text accompanying note 18 *supra*.

44 432 U.S. at 344-45.

45 622 F.2d at 1385.

46 *Id.* at 1392.

47 These two problem areas were first discussed in Comment, *supra* note 37.

48 *Simon v. East Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *National Motor Freight Ass'n v. United States*, 372 U.S. 246 (1963) (per curiam).

49 Voluntary membership associations consist of members united to advance common interests. Although there may be compelling reasons why members would want to join, there can be no mandatory membership requirement. The "typical trade association" is one example. *Hunt v. Washington State*

thority, the Court held that the Washington State Apple Advertising Commission, an *involuntary* membership association,⁵⁰ had representational standing to sue without showing its own actual injury. In three of the five cases cited in *Hunt*, however, the associations had actually been *denied* standing.⁵¹ In the other two cases, the Court had not passed on the issue of standing because the associations were authorized to appear in court by federal statute or the Federal Rules of Civil Procedure.⁵² Since *Hunt* held in favor of an involuntary membership association's standing to sue, its test may apply solely to associations of that type. Without a specific Supreme Court holding, the best authority governing representational standing of voluntary membership associations is the Court's dicta.⁵³

The very nature of a voluntary membership association requires that its members be free to terminate their membership. This freedom creates potential for abuse and warrants standing requirements more restrictive than those of *Hunt*. A member opposed to upcoming litigation may choose to drop out of the association rather than allow the association to assert his rights in court. By terminating his membership before trial, the member would not be foreclosed by res judicata should he decide to sue separately.⁵⁴ In addition, the member might have the added benefit of using collateral estoppel offensively.⁵⁵

A member dissatisfied with his association's plans to bring a lawsuit might be encouraged by the potential of this tactical advantage to terminate his membership in the association. Requiring an overwhelming majority of members to expressly indicate their support of the litigation might help ensure that a voluntary membership association truly represents its members' interests in litigation.⁵⁶

Apple Advertising Comm'n, 432 U.S. at 334. Other examples are college fraternities, sororities, and athletic leagues.

⁵⁰ The Commission has a statutory duty to promote and protect Washington State's apple industry. The Commission represents the entire apple industry, but, as an agency of the state, it has no members per se. "Membership" is in effect "compelled," however, in the form of mandatory assessments levied upon apple growers and dealers. *Id.* at 344-45. Another example of an involuntary membership association is a state bar association. *Id.* at 345.

⁵¹ *Simon v. East Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

⁵² *Meek v. Pittenger*, 421 U.S. 349 (1975); *National Motor Freight Ass'n v. United States*, 372 U.S. 246 (1963) (per curiam). In *Meek* the question of adequacy of representation was not present because the association was joined with individual members as the plaintiff party. In *National Motor Freight* the association was authorized under federal statute to represent the interests of its members. Neither *Meek* nor *National Motor Freight* therefore can provide positive authority that a voluntary membership association has standing to sue without the additional benefits of an explicit statutory provision or joinder of a member's claim. Comment, *supra* note 37 at 129.

⁵³ The Supreme Court has not yet ratified the application of the *Hunt* criteria to voluntary membership organizations. Although *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) is enlightening on the law of standing, *Duke* presents a situation similar to *Meek* in that individual harmed members joined with an association to litigate common claims.

⁵⁴ Comment, *From Net to Sword: Organizational Representatives Litigating their Members' Claims*, 1974 ILL. L. F. 663, 673.

⁵⁵ In *Parklane Hosiery Company v. Shore*, 439 U.S. 322 (1979), the Supreme Court upheld the "offensive" use of collateral estoppel. This ruling raises the possibility that a plaintiff can estop a defendant from relitigating issues which the defendant has previously litigated and lost in an action with another party. In the case of an individual who has terminated his membership in an association prior to the association's lawsuit, *Parklane* would apparently allow him to bring suit in his own right and use collateral estoppel offensively. Application of the *Parklane* rule is discretionary, however. A court may disallow the offensive use of collateral estoppel where (1) the plaintiff could easily have been joined in the earlier action, and (2) its application would result in unfairness to the defendant. The practical potential for "strategic advantage" would thus turn on the facts of a particular case.

⁵⁶ In assessing the NCAA's adequacy of representation, the Tenth Circuit required only a simple

The second problem with the standing test applied in *NCAA* is that it fails to give suitable assurance that an "unworthy" association will be denied standing.⁵⁷ An ad hoc organization could satisfy all aspects of the present test without showing that it would be a sincere advocate of its members' interests.⁵⁸ To safeguard against this possibility, the second *Hunt* requirement, that the interests an organization seeks to protect be germane to its purpose,⁵⁹ should be supplemented by a requirement that the organization possess "pertinent, bona-fide, and well-recognized attributes and purposes."⁶⁰ This criterion was first enunciated in Justice Blackmun's dissent in *Sierra Club v. Morton*.⁶¹ Justice Blackmun thought it important to examine the organization *qua* organization to determine whether it has a "provable, sincere, dedicated and established status."⁶² This proposed fourth prong of the *Hunt* test would ensure that only the most genuine and capable organizations achieve standing.

The Tenth Circuit in *NCAA* did not expressly consider Justice Blackmun's criterion. Perhaps the court recognized the NCAA's ability to "speak knowingly"⁶³ for the values it asserts and its reputation as a competent proponent of intercollegiate sports programs. The NCAA's prestige as an association charged with the responsibility of representing hundreds of educational institutions may have assured the court that it would adequately assert the rights of its members in litigation. In the case of less established organizations, however, an inquiry into the organization *qua* organization is essential.⁶⁴

NCAA illustrates several areas of concern resulting from the ease with which third party litigants may now obtain access to the federal courts. The Tenth Circuit in *NCAA* failed to consider that the Supreme Court's present test for associational standing does not necessarily apply to voluntary membership organizations. A test stricter than that found in *Hunt* may be necessary for this type of association. Judicial inquiries into both the sufficiency of membership support for proposed court action and the organization's authenticity would ensure that an association truly represents the interests of its harmed members.

Adoption of these stricter requirements would no doubt slow the liberal

majority of member institutions to support the litigation. Given the controversial nature of Title IX, a requirement that a more substantial majority favor the litigation would not be unreasonable. A requirement of 75% support, for example, would add greater assurance that the NCAA would adequately represent its members' interests. Such a requirement would also reduce the possibility of a collusive lawsuit.

57 Comment, *supra* note 37 at 134-37.

58 *Id.* at 135.

59 See notes 40-43 *supra* and accompanying text.

60 *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972) (Blackmun, J., dissenting).

61 *Id.* at 757-58.

62 *Id.*

63 *Id.* at 758.

64 For the practicing lawyer preparing a complaint wherein representational standing will be sought, the Tenth Circuit's decision is instructive. Although the complaint must allege injury to some present or represented member, too much emphasis on injury and causation may lead the court to embark on a fact-finding expedition to verify the allegations. See, *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (Supreme Court launched inquiry into merits of case to investigate causal nexus of alleged injury). This approach has been heavily criticized for its "great potential for waste of judicial resources," *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 257, 262 (1978). To avoid the difficulties which arise upon judicial scrutiny of injury and causation, the lawyer should describe with precision the parties involved and the causal chain of harm which links them. Once injury has been clearly shown, the complaint should accentuate the representative's interest in the litigation as clearly as possible. See Katz and Butler, *Recent Developments in the Law of Standing to Sue*, 17 LEGAL SERVICES CLEARINGHOUSE 783, 789 (1978).

trend in the area of representational standing. It would, however, add stability and fairness to the determination of whether an association is fit to go to court on behalf of its members.

Patrick M. Joyce

Criminal Procedure—A TRIAL COURT MAY REFUSE TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE WHEN DEFENDANT OFFERS EXCULPATORY TESTIMONY—*United States v. Chapman*, 615 F.2d 1294 (10th Cir. 1980)*

The lesser included offense doctrine provides that a defendant may be convicted of a lesser offense necessarily included in the offense charged.¹ Although originally developed to aid prosecutors who had failed to prove every element of the crime charged in the indictment,² the doctrine has long been held to entitle the defendant to an instruction on a lesser included offense when there is some evidence to support a conviction of that crime.³

In *United States v. Chapman*, the United States Court of Appeals for the Tenth Circuit held that, where the defendant testified that he was not guilty of any wrongdoing, the trial court's refusal to instruct the jury on a lesser included offense did not constitute reversible error.⁴ The court so held despite the existence of evidence which could have supported a conviction of the lesser offense.⁵ Only the Tenth Circuit, in *Chapman* and in its 1975 holding in *United States v. Smith*,⁶ has upheld the refusal to give a lesser included instruction in the face of such evidence.

Kenneth Rudolph Chapman, an American Indian, was convicted and sentenced to fifty years imprisonment for murdering another Indian, Larry Paquin. At Chapman's trial, the prosecution presented considerable evidence establishing the elements of murder.⁷ However, other evidence indicated that Chapman may have acted in the "heat of passion" in shooting Paquin, and thus could have been guilty of voluntary manslaughter.⁸ The evidence supporting a manslaughter

* *Cert. denied*, 446 U.S. 967 (1980).

1 FED. R. CRIM. P. 31(c) states: "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included if the attempt is an offense."

The Model Penal Code's treatment of the lesser included offense doctrine is in MODEL PENAL CODE § 1.07(4) (1962).

2 *See, e.g.*, *Beck v. Alabama*, 100 S. Ct. 2382, 2387 (1980); *Keeble v. United States*, 412 U.S. 205, 208 (1973).

3 *See, e.g.*, *Beck v. Alabama*, 100 S. Ct. at 2388; *Sansone v. United States*, 380 U.S. 343, 349 (1965); *Stevenson v. United States*, 162 U.S. 313 (1896).

Although the Supreme Court of the United States has not held defendants constitutionally entitled to a lesser included instruction except in capital cases, all states require that such instructions be given when warranted by the evidence. *Beck v. Alabama*, 100 S. Ct. at 2388.

4 615 F.2d at 1300.

5 *Id.* at 1295.

6 521 F.2d 374 (10th Cir. 1975).

7 615 F.2d at 1295-96. This evidence included testimony that for some weeks prior to the shooting, Chapman had told several people that he was going to "shoot" or "kill" Paquin for stealing his truck and some money.

8 18 U.S.C. § 1112 (1976): "(a) Manslaughter is the unlawful killing of a human being without

conviction included testimony that Chapman believed Paquin had previously stolen his truck and some money and that Paquin had made an obscene gesture toward Chapman immediately prior to the shooting and dared him to shoot.⁹ There was also testimony that Chapman had been drinking prior to the killing.¹⁰ Chapman, however, testified that the shooting was an accident.¹¹ He further claimed that he was "happy" and on his way to a picnic when he saw Paquin and decided to scare him into returning his money.¹²

At the close of the trial the judge refused to give the defendant's proposed jury instruction on voluntary manslaughter¹³ on the ground that the instruction was not justified by the evidence.¹⁴ Instead, the judge instructed the jury on the elements of first and second degree murder. Upon conviction of second degree murder, Chapman appealed on the ground that his request for an instruction on voluntary manslaughter had been improperly refused.¹⁵

In affirming Chapman's conviction, the Tenth Circuit reasoned that, although some evidence supporting a manslaughter conviction existed, this evidence was inconsistent with the defendant's testimony that the shooting was an accident and, therefore, did not entitle the defendant to an instruction on that offense.¹⁶ Writing for the majority, Judge Barrett observed that:

[H]ad Chapman opted not to testify, thereby removing from the jury's consideration his personal account of the events relating to his state of mind, the evidence viewed in the light most favorable to Chapman, vis-a-vis the availability of the instruction, might have warranted the giving of the requested instruction on manslaughter.¹⁷

The court thus held that, in light of Chapman's testimony, it was impossible for a jury rationally to convict him of manslaughter.¹⁸

Judge Holloway, in a vigorous dissent, argued that although the evidence to support a manslaughter conviction may be weak and unconvincing, the existence of any such evidence makes an instruction on manslaughter mandatory.¹⁹ The dissent reasoned that the jury could have rejected the defendant's testimony that the shooting was accidental, yet still have believed that the defendant acted in the heat of passion.²⁰ The dissent concluded that the trial court's action deprived the defendant of his right to have the jury consider all the testimony, including his own, in determining whether the evidence supported a conviction of murder, a conviction of manslaughter, or an acquittal.²¹

Courts considering the availability of a lesser included offense instruction

malice. It is of two kinds: [1] Voluntary—Upon a sudden quarrel or heat of passion. [2] Involuntary—

⁹ 615 F.2d at 1295-97.

¹⁰ *Id.* at 1295.

¹¹ *Id.* at 1297.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1298.

¹⁵ *Id.* at 1297. Chapman also appealed on the grounds that the use of the words "murder," "crime," and "crime scene" by law enforcement officials constituted reversible error. The Tenth Circuit unanimously rejected this argument. *Id.* at 1300.

¹⁶ *Id.* at 1300.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1301. *Accord*, *Larson v. United States*, 296 F.2d 80, 81 (10th Cir. 1961).

²⁰ 615 F.2d at 1302-03.

²¹ *Id.* at 1302.

have formulated several criteria for determining whether to give such an instruction.²² From these criteria two questions emerge: (1) Is the offense for which the instruction is sought in fact a lesser included offense?²³ (2) Is the evidence presented sufficient to support a conviction of the lesser included offense? Because there was no question in *Chapman* that manslaughter was a lesser included offense of murder, the court focused on whether the evidence presented at trial could have supported a manslaughter conviction.

In *Stevenson v. United States*,²⁴ the Supreme Court of the United States announced the federal standard for determining the amount of evidence sufficient to require a lesser included instruction. The defendant in *Stevenson* was convicted of murder after the trial judge refused to instruct the jury on the elements of manslaughter.²⁵ The Supreme Court reversed the conviction, stating:

The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were *any* evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder.²⁶

The Court further held that if there was any evidence to support a conviction of a lesser included offense, a requested instruction on that offense was required even if the evidence supporting a conviction on the greater charge appeared "simply overwhelming" to the trial court.²⁷ Indeed, in setting forth the facts in *Stevenson*, the Court noted that it had omitted some of the evidence showing malice because it was merely seeking to determine whether any evidence presented at trial could have supported a manslaughter conviction.²⁸ The Court thus made it clear that when considering the appropriateness of a lesser included offense instruction, the evidence supporting a conviction of the lesser crime must be viewed independently of evidence to the contrary. The dissent in *Chapman* recognized the *Stevenson* decision as controlling on this issue.²⁹

In 1973, the Supreme Court restated the quantum of evidence needed for a lesser included instruction in *Keeble v. United States*,³⁰ when it held that an instruc-

22 One highly regarded formulation, cited by the majority in *Chapman*, appears in *United States v. Thompson*, 492 F.2d 359 (8th Cir. 1974). The court in *Thompson* held that a defendant is entitled to a lesser included instruction when the following criteria are met: (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence that would justify conviction of the lesser offense; (4) the proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense; and (5) there is mutuality (*i.e.*, a charge may be demanded by either the defendant or the government). *Id.* at 362.

23 This question has been the subject of considerable judicial debate. *See, e.g.*, *United States v. Bishop*, 412 U.S. 346 (1976); *United States v. Wallete*, 580 F.2d 335 (8th Cir. 1978) (involuntary manslaughter not a lesser offense of reckless endangerment when the latter is a felony); *Virgin Islands v. Carmona*, 422 F.2d 95 (3d Cir. 1970) (manslaughter not necessarily an included offense in felony murder). Both *Wallete* and *Carmona* are cited in *Chapman*. 615 F.2d at 1299.

24 162 U.S. 313 (1896).

25 *Id.* at 314.

26 *Id.* (emphasis added).

27 *Id.* at 315.

28 *Id.* at 316.

29 615 F.2d at 1302.

30 412 U.S. 205 (1973). The defendant in *Keeble* was convicted of assault with intent to commit serious bodily injury on an Indian reservation in violation of 18 U.S.C. § 1153. On appeal, *Keeble* argued

tion was required "if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater."³¹

The *Chapman* court erroneously interpreted *Keeble* as authorizing the trial judge to consider evidence contrary to a lesser included conviction in determining whether an instruction should be given on that offense. *Keeble* provided no indication of an intent to alter the "any evidence" standard announced in *Stevens*.³² Instead, *Keeble* preserved the old rule and merely emphasized that, based on the evidence favoring the lesser conviction, a jury must rationally be able to find guilt of the lesser, and not the greater, offense. This simply means that the support for the lesser conviction must not be fallacious or founded upon wild conjecture. *Keeble* did not, however, authorize the trial court to consider evidence refuting a conviction of the lesser offense in determining what instructions are proper. In fact, the only issue in *Keeble* was whether a lesser included instruction was required where the trial court had jurisdiction over the greater, but not the lesser, offense.³³ Had it not been for this jurisdictional question, the evidence presented at trial would undisputedly have been sufficient to require the giving of the requested instructions.³⁴

The rule that there must be a rational basis for a conviction of the lesser offense ensures that the jury's verdict will be based on the evidence rather than on mercy or compromise.³⁵ Therefore, although a court may be justified in refusing to give an instruction on the grounds that no evidence presented could rationally support a conviction of a lesser offense, a court cannot be justified in refusing an instruction on the grounds that the evidence supporting a conviction is negated by other evidence. In the latter case the court does not determine whether any evidence supporting the lesser offense exists for the jury to consider, but rather it weighs the evidence.

As precedent for its holding that a defendant's exculpatory testimony can justify refusing a lesser included instruction request, the majority in *Chapman* cited *United States v. Beverly*³⁶ and *United States v. Sinclair*.³⁷ However, any support these cases provide the *Chapman* majority is weak at best.

The defendant in *Beverly* was convicted of possession with intent to dis-

that the trial judge's refusal to instruct the jury on the lesser included offense of simple assault constituted reversible error. The Eighth Circuit affirmed the conviction, holding that no error was committed because simple assault was not one of the offenses enumerated in the statute conferring federal jurisdiction over crimes committed on an Indian reservation. Accordingly, the matter was held to fall under tribal jurisdiction. 459 F.2d 757 (8th Cir. 1972). On *certiorari*, the Supreme Court held that the requested instruction was improperly refused. The Court reasoned that the giving of the instruction would not expand the violated statutes or permit the federal government to infringe on tribal jurisdiction. 412 U.S. at 214.

31 412 U.S. at 208.

32 In fact, both the majority and the dissenting opinion in *Chapman* cite *Keeble's* expression of the amount of evidence needed for a lesser included instruction as support. 615 F.2d at 1298, 1301.

33 412 U.S. at 206.

34 *Id.* at 208-09.

35 *United States v. Busic*, 592 F.2d 13, 25 (2d Cir. 1978); *Kelly v. United States*, 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); *United States v. Trujillo*, 497 F.2d 408, 409 (10th Cir. 1974).

In determining when an instruction on a lesser included offense is required, the court must balance the principle that fact-finding is the sole province of the jury with the principle that the jury is not free to render a verdict in flagrant disregard of the proof. *United States v. Comer*, 421 F.2d 1149, 1153 (D.C. Cir. 1970).

36 562 F.2d 201 (2d Cir. 1977).

37 444 F.2d 888 (D.C. Cir. 1971).

tribute cocaine after the trial judge refused his request for an instruction on simple possession.³⁸ At his trial, Beverly admitted possessing the cocaine but denied any intent to distribute it, claiming that an informant for the Drug Enforcement Agency had given him the drugs and had asked him to keep them for a few hours.³⁹ The Second Circuit upheld the trial court's refusal to give the requested instructions. The court reasoned that if the jury had believed Beverly's testimony, entrapment would have existed as a matter of law and acquittal of both simple possession and possession with intent to distribute would have been required.⁴⁰ But the court further reasoned that if the jury had *not* believed Beverly's testimony regarding his intent, he could only have been found guilty of the greater crime since this testimony was the only evidence which could have supported a conviction of simple possession and an acquittal of possession with intent to distribute.⁴¹ It was, therefore, legally impossible for Beverly to be found guilty of simple possession.

In *Chapman*, on the other hand, evidence did exist independent of the defendant's testimony which could have supported a conviction of the lesser offense. Although acquittal would have resulted had the jury believed Chapman's testimony that the shooting was an accident, the jury could conceivably have disbelieved this testimony and nevertheless found that Chapman had acted in heat of passion.⁴² Beverly thus fails to provide firm support for the holding in *Chapman*.

The defendant in *Sinclair* was convicted of burglary after the trial judge refused to instruct the jury on the lesser included offense of unlawful entry. Although the defendants in both *Sinclair* and *Chapman* gave exculpatory testimony,⁴³ only in *Chapman* did evidence exist that the lesser offense had been committed.⁴⁴ Therefore, the *Sinclair* court did not uphold the refusal of the requested instruction solely because of the defendant's testimony. Instead, the District of Columbia Circuit reasoned:

[T]he refusal to give the lesser-included instruction is not error when defendant's testimony is completely exculpatory and, if believed, could only lead to acquittal, *and* the kind of reconstruction of events needed to support a lesser charge is neither fairly inferable from the testimony nor pointed out by defense trial counsel.⁴⁵

Thus, the defendant's testimony in *Sinclair*, unlike that in *Chapman*, was not held to have negated any other evidence.

The crux of the *Chapman* decision is the Tenth Circuit's belief that the jury need not consider the manslaughter issue if a conviction of that crime would be inconsistent with the defendant's testimony. But a defendant's testimony is no

38 562 F.2d at 202-03.

39 *Id.* at 203.

40 *Id.* at 204.

41 *Id.*

42 615 F.2d at 1302 (dissenting opinion).

43 In *Sinclair*, the defendant testified that while driving during the 1968 Washington, D.C. riots he saw clothes strewn on the sidewalk outside a clothing store. The defendant claimed that when he got out of the car and started to pick up some of the clothing, a police officer approached, forced him into the store at gunpoint and made him lie on the floor. 444 F.2d at 889 n.1.

44 *Id.* at 890. However, Judge Robinson, dissenting in *Sinclair*, argued that the evidence on the appellant's intent upon entering the store was not so unequivocal that a finding that no criminal design accompanied it would have been "irrational." *Id.* at 893.

45 *Id.* at 890 (emphasis added).

different from the testimony of any other witness: it may be believed in its entirety, in part, or not at all by the jury.

In *Belton v. United States*,⁴⁶ the District of Columbia Circuit, citing *Stevenson*, held that a manslaughter instruction is required when there is "any evidence fairly tending to bear upon the issue of manslaughter," however weak," and that this evidence may exist "even though this depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on other points in dispute."⁴⁷ The court upheld the trial judge's refusal to give the instruction on the lesser included offense because no evidence justifying such an instruction had been presented at trial.⁴⁸

A court confronted with a defendant's exculpatory testimony must consider whether any evidence exists which could support a lesser conviction if the jury does not believe all or part of the defendant's claims. If such evidence exists, an instruction must be made on the lesser offense. In *United States v. Comer*,⁴⁹ the defendant was convicted of murder after the trial judge refused to give a requested instruction on manslaughter. Despite Comer's claim that he did not even know the immediate circumstances surrounding the victim's death, the District of Columbia Circuit held that a manslaughter instruction was "obviously" required by the evidence.⁵⁰ Unlike the Tenth Circuit in *Chapman*, the *Comer* court recognized that a defendant's exculpatory testimony should not adversely affect his right to a lesser included offense instruction.⁵¹ Writing for the majority, Judge Wright stated:

Appellant's theory, of course, was that he did not commit the [fatal] act and, therefore, he introduced no evidence to show that the act was committed with malice. It may be, however, that appellant's testimony concerning his wife's lover, the police testimony of appellant's intoxication, and the autopsy evidence showing that Mrs. Comer was intoxicated when she died do, in fact, provide "some evidence, however weak" tending to support a manslaughter charge.⁵²

Judge Wright further noted that malice is required to convict of second degree murder but not of manslaughter.⁵³ Because malice is a term of art, referring to the defendant's state of mind at the time he acted, it can rarely be proved by direct evidence,⁵⁴ even defendant's testimony. Instead, as the Supreme Court recognized in *Stevenson*, "as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of the killing is to infer it from the surrounding facts, and that inference is one of fact for a jury."⁵⁵ Further, it is not enough for the trial court to determine that no evidence presented explicitly

46 382 F.2d 150 (D.C. Cir. 1967). The defendant in *Belton* was convicted of first degree murder after the judge refused to instruct the jury on manslaughter. The defendant testified that he was not present at the time the victim was shot. *Id.* at 155.

47 *Id.* at 155.

48 *Id.* at 156. The court noted, however, that "[i]f the trial court had been specifically apprised of the reconstruction of events now put forward to us by appellate counsel, it would have been well advised to give the manslaughter instruction." *Id.* In his dissenting opinion, Judge Bazelon argued that a request for an instruction should not depend on how well the lawyer constructed the facts at trial. *Id.* at 158.

49 421 F.2d 1149 (D.C. Cir. 1970).

50 *Id.* at 1155.

51 *Id.*

52 *Id.*

53 *Id.* at 1154.

54 *Id.*

55 162 U.S. at 320.

supports a conviction of the lesser offense. The court must also determine whether the evidence presented is capable of more than one interpretation.⁵⁶ In the words of Judge Wright, "[I]n a manslaughter case . . . the inquiry is whether the evidence bearing on malice was so compelling and unequivocal on the issue that a jury finding of no malice would be irrational."⁵⁷

Similarly, evidence raising an issue as to whether a crime was committed may also raise an issue as to whether the crime that was committed was manslaughter or murder.⁵⁸ But in *Chapman*, once the jury disbelieved the defendant's claim of accidental shooting, it was not able to consider whether the evidence could justify a conviction of manslaughter because it had not been instructed on that offense. Instead, the jury effectively had to convict the defendant of murder. Regardless of what the evidence may have indicated, the jury had but two options: believe Chapman's testimony and acquit him, or disbelieve it and convict him of murder. This limitation is inconsistent with the doctrine that the jury be free to reach the verdict supported by the evidence.⁵⁹

The trial court's refusal in *Chapman* to instruct on manslaughter is contrary to the right of the defendant to an instruction on any theory of his case which is supported by the evidence.⁶⁰ The Tenth Circuit itself recognized this right in 1975 when it held: "Even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility, its presence requires an instruction on any theory of defense."⁶¹ This is true even if the defense theory is inconsistent with the defendant's own testimony and requires the jury to believe part of the defendant's testimony and part of the testimony of others before being able to accept the theory as valid.⁶² The *Chapman* decision forces the defendant to exercise his right to testify on his own behalf⁶³ at the expense of his right to plead inconsistent defenses.⁶⁴ Further, under the *Chapman* rationale, in order to get a lesser included offense instruction once the government has made a compelling case, the defendant would be required not only to refute the evidence indicating the commission of the greater offense, but also to (1) put forward evidence that he *was* guilty of the lesser offense, and (2) refrain from presenting any exculpatory

56 *United States v. Comer*, 421 F.2d at 1154.

57 *Id.*

58 *Stevenson v. United States*, 162 U.S. at 322; *Broughman v. United States*, 361 F.2d 71, 72 (D.C. Cir. 1966).

59 *E.g.*, *United States v. Lange*, 528 F.2d 1280, 1287 (5th Cir. 1976); *United States v. May*, 419 F.2d 553, 554 (8th Cir. 1969).

60 *See, e.g.*, *United States v. Rabbit*, 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Sparrow v. United States*, 402 F.2d 826, 828 (10th Cir. 1968).

61 *United States v. Swallow*, 511 F.2d 514, 523 (10th Cir.), *cert. denied*, 423 U.S. 845 (1975).

While it may be argued that the defendant's request for a manslaughter instruction was not made pursuant to a "theory of defense," this argument finds little support in the law. There is no indication that the courts treat theories based upon lesser offenses any differently from theories which are fully exculpatory. In short, the terms "theory of defense" and "theory of the case" are both used to denote the same thing: the theory or theories put forward by the defendant at trial. *See, e.g.*, *United States v. Swinton*, 521 F.2d 1255, 1260 (10th Cir. 1975) (two cases cited for the proposition that a defendant is entitled to an instruction on any "theory of defense" finding support in the evidence; one case spoke of "theory of defense" and the other spoke of "theory of his case").

62 *E.g.*, *United States v. Grady*, 481 F.2d 1106, 1108 (D.C. Cir. 1973); *Belton v. United States*, 382 F.2d at 155; *Womack v. United States*, 336 F.2d 959 (D.C. Cir. 1964).

63 18 U.S.C. § 3481 (1976).

64 *See, e.g.*, *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975).

evidence. The defendant, in short, would be required to incriminate himself, forgoing his right to argue that he was guilty of no crime at all.

The Tenth Circuit's holding in *United States v. Chapman* is an aberration in the law. It lacks any significant statutory or case law support. The undesirability of permitting a conviction of a lesser crime than is established by the evidence is slight when compared to the risks involved in permitting the trial court to weigh this evidence. Accordingly, it has been held that in close situations, the lesser included offense instruction should be given.⁶⁵ In determining what jury instructions are proper, a court's consideration of inconsistencies between the defendant's testimony and other evidence infringes upon the right of the defendant to have a jury consider the evidence against him. Such conduct can also severely inhibit the defendant in the presentation of his defense. In a legal system designed to accord the criminal defendant every reasonable protection in defending himself against government prosecution,⁶⁶ these consequences are unacceptable.

Edward V. Sommer

Environmental Law—A FEDERAL COMMON LAW CAUSE OF ACTION FOR NUISANCE IS ALLOWED AGAINST AN IN-STATE POLLUTER OF INTERSTATE OR NAVIGABLE WATERS—*Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980)*

In *Illinois v. Milwaukee*,¹ the Supreme Court of the United States recognized a federal common law cause of action to abate a nuisance resulting from the pollution of interstate waters. The Court held that the State of Illinois was entitled to bring a federal common law cause of action against four Wisconsin cities to stop the pollution of Lake Michigan. The Court did not, however, establish precise guidelines for application of this new body of federal common law, preferring instead to leave this difficult task to the lower courts.

Because the Supreme Court failed to define the limits of the federal common law of nuisance, lower courts have had to decide whether the nuisance claim exists in controversies involving (1) the pollution of intrastate waters, and (2) the pollution of interstate waters by an in-state defendant. In *Illinois v. Outboard Marine Corp.*,² the United States Court of Appeals for the Seventh Circuit addressed the second of these questions. The court held that a state has a federal common law cause of action for nuisance against an in-state polluter "to prevent the pollution of interstate or navigable waters."³ The court further stated, however, that the federal common law also applies to controversies involving purely intrastate waters.⁴ This unnecessary extension of the court's decision has impor-

65 *United States v. Comer*, 421 F.2d at 1154; *Belton v. United States*, 382 F.2d at 156.

66 *United States v. Demma*, 523 F.2d at 985.

* *Petition for cert. filed*, 49 U.S.L.W. 3043 (U.S. July 28, 1980) (No. 80-126).

1 406 U.S. 91 (1972).

2 619 F.2d 623 (7th Cir. 1980).

3 *Id.* at 623-24.

4 *See id.* at 627.

tant implications for future suits involving pollution of intrastate waters, and raises the specter of encroaching federalism.

In *Illinois v. Outboard Marine Corp.*, the State of Illinois brought suit in a federal district court against Outboard Marine Corporation (O.M.C.), alleging that O.M.C. had discharged highly toxic pollutants into the North Ditch,⁵ a tributary of Lake Michigan. The complaint alleged that the pollutants impaired the usefulness of the lake as a public water supply and place of recreation, and threatened the health and welfare of Illinois residents. The state sued under the federal common law of nuisance and the Clean Water Act,⁶ and made several pendent claims based on Illinois law. The state sought injunctive relief restraining O.M.C. from discharging pollutants from its Waukegan facility, directing O.M.C. to study removal and disposal methods for the accumulated contaminated sediments, directing O.M.C. to remove and dispose of the contaminated sediments in the North Ditch, Waukegan Harbor and Lake Michigan, and requiring removal of contaminated soil. The state also sought civil penalties.

The United States District Court for the Northern District of Illinois granted O.M.C.'s motion to dismiss. The district court held that because the case involved a controversy between two Illinois residents and because there was no allegation of injury to or from another state, Illinois failed to state a claim under the federal common law upon which relief could be granted.⁷ The court also dismissed the Clean Water Act claim because Illinois had failed to meet the statute's notice requirements.⁸ Since the federal claims had been dismissed, the district court rejected pendent jurisdiction over the state law claims.⁹

Illinois limited its appeal to the ruling on the federal common law claim. The Seventh Circuit was asked to decide whether a state could use federal common law against one of its own citizens to abate the pollution of an interstate body of water. The court held that a state¹⁰ does have a federal common law cause of action to prevent the pollution of interstate or navigable waters by in-state defendants.¹¹ It then defined "navigable waters" as including purely intrastate waters.¹² Since Illinois had alleged the pollution of interstate rather than navigable waters, this definition was superfluous. It is apparent, however, that the Seventh Circuit was intent on expanding the availability of the federal common law cause of action well beyond the limits recognized in other circuits. The

5 The North Ditch flows into Waukegan Harbor, a boat harbor of Lake Michigan.

6 The "Clean Water Act" is the popular name of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. § 1251-1376 (1976).

7 The district court apparently assumed that the pollution of interstate waters had no extraterritorial pollution effects.

8 The Clean Water Act requires a plaintiff to give the Environmental Protection Agency sixty days notice prior to instituting a citizens' suit. 33 U.S.C. § 1365(b) (1976).

9 The United States also filed a complaint in federal district court against O.M.C., alleging pollution by the defendant of the North Ditch, Waukegan Harbor, and Lake Michigan. The Attorney General of Illinois filed a motion for leave to intervene in the federal suit, but the district judge denied the motion. The intervention issues arising in the consolidated appeals are beyond the scope of this comment.

10 Since Illinois was the plaintiff in the suit, the Seventh Circuit did not have to consider whether a private plaintiff is entitled to bring an action under the federal common law of nuisance. That issue, however, will soon be addressed by the Supreme Court. In *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3rd Cir. 1980), cert. granted, 49 U.S.L.W. 3281 (1980) (No. 80-12), the Third Circuit held that even a private plaintiff could bring an action under the federal common law of nuisance.

11 619 F.2d at 623-24.

12 *Id.* at 627.

dictum defining navigable waters is therefore of greater importance than might otherwise be the case.

Although *Milwaukee* involved the pollution of an interstate body of water, the Supreme Court specifically referred to "interstate or navigable waters" throughout its opinion.¹³ The Seventh Circuit in *Outboard Marine* seized upon the Supreme Court's use of the term "navigable waters" and expressed the view that the term included both "territorial seas and purely intrastate waters having no necessary interstate impact."¹⁴ In support of this broad definition, the court noted that the term is also broadly defined in the Clean Water Act¹⁵ and in the regulation promulgated by the Environmental Protection Agency (EPA).¹⁶ The EPA regulation, however, seems contrary to the court's definition of navigable waters, since it defines the term to include only those waters which have some effect, however attenuated, on interstate commerce. The Seventh Circuit, although requiring no "interstate impact," did not dismiss as immaterial the impact on interstate commerce mandated by the regulation. Rather, the court found nothing in the regulation's definition requiring an impact on the environment of another state. The court apparently accepted the definitions of navigable waters found in the EPA regulation¹⁷ and in the legislative history of the

13 406 U.S. at 99, 102, 104.

14 619 F.2d at 627.

15 The legislative history of the Act reveals that Congress intended that the term "navigable waters" be given an expansive interpretation: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 144, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3776, 3822.

16 The Environmental Protection Agency promulgated the following definition of "navigable waters": "Navigable waters" means "waters of the United States, including the territorial seas."

This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (1)-(4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (1)-(5) of this section ("Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds); provided that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States. [Emphasis in original].

40 C.F.R. § 122.3(t) (1979). The term "navigable waters" is no longer used in the EPA regulations. It has been replaced by the term "waters of the United States" with only minor wording changes in the definition. See 40 C.F.R. § 122.3 (1980).

17 If the EPA's definition of navigable waters were accepted as the guideline for determining when the federal common law of nuisance could be applied, virtually every body of water in the United States

Clean Water Act, and concluded that the Supreme Court must have realized the implications of its use of the phrase "navigable waters."¹⁸

In *Reserve Mining Co. v. Environmental Protection Agency*¹⁹ and *Committee for the Consideration of the Jones Falls Sewage System v. Train*,²⁰ two decisions noted in the *Outboard Marine* opinion, two other courts of appeal implicitly rejected a broad interpretation of the term "navigable waters." The plaintiff in *Reserve Mining* alleged that the defendant was discharging asbestos fibers into the air at Silver Bay, Minnesota. The Eighth Circuit, noting that only the air in Minnesota villages was affected, held that "federal nuisance law contemplates, at a minimum, interstate pollution of air or water."²¹ Similarly, the in-state plaintiffs in *Jones Falls* alleged that the City of Baltimore was dumping raw sewage into a stream flowing into the Patapsco River and from there into Cheasapeake Bay. The plaintiffs failed, however, to allege any interstate effects of this pollution. The Fourth Circuit, although recognizing a federal common law cause of action for the abatement of nuisances which infringe upon another state's environmental rights, held that no such cause of action existed for purely intrastate nuisances.²² The court indicated that the only federal interest in the pollution of intrastate waters was expressed in the Clean Water Act.²³

The *Outboard Marine* court found these two cases distinguishable from the factual situation before it.²⁴ The court observed that while the pollution in *Reserve Mining* and *Jones Falls* was found to have no interstate impact, the pollution allegedly caused by O.M.C. affected Lake Michigan, an interstate body of water. The court refused to rely solely on this distinction,²⁵ however, and explicitly rejected the "extraterritorial pollution effects" requirement of *Reserve Mining* and *Jones Falls*.²⁶

The Supreme Court in *Illinois v. Milwaukee* indicated that the federal interest in preventing pollution of interstate bodies of water was an important factor in allowing a federal common law claim.²⁷ Recognizing that its decision would turn on the broad policy considerations of *Milwaukee*,²⁸ the Seventh Circuit stated the test to be "whether the dispute is a matter of federal concern."²⁹ It indicated that there is a federal concern in the purity as well as the navigability

would be governed by the federal common law. For example, under 40 C.F.R. § 122.3(t)(3)(i) (1979), navigable waters include those "which are or could be used by interstate or foreign travelers for recreational or other purposes." Thus, if sufficient damage were alleged, the owner of a small swimming pond could bring an action under the federal common law of nuisance to abate the pollution of the pond caused by his neighbor's cattle.

18 619 F.2d at 626. The Supreme Court may well not have realized the implications of its use of the phrase "navigable waters," since the expanded definition of "navigable waters" did not develop until after the *Milwaukee* decision. The Clean Water Act was enacted on October 18, 1972, six months after the *Milwaukee* decision. The Environmental Protection Agency regulations were promulgated on July 1, 1973.

19 514 F.2d 492 (8th Cir. 1975).

20 539 F.2d 1006 (4th Cir. 1976).

21 514 F.2d at 520.

22 539 F.2d at 1008-10.

23 *Id.* at 1009.

24 619 F.2d at 629.

25 *Id.*

26 *Id.* at 630.

27 406 U.S. at 105 n.6.

28 619 F.2d at 626.

29 *Id.* at 630.

of waters.³⁰ The Seventh Circuit concluded that the rule of law applicable to the pollution of interstate or navigable waters should be uniform³¹ and should not depend upon whether extraterritorial pollution effects are shown to exist.³² The court, therefore, went beyond what was necessary to decide the case before it, involving pollution of interstate waters by an in-state polluter, and found a federal interest in virtually all waters.

In *Erie R.R. v. Thompkins*,³³ the Supreme Court abolished the "federal general common law." The federal courts were no longer to fashion their own substantive rules of law to apply to controversies over which federal jurisdiction was based solely on diversity of citizenship. Instead, the federal courts were to apply the state substantive law. However, in *Hinderlider v. La Plata Co.*,³⁴ decided the same day as *Erie*, the Court left open the possibility of fashioning a "new federal common law."³⁵ The issue that has arisen since that time is: Under what circumstances is it proper to formulate this new federal common law?

It has been suggested that this issue be resolved by determining whether the federal interest involved undermines or overrides the presumption in favor of applying state law.³⁶ The presumption can be undermined by Congressional authorization, by the need to remedy the breach of duties created by federal law, or by matters involving national sovereignty.³⁷ In each of these situations the reasons for the presumption are absent. In other situations reasons for applying the presumption exist, but circumstances justify overriding them. When a federal common law is necessary to foster federal policies or promote uniformity, the presumption can be properly overridden.³⁸

Water pollution disputes fall within one of three categories: (1) interstate controversies affecting interstate waters; (2) intrastate controversies affecting interstate waters; or (3) intrastate controversies affecting intrastate waters. The federal interest in each of these categories must be examined to determine whether the presumption favoring state law is justified.

*Illinois v. Milwaukee*³⁹ is an example of a category one controversy: one state sued municipalities of another state to prevent the pollution of interstate waters. The Supreme Court noted that in cases involving the pollution of a body of water such as Lake Michigan, it was appropriate to apply federal law.⁴⁰ As the Tenth Circuit recognized in an early federal nuisance suit, the federal common law is an appropriate tool to prevent the "conflicting disputes, increasing asser-

30 *Id.* at 628.

31 *Id.*

32 *Id.* at 630.

33 304 U.S. 64 (1938).

34 304 U.S. 92 (1938).

35 See Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). In *Hinderlider*, the Supreme Court held that the question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive. 304 U.S. at 110.

36 See Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969). The justification for the presumption lies in (1) the desirability of local experimentation, and (2) the desirability of states providing solutions closely tailored to local conditions. *Id.* at 1517. Federal common law might also undermine state substantive policies or become a body of law in conflict with the surrounding bodies of state law. *Id.* at 1518.

37 *Id.* at 1520-23.

38 *Id.* at 1527-30.

39 406 U.S. 91 (1972).

40 *Id.* at 105 n.6.

tions and proliferating contentions" which are more likely to arise when a state's ecological conditions are impaired by outside sources.⁴¹ Because of the possibility of subjecting polluters to diverse bodies of pollution control laws, the law of the state whose citizens⁴² were harmed by the interstate pollution should not be allowed to govern the conduct of citizens in another state.⁴³ The laws of the offending state, however, may not adequately protect injured out-of-state citizens.⁴⁴ Since the reasons behind the presumption favoring state law are absent, the presumption would be undermined in controversies between citizens of diverse states concerning the pollution of an interstate body of water.

Outboard Marine is an example of a category two controversy: a state sued one of its own citizens for allegedly discharging pollutants into an interstate body of water. Because this controversy was intrastate rather than interstate, the presumption favoring state law should not be undermined. On the other hand, the federal interest in interstate waters and the need for a uniform rule might be considered sufficiently important to justify overriding the presumption.

The *Outboard Marine* court relied on the federal interest in the purity of interstate waters in holding the federal common law of nuisance applicable. This federal interest by itself, however, should not necessarily override the presumption favoring state law. As one commentator has noted, "[o]therwise, the broad spectrum of areas touched by federal interest would preempt state law so extensively as to render the constraints of federalism meaningless."⁴⁵ Federal common law ordinarily is fashioned where there is an overriding need for a uniform rule.⁴⁶ The national policy favoring uniformity in pollution control matters is expressed throughout the Clean Water Act.⁴⁷ Since this statute allows states to adopt and enforce standards more stringent than those required under the Act, the uniformity envisioned by the statute is a "uniform floor."⁴⁸ There is no reason to conclude, however, that the need for a uniform floor is insufficient to override the presumption favoring state law.

Nevertheless, a uniform rule should not be established for the sake of uniformity alone; policy considerations must support adoption of such a rule. One such policy consideration arises when the federal government is the plaintiff and

41 *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971).

42 The term "citizens" as used above includes states, other political subdivisions, and corporations.

43 *See* *Committee for the Consideration of the Jones Falls Sewage System v. Train*, 539 F.2d at 1008.

44 *Id.*

45 Note, *Federal Common Law and Intrastate Pollution*, 18 WAKE FOREST L. REV. 246, 256 (1977).

46 *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *See Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

47 *See* 33 U.S.C. § 1251(a) (1976) (establishing national goals for the elimination of pollution); 33 U.S.C. § 1316(c) (1976) (allowing state enforcement if the state's standards comply with federal regulation); 33 U.S.C. § 1319(a)(2) (1976) (allowing the Administrator to enforce pollution limitations if a state defaults); 33 U.S.C. § 1370 (1976) (providing that no state standard may be less stringent than the federal regulations).

48 33 U.S.C. § 1370 (1976). The Act also allows the use of more stringent common law standards by providing that nothing "shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or to seek any other relief . . ." 33 U.S.C. § 1365(e) (1976). This provision was the principle basis for the Seventh Circuit's holding in *Illinois v. Milwaukee*, 599 F.2d 151 (1979), *cert. granted*, 48 U.S.L.W. 3602 (1980) (No. 79-408), that the federal common law of nuisance had not been pre-empted by the Clean Water Act. This case, the sequel to the original *Illinois v. Milwaukee* case, probably arose because of the Supreme Court's remark that "[i]t may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." 406 U.S. at 107.

is faced with the inconvenience of having to resort to the diverse anti-pollution laws of the fifty states.⁴⁹ The federal government should not be required to use state law to abate pollution of waters in which it has an interest.⁵⁰ Allowing the use of the federal common law to abate pollution of interstate waters would also help achieve some of the practical results listed in *Outboard Marine*. For example, it would prevent polluters of interstate waters residing in different states from hiding behind each other in the state forums.⁵¹ In addition, application of the federal common law to all controversies affecting interstate waters would prevent the anomaly that while other states surrounding a body of interstate water could use federal law to abate the pollution, the very state in which the polluter resides could not.⁵² When a state is suing any defendant for injuries to interstate water, there is a clear and overriding federal interest in uniformity.⁵³

The third category of water pollution disputes concerns intrastate controversies affecting purely intrastate waters. State law is perfectly adequate for handling these disputes. The application of state law to these situations fosters legislative experimentation and allows states to forge solutions closely tailored to local conditions. It would also be consistent with the policy of the federal system to require state solutions whenever feasible.⁵⁴

The Clean Water Act established federal control over "interstate and navigable waters," and thus lends support to the argument that there is a federal interest in preventing pollution of navigable intrastate waters.⁵⁵ This federal interest does not, however, extend beyond that expressed in the Act.⁵⁶ It appears inconsistent to allow the federal government to regulate intrastate waters by stat-

49 Note, *supra* note 36, at 1530.

50 The federal government is entitled to bring suits under the federal common law of nuisance. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145, 149-50 (D. Vt. 1972), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

51 619 F.2d at 629-30. The *Outboard Marine* court hypothesized a situation in which two plants, located in different states, poured the same type of pollutants into an adjacent body of water. If the federal common law applied only when the pollution emanated from another state, a plaintiff would have to bring one suit in state court and one in federal court. The Seventh Circuit was concerned that each polluter would argue that most or all of the pollution harming the plaintiff was coming from the other plant, and that therefore the plaintiff should be denied an injunction. Bringing a single action in one forum would prevent the defendants from hiding behind each other in this manner.

52 619 F.2d at 629.

53 *Illinois v. Milwaukee*, 406 U.S. 91, 103 (1972); *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1233 (3rd Cir. 1980); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

It is, however, questionable whether a uniform rule can ever be established using a common law approach. Commentators have urged that the case-by-case adjudication of the federal common law of nuisance would be inappropriate for establishing uniform rules. See, e.g., Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972). The problems making uniformity difficult to achieve via the common law include the necessity of focusing on the individual litigants, the technical competency of the court, and the lack of common law actions brought in the environmental field. Note, *supra* note 45, at 257-58 (1977). The reasons presented for not using a common law approach, however, are not persuasive. Courts may set forth general rules of law even while considering the particular conflicts of individual litigants. Federal common law nuisance cases would doubtless be less complex than many antitrust cases now heard by the courts. See *United States v. Rohm & Haas Co.*, 500 F.2d 167, 175 (5th Cir. 1974). More environmental cases will likely be brought as a result of the availability of the federal common law nuisance remedy in suits by private parties. See *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3rd Cir.), *cert. granted*, 49 U.S.L.W. 3281 (1980) (No. 80-12).

54 Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 545 (1954).

55 See Note, *Application of Federal Common Law of Public Nuisance to Intrastate Stream Pollution*, 18 B.C. INDUS. & COM. L. REV. 929 (1977).

56 See 539 F.2d at 1009.

ute but not to allow the same waters to be governed by federal common law. Congress can regulate the waterways because of the expansive reach of the commerce clause; the federal courts, however, are more limited. They are justified in using federal common law only because of the interstate nature of the dispute, not because the matters involve interstate commerce in the constitutional sense.⁵⁷ The limited federal interest in disputes involving intrastate waters is consequently insufficient to override the presumption favoring state law.

In its conclusion, the *Outboard Marine* court set forth the standard for determining when federal common law should be applied to water pollution controversies. Under the court's standard, common law is to be applied whenever the dispute is a matter of federal concern.⁵⁸ Although this standard focuses on the central issue, it fails to distinguish between a mere federal concern and an overriding federal concern. The court's definition of "navigable waters" as including "both the territorial seas and purely intrastate waters having no necessary interstate impact"⁵⁹ could lead lower courts to conclude that there is an overriding federal interest in all pollution cases.

The result reached by the *Outboard Marine* court was correct. The plaintiff alleged the pollution of an interstate body of water; the court found that federal common law of nuisance should apply. The court should, however, have relied exclusively on the interstate nature of the waters allegedly affected by the defendant's actions and found extraterritorial pollution effects. The groundwork which the court laid for applying the federal common law of nuisance to all future water pollution controversies was both unnecessary and unfortunate. Pollution of purely intrastate waters is exclusively a matter of state concern, and the constraints of federalism demand that state law alone apply in addressing that concern.

Ronald J. Ehinger

Government Contracts—STATES ARE FREE TO LOOK TO THE SMALL BUSINESS ACT AS A STANDARD IN DETERMINING WHETHER A SUCCESSFUL BIDDER FOR A SET-ASIDE CONTRACT COMMITTED FRAUD OR WAS UNJUSTLY ENRICHED AT THE EXPENSE OF AN UNSUCCESSFUL BIDDER—*Iconco v. Jensen Construction Co.*, 622 F.2d 1291 (8th Cir. 1980).

Congress enacted the Small Business Act (SBA)¹ to help small businesses

57 *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1281 n.15 (D. Conn. 1976), *aff'd sub nom East End Yacht Club v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); see Note, *The Case for a Federal Common Law of Aircraft Disaster Litigation*, 51 N.Y.U. L. REV. 231, 243 n.84 (1976).

58 619 F.2d at 630.

59 *Id.* at 627.

1 15 U.S.C. §§ 631-637 (1976) [hereinafter referred to as the "SBA" or the "Act"]. The SBA's stated purpose is to "aid, counsel, assist, and protect . . . the interests of small business concerns." *Id.* § 631. The Small Business Administration was created to carry out the policies of the SBA. *Id.* § 633(a). The Administrator is authorized to "make such rules and regulations as he deems necessary to carry out the authority vested in him . . ." *Id.* § 634(b)(6). Pursuant to this authority, the Small Business Administration Reg-

compete for government contracts.² Under the SBA, qualified small businesses are eligible for contracts set aside specifically for their bidding.³ Because of the preferential treatment accorded small businesses in awarding set-aside contracts, disputes often arise concerning a bidder's status as a small business. Although the regulations implementing the SBA are designed to prevent ineligible bidders from receiving set-aside contracts,⁴ they do not expressly create a cause of action for unsuccessful bidders against a successful bidder even if the successful bidder is subsequently ruled ineligible for the contract by the Small Business Administration.⁵ Likewise, the federal courts have refused to find an implied cause of action under the SBA, because allowing such suits could hinder the "expeditious administration of government contracts."⁶ Nevertheless, in *Iconco v. Jensen Construction Co.*,⁷ the United States Court of Appeals for the Eighth Circuit held that despite the absence of an express or implied federal cause of action, an unsuccessful bidder may sue an ineligible successful bidder under state common law doctrines of fraud and unjust enrichment.⁸

On December 16, 1974, after accepting at face value Jensen's self-certification as a small business, the Army Corps of Engineers awarded Jensen a contract.⁹ No protests challenging Jensen's small business status were filed before the contract's award. Several days following the award, however, in connection with a separate project, Jensen's status as a small business was rejected.¹⁰ Learning of Jensen's disqualification, Iconco demanded that the contracting officer terminate Jensen's contract. The contracting officer refused and advised Iconco the

ulations, 13 C.F.R. §§ 101-131 (1980) implement the SBA. The regulations include procedures for handling size disputes among bidders. *Id.* §§ 121.3-5 to 3-6.

2 The legislation noted that competition was the essence of the American economic system and that expansion of this competition was necessary to ensure the security of the country. By aiding small businesses in receiving federal contracts, Congress intended to preserve competition and strengthen the over-all economy of the nation. 15 U.S.C. § 631 (1976). Furthermore, 13 C.F.R. § 121.3-1(b)(2)(ii) states that the principal reason for discrimination in favor of small business is that "there is a segment of each industry wherein concerns by reason of their size are at a competitive disadvantage."

3 To effectuate the purpose of the SBA, small businesses are given preferential treatment on contracts determined, by both the Small Business Administration and the contracting government agency, to be suitable for performance by a small business. These determinations are made for the purpose of assuring that a fair proportion of government contracts are placed with small businesses. 15 U.S.C. § 644 (1976). Such contracts are customarily referred to as small business set-aside contracts.

4 The regulations provide that a bidder may challenge the status of any other bidder by filing a written protest with the government contracting officer within five days of the bid opening. 13 C.F.R. § 121.3-5(a) (1980). A late protest will not be considered in awarding the outstanding contract. *Id.*

5 See Tracy, *Forums and Remedies for Disappointed Bidders on Federal Government Contracts*, 10 PUB. CONT. L.J. 92 (1978). This article discusses the remedies available to unsuccessful bidders on government contracts. It also provides a listing of forums available to complainants, including the procurement agencies, the General Accounting Office, and the federal courts.

6 See, e.g., *Savini Constr. Co. v. Crooks Bros. Constr. Co.*, 540 F.2d 1355 (9th Cir. 1974); *Mid-West Constr., Ltd. v. United States*, 387 F.2d 957 (Ct. Cl. 1968); *Royal Serv's., Inc. v. Maintenance, Inc.*, 361 F.2d 86 (5th Cir. 1966); *Northland Equities, Inc. v. Gateway Center Corp.*, 441 F. Supp. 259 (E.D. Pa. 1977).

7 622 F.2d 1291 (8th Cir. 1980).

8 *Id.* at 1295.

9 13 C.F.R. § 121.3-8 (1980) provides that "in the absence of written protest or other information which would cause him to question the veracity of the self-certification, the contracting officer shall accept the self-certification at face value for the particular procurement involved."

10 The Corps received a protest from Orvedahl Construction Co. questioning the status of Jensen as a small business. The Corps forwarded the protest to the Small Business Administration. Meanwhile, the contracting officer handling the current procurement did not know of the protest and awarded the contract to Jensen. Two days later the contracting officer was notified of Jensen's ineligibility by the Small Business Administration. Since it was received after the award was made, the notification had no legal effect on the procurement involved. 622 F.2d at 1293-94.

contract was valid since no protest had been filed prior to the award.¹¹ Iconco then wrote Jensen and demanded that Jensen relinquish the contract. Jensen refused and completed the work. Ignoring an administrative remedy,¹² Iconco filed suit against Jensen in federal district court.

Iconco alleged Jensen had fraudulently misrepresented itself as a small business, thereby obtaining a contract to which it was not entitled, resulting in Jensen's unjust enrichment at Iconco's expense. Jensen denied Iconco's allegations arguing the federal courts had established that an unsuccessful bidder for a small business set-aside contract had no claim against a successful bidder not qualifying as a small business.¹³ The jury awarded Iconco \$61,503 on its claim of unjust enrichment and \$40,000 on its claim of fraud. The district court set aside the award for fraud, finding insufficient evidence to support the verdict.¹⁴ In sustaining the unjust enrichment award, the court held the remedy provided under Iowa common law would neither interfere with the objectives of the SBA nor obstruct the efficient administration of the federal procurement process.¹⁵ The district court reasoned that providing a remedy to protect a bidder not knowing of another bidder's ineligibility until the protest period had lapsed would only further the congressional aim of aiding small businesses.¹⁶ On appeal, the Eighth Circuit unanimously affirmed.¹⁷

The Eighth Circuit's decision focuses on federal preemption. Because the SBA does not expressly preempt state remedies, the court had to determine whether Congress had impliedly prohibited states from looking to the SBA for guidance in fashioning state common law.¹⁸ The court stated that without finding a "clear and manifest" congressional purpose to "deny Iowa the right to vindicate its overriding state interest in redressing unjust enrichment and fraud," Iowa could not be found to have been prohibited from looking to the SBA.¹⁹ However, although Iowa had "great latitude" in fashioning its common law, it could not do so in a manner inconsistent with congressional objectives.²⁰ But the court found no inconsistency between the lower court's ruling and the SBA's objectives. The court agreed with the district court that the remedy provided would promote the achievement of congressional objectives by preventing unqualified bidders from benefiting from contracts to which they were never entitled.²¹

A broad federal standard for interpreting the SBA's objectives was first set out in *Savini Construction Co. v. Crooks Brothers Construction Co.*²² In *Savini*, the Ninth

11 See note 4 *supra*.

12 General Accounting Office Regulations, 4 C.F.R. §§ 20.1-10 (1974) (current version at 4 C.F.R. §§ 20.1-10 (1980)), allow parties to protest awards to the General Accounting Office (GAO). If appropriate, the regulations allow the Comptroller General to consider a late protest. A decision by the GAO that the award was illegal can result in a recommendation the contract be cancelled.

13 Record at 416, *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291 (1980).

14 622 F.2d at 1293.

15 Record at 418-20, *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291 (1980).

16 *Id.* at 419.

17 622 F.2d 1291, 1304 (8th Cir. 1980). Judge Arnold presided; Judge Heaney and District Judge Wright, sitting by designation, joined in the opinion.

18 *Id.* at 1296.

19 *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

20 *Id.*

21 *Id.* at 1299.

22 540 F.2d 1355 (9th Cir. 1974). The *Savini* facts resembled those in *Iconco*. *Savini* had challenged

Circuit held the SBA provides no implied cause of action for lost profits.²³ According to the court, Congress did not intend to "benefit small business at any cost."²⁴ Congress' primary purpose for enacting procurement legislation was to insure the expeditious administration of government contracts.²⁵ Where awarding a contract to a small business facilitates expeditious administration, the set-aside program insures the award will be made.²⁶ However, where an award obstructs expeditious administration, the "by-product" derived from helping small businesses must yield.²⁷ The court reasoned that the possibility of subjecting a bidder to a suit for profits after the contracting officer determines the public interest is best served by proceeding with an award, despite a subsequent finding of ineligibility, would likely cause disruptions and delays inconsistent with congressional objectives.²⁸

The *Iconco* court analyzed the congressional purpose from a perspective unlike the *Savini* court's.²⁹ In *Iconco*, the Eighth Circuit isolated the SBA from the general scheme of procurement legislation. Although both courts emphasized aid to small business and efficient administration of government procurement, the *Iconco* court placed a greater emphasis on aid to small business than had the *Savini* court. The *Iconco* court stated that in enacting the SBA, one of Congress' primary goals was to insure that small businesses receive a "fair proportion of government contracts so that they might compete on an equal footing with large concerns."³⁰ According to the court, recognizing *Iconco's* cause of action would promote the achievement of this congressional goal.³¹ However, like the *Savini* court the *Iconco* court also recognized that Congress intended to insure government contracts were performed in a "timely and competent manner."³² But the court brushed off as "speculative" Jensen's contention that allowing the suit would thwart congressional objectives in the area.³³ Jensen contended the threat of legal action would discourage businesses from bidding or would cause a successful bidder to delay beginning work knowing he may be deprived of his profits after performance.³⁴ According to the court the "mere threat of legal action, without more, would not be sufficient to discourage either submission of bids or the acceptance of contracts."³⁵ Moreover, the court emphasized that "the legal action involved here, even when it succeeds, does not interfere with the work

Crooks' status as a small business prior to the contract award, but the Small Business Administration found Crooks to be a small business. Savini appealed the decision to the Small Business Administration. But while the appeal was pending, the contracting officer awarded the contract to Crooks because an emergency procurement was involved. After the valid award was made, the Small Business Administration ruled that Crooks was ineligible to qualify as a small business. Savini then brought an action against Crooks for fraud in misrepresenting the company as a small business and for lost profits.

23 *Id.* at 1359.

24 *Id.* at 1358.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 1359.

29 See note 22 *supra*.

30 622 F.2d at 1298.

31 *Id.*

32 *Id.*

33 *Id.* at 1299.

34 *Id.*

35 *Id.*

contracted for" because it takes place after the contract is performed.³⁶

Iconco conflicts with the decisions of other circuits.³⁷ Prior to *Iconco*, courts had consistently ruled that allowing an unsuccessful bidder to sue a successful, though ineligible, bidder would violate federal policy by impairing the efficiency of the federal procurement system. However, because they dealt with the right to a private remedy under federal and not state law, the *Iconco* court found none of the previous cases controlling.³⁸ The Eighth Circuit failed to recognize, however, that the rationale for disallowing a remedy directly under the SBA applied equally to a state law remedy. There is little, if any, substantive difference between a remedy fashioned in district court applying federal law and a remedy fashioned in a district court diversity action applying state law according to the same federal standards. Thus, *Iconco's* true conflict concerns whether a state law remedy fashioned according to SBA standards comports with Congress' procurement objectives. A satisfactory resolution of such a conflict requires analysis under the doctrine of preemption.

The United States Constitution and the laws of the United States are the supreme law of the land.³⁹ When state laws conflict with federal laws, federal law prevails.⁴⁰ A state does not have the power to "retard, impede, or burden" the operation of federal laws.⁴¹ Furthermore, a state law may not produce a result which "frustrate[s]" the purpose of the federal law or "impair[s] the efficiency" of federal agencies or the agencies' ability to discharge their duties.⁴² Applying basic preemption principles to the *Iconco* decision illustrates how the decision frustrates the purpose of federal law and impairs the efficiency of the federal procurement system.

By definition the federal procurement scheme is exclusively federal. The system must remain exclusively federal to maintain a uniform character. "[C]onstruction of the procurement provisions is a matter of federal, not state, law."⁴³ The *Iconco* decision allows each state to mold the federal procurement process according to its own common law doctrine. Divergent state adjudications impeding the efficient administration of federal procurement will result. If the more than ninety district courts are allowed to interpret different state common law doctrines according to the SBA's standards, the certainty and uniformity engendered by the present federal procurement scheme will vanish.

Also, the state remedy provided by the *Iconco* court, much like the remedy denied in *Savini*⁴⁴ and *Northland Equities, Inc. v. Gateway Center Corporation*,⁴⁵ fur-

36 *Id.*

37 See note 6 *supra*.

38 622 F.2d at 1299.

39 U.S. CONST. art. VI, § 2 provides in part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."

40 *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 240 (1967).

41 *Id.*

42 *Id.*

43 *Royal Serv's., Inc. v. Maintenance, Inc.*, 361 F.2d 86, 91 (5th Cir. 1966).

44 540 F.2d 1355. See note 22 *supra*.

45 441 F. Sup. 259 (E.D. Pa. 1977). *Northland Equities*, an unsuccessful bidder, brought an action against Gateway, the successful bidder, alleging that Gateway received the government lease under circumstances which violated federal procurement statutes and regulations. The court held the federal procurement statutes and regulations do not confer a private case of action for damages.

nishes an "irresistible disincentive" to an unsuccessful bidder's pursuing administrative remedies in a timely manner.⁴⁶ The *Northland Equities* court, relying on *Savini*, denied an unsuccessful bidder a remedy under the SBA partly because the unsuccessful bidder failed to invoke a remedy in a timely manner.⁴⁷ The court stated that providing a remedy would encourage "speculative plaintiffs" to wait until the contract is performed before attacking the propriety of the initial award.⁴⁸ The *Iconco* decision will encourage such behavior. The Eighth Circuit held that "the Iowa law of unjust enrichment imposes no prerequisite akin to exhaustion of administrative remedies."⁴⁹ Because administrative remedies do not allow recovery of lost profits, it will be to the economic advantage of unsuccessful bidders to forego the less lucrative administrative remedies and file suit in federal court. Furthermore, the decision could lead to the generation of windfall profits for "unsuccessful" bidders. For example, an unsuccessful bidder might maximize his profits by engaging in other work during the performance of the challenged contract. Upon the challenged contract's completion, the unsuccessful bidder could then sue for unjust enrichment. The successful plaintiff would reap not only the profits from the challenged contract, but also the normal profits obtained from the other work.

The *Iconco* decision could also obstruct the performance of government contracts. Because prior to *Iconco* the federal courts had denied unsuccessful bidders a private remedy against a successful bidder, successful bidders were insulated from interference by third parties and could rely on the contracting officer's decisions controlling administration of the contract.⁵⁰ The *Iconco* court, however, disregarded the contracting officer's determination that the contract was valid and binding between the government and the successful bidder.⁵¹ *Iconco* was allowed to recover for unjust enrichment even though the contracting officer had ruled there was a valid contract. As a result, successful bidders will have to perform despite potential conflicts between the authority of contracting officers acting under the procurement regulations and the authority of courts determining the respective rights of bidders under state common law doctrines. Although a contracting officer's decision will still be binding between the government and the successful bidder, it will not protect the successful bidder from an unsuccessful bidder's suit for lost profits. As the *Savini* court pointed out, if the successful bidder knows that because of a post-award dispute over qualification he may be subjected to a suit for his profits, the successful bidder might refuse to continue work pending the dispute's resolution.⁵² However, even if the successful bidders do continue performance, the possibility of loss of profits at the conclusion of the project may affect the quality and promptness of performance.

In conclusion, due regard for uniformity in applying federal regulations re-

46 *Id.* at 263.

47 *Id.*

48 *Id.* The court also stated this remedy would "wreak havoc on procurement. To be compatible with statutory goals, a remedial scheme must guarantee that the proper bidder can still be selected." *Id.*

49 622 F.2d at 1302.

50 Contracting officers are delegated considerable discretion in settling disputes arising under federal contracts. Unless appealed, decisions of contracting officers are binding on the parties.

51 622 F.2d at 1302.

52 540 F.2d at 1359.

quires a finding of preemption when state law conflicts with legitimate congressional objectives. The *Iconco* decision conflicts with the congressional objective of ensuring efficient administration of the federal procurement system. Congress itself has enacted detailed legislation and established administrative agencies to resolve disputes. Allowing the courts to apply SBA standards in fashioning state common law remedies would generate all the undesired results the preemption doctrine was designed to prevent. The basic aim of procurement legislation—expeditious administration—would be frustrated by the inevitably inconsistent state decisions which will result from decisions like *Iconco*. The Eighth Circuit's decision in *Iconco* should be reversed.

Craig L. Jones

Loans—TRUTH IN LENDING—A DE MINIMIS DEFENSE IS NOT AVAILABLE TO A LENDER FOR A TECHNICAL VIOLATION OF REGULATION Z—*Villanueva v. Motor Town, Inc.*, 619 F.2d 632 (7th Cir. 1980).

The Truth in Lending Act¹ (the Act) is intended to provide consumers with information about the cost of consumer credit and to protect consumers against unfair credit practices.² The courts have disagreed as to whether the language of the Act should be interpreted strictly or liberally.³ The problem of statutory interpretation is especially acute in suits involving bona fide, technical errors, where strict enforcement creates inequitable results. Borrowers bringing suit under the Act are not motivated solely by a desire to recover out-of-pocket expenses; the Act provides that successful plaintiffs may recover twice the finance charge, actual damages, attorney's fees and costs of the action.⁴

In *Villanueva v. Motor Town, Inc.*,⁵ the United States Court of Appeals for the Seventh Circuit enforced a borrower's claim based on a \$1.76 error even though the lender's error had been made in good faith and was quickly corrected upon discovery. The court held that it was required to enforce strictly the specific provisions of the Act, and refused to absolve the lender of its technical, de minimis⁶ violation.

In December, 1975, plaintiff Ben Green entered into a retail installment contract with Deluxe Motors, Inc. (Deluxe) for the purchase of a used automo-

1 15 U.S.C. §§ 1601-1665 (1976).

2 15 U.S.C. § 1601(a) provides:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

3 See text accompanying notes 23-25 *infra*.

4 15 U.S.C. § 1640(a) (1976).

5 619 F.2d 632 (7th Cir. 1980).

6 Under the de minimis doctrine the law refuses to take notice of very small or trifling matters. "De minimis" will be used in this comment to describe a violation of the Truth in Lending Act which results in a very small difference in the cost of credit to the borrower.

bile. The financing contract disclosed an annual percentage rate of 30.09% and a finance charge of \$169.44. The first installment payment was due four days after execution of the contract and the remaining payments were due at weekly intervals. In November, 1976, Deluxe became aware that the short first payment period, found in many of its financing contracts, violated Regulation Z,⁷ promulgated by the Federal Reserve Board under the authority of the Act. Within fifteen days of this discovery, Deluxe mailed one thousand notices to customers whose accounts were affected.⁸ The notice mailed to Green stated that "[t]he annual percentage rate stated should have been 30.48% as computed on an actuarial basis and the finance charge should have been \$167.68, instead of 30.09% and \$169.44, respectively."⁹ Green never received this notice due to a change of address.¹⁰

When he learned of the changed terms in his financing contract, Green filed suit against Deluxe and its parent corporation alleging violations of the Truth in Lending Act, Regulation Z and two corresponding state statutes.¹¹ Green alleged that Deluxe misstated the annual percentage rate in the financing contract and that the method used to compute the annual percentage rate had not met the statutory requirements.¹² Deluxe answered that its correction of the errors within the fifteen day statutory grace period absolved it of liability.¹³

The United States District Court for the Northern District of Illinois found that Green's suit, based as it was upon a \$1.76 error, constituted an abuse of the Truth in Lending Act.¹⁴ The court stated that the violation asserted by Green was de minimis and that to allow such a spurious claim would ultimately weaken the Act. Furthermore, the court found that by correcting its error within the fifteen day statutory grace period, Deluxe had established a viable defense under section 1640(b) of the Act.¹⁵

On appeal, the Seventh Circuit reversed the district court.¹⁶ Writing for the court, Judge Dumbauld¹⁷ stated that the district court was without discretion in adjudicating Truth in Lending violations¹⁸ and held that the court erred in allowing a de minimis defense. The court also reversed the district court's holding that defendants had established a section 1640(b) defense.¹⁹ Despite its strict

7 12 C.F.R. § 226 (1980).

8 Brief for Appellant at 8, *Villanueva v. Motor Town, Inc.*, 619 F.2d 632 (7th Cir. 1980).

9 *Id.* at 9.

10 *Id.*

11 ILL. REV. STAT. ch. 121-1/2, §§ 401, 561 (1967).

12 *Green v. Deluxe Motors, Inc.*, No. 76 C 4538 (N.D. Ill. Jan. 18, 1979).

13 15 U.S.C. § 1640(b) provides:

A creditor has no liability under this section if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount of percentage rate actually disclosed.

14 The district court stated that the claim constituted "not only an imposition upon the defendants, but also on the court and the public." *Green v. Deluxe Motors, Inc.*, No. 76 C 4538 (N.D. Ill. Jan. 18, 1979).

15 See text accompanying note 13 *supra*.

16 619 F.2d at 632.

17 Senior District Judge of the Western District of Pennsylvania, sitting by designation.

18 619 F.2d at 634.

19 Although the court acknowledged that § 1640(b) allowed lenders fifteen days to correct errors in the disclosure of credit terms, it held that the defense was available to a lender only for a "downward" adjustment of the disclosed terms to the benefit of the borrower. 619 F.2d at 635.

statutory interpretation, the Seventh Circuit in *Villanueva* was sympathetic to the concerns of the district court. The court recognized that, as a practical matter, the technical error made by Deluxe was not significant enough to cause even a discriminating borrower to divert his business.²⁰ It also recognized that the purpose of the Truth in Lending legislation was to eradicate the deliberately misleading techniques practiced by some fraudulent creditors.²¹ Nevertheless, the court concluded that the statute's specific provisions could not be disregarded in an effort to promote its policies.²²

Before *Villanueva*, five courts of appeals had examined a lender's liability for minor technical violations of the Truth in Lending Act. Four of these courts interpreted the Act strictly, imposing liability inflexibly once a violation was found.²³ One appellate court interpreted the Act liberally, considering the individual merits of the plaintiff's claim before imposing liability.²⁴ Several district courts also employed the liberal approach, criticizing the use of the Truth in Lending Act as an instrument to harass creditors for harmless mistakes.²⁵

The Cases. *Charles v. Krauss Co.*²⁶ involved the purchase of household furniture through a retail installment contract. Although the defendant Krauss Co. had made the required disclosures, it had made them on both sides of the contract document in violation of Regulation Z. The Fifth Circuit, interpreting the Truth in Lending Act as a prophylactic measure, held that liability resulted from even as minute a deviation from the statutory strictures as this.²⁷

*Barber v. Kimbrell's, Inc.*²⁸ also involved a retail installment contract for the purchase of household furniture. Although the defendant had made the required disclosures, its disclosure document used the term "Total Time Balance" rather than "Total of Payments," as required by Regulation Z. The Fourth Circuit held that the failure to use the Act's prescribed terminology constituted a violation of the Act for which the defendant could be held liable, even though the plaintiffs had nowhere claimed that they had not understood the terms of the credit agreement.²⁹

20 619 F.2d at 633.

21 *Id.* at 634.

22 *Id.*

23 See *Gennuso v. Commercial Bank & Trust Co.*, 566 F.2d 437 (3d Cir. 1977); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978); *Powers v. Sims & Levin*, 542 F.2d 1216 (4th Cir. 1976); *Charles v. Krauss Co.*, 572 F.2d 544 (5th Cir. 1978); *McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978); *Pennino v. Morris Kirschman & Co.*, 526 F.2d 367 (5th Cir. 1976); *Grant v. Imperial Motors*, 539 F.2d 506 (5th Cir. 1976); *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976); *Eby v. Reb Realty, Inc.*, 495 F.2d 646 (9th Cir. 1974).

24 See *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975).

25 See *Jennings v. Edwards*, 454 F. Supp. 770 (M.D.N.C. 1978); *Sharp v. Ford Motor Credit Co.*, 452 F. Supp. 465 (S.D. Ill. 1978); *Dzadovsky v. Lyons Ford Sales, Inc.*, 452 F. Supp. 606 (W.D. Pa. 1978); *Augusta v. Marshall Motor Co.*, 453 F. Supp. 912 (N.D. Ohio 1977); *Ivey v. HUD*, 428 F. Supp. 1337 (N.D. Ga. 1977); *George v. General Fin. Corp.*, 414 F. Supp. 33 (E.D. La. 1976).

26 572 F.2d 544 (5th Cir. 1978).

27 The Fifth Circuit's holding in *Charles* was consistent with its reasoning in Truth in Lending actions, *McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978); *Pennino v. Morris Kirschman & Co.*, 526 F.2d 367 (5th Cir. 1976); *Grant v. Imperial Motors*, 539 F.2d 506 (5th Cir. 1976); *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296 (5th Cir. 1976), but is not reflective of the discord among the district courts within the circuit, *Ivey v. HUD*, 428 F. Supp. 1337 (N.D. Ga. 1977); *George v. General Fin. Corp.*, 414 F. Supp. 33 (E.D. La. 1976); *Welmaker v. W. T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1972); *Buford v. American Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971).

28 577 F.2d 216 (4th Cir. 1978).

29 The dissent in *Barber* criticized the court's "mechanical and insensitive" application of the Act, labeling the court's pedantic construction "unrealistic." 577 F.2d at 228.

In *Gennuso v. Commercial Bank and Trust Co.*,³⁰ the Third Circuit addressed the issue of minor technical violations of the Truth in Lending Act. Gennuso's claim arose out of a financing contract for the purchase of a new car. Since the contract was contained on two documents, the court held that the lender had failed to meet the one side document requirement of Regulation Z. The court recognized that the lender had not demonstrated egregious misconduct³¹ and acknowledged that imposing liability would be highly inequitable.³² Nevertheless, the court reasoned that the specific requirements of the Act dictated the imposition of liability.³³

In *Eby v. Reb Realty, Inc.*,³⁴ the plaintiff Eby brought suit under the Act after defaulting on a contract with the defendant for the purchase of residential property. Eby claimed that the defendant had failed to disclose her rescission rights as required by the Truth in Lending Act. The Ninth Circuit held that the Act is a remedial statute designed to permit borrowers to make informed judgments about the use of credit. To effectuate this congressional purpose, the court reasoned that it was required to construe strictly the provisions of the Act. The plaintiff was consequently allowed to recover from the defendant for a technical violation even though the plaintiff was the party who had failed to perform the agreement.

The Tenth Circuit in *Redhouse v. Quality Ford Sales, Inc.*,³⁵ followed a liberal approach in its interpretation of the Act. The two plaintiffs, native Indians who were not fluent in English, contracted to purchase a truck from the defendant car dealer and brought a class action against the defendant for noncompliance with the disclosure requirements of the Act. The court held that since the plaintiffs did not read the contracts prior to their execution, the omission of information required by the Truth in Lending Act could not have affected their decision to enter into the credit contract. The court found that the Act should be liberally construed and should not be enforced so as to constitute a means of harassment, oppression, or unjust enrichment. This decision emphasized the stated purpose of the Act rather than the technical requirements of its language.

In addition to the Tenth Circuit, various district courts have indicated support for the liberal approach by protecting lenders from obscure technical violations of the Act.³⁶ *George v. General Finance Corp.*³⁷ and *Jennings v. Edwards*³⁸ are leading cases in which federal district courts have refused to impose liability on lenders for de minimis or technical violations of the Act. In *George*, a two dollar

30 566 F.2d 437 (3d Cir. 1977).

31 *Id.*

32 *Id.* at 440.

33 *Id.* at 443.

34 495 F.2d 646 (9th Cir. 1974).

35 511 F.2d 230 (10th Cir. 1975).

36 See notes 37 and 38 *infra* and Sharp v. Ford Motor Credit Co., 452 F. Supp. 465 (S.D. Ill. 1978) (no violation where manufacturer had been identified as an assignee rather than as a co-creditor); Dzadovsky v. Lyons Ford Sales, Inc., 452 F. Supp. 606 (W.D. Pa. 1978) (no violation where defendant failed to use the prescribed terms of Regulation Z; plaintiff had been fully informed about and completely understood the credit terms); Ivey v. HUD, 428 F. Supp. 1337 (N.D. Ga. 1977) (no violation where defendant failed to disclose accurately the total amount of payments; \$11.30 error held not material); Augusta v. Marshall Motor Co., 453 F. Supp. 912 (N.D. Ohio 1977) (no violation where defendant failed to disclose the identity of the creditor upon assignment of the contract).

37 414 F. Supp. 33 (E.D. La. 1976).

38 454 F. Supp. 770 (M.D.N.C. 1978).

charge for official fees and a seventy-five cent charge for notary fees were not itemized as part of the finance charge disclosed to the plaintiff. The court in *George* held that while the Truth in Lending Act was to be interpreted for the protection of the borrowers, it was not to be read as a maze of obscure technical pitfalls for lenders. The court reasoned that although the amount set forth on the disclosure form did not conform precisely to the regulations, Congress had not intended a violation to result from an omission of a charge of \$2.75.

The court in *Jennings* refused to impose liability upon a lender acting in good faith, holding that charges made by the lender as a cost of doing business were not required to be disclosed as part of the finance charge. Therefore, the defendants were not liable for failure to itemize the four dollar fee. The *Jennings* court found that even if the administrative fees and discount should have been itemized, such a violation of the Truth in Lending Act was de minimis and did not justify the imposition of liability.

The Basis For The Strict Approach. The strict statutory approach adopted by the *Villanueva* court and the majority of appellate courts³⁹ finds support in the language of the Truth in Lending Act. The Act was promulgated to protect consumers from the confusingly disparate and at times fraudulent practices of some lenders.⁴⁰ The Act places the burden upon lenders to clearly disclose credit terms to borrowers, and subjects violators to possible criminal and civil penalties.⁴¹ The statute gives regulatory power to the Federal Reserve Board which promulgated Regulation Z,⁴² currently filling 43 pages in the Code of Federal Regulations. This single regulation has produced over 1,495 staff rulings and interpretations.⁴³ The voluminous provisions, regulations and interpretations associated with the Truth in Lending Act provide a complex disclosure scheme which lenders must precisely follow. The courts of appeals following the strict approach reason that since Congress expressly authorized the Federal Reserve Board to promulgate detailed procedures, it intended those procedures to be strictly applied. These courts conclude that even technical violations of the Act are sufficient to subject the lender to civil liability.

The Basis For The Liberal Approach. Support for the liberal approach, used by the Tenth Circuit⁴⁴ and by several district courts,⁴⁵ is found in the underlying policy of the Truth in Lending Act—to insure meaningful disclosure of credit terms so that consumers can avoid the uninformed use of credit. The Act focuses upon promoting accurate disclosure of annual interest rates and total finance charges. The courts exercising the liberal approach emphasize that the Act's pur-

39 See note 23 *supra*.

40 In addressing the need for truth in lending legislation, Senator Proxmire stated:

Today the average consumer is faced with a bewildering variety of credit rates and terms. . . . As a result of these confusing practices, some segments of the credit industry have been able to charge truly exorbitant rates with relative impunity.

. . . .

Frequently, these high rates are levied upon the low income groups who can least afford to pay the exorbitant sums.

113 CONG. REC. 18400 (July 11, 1967).

41 15 U.S.C. §§ 1611, 1640 (1976).

42 12 C.F.R. § 226 (1980).

43 Edmonds, *Truth and Consequences*, 35 WASH. & LEE L. REV. 367 (1978).

44 511 F.2d 230 (10th Cir. 1975).

45 See text accompanying notes 36, 37 and 38 *supra*.

poses are (1) to protect borrowers by making them more knowledgeable concerning credit transactions they enter into, and (2) to protect lenders by strengthening their ability to compete in the free market.⁴⁶ These courts point out that the original legislative draft of the Act was consciously tolerant of technical, insignificant errors made by lenders.⁴⁷

Though supported by case precedent,⁴⁸ the decision reached by the Seventh Circuit in *Villanueva* did not consider the effect of the recent Truth in Lending Simplification and Reform Act⁴⁹ (Simplification Act), passed by Congress to deal with de minimis violations. The Simplification Act has four purposes: (1) to provide consumers with simple, understandable information relating to rates and charges; (2) to make compliance easier for creditors; (3) to limit civil penalties to material violations; and (4) to strengthen administrative enforcement.⁵⁰ The Simplification Act is a congressional response to the highly technical scheme that has distorted the purpose of the Truth in Lending Act. Senator Garn, in addressing the Senate on the need for simplification, stated:

[The Act] had been subverted into one of the most monumental monstrosities of paperwork ever foisted upon the American public. [I]n some Federal courts . . . 40 percent of the caseload was Truth in Lending violations, highly technical, super critical, a comma out of place, a word wrong, . . . creating a big burden . . .⁵¹

Villanueva provided the federal appellate courts with their first opportunity to consider de minimis violations of the Truth in Lending Act in light of the new legislation. The cases relied on in *Villanueva* had rejected the de minimis defense because no such defense was specified in the statutory language, and because the Act's legislative history appeared to oppose the existence of such a defense. The new amendment, however, is intended to create a de minimis defense, and its legislative history indicated Congressional desire that such a defense be allowed. Section 615 of the Simplification Act "is intended to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping. The [Senate] committee believes this will eliminate litigation based on purely technical violations of the Act."⁵²

The Simplification Act does not take effect until March 31, 1982 and a statute with a definite future date fixed for its commencement has effect only from that time.⁵³ For this reason the Seventh Circuit may have felt constrained from considering it.⁵⁴ However, the *Villanueva* decision is based upon a conflicting leg-

46 In his remarks at the congressional debates over the Truth in Lending Act, Senator Young stated: "[T]he truth-in-lending bill before us here today is aimed only at the unscrupulous lender. Its passage would protect not only the consumer who is uneducated in credit, but the ethical businessman who faces unfair competition on the part of those who engage in deceiving or fooling or cheating the public. It is a bill which would greatly strengthen the free competitive system."

113 CONG. REC. 18420 (1967).

47 At the congressional debates Senator Bennett remarked: "[T]his bill has [been] rescued from the straitjacket of mathematical rigidity and made practical by recognition of the need for mathematical tolerances. . . ." 113 CONG. REC. 18408 (1967).

48 *Mirabal v. GMAC*, 537 F.2d 871 (7th Cir. 1976).

49 Pub. L. No. 96-221, 94 Stat. 180 (1980).

50 124 CONG. REC. S7226 (daily ed. May 10, 1978).

51 124 CONG. REC. S7230 (daily ed. May 10, 1978) (remarks of Sen. Schmitt).

52 S. REP. NO. 73, 96th Cong., 1st Sess. (1979).

53 *United States v. Casson*, 434 F.2d 415 (D.C. Cir. 1970).

54 The purpose of the future effective date is to inform persons of a statute's provisions before it becomes effective so that they may take steps to protect their rights and discharge their obligations. If a

islative history which Congress clarified in passing the Simplification Act. In light of Congress's attempt to clarify its intent in the Truth in Lending Act, the Seventh Circuit should have at least addressed that issue.

The Seventh Circuit held in *Villanueva* the de minimis defense unavailable to lenders whose violation of the Truth in Lending Act was de minimis. In strictly interpreting the statute, the court failed to recognize a recent legislative pronouncement aimed at limiting abusive actions against lenders for technical violations such as those present in *Villanueva*. This case presented the appellate courts with their first opportunity to reevaluate, in light of the new legislation, the strict approach to the Act. Courts faced with future technical violations of the Act should reexamine the legislative intent underlying the Act and adopt a liberal approach in suits against lenders who make essentially harmless mistakes.

Ophelia S. Camiña

Securities Law—MISLEADING PROXY STATEMENTS—OUTSIDE ACCOUNTANTS CAN BE HELD LIABLE UNDER RULE 14a-9 ONLY UPON A SHOWING OF SCIENTER—*Adams v. Standard Knitting Mills*, 623 F.2d 422 (6th Cir. 1980).

The culpability standard in a shareholder's action under section 14(a) of the Securities Exchange Act of 1934 (the 1934 Act)¹ and rule 14a-9² of the Securities and Exchange Commission (SEC) has remained unclear since 1964 when the Supreme Court of the United States, in *J.I. Case Co. v. Borak*,³ established a private right of action for violations of these provisions.⁴ Section 14(a) makes it

statute takes immediate effect, it is often impossible for all persons affected by it to discover its existence or to comply with its terms, and thus it results in hardship and unfairness. Likewise, as the complexity of statutes increases it becomes necessary to provide a future effective date to allow the government time to establish machinery for the enforcement of statutes. J. SUTHERLAND, *STATUTES & STATUTORY CONSTRUCTION* § 33.07 (4th ed. 1973).

1 15 U.S.C. § 78n(a) (1976). Section 14(a) provides:

(a) It shall be unlawful for any person . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

2 17 C.F.R. § 240.14a-9a (1979). This rule, promulgated by the SEC pursuant to authority granted under section 14(a), is intended to prevent false or misleading statements in proxy solicitations. The rule provides:

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

3 377 U.S. 426 (1964).

4 *Id.* at 431. Although 14(a) does not by its terms create an express civil remedy for its violation, the Court in *Borak* implied a private right of action to serve the broad remedial purpose of affording protection to investors. *See, e.g., Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1979) (private action a necessary supplement to Commission's enforcement activities). *See generally Note, Private Enforcement of the Federal Proxy Rules: Remedial Alternatives*, 15 WM. & MARY L. REV. 286 (1973).

unlawful to issue proxy materials in violation of rules and regulations promulgated by the SEC. Rule 14a-9, implementing section 14(a), forbids proxy solicitations which contain false or misleading statements, or omissions, of material fact. What *Borak* and subsequent cases left unanswered is whether liability under these provisions requires proof of scienter or merely negligence. In *Adams v. Standard Knitting Mills*,⁵ the United States Court of Appeals for the Sixth Circuit held that outside accountants are liable for false or misleading proxy statements in a civil action for damages under rule 14a-9 only upon a showing of scienter.

In April 1970, Chadbourn, Inc. (Chadbourn), a North Carolina hosiery manufacturer, completed a merger with Standard Knitting Mills, Inc. (Standard), a small publicly held textile manufacturer. Standard's shareholders had agreed to the merger after receiving a proxy statement describing the proposed merger plan, including a recommendation by Standard's management favoring the merger and financial statements of Chadbourn prepared by Chadbourn's accountants, Peat, Marwick, Mitchell and Co. (Peat, Marwick).

Approximately a year after the merger, Chadbourn's sales of hosiery plummeted unexpectedly and Chadbourn suffered heavy losses. It was later unable to pay dividends on or redeem the preferred stock held by former Standard shareholders as was expected under the merger agreement. In October 1972, the shareholders brought suit against, *inter alia*, Peat, Marwick, alleging that the proxy materials issued in order to gain shareholder approval of the merger had contained false or misleading statements.⁶ The district court, finding that Peat, Marwick had acted willfully and with intent to deceive, imposed liability under rules 10b-5 and 14a-9 in the amount of \$3.4 million, plus prejudgment interest and attorneys fees of \$1.2 million.⁷ The Sixth Circuit reversed, holding that Peat,

⁵ 623 F.2d 422 (6th Cir. 1980).

⁶ In addition to Peat, Marwick, the shareholders brought suit against Chadbourn, Standard, their management, and their lawyers. However, these defendants entered into a settlement agreement with the plaintiffs, leaving Peat, Marwick as the sole defendant at trial.

The action was brought pursuant to sections 10(b) and 14(a) of the 1934 Act and SEC rules 10b-5 and 14a-9. Section 10(b), 15 U.S.C. § 78j(b) (1976) provides:

It shall be unlawful for any person . . . (b) to use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), was promulgated by the SEC pursuant to Section 10(b), and provides:

It shall be unlawful for any person . . .

(a) To employ any device, scheme or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

The allegedly false or misleading statements concerned certain restrictions which would affect payment of dividends on Chadbourn's stock. Several months prior to the merger, Chadbourn had taken out a \$6 million bank loan and borrowed another \$12.5 million in exchange for a debenture issue. The two debt agreements contained various restrictions on retained earnings that would affect the payment of dividends or redemption of preferred shares issued to Standard's shareholders. These restrictions were incorrectly described in the proxy statements as applying to "common stock" rather than to "capital stock of any class." Accordingly, the proxy materials conveyed the erroneous impression that the debt agreement restrictions did not apply to Chadbourn preferred stock. 623 F.2d at 426.

⁷ FED. SEC. L. REP. (CCH) ¶ 95,683 (E.D. Tenn. 1976). The error in the financial statements was called to Peat, Marwick's attention by a Chadbourn lawyer several weeks before the merger vote occurred.

Marwick had been guilty solely of negligence and that negligence alone was insufficient to create liability under either 10b-5 or 14a-9.

Writing for the court, Judge Merritt⁸ quickly discarded rule 10b-5 as a basis for liability, citing the Supreme Court's holding in *Ernst & Ernst v. Hochfelder*⁹ that liability under rule 10b-5 requires "intentional misconduct" in a private action for damages.¹⁰ The court similarly held that negligence alone would not support liability under rule 14a-9 due to (1) policy considerations governing liability of accountants, and (2) section 14(a)'s legislative history. The court insisted that the standard of culpability is "not simply a question of statutory interpretation,"¹¹ and expressed concern about the magnitude of accountants' potential liability for relatively minor mistakes should a negligence standard be adopted.¹² Seeking to place some limits upon the shareholder's cause of action, the court concluded that the standard of culpability should be the more exacting one of scienter.

The court's examination of the proxy provisions'¹³ legislative history led it to conclude that the sort of proxy abuse which Congress sought to correct by enacting section 14(a) involved wrongs which "required some degree of knowledge, i.e. scienter."¹⁴ The court found no evidence that Congress specifically desired to protect shareholders from the negligence of accountants. To further support its interpretation of congressional intent, the court referred to section 14(e),¹⁵ pertaining to tender offers. The court reasoned that since 14(e) requires scienter, a "strong policy reason" exists for a like standard in a section 14(a) action. Tender offers and proxy solicitations are two alternate methods of achieving the same result—corporate control—and similar standards of liability should, therefore, govern both.

To the extent the Sixth Circuit premised its holding upon its reading of congressional intent, its reasoning contains two related flaws. First, the court reached its conclusion without reference to the actual language of the statute. Second, the court gave greater weight to the legislative history of the proxy provisions, as a guide to congressional intent, than is merited.

No effort was made by Peat, Marwick to call the error to the attention of Standard shareholders or officials. 623 F.2d at 427-28.

8 Judge Merritt was joined by Judge Engel. Judge Weick filed a separate dissenting opinion, maintaining that Peat, Marwick's conduct was sufficient to establish scienter.

9 425 U.S. 185 (1976).

10 *Id.* at 201. This rule was later expanded in *Aaron v. SEC*, 446 U.S. 680 (1980), where the Court held that scienter was a requisite element in a SEC injunctive action. In sweeping language, the Court declared that "scienter is an element of a violation of section 10(b) and rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought." *Id.* at 1952.

11 623 F.2d at 428.

12 The court noted that the accountant is not in privity with the shareholders and, unlike the corporate issuer, does not directly benefit from the proxy vote. The court also observed that 14a-9 does not require proof of actual investor reliance, but substitutes the less exacting standard of materiality for reliance. *Id.* at 428-9.

13 The proxy provisions include section 14(a) through 14(e), 15 U.S.C. § 78n (1976).

14 623 F.2d 422, 430 (1980). The court used the term "scienter" as it was used in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), to refer to a "mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 193 n.12.

15 15 U.S.C. § 78n(e) (1976), which provides in part:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender, offer . . .

To the extent the court premised its holding upon the policy against exposing outside accountants to excessive liability, it failed to take adequate account of the equally important policy of protecting investors from inadequately prepared or misleading proxy materials. Since the latter policy is endorsed by the federal statutory scheme, the Sixth Circuit has struck the balance between the two in an overly restrictive fashion.

Rule 14a-9 imposes a duty of disclosure when shareholders are solicited for their proxies or for their authorization of specific corporate action. The rule implements Congress's desire to substitute "a philosophy of full disclosure for the philosophy of caveat emptor,"¹⁶ and to place upon those in control of information the responsibility for misrepresentation. Accordingly, courts have readily identified the main purpose of section 14(a) as informed corporate suffrage,¹⁷ requiring that shareholders be fully and fairly informed when their consent is solicited and creating liability when such disclosure has not occurred. To achieve this purpose, Congress delegated very broad powers to the SEC. The only standards provided in the enabling legislation are those inherent in such terms as "public interest" and "protection of investors."¹⁸ Thus, the express terms of section 14(a), as of many other sections of the Securities Acts, shed little light on the question of standards of culpability.¹⁹ However, a substantial body of interpretive case law and commentary has developed concerning the approach to be used for determining the culpability standard required by particular Securities Act provisions.²⁰

The starting point is *Ernst & Ernst v. Hochfelder*,²¹ which dealt with the culpability standard for section 10(b). The Supreme Court in *Ernst & Ernst* affirmed the general principle that the "[a]scertainment of congressional intent with respect to the standard of liability created by a particular section [of the Securities Acts] . . . [must] rest primarily on the language of that section."²² Examining the language of 10(b), the Court found the presence of such words as "manipulative," "device," and "contrivance" to be unmistakable evidence that Congress intended scienter as the requisite element for triggering liability under rule 10b-5.²³ Indeed, the Court found the language to be such a clear manifestation of congressional intent that it suggested "further inquiry may be unnecessary."²⁴

16 SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963). See, e.g., H.R. REP. NO. 85, 73d Cong., 1st Sess. 1-5 (1933); *Securities Act: Hearing on S.875 before the Senate Committee on Banking and Currency*, 73d Cong., 1st Sess. 71 (1933).

Manuel Cohen, former Chairman of the SEC, has written: "The primary underlying concept of the proxy rule . . . is that of disclosure. While the proxy regulation contains procedural rules of one kind or another, these are designed to make effective the basic requirements and to permit freer communications among security holders." Cohen, *The SEC and Proxy Contests*, 20 FED. B.J. 91, 98 (1960). See generally Comment, *Proxy Solicitations: The Need for Expanded Disclosure Requirements*, 60 MARQ. L. REV. 1100 (1977).

17 *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (quoting H.R. REP. NO. 1383, 73d Cong., 2d Sess. 13 (1934). *Accord*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

18 15 U.S.C. § 78n(a) (1976). See note 1 *supra*.

19 Section 14(a) does no more than make it unlawful to violate such rules as the SEC may prescribe for the protection of investors. SEC rule 14a-9 is equally silent as to any culpability standard, merely establishing a qualitative standard for proxy materials.

20 Friedman & Hertz, *Developments in the '33 and '34 Acts: Disclosure and Reporting*, 9 INST. SEC. REG. 381-424 (1978); Note, *Development of Scienter Under 10b-5*, 9 INST. SEC. REG. 327-40 (1978).

21 425 U.S. 185 (1976).

22 *Id.* at 200.

23 *Id.* at 199.

24 *Id.* at 201. Nonetheless, the Court did proceed to examine the legislative history of the 1934 Act

Ultimately, the Court held that Congress intended to proscribe only willful conduct under rule 10b-5.

The Court's approach in *Ernst & Ernst* is important when construing section 14(a) because the 1933²⁵ and 1934 Acts are interrelated components of the federal regulatory scheme governing transactions in securities.²⁶ As the Court stated in *SEC v. National Securities, Inc.*,²⁷ "the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen"²⁸ Accordingly, just as the presence of such terms as "manipulative," "device," and "contrivance" in section 10(b) was held in *Ernst & Ernst* to denote a scienter requirement, the absence of such terms in other Securities Act provisions has been held to indicate that Congress intended something less than a scienter requirement.

For example, in *Aaron v. SEC*²⁹ the Supreme Court set forth the culpability requirements of section 17(a) of the 1933 Act.³⁰ Focusing on the operative language chosen by Congress, the Court distinguished each subparagraph of 17(a), holding that Congress clearly intended a scienter requirement under subparagraph (1), which contained such terms as "employ," "device," "scheme," and "defraud," but not under subparagraphs (2) or (3), which contained no such language.³¹ The Court refused to adopt a uniform culpability requirement for the three subparagraphs, holding that "the language of the subsection is simply not amenable to such an interpretation."³²

A number of courts interpreting section 14(a) have also viewed the language of the provision as the most accurate expression of congressional intent. Here, too, a comparison of the language of 10(b) with that of 14(a) has led courts to conclude that 14(a) does not require scienter. Thus, in *Gerstle v. Gamble-Skogmo, Inc.*,³³ the Second Circuit observed that the SEC's rulemaking authority under section 10(b) extended only to regulation of "manipulative or deceptive devices," while its authority under section 14(a) was "broad, extending to all proxy regulation 'necessary or appropriate in the public interest or for the protection of investors' and not limited by words connoting fraud or deception."³⁴ The court

and concluded that the history supported its conclusion that section 10(b), and the scope of authority granted to the SEC thereunder, did not extend to liability for negligent conduct alone. *Id.* at 214. *See also* *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1979).

25 15 U.S.C. §§ 77a-77bbbb.

26 *See* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-30 (1975).

27 393 U.S. 453 (1969).

28 *Id.* at 466.

29 446 U.S. 680 (1980).

30 15 U.S.C. § 77a (a) (1976). Section 17(a) provides:

(a) It shall be unlawful for any person in the offer or sale of any securities . . .

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

31 446 U.S. at 696-97.

32 446 U.S. at 697. Both litigants urged the Court to adopt a uniform culpability requirement for the three subparagraphs of 17(a), which the Court declined to do. The Court also cited previous cases in which it had emphasized the distinctions among the three subparagraphs of 17(a). *See* *United States v. Naftalin*, 441 U.S. 768, 774 (1979).

33 298 F. Supp. 66 (E.D.N.Y. 1969), *modified and aff'd*, 478 F.2d 1281, 1299 (2d Cir. 1973).

34 478 F.2d at 1299.

concluded that scienter was unnecessary for liability under rule 14a-9.³⁵ Similarly, the Third Circuit's holding in *Gould v. American-Hawaiian Steamship Co.*,³⁶ that negligence is the appropriate standard under 14(a), is also based on the language of that section. Indeed, the court in *Gould* observed that all the courts which had discussed the question favored applying a negligence standard for liability under 14(a).³⁷ Such a standard has met with approval by commentators.³⁸

Although none of the cases cited above dealt with the precise issue of liability of accountants, they illustrate that the Sixth Circuit's sweeping statement that Congress "contemplated that 14(a) would be applied only against the knowing or reckless wrongdoing of outsiders,"³⁹ is not in accord with the conclusions reached by other courts. Yet the court's conclusion is not as surprising as its failure to consider adequately the statutory language and reconcile 14(a)'s language with that of other sections. This failure is especially puzzling in view of the court's apparent willingness to scrutinize the statutory language when construing section 14(e),⁴⁰ pertaining to tender offers. Observing that in 14(e) Congress uses such terms as "fraudulent," "deceptive," and "manipulative," the court stated: "This language indicates, in light of *Ernst & Ernst*, that 14(e) requires scienter. Although *Ernst & Ernst* was decided several years after the enactment of 14(e), we are bound by its holding that Congress intends scienter when it uses the above quoted language."⁴¹ It is paradoxical that the court found the presence of such language dispositive when construing 14(e), yet appeared unconcerned by its absence in 14(a).

Although the court did not look to the statutory language in determining that Congress intended section 14(a) to require proof of scienter, it did rely heavily upon the legislative history of 14(a). The portions of the floor debates and the Fletcher Report⁴² cited by the court concededly support the view that Congress, when it considered the proxy provisions, was primarily concerned with those who

35 The court's holding, however, was applicable only to inside corporate directors and was qualified by the court: "Although this does not mean that scienter should never be required in an action under rule 14a-9 . . . it would be inappropriate to require plaintiffs to prove it in the circumstances of this case." 478 F.2d at 1300. This dictum was noted by the court in *Adams*, 623 F.2d at 428.

36 356 F. Supp. 853 (D. Del. 1972), *vacated and remanded on other grounds*, 535 F.2d 761 (3d Cir. 1976).

37 535 F.2d 761, 777 (1976). See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. at 210 n.28 (observing that lower courts have held scienter to be unnecessary). For cases holding persons other than directors to be liable for negligence, see *Norte & Co. v. Huffines*, 304 F. Supp. 1096, 1098-99 (S.D.N.Y. 1968), *aff'd in pertinent part*, 416 F.2d 1189, 1192 (2d Cir. 1969), *cert. denied*, 397 U.S. 989 (1970) (financial consultants).

38 See Note, *Stringent Duty of Care on Board Nominees Under 14(a)*, 74 NW. U.L. REV. 468 (1979); Note, *Negligence Rather Than Scienter is the Test for Liability Under 14(a)*, 23 EMORY L.J. 567 (1974); Note, *Proper Standard of Fault for Directors Re: Proxy Solicitations*, 34 OHIO L.J. 670 (1973).

39 623 F.2d at 430.

40 *Id.* at 431. For the text of section 14(e), see note 14 *supra*.

41 *Id.* at 431. Although the court in *Adams*, citing no authorities, assumed that 14(e) requires scienter, at least one federal court has held that negligence alone is sufficient for liability under 14(e). See *SEC v. Wills*, 472 F. Supp. 1250 (D.D.C. 1978). For a discussion of 14(e) and congressional purpose, see Note, *A Negligence Standard for Material Misstatements and Omissions in Tender Offers Under 14(e) of the Securities Exchange Act of 1934*, 31 WASH. & LEE L. REV. 733-56 (1974).

42 623 F.2d at 429-30. The "Fletcher Report" is the common designation for the Senate Report on the 1934 Act. See S. REP. NO. 1455, 73d Cong., 2d Sess. 75, 77 (1934): "It is contemplated that the rules and regulations promulgated by the Commission will protect investors from promiscuous solicitation of their proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporation officials; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting facts." The court pointed to the words "promiscuous," "concealing," and "distorting" as evidence that Congress was primarily concerned with intentional misconduct.

solicited proxies with actual intent to deceive. However, the mere fact that Congress was concerned with intentional abuses of the solicitation process does not clearly establish that Congress was not also concerned with the possibility of negligent wrongdoing, particularly since the grant of authority to the SEC under 14(a) to oversee proxy solicitations was made in such broad terms.⁴³

The court's conclusion that Congress intended to impose a scienter requirement for 14(a) essentially derives from the observation that "nowhere, not in the committee reports nor in the House or Senate debates, does it appear that Congress desired to protect the investor against negligence of accountants. . . ."⁴⁴ This hardly resolves the question. For example, section 14(a) does not by its terms create an express private remedy for damages, and there is no indication "in the committee reports [or] in the House or Senate debates" that Congress ever contemplated such a remedy. Yet the existence of a private cause of action is well established.⁴⁵ The legislative history of section 14(a) does not, as the court holds, mandate a scienter requirement for imposition of liability. The history is simply silent on the issue and therefore inconclusive. Perhaps for this reason, the federal courts have not accorded the legislative history much deference in their search for the proper standard of culpability, viewing it as insufficient, without more, to settle the question.⁴⁶

The court in *Adams*, however, did not rest solely on its reading of congressional intent. It expressed the concern that to hold outside accountants liable to shareholders for negligence is to go too far. This concern reflects the long-standing reluctance of courts to extend accountants' liability "in an indeterminate amount for an indeterminate time to an indeterminate class."⁴⁷ It is not clear, however, that this concern should dominate cases involving accountants' preparation of proxy materials. Not only has concern for the untutored, ordinary investor risen in the last decade,⁴⁸ but the securities statutes have an avowed purpose of full disclosure and investor protection.⁴⁹ Numerous legal commentators have advocated an expansion of accountants' liability to users of financial statements,⁵⁰ and courts have begun to find liability in circumstances where it

43 See *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (1973).

44 623 F.2d at 430.

45 *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (creating private right of action, and exhorting courts "to be alert to provide such remedies as are necessary to make effective the congressional purpose"); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

46 See, e.g., *Gould v. American-Hawaiian Steamship Co.*, 356 F. Supp. 853, 860 (1972), *vacated and remanded on other grounds*, 535 F.2d 761 (3d Cir. 1976) ("The legislative history . . . provides no significant assistance in helping us to determine the applicable standard of culpability").

47 *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174, 174 N.E. 441, 445 (1931). On the liability of accountants to third parties, see generally Fiffis, *Current Problems of Accountants' Responsibilities to Third Parties*, 28 VAND. L. REV. 31 (1975); Gormley, *Accountants' Professional Liability—A Ten Year Review*, 29 BUS. LAW 1205 (1974).

48 See, e.g., Sonde, *The Responsibility of Professionals Under the Federal Securities Laws—Some Observations*, 68 NW U.L. REV. 1 (1973); Note, *Accountants, Financial Disclosure, and Investors' Remedies*, 18 N.Y.L.F. 681 (1973).

49 See note 15 *supra*.

50 See, e.g., Bradley, *Auditors' Liability and the Need for Accounting Uniformity*, 30 LAW & CONTEMP. PROB. 898 (1965); Wyatt, *Auditors' Responsibilities*, 12 ST. LOUIS L.J. 331 (1968); Solomon, *Ultramares Revisited: A Modern Study of Accountants' Liability to the Public*, 18 DE PAUL L. REV. 56 (1968); Comment, *Accountants' Liabilities to Third parties Under Common Law and Federal Securities Law*, 9 B.C. IND & COM L. REV. 137 (1967). For articles on accountants' liability that do not accept its expansion as desirable, see Note, *Overaccountable Accountants?* 16 WM. & MARY L. REV. 71 (1974); Katsoris, *Accountants' Third Party Liability—How Far Do We Go?* 36 FORDHAM L. REV. 191 (1967).

would have been unthinkable in earlier decades.⁵¹ Such liability has had two purposes: improved disclosure of financial information to investors⁵² and restitution to investors injured by misleading financial statements.⁵³ The need for disclosure and restitution is particularly great in securities transactions since, as one court observed, false and misleading statements about securities "can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar."⁵⁴ And when misinformation causes loss, it little comforts a shareholder to know that he has been hurt by negligent mistake rather than by fraudulent design.

Moreover, liability under 14(a) for negligent misconduct does not subject accountants to potential liability to an unlimited class of plaintiffs. In *Adams*, the shareholders were a readily ascertainable group whose reliance on the proxy materials was foreseen by the defendant accounting firm, thus placing a natural limit upon those to whom the firm could be said to have owed a duty. Although the court was concerned about exposing the accounting firm in *Adams* to undue risk, the firm had charged 125 percent of its usual fee for services precisely because "SEC work does require a higher degree of risk."⁵⁵

In short, a court's concern about over-liability of accountants should be weighed against a federal statutory scheme seeking to protect shareholders from deceptive or inadequately prepared financial statements. When proxy materials are prepared and certified by accountants with the knowledge that specific shareholders will rely upon them, there is nothing unreasonable about imposing a duty of care and of full and fair disclosure.

As one of the latest cases considering the standard of culpability required by section 14(a), the Sixth Circuit's decision in *Adams* contains deficiencies which seriously diminish its precedential value. The court's failure to consider carefully the statutory language is difficult to reconcile with the many decisions which have found such reference essential, if not dispositive. Furthermore, the court relies excessively on the scant and equivocal legislative history of 14(a) as a guide to congressional intent. Finally, the court's interest in protecting outside accountants from excessive liability does not outweigh the countervailing interest of protecting shareholders from misleading proxy materials.

Although *Adams* establishes scienter as the culpability standard under 14(a) for accountants within the Sixth Circuit,⁵⁶ it provides little guidance to those in

51 See *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968) (suit brought under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k (1964)); *Fischer v. Kletz*, 266 F. Supp. 180 (S.D.N.Y. 1967) (public accountant's duty is not only to immediate client, but to all who may be expected to rely). The SEC's long held position has been best expressed in *Touche, Niven, Bailey & Smart*, 37 S.E.C. 629, 670 (1957); "The responsibility of a public accountant is not only to the client who pays his fee, but also to investors, creditors and others who may rely on the financial statements he certifies."

52 See note 49 *supra*.

53 See, e.g., Note, *Accountants' Liabilities for False and Misleading Financial Statements*, 67 COLUM. L. REV. 1437, 1468 (1967).

54 *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, *Howard v. United States*, 377 U.S. 953 (1964).

55 623 F.2d at 439.

56 The Sixth Circuit's holding might be reversed on one of three grounds. First, the Supreme Court could rule that the district court's factual determinations were not "clearly erroneous" and that the Sixth Circuit exceeded its authority on review when it reversed the finding of scienter and substituted its own finding that Peat, Marwick acted only negligently. See dissent by Judge Weick, 623 F.2d at 436-46 ("[M]ajority has usurped the fact finding functions of Judge Boldt.")

Second, the Court could hold that the Sixth Circuit erred in applying the term "scienter" too restrictively. In *Adams*, even if the original error in the proxy materials had occurred through negligence, Peat,

other circuits who are concerned with third-party liability in the preparation of proxy statements. The expansion of accountants' liability generally, and the willingness of other jurisdictions to interpret the reach of 14(a) more generously than the Sixth Circuit, suggest that *Adams* cannot be expected to ease the pressure on outside accountants to avoid professional negligence.

—*Brian G. Waliser*

Marwick became aware of the error several weeks before the merger vote occurred, transforming mere negligence into a knowing misrepresentation or scienter. *See* note 7 *supra*; 623 F.2d at 438-46 (Weick, J., dissenting).

Finally, the Court could reverse on the ground that liability under 14(a) may be predicated upon negligence.

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