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Recent Cases

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RECENT CASES

Constitutional Law—Criminal Procedure—Circuits Split over Application of *Stone v. Powell's* "Opportunity for Full and Fair Litigation"

I. INTRODUCTION

In *Stone v. Powell*[1] the Supreme Court held that when a state has provided an "opportunity for full and fair litigation" of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial.[2] The Court left open, however, the question of what "opportunity for full and fair litigation" means,[3] and recently two courts gave conflicting answers to that question. The Second Circuit in *Gates v. Henderson*[4] concluded that a federal court should apply the Supreme Court's *Townsend v. Sain*[5] test; thus under the Second Circuit's view unless a petitioner intentionally waives an opportunity to raise his fourth amendment right, a state court must decide his constitutional claim on the merits. The Fifth Circuit in *O'Berry v. Wainwright,*[6] on the other hand, held that an "opportunity for full and fair litigation" is provided even though a state court never decides a petitioner's constitutional question because the petitioner has failed to comply with a state procedural requirement. Analysis of these cases requires a brief study of the history of habeas corpus and a careful examination of three recent United States Supreme Court cases.

II. LEGAL BACKGROUND

Although Congress has made little change in the habeas corpus

1. 96 S. Ct. 3037 (1976).

2. *Id.* at 3045- 46.

3. The only guidance the Court provided was to cite Townsend v. Sain, 372 U.S. 293 (1963), in footnote 36 to be read after the words, "where the state has provided for full and fair litigation of a Fourth Amendment claim . . . ." 96 S. Ct. at 3052.

4. No. 76-2065 (2d Cir. Jan. 12, 1977).

5. Townsend v. Sain, 372 U.S. 293 (1963), provides a test by which federal habeas courts determine whether state courts have granted a petitioner a full and fair evidentiary hearing; *see* notes 19-20 *infra* and accompanying text.

6. 546 F.2d 1204 (5th Cir. Feb. 11, 1977).

statutes[7] since 1867, when federal habeas corpus relief was extended to state prisoners,[8] Supreme Court interpretations of both the habeas corpus statutes and the United States Constitution have expanded the scope of the writ significantly. In the early twentieth century, federal habeas corpus evolved from a limited inquiry into whether the convicting state court had jurisdiction[9] to a careful determination of whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims.[10] This expansionary trend continued in 1953 with *Brown v. Allen,*[11] in which a state prisoner applied for federal habeas corpus relief claiming that the state trial court erred in failing to quash his indictment because racial discrimination had been involved in the selection of grand jurors and a coerced confession had been admitted against him. Despite apparently adequate state litigation of these issues, the Supreme Court held that petitioner Brown was entitled to federal habeas consideration of his constitutional claims. *Daniels v. Allen,*[12] a companion case of *Brown,* did retain one major barrier to habeas relief for state prisoners by holding that reconsideration of constitutional issues by federal courts was improper if the state court's decision rested on the defendant's failure to comply with legitimate state procedural requirements.[13]

In 1963 the expansion of habeas corpus jurisdiction culminated with *Fay v. Noia,*[14] in which the Supreme Court overruled *Daniels. Fay* held that federal habeas review was not barred by procedural defaults incurred by a petitioner during state court proceedings and thus cleared the last obstacle to habeas relief. The *Fay* Court conceded that a district court judge had discretion to deny relief to an applicant who had "deliberately by-passed the orderly procedure of the state courts,"[15] but the opinion stressed that a knowing and intelligent waiver was required[16] and that legal fictions would not be

7. The only significant amendment occurred in 1966 when Congress substantially codified and limited the holding of *Townsend v. Sain; see* 28 U.S.C. § 2254(d) (1970).

8. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

9. *In re* Moran, 203 U.S. 96 (1906).

10. Frank v. Mangnm, 237 U.S. 309 (1915).

11. 344 U.S. 443 (1953).

12. *Id.*

13. *See* Henry v. Mississippi, 379 U.S. 443 (1965), under which a state procedural default may prevent direct appellate review by the United States Supreme Court of a constitutional claim decided by a state court of last resort.

14. 372 U.S. 391 (1963).

15. *Id.*

16. The Court stated that "an intentional relinquishment or abandonment of a known right or privilege," the definition of waiver stated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), would furnish the controlling standard. 372 U.S. at 439.

tolerated.[17] *Townsend v. Sain,*[18] also decided in 1963, provided a standard for the review of state court findings required by *Fay*. *Townsend* held that if a defendant had not made a knowing waiver under *Fay,* a federal habeas court must hold an evidentiary hearing unless the state court reliably found the relevant facts after a full hearing. The Court listed six situations[19] that indicated lack of full and fair state court litigation and stated that if a federal court found any one of the six in a particular case, it must grant an evidentiary hearing.[20] After *Fay* and *Townsend* habeas corpus jurisdiction remained stable for over ten years.[21]

This stability was shaken by three 1976 Supreme Court decisions. The first was *Estelle v. Williams,*[22] in which the defendant was tried, while wearing jail clothes, and convicted of assault. The Supreme Court agreed with the lower federal courts that forcing a defendant to be tried in jail clothes would violate the fourteenth amendment. Yet the Court held that the defendant in *Estelle* had the burden of informing the state court that he wished to be tried in civilian clothes and that his failure to object was sufficient to negate the presence of the compulsion necessary to establish a constitutional violation.[23] Dissenting, Justices Brennan and Marshall[24] noted that, without reason, the majority departed from the *Fay v.*

17. 372 U.S. at 439. In *Henry v. Mississippi* the Supreme Court reiterated that procedural defaults by a defendant in state courts would not preclude habeas corpus relief unless the petitioner had deliberately bypassed a state court opportunity to raise his constitutional claim.

18. 372 U.S. 293 (1963).

19. The six situations listed in *Townsend* are ones in which: (1) the state court did not resolve the merits of the factual dispute; (2) the record does not fairly support the state courts' factual determinations; (3) the state courts used an inadequate factfinding procedure; (4) the habeas petition alleges newly discovered evidence; (5) the state courts did not develop evidence crucial to the proper consideration of the constitutional claim—unless there was "inexcusable neglect" by the petitioner under *Fay v. Noia;* (6) it appears to the habeas court for any other reason that the trier of fact did not afford the petitioner a full and fair hearing. 372 U.S. at 313.

20. The fifth situation in the *Townsend* test incorporates the *Fay* waiver standard; *see* note 19 *supra.*

21. The holding of *Fay v. Noia* was approved explicitly by the Supreme Court as late as 1975 in Lefkowitz v. Newsome, 420 U.S. 283 (1975). The only significant expansionary case during this ten-year period after *Fay* and *Townsend* was Kaufman v. United States, 394 U.S. 217 (1969), which held that federal habeas relief was available to both state and federal prisoners to protect all constitutional rights related to the criminal trial process, including the right to have unconstitutionally obtained evidence excluded from trial.

22. 425 U.S. 501 (1976).

23. The Court stated, "[O]nce a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." 425 U.S. at 512.

24. *Id.* at 515.

Noia "deliberate by-pass" test by not basing its holding on a finding of waiver. In the second 1976 decision, *Francis v. Henderson,*[25] the question was whether a state prisoner who failed to make a timely challenge to the composition of the indicting grand jury could, after his conviction, bring that challenge in a federal habeas corpus proceeding. Basing its opinion on *Davis v. United States,*[26] which involved a federal prisoner, and "considerations of comity,"[27] the Court once more denied habeas relief. Justice Brennan, again dissenting,[28] pointed to the majority's rejection of the "deliberate by-pass" standard of *Fay* and noted that the majority opinions in *Estelle* and *Francis* did not distinguish the constitutional rights involved in those cases from other constitutional rights, such as failure to challenge properly the introduction of unconstitutionally seized evidence. Thus, Brennan argued, *Estelle* and *Francis* could easily be extended to other constitutional issues, resulting in the complete demise of *Fay*. In *Stone v. Powell,*[29] the third 1976 decision, the Supreme Court made a limited but distinct break with precedent.[30] *Stone* held that a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial as long as the state has provided an "opportunity for full and fair litigation" of his fourth amendment claim.[31] The Court, as noted previously, did not define what kind of "opportunity" is required, and again it neglected to indicate what impact *Stone, Estelle,* and *Francis* would have on habeas corpus precedents such as *Fay v. Noia.*

III. THE INSTANT DECISIONS

Gates v. Henderson involved a petitioner who was convicted of murder in state court on the basis of fingerprint evidence that he claimed was taken in an illegal search and seizure.[32] At trial defense

25. 425 U.S. 536 (1976). *Francis v. Henderson* and *Estelle v. Williams* were decided on the same day.

26. 411 U.S. 233 (1973). *Davis* held that habeas relief will be denied a federal prisoner under 28 U.S.C. § 2255 (1970) if he fails to make a timely challenge to the composition of a federal grand jury.

27. 425 U.S. at 539.

28. *Id.* at 542.

29. 96 S. Ct. 3037 (1976). *Stone v. Powell* was decided approximately two months after *Estelle* and *Francis.*

30. *Stone* obviously overruled *Kaufman v. United States; see* note 22 *supra.*

31. 96 S. Ct. at 3045-46. The Court was concerned that federal redetermination of search and seizure claims after full litigation by state courts would be an inefficient use of judicial resources.

32. Petitioner's estranged wife died in her apartment of multiple stab wounds. Forty-

counsel objected to the introduction of the evidence on the ambiguous ground that it violated petitioner's constitutional rights. Without ascertaining whether the objection was based on fourth amendment[33] or fifth amendment[34] grounds and without making formal findings concerning probable cause, the trial judge admitted the evidence. After the district court denied habeas corpus relief,[35] the Second Circuit reversed, holding that *Stone v. Powell* did not foreclose federal habeas review since petitioner had not been granted the requisite "opportunity for full and fair litigation." *Stone* indicated that *Townsend v. Sain* is relevant in determining whether an adequate "opportunity" has been provided,[36] and the court inferred that the six situations listed in *Townsend* in which a state habeas prisoner is entitled to an evidentiary hearing are also situations in which an "opportunity for full and fair litigation" of a search and seizure claim has been denied. The Second Circuit found that two of the situations listed in *Townsend* were present in the instant case: first, the state courts had not made adequate factual or legal findings to support their conclusions;[37] secondly, the trial court had failed to develop evidence crucial to the determination of petitioner's constitutional claim, and this failure was not due to a waiver under *Fay v. Noia.*[38] Thus the court concluded that, under the *Townsend* test, petitioner had not received an "opportunity for full and fair litigation." Finally, the court observed that even if petitioner's objection was inadequate for state law purposes, it did

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five minutes after she was found, law enforcement officials stopped petitioner's car ten miles from the murder scene for failure to dim his headlights. For reasons that were never revealed at trial, petitioner was charged with first degree murder. His conviction occurred largely because his fingerprints, taken at the police station, matched prints found on the windowsill of the victim's apartment.

33. Petitioner's objection could have been based on fourth amendment grounds that his fingerprints were obtained after an arrest made without probable cause. If so, Davis v. Mississippi, 394 U.S. 721, 723-24 (1969), holds that such an objection is clearly valid. To rule on such an objection, the trial judge would have needed to determine whether probable cause existed for petitioner's arrest. (*Davis* was decided after petitioner's conviction.)

34. If petitioner objected on the ground that his being compelled to be fingerprinted was a violation of the fifth amendment, Schmerber v. California, 384 U.S. 757, 764 (1966), would invalidate that objection. (*Schmerber* was decided six months before appellant's trial.)

35. The appellant sought to raise his fourth amendment claim in a federal habeas proceeding, but the federal district court denied relief, holding that appellant's objection was not specific enough to raise the issue of "fruit of an unlawful search." No. 73-3865, slip op. at 7 (S.D.N.Y. May 27, 1976).

36. *See* 96 S. Ct. at 3052 n.36.

37. The trial judge had overruled petitioner's objection without stating factual or legal grounds, and none of the reviewing courts ever mentioned the objection.

38. The *Townsend* test uses the term "inexcusable neglect," which the courts have interpreted to be a *Fay v. Noia* waiver or bypass; *see* note 20 *supra*. *Fay v. Noia* did not contain the language "inexcusable neglect."

not follow that this inadequacy would give the district court grounds to deny habeas relief since, under *Fay v. Noia,* such power exists only if the procedural default amounted to a deliberate bypass of state remedies. In the instant case petitioner had not deliberately bypassed state procedures nor waived his fourth amendment right under *Fay.* In conclusion the court stated that neither *Estelle v. Williams* nor *Francis v. Henderson* purports to affect *Fay v. Noia* and distinguished petitioner's lack of proper objection from the procedural defaults involved in those cases.[39]

The petitioner in *O'Berry v. Wainwright* was convicted of rape on the basis of evidence allegedly obtained in violation of the fourth amendment.[40] In subsequent state court proceedings, petitioner raised his search and seizure claim for the first time, but the state court ruled that petitioner had not preserved the fourth amendment claim for review because he had failed to object properly at trial.[41] Thus no state court decided the constitutional claim. The federal district court[42] granted petitioner's request for habeas corpus relief, but the Fifth Circuit reversed, holding that *Stone's* "opportunity for full and fair litigation" had been satisfied when the state court directly confronted petitioner's fourth amendment claim but chose to resolve the case on an adequate and independent state ground.[43] The court found that the state procedural rule requiring timely objection to evidentiary rulings serves a legitimate state interest and thus is an adequate and independent state ground that, under

39. One judge dissented, characterizing the majority opinion as "an artful effort to circumvent *Stone.*" He noted that the result of the decision was to release a convicted murderer.

40. After petitioner was charged with two counts of rape, his car was towed to a police storage area. The car was inspected and checked for fingerprints without a search warrant to authorize the inspection. The inspecting detective determined that the hackseat area recently had been "wiped down clean." The testimony of this detective that the backseat of petitioner's car had been wiped was the only evidence that corroborated the prosecutrix's testimony that petitioner was the man who had raped her. 546 F.2d 1204, 1206-07 (1977).

41. *Id.* at 1209. Although petitioner did not appeal his conviction, he filed three separate motions to vacate judgment and the sentence under FLA. CRIM. P. R. 1.850, the Florida counterpart of 28 U.S.C. § 2255 (1970). Each motion was denied without an evidentiary hearing. Petitioner then filed a state habeas corpus petition alleging, among other claims, that his fourth amendment rights had been violated. The court denied the petition since petitioner had not raised his fourth amendment objection at trial. 546 F.2d at 1207-09.

42. The petitioner filed a federal habeas corpus petition in the District Court for the Southern District of Florida, which held that petitioner's fourth amendment right to be free from warrantless searches and seizures had been violated. The court based its holding on Coolidge v. New Hampshire, 403 U.S. 443 (1971). 546 F.2d at 1209.

43. The court added the words "at least where that state ground does not unduly burden federal rights." 546 F.2d at 1216. The court found that the state procedural requirement involved in *O'Berry* did not unduly burden or interfere with federal rights.

Henry v. Mississippi, precludes federal review. The court conceded that support exists in *Stone v. Powell* for using the *Townsend* test to define "opportunity for full and fair litigation" but refused to adopt that test since it was intended to be used to determine whether a petitioner had been granted a full and fair evidentiary hearing. The Fifth Circuit found, however, that the only issues in dispute before it were legal, not factual.[44]

A vigorous dissent in *O'Berry* pointed out that *Fay v. Noia* held state judgments resting on independent state procedural grounds to be reviewable in federal habeas proceedings unless the petitioner has deliberately bypassed his right to raise a federal constitutional claim in state court.[45] The dissent stated that the majority's decision directly confiicted with *Fay's* deliberate bypass test, even though *Stone v. Powell* did not compel such a confiict, and would read *Stone's* "opportunity" consistently with *Fay* so that noncompliance with a state procedural rule would preclude habeas consideration of a fourth amendment claim by federal courts only if that noncompliance was the product of a knowing decision by the defendant and his counsel.[46] Since it relied so strongly on *Fay v. Noia,* the dissent made a brief study of *Francis v. Henderson* and mentioned *Estelle v. Williams,* concluding that neither overrules *Fay.*[47] The dissent noted the irony of the majority's reliance on *Henry v. Mississippi* since, after the direct appeal to the Supreme Court, petitioner Henry was released in a habeas corpus proceeding even though he had failed to meet a state procedural rule by failing to raise his fourth amendment claim in a timely fashion.[48] Furthermore, the dissent pointed out that the Supreme Court specifically stated in *Henry* that a dismissal on adequate and independent state grounds would not preclude habeas relief unless the petitioner had deliber-

44. 546 F.2d at 1218. In determining that *Townsend* was not the proper test to use, the court looked to four points in *Stone* to reach its conclusion: (1) The court inferred from *Stone* that when facts are not in dispute, "full and fair litigation" is satisfied even if only one state court considers the fourth amendment claim. (2) The court noted that only an "opportunity" is required by *Stone;* thus if petitioner deliberately bypassed state procedures for making his constitutional ohjection known, habeas relief may be denied. (The court noted in note 14 that *Fay v. Noia* has not been overruled.) (3) The court stated that *Stone* is based on the Supreme Court's determination that the cost of the exclusionary rule outweighs its benefits. (4) The court understood *Stone* to imply that state courts are as competent as federal courts in protecting federal rights. The court then applied these four considerations to the instant case and summarily concluded that the state had given petitioner the "opportunity" required by *Stone. Id.* at 1212-15.

45. *Id.* at 1219.

46. *Id.* at 1220-21.

47. *Id.* at 1223.

48. *Id.* at 1222.

ately bypassed his opportunity to raise the issue in state court. The dissent noted that *Stone* was concerned with the cost of relitigating search and seizure questions already decided by state courts, but that in the instant case the petitioner never had his claim decided. Since under these facts there was no "opportunity for full and fair litigation," the dissent concluded that *Stone* should not preclude relief.[49]

IV. COMMENT

The instant cases are the first attempts by federal appellate courts to define "opportunity for full and fair litigation" for purposes of applying *Stone v. Powell.*[50] The Second Circuit's adoption in *Gates v. Henderson* of the *Townsend v. Sain* test has much to commend it. The factors listed in *Townsend* seem especially appropriate in the habeas context since, if *Stone v. Powell* does not apply to bar habeas review in a particular case, the federal court must consider these same factors in deciding whether it must hold an evidentiary hearing.[51] The test is familiar to the federal courts because they have applied it since 1963, and the state courts also are familiar with its interpretation and therefore will be able to judge accurately what procedures will pass muster. But most important, use of the *Townsend* standard is supported by *Stone* itself. In addition to its footnote reference to *Townsend v. Sain,* the *Stone* opinion stressed that federal review of search and seizure issues already considered by a state court was inefficient and was not required by the exclusionary rule implicit in the fourth amendment. Yet the

49. *Id.* at 1220.

50. The following cases have been decided on the basis of *Stone v. Powell:* Holmberg v. Parratt, No. 76-1609 (8th Cir. Feb. 1, 1977); Chavez v. Rodriguez, 540 F.2d 500 (10th Cir. 1976); Caver v. Alabama, 537 F.2d 1333 (5th Cir. 1976); United States *ex rel* Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976); Roundtree v. Riddle, 417 F. Supp. 1274 (W.D. Va. 1976). Only *Petillo* addressed the issue of full and fair litigation. That court held that petitioner had been denied an opportunity for full and fair litigation of his fourth amendment claim due to an unusual New Jersey procedural rule.

51. 28 U.S.C. § 2254(d) (1970) provides that the state court factual findings "shall be presumed correct" unless one of the *Townsend* factors is present. If the federal habeas court determines that the state court did not meet the *Townsend* test for a full and fair evidentiary hearing, the federal court must provide a hearing. If the *Townsend* test is used at both tiers of the habeas court's inquiry, the district court can apply the test once to determine whether *Stone* precludes relief. If the court finds an absence of full and fair state litigation, it does not have to apply a second test to see if an evidentiary hearing must be held. (It should be noted that the fifth situation listed in the *Townsend* test incorporates the *Fay v. Noia* waiver test. Thus if the *Townsend* test is used in conjunction with *Stone,* an "opportunity for full and fair litigation" would be provided (1) if the petitioner makes a knowing waiver under *Fay* or (2) if his claim is fully litigated under the remainder of the *Townsend* test.)

Stone Court did not indicate that anything less than direct judicial decision of the constitutional issue would preclude habeas review, for in such a situation the federal courts would be making an initial consideration rather than performing a wasteful review.

On the other hand, *O'Berry v. Wainwright's* definition of "opportunity" has less support in *Stone* than does the *Townsend* test and directly conflicts with *Fay*. The Fifth Circuit extends *Stone* much farther than necessary in holding that the *Stone* "opportunity" may come and go without a defendant's knowledge and without any court deciding whether a defendant is being held in violation of the fourth amendment. Multiple determinations of the same constitutional question, a *Stone* concern, is simply not present in a situation like that in *O'Berry*. Moreover, assuming *Fay* is still good law, as the Fifth Circuit concedes, the court obviously is mistaken in relying on *Henry v. Mississippi* since *Fay* makes the *Henry* rule inapplicable to habeas corpus review. This misplaced reliance is at the very core of the court's holding, making its conclusion concerning what is required by *Stone's* "opportunity" difficult to accept.

In addition to providing conflicting definitions of *Stone's* "opportunity for full and fair litigation," the instant cases serve to demonstrate that the guidance provided by the Supreme Court in its recent habeas corpus decisions has been inadequate. The three recently decided habeas cases have reduced substantially habeas corpus jurisdiction of federal courts. These decisions fail, however, to expressly overrule prior cases, such as *Fay*, or set new comprehensive guidelines; thus they present lower federal courts with inconsistent precedent to use in deciding current cases. The instant cases pointedly reveal the current conflict over the viability of *Fay v. Noia,* which is at the center of confusion in the habeas corpus area. The problem is obvious in *O'Berry v. Wainwright,* for that decision directly contradicts the *Fay v. Noia* deliberate bypass test although the court explicitly recoguizes that *Estelle v. Henderson* did not overrule *Fay*. Such a radical inconsistency is especially distressing in light of the well-reasoned dissent highlighting the majority's error.

The uncertain viability of *Fay* also permeates the Second Circuit's adoption of the *Townsend* test in *Gates v. Henderson,* although one must look much deeper to find the conflict. As previously discussed, the *Townsend* test seems appropriately adopted by the Second Circuit to define *Stone's* "opportunity for full and fair litigation," but the *Townsend* criteria for determining whether a full

and fair hearing has been held seems philosophically inconsistent with the Supreme Court's present restrictive attitude toward habeas jurisdiction. The *Townsend* test speaks of providing a federal hearing whenever state factual determinations are "not fairly supported by the record"[52] or whenever the state's factfinding procedure is "not adequate to afford a full and fair hearing."[53] Such a standard implicitly requires close federal scrutiny of state court decisions, but *Stone* leaves the impression that the burden of showing denial of an adequate opportunity for full and fair litigation rests on the petitioner.[54] More importantly, the *Townsend* test is linked inextricably to *Fay v. Noia,* which is currently in jeopardy in light of *Estelle* and *Francis.* As the Second Circuit recognized, the fifth factor in the *Townsend* test calls for a federal evidentiary hearing if evidence crucial to the constitutional claim was not developed by the state, although such a hearing is not required if the applicant waived, as defined by *Fay v. Noia,* his constitutional rights. In *Gates v. Henderson* the petitioner certainly did not knowingly waive his fourth amendment right under *Fay;* therefore, if *Fay* is still good law, the state court clearly failed the *Townsend* test, and the *Gates* court is correct in not applying *Stone v. Powell* to bar relief. But the search and seizure right in *Gates* is analogous to the due process rights involved in *Estelle v. Williams* and *Francis v. Henderson,* in which the defendants were denied habeas review because they had failed to object according to state procedural rules.[55] These cases certainly reject the deliberate bypass standard of *Fay* for two constitutional rights. If their principles extend to all constitutional rights, and thus overrule *Fay,* the *Townsend* test is changed drastically, and the Second Circuit decided *Gates* incorrectly.

V. CONCLUSION

The lack of guidance provided by *Stone* makes defining "opportunity for full and fair litigation" difficult, but with the viability of *Fay v. Noia* in question, the task is impossible. The deliberate bypass standard of *Fay* is at the core of both definitions of "opportunity for full and fair litigation" used in the instant cases:

52. 372 U.S. at 313.

53. *Id.*

54. *See* 96 S. Ct. at 3052 n.37.

55. The Supreme Court made no effort to distinguish the failure to challenge the composition of a grand jury or the wearing of jail clothes from other constitutional rights. Thus the failure to challenge the introduction of unconstitutionally seized evidence as required by state procedural rules seems vulnerable under these two cases.

the Fifth Circuit's definition depends on the demise of *Fay* while the Second Circuit's *Townsend* standard is based on and incorporates *Fay*. Thus it is apparent that until the Supreme Court provides an explicit definition of "opportunity for full and fair litigation" or sets new limits on or overrules *Fay v. Noia,* lower federal courts will be unable to ascertain whether *Stone v. Powell* should preclude habeas review in a particular case.[56]

JAMES H. LOKEY JR.

Military Law—The Role of the Military Judiciary—The United States Court of Military Appeals Strengthens Judicial Control of Courts-Martial and Expands Its Scope of Appellate Review.

I. INTRODUCTION

The Uniform Code of Military Justice[1] attempts to strike a delicate balance between traditional civilian concepts of an impartial, independent judicial system and the military's reliance on the court-martial as an effective method by which a commander maintains discipline. Two recent decisions by the United States Court of Military Appeals (COMA)[2] strengthen the authority of military trial judges and expand relief powers at the appellate level.[3] In *United States v. Ware*[4] COMA abrogated the "accession doctrine"

56. The instant opinion reveals another potential problem. Unless the Supreme Court reveals how far *Estelle* and *Francis* go in overruling *Fay v. Noia,* defendants might raise sixth amendment right to effective counsel issues since counsel will be unable to know which constitutional rights must be raised in accordance with state procedures in order to be preserved for habeas review.

1. 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ and Code].

2. COMA, composed of three civilian judges appointed by the President, is the court of last resort in the military system. *See* UCMJ art. 67(a), 10 U.S.C. § 867(a) (1970).

3. Of the three types of courts-martial authorized by the Code — summary, general, and special — summary courts-martial and many special courts-martial do not involve military trial judges or appellate review, and thus are not addressed specifically in this comment. Minor offenses may be tried by a summary court-martial, consisting of a single officer, or by a special court-martial board composed of at least three members without a judge presiding. Because these courts may impose sentences of only limited severity, cases tried before them do not reach COMA on appeal. The more serious offenses are tried before special courts-martial boards with a judge presiding, or before general courts-martial boards, which may impose sentences of sufficient severity to invoke appellate review. *See* UCMJ arts. 16-20, 10 U.S.C. §§ 816-820 (1970). *See also* note 35 *infra* and accompanying text.

4. 24 C.M.A. 102, 51 C.M.R. 275 (1976).

that had allowed the convening authority (usually the accused's commander)[5] to reverse the trial judge's dismissal of charges referred for court-martial. In *McPhail v. United States*[6] COMA strengthened its appellate role by asserting jurisdiction to issue extraordinary writs to insure that lower courts and officials purporting to act under the authority of the Code comply with applicable law. Together these cases illustrate the court's belief that enhancing the role of the military judiciary is essential to effectuate congressional intent that actions taken by military commanders pursuant to the Code achieve the proper objective of military discipline while protecting the rights of the accused.

II. The Accession Doctrine and the Military Judge

Article 62(a) of the Code authorizes the convening authority to return to a court for its "reconsideration" any dismissal of a charge that does not constitute a finding of not guilty.[7] The *Manual for Courts-Martial,* the authoritative procedural implementation of the Code,[8] interprets "reconsideration" to require that the trial judge "accede" to the convening authority's disagreement on points of law (as opposed to findings of fact) and proceed with the trial.[9] This

5. Unlike most civilian criminal courts that are permanently established with continuing jurisdiction, courts-martial are ad hoc tribunals assembled by the convening authority and empowered to hear individual cases. The Code authorizes commanders at various echelons to act as convening authorities. *See* UCMJ arts. 22-24, 10 U.S.C. §§ 822-824 (1970).

In their role as convening authorities, military commanders supervise many functions in the course of court-martial proceedings. After investigating suspected violations of military law reported to him by subordinates, the convening authority decides whether criminal prosecution is warranted and, with the aid of his staff judge advocate, prepares the charges for referral to the court. UCMJ arts. 30, 32-35, 10 U.S.C. §§ 830, 832-835 (1970). Other duties incident to convening a court-martial include appointing the members of the court-martial board who will serve as the jury, and insuring the presence of counsel. UCMJ arts. 25, 27, 10 U.S.C. §§ 825, 827 (1970). For a discussion of the convening authority's post-trial powers, see note 35 *infra*.

6. 24 C.M.A. 304, 52 C.M.R. 15 (1976).

7. UCMJ art. 62(a), 10 U.S.C. § 862(a) (1970).

8. UCMJ art. 36, 10 U.S.C. § 836 (1970), authorizes the President to prescribe rules and regulations for conducting courts-martial consistent with the Code. President Nixon issued the present edition of the *Manual* in 1969 and President Ford amended it in 1975. Exec. Order No. 11,476, 3 C.F.R. 132 (1966-1970 Compilation), *amended by* Exec. Order No. 11,835, 3A C.F.R. 113 (1975).

9. Manual for Courts-Martial ¶ 67(f) (rev. ed. 1969) [hereinafter cited as Manual] provides in part: "To the extent that the matter in disagreement relates solely to a question of law, . . . the military judge . . . will accede to the view of the convening authority. If the matter relates to issues of fact, . . . the military judge . . . will exercise his . . . discretion in reconsidering the motion." As an example of a matter relating to a question of law, the *Manual* cites a court's ruling that the charges do not allege an offense cognizable by a court-martial. The *Manual* further suggests that scienter would be an issue of fact. *Id.*

practice of acquiescence to the convening authority's opinion illustrates a vestige of the control over military justice fomerly exercised by the commander. Historically, command control of courts-martial was recognized as a necessary adjunct of the commander's responsibility to maintain discipline, and his personal dominance was both expected and accepted.[10] In sharp contrast to the convening authority's traditional control, military judicial officers have possessed only secondary authority in the conduct of courts-martial.[11] Although the Code, enacted in 1950, restrained capricious abuse by the commander[12] and vested the judicial officer with some supervisory control over the court-martial board and trial proceedings,[13] the continuing spectre of unlawful command influence[14] persuaded Congress to recognize the desirability of firm judicial control of court-martial proceedings.[15] By amendments to the Code in the Military

10. *See generally* Schiesser & Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice,* 7 TEXAS TECH. L. REV. 559, 559-63 (1976); West, *A History of Command Influence on the Military Judicial System,* 18 U.C.L.A. L. REV. 1, 1-20 (1970).

11. Prior to 1920 there was no requirement that any officer exercising a judicial function be included in courts-martial boards. Statutory reforms in military justice following World War I provided tbat a "law member" he assigned to every general court-martial, but this official had little judicial authority. Stevenson, *The Inherent Authority of the Military Judge,* 17 A.F.L. REV. 1, 2-3 (Summer 1975).

12. The debates over enactment of the Code centered on the proper role of the commanding officer in judicial processes. Interests in the importance of discipline and the necessity of command control in military matters competed with fears that military commanders would tend to discount the importance of guaranteeing the accused a fair and impartial trial. *See* Morgan, *The Background of the Uniform Code of Military Justice,* 6 VAND. L. REV. 169, 173-74, 184 (1953). The resulting compromise retained command "control" by investing the commander with clearly defined responsibilities and powers in the administration of military criminal law. *See* note 5 *supra. See also* Priest v. Kocb, 19 C.M.A. 293, 295-96, 41 C.M.R. 293, 295-96 (1970). On the other band, specific safeguards concerning pretrial restraint, compulsory self-incrimination, pretrial investigations, trial procedures, and post-conviction review were provided to eliminate the use of courts-martial as mere disciplinary boards. *See* Ward, *UCMJ - Does It Work?* 6 VAND. L. REV. 186, 194-209 (1953).

13. *See* Act of May 5, 1950, ch. 169, § 1 (arts. 26 & 51), 64 Stat. 117, 124. Although the Code abolisbed the legal officer's status as a voting memher of the hoard, and changed his title to "law officer," his transformation from juror to judge was incomplete. Certain of his rulings were still subject to the objections of court members, and the president of the court, the highest ranking officer on the hoard, was still considered the presiding officer. Stevenson, *supra* note 11, at 4-5.

14. Unlawful "command infiuence" generally refers to those actions by a commanding officer tbat tbreaten the impartiality of the trial, such as attempting to influence tbe military jury to return a guilty verdict. *See generally* Schiesser & Benson, *supra* note 10, at 564; Wacker, *The Unreviewable Courts-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals,* 10 HARV. C.R.-C.L. L. REV. 33, 36 n.17 (1975); West, *supra* note 10, at 1,2. Unlawful command infiuence was proscribed expressly by article 37 of the Code. *See* UCMJ art. 37, 10 U.S.C. § 837 (1970).

15. *See* S. REP. No. 1601, 90th Cong., 2d Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 4501, 4504.

Justice Act of 1968,[16] Congress established an independent military judiciary composed of trial judges specifically authorized to preside over courts-martial with functions and powers similar to those of federal judges.[17] Although Congress attempted to vest in military judges the complete responsibility for the impartial adjudication of criminal liability in courts-martial, it nevertheless failed to amend article 62(a) or to address the continued validity of the accession doctrine.

Despite the increased authority of the military trial judiciary effected by the 1968 amendments and by case history,[18] COMA consistently upheld the convening authority's purported power under article 62(a) to reverse a dismissal of charges by the judge. When the defendant in *Priest v. Koch*[19] argued that the accession doctrine exceeded the convening authority's power under article 62(a) to force "reconsideration" of a court's ruling, COMA held that denying the reversal power of the convening authority would create "an impasse between an unyielding trial court and a persistent convening authority."[20] The defendant in *United States v. Frazier*[21] contended that the convening authority's reversal power extended solely to questions of law[22] and that a judge's dismissal after an evidentiary hearing on speedy trial amounted to a mixed question of law and fact. COMA agreed that the convening authority could not make new findings of fact based on the evidence, but nevertheless held that the convening authority could determine either that

16. Pub. L. No. 90-632, 82 Stat. 1335 (1968) (amending 10 U.S.C. §§ 801-940 (1964)).

17. The term "military judge" was substituted for "law officer," and the military judge was empowered specifically to preside over courts-martial. The judge was authorized to try cases without board members at the request of the accused, and to conduct out-of-court hearings to consider motions. The amendments also stressed the finality of the judge's rulings on questions of law and interlocutory matters arising during the course of the trial. In addition, military trial judges assigned to general courts-martial became responsible only to the Judge Advocate General. UCMJ arts. 16, 26(c), 39, 10 U.S.C. §§ 816, 826(c), 839 (1970). *See also* Stevenson, *supra* note 11, at 5-6.

18. Many of COMA's early decisions expressed concern for the independence of the military judge or law officer. *See, e.g.*, United States v. Knudson, 4 C.M.A. 587, 16 C.M.R. 161 (1954) (improper for convening authority to overrule a law officer's grant of continuance). *See generally* 27 JAG J. 272, 282-83 (1973); 59 MIL. L. REV. 215, 222-27 (1973).

19. 19 C.M.A. 293, 41 C.M.R. 293 (1970).

20. *Id.* at 298, 41 C.M.R. at 298. The court relied upon its earlier decision in United States v. Boehm, 17 C.M.A. 530, 38 C.M.R. 328 (1968), which held that convening authorities could reverse dismissals granted by special courts-martial with law officers present. Although article 62(a) does not distinguish courts-martial presided over by judges and courts-martial consisting of only board members, the defendant in *Priest* argued unsuccessfully that the Military Justice Act's enhancement of military judges required reconsideration of *Boehm*. 19 C.M.A. at 296, 41 C.M.R. at 296. *See* note 3 *supra*.

21. 21 C.M.A. 444, 45 C.M.R. 218 (1972).

22. *See* note 9 *supra* and accompanying text.

the facts established by the judge were not supported by the evidence, or that the facts supported by the evidence did not justify the dismissal as a matter of law.[23] Thus the *Frazier* decision minimized the importance of the *Manual's* law/fact distinction and strengthened the power of the convening authority to countermand judicial determinations.

COMA recently abolished the accession doctrine in *United States v. Ware.*[24] The trial judge had dismissed the charges because of the government's failure to provide the accused speedy disposition of his case. The trial counsel[25] appealed the decision to the convening authority, who determined that the judge's findings of fact did not justify the ruling as a matter of law. The judge acceded to the views of the convening authority, and the trial proceeded, resulting in petitioner's conviction.[26] On appeal[27] COMA reversed the conviction, holding that article 62(a) allowed the convening authority to do no more than reconvene the court and submit the dismissal of the charges for reconsideration by the judge.[28] While finding the chief support for its ruling in the "clear and unambiguous language" of article 62(a), COMA noted that appeals by the government in federal criminal practice are disfavored and therefore refused to sanction reversals by the convening authority absent specific congressional approval.[29] Finally, COMA concluded that the accession doctrine was irreconcilable with the Military Justice Act's creation of the military judge and its institution of a trial judiciary independent of command control.[30]

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23. 21 C.M.A. at 446, 45 C.M.R. at 220.

24. 24 C.M.A. 102, 51 C.M.R. 275 (1976).

25. The prosecutor in a court-martial is called the trial counsel. *See* UCMJ art. 27, 10 U.S.C. § 827 (1970).

26. The judge's accession was not the result of his "reconsideration" of the evidence; in fact, the judge heard further evidence on a second motion that indicated an even stronger case for dismissal. 24 C.M.A. at 103, 51 C.M.R. at 276.

27. COMA had granted defendant's petition for review of the affirmation of his conviction by the Navy Court of Military Review. *See* UCMJ art. 67(b)(3), 10 U.S.C. § 867(b)(3) (1970); note 35 *infra.*

28. COMA held that the part of ¶67(f) of the *Manual* that allowed the convening authority to reverse judicial dismissals exceeded the authority of article 62(a) and thus was void. *See* notes 7-9 *supra.* COMA has the power to void provisions of the *Manual* that it finds irreconcilable with the Code. *See* United States v. Douglas, 24 C.M.A. 178, 51 C.M.R. 397 (1976); United States v. Johnpier, 12 C.M.A. 90, 30 C.M.R. 90 (1961).

29. Two weeks after the *Ware* decision, in United States v. Rowel, 24 C.M.A. 137, 51 C.M.R. 327 (1976), Chief Judge Fletcher recommended congressional action to provide the government with a means to appeal an adverse ruling of the trial judge. *Id.* at 138, 51 C.M.R. at 328.

30. The court asserted:

> Finally, we note that in the Military Justice Act of 1968, in amending the UCMJ, Congress caused a metamorphosis of the law officer into a military judge and created a

The *Ware* decision correctly concludes that the accession doctrine was an anamoly of military law after the establishment of a military judiciary in 1968. In addition the decision clearly eliminates the incongruity between established practice and statutory language in favor of the judge.[31] If the convening authority and the judge reach opposite conclusions of law, notions of impartial justice require preference of the judicial decision over the opinion of the convening authority who has initiated the prosecution.[32] Although the practical impact of *Ware* is minimal,[33] the decision indicates a full recognition by COMA of congressional attempts to establish strong judicial authority at the trial level and to eliminate the vestiges of command influence in court-martial proceedings.[34]

III. COMA'S APPELLATE REVIEW OF COURTS-MARTIAL

The Code generally limits COMA's appellate jurisdiction to cases in which the sentence imposed directs a punitive discharge or

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trial judiciary independent of the line command. It appears to us to be inherently inconsistent with the action of Congress in creating an independent judicial structure in the military, to strain the clear meaning of Article 62(a) to the point of permitting the *lay* convening authority to *reverse* a ruling of *law* by the trial *judge*. We decline to do so.

24 C.M.A. at 105-06, 51 C.M.R. at 278-79 (original emphasis) (footnotes omitted). COMA's emphasis on *lay* personnel reversing judicial decisions perhaps was unduly harsh since commanders confer with legally-qualified staff judge advocates on all legal matters. *See* UCMJ arts. 6(b), 34(a), 10 U.S.C. §§ 806(b), 834(a) (1970). The clear intent of the court, however, is to prevent interference by members of the command staff, as well as intervention by any non-legal officer, during court-martial proceedings.

31. The language of the opinion addresses only the confrontation between the convening authority and the military judge, and does not mention the effect of its ruling on a dismissal by a court-martial board sitting without a judge. *See* note 3 *supra*.

32. *See* note 5 *supra*. The Code and the *Manual* provide procedures designed to insure that the commander convening the court-martial is not involved personally in the offense alleged, and is sufficiently remote from the accused to facilitate objectivity. *See* UCMJ arts. 22(b), 23(b), 10 U.S.C. §§ 822(b), 823(b) (1970); MANUAL, *supra* note 9, chap. VII. By convening the court and referring charges, however, the convening authority already has determined that the charges are correct in law and that the circumstances warrant court-martial action. Final appellate authority from an opposite decision by the judge, therefore, should not lie with the authority making the initial prosecutorial decision. *See* note 29 *supra*.

33. *See* 59 MIL. L. REV. 215, 230 (1973), which discusses the infrequent use of the accession doctrine.

34. Recent cases regarding procedural errors committed by the judge during courts-martial sessions indicate COMA's determination that the trial judiciary play the key role in military courtrooms. *See, e.g.*, United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976) (obligation of judge to prevent improper argument by trial counsel); United States v. McGee, 23 C.M.A. 591, 50 C.M.R. 856 (1975) (duty of judge to instruct the court members *sua sponte* on lesser included offenses suggested by the evidence). *See generally* Cooper, *The Military Judge: More Than a Mere Referee*, ARMY LAW. 1 (Aug. 1976). For a discussion of COMA's recognition of the judge's inherent powers concerning pretrial and interlocutory matters, see Stevenson, *supra* note 11, at 13-38.

confinement for at least one year.[35] Although the establishment of military appellate courts was considered to be one of the more revolutionary and controversial innovations effected by enactment of the Code in 1950,[36] the prerequisite of a jurisdictional sentence precluded judicial review upon the petition of the accused in the vast

35. The Code vests primary judicial appellate power in separate Courts of Military Review (CMR), composed of both military and civilian judges and established within each branch of the service. The Judge Advocate General (JAG) of each branch submits to the appropriate CMR the record of every court-martial that imposes a sentence extending to confinement for one year or punitive discharge/dismissal from the service. In addition the JAG must submit to a CMR all cases imposing the death penalty or affecting generals and admirals, although he may in his discretion submit any general court-martial, regardless of sentence, for review. *See* UCMJ arts. 66(a)-66(b), 69, 10 U.S.C. §§ 866(a)-866(b), 869 (1970). *See also* note 3 *supra*. Except for cases involving generals and admirals or the death penalty, further review may be had by COMA only if the JAG so directs, or if COMA grants the petitioner's request for further review under article 67(b)(3). *See generally* UCMJ art. 67(b), 10 U.S.C. § 867(b) (1970). Because COMA may review a case only after prior action by a CMR, the jurisdictional requirement for review by a CMR likewise restricts the number of cases which may reach COMA.

Unlike the limitations on judicial appellate review, however, the Code provides for extensive nonjudicial review of each court-martial at the command level. After every trial the record is forwarded to the convening authority, who reviews the case with his staff judge advocate and approves only such findings and sentence as he finds correct in law and fact, and as he in his discretion determines should be approved. UCMJ arts. 60, 61, 64, 10 U.S.C. §§ 860, 861, 864 (1970). Because the convening authority may not disturb findings of acquittal nor increase sentences, this review is benign in nature. If the convening authority disapproves the findings or sentence, he may order a rehearing before a new court-martial board, but a more severe punishment may not be imposed, nor may the defendant be tried for an offense of which he was acquitted by the first court-martial. UCMJ art. 63, 10 U.S.C. § 863 (1970). The records of general courts-martial are then forwarded to the appropriate JAG for possible submission to a CMR. UCMJ arts. 65(a), 69, 10 U.S.C. §§ 865(a), 869 (1970). If the sentence of any court-martial as approved by the convening authority includes confinement for one year or punitive discharge, the record is further reviewed by a superior commander or sent directly to the JAG for submission to a CMR. All other special and summary courts-martial records are reviewed by a military lawyer. UCMJ arts. 65(b), 65(c), 10 U.S.C. §§ 865(b), 865(c) (1970). For a discussion of the three kinds of courts-martial, see note 3 *supra*.

36. During the 1949 congressional hearings, the UCMJ's primary objectives of protecting servicemen, promoting uniformity, and increasing public confidence in military justice coalesced into one overriding concern: the elimination of improper command influence, which long had plagued military justice. A civilian appellate court was seen as a key to controlling command influence. Wacker, *supra* note 14, at 36-37. Opposition to a judicial appellate scheme, especially one directed by civilian judges, came from military traditionalists who questioned the delay concomitant with judicial review. They argued that military effectiveness would be unduly restricted by non-military minds unable to appreciate fully the military problems involved in court-martial cases. Some spokesmen predicted that a civilian appellate court would not be able to cope with the tremendous number of cases tried annually. *See generally* Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921-1966,* 17 A.F.L. REV. 55, 66-68 (1975); Walker & Niebank, *The Court of Military Appeals—Its History, Organization and Operation,* 6 VAND. L. REV. 228, 228 (1953); Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future,* 55 MIL. L. REV. 39, 54-63 (1972).

majority of cases.[37] Despite this limited grant of jurisdiction, early decisions by COMA reflected its intention to act as the supreme court of the military judicial system in protecting the rights of military defendants,[38] and the court recognized the possibility of "extraordinary proceedings" outside the normal appellate scheme of the Code.[39] As an example of extraordinary proceedings traditionally available to federal appellate courts, COMA cited the All Writs Act, which authorizes all courts established by Congress to issue writs "necessary or appropriate in aid of their respective jurisdictions. . . ."[40] After several years of alluding to its incidental powers in dicta,[41] COMA unequivocally embraced the authority to issue writs in aid of its jurisdiction under the All Writs Act in *United States v. Frischholz.*[42] Although the petitioner had exhausted all ordinary appellate remedies provided by the Code,[43] COMA declared that it should not be precluded from reviewing his case since the fundamental question of military jurisdiction was at issue.[44]

Because the petitioner in *Frischholz* had been dismissed from the service as a result of his conviction, *Frischholz* established

37. In 1972 one commentator calculated that COMA had the opportunity to review only 6% of the courts-martial conducted under the Code. Willis, *supra* note 36, at 76 n.189.

38. United States v. Armbruster, 11 C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960); United States v. Clay, 1 C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951). *See also* United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411 (1963) (COMA has the responsibility to decide constitutional claims); United States v. Holloway, 10 C.M.A. 595, 28 C.M.R. 161 (1959) (COMA has inherent authority to note plain error on review); United States v. Bouie, 9 C.M.A. 228, 26 C.M.R. 8 (1958) (COMA may correct errors that result in a miscarriage of justice or undermine the public reputation of military judicial proceedings).

39. United States v. Best, 4 C.M.A. 581, 584-85, 16 C.M.R. 155, 158-59 (1954).

40. 28 U.S.C. § 1651(a) (1970). In federal practice, the All Writs Act has been utilized by courts to issue such common law writs as prohibition, mandamus, error *coram nobis,* habeas corpus, and certiorari. Jurisdiction conferred by the All Writs Act is ancillary to and dependent upon primary jurisdiction independently conferred by other statutes. *See* Rankin, *The All Writs Act and the Military Judicial System,* 53 MIL. L. REV. 103, 103, 105-14 (1971); Wacker, *supra* note 14, at 57-73.

41. *See In re* Taylor, 12 C.M.A. 427, 31 C.M.R. 13 (1961); United States v. Tavares, 10 C.M.A. 282, 27 C.M.R. 356 (1959); United States v. Buck, 9 C.M.A. 290, 26 C.M.R. 70 (1958).

42. 16 C.M.A. 150, 36 C.M.R. 306 (1966). Rejecting the government's argument that the All Writs Act applied only to Article III courts, COMA concluded that by choosing the statutory language "all courts established by Act of Congress" for the All Writs Act, Congress intended to include legislative courts under Article I. *Id.* at 152, 36 C.M.R. at 308.

43. Petitioner had heen convicted in 1960, and a CMR had affirmed. COMA denied his petition for review under article 67(b)(3). *See* note 35 *supra.*

44. COMA also held that article 76 of the Code, which affords finality to all cases when appellate review is terminated, did not bar relief sought in the nature of a writ error *coram nobis.* 16 C.M.A. at 151, 36 C.M.R. at 307. *See also* UCMJ art. 76, 10 U.S.C. § 876 (1970). Holding that extraordinary relief available by writ could not be used as a substitute for appeal, COMA nevertheless denied relief because the issues raised by the petition could have been presented on original review. *Id.* at 153, 36 C.M.R. at 309.

COMA's jurisdiction to review by writ a conviction that involved the jurisdictional sentence required by the Code for normal appellate review.[45] In *Gale v. United States,*[46] however, COMA expanded its scope of review to entertain a petition for relief from prosecution[47] sought *prior* to the completion of trial or imposition of sentence. The government contended in *Gale* that, because COMA obtains no appellate jurisdiction prior to the imposition of a jurisdictional sentence, the court had no power to grant interlocutory relief under the All Writs Act, which requires that any writ be "in aid of the court's jurisdiction."[48] The court rejected that argument by emphasizing congressional intent that COMA exercise a general supervisory power over the military justice system.[49] Concerns for maintaining COMA's supervisory role likewise prevailed in *United States v. Bevilacqua,*[50] in which the court found jurisdiction to hear a petition for extraordinary post-conviction relief even though the sentence imposed did not meet the jurisdictional requirements of the Code. Reluctant to force military defendants to seek relief by writ of habeas corpus from the federal courts, COMA refused to allow the restrictions of the Code to impair its potential ability to protect the constitutional rights of members of the armed forces.[51]

Less than one year after *Bevilacqua,* however, in *United States v. Snyder,*[52] COMA severely limited its recently expanded authority to entertain petitions under the All Writs Act in cases lacking the requisite jurisdictional sentence. Although the petitioner's prayer for post-conviction relief addressed the fundamental question of subject matter jurisdiction of the court-martial,[53] COMA held that

45. *See* note 35 *supra.*

46. 17 C.M.A. 40, 37 C.M.R. 304 (1967).

47. Petitioner filed a petition for writ of certiorari and/or writ of prohibition. *Id.* at 42, 37 C.M.R. at 306.

48. *See* note 40 *supra* and accompanying text.

49. COMA nevertheless denied relief, concluding that the circumstances did not warrant a premature review of issues that could be raised during the normal course of appellate review. 17 C.M.A. at 44, 37 C.M.R. at 308.

50. 18 C.M.A. 10, 39 C.M.R. 10 (1968).

51. Having established jurisdiction to issue the writ, COMA nevertheless denied relief because of the absence of an alleged denial of a fundamental right afforded by the Constitution or the Code or other grounds justifying extraordinary relief. *Id.* at 12, 39 C.M.R. at 12.

52. 18 C.M.A. 480, 40 C.M.R. 192 (1969).

53. *See* United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966), in which the court asserted that it never should be precluded from review of a challenge to the jurisdiction of a court-martial. In *Snyder* the petitioner's request for a writ of error *coram nobis* alleged that the court-martial lacked jurisdiction to try him for the offense of adultery. 18 C.M.A. at 481, 40 C.M.R. at 193. Under the principle of O'Callahan v. Parker, 395 U.S. 258 (1969), a court-martial has jurisdiction only if the alleged crime is service-connected, *i.e.*, if the illegal activity is related to the accused's military status.

it had no jurisdiction to grant relief when the sentence imposed did not meet the Code's jurisdictional requirement for ordinary appellate review.[54] While affirming that the All Writs Act authorized the exercise of powers ancillary to its jurisdiction under the Code, COMA noted that recent legislation allowing a defendant to petition the Judge Advocate General for extraordinary relief in cases not subject to judicial review[55] precluded the court's jurisdiction over cases not amenable to normal appellate review. Although COMA occasionally exercised its interlocutory and post-conviction writ powers after *Snyder*,[56] the preclusion of post-conviction petitions for

54. Petitioner's sentence as approved by the convening authority extended only to a reduction in rank. 18 C.M.A. at 481, 40 C.M.R. at 193. *See* note 35 *supra*.

55. 18 C.M.A. at 483, 40 C.M.R. at 195. The Military Justice Act of 1968 amended article 69 to permit a defendant convicted in any court-martial not reviewed by an appellate court to petition the JAG to vacate or modify his conviction for good cause shown, including lack of jurisdiction in the convicting court-martial. *See* UCMJ art. 69, 10 U.S.C. § 869 (1970), *as amended by* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1342. The Senate Report on the amendment states that a decision to remove the burden of a conviction was based on traditional legal grounds and thus required a "judicial" determination, but it does not explain why this relief power was entrusted to a "quasi-judicial" Judge Advocate General. *See* S. REP. No. 1601, 90th Cong., 2d Sess. 15, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 4501, 4515.

56. Relying upon federal court doctrine recognizing the availability of the All Writs Act to a court ancillary to its "past" or "future" jurisdiction, COMA, on the authority of *Gale* and *Frischholz*, infrequently granted petitions for relief in cases that previously had qualified for ordinary appellate review or that could potentially come before the court if a conviction and jurisdictional sentence were obtained and sustained by nonjudicial review and a CMR. *See* note 35 *supra*. *See generally* Wacker, *supra* note 14, at 59-63. Petitions that the court considered to present circumstances sufficiently "extraordinary" to exercise its ancillary powers generally requested interlocutory writs in the nature of prohibition to enjoin a court-martial clearly lacking jurisdiction to try the defendant, or writs in the nature of habeas corpus or mandamus to release the petitioner from a patently illegal restraint or conviction. *See, e.g.*, Thomas v. United States, 23 C.M.A. 570, 50 C.M.R. 789 (1975) (directing petitioner's release from confinement pending re-trial after COMA had reversed his conviction); Rhoades v. Haynes, 22 C.M.A. 189, 46 C.M.R. 189 (1973) (ordering a convening authority to conclude his tardy review of the trial record so that the appellate process might continue); Asher v. United States, 22 C.M.A. 6, 46 C.M.R. 6 (1972) (writ of error *coram nobis* granted to reverse a conviction which COMA had previously refused to review under article 67(b)(3)); Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970) (vacating a convening authority's order illegally confining the petitioner following the conviction but prior to ordinary appellate review by COMA); Fleiner v. Koch, 19 C.M.A. 630 (1969) (pending court-martial charges dismissed by COMA due to a clear lack of the trial court's jurisdiction). Petitions for relief usually were refused, however, because of the judicial policy that disfavors piecemeal appeals, or for failure to state circumstances so extraordinary that the normal trial and appellate process could not grant appropriate relief. *See, e.g.*, Henderson v. Resor, 20 C.M.A. 165, 43 C.M.R. 5 (1970) (mere inconvenience of standing trial insufficient to seek termination of court-martial proceedings); Hallinan v. Lamont, 18 C.M.A. 652 (1968) (alleged harassment of the accused prior to trial may be remedied by appropriate motion at trial level).

The court rarely discussed how granting the relief sought was "in aid" of its jurisdiction. *See* note 40 *supra* and accompanying text. In Gallagher v. United States, 22 C.M.A. 191, 46 C.M.R. 191 (1973), COMA previously had denied petitioner's application for regnlar appel-

extraordinary relief in the absence of a jurisdictional sentence indicated a significant diminution of COMA's perception of its supervisory authority as expressed in *Frischholz, Gale,* and *Bevilacqua.*

COMA recently clarified its jurisdictional powers and its role in the military justice system in *McPhail v. United States.*[57] The trial judge had determined that the accused's alleged offenses were not connected with his membership in the Air Force and thus dismissed the charges for lack of military jurisdiction.[58] The convening authority returned the record of the proceedings to the judge and indicated his disagreement with the ruling. Acceding to the decision of the convening authority, the judge tried the petitioner and sentenced him to restriction to base and performance of hard labor without confinement. Because the sentence did not include a discharge or confinement for at least one year, the petitioner had no recourse to the military judicial appellate system. When his prayer for extraordinary relief to the Judge Advocate General was denied,[59] petitioner sought a writ of certiorari or error *coram nobis*[60] from COMA. Relying on *Snyder,* the government contended that because the case never could reach COMA by normal appellate review, any contemplated action by the court would not be in aid of its jurisdiction.

COMA held that it had jurisdiction to review the petitioner's

late review under article 67(b)(3) but had erroneously failed to note a fundamental error in the conviction. Extraordinary relief thus was warranted because of the court's responsibility to grant a meaningful review. In Chenoweth v. Van Arsdall, 22 C.M.A. 183, 46 C.M.R. 183 (1973), the court explained that post-conviction relief granted prior to a petitioner's request for regular appellate consideration under article 67(b)(3) would aid the court's ability eventually to grant meaningful review otherwise unavailable when the petitioner remained in illegal restraint during the course of regular appellate review. Interlocutory relief terminating clearly illegal court-martial proceedings would aid COMA's future jurisdiction by preventing a waste of time and energy involved throughout the trial and appellate level. *Id.* at 187-88, 46 C.M.R. 187-88. Subsequent decisions, however, reflect a more restrictive view of the "in aid" requirement. *See, e.g.,* Hendrix v. Warden, 23 C.M.A. 227, 49 C.M.R. 146 (1974). For a critical analysis of post-*Snyder* decisions by COMA, see Rankin, *supra* note 40, at 110-35; Wacker, *supra* note 14 at 51-57.

57. 24 C.M.A. 304, 52 C.M.R. 15 (1976).

58. *See* O'Callahan v. Parker, 395 U.S. 258 (1969).

59. *See* note 55 *supra.*

60. While the trial judge's order of dismissal was still under consideration by the convening authority, petitioner had applied to COMA for a writ of prohibition to prevent the convening authority from reviewing the judge's decision. COMA had denied the petition. In the instant opinion COMA held that error *coram nobis* is the appropriate remedy only when the court's earlier disposition of a case is flawed because the court misperceived or improperly assessed a material fact. Since article 62(a) allows the convening authority to review a dismissal and submit it to tbe trial judge for *reconsideration,* the writ of prohibition requested would have been improper. Thus there were no grounds for error *coram nobis.* 24 C.M.A. at 306-07, 52 C.M.R. at 17-18.

conviction. The court acknowledged that, although the Code limited its ordinary appellate power, a review of the legislative history of the Code indicated that Congress intended the court to perform a supervisory function over the administration of military justice. Citing language of the United States Supreme Court that acknowledged COMA's primary responsibility for the integrity of military justice,[61] the court concluded that its role as the highest court in the military justice system demands that it have the power to issue supervisory writs to insure that all courts and persons purporting to act under the authority of the Code comply with applicable law.[62] Accordingly, in the instant case a writ would issue to the Judge Advocate General of the Air Force to vacate the petitioner's conviction.[63]

Rejecting *Snyder's* conclusion that COMA's ancillary powers are limited to cases contemplated by the Code's scheme of regular appellate review, *McPhail's* expansive concept of supervisory jurisdiction provides a more practical framework for reconciling COMA's writ powers with the Code's delineation of COMA's jurisdictional grant. The court had correctly reasoned in *Snyder* that the All Writs Act was ancillary in nature and could not create jurisdiction and thus felt compelled to dismiss as dictum *Bevilacqua's* asserted power of review over a completed case lacking a sufficient jurisdictional sentence. The *Gale* and *Frischholz* decisions, however, survived *Snyder,* and COMA apparently retained the power both to grant interlocutory writs before the sentence was imposed and to review for error convictions that included the jurisdictional sentence and either had been or would be before the court during regular appellate review.[64] As a result of *Gale, Frischholz,* and *Snyder,* defendants who obtained a trial continuance and appealed

61. 24 C.M.A. at 309, 52 C.M.R. at 20 (*citing* Noyd v. Bond, 395 U.S. 683, 695 (1969)).

62. The court pointed out that its actions in *Gale* and *Bevilacqua* were consistent with the concept of action in aid of its jurisdiction as the supreme court of the military and that *Snyder* had limited unnecessarily the ability to grant relief through supervisory writs. 24 C.M.A. at 308, 310, 52 C.M.R. at 19, 21. For a discussion of the concept and applications of the supervisory mandamus in several Supreme Court cases and its amenability with COMA's role in the military justice system, see Wacker, *supra* note 14, at 57-91.

63. COMA concluded that, even before the abolition of the accession doctrine in *Ware,* findings of the judge could not be reexamined when there was ample evidence to support his ruling. 24 C.M.A. at 306, 52 C.M.R. at 17. In view of the latitude granted the convening authority to ignore findings of the military judge in United States v. Frazier, 21 C.M.A. 444, 45 C.M.R. 218 (1972) this is an arguable conclusion. Nevertheless, in the instant opinion COMA apparently accepted the trial judge's determination of a lack of military jurisdiction to try the accused and assumed that the court-martial conviction was unconstitutional under *O'Callahan v. Parker.*

64. *See* note 56 *supra.*

directly to COMA, or those who had received the jurisdictional sentence and now sought post-conviction relief outside the ordinary appellate scheme, could obtain redress, while defendants who proceeded directly to judgment or who suffered post-conviction procedural errors without the requisite jurisdictional sentence would have no judicial remedy within the military system.[65] *McPhail,* however, avoids preclusion of COMA's relief powers and abolishes the premium placed on interlocutory appeals because the jurisdiction to grant extraordinary relief through the All Writs Act vests through COMA's supervisory power over all courts-martial, and not through the imposition or possible imposition of the jurisdictional sentence. If the petitioner sufficiently alleges a substantial constitutional or statutory violation, COMA's exercise of review and possible relief by writ clearly is "in aid" of its supervisory jurisdiction over the court-martial system.

COMA's recognition of its responsibility to insure the integrity of court-martial proceedings beyond its duties narrowly defined by the appellate provisions of the Code is a necessary and desirable development in view of recent United States Supreme Court restrictions on federal court intervention in military justice.[66] On the other hand, COMA avoids usurpation of jurisdiction by relying on a clearly manifested congressional intent and the accepted use of the All Writs Act in federal appellate practice.[67] COMA has not attempted to create judicial review powers over military proceedings not pertaining to courts-martial,[68] nor has the court unjustifiably altered the Code's scheme of appellate review by encouraging peti-

65. In *McPhail* the court noted that the petitioner could have sought interlocutory relief under Fleiner v. Koch, 19 C.M.A. 630 (1969), *after* the judge's accession but before conviction. COMA therefore characterized the government's argument: "The Government contends that it is too late for this Court to intercede." 24 C.M.A. at 307, 52 C.M.R. at 18.

66. *See* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975), in which the Court stated:

> [J]udgments of the military court system remain subject in proper cases to collateral impeachment. But implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate the servicemen's constitutional rights. We have recognized this . . . in holding that federal courts normally will not entertain haheas petitions by military prisoners unless all available military remedies have been exhausted.

67. *See* notes 56 & 62 *supra.*

68. An earlier decision by COMA had denied review of a petitioner's decertification as a trial judge by the JAG of the Air Force. *In re* Taylor, 12 C.M.A. 427, 31 C.M.R. 13 (1961). In *McPhail,* the court thought it significant that the petition was denied in *Taylor* because the relief sought was not in aid of its jurisdiction over court-martial processes. 24 C.M.A. at 307-08, 52 C.M.R. at 18-19.

tions that seek to avoid the regular appellate process.[69] *McPhail* carefully reserves to COMA only those powers that serve to implement congressional desire for an effective military judicial system.

IV. CONCLUSION

Ware's affirmation of the independence of the military judge and *McPhail's* expansion of appellate relief powers represent the "judicial activism" that commentators have observed in the present COMA.[70] Although the court has requested congressional guidance in limiting the role of the convening authority and delineating the powers of the appellate courts to grant extraordinary relief,[71] *McPhail* and *Ware* indicate COMA's willingness to erode obstacles to appellate review as well as powers of the convening authority that frustrate its understanding of congressional purposes embodied in the Code. COMA's recent attempts to enhance the role of the judiciary within the military justice system do no violence to the Code's balance of military discipline and civilian notions of fairness in criminal proceedings. The cases do reflect, however, that COMA will maintain an active supervisory role over military justice and a careful eye on nonjudicial interference with and usurpation of judicial functions at the trial level.

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69. COMA cautioned that its extraordinary jurisdiction could not he invoked to address all of the errors reviewable hy ordinary appeal under article 67. 24 C.M.A. at 310, 52 C.M.R. at 21. Relief from reversible errors in the large majority of cases not qualifying for regular review by a CMR will be obtained properly from the JAG under article 69. *See* note 55 *supra*. In cases like *McPhail,* however, when such relief was denied, COMA will not be precluded from making the final judgment.

70. Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals,* 18 A.F.L. REV. 81, 90 (1976).

71. 1974 ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION 6 (1974) [hereinafter cited as COMA REPORT]; 1973 COMA REPORT *supra*, at 7; 1972 COMA REPORT, *supra*, at 1, 2.

Securities Law—Investment Adviser Fraud—A Private Damages Remedy Is Implied Under Section 206 of the Investment Advisers Act of 1940

I. FACTS AND HOLDING

Plaintiffs, limited partners in an investment partnership,[1] sought damages under section 206[2] and rule 206(4)-1[3] of the Investment Advisers Act of 1940 from the partnership, its accountants,[4] and its general partners for failure to disclose in financial reports substantial investment of partnership assets in unregistered securi-

1. Robert Abrahamson and Marjorie Abrahamson, husband and wife, were limited partners in defendant investment partnership, Fleschner Becker Associates (FBA), from its inception in 1965 until their withdrawal in 1970. Although the partners reorganized the partnership in 1966 and 1968, at which time more general and limited partners entered the partnership, the general partners actively invested the partnership assets and received compensation for their services throughout the existence of the partnership. Plaintiffs' initial joint contribution was $150,000.

2. 15 U.S.C. § 80b-6 (1970) provides in pertinent part:

It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

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

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

. . .

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

3. 17 C.F.R. § 275.206(4)-1 (1976) in relevant part states:

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of the section 206(4) of the Act, for any investment adviser, directly or indirectly, to publish, circulate or distribute any advertisement:

. . .

(5) Which contains any untrue statement of a material fact, or which is otherwise false or misleading.

(b) For the purposes of this section the term "advertisement" shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

4. Harry Goodkin & Sons, certified public accountants, audited FBA's books and certified FBA's annual financial reports in 1966, 1967, and 1968. The Abrahamsons joined Harry Goodkin as a knowing aider and abettor of the alleged fraud, pursuant to a similar express SEC power to enjoin aiders and abettors. *See* 15 U.S.C. § 80b-9(e) (1970) (amending Investment Advisers Act of 1940 § 209(e), 15 U.S.C. § 89b-9(e) (1958)).

ties.[5] Plaintiffs contended[6] that the nondisclosure constituted fraudulent conduct under the Act by contravening the partnership's averred low risk investment policy and caused substantial financial loss to plaintiffs by delaying their withdrawal from the partnership.[7] Defendants responded that they were not investment advisers within the meaning of the Act and that plaintiffs realized no losses compensable under the Act.[8] On cross motions for summary judgment, the district court, which previously had recognized a private damages action under section 206,[9] dismissed the complaint for failure to allege compensable damages.[10] On appeal, the Second Circuit requested the parties to brief the threshold issue whether a private damages action is implicit under section 206 of the Act,[11] and *held,* reversed and remanded for determination of damages. An implied private cause of action for damages arises under section 206 of the Investment Advisers Act of 1940 when investment advisory reports fail to disclose material facts and result in financial loss to limited partners of an investment partnership. *Abrahamson v. Fleschner*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,889 (2d Cir., Feb. 25, 1977), *petition for rehearing granted* (2d Cir., April 15, 1977).

5. Despite plaintiff's expressed concern for financial security and conservatism and the recital of that policy in monthly and annual reports by defendants, those reports failed to disclose the substantial investment in securities that were not registered with the SEC and were subject to restrictions on their sale. Investment in the unregistered securities fluctuated from 15% to 72% of the partnership's total portfolio from October 1967 through September 1968, and from 72% to 88% from October 1968 to September 1969.

6. Plaintiffs also claimed under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1976), promulgated thereunder. The district court and the instant court rejected this claim because the reconstitution of the partnership in 1968 did not constitute the purchase or sale of a security and because the alleged fraud's inducement not to sell plaintiffs' partnership interests did not constitute the purchase or sale of a security. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38 (1975).

7. The plaintiffs learned of the investment in unregistered securities in an annual report received in December 1969 or January 1970 and withdrew from the partnership at the next possible opportunity pursuant to the partnership agreement, September 1970. Although Mr. Abrabamson realized $156,097 in net profits and Mrs. Abrahamson realized $133,081.35, the plaintiffs claimed damages of $454,979 and $799,821 respectively on the theory that they would have withdrawn from the partnership in Septemher 1968 had they known the true investment posture of FBA.

8. Defendants also claimed that FBA was authorized by the partnership agreement to purchase securities of any type and that plaintiffs, having access to FBA's hooks and records, were charged with constructive knowledge of the investments.

9. Bolger v. Laventhol, Krekstein, Horwath & Horwath, 381 F. Supp. 260 (S.D.N.Y. 1974) (noted in 43 FORDHAM L. REV. 493 (1974); 48 TEMP. L.Q. 433 (1975)); *see* text accompanying note 60 *infra.*

10. Abrahamson v. Fleschner, 392 F. Supp. 740, 749 (S.D.N.Y. 1975). The court held that plaintiffs had not stated compensable damages under the Act since they had realized significant profits on their investments. *See* note 7 *supra.*

11. Abrahamson v. Fleschner, 537 F.2d 27 (2d Cir. 1975).

II. LEGAL BACKGROUND

The Investment Advisers Act of 1940 was one in a series of pervasive securities laws[12] in which Congress proscribed fraudulent conduct, but failed to provide the injured party with an express private right of action to redress the fraud. Despite the absence of explicit authorization, courts have implied private damages actions from other securities statutes[13] based on the analyses derived from the seminal decisions in *Kardon v. National Gypsum Co.*[14] and *J.I. Case Co. v. Borak.*[15] The district court in *Kardon,* relying on the absence of an express congressional denial of a private remedy and the "broad purpose" of the Securities Exchange Act of 1934 to regulate securities transactions and to eliminate fraudulent conduct, implied on tort[16] and contract[17] theories a private remedy under section 10(b) and rule 10b-5. For nearly twenty years, lower federal courts relied on *Kardon* to infer private causes of action under the securities laws. The Supreme Court adopted lines of analysis similar to the *Kardon* rationale in *Borak* and concluded that the "broad remedial purpose" of section 14(a) of the 1934 Act to protect inves-

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12. The Investment Advisers Act of 1940 was preceded by: Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-77lll (1970); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1970); Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (1970); and Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to-52 (1970).

13. Implied actions have been found under the 1933 Act, Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); under § 10(b) of the 1934 Act, Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Superintendant of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946); under § 14(a) of the 1934 Act, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); under tbe 1935 Act, Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944); and under the Investment Company Act of 1940, Moses v. Burgin, 445 F.2d 369 (1st Cir. 1971); Herpich v. Wallace, 430 F.2d 792 (5tb Cir. 1970); Esplin v. Hirscbi, 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969); Taussig v. Wellington Fund, Inc., 313 F.2d 472 (3d Cir.), *cert. denied,* 374 U.S. 806 (1963); Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y.), *aff'd,* 294 F.2d 415 (2d Cir. 1961) (en banc).

14. 69 F. Supp. 512 (E.D. Pa.1946).

15. 377 U.S. 426 (1964).

16. 69 F. Supp. at 513-14. The court argued that § 10(b) created federal rights, the infringement of whicb was remedial under the law of torts:

> The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:
>
> (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
>
> (b) the interest invaded is one wbich the enactment is intended to protect
>
> . . . .

RESTATEMENT OF TORTS § 286 (1934).

17. 69 F. Supp. at 514. The court concluded tbat Congress must have intended to imply a civil remedy for rescission and damages when it provided in § 29(b) of the 1934 Act that contracts in violation of any provision of the Act shall be void. *See* 15 U.S.C. § 78cc(b) (1970).

tors from fraud in the issuance of proxies, the need for a supplement to SEC enforcement, and the statutory grant of jurisdiction in section 27 "over all suits in equity and actions at law brought to enforce any liability or duty" created under the Act mandated an implied right of action for damages under sections 14(a) and 27.[18] The analyses in *Kardon* and *Borak* thus reflect the willing attitude of the federal courts to provide private remedies under the antifraud sections of the federal securities statutes.

Subsequent to the expansive decisions in *Kardon, Borak,* and their progeny,[19] the Supreme Court enunciated guidelines in two major cases outside the securities field that define the relevant considerations in implying private remedies from statutory language.[20] In *National Railroad Passenger Corp. v. National Association of Railroad Passengers*[21] *(Amtrak)*, the Court reached a conclusion contrary to *Kardon* by establishing a presumption against implied private causes of action rebuttable only by substantial proof that legislative history and congressional purpose manifest an affirmative congressional intent to create a private damages remedy.[22] The Supreme Court clarified its standards for determining whether a private remedy is implicit in a statute not expressly granting such a remedy with the promulgation of four definitive criteria in *Cort v. Ash*:[23]

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one tradition-

18. 377 U.S. at 430-31. *Borak* provides compelling evidence that jurisdictional grants have been significant in the implication of private remedies under the securities statutes since the Supreme Court framed the question in that case whether the jurisdiction section, § 27, permits private parties to remedy frauds under the proxy section, § 14. *See id.* at 428.

19. *See* note 13 *supra.*

20. *See* Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication,* 123 U. PA. L. REV. 1392 (1975).

21. 414 U.S. 453 (1974). The Court in *Amtrak* held that the private party could not enjoin discontinuance of railroad service prohibited by the Rail Passenger Act of 1970 because the express language of the statute, the legislative history, and the congressional purpose provide an exclusive remedy.

22. *Id.* at 458-61. Mr. Justice Stewart, writing for the majority, declared, "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Id.* at 458 (citing Botany Mills v. United States, 278 U.S. 282, 289 (1929)).

23. 422 U.S. 66 (1975). In *Ash* the Court rejected a stockholder's derivative suit to enjoin and to recover compensatory and punitive damages for a corporation's alleged violations of the Federal Election Campaigu Act, 18 U.S.C. § 610 (1970), during the 1972 presidential election.

> ally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[24]

The *Amtrak* presumption against implication and the rigorous analysis undertaken by the Court under each of the four *Ash* criteria indicate a more restrictive judicial approach than the analytical structure used in *Kardon* and *Borak* to imply private remedies when express congressional authorization does not exist.

The Supreme Court's implementation of *Amtrak* and *Ash* in the securities area has produced significant limitations on the implication of private causes of action to remedy fraudulent conduct. In *Securities Investor Protection Corp. v. Barbour*[25] *(SIPC)*, the Court relied on *Amtrak* in refusing to imply a private remedy for the customer of a failing broker-dealer to compel the SIPC to recompense the investor's losses. The Court found that the legislative history of the Act[26] indicated that the statute contemplated exclusive SEC enforcement, the implied remedy would be inconsistent with the structure and purposes of the regulatory scheme, and the statute lacked standards of conduct that a private action could implement. In *Piper v. Chris-Craft Industries, Inc.*,[27] the Court refused to imply a private remedy under section 14(e) of the 1934 Act,[28] finding that application of the four-part *Ash* test demonstrated that unsuccessful tender offerors were not of the special class Congress intended to benefit, that there was no manifestation of legislative intent to provide tender offerors with a remedy,[29] that an implied damages action was unnecessary to effectuate the dominant congressional purpose to protect investors, and that state remedies were adequate for the tender offeror's recovery.[30] The Court reiterated these themes one month later in *Santa Fe Industries, Inc. v. Green*[31] when it considered a claim under section 10(b) of the 1934

24. 422 U.S. at 78.

25. 421 U.S. 412 (1975).

26. Securities Investor Protection Act of 1970, 15 U.S.C. § 78ggg(b) (1970).

27. 97 S. Ct. 926 (Feb. 23, 1977).

28. The Supreme Court reversed the Second Circuit's decision to imply the cause of action in this set of circumstances.

29. Interestingly, although the Court found no positive congressional intent to deny a private remedy, it held that congressional silence is consistent with the *Amtrak* presumption. *Id.* at 4192.

30. *Id.* at 4192-93. The instant court cited *Piper* for the proposition that a private right of action for damages should be implied under § 206 of the Advisers Act. Abrahamson v. Fleschner, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,889, at 91,274 (2d Cir., Feb. 25, 1977), *petition for rehearing granted* (2d Cir., Apr. 15, 1977). Clearly, *Piper* stands for the opposite conclusion that a private remedy should not be implied under § 14(e) of the 1934 Act.

31. 97 S. Ct. 1292 (Mar. 23, 1977). As in *Piper*, the Supreme Court reversed the Second

Act by minority shareholders alleging a breach of fiduciary duty without deception or manipulation during an attempted merger. In applying the *Ash* analysis, the Court determined that the intrinsic fairness of a securities transaction was subsidiary to the dominant congressional purpose of full disclosure under the 1934 Act and that state corporation statutes provided a sufficient remedy. The application of *Amtrak* and *Ash* to the implication of private remedies under the securities laws indicates a significant constriction of the judicial willingness to expand the protection of the federal securities statutes by private enforcement. The Court's requirement that legislative history manifest a congressional intent to permit private enforcement of the statute and the Court's willingness to relegate plaintiffs claiming under the federal securities statutes to state remedies are both important restrictions on the implication of a private damages action under the Investment Advisers Act of 1940.

In addition to restricting the creation of implied private remedies, the Court also has limited previously recognized implied causes of action in the securities field. The Court established in *Blue Chip Stamps v. Manor Drug Stores*[32] that a plaintiff must be a purchaser or seller to bring suit under section 10(b) of the 1934 Act on the basis of a strict constuction of the statutory language and a careful scrutiny of legislative intent and purpose. This requirement thus limits recovery under section 10(b) and rule 10b-5 to actual rather than speculative damages. Similarly, the requirement of scienter for claims under section 10(b) in *Ernst & Ernst v. Hochfelder*[33] provides another important limitation on the burgeoning caseload arising under the 1934 Act. Although the Court's restrictions on implied remedies under the 1934 Act are not directly transferrable to a remedy under the Advisers Act, the restrictions evidence a desire by the Court to constrict judicially created remedies for fraudulent conduct in securities transactions.[34]

As ultimately enacted, the Investment Advisers Act of 1940 seeks to register and regulate on the federal level persons compensated for providing others with advice concerning the value of securities or the desirability of investing in, purchasing, or selling securities.[35] The Act grants the SEC authority to enjoin or to recommend

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Circuit's conclusion that rule 10b-5 extended to breaches of fiduciary duties of majority stockholders to minority stockholders in a merger setting without misrepresentation or lack of disclosure.

32. 421 U.S. 723, 733-49 (1975).

33. 96 S. Ct. 1375 (1976).

34. *See* Haimoff, *Holmes Looks at Hochfelder and 10b-5*, 32 BUS. LAW. 147, 174 (1976).

35. Investment Advisers Act of 1940 § 202(11), 15 U.S.C. § 80b-2(11) (1970).

criminal prosecution[36] for any violation of two substantive provisions proscribing certain compensatory schemes in advisory contracts[37] and certain fraudulent transactions.[38] Attached as title II to the bill that created the Investment Company Act of 1940, the SEC's initial draft of the proposed Advisers Act[39] resulted from an SEC study of abuses in the investment trust industry.[40] The rather broadly drawn SEC draft of the bill encountered strong opposition from investment advisers who argued that the bill was far more extensive than it appeared,[41] that it had exceeded the original SEC concept of a compulsory census of advisers,[42] and that it had been appended hastily to title I without adequate demonstration of abuse.[43] As the result of a compromise between the industry and the SEC accommodating these objections,[44] Congress enacted a second draft of the proposed legislation[45] that represented a delicate balance between the interests of investors and advisers and that refined and narrowed the expansive provisions of the SEC draft. Throughout the drafting process, the registration of advisers[46] received major emphasis in order to achieve the stated congressional purpose of protecting the public and investors from "tipsters and touts."[47] A

36. *Id.* § 209(e), 15 U.S.C. § 80b-9(e) (1970).

37. *Id.* § 205, 15 U.S.C. § 80b-5 (1970).

38. *Id.* § 206, 15 U.S.C. § 80b-6 (1970).

39. S. 3580, 76th Cong., 3d Sess., *reprinted in Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 76th Cong., 3d Sess., pt. 2, at 1 (1940); H.R. 8935, 76th Cong., 3d Sess. (1940).

40. U.S. SECURITIES AND EXCHANGE COMMISSION, INVESTMENT TRUSTS AND INVESTMENT COMPANIES: INVESTMENT COUNSEL, INVESTMENT MANAGEMENT, INVESTMENT SUPERVISORY AND INVESTMENT ADVISORY SERVICES, H.R. Doc. No. 477, 76th Cong., 2d Sess. (1939). The study was made pursuant to § 30 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z-4 (1970).

41. *Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, supra* note 39, at 718, 759. Adviser Robert Loomis noted:

> On the face of it, title II appear[s] rather mild and innocuous and it is only after careful study of it and also a study of what is implicit in its present requirements, that I have decided it is drastic enough to indicate that someone must have thought the situation pretty bad.

Id. at 761. The implications to which Mr. Loomis referred were the sections of S. 3580 that the industry sought to eliminate.

42. *Id.* at 712.

43. *Id.* at 712, 715.

44. S. REP. No. 1775, 76th Cong., 3d Sess. 2, 12 (1940); H.R. REP. No. 2639, 76th Cong., 3d Sess. 10 (1940).

45. S. 4108, 76th Cong., 3d Sess. (1940); H.R. 10065, 76th Cong., 3d Sess., *reprinted in Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 76th Cong., 3d Sess. 1 (1940). H.R. 10065 was the draft passed by Congress.

46. *Compare* H.R. 10065, *supra* note 45, § 203 *with* S. 3580, *supra* note 39, § 203.

47. H.R. REP. No. 2639, 76th Cong., 3d Sess. 28 (1940); *see* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), in which the Court determined that the impetus for legislation was to prevent the abuses that had contributed to the 1929 stock market crash

series of deletions and additions, however, reflects the significant industry input into the second draft and suggests an underlying purpose of preventing disruption in the industry.[48] Designed to protect advisers' clients and potential clients against fraudulent conduct, section 206 remained essentially unchanged throughout the 1940 legislative process,[49] although the 1960 and 1970 amendments augmented the SEC enforcement powers of the section.[50] Significantly, the second draft deleted the broad statement of policy that the SEC had designed to guide the courts in the construction of the Act.[51] Furthermore, the second draft provided its own definitions

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and to substitute a policy of full disclosure for the philosophy of caveat emptor. The Court spoke only to the issue of SEC injunctive enforcement expressly provided in § 209 in that case when it noted that § 206 had been intended to prevent frauds upon investors throughout the Act's legislative history. 375 U.S. at 186-95.

48. Congress subsequently recognized the limited scope of the Act in 1960:

> The Investment Advisers Act of 1940 was passed as title II of the bill of which title I was the Investment Company Act. Unlike other Federal securities statutes, it has few substantive or regulatory provisions. Modeled somewhat on the hroker-dealer registration provisions of the Securities Exchange Act of 1934, it resembles a continuing census of the Nation's investment advisers.

S. REP. No. 1760, 86th Cong., 2d Sess. 2, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3502, 3503.

49. *Compare* H.R. 10065, *supra* note 45, § 206 *with* S. 3580, *supra* note 3, § 206.

50. The 1960 amendments to the Investment Advisers Act of 1940 granted the SEC rulemaking power to define fraud under § 206 and power to inspect books and records, and extended SEC enforcement under § 206 to all investment advisers dealing in interstate commerce whether they are registered under the Act or not. S. REP. No. 1760, 86th Cong., 2d Sess. 4, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3502, 3503. The 1970 amendments added § 206A, 15 U.S.C. § 80b-6a, which permits the SEC to exempt classes of advisers from its rulemaking powers. S. REP. No. 91-184, 91st Cong., 2d Sess. 42, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4897, 4941-42. Although Congress clearly strengthened the enforcement powers of the SEC to remedy any enforcement deficiencies, Congress did not add any provision for private enforcement.

51. S. 3580, *supra* note 39, § 202 provided:

> Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby declared that the national public interest and the interest of investors are adversely affected—
>
> (1) when investors are unable to obtain adequate information as to the activities, practices, ability, training, and integrity of investment advisers, their affiliated persons, and employees;
>
> (2) when persons of proven lack of integrity in financial matters are permitted to engage in business as investment advisers;
>
> (3) when the compensation of investment advisers is based upon profit-sharing contracts and other contingent arrangements conducive to excessive speculation and trading; or
>
> (4) when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients.
>
> It is hereby declared that the policy and purposes of this title, in accordance with which

and jurisdictional requirements rather than incorporating these provisions by reference to title I as the original SEC draft had proposed.[52] In enacting section 214,[53] Congress omitted the "boiler plate" SEC jurisdiction by excising any reference to "actions at law" to enforce "any duty or liability created" under the Act. Congress did not seek to alter this omission in 1960 or 1970 when it created additional jurisdiction in title I,[54] and an amendment supplying this omitted language failed in Congress in 1976,[55] but has

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the provisions of this title shall be interpreted, are to mitigate and, so far as is presently practicable to eliminate the abuses enumerated in this section.

The purpose of including the findings of policy was to aid the courts in their construction of the statute. *Hearings on S. 3580, supra* note 41, at 176. The rescission of that section indicates a narrowing of the original bill.

52. S. 3580, *supra* note 39, § 203 (1940). Section 203 of the SEC draft purported to incorporate by reference § 40 of title I of the bill, which in turn incorporated § 25 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79y (1970).

53. Section 214, 15 U.S.C. § 80b-14 (1970), provides:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this subchapter or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity to enjoin any violation of this subchapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enjoin any violation of this subchapter or rules, regulations, or orders thereunder, may he brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia," approved February 9, 1893. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against the Commission in any court.

Each of the preceding securities regulations provided for both actions in equity and at law. *See* Securities Act of 1933 § 22, 15 U.S.C. § 77v (1970); Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1970); Public Utility Holding Company Act of 1935 § 25, 15 U.S.C. § 79y (1970); Trust Indenture Act of 1939 § 322, 15 U.S.C. § 77vvv (1970); Investment Company Act of 1940 § 44, 15 U.S.C. § 80a-43 (1970). Although § 14 was one of several sections deemed "generally comparable" to similar provisons in the Investment Company Act, the differences are manifest.

54. In 1970 Congress amended the Investment Company Act to provide for the civil liability of investment advisers who advise investment companies to the extent of a breach of fiduciary duty with respect to compensation for services. 15 U.S.C. § 80a-35 (1970) (amending Investment Company Act of 1940 § 36, 15 U.S.C. § 80a-5 (1958)). Apparently, Congress knew how to provide for the civil liability of investment advisers when it desired to do so.

55. S. 2849, 94th Cong., 2d Sess. § 6 (1976) provides:

> The district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, orders thereunder, and, concurrently with State and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder.

been reintroduced in the 95th Congress.[56]

Although private section 206 claims for damages have been presented to the courts frequently, most decisions prior to 1974 granted relief on the strength of alternative claims (usually under the 1934 Act) or simply omitted discussion of the possibility of relief under the Investment Advisers Act of 1940.[57] The district courts directly addressing the issue since 1974 have divided in their judgments. In *Greenspan v. Del Toro,*[58] the court rejected the implication of a private damages action, arguing that the omission of "actions at law" from the jurisdictional requirements of section 214 evidenced congressional intent to deny such a remedy. Similarly, the district court in *Gammage v. Roberts, Scott & Co.*[59] reasoned that without an explicit statutory condemnation of fraudulent conduct and a general grant of jurisdiction such a remedy should not be recognized judicially. Relying on congressional intent to protect investors, the court in *Bolger v. Laventhol, Krekstein, Horwath & Horwath*[60] reached a contrary conclusion and advanced three ex-

S. 2849, 94th Cong., 2d Sess., *reprinted in Hearings on S. 2849 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. 3 (1976). The amendment was slipped between proposed amendments to strengthen qualifications of advisers and financial responsibility. Although the bill was reported out of the Senate Banking, Housing and Urban Affairs Committee, S. REP. No. 910, 94th Cong., 2d Sess. (1976), the bill failed to come to a vote in 1976. The jurisdiction amendment was not discussed significantly at hearings, but Professor Loss of Harvard did draw an important distinction before the Committee. He asserted that the addition of the proposed language would not create a private damages remedy, but merely would facilitate its implication in the courts. *Hearings on S. 2849 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, supra,* at 232-33.

56. H.R. 2105, 95th Cong., 1st Sess. § 7 (1977).

57. Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975); Competitive Assoc., Inc. v. Laventhol, Krekstein, Horwath & Horwath, 516 F.2d 811 (2d Cir. 1975); Kutner v. Gofen & Glossberg [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,109 (7th Cir. 1971); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970); Index Fund, Inc. v. Hagopian, 417 F. Supp. 738 (S.D.N.Y. 1976); Carroll v. Bear, Stearns & Co., 416 F. Supp. 998 (S.D.N.Y. 1976); Kusner v. First Pa. Corp., 395 F. Supp. 276 (E.D. Pa. 1975); Competitive Capital Corp. v. Yamada [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,617 (S.D.N.Y. 1974); Selzer v. Bank of Bermuda Ltd., 385 F. Supp. 415 (S.D.N.Y. 1974); Fox v. Prudent Resources Trust, 382 F. Supp. 81 (E.D. Pa. 1974); Jones Memorial Trust v. Tsai Inv. Services, Inc., 367 F. Supp. 491 (S.D.N.Y. 1973); Young v. Seaboard Corp., 360 F. Supp 490 (D. Utah 1973); Courtland v. Walston & Co., 340 F. Supp. 1076 (S.D.N.Y. 1972); Skydell v. Mates, 59 F.R.D. 297 (S.D.N.Y. 1972); Schlusselberg v. Werly [1966-1967 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,012 (S.D.N.Y. 1967).

58. [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,488 (S.D. Fla. 1974).

59. [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,761 (S.D. Cal. 1974).

60. 381 F. Supp. 260 (S.D.N.Y. 1974). *Bolger* has been followed in subsequent cases. Fund of Funds, Ltd. v. Vesco [Current] FED. SEC. L. REP. (CCH) ¶ 95,644 (S.D.N.Y. 1976); Jones v. Equitable Life Assurance Soc'y of the United States, 409 F. Supp. 370 (S.D.N.Y. 1975).

planations for the implication of a damages remedy despite the omission of "actions at law" from the federal jurisdiction in section 214. First, the court reasoned that the jurisdiction granted over "violations" of the Act[61] does not apply exclusively to criminal cases, but also to actions at law. Secondly, the court argued that Congress omitted the "actions at law" language because the Act does not provide expressly any action at law. Finally, the *Bolger* court emphasized that the Senate and House Reports stated that section 214 of the Advisers Act was comparable to a similar provision in the companion Investment Company Act that provided jurisdiction over actions in equity and at law. In *Angelakis v. Churchill Management Corp.*[62] the court relied on the *Bolger* analysis of congressional purpose and possible bases of jurisdiction to imply a private remedy under section 206 and criticized the *Gammage* court for relying solely on statutorily proscribed conduct and jurisdictional power in its consideration of implying a remedy. In view of these widely divergent district court opinions, the instant opinion is important as the first circuit court decision on the question whether a private damages remedy is implicit in section 206.[63]

III. The Instant Opinion

The instant court[64] initially determined that defendants as paid providers of investment advice in monthly reports and as managers of investment funds for compensation qualified as investment advisers under the Act.[65] Noting that private remedies had been implied under other securities regulations,[66] the court implemented the four *Ash* criteria in its consideration of section 206.[67] Initially, the court held that plaintiffs, as advisers' clients under section 206, were members of the class for whose benefit the Act was intended. Next, the court found that the absence of explicit evidence that Congress ever considered a private damages remedy when it enacted the in-

61. *See* note 53 *supra.*

62. [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH)¶ 95,285 (N.D. Cal. 1975).

63. *But see* Brouk v. Managed Funds, Inc., 286 F.2d 901 (8th Cir. 1961), *vacated as moot,* 369 U.S. 424 (1962). The vacated judgment refused to recognize an implied private remedy under the Advisers Act and the Investment Company Act. The Circuit later disapproved of the Investment Company Act decision. Greater Iowa Corp. v. McLendon, 378 F.2d 783, 793 (8th Cir. 1967).

64. Judge Timbers wrote the majority decision and was joined by Judge Mansfield.

65. In so holding, the instant court inferred from legislative intent that general partners of investment partnerships as managers of partnership assets were investment advisers within the meaning of the Act.

66. *See* note 13 *supra.*

67. *See* text accompanying note 24 *supra.*

stant legislation rendered an examination of legislative intent inconclusive, but did not militate against judicial implication of a private remedy. The majority then examined legislative purpose, the third *Ash* criterion, to ascertain implicit legislative intent. The court determined that protection of the public and investors from malpractice by those employed to advise clients compels recognition of private enforcement by federal courts. In support of this conclusion, the court relied on the inadequacy of SEC enforcement resources to promote the effective regulation of securities intended by Congress, the congressional intent to provide an implied damages action in the Act as ascertained by the court under the *Kardon* contract theory,[68] and the insignificance of the jurisdictional omission of "actions at law" to the court's power to fashion a remedy. With respect to the jurisdictional problem, the court advanced many of the *Bolger* arguments, asserting that the omitted language would have been superfluous since the Act provided no express action at law, that the jurisdiction of the Advisers Act was comparable to the Investment Company Act, and that courts have never relied on the jurisdictional language to imply remedies in other securities cases.[69] The instant court thus held that an implied private remedy exists under section 206. The court concluded its analysis by declining to superimpose the *Blue Chip Stamps* purchaser-seller limitation on the remedy it had created since the Advisers Act does not contain the same express requirement and since Congress intended to protect advisers' clients regardless of whether they purchase or sell shares. It then recommended a formula to measure damages it deemed compensable and ascertainable on remand.[70]

A vigorous dissenting opinion[71] challenged the majority's conclusion that section 206 contains an implied private right of action for damages and emphasized significant distinctions between the Advisers Act and other federal securities statutes in which courts have recognized implied private remedies.[72] The dissent contended that the fundamental approach of effecting a compulsory census of

68. As in the 1934 Act construed in *Kardon,* the Advisers Act provides: "Every contract made in violation of any provision of [the Act] . . . shall be void . . . ." 15 U.S.C. 80b-15(b) (1970).

69. *See* note 18 *supra.*

70. The three standards were: (1) determine at what point defendants' representations became fraudulent due to the increase in investment in unregistered securities; (2) compute total net losses on all holdings in unregistered securities after that date; and (3) determine which holdings were inconsistent with a conservative investment posture.

71. Judge Gurfein wrote the dissenting opinion.

72. *See* note 13 *supra.*

investment advisers by their registration and the substantial industry contribution to the final draft of the Act indicated a cautious, limited congressional approach. Arguing that the majority's finding of congressional silence did not suffice to evoke implication under *Amtrak* or *SIPC*,[73] the dissent additionally found an implicit legislative intent to deny a private damages action under section 206 since Congress chose to omit jurisdiction over actions at law from the Act while it included such a provision in all other securities regulations.[74] Furthermore, the dissent propounded that this implicit legislative intent to deny a private right of action for damages combined with the congressional purpose to avoid disruption of the investment advisory industry outweighed the protection of investors, the congressional purpose heavily relied upon by the majority. Finally, the dissent concluded that the absence of a purchaser-seller limitation in section 206 and the majority's rejection of judicial application of that limit to section 206 rendered the computation of damages speculative under the Act. In the dissent's opinion, such policy considerations militated against unwise judicial implication of a private remedy without limitations.

IV. COMMENT

As the first decision by a circuit court to imply a private remedy for damages under section 206 of the Investment Advisers Act and the most fully reasoned decision on the issue yet, the instant opinion creates an important new federal cause of action in favor of clients and potential clients of investment advisers. Such clients need no longer rely on the technical requirements of common law fraud and deceit[75] or on state investment adviser antifraud statutes[76] to recover damages for fraudulent advisers' conduct prohibited by section 206 and rule 206(4)-1. As the Supreme Court restricts the boundaries of recovery under the 1934 Act with decisions such as *Blue Chip Stamps* and *Hochfelder*, the instant court's creation of a federal remedy under the Advisers Act provides an alternative form of relief for investors aggrieved by allegedly fraudulent conduct in their se-

73. *See* notes 21 & 25, *supra* and accompanying text.

74. *See* note 52 *supra.*

75. The common law requirements for fraud and deceit include: (1) a misrepresentation of a material fact by defendant; (2) scienter; (3) reliance by plaintiff; and (4) actual damage to the plaintiff. 3 LOSS, SECURITIES REGULATION 1628 (2d ed. 1961); *see The Regulation of Investment Advisers*, 14 STAN. L. REV. 827, 832 (1962).

76. Thirty-five states currently have statutes that require registration and/or prohibit fraudulent activities. *Hearings*, *supra* note 55, at 19-26. *See also* 1 LOSS, SECURITIES REGULATION 47-48 (2d ed. 1961); 14 STAN. L. REV., *supra* note 75, at 833.

curities transactions.[77]

Nevertheless, the instant opinion misapplies and confuses the analysis set forth in *Ash* in implying a private damages action under the Advisers Act. If one accepts the majority's analysis that the general partners of an investment partnership are investment advisers, the court's classification of plaintiffs as members of the special class that section 206 seeks to benefit is correct. The instant court, however, glosses over the second *Ash* criterion, legislative intent, by claiming that congressional silence is indicative of nothing. Instead it focuses on legislative purpose and thereby confuses separate analysis of the second and third criteria. The court's conclusion that it can imply a private cause of action despite the absence of legislative intent to permit the coexistence of a private remedy and statutorily provided enforcement contradicts the Supreme Court's determinations in *Amtrak, SIPC,* and *Piper* that congressional silence does not rebut the presumption against implication of a private remedy but serves to reinforce it. In addition to overlooking the presumption against implication established by *Amtrak,* the instant court, in ascertaining legislative intent in the instant case, accords insufficient weight to the changes effected between the first and second drafts of the bill. The deletions in section 214 of "actions at law" and "duties and liabilities created" require more significant attention than the instant court attaches. Contrary to the court's assertions, previous decisions implying private remedies under other securities statutes have relied on such jurisdictional grants.[78] Additionally, the majority's argument that the language is superfiuous because the Act created no express private remedy is intrinsically weak and tenuous. The deliberate recission of that language from the first draft of the bill more fairly supports the dissent's conclusion that Congress clearly intended no private remedy under the Act without further study. The majority's interpretation of the omission also undercuts its own conclusion that Congress intended to provide a damages remedy under the *Kardon* contract theory[79] since Congress surely would have provided jurisdiction for actions at law if it intended to create a private damages remedy for contracts voided under the Act. Furthermore, the majority fails to consider the broader context of the legislative history of the Act, particularly the second draft's deletion of the broad policy objectives designed to aid

77. Interestingly, the instant court could not justify recovery on the plaintiffs' claim under the 1934 Act. *See* note 6 *supra.*

78. *See* note 18 *supra.*

79. *See* note 68 *supra.*

the court's construction of the Act and Congress's willingness to conform the draft to the narrower objectives advanced by the industry. While Congress did provide for adviser liability under the Investment Company Act in 1970, Congress examined the enforcement provisions of section 206 in 1960 and 1970 and chose to augment the SEC's enforcement power rather than create a private remedy. Such an attempt to provide jurisdictional authority to imply a private damages remedy under the Advisers Act failed in Congress in 1976. Even the proposed amendment pending before Congress would only permit implication by strengthening the evidence of legislative intent; it would not provide expressly for private enforcement. In the context of *Amtrak, Ash, SIPC, Piper,* and *Green,* the majority's dismissal of these considerations does not appear to be consistent with the Supreme Court's requirement of affirmative legislative intent that a private remedy should coexist with the statutorily prescribed enforcement. Similarly, the court's analysis of legislative purpose, the third *Ash* standard, accounts only for the protection of investors and ignores the concommitant purposes of registering advisers as the device to protect investors, of avoiding industry disruption, and of restraining imposition of financial liability under section 206 without further study by Congress. Moreover, the court fails to consider that the primary congressional purpose in enacting section 206 may not have been to provide a cause of action for adviser fraud, but rather to define adviser conduct for which registration would be denied or revoked by the SEC. Such an interpretation is consistent with the protection of investors through the registration of advisers, the primary thrust of the Act.

Finally, the court chooses to ignore the fourth *Ash* criterion, the adequacy of state statutory and common law remedies to compensate investors for fraudulent adviser activity, by stressing the importance attached to the federal regulation propagated by the Act. This analysis obviates the entire purpose of the criterion because *Ash* contemplates federal regulation while still considering state remedies. In the instant case, plaintiffs could have sought a remedy under state partnership law by claiming that the partners breached their fiduciary duty to disclose information.[80] On a more general level of the adviser-client relationship, a common law action for fraud and deceit may not be inadequate to reimburse a client for an investor's fraudulent misrepresentation or nondisclosure. While

80. *See* UNIFORM PARTNERSHIP ACT § 20.

a fiduciary relationship ordinarily has not existed when courts have implied remedies under other securities acts, the existence of such a relationship between an adviser and his client eases the burden of proof in a common law fraud and deceit action to recover damages for adviser fraud. Furthermore, because common law fraud and deceit demand adherence to various technical requirements such as reliance and actual damages, the common law action provides inherent limitations on recovery that a judicially implied private cause of action under section 206 eliminates.

The instant court's establishment of a broad private damages remedy under section 206 will require extensive litigation to provide necessary limitations on the cause of action. Commentators have discussed the problems that the courts will encounter in defining the contours of the right of action, including the plaintiff class, the defendant class, causation and reliance, and scienter.[81] Since Congress never contemplated a private damages action under section 206, the courts must define the parameters of the investment clients' remedy without the guidance of legislative history, congressional intent, or delimiting statutory language on which the Supreme Court relied so heavily in *Blue Chip Stamps* and *Hochfelder.* Congress designed section 206 for equitable enforcement by the SEC, which requires far less technical proof than common law fraud and deceit.[82] The creation of a private remedy based on the same broad langauge intended for equitable enforcement necessarily lacks natural perimeters. The potential financial liability of investment advisers without limitations is manifest. The majority's rejection of the application of the *Blue Chip Stamps* purchaser-seller limitation to section 206 invites speculative claims. Clients or potential clients (however defined) may simply await market developments and then contend that the investment advice deceptively encouraged investment in a losing speculation, as in the instant case, or precluded investment in stock whose value subsequently soars. The *Blue Chip Stamps* Court feared that just such a result would encourage fraud on the investor's or client's part. Furthermore, if courts later reject the application of *Hochfelder* to the remedy created under the Advisers Act as the instant court refused to apply *Blue Chip Stamps,* negligent or unknowing inclusion or exclusion of some fact in investment advisory reports may constitute an

81. Note, *Private Causes of Action Under Section 206 of the Investment Advisers Act,* 74 MICH. L. REV. 308 (1975).

82. S. REP. NO. 1760, 86TH CONG., 2D SESS. 8, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 3509.

activity that is "fraudulent, deceptive, or manipulative," and therefore may be actionable under section 206 despite the absence of scienter, a traditional requirement of fraud. Although the scope of investment advisers' financial liability must be determined by future litigation, the delineation of the extent of that liability could be expressed more properly and fully by state legislatures or by Congress after appropriate study and reflection.

The distinctions that limit the Advisers Act and differentiate it from other securities laws in which courts have implied private damages remedies and the recent Supreme Court decisions in *Amtrak*, *SIPC*, and *Piper* that militate against the implication of private remedies absent compelling evidence to the contrary establish insufficient sources and limitations to imply such a right of action under section 206. While it is initially an attractive policy to arm investors with new weapons to combat fraud in their securities dealings, the wisdom and prudence of such a policy is questonable under section 206 of the Investment Advisers Act of 1940.

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