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RECENT CASES

Civil Rights—Desegregation—School Authorities Have Affirmative Duty To Make a Reasonable Inquiry into the Purposes of a Prospective Purchaser of Public School Property

Black citizens of Tate County, Mississippi, brought suit[1] seeking rescission of the County Board of Education's sale of a public school to a foundation that used the property to establish a private, segregated[2] academy. Respondent, Tate County Board of Education, had determined that the continued operation[3] of the dilapidated school would be uneconomical and had conveyed the property to a private citizen without knowing the purpose for which the school was to be used. The purchaser later conveyed the property[4] to the Tate County Foundation, which established a private, segregated academy. Petitioners contended that the sale violated the equal protection clause of the fourteenth amendment because it encouraged and fostered racially segregated education. The district court refused to invalidate the sale of the school on the grounds that there was no showing of illegality or bad faith by the school board in disposing of the property. On appeal, the Fifth Circuit Court of Appeals, *held*, reversed. In order to bring about a unitary school system, a school board has the affirmative duty to make a reasonable inquiry

1. The suit was brought under 42 U.S.C. §§ 1981, 1983 (1970) and 28 U.S.C. § 1343 (1970), seeking equitable relief against the County Board of Education and, by later amendment, against the purchaser who was acting as agent for a citizen group that later became the Tate County Foundation.

2. After the petitioners filed suit, the Foundation instituted a nondiscriminatory admissions policy; however all the faculty and students were white. The total absence of applications from black students was caused largely by the tuition of $450, which was beyond the means of most Negroes in Tate County. McNeal v. Tate County School Dist., No. 30722 (5th Cir., Sept. 17, 1971).

3. It was not contended that the school board lacked valid reasons for selling the school, which was constructed in 1941. During the 1969 school year, only 3 of the 7 classrooms were utilized, and 35 children of both races attended.

4. The school board conveyed the school to the private citizen, who was the only bidder, on January 7, 1970; workmen began repairs on the building in February 1970, and the Foundation took possession on June 1, 1970. The short time span between the transactions at least creates a presumption that the intention to establish a segregated school existed when the property was purchased from the school board. Had the time period between the purchase of the school from the board and the sale to the foundation been considerably longer, the result of the case might have been different.

into the purposes of a prospective purchaser of public school property and must refuse to sell to one who intends to establish a racially segregated school on the premises. *McNeal v. Tate County School District*, No. 30722 (5th Cir., Sept. 17, 1971).

In the first *Brown v. Board of Education*[5] decision, the Supreme Court held that racial discrimination in public education violates the equal protection clause of the fourteenth amendment. In *Brown II*,[6] the Court placed the primary responsibility for creating such a desegregated public school system on each local school authority and stated that the district courts were to determine whether the school authorities were complying with the constitutional mandate of *Brown I*.[7] Because ten years after *Brown* only 2.25 percent of Negro school children in the South were attending desegregated schools,[8] Congress enacted Titles IV and VI of the Civil Rights Act of 1964,[9] which shifted some of the burden of implementing school desegregation from the federal courts to the Department of Health, Education, and Welfare (HEW).[10] The statute conditioned the receipt of federal financial assistance upon the existence of a nondiscriminatory school system.[11] The HEW Office of Education issued guidelines[12] that provided three methods by which a school district could qualify for federal financial assistance, one of which required the district to show that it was subject to a final court order requiring desegregation of the school system.[13] School boards, however,

5. 347 U.S. 483 (1954).

6. Brown v. Board of Educ., 349 U.S. 294 (1955). Due to the complex nature of the transition to a desegregated public school system, the Court in *Brown I* requested further argument on the question of relief. The administration of this relief is the subject of *Brown II*.

7. *Id.* at 299. Although no absolute time limit was set, the Court ordered school boards to comply at the earliest practicable date, and directed district courts to ensure that efforts to end racial discrimination proceeded with all deliberate speed. *Id.* at 300-01.

8. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, table I at 903 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (en banc), *cert. denied*, 389 U.S. 840 (1967). In 1964, the Supreme Court, in reexamining the "deliberate speed" standard, found that there had been "too much deliberation and not enough speed." Griffin v. County School Bd., 377 U.S. 218, 229 (1964); *see* Watson v. City of Memphis, 373 U.S. 526 (1963) (delay in desegregating recreational facilities).

9. 42 U.S.C. §§ 2000c, 2000d to -4 (1970).

10. 42 U.S.C. § 2000c-2 (1970) authorizes HEW's Commissioner of Education to render technical assistance to any school board that applies for help in implementing desegregation plans. HEW issued regulations to effectuate the provisions of Title VI. 45 C.F.R. § 80 (1971).

11. 42 U.S.C. § 2000d (1970) provides that no person in the United States shall be discriminated against on the basis of race, color, or national origin in any program or activity receiving federal assistance.

12. *See* U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 10-19 (1967).

13. The other 2 alternatives with which a school district could comply and still obtain federal financial assistance were: (1) it could submit an HEW form assuring compliance if the district was completely desegregated, or (2) it could submit its own plan for the desegregation of the school system for the Commissioner of Education's approval. *Id.* at 11.

were able to circumvent the purpose of the HEW guidelines by obtaining a federal court order approving a desegregation plan that differed significantly from the plans set forth in the guidelines.[14] In *United States v. Jefferson County Board of Education*,[15] the Fifth Circuit Court of Appeals attempted to foreclose the use of this avoidance device and held that state school authorities have an affirmative duty under the fourteenth amendment to establish a unitary school system in areas where the schools had been segregated on a de jure basis.[16] The court, in holding that the HEW guidelines set forth the minimum standards to be applied toward achieving desegregation, stated that the "only school desegregation plan that meets constitutional standards is one that works."[17] On rehearing, the court further stated that if one desegregation plan[18] proves to be ineffective, the school authorities are under an affirmative duty to adopt other methods that would accomplish the desired result of converting a dual system into a unitary system, which would in turn provide educational opportunities on equal terms to all.[19] In order to establish

14. "The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of local responsibility . . . ." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 861 (5th Cir. 1966); *see* Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966) (administrative transitionary period no justification for denial of a constitutional right); Price v. Denison Independent School Dist. Bd. of Educ., 348 F.2d 1010 (5th Cir. 1965) (grade-a-year plan inadequate). For excellent discussions of the practical application of the HEW guidelines see Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967); Comment, *The Courts, HEW and Southern School Desegregation*, 77 YALE L.J. 321 (1967).

15. 372 F.2d 836. In the 7 cases before the court the first district to move toward desegregation began its efforts in 1965, 11 years after *Brown I*. In all of the cases only a vigorously contested court order stimulated the school officials to act. 372 F.2d at 845 n.3.

16. Courts have interpreted *Brown* as applying only to "de jure segregation"—deliberate separation of the races by state law—which furnishes the state action necessary under the fourteenth amendment. The courts have not applied *Brown* to "de facto segregation" which has been defined as the fortuitous result of segregated housing and adherence to neighborhood school plans rather than as a result of state action. *See, e.g.*, Downs v. Board of Educ., 336 F.2d 988, 998 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Wright, *Public School Desegregation: Legal Remedies For De Facto Segregation*, 40 N.Y.U.L. REV. 285 (1965); Note, *Constitutional Law—School Desegregation—The Conundrum of De-Facto And De-Jure Segregation*, 18 DE PAUL L. REV. 305 (1968).

17. 372 F.2d at 847.

18. At issue was a freedom-of-choice plan that allowed the student or his parents to choose the school which the student would attend, providing space was available. These plans were approved by HEW as a permissible means of desegregation and were the popular method adopted by southern states after the Civil Rights Act of 1964. The plans were ineffective, but gave the appearance that the authorities were complying with their duty to desegregate the public schools. 372 F.2d at 888-89 & nn.110-12.

19. 380 F.2d at 390.

some standard by which a lower court could determine whether a desegregation plan is effective, the Supreme Court in *Green v. County School Board of New Kent County*[20] stated that there must be a finding that the authorities are proceeding in good faith toward the dismantling of state-imposed segregation, and required that the new plan must promise meaningful and immediate progress.[21] The Court further noted that a lack of good faith might be indicated if more productive courses of action were available than the one chosen by the school authorities.[22] The scope of a school board's affirmative duty thus was defined to include not only the duty to act positively, but also to act by selecting the best means available to desegregate public education at the earliest practicable date. Recent cases have focused on the question whether specific activities by school boards comply with the affirmative duty defined by the Supreme Court. In *Wright v. City of Brighton*,[23] the Fifth Circuit was called upon to determine whether a city had met its affirmative good faith duty when it sold an abandoned school building to a private group, even though the city knew the buyers were going to establish a private, segregated academy with the property. The court rescinded the sale on the grounds that it was made with the knowledge and purpose of encouraging racial discrimination and was not a good faith effort by the city to implement a unitary system. The court noted that the sale alone, and not any involvement by the city in the operation of the academy, constituted the state action that violated the petitioner's rights to equal protection.[24] In *Swann v. Charlotte-Mecklenburg Board of Education*,[25] the most recent pronouncement in the area, the Supreme Court more precisely defined the scope of the affirmative duty of school officials by stating that it was the joint responsibility of the school boards and the courts to see to it that future school construction and disposition of school property do not perpetuate or reestablish the dual system.[26]

In the instant case, the court first observed that the school board members were cognizant of both local and statewide movements to avoid the impact of integration by establishing private schools. The court noted that no effort was made to investigate the obvious possibility that

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20. 391 U.S. 430 (1968).

21. *Id.* at 439.

22. *Id.*; *see* Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (free-transfer plan unacceptable); Raney v. Board of Educ., 391 U.S. 443 (1968) (freedom-of-choice plan inadequate).

23. 441 F.2d 447 (5th Cir. 1971).

24. *Id.* at 452-53.

25. 402 U.S. 1 (1971).

26. *Id.* at 21.

the property in question might become a segregated academy after it was sold. The court did not contest the district court's findings that the school board had made a good faith determination that the continued operation of the school would be uneconomical and that the purchase price was adequate;[27] they stated, however, citing *Wright v. City of Brighton*,[28] that the establishment of a private, all-white school had the ultimate effect of placing a special burden on the black citizens of the community, and that the city, by its sale of the school, encouraged the maintenance of a segregated facility.[29] Since school boards are charged with the affirmative duty to take all necessary steps to bring about a unitary educational system free from racial discrimination, the court held that this duty included making a reasonable inquiry into the purposes of a prospective purchaser when the school property is located in an area where it is common practice to establish private schools to avoid the impact of court-ordered integration.[30]

In the instant case, the Fifth Circuit has demonstrated that it will not hesitate to impose a heavy burden on school boards[31] in order to prevent delay in the establishment of a unitary school system. A contrary result would have left a large loophole for school boards that sought to frustrate desegregation efforts;[32] any such board could have sold to a

27. The court also did not disagree with the district court's finding that the Foundation intended to establish a private school in order to avoid the impact of integration resulting from the adoption of a unitary school plan by the school board.

28. 441 F.2d 447 (5th Cir. 1971).

29. Although the court noted that the city of Brighton had actual knowledge that the sale would result in the creation of an all-white segregated school whereas here the school board was not aware of the purpose of the purchaser, it found the distinction inconsequential and refused to allow the school board to ignore local conditions and then claim lack of actual knowledge.

30. Judge Gewin dissented on the grounds that the majority invalidated the sale despite accepting the district court's findings that the sale was made in good faith and for sound economic and educational reasons; he expressed concern that the majority's refusal to say exactly what type inquiry must be made forces a school board that wants to be completely safe to include a covenant running with the land in the deed forbidding the property's use as a segregated school. No. 30722 at 9 (Gewin, J., dissenting).

31. In addition to the purchase price, the school board will have to refund at least some of the approximately $20,000 the Foundation had spent on improvements. The burden operates extensively on the Foundation as well, for in addition to the money spent, considerable free labor had been donated by many interested in the Foundation.

32. *See, e.g.*, Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (free transfer plan); Green v. County School Bd., 391 U.S. 430 (1968) (freedom-of-choice plan); Griffin v. County School Bd., 377 U.S. 218 (1964) (closing of public schools); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark.), *aff'd mem. sub nom.*, Faubus v. Aaron, 361 U.S. 197 (1959) (statute cutting off state funds to integrated school districts). For discussions of the recent history of school desegregation efforts see Gozansky, Gignilliat, & Horwitz, *School Desegregation in the Fifth Circuit*, 5 HOUSTON L. REV. 946 (1968); Note, *Desegregation of Public Schools: An Affirmative Duty To Eliminate Racial Segregation Root And Branch*, 20 SYRACUSE L. REV. 946 (1968); Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967).

private group if the board had made a good faith determination that the operation of the school was no longer economically feasible and if the board had no actual knowledge of the use to which the school would be put. Inherent in the decision is the recognition that the establishment of large numbers of private, all-white schools has retarded significantly the integration effort,[33] and the court again has served notice that state action which results in the establishment of these private academies will not be condoned. By failing to define more precisely the scope of the school board's duty, however, the court created the possibility that its decision actually will serve to deter the development of unitary school systems by restricting the marketability of school property. In order to ensure that it is fulfilling its duty, a school board may feel compelled to include a clause in the contract of sale preventing the property from being used as a segregated school. Interested parties might be unwilling to purchase the property if there is a binding restriction on its use even though, at the time, the purchaser has no intention of either establishing, or reselling to those who intend to establish, a private, segregated school. At the same time, school boards are in need of revenue to finance development of unitary school systems. Since the uses to which old school buildings may be put are limited, a restraint on their marketability may prove to be a significant barrier to a school district's ability to raise funds. If a school board makes a determination in good faith that a school building has outlived its usefulness, the standard for inquiry into the purposes of a prospective purchaser should not be so stringent that it will deprive the board of the much needed funds that such a sale would bring to the educational system.

33. The Fifth Circuit previously has been aware that integration has caused a substantial number of white students to withdraw from the public school system. *See* United States v. Hinds County School Bd., 433 F.2d 605, 609 (5th Cir. 1970); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 848-49 (5th Cir. 1966). For an excellent discussion of the role private schools play see Note, *The Wall of Racial Separation: The Role of Private and Parochial Schools in Racial Integration*, 43 N.Y.U.L. REV. 514 (1968).

Communications—FCC Renewal Hearings—1970 Policy Statemeut Denying Full Comparative Heariugs Violates Sectiou 309(e) of the Communicatious Act of 1934

Plaintiffs, two organizations formed to improve the position of minority groups in the broadcasting industry[1] and two applicants for television channels,[2] challenged the legality of the defendant Federal Communications Commission (FCC) 1970 Policy Statement,[3] which set forth the substantive and procedural guidelines for comparative hearings[4] regarding renewal applications for broadcasting licenses.[5] Plaintiffs

1. Plaintiffs, Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST), are organized to improve the position of minority groups in the broadcasting industry and to make existing stations more responsive to the communities they serve.

2. Plaintiffs, Hampton Roads Television Corporation (Virginia) and Community Broadcasting of Boston, Inc., are applying for television channels.

3. On January 15, 1970, theFCC promulgated its Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970). The Policy Statement "calls for the balancing of two obvious considerations. The first is that the public receive the benefits of the statutory spur inherent in the fact that there can be a challenge, and indeed, where the public interest so requires, that the new applicant be preferred. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operations.

. . . .

"We believe that these two considerations call for the following policy—namely, that if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application will be granted. . . ." 22 F.C.C.2d at 424-25.

4. The Commission has always dealt with applicants on a comparative basis, rather than judging each applicant on an absolute standard because the number of applications exceeds the number of available broadcasting frequencies. Thus, the Commission's task has been to choose the applicant that will best serve the public.

5. The opinion incorporates 3 separate suits against the FCC. In the first action CCC and BEST filed a petition pursuant to 47 U.S.C. § 402(a) (1970) and 28 U.S.C. § 2342 (1970) seeking to review (1) the FCC's Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants; (2) the Commission's memorandum opinion dismissing plaintiff's request to codify standards for all comparative hearings; and (3) the FCC's order denying reconsideration of the 1970 Policy Statement. In the second action, Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc., 2 corporations seeking to challenge incumbent stations in Norfolk, Virginia, and Boston, Massachusetts, respectively, sought review of (2) and (3) above. The last action, brought by CCC and BEST, was an appeal from the United States District Court for the District of Columbia's dismissal of plaintiff's complaint seeking to have the court enjoin the FCC from further policy decisions regarding standards applicable to comparative broadcast license renewal proceedings without first giving all interested parties notice and an opportunity to be heard pursuant to § 4 of the Administrative Act, 5 U.S.C. § 553 (1970). This last case was considered moot by the instant court because of its decision regarding the first 2 actions. Citizens Communications Center v. FCC, 447 F.2d 1201, 1204 (D.C. Cir. 1971).

contended that the Policy Statement, which grants a controlling preference to an incumbent licensee if it demonstrates substantial past performance without serious deficiencies, is unlawful under the "full comparative hearing" requirement of section 309(e) of the Communications Act of 1934.[6] The FCC maintained that the Policy Statement was a lawful exercise of the Commission's authority and that it represented a legitimate effort to balance the need for predictability and stability within the broadcasting industry with the desire for a constructive level of competition.[7] On appeal to the United States Court of Appeals for the District of Columbia, *held*, judgment for plaintiffs.[8] The FCC's 1970 Policy Statement violates section 309(e) of the Communications Act of 1934 because it denies an applicant for a broadcasting license a full comparative hearing if the incumbent has a record of substantial service to the community without serious deficiencies. *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

The first license requirement within the broadcasting industry was set forth by the Federal Radio Act of 1927, which required that a three-year license be awarded to all broadcasting stations on the basis of "public interest, convenience, or necessity."[9] When there were competing applicants, a license was granted to that applicant who, in the judgment of the Commission,[10] would best serve the public good. Seven years later, Congress enacted the Communications Act of 1934,[11] which is the

6. Ch. 652, 48 Stat. 1064 (1934), *as amended*, 47 U.S.C. § 309(e) (1970). This section provides in part: "Any hearing subsequently held upon such application should be a full hearing in which the applicant and all other parties in interest shall be permitted to participate . . . ." Plaintiffs further contended that the Policy Statement restricted plaintiffs' first amendment rights and violated the Adminisrative Procedure Act § 4, 5 U.S.C. § 553 (1970), by not holding a public hearing before issuing the Policy Statement. The court, however, deemed it unnecessary to decide these 2 issues in light of its holding.

7. The FCC also contended that the Policy Statement was not ripe for review because it was not a final order within the meaning of 28 U.S.C. § 2342(1) (1970) and 47 U.S.C. § 402(a) (1970), and that it established loose guidelines that could be used in "future adjudicatory proceedings." The court, using the Supreme Court test for ripeness in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), dismissed this defense because it found plaintiffs would suffer hardship if the Policy Statement were not revised and because the issues were proper for judicial review.

8. In holding the Policy Statement invalid, the instant court revised the Commission's order of July 21, 1970, denying plaintiffs' petition for reconsideration of the Policy Statement and refusing to institute rule-making proceedings. The Commission was ordered further to "redesignate all comparative renewal hearings to which the Policy Statement was deemed applicable . . . ." 447 F.2d at 1214.

9. Ch. 169, 44 Stat. 1162, *as amended*, 47 U.S.C. §§ 151-609 (1970).

10. Under the 1927 Federal Radio Act, the regulatory body was the Federal Radio Commission, the FCC's predecessor.

11. Ch. 652, 48 Stat. 1064 (1934), *as amended*, 47 U.S.C. §§ 151-609 (1970).

basis for most of the present broadcasting controls legislation. Under this Act, if, after examining each application, the Commission cannot, for any reason, determine which applicant would best serve the public interest,[12] section 309(e) requires that any hearing held thereafter must be a "full hearing in which the applicant and all other parties in interest shall be permitted to participate. . . ."[13] In interpreting this section of the Act, the Supreme Court, in *Ashbacker Radio Corp. v. FCC*,[14] held that when there were two or more mutually exclusive applications for the same license, section 309(e)[15] guaranteed a full comparative hearing for all interested parties.[16] Following the *Ashbacker* decision, the broadcasting industry, gathering strength in the post-World War II commercial boom, applied pressure on the FCC to promulgate specific criteria upon which their license applications would be judged.[17] In response, the FCC, in *Hearst Radio, Inc.*,[18] announced the general rule that, even though a new applicant was entitled to a full comparative hearing, an incumbent licensee's past performance was the single most reliable criterion in determining whether to renew its license for another three-year period. This past performance policy was further clarified in *Wabash Valley Broadcasting Corp.*,[19] in which the FCC held that a challenging applicant, seeking to replace the incumbent, must show a superior ability to serve the public interest. A different policy came to prevail if no incumbent were involved and, in its 1965 Policy Statement, the FCC announced that, when awarding a license to one of several new applicants, diversification of control of the media, proposed program service, and efficiency would be of primary importance.[20] As to past performance, the 1965 Statement provided that if one of the competing applicants had a previous broadcasting record, this performance would not

12. 47 U.S.C. § 309(a) (1970) (requiring the Commission to examine each application to determine whether granting a license to an applicant would serve public interest, convenience, and necessity).

13. 47 U.S.C. § 309(e) (1970). The section becomes operative only after the Commission is unable to resolve which applicant would best serve the public interest.

14. 326 U.S. 327 (1945).

15. Section 309(e) originally was enacted as 47 U.S.C. § 309(a) (1934).

16. 326 U.S. 327, 330 (1945).

17. *See* Comment, *The Swinging Pendulum—Conflict of Interest in Renewal of Broadcast Licenses*, 65 NW. U.L. REV. 63 (1970).

18. 15 F.C.C. 1149 (1951).

19. 35 F.C.C. 677 (1963).

20. 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). The Commission listed the following as the principal criteria to which it would look in choosing licensees: full-time participation in station operation by the owners, proposed program of service, past broadcast record, efficient use of frequency, and diversification of control of mass media.

be considered if it were only "within the bounds of average."[21] The 1965 Policy Statement, however, explicitly refrained from addressing the "somewhat different problems raised where an applicant is contesting with a licensee seeking renewal."[22] In considering applicants challenging incumbents, the Commission continued to follow the *Hearst-Wabash* policy until its highly controversial 1969 decision of *WHDH, Inc.*,[23] in which it deposed an incumbent, holding that if the existing licensee's past performance were merely average, the licensee would not be entitled to any preferential treatment.[24] For the first time, a licensee with a faultless record was not allowed to rely on the almost automatic renewals previously granted. This unprecedented and wholly unpredicted action by the FCC precipitated an immediate response by the broadcasting industry. Within the year, more than 50 legislative proposals were being considered in Congress.[25] Predominant among these proposals was the Pastore Bill,[26] which proposed to have section 309(e) amended to provide for a two-stage hearing in which an incumbent's record would be reviewed prior to any hearings with challengers.[27] If, when reviewed, the incumbent's past record were found to have been in the public interest, the renewal would be granted without hearing any counterproposals by a challenger.[28] Before this Bill could be voted on, however, the FCC issued its 1970 Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants.[29] The Policy Statement retained the traditional single-hearing approach, but allowed the challenger the limited role of pointing out the incumbent's shortcomings over the past three years.[30] The Statement further provided that if the incumbent had a record that reflected substantial service to the community without "serious deficiencies," it would be granted a renewal regardless of a

21. *Id.* at 398.

22. *But see* Seven League Productions, Inc. (WIII), 1 F.C.C.2d 1597 (1965). Commissioner Hyde dissented in the 1965 Policy Statement, saying there was no reason why the Statement should not apply to comparative hearings involving renewals. 1 F.C.C.2d at 403.

23. 16 F.C.C.2d 1 (1969), *aff'd sub nom.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

24. 16 F.C.C.2d at 9-10.

25. Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368 (1970). *See also* Comment, *The FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 U. CHI. L. REV. 854 (1969).

26. S. 2004, 91st Cong., 1st Sess. (1969).

27. *Id.*

28. *Id.*

29. 22 F.C.C.2d 424 (1970).

30. *Id.* at 425.

challenger's promise for superior performance.[31] Moreover, a challenger would be given a full comparative hearing only if the Commission refused to renew the incumbent's license because of a weak record.[32] Thus, the 1970 Policy Statement not only reinstated the essentials of the *Hearst-Wabash* policy concerning the incumbent's past performance,[33] but it also narrowed the comparative hearing guarantee announced in *Ashbacker*.[34] Consequently, this preference for the incumbent results in the inability of minority groups to gain access to broadcasting operation and ownership.

Before addressing the validity of the 1970 Policy Statement, the instant court reviewed the FCC's practice of awarding renewal licenses. Acknowledging that the criteria set forth in the 1965 Policy Statement were expressly limited to the consideration of new applicants, the court held that there was nothing in the Communications Act calling for the preference traditionally given the past performance of an incumbent licensee. The court further noted that the Act specifically provided that no automatic preferential rights were to be afforded any renewal applicant.[35] The court felt, therefore, that past performance should not be given any priority unless it had been superior performance. Turning to the 1970 Policy Statement, the court observed that the Policy Statement afforded a challenging applicant a full comparative hearing only in those limited instances when the renewal applicant's past performance was found to be insubstantial or marred by serious deficiencies. The court held that this limitation effectively denied a challenger the opportunity to display his broadcasting plans before the FCC. Consequently, the court concluded that the 1970 Policy Statement abridged the right to a full comparative hearing that a challenging applicant for an incumbent's license is granted under section 309(e) and the Supreme Court's interpretation of that section in *Ashbacker*.[36]

In striking down the FCC's 1970 Policy Statement, the instant court has taken a significant step toward forcing either the Commission

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31. *Id.*

32. *Id.*

33. *See* Goldin, *"Spare the Golden Goose"—The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970); Comment, *supra* note 17.

34. 47 U.S.C. §§ 301, 304, 307(d), 309(h) (1970). For the court's discussion of this point see 447 F.2d at 1208-09.

35. The instant decision once again will set the powerful broadcasting industry lobby into action. Pointing to the *WHDH* decision and this case, the lobby and its congressional supporters undoubtedly will propose legislation similar to the Pastore Bill. *See* text accompanying note 26 *supra*.

36. 447 F.2d at 1214.

or Congress into promulgating explicit guidelines to be used in license renewal proceedings.[37] The Policy Statement, while correctly attempting to "strike a balance" between stability and motivation for improvement through competition, was too heavily weighted in favor of an incumbent licensee for it restricted the challenger to pointing out the incumbent's weaknesses rather than affording him an opportunity to present what could be a far superior program. Evidence of the stifling effect that the Policy Statement has had is provided by the fact that there has not been a single challenger application filed since the issuance of the Statement over one year ago.[38] While the Commission has accurately analyzed the situation as a balancing problem, the proper weight to be attributed to the several factors should be reexamined. Theoretically, the need for security for the industry's investment is weighed against the desire for healthy competition.[39] The 1970 Policy Statement evidences the belief that the proper balance will be struck by granting an automatic renewal if the incumbent's past performance has been "substantially attuned" to the public interest. In effect, however, the present policy balances average with below average past records. Since a poor past performance usually will require automatic disqualification, the FCC is left with judging a large number of average performances and a relatively few excellent ones. The superior licensees should be and are rewarded with a renewal license; without a competitive hearing, however, it would appear that an average performer could color his record in such a manner that it would persuade the Commission to grant a renewal without hearing from prospective challengers. The subjective balancing act of the 1970 Policy Statement thus enables the average licensee to highlight that part of its record it believes the Commission would most readily approve. If this clear invitation for a distorted presentation is coupled with an abundance of promises for future improvement, there is every reason to expect the implementation of the Statement to protect most average licensees and grant them an opportunity to continue for three more

37. Both industry and the public have lobbied for specific guidelines since the inception of the FCC.

38. 447 F.2d at 1213.

39. The industry's argument for stability is a good one. No company wants to invest millions of dollars in a broadcasting station that might not have a license in 3 years. The 1970 Policy Statement, however, does not necessarily secure the superior licensee's position. If the Commission fails to set specific criteria by which it will judge superior performance, even the superior incumbent may be subject to the caprice of the FCC. Even worse, with no set of standards, the incumbent may well be inhibited from trying new programs and ideas and, instead, seek the security of anonymous mediocrity.

years. In order to avoid this sheltering of mediocrity, the instant court suggested that only superior performance should be given priority and that the FCC should specify, qualitatively and quantitatively, what constitutes superior performance. Were the suggestion followed, it would still protect the investment of a licensee, but only if the station's past record clearly warranted the protection. Moreover, it would give others guidelines that they might follow in order to reach the security of a "superior performance" rating.

Perhaps the most immediate effect the instant decision will have concerns the campaign by minority groups to bring responsive broadcasting to their communities.[40] Because the 1970 Policy Statement as promulgated deprived applicants of the opportunity for a full comparative hearing, the incumbent licensee would have been able to ignore the demands of the community and still stand an excellent chance of having his license renewed by the Commission. Now, however, challengers can force the licensee into choosing one of two alternatives. The station can respond to the community and modify both its broadcasting and hiring practices,[41] or the station can brace itself for a vigorous challenge from various pressure groups when its license is next examined pending renewal.[42] These alternatives should substantially improve the present situation and promote the Commission's avowed goals of diversification and decentralization; since only twelve out of 7500 currently licensed stations are owned and operated by nonwhites, the Commission can expect that the instant decision will be used by numerous groups attempting to infuse community interests and ownership into the broadcasting industry.

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40. Following the lead of plaintiffs in *WHDH*, many black and Mexican-American groups have launched an assault on the broadcasting industry. In California alone, 15 incumbent stations are facing strong challenges from minority groups, while over 50 stations nationwide are under the same type of pressure. N.Y. Times, Nov. 8, 1971, at 79, col. 1.

41. *Id.* Recently, 5 Dallas stations hired 50 members of minority groups in order to avoid facing the community group at a renewal hearing. *Id.*

42. *Id.* The leader of the movement to gain a voice in the broadcasting industry is the Office of Communications of the United Church of Christ in Washington, D.C. Its director, Rev. Everett L. Parker, has thus far preferred negotiations with incumbents rather than renewal battles. Parker's example has been followed by Cesar Chavez, noted for his leadership in the Mexican-American labor movement in California. Mr. Chavez plans to challenge KWAC in Bakersfield, California, in upcoming renewal hearings. *Id. See also* NEWSWEEK, Jan. 31, 1972, at 53.

Constitutional Law—Civil Rights—Granting Absolute Employment Preference to Minority Applicants over White Applicants with Superior Qualifications Violates Eqnal Protection Clause

Five blacks instituted a class action[1] against the Civil Service Commission of Minneapolis[2] alleging discriminatory practices in the recruitment, examination, and hiring procedures of the Minneapolis Fire Department. Accepting the arguments of plaintiffs, the district court found that the Commission's practices denied them the equal protection of the law guaranteed by the fourteenth amendment and infringed their right not to be discriminated against in employment by reason of race, which is guaranteed by section 1981 of title 42 of the United States Code.[3] Enjoining defendants temporarily from holding further examinations, the district court issued a decree creating an absolute preference in fire department employment for twenty minority persons who met either the qualifications presently in force[4] or the revised qualification standards established by the decree.[5] On appeal, the Commission contended that

1. The 5 blacks sued on behalf of themselves and all persons similarly situated in the city of Minneapolis. The classes represented by plaintiff were those black, Indian, and other minority persons presently applying for employment with the fire department and minority persons who were not applicants either because their applications were not approved or because they believed that equal employment would be denied to minority persons.

2. Defendants, who were sued individually and in their official capacity, were members of the Civil Service Commission of the city, the personnel director of the Commission, and fire chief.

3. 42 U.S.C. § 1981 (1970) provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Of the 535 men in the fire department, none was black, Indian, or Mexican-American. Only 2 blacks had served on the fire department in the recent past. Blacks constituted 6.44% of the Minneapolis population in 1970.

4. Although the examinations were found to be discriminatory, they were standard, job-related tests. At the time of trial, defendants, who only recently had been appointed to the Civil Service Commission, had discussed their rules and examinations with interested parties and civic groups, and had made changes in the Commission rules, in order to eliminate racial discrimination. They also had agreed to employ competent experts to validate future examinations and to take steps to promote recruitment of minority persons.

5. The court also directed defendants: (1) to establish an eligibility list of all minority applicants for the position of fireman who qualified under either the present examination plan or under an amended plan decreed by the court; (2) to refrain from holding examinations for white applicants until the discriminatory hiring practiees were corrected and 20 minority persons employed; and (3) to submit to the court for approval an affirmative plan for recruitment of minority persons. The court was to maintain jurisdiction until it was reasonably assured that racial discrimination had been eliminated in filling positions in the department.

the minority preference violated the fourteenth amendment because it discriminated against white applicants who had qualifications superior to those of the minority applicants. Agreeing with the Commission, the United States Court of Appeals for the Eighth Circuit, *held*, reversed and vacated the preferential order.[6] A grant of absolute preference in governmental employment to qualified minority applicants over white applicants with superior qualifications discriminates against whites in violation of the equal protection clause of the fourteenth amendment and section 1981 of title 42 of the United States Code. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971).

The purpose of the fourteenth amendment was to eliminate racial classifications,[7] and to prevent groups and individuals from being stigmatized by government.[8] Section 1981 of title 42 of the United States Code complements that purpose by guaranteeing to all persons the same rights and protections regardless of race.[9] Although classifications based on race are not per se unconstitutional, they are said to be "suspect" and their constitutionality requires more than a showing of a mere rational relationship between the classification and a legitimate purpose.[10] The general rule is that they not only must be reasonably drawn for the purpose for which they were established, but that they also must be supported by an overriding or compelling state interest.[11] The determination of a compelling state interest involves a judicial balancing of the benefits emanating from the state's objectives against the detriments resulting from infringement of a basic personal right.[12] Since the classifications that generally have been the subject of constitutional challenge

6. The court reversed only the minority preference and the provisions that implemented the preference.

7. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 188 (1965) (statute that prohibits an unmarried interracial couple from living in the same room violates the equal protection clause). *See also* Pace v. Alabama, 106 U.S. 583, 584 (1882) (statute that prohibits white and Negro from living together not in conflict with fourteenth amendment).

8. Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L.Q. 1, 18 (1968). *See also* Hobson v. Hansen, 269 F. Supp. 401, 492-508 (D.D.C. 1967); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 713 (1971).

9. The Supreme Court has recognized that § 1981 and the fourteenth amendment are related in purpose and meaning. *See, e.g.*, Virginia v. Rives, 100 U.S. 313 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880).

10. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088 (1969).

11. McLaughlin v. Florida, 379 U.S. 184 (1964). Although *McLaughlin* is concerned primarily with classifications in a criminal miscegenation statute, the Court considered the broad implications of the constitutionality of racial classifications.

12. *Developments in the Law—Equal Protection*, *supra* note 10, at 1132.

are those which discriminate against a minority group, a somewhat unique problem has been created by discriminatory classifications of majority groups intended to ameliorate past racial inequities. Although the classification in these instances may be racial and therefore "suspect," the Supreme Court has recognized a compelling public interest in overcoming discriminatory practices and has held that equity courts have the duty to eliminate present effects of past discrimination.[13] Accordingly, lower courts have upheld racial classification in the form of preferences designed to achieve equality in the areas of school segregation[14] and housing.[15] Similarly, in the field of employment, a minority preference to correct past discriminatory promotion practices has been judicially approved as a remedy for qualified minority employees in a departmental transfer, even though existing seniority arrangements were nondiscriminatory.[16] Preference also has been used by courts in order to promote black teachers to positions as principals, and bypassing white teachers due for promotion.[17] More recently, the United States Court of Appeals for the Third Circuit has upheld the constitutionality of minority manpower utilization goals as an appropriate remedy for discriminatory hiring policies despite the plaintiff's argument that an employer's decision to hire a black person necessarily involves a decision not to hire a qualified white employee.[18] Some remedial racial classifications however, have come under attack as promoting unconstitutional reverse discrimination against whites. At least one court, on its own initiative, has struck down racial classifications in school preferential admissions on the premise that the Constitution is color blind and requires nondiscriminatory treatment toward all groups.[19] The Supreme Court has

13. *See, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965) (equity courts have the duty to eradicate the evil effects of discriminatory practices).

14. Swann v. Charlotte-Mecklenburg Board of Educ., 431 F.2d 138 (1970), *aff'd*, 402 U.S. 1 (1971) (busing and assignment to schools on racial basis to achieve integrated school system are constitutional); Offermann v. Notkowski, 378 F.2d 22 (2d Cir. 1967) (school district boundaries based on race do not violate the constitutional rights of whites).

15. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) (regulation granting housing preference to persons displaced by urban renewal is constitutional).

16. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (although reverse discrimination is not required under the Civil Rights Act of 1964, minority persons should not be frozen in job opportunities because of past discriminatory practices).

17. Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (state action based in part on considerations of color and in furtherance of a proper governmental objective is not necessarily a violation of the equal protection clause).

18. Contractor's Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971). The case was brought under Title VII of the Civil Rights Act of 1964 and upheld the constitutionality of the revised "Philadelphia Plan" for contractors.

19. DeFunis v. University of Washington, No. 741727 (Wash. Super. Ct., Sept. 22, 1971).

never addressed the constitutional issue of reverse discrimination, but, in *Griggs v. Duke Power Co.*,[20] it held that Title VII of the Civil Rights Act of 1964[21] did not command that a person be hired simply because he was a member of a minority group which previously had been discriminated against; discriminatory preference for any group, either majority or minority, was proscribed.

In the instant case, the court read section 1981 and the fourteenth amendment to proscribe any racial discrimination in employment whether the discrimination be against whites or blacks. Recognizing that defendants had taken affirmative action to remedy discriminatory hiring practices, and stating that an applicant who scored higher on a fairly conducted civil service examination had a right to preference over applicants with lower scores,[22] the court found that granting an absolute preference to minority persons regardless of their respective scores would discriminate against white applicants who scored higher than the minority applicants.[23] The court distinguished the school integration cases[24] on the ground that whites have no constitutional right to insist upon segregated schools while all persons have a right to employment free from discrimination. Since there was no proof that any specific plaintiff had been discriminated against, the court also distinguished those cases in which specific identified persons were able to prove that they had been discriminated against.[25] Relying on *Griggs*[26] to support its viewpoint, the court concluded that past discrimination against minorities was no justification for discrimination against the majority in the present[27] and that an absolute employment preference to minority applicants therefore violated the equal protection clause and section 1981.

The instant decision is one of the first to uphold an asserted defense

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20. 401 U.S. 424 (1971).

21. 42 U.S.C. §§ 2000e to -15 (1970).

22. The court found that the Home Rule charter of Minneapolis and civil service provisions of Minneapolis accorded preference to the fireman-applicant with the highest test score.

23. The Eighth Circuit found that the lower court's equity power afforded no basis for depriving others of constitutionally protected rights. The court stated that plaintiffs had conceded this in their brief when plaintiffs assumed that the lower court could not order the city to take any unconstitutional action.

24. *See* cases cited note 14 *supra*.

25. *See, e.g.*, Heat Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (plaintiffs denied membership in union with no Negro or Mexican-American members ordered admitted by court).

26. 401 U.S. 424 (1971).

27. The court reasoned that the fact that because of racial discrimination some unknown white person may have received preference over some unidentified minority person with higher qualifications was no justification for discriminating against a better qualified white applicant now.

of reverse discrimination. In considering whether a minority preference violates the constitutional rights of others, the court confronted a dilemma not heretofore resolved. On the one hand, there is the question whether minorities should be given preferences to compensate for past injustices. On the other hand, there is the question whether the court should proscribe all discrimination, including reverse discrimination created through preferential treatment. Those who advocate minority preferences have accepted as a basic premise that, when inequalities exist, justice demands that preference be given immediately to correct the imbalance.[28] Arguing that the majority enjoys benefits of past inequalities, those favoring minority preferences further contend that preferences aid the minority in their integration into society thereby correcting inequalities. These advocates argue that the utilitarian considerations, such as the cost to educate the minority and the divisive resentment caused in the majority by the preference, should yield to the upgrading of the minority's unequal economic status and the abolishment of the disrespect caused by that status.[29] The opponents of minority preference premise their argument on the idea that preference tends to undermine the principle of increasing the individual's worth, which is the goal behind the preferential treatment. Their argument is that a minority group's motivation, which may have existed before they received the preference, will be dampened because they will rely on preferential treatment as a right, and that after receiving the preference their feeling of accomplishment will be clouded becaue they will not know to what extent their achievement was based on merit.[30] In addition, they urge that the arbitrary selection of individual members of a minority for preferential treatment not only discriminates against majority groups, but also against those of the minority who are not given preference. In attempting to evade the horns of this dilemma, the instant court compromised both arguments by refusing to allow discriminatory minority preference while at the same time requiring the city to revise the qualification examination and eligibility list to insure the inclusion of minority persons in the fire department. The instant court supports this compromise position by the *Griggs*[31] interpretation of Title VII of the Civil Rights Act of 1964.

28. *E.g.*, Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063, 1067 (1968). *See also* Rawls, *Justice as Fairness*, 67 PHILOSOPHICAL REV. 164, 165 (1968).

29. *E.g.*, Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063, 1064 (1968).

30. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 378 (1966).

31. "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 430-31.

Although *Griggs* is not controlling in the instant case, it is noteworthy that the Supreme Court has construed congressional intent to mean that less qualified persons should not be preferred over the better qualified solely because of minority origins. If this is the intent of Congress, the instant decision is justifiable when applied to employment decisions, especially decisions that rely on job-related tests involving the hiring of nonmanagement personnel. It is doubtful, however, whether the instant decision is applicable to other areas of the law, such as college preferential admissions, which involve decisions that are more discretionary. While preferences related to these discretionary decisions probably would have to meet the general rule of reasonableness and be related to a compelling state interest, the instant court failed to discuss the reasonableness of this preference or any state interest that might be served by minority preference. This failure to consider the possible appropriateness of minority preferences seems to thwart previous progress in overcoming discrimination. In addition, the instant court's requirement that specific acts of discrimination must violate identifiable constitutional rights of each individual member of the class before a class action is appropriate significantly lessens the availability of a class action as a remedy to discrimination. Regardless of these negative implications of the decision, the instant court's compromise result does not undo all the progress made, because, while it did refuse to allow a discriminatory minority preference, it also required the city to take specific affirmative action to include minority persons in the fire department.[32]

32. Since the preparation of this Comment, the Eighth Circuit has modified the instant decision. On rehearing, the Eighth Circuit reaffirmed its holding that an absolute preference violates the constitutional right of equal protection to white persons who are equally or better qualified. The court did set up a temporary ratio hiring procedure, however, as a remedy for the past discrimination. The ratio requires one out of every 3 persons hired by the fire department to be a qualified, minority person until at least 20 minority persons have been hired. The dissenting opinion, while acknowledging that the ratio will not discriminate against as many whites as an absolute preference, argued that the ratio procedure was nevertheless subject to the same constitutional infirmity. Carter v. Gallagher, No. 71-1181 (8th Cir., Jan. 2, 1972).

Constitntional Law—Right of Privacy—Retention of Arrest Records After Acqnittal Violates Right of Privacy

Petitioner, acquitted of charges for assault, sought a writ of mandate ordering the chief of police to show cause why the fingerprints and photographs contained in the police records[1] of her arrest should not be returned to her. Petitioner contended that the refusal to return her fingerprints and photographs, in the absence of justification for their retention, violated her right of privacy. Respondent, on the other hand, argued that since the statute[2] contained no provision for the return of arrest records, the police had implied statutory authority to retain them.[3] The trial court refused to issue the writ.[4] On appeal to the Washington Court of Appeals, *held*, reversed. Without a showing of compelling necessity by the state, the retention of fingerprints and photographs of a person who has been acquited of criminal charges and who has an otherwise unblemished criminal record violates that person's constitutional right of privacy.[5] *Eddy v. Moore*, 487 P.2d 211 (Wash. Ct. App. 1971).

Long before the Supreme Court originally discerned a constitutionally grounded right of privacy, virtually all courts recognized an equitable right of privacy.[6] Although the equitable right of privacy protected the individual from unreasonable intrusion into his private affairs and from unreasonable publicity of private facts that could embarass or falsely represent him in the public eye,[7] the courts almost uniformly have refused to extend that right to a case in which a person acquitted of criminal charges seeks expunction of his criminal arrest records.[8] In refusing expunction the courts have reasoned that the police, by virtue

1. Washington, like most states, requires the filing of arrest records, including fingerprints and photographs, on all persons arrested for felonies or serious misdemeanors, and provides for the dissemination of these records through cooperative exchange with other state and federal law enforcement agencies. There is no provision for the return or expunction of these records. WASH. REV. CODE ANN. §§ 72.50.010-.110 (1962).

2. *Id.*

3. Eddy v. Moore, 487 P.2d 211, 212 (Wash. Ct. App. 1971).

4. *Id.* at 211.

5. Since the Seattle Police Department showed no further justification for the retention of petitioner's arrest records, the court ordered their return.

6. *E.g.*, Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (movie based on defendant's earlier life as a prostitute).

7. *See* RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 13, 1967); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

8. *See, e.g.*, Hershel v. Dyra, 365 F.2d 17 (7th Cir.), *cert. denied*, 385 U.S. 973 (1966); Shaffer v. United States, 24 App. D.C. 417 (Ct. App. 1904), *cert. denied*, 196 U.S. 639 (1905).

of their obligation to protect society, have an interest in the retention of fingerprints, photographs, and other arrest information for investigative purposes and that this interest overrides a mere equitable prohibition against intrusion upon personal rights.[9] An exception to the general rule denying expunction has been recognized, however, when records obtained through an illegal arrest are retained by the state. The view taken by the courts is that this action is nonjudicial punishment which violates due process as well as the equitable right of privacy.[10] The display of an acquitted individual's photograph in a rogue's gallery also has been held by some courts to exceed the police privilege of retaining arrest records.[11] These courts have reasoned that the risk of undeserved infamy arising from the exhibition of an acquitted person's photograph among those of convicted criminals is a particularly offensive abuse of the right to retain records, especially when the form of retention is not justified as an investigative tool.[12] Although the equitable right of privacy generally has proved to be an ineffective basis for compelling the expunction of arrest records, the Supreme Court, in *Griswold v. Connecticut*,[13] recently has acknowledged the existence of zones of individual privacy that emanate from the penumbrae of express constitutional guarantees found in the Bill of Rights.[14] Although declining to outline specifically the boundaries of these peripheral zones, the Court held that for government encroachment upon these fundamental liberties to be permitted, it must be accompanied by compelling and necessary state interests,[15] a requirement not present in the equitable right of privacy. *United States v. Kalish*[16] was the first case to examine the right to the return of arrest

9. *See* cases cited note 8 *supra*. One court described it as "a humiliation to which [the individual] must submit for the benefit of society." Fernicola v. Keenan, 136 N.J. Eq. 9, 10, 39 A.2d 851 (Ch. 1944).

10. United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (arrests of Negroes for purpose of interfering with voting rights); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968) (arrests of "hippies" for purpose of harassment); *see* Note, *Constitutional Law—Right of Police To Retain Arrest Records*, 49 N.C.L. REV. 509, 510-11 (1971).

11. Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905); Downs v. Swann, 111 Md. 53, 73 A. 653 (1909).

12. Note 11 *supra* and accompanying text; *see* Prosser, *supra* note 7, at 399-400.

13. 381 U.S. 479 (1965).

14. *Id.* at 484. The independent right to personal privacy arises from the first amendment right of association, the fourth amendment protection against unreasonable search and seizure, and the fifth amendment protection against self-incrimination. The ninth amendment added support to these "other rights" retained by the people. *Id.* For further explanation of the Court's rationale and the impact of the *Griswold* decision see *Symposium—Comments on the Griswold case*, 64 MICH. L. REV. 197 (1965); 18 VAND. L. REV. 2037 (1965).

15. 381 U.S. at 485.

16. 271 F. Supp. 968 (D.P.R. 1967). Kalish, arrested for refusing to submit to induction, contended that his refusal was based on advice of counsel in appealing his selective service classification. Soon after dismissal of the charges, he voluntarily entered the armed services.

records under the *Griswold* rationale. In ordering the expunction of the records from police files, the court reasoned that even though there is no constitutional right of privacy outweighing the societal interest in compiling fingerprints, photographs, and other data at the time of arrest, these records no longer serve a public interest when the accused has been acquitted or discharged without conviction.[17] Instead, the retention of the arrest record sullies his personal dignity and violates his right of privacy[18] by attaching to his public record an unwarranted stigma of criminality.[19] Similarly, in *Menard v. Mitchell*,[20] the court examined in detail the detrimental effects of an arrest record and noted that even when followed by exoneration from the charges, an arrest record can result in the loss of educational and employment opportunities,[21] or can adversely affect the disposition of subsequent criminal charges against an individual.[22] Although the case was remanded for insufficient facts, the court emphasized the need for safeguards against improper dissemination of arrest records,[23] and indicated that when the accused had been wholly cleared of the charges against him, the mere existence of an arrest record might be constitutionally invalid.[24]

Confronting the issue whether the constitutional right of privacy, as developed in *Griswold*, forbids unwarranted retention of an acquitted person's fingerprints and photographs, the instant court initially observed that a loss of privacy necessarily accompanies the accumulation

17. *Id.* at 970.

18. The court's opinion did not clarify whether the basis for this right of privacy was constitutional or equitable. The extremity of the factual situation, as well as the brevity of the opinion, indicate that the court intended equitable grounds for their decision.

19. 271 F. Supp. at 970.

20. 430 F.2d 486 (D.C. Cir. 1970). Plaintiff, arrested in California for suspicion of burglary, was discharged for lack of evidence connecting him with the crime. An arrest record was filed, however, and a copy transferred to the FBI files in accordance with California law. Plaintiff sought expunction of the FBI record, contending that his arrest had been made without probable cause and that the arrest record was not a "criminal record" within the scope of the statute authorizing FBI retention. *See* Note, *supra* note 10; 46 NOTRE DAME LAW. 825 (1971).

21. 430 F.2d at 490. For example, 75% of the New York area employment agencies will not recommend a person with an arrest record. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967); *see* Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELIN. 494 (1967).

22. 430 F.2d at 491; *see* Russell v. United States, 402 F.2d 185 (D.C. Cir. 1968) (determination of bail or pretrial release); W. LAFAVE, ARREST 287-89 (1965).

23. "[T]here is a limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty." 430 F.2d at 492.

24. *Id.* The court stated that an arrest without probable cause was especially susceptible to constitutional attack. On remand, the district court refused to acknowledge jurisdiction on the issue of probable cause, but did enjoin the FBI from dissemination of Menard's arrest record to nongovernmental agencies. Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971).

of an arrest record. It noted further that the resultant notoriety can be injurious to personal reputation and give rise to an increased susceptibility to police scrutiny.[25] Thus the court found that the unwarranted retention of police records offends an inherent constitutional right of privacy, and concluded that the state must show a compelling necessity for the continuation of this practice.[26] In that same vein, it conceded that the state could provide the justification by establishing that the retention of all arrested persons' fingerprints and photographs is critical to effective law enforcement and societal protection. The court noted, however, that since this justification rests upon the assumptions that the person actually committed the crime and that commission of the crime indicates a risk of future criminal activity, an acquittal, which appears to negate both premises, belies the need for retention of the arrest record. Accordingly, it held that in the absence of compelling justification by the State,[27] an individual acquitted of charges against him has a constitutional right to the return of his fingerprints and photographs from police files.

By extending the *Griswold* doctrine to an acquitted person's fingerprints and photographs, the instant court has provided long-needed safeguards against the deleterious effects of retaining those records—the increased visibility to police, the risk of damage to reputation, and the ensuing loss of job opportunities and other societal benefits. Conversely stated, since retention of an arrest record is only justified when the record is necessary to efficient law enforcement, which in turn depends upon whether the person is guilty, the police implicitly are authorized to retain only those arrest records that are followed by conviction or for which the police can demonstrate extrinsic compelling need. One administrative problem generated by this ruling is whether the police must now take affirmative action to expunge from their files all past records that cannot be justified under the instant decision, or instead, whether expunction is contingent upon the individual's request. The instant court's rationale indicates that removal of all unauthorized records is required without request of the individual. Moreover, the court intimates that unless the state can establish compelling justification, any nonconviction disposition of criminal charges against an individual will require auto-

25. The court, citing *Kalish*, emphasized the heightened visibility to both the public and police created by identification as a criminal suspect.

26. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

27. Although the court did not specify what further justification would be sufficient, the opinion implies a need to rebut the presumption of innocence accorded an acquittal or discharge without conviction.

matic expunction of his arrest records. Under such a mandate the state is obviously burdened with the problem of determining what external justification will warrant retention of arrest records not followed by conviction. Must the police, for example, forego investigative files on persons who, although repeatedly arrested, escape conviction on procedural grounds? A viable solution to this problem, which is analogous to the procedure for obtaining a search warrant, may be to give the state the opportunity to request an independent judicial ruling in those situations in which the failure to obtain a conviction does not necessarily establish an absence of guilt.[28] Such a method, although initially cumbersome, would provide objective determinations on a case-by-case basis and eventually would establish more facile judicial guidelines.[29] Even legitimately retained records, including the arrest records of convicted criminals, might not fully escape the requirements of the instant case, however, because the right of privacy may demand some control over the dissemination of records properly in police custody. Public prejudice against the ex-convict greatly impedes his search for social acceptance, employment, and a return to normal life, and may even result in recidivism.[30] Certainly there are some institutions, including many individual employers, with valid reasons to examine a person's criminal history, but it may be that the individual's right of privacy and the overall need to achieve social tolerance will restrict the uncontrolled dissemination of even legitimate arrest records. Special benefit could be derived by the juvenile offender who, although often arrested for less serious or even noncriminal actions, is particularly sensitive to the stigma of delinquency and must suffer its effects throughout his adulthood.[31] In addition to the retention and dissemination of criminal records, the instant case may affect the accumulation of government dossiers on political dissidents, which are not specifically "criminal" in nature, but which do pose ominous threats to an individual's privacy. These dossiers, compiled under the auspices of national security, encroach not only upon the right of privacy but also the freedoms of speech and assembly guaran-

28. Note, *supra* note 10, at 518-19.

29. *Id.*

30. *See Special Project, The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

31. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 21, at 38-40. A few states have instituted procedures by which a youth arrested or convicted of a juvenile offense may, after a period of time, petition for the expunction or sealing of all records retained by the police or court pertaining to his arrest or its disposition. *See* CAL. WELF. & INST'NS CODE § 781(a) (Supp. 1971); UTAH CODE ANN. § 55-10-117 (Supp. 1971).

teed by the first amendment.[32] Since these persons threaten no criminal activity in the ordinary sense, and since government dossiers imply a twofold violation of the Constitution, the courts should require an even stronger showing of compelling governmental justification as a condition to their retention.

Amidst a technological naissance, in which computer-based data centers can process and disgorge information almost instantaneously, both governmental and private institutions have begun extensive programs for the compilation and centralization of personal data.[33] The rapid expansion of private credit-reporting services[34] and the growing support for a National Data Center,[35] which would centralize the information of all the various government agencies, illustrate the growth of technology in this area and its popularity. These developments, however, are necessarily accompanied by the danger of misuse, because the computer with its calculated objectivity is susceptible to unauthorized examination and misinterpretation of its information.[36] The instant case, in recognizing constitutional safeguards against the accumulation and dissemination of certain personal data, may limit the extent to which these data banks can store and use personal information and may provide reasonable controls to ensure that authorized reporting will be done accurately. Unfortunately, the collection of personal information, especially by private institutions, is not easily controlled. Even a constitutional right to have this data secreted may prove inadequate due to difficulties in discovering unauthorized invasions of privacy and in proving actual damages that result from the invasion.[37] In addition, economic pressures imposed by many employers and the incentive to obtain a good credit-rating may force individuals to waive their right of privacy and volunteer confidential information.[38] An obvious and perhaps necessary

32. *See* Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970).

33. Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1103 (1969).

34. For a discussion of private services see V. PACKARD, THE NAKED SOCIETY (1964); A. WESTIN, PRIVACY AND FREEDOM (1967).

35. *See* Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 HARV. L. REV. 400 (1968). A recent proposed model for the National Data Center is described in HEARINGS ON COMPUTER PRIVACY BEFORE THE SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 90th Cong., 1st Sess. (1967).

36. Miller, *supra* note 33, at 1109.

37. Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 350 (1966).

38. *Id.* at 345; Michael, *Speculations on the Relation of the Computer to Individual Freedom and the Right to Privacy*, 33 GEO. WASH. L. REV. 270, 275 (1964).

alternative is for the legislature to introduce comprehensive controls upon the accumulation and use of personal data. Congress, far more than the courts, is equipped with the research tools to provide an extensive series of safeguards throughout the area of personal data processing. The instant case may provide a springboard for legal developments, both judicial and legislative, that will determine whether our evolution toward a "dossier society" will upend the balance between an individual's right to privacy and the public's need for protection.

Criminal Law—Jury Instructions—ABA Jury Instruction Adopted As Preferable to Allen Charge

Appellant was convicted in federal district court on counts of robbery and assault with a deadly weapon.[1] At the conclusion of the evidence, the trial judge delivered to the jury a version of the *Allen* charge,[2] which includes a reference to the duty of a dissenting juror to consider whether his position is reasonable in light of the conclusions drawn by the majority.[3] Following an apparent deadlock by the jury,[4] the judge, in a supplementary instruction, told the jury that he was not going to declare a mistrial, reminded them of the "substantial backlog of work" facing the court, and instructed them to reconvene and try to reach a

1. The indictment alleged that appellant was one of 2 men who broke into the victim's apartment and held him at gunpoint while they ransacked his apartment. At issue in the trial court was the identity of appellant as one of the assailants.

2. The charge, taken from the 1851 Massachusetts decision of Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851), was sanctioned by the Supreme Court in Allen v. United States, 164 U.S. 492 (1896). It is also known as the "dynamite charge," the "third-degree instruction," and the "shotgun instruction."

3. The trial judge included the following as part of his instruction: "In a large portion of the cases absolute certainty cannot be expected, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, yet you should examine the question submitted with candor and proper regard and deference for the opinion of each other. It is your duty to decide the case if you can conscientiously do so. You should listen to each other's argument with a disposition to be convinced. If much the larger number of jurors are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which makes no impression upon the minds of so many jurors equally honest, equally intelligent with himself.

"If on the other hand the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority." United States v. Thomas, 449 F.2d 1177, 1180 (D.C. Cir. 1971). The significant portion of this instruction taken from *Allen* is the direction of the minority dissenting jurors to review their conclusions in light of those of the majority.

4. After the jury had deliberated for about an hour, they sent a note to the judge advising him that they were unable to reach an agreement. The jury was returned to the courtroom.

decision.[5] After further deliberation, the jury returned a verdict finding appellant guilty on both counts of the indictment. Appellant maintained that the trial judge's use of the *Allen* charge and the supplementary instruction constituted coercion of the jury and improperly induced the verdict. On appeal to the United States Court of Appeals for the District of Columbia, *held*, reversed. When the *Allen* charge is supplemented by further encouragement for the jury to reach a decision, a substantial probability of prejudice to the accused is created; moreover future renditions of the *Allen*-type charge should adhere to the guidelines established by the ABA Standards for Trial by Jury. *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971).

In a day of crowded dockets and rising legal costs, the expense of a mistrial often has prompted a judge to attempt to avoid a hung jury[6] by encouraging the unanimous agreement of a deadlocked panel. The authority of a judge, however, to influence the deliberation process has been carefully circumscribed to prevent coercion or unwarranted intrusions into the province of the jury,[7] but the line between proper guidance and coercion remains a fine one. In the 1896 decision of *Allen v. United States*,[8] the Supreme Court sanctioned a charge generally considered to be the outer limit of a judge's prerogative to urge a unanimous verdict.[9] The approved instruction directed that while a dissenting juror should

5. In the supplementary instruction the judge made the following comments to the jury: "I am not going to declare a mistrial, and thereby require a retrial of this case before some other jury. . . .

"I am sure you ladies and gentlemen know we have a substantial backlog of work, and to spend another day before another jury retrying this case just doesn't make sense to me. See if you can't decide and come to a verdict, think about it overnight individually." 449 F.2d at 1180 n.11. The judge then excused the jury for the night.

6. Over 5% of all jury trials result in a hung jury. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 453 (1966).

7. *See, e.g.*, Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123 (1967).

8. 164 U.S. 492 (1896).

9. The approved instruction was stated by the *Allen* court: "[T]hat in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescenee in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." 164 U.S. at 501.

by no means merely acquiesce in the conclusion of his fellows, he nevertheless should consider whether his opinion was reasonable in light of the decision reached by the majority. Since its approval by the Supreme Court, however, the *Allen* charge has become the subject of a great deal of criticism, both for the substantive issues it raised and for the administrative difficulties it created.[10] The substantive objections focus primarily upon the direction of a minority juror to "consider whether his doubt [is] a reasonable one which [makes] no impression upon the minds of so many men, equally honest, equally intelligent with himself."[11] By directing reevaluation only of the minority point of view, it has been argued that the charge interjects the prestige of the court on behalf of the majority position and thereby creates a risk of dislodging individual jurors from conscientiously held beliefs.[12] Although this objection has never persuaded a court to find a properly framed *Allen* charge unconstitutional,[13] it has elicited the holding that an unwarranted addition to the basic *Allen* charge renders it coercive.[14] Similarly, failure to include in the charge language emphasizing a juror's right to retain his conscien-

10. *See* United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969) (modifying the *Allen* charge in that circuit); Jenkins v. United States, 330 F.2d 220, 221 (D.C. Cir. 1964) (Wright, J., dissenting), *rev'd*, 380 U.S. 445 (1965); Andrews v. United States, 309 F.2d 127, 129 (5th Cir. 1962) (Wisdom, J., dissenting); Huffman v. United States, 297 F.2d 754, 756 (5th Cir. 1962) (Brown, J., dissenting); Comment, *Defusing the Dynamite Charge: A Critique of Allen and Its Progeny*, 36 TENN. L. REV. 749 (1969); Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge,"* 31 U. CHI. L. REV. 386 (1964); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123 (1967); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968).

11. 164 U.S. at 501.

12. Claims of such coercive influence usually are based upon one of 2 grounds: first, language is often added to or left out of the charge, distorting the thrust of the approved wording; secondly, the argument is made that the charge, even if properly worded, is coercive per se. Note, *Deadlocked Juries and Dynamite: A Criticial Look at the "Allen Charge," supra* note 10.

13. The charge sanctioned in *Allen* has been upheld by the Supreme Court in subsequent decisions. Kawakita v. United States, 343 U.S. 717 (1952); Lias v. United States, 284 U.S. 584 (1931). The D.C. Circuit also has voiced approval of the charge. Post v. United States, 407 F.2d 319, 320 n.3 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969); Fulwood v. United States, 369 F.2d 960 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 934 (1967). This court has warned, however, that the *Allen* charge approaches the limit to which a court should go in suggesting to jurors the desirability of agreement and avoidance of the necessity of a retrial before another jury. Williams v. United States, 338 F.2d 530, 533 n.4 (D.C. Cir. 1964).

14. *See, e.g.*, Jenkins v. United States, 380 U.S. 445, 446 (1965) ("you have got to reach a decision in this case"); United States v. Smith, 399 F.2d 896, 898 (6th Cir. 1968) ("it is my opinion that this defendant has been proven guilty beyond a reasonable doubt"); United States v. Harris, 391 F.2d 348, 355 (6th Cir. 1968) ("this lawsuit must be decided—it must be decided at some time by some jury"); Powell v. United States, 297 F.2d 318, 320 (5th Cir. 1961) ("it is no credit for a juror to stand out in a pure spirit of stubbornness").

tiously held minority viewpoint has been a ground for reversal.[15] The administrative objection to the *Allen* charge is that it generates a large number of appeals based on claims that the charge and its many variations have exceeded the limits of proper guidance.[16] This argument has led the Third and Seventh Circuits to ban the use of the *Allen* charge.[17] In an effort to alleviate these problems created by *Allen*, the American Bar Association Project on Minimum Standards for Criminal Justice developed a jury instruction designed to fulfill the desirable purpose of the *Allen* charge while eliminating some of its potentially coercive language.[18] The ABA charge encourages each juror to reexamine his own views in light of the opinions held by the other jurors, but abandons all reference to majority-minority divisions, thus reducing the likelihood that the court's influence will improperly support the majority and undermine the minority.[19] Following the ABA suggestion, the Court of Appeals for the District of Columbia expressed approval of the ABA charge in *United States v. Johnson*.[20] Among those courts who have

15. *See, e.g.*, United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

16. This objection has led the supreme courts of Montana and Arizona to abandon further use of the *Allen* charge. State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959). The *Thomas* court explained: "When and wherever its use is called into question it must stand or fall upon the facts and circumstances of each particular case. It has given, and we believe each use will give us, harassment and distress in the administration of justice. No rule of thumb can circumscribe definite bounds of when and where, or under what circumstances it should he given or refused." *Id.* at 166, 342 P.2d at 200.

17. United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969). The *Fioravanti* court recommended the substitution of a charge approved in W. MATHES & E. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 79.01 (1965). 412 F.2d at 420 n.32.

18. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL BY JURY 145-46 (1968): "5.4 Length of Deliberations; deadlocked jury.

"(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury: (i) that in order to return a verdict, each juror must agree thereto; (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment; (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors; (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

"(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

"(c) The jury may be discharged without having agreed upon a verdict if it appears there is no reasonable probability of agreement."

19. *Id.*

20. 432 F.2d 626 (D.C. Cir.), *cert. denied*, 400 U.S. 949 (1970).

criticized the *Allen* charge, however, only one court[21] has expressly adopted the ABA instruction in lieu of the *Allen* charge.

The instant court, acknowledging the narrow distinction between guidance and coercion, outlined three types of instructions that have been held to impose improper duress on a deadlocked jury: statements reflecting the judge's assessment that the factual issues bear relatively easy solution; expressions overly emphasizing the desirability of achieving a verdict as a means of avoiding the necessity of a retrial; and statements susceptible to an interpretation reflecting unwholesomely upon minority jurors simply because they happen to be in the minority. The court held that the proper test to measure the propriety of an instruction was whether the communication from the judge possessed "a substantial propensity for prying individual jurors loose from beliefs they honestly have."[22] The court further noted that, although the *Allen* charge was not coercive per se, it could become so if supplemented by additional encouragement to minority jurors to consider the findings of the majority. After reviewing the instant facts, the court concluded that the additional statements of the trial judge created a substantial probability of prejudice to the accused. Having thus given the grounds upon which the instant conviction should be reversed, the court turned to a consideration of the utility of the *Allen* charge and the expenditure of judicial time and energy it required. The court pointed out the drain on appellate resources caused by recurring *Allen* charge appeals and noted that it previously had approved the ABA standard jury charge in *Johnson*.[23] Exercising its supervisory jurisdiction,[24] the court concluded that, in the interest of efficient judicial administration, future renditions of the *Allen*-type instruction would be required to adhere to the guidelines of the ABA standard.[25]

The purpose of employing the *Allen* charge is to avoid unnecessarily deadlocked juries by encouraging any stubborn juror to consider the

21. United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969).

22. 449 F.2d at 1182.

23. 432 F.2d at 633.

24. The court in the instant case was sitting en banc, giving it jurisdiction, not present in the *Johnson* case, to issue a supervisory opinion binding upon the district courts within the circuit.

25. Circuit Judge Robb, joined by 3 other judges, dissented vigorously both to the finding of improper coercion and to the supervisory ban of the *Allen* charge. The dissent contended that the instructions of the trial judge, when read in context, showed no probability of coercive impact upon any juror. The dissent also disapproved of the adoption of the ABA charge, pointing out that it also may be rendered coercive by additions or deletions by the trial judge, and referred to the charge as "an invitation to a stubborn or recalcitrant juror to persist in a blind adherence to his position, thereby producing a hung jury." 449 F.2d at 1188, 1192 (Robb, J., dissenting).

reasoning of other members before reaching his conclusion. To be balanced against this legitimate objective is the right of the parties to have each juror draw any reasonable conclusion in which he conscientiously believes. The ideal balance of these apparently opposing interests would result in the agreement of "improperly" hung juries and the preservation of those "properly" deadlocked. An instruction, however, that, in every instance, could selectively lead the stubborn or recalcitrant dissenting juror to agreement without influencing the stand of a conscientious minority juror has not yet been framed. Consequently, critics believe that the risk of coercion of sincere minority jurors is unjustifiably present in *Allen*.[26] Moreover, the progeny of *Allen v. United States* reveal that any judicial expense saved at the trial level is resurrected at the appellate level. It is apparent, therefore, that the *Allen* charge has produced questionable results on both substantive and administrative grounds, lending support to the instant court's decision to abandon it. The adoption of the ABA standard jury charge was based upon the belief that it will reduce the appellate caseload previously generated by *Allen*. The ABA project has not, in any meaningful sense, recommended abolishment of the *Allen* charge, but merely has deleted the reference to the majority-minority division. The deletion was suggested because this element has been widely thought to contain the true dangers to the free and unfettered judgment and expression of conscience upon which the jury system is based.[27] The ABA charge wisely reduces the risk, inherent in *Allen*, that the jury's findings of fact will be improperly influenced by "some sort of Gallup Poll conducted in the deliberation room."[28] Although this modification represents an improvement from a substantive viewpoint, it is unlikely that the number of appeals spawned by this instruction will be reduced significantly. Since the constitutionality of a properly framed *Allen* charge uniformly has been upheld by the courts, most appeals have been based upon the trial judge's additions to or deletions from the approved instruction. It is apparent that, like *Allen*, the ABA charge could suffer from the same coercive embellishments added by the trial judge in an attempt to give his instruction a personal touch.[29] This source of appellate cases, however, cannot be eliminated by changes in the wording of the sanctioned instruction, but must be governed by the wisdom and discretion of the trial judge, coupled with his desire to be

26. *See* materials cited note 10 *supra*.
27. United States v. Fioravanti, 412 F.2d 407, 417-19 (3d Cir. 1969).
28. *Id.* at 417.
29. *Cf.* cases cited note 14 *supra*.

upheld on appeal. The abandonment of the majority-minority element of the *Allen* charge reduces the inherent risk of improper duress, but does nothing to correct the problem of unwarranted variations of the sanctioned instruction. As long as trial judges attempt to promote the agreement of a deadlocked jury, appellate tribunals will be called upon to distinguish precisely between proper guidance and improper coercion.

Criminal Procedure—Appellate Review—Federal Appellate Court May Remand Criminal Sentence Based on Unverified Information

After a jury found defendant guilty of knowingly transporting contraband drugs,[1] the presiding federal district judge indicated that based on the evidence presented the minimum mandatory sentence of five years' imprisonment was appropriate. The government prosecutor, however, requested that a presentence report[2] be prepared before final sentence was imposed. At the sentencing hearing a presentence study was delivered to the court that contained broad unsworn statements charging defendant with serious drug-related violations,[3] and on the basis of that report the trial judge imposed the maximum statutory sentence of twenty years' imprisonment.[4] On appeal, defendant contended that since the

1. Defendant was found guilty on November 2, 1970 of violating 21 U.S.C. § 174 (1964) (repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101(a), 84 Stat. 1291), which provided that: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . or in any manner facilitates the transportation . . . or sale of any such narcotic drug . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . ."

2. The primary purpose of presentence reports is to comment upon the character and personality of the defendant. The use of these reports, although encouraged, is discretionary with the trial judge. No particular procedure is employed in conducting the investigation. *See* FED. R. CRIM. P. 32(c)(1). For a comprehensive study of the use of presentence reports see Lehrich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1969); Note, *The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process*, 58 GEO. L.J. 451 (1970).

3. The report, based upon the unsworn memorandum of a federal narcotics agent, stated that defendant was a clever and intelligent dealer in heroin and had been the chief supplier to the western Washington state area. The report further charged that defendant had made numerous trips to Mexico in order to purchase heroin, and that defendant sold the heroin in the United States earning a profit of approximately $140,000 every 2 weeks.

4. Because of the severity of the sentence, the court directed the Government to submit factual material sufficient to support the conclusion of the report. When submitted, the substantiating information consisted of further unsworn information, but the court found it sufficient to allow the maximum sentence to stand.

information in the report was largely unsubstantiated and was too vague to be proved false with reasonable effort,[5] the trial judge should not have relied upon it in imposing sentence. The Government, while also arguing the merits,[6] primarily contended that federal appellate courts have no right to review sentences that are within statutory limits. The Ninth Circuit Court of Appeals, *held*, sentence vacated and remanded. A federal appellate court may remand a sentence predicated on unverified information. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

Under section one of the Judicature Act of 1879[7] federal circuit courts of appeals were given jurisdiction to review all lower federal court sentences that required imprisonment. The Act was held to establish that if, upon the whole record, it appeared that the penalty imposed by the lower court was not in conformity with law, then a circuit court could modify the sentence, even when the sentence was within the statutory maximum.[8] When federal appellate jurisdiction was transferred to the courts of appeals in 1891,[9] however, no provision similar to section one of the Judicature Act was incorporated into the new legislation. Even though the Supreme Court indicated that all powers created under the Judicature Act were retained by the Act of 1891,[10] the Ninth Circuit held, in *Freeman v. United States*,[11] and other courts of appeals have since agreed,[12] that in the absence of a specific statutory mandate, federal appellate courts cannot review sentences that are within statutory limits. Refusal to review has been justified on two grounds. First, appellate

5. Defendant's counsel pointed out that he could not imagine what type of investigation would establish satisfactorily that his client was not, as charged, "the biggest dealer in the Western States."

6. The Government argued in the alternative that evidence of criminal activity not resulting in conviction may be considered in imposing sentence.

7. Act of March 3, 1879, ch. 176, § 1, 20 Stat. 354, provides that: "The circuit court for each judicial district shall have jurisdiction of writs of error on all criminal cases tried before the district court where the sentence is imprisonment . . . and in such case a respondent feeling himself aggrieved by a decision of a district court, may except to the opinion of the court. . . ."

8. Bates v. United States, 10 F. 92 (7th Cir. 1881).

9. Act of March 3, 1891, ch. 517, 26 Stat. 826.

10. Ballew v. United States, 160 U.S. 187, 201-02 (1895) (the general grant of power to modify sentences was not reiterated in express terms when additional subject-matter jurisdiction was vested in the circuit courts in 1891, but the authority was deemed to be already adequately provided by the statute of 1879).

11. 243 F. 353 (9th Cir. 1917), *cert. denied*, 249 U.S. 600 (1919).

12. *See, e.g.*, Bowman v. United States, 350 F.2d 913 (9th Cir. 1965); United States v. Kapsalis, 214 F.2d 677 (7th Cir. 1954); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952); Beckett v. United States, 84 F.2d 731 (6th Cir. 1936); Gurera v. United States, 40 F.2d 338 (8th Cir. 1930); Bailey v. United States, 284 F. 126 (7th Cir. 1922); Voege v. United States, 270 F. 219 (2d Cir. 1920).

judges have felt that the trial judge was in a better position to determine the proper sentence since he had the opportunity to observe a defendant's demeanor.[13] Secondly, the courts of appeals have feared that appellate review would open the floodgates to frivolous appeals, thereby increasing the burden both upon trial judges who would have to write sentence reports and upon practicing attorneys who would be appointed to represent the influx of indigent defendants.[14] Despite these justifications, the general rule of nonreview in certain situations, has operated harshly with respect to the criminal defendant, and in response, some courts have developed limited exceptions to the general rule. When, for example, a trial judge in determining the sentence has relied upon evidence obtained in violation of a defendant's constitutional rights,[15] or when the sentence has been based in part upon convictions in which defendant was not represented by counsel,[16] appellate courts, without discarding the general rule of nonreview, have remanded the case for resentencing.[17] Since presentence reports frequently include unverified information obtained by a probation officer, escape from the general rule often has been sought to overturn sentences based upon the allegations made in such reports. In *Townsend v. Burke*,[18] for example, defendant was sentenced on the basis of evidence contained in the presentence report even though the evidence already had been proved false. In overturning the sentence,the Supreme Court held that fourteenth amendment due process requires that a sentence be based on accurate information. Having affirmatively

13. *See, e.g.*, Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79 (1967); Hruska, *Appellate Review of Sentences*, 8 AM. CRIM. L.Q. 10 (1969); Note, *A Plea for Appellate Review of Sentences*, 32 OHIO ST. L.J. 410, 417 (1971). *See also* note 29 *infra* and accompanying text.

14. *See, e.g.*, Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79, 87 (1967); Frankel, *The Sentencing Morass, and a Suggestion for Reform*, 3 CRIM. L. BULL. 365, 379 (1967); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1292-93 (1952).

15. *See, e.g.*, Verdugo v. United States, 402 F.2d 599, 612-13 (9th Cir. 1968) (evidence unlawfully seized cannot be considered in sentencing hearing); *cf.* Armpriester v. United States, 256 F.2d 294, 297 (4th Cir. 1958) (court would not condone use of evidence obtained in breach of law).

16. *See, e.g.*, Burgett v. Texas, 389 U.S. 109 (1967) (conviction based on evidence of prior uncounseled convictions not allowed to stand); Tucker v. United States, 431 F.2d 1292 (9th Cir. 1970) (sentence remanded because of reasonable probability that trial judge imposed heavier sentence based on prior convictions in which defendant was not represented by counsel).

17. For other cases in which the sentence has been vacated and remanded by federal appellate courts see Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969) (imposition of a heavier sentence because defendant refused to confess his guilt after jury had found him guilty); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (imposition of heavier sentence because defendant chose to be tried by jury rather than plead guilty); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960) (defendant sentenced to longer term than codefendants even though all defendants had committed same offense).

18. 334 U.S. 736 (1948).

established in *Townsend* that some types of information could not be considered in the sentencing process, the Supreme Court in *Williams v. New York*[19] was faced with the problem of giving a more complete definition of precisely what types of information the sentencing court could use. Defendant, who had been sentenced on the basis of a presentence report containing evidence of other criminal activity,[20] challenged the sentence on the ground that the court's failure to verify the information in the report violated due process. In refusing to review the sentence, the Supreme Court held that due process does not require that information relied upon in sentencing be restricted to that given in court by persons subject to cross-examination.[21] The Court, however, failed to specify how, at the sentencing hearing, this unverified information could be shown to have met the accuracy requirement established in *Townsend*, and if not shown to have met that requirement, whether the sentence based on information of such little value would be permitted to stand on appeal.

Acknowledging the general rule that federal appellate courts do not review sentences that are within statutory limits, and noting the support given to that rule by *Williams*, the instant court initially sought to distinguish *Williams* from the case at bar. The court pointed out that, in *Williams*, defendant broadly attacked the entire sentencing process, and sought review of that process which would have been tantamount to a second trial. The instant defendant, on the other hand, specifically objected only to the trial judge's reliance upon definite information in the presentence report. After cataloguing several decisions that similarly distinguished between reviewing a sentence and merely deciding that certain information should not have been relied upon by the trial judge,[22] the instant court concluded that it had the power to examine the reasons upon which a sentence is based. Turning, therefore, to the instant case, the court found that not only did defendant's sentence rest upon a weak factual basis, but the defendant unjustifiably had the burden of disprov-

19. 337 U.S. 241 (1949).

20. The report contained hearsay statements that charged Williams with the commission of 30 burglaries for which he had not been convicted. The judge also referred to certain activities shown in the report that indicated Williams possessed "a morbid sexuality" and that, therefore, classified him as a "menace to society." *Id.* at 244.

21. *Id.* at 251.

22. *See* cases cited notes 15-17 *supra*.

ing these unsubstantiated facts.[23] Admittedly extending prior law,[24] the instant court held that since the sentence was based upon facts which were of no value, the sentence could not stand.

The instant decision merits attention both for what it did, and for what it refused to do. First, the instant court in effect shifted the burden of proof on the validity of information contained in presentence reports from the criminal defendant to the state. This indirect restriction on the preparation of presentence reports should operate so as to limit the types of information contained in such reports with the result that presentence reports will become more verifiably accurate, and that sentences based thereon will become less arbitrary. Secondly, although the instant court had the opportunity to reject the general rule of nonreview, it chose instead to create an exception to that rule. Whether constrained by precedent,[25] or fearful of opening the floodgates to inconsequential appeals,[26] the court distinguished between reviewing a sentence and reviewing the bases for that sentence. The distinction, however, from the standpoint both of appellate courts and of criminal defendants, is difficult to perceive. Since any appeal of any sentence necessarily would include a consideration of the bases for that sentence, an appellate court, in effect, would have to engage in the same sort of investigation no matter which method of review it chose. Moreover, the sole distinction for the criminal defendant is the elapsed time between conviction and final judgment. If the sentence were reviewed, an appellate court could impose a new sentence without further consideration at the trial level. If an appellate court merely reviewed the bases for that sentence, however, it could only vacate the sentence and remand the case to the trial court for resentencing. Furthermore, this slight difference is erased if the original sentence is affirmed on appeal. Since the distinction drawn by the instant court is negligible, and since the court already had decided on the merits that this sentence was improper, the court easily could have taken the additional

23. The court stated that it thought "it a great miscarriage of justice to expect [defendant] or her attorney to assume the burden and expense of proving that she is not the large scale dealer that the anonymous informant says that she is. . . . A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." 448 F.2d at 634.

24. *Id.*

25. *See* cases cited note 12 *supra.*

26. *See Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1962).

step and overturned the general rule of nonreview.[27] That action would have raised the question whether appellate review of all criminal sentences is desirable. Aside from the floodgates argument that appellate review would result in overcrowded dockets and fatigued judges,[28] some scholars have suggested that review of all criminal sentences would create a superficial uniformity in sentences and would curtail proper exercise of creative discretion in the district courts.[29] Others have suggested that the increased costs for records necessary for appeal would place an unwanted burden upon taxpayers in general.[30] A more compelling objection to total review is that it would allow a sentence to be imposed by a judge who did not have the benefit of observing the demeanor both of the defendant and of those furnishing information relevant to the defendant's sentencing.[31] Consequently, appellate review of all sentences within the statutory maximum would be as undesirable as no review at all.[32] Perhaps the instant court's failure to repudiate the general rule of nonreview while in effect permitting review represents an awareness that

27. There are 2 grounds upon which the court might have relied in overturning the general rule of nonreview. First, the court could have relied on Ballew v. United States, 160 U.S. 187 (1895), wherein the Supreme Court acknowledged that federal circuit courts of appeals have the right to review all criminal sentences. *See* note 10 *supra* and accompanying text. Secondly, it has been argued that § 2106 of the Judicial Code, which grants federal appellate courts the power to modify any judgment of a lower federal court and enter a more appropriate judgment, has always provided the appellate courts with the right to review criminal cases in situations like the instant case. *See, e.g.*, Smith v. United States, 273 F.2d 462, 468 (10th Cir. 1959) (dissenting opinion); Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521 (1937). Section 2106 provides that a federal appellate court may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order . . . and direct the entry of such appropriate judgment . . . as may be just under the circumstances." 28 U.S.C. § 2106 (1964).

28. *See* Brewster, *supra* note 13; Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379 (1964).

29. *See* Sobeloff, *A Recommendation for Appellate Review of Criminal Sentence*, 21 BROOKLYN L. REV. 2 (1954); Tydings, *Ensuring Rational Sentences, The Case for Appellate Review*, 53 JUDICATURE 68 (1969); Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405 (1968).

31. For a comprehensive study on the arguments for and against appellate review see *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1962).

32. For a discussion of the undesirability of the general rule of nonreview see ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCING (Tent. Draft, April 1967) at 1-2, 13-14. *See also* Note, *A Plea for Appellate Review of Sentences*, 32 OHIO ST. L.J. 410 (1971).

until the legislature adopts a more workable system of sentencing review,[33] substantial justice is in fact the standard that should be applied.

Environmental Protection—National Environmental Policy Act—Federal Agencies Must Give Fnll and Immediate Consideration to Environmental Factors in Their Project Plans, Regardless of Compliance with Specific Quality Standards in Other Statutes

Petitioners, several conservation groups,[1] sought a declaratory judgment that the Atomic Energy Commission's (AEC) licensing regulations,[2] promulgated in compliance with the National Environmental Policy Act (NEPA),[3] were inadequate and illegal.[4] Section 102 of NEPA[5] requires all federal agencies to consider environmental issues as

33. In recent years a number of proposals to permit review of sentences by the courts of appeals have been introduced into Congress although none has been enacted into law. *See* S. 1561, 91st Cong., 1st Sess. (1969); S. 1540, 90th Cong., 1st Sess. (1967); S. 2722, 89th Cong., 1st Sess. (1965); S. 823, 88th Cong., 1st Sess. (1963); S. 2879, 87th Cong., 2d Sess. (1962); S. 1692, 87th Cong., 1st Sess. (1961); S. 3914, 86th Cong., 2d Sess. (1960); H.R. 270, 85th Cong., 1st Sess. (1957); S. 1480, 84th Cong., 1st Sess. (1955); H.R. 4932, 84th Cong., 1st Sess. (1955). The Advisory Committee on Sentencing and Review of the American Bar Association also has suggested statutory provisions for review. *See, e.g., Hearings on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 83-102 (1966).

1. There were 3 petitioners: the Calvert Cliffs' Coordinating Committee, which is composed of various Maryland civic groups; the Sierra Club; and the National Wildlife Federation. Wall Street J., July 26, 1971, at 9, col. 2.

2. Statement of General Policy and Procedure: Implementation of the National Environmental Policy Act of 1969 (P.L. 91-190) (AEC Regulations), 10 C.F.R. § 50, app. D (1971).

3. 42 U.S.C. §§ 4321-47 (1970).

4. In another suit, consolidated for argument and decision with the instant one, the same petitioners challenged the AEC's final order issuing a construction permit to build the $300,000,000 Calvert Cliffs nuclear power plant on the western shore of the Chesapeake Bay, about 45 miles southeast of Washington, D.C. The AEC had refused to hear petitioners' evidence that alleged the dangers of thermal pollution to the Bay's ecological system and ultimately to aquatic life consumed as human food. Petitioners had tried unsuccessfully to invoke a Maryland state law to stop construction. Petitioners appealed the AEC order to the Court of Appeals for the District of Columbia. Unlike the 2 cases in note 42 *infra*, which were held not ripe for review because no final order had been issued by the AEC, petitioners here appealed from a final order that granted a construction permit. The instant court remanded the cases and directed the AEC to formulate new regulations consistent with its opinion. At the time of the decision, the plant was about 45% complete. *See generally* People's Counsel v. Public Serv. Comm'n, 259 Md. 409, 270 A.2d 105 (1970); CCH ATOM. EN. L. REP. ¶¶ 10,155, 11,578.01-.02, 16,598, 16,611; Wall Street J., July 26, 1971, at 9, col. 2.

5. 42 U.S.C. § 4332 (1970).

routinely as they consider other issues in their decision-making processes. Furthermore, in order to insure that this consideration is given, the Act establishes procedures that require each agency to file a detailed statement evaluating the environmental impact of its proposed activities. Petitioners alleged that the AEC's regulations failed in several respects to satisfy the strict mandate of NEPA.[6] First, the regulations did not require the final decision-making body of the AEC to take the initiative in raising environmental issues; secondly, they did not require immediate compliance with NEPA's procedural duties; and thirdly, they excused the AEC from having to file a section 102 environmental impact statement on water quality when the proposed facility was already certified as complying with the water quality standards of other government agencies.[7] In addition, petitioners argued that until the AEC can make an evaluation of the environmental impact of each project,[8] the AEC must suspend all ongoing projects whose licensing decisions failed to comply with NEPA procedures. Respondent AEC contended that NEPA's mandate is vague and, therefore, permits discretion in initiating consideration of environmental issues.[9] Respondent further claimed that a fourteen-month transition period was needed to achieve full compliance with NEPA's procedures in order to avoid delay in the use of new power facilities urgently needed to alleviate the national energy crisis.[10] Finally, because section 104 of NEPA permits compliance with specific quality standards to supplant the more general duties set forth under section 102,[11] the AEC denied that it was required to make an environmental impact statement on water quality. On appeal to the United States Court of Appeals for the District of Columbia, *held*, the Atomic Energy Commission was ordered to promulgate new regulations. The National Environmental Policy Act requires a federal agency to initiate an immediate and complete evaluation of the environmental effects of proposed actions even when the action complies with specific environmental quality standards of other federal or state agencies. *Calvert*

6. *See* 1 ENVIR. L. REP. 65047, 67551-53 (1971) (digest of cases).

7. Calvert Cliffs' Coordinating Comm., Inc. v. United States AEC, 449 F.2d 1109, 1116-17 (D.C. Cir. 1971).

8. 1 ENVIR. L. REP. 67552 (1971).

9. 449 F.2d at 1112.

10. *Id.* at 1119.

11. NEPA § 104 provides: "Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency." 42 U.S.C. § 4334 (1970).

Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

Even before environmental problems became a popular public concern, courts had found that some federal agencies were required to consider and be sensitive to the possible adverse environmental effects of projects under their supervision. For example, in two early cases involving the Federal Power Commission, licenses for hydroelectric facilities were set aside because, in evaluating project alternatives that were better adapted to all uses of the river, the Commission had failed to assess the potential damage to the river's scenic beauty[12] and the public's interest in preserving wilderness areas and wildlife.[13] Despite occasional interpositions of judicial authority to compel consideration of the environmental impact of federal activities, the courts did not have a coherent, fully integrated national policy on the environment around which to pattern their decisions. With the 1969 enactment of the National Environmental Policy Act,[14] however, the absence of such a policy came to an end. NEPA manifests the federal government's policy "to promote efforts which will prevent or eliminate damage to the environment."[15] Under the procedures outlined in section 102,[16] federal agencies must make a

12. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 624 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

13. Udall v. FPC, 387 U.S. 428, 450 (1967). On remand to the Federal Power Commission, the NEPA § 102 requirements for full evaluation of the environmental impact were followed. Presiding Examiner's Initial Decision on Remand in Pacific Northwest Power, Project No. 2243, and Washington Public Power Supply System, Project No. 2273, 1 ENVIR. L. REP. 30017 (FPC, Feb. 23, 1971).

14. 42 U.S.C. §§ 4321-47 (1970). NEPA is essentially Senator Jackson's bill, S. 1075, 91st Cong., 1st Sess. (1969), which was introduced on February 18, 1969. It was passed by the Senate on July 10, 1969, and the House on December 22, 1969. S. 1075 was very similar to S. 2805, 90th Cong., 1st Sess. (1967), a bill that Senators Jackson and Kuchel had introduced on December 15, 1967. Although that particular bill was never passed, it did result in a congressional colloquium on July 17, 1968, to discuss a national policy for the environment. Ideas for S. 1075 also came from the Resources and Conservation Act introduced as S. 2549, 86th Cong., 1st Sess. (1959) by Senator Murray on August 17, 1959, but which never passed. It called for more efficient machinery in the President's office to coordinate resource conservation on the basis of national goals. Further background to S. 1075 was provided by S. 2282, 89th Cong., 1st Sess. (1965), the Ecological Research and Surveys Act introduced by Senator Nelson on July 13, 1965, that resulted in hearings in the 89th Congress. *Hearings on S. 2282 Before the Senate Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. (1966). It also was not passed. The bill made provisions to cope with the inadequate use and application of ecological knowledge by federal agencies as research methods to ensure better management of the physical environment. 115 CONG. REC. 29066 (1969) (remarks of Senator Jackson).

15. NEPA § 2, 42 U.S.C. § 4321 (1970).

16. NEPA § 102, 42 U.S.C. § 4332 (1970). The detailed statement must include (a) the environmental impact of the proposed action, (b) any adverse environmental effects that cannot be

detailed statement that both evaluates the environmental impact of proposed agency action and suggests alternatives to the proposal. The section 102 duties are designed to ensure that the government will fulfill its responsibility "to improve and coordinate Federal plans, functions, programs, and resources" so that environmental protection is maximized.[17] Pursuant to that purpose, NEPA provides for the establishment of the Council on Environmental Quality (CEQ),[18] which is authorized to issue guidelines to the various federal agencies to aid them in the integration of NEPA into their decision-making processes.[19] This integration of NEPA, however, represented a difficult problem for CEQ to solve. NEPA, although clear in its general meaning, fails to provide a timetable for implementing its section 102 procedures, aside from directing compliance with them "to the fullest extent possible."[20] On its face, the statute does not require immediate, as opposed to gradual, implementation. NEPA also does not explicitly require the application of its standards and procedures to agency actions that were already under way at the time of its enactment. The CEQ guidelines[21] attempted to resolve these uncertainties within the framework of NEPA's ambiguous language. Dealing directly with the question of NEPA's application to ongoing projects, the guidelines provided that when it was impractical to reassess a project's initial course of action, its future course of action had to be "shaped so as to minimize adverse environmental consequences."[22] Based on the CEQ guidelines, the AEC established its own regulations for the implementation of NEPA.[23] It created a transition period ending fourteen months after NEPA's effective date,[24] during

avoided, (c) alternatives to the proposed action, (d) the relationship between local short-term uses of the environment, and maintenance and enhancement of long-term productivity, and (e) any irreversible and irretrievable commitments of resources that would be involved in the proposed action. Comments from appropriate federal, state, and local agencies authorized to set and enforce environmental quality standards must "accompany" the proposal through the agency review process.

17. NEPA § 101(b), 42 U.S.C. § 4331(b) (1970).

18. NEPA §§ 201-07, 42 U.S.C. §§ 4341-47 (1970).

19. Exec. Order No. 11,514, 3 C.F.R. 531 (1971).

20. NEPA § 102, 42 U.S.C. § 4332 (1970).

21. Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, Interim Guidelines (CEQ Interim Guidelines), 35 Fed. Reg. 7390 (1970).

22. *Id.* § 11, 35 Fed. Reg. at 7392.

23. AEC Regulations, 10 C.F.R. § 50, app. D (1971).

24. The National Environmental Policy Act of 1969 was signed into law by President Nixon on January 1, 1970. Section 11 of the AEC Regulations declares that the AEC's full procedure under NEPA is not required for license applications when the notice of hearing on the application is published in the Federal Register before March 4, 1971. *Id.* § 11.

which time both new and ongoing projects were not required to be in full compliance with NEPA. In justification, the AEC emphasized the public interest in preventing a delay in meeting the nation's electric power needs.[25] The early judicial interpretations of NEPA focused mainly on the issue of NEPA's application to projects not completed at the time of its passage. While these decisions are inconsistent,[26] the most recent cases indicate a trend toward giving NEPA only prospective effect, that is, applying NEPA to all decisions on new and ongoing projects made after the Act's passage. One court[27] found, for example, that Congress did not intend to undo agency action already in progress by applying NEPA retroactively. The court observed instead that NEPA applies to future agency decisions and new programs, and requires only the improvement or upgrading of pre-NEPA projects. Prior to the instant case, however, the issue of applying NEPA duties to projects initiated prior to its effective date had not been raised at the federal appellate level. Similarly, no court had dealt with the question of temporarily delaying the full implementation of NEPA for projects initiated after passage of the Act, such as the AEC regulations permit.

The possible overlap between NEPA and other federal or state statutes is recognized in section 104,[28] which states that NEPA cannot be construed to hinder or prevent compliance with specific environmental standards of other government agencies. In the event that such an overlap occurs, two closely related questions are raised. The first is whether compliance with the other federal or state law makes compliance with NEPA unnecessary. If the answer to the first question is no, then the second is whether the standards and procedures of both acts must be followed. An example of the overlap problem can be seen in the conflict over the effect of heated waste water discharges into streams and

25. *Id.*

26. For cases holding that NEPA does apply see Texas Comm. on Natural Resources v. United States, 1 ENVIR. REP. CASES 1303 (W.D. Tex.), *dismissed as moot*, 430 F.2d 1315 (5th Cir. 1970) (although the FHA had approved a loan, no federal money had been expended and no construction begun); Environmental Defense Fund, Inc. v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971) (although the Cross-Florida Barge Canal was one-third completed, an injunction was granted pending fulfillment of NEPA duties for the remaining portions to be constructed). For cases holding that NEPA does not apply see Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970) (contract finalized and construction begun, although no federal funds had been expended); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970); Bucklein v. Volpe, 1 ENVIR. L. REP. 20043 (N.D. Cal. 1970) (NEPA created no duties enforceable by courts).

27. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971).

28. 42 U.S.C. § 4334 (1970).

rivers, a common disadvantage to nuclear power reactors. The Water Quality Improvement Act (WQIA)[29] requires federal facilities to be certified in accordance with specific state water quality standards. NEPA requires all federal agencies to give independent consideration to the environmental impact of their activities, including a consideration of the effect on water quality. Thus, on the surface at least, the AEC would be forced to serve two statutory masters—NEPA and the applicable state law under WQIA—in constructing a nuclear reactor that complies with environmental quality standards. During the debate on WQIA, Senator Jackson, the original sponsor of NEPA, addressed the problem of resolving a conflict between the two potentially applicable environmental laws by noting the existence of a "compromise" between the two acts that would exempt the Atomic Energy Commission from filing a section 102 environmental impact statement on water quality.[30] In marked contrast to this Senate floor discussion is the conference report on NEPA, which indicates that a federal agency can be exempt from carrying out the procedural duties under section 102 only when an agency's operating law expressly prohibits compliance.[31] In addition, the report states that the agency can not use an "excessively narrow construction of the existing statutory authorizations to avoid compliance."[32] The CEQ guidelines, however, apparently relied on the "compromise" idea from the legislative history to make compliance with the procedural requirements of NEPA and WQIA mutually exclusive. They provided that mere reference to previous certification of compliance with state water quality standards was sufficient to comply with the section 102 environmental impact statement requirements.[33] Extending the CEQ guidelines further, the AEC regulations indicated that not only would a compliance certificate "supersede pro tanto"[34] the section 102 impact statement, but that it also would be "dispositive" of the question whether there was any adverse effect on the environment.[35] At the end of 1970, hearings held

29. The Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1152, 1155-56, 1158, 1160-75 (1970), was passed by Congress in March 1970. It amended the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1970).

30. 115 CONG. REC. 29056 (1969) (remarks of Senator Jackson).

31. For pre-NEPA agency operating legislation, the conflict would come if the agency is prohibited from following a certain procedure that would be required under NEPA or if it is required to do certain things that NEPA disallows. Post-NEPA laws would conflict only if the agency was expressly exempted from following certain NEPA procedures.

32. CONFERENCE REPORT ON NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, No. 91-765 (Dec. 17, 1969), 2 U.S. CODE CONG. & ADMIN. NEWS 2770 (1969).

33. CEQ Interim Guidelines § 7(b), 35 Fed. Reg. at 7392.

34. AEC Regulations § 9, 10 C.F.R. § 50, app. D (1971).

35. *Id.* § 11(b).

on the first year's experience with NEPA revealed congressional antagonism toward the AEC's interpretation of the Act.[36] Although the AEC defended its interpretation by claiming that the procedure had been reviewed and approved by the CEQ,[37] the subsequent congressional report on the hearings indicated otherwise. It showed that the CEQ, far from approving the AEC's interpretation of NEPA, merely had conformed to its policy of refraining from publicly challenging noncomplying agencies.[38] In the same vein, the report also attacked the AEC's "narrow and restrictive view of [its] responsibilities under NEPA"[39] and recommended revision of its rules to require evaluation of the environmental consequences of a proposed activity beyond mere certification of compliance with other federal or state water quality standards.[40] In *Zabel v. Tabb*,[41] NEPA, and specifically section 104, was interpreted on the federal appellate level for the first time. There the Fifth Circuit was faced with the issue whether the Secretary of the Army could refuse for substantial ecological reasons to grant a dredging permit even though the project did not violate the Corps of Engineers' navigation protection standards. In supporting the Secretary's discretion to reject the application under these circumstances, the court held that NEPA created a duty for the project decision-maker to consult with other agencies on environmental questions and to evaluate their recommendations in light of the total impact of the project. Aside from *Zabel*, no other decisions have dealt with the question whether specific agency or project standards override the NEPA duties. Recently, two courts[42] refused to hear appeals challenging the AEC's interpretation of its NEPA duties. They ruled

36. Representative Dingell, Chairman of the House Subcommittee on Fisheries and Wildlife Conservation, stated that the "AEC is in great trouble" if its only compliance with the impact statement is acceptance of a certificate. *Hearings on the Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., pt. 2, app. A, 182-85 (1970).

37. *Id.* at 199-205.

38. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, ADMINISTRATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT (P.L. 91-190), H.R. REP. NO. 316, 92d Cong., 1st Sess. 31-32 (1970).

39. *Id.* at 30.

40. *Id.* at 6.

41. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

42. Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970); Lloyd Harbor Study Group, Inc. v. Seaborg, 1 ENVIR. L. REP. 20188 (E.D.N.Y. Apr. 2, 1971). A third case, *In re* Consumers Power Co., 1 ENVIR. L. REP. 65045, 67509 (1971) (digest), was settled out of court when conservation groups promised not to intervene if the company would install cooling towers and cut down to "essentially zero" the radioactive liquid release system at the plant. The company was applying for an interim license to operate the plant at 60% capacity. Wall Street J., Sept. 28, 1971, at 13, col. 4. *See also* note 4 *supra*.

that the AEC decisions were not ripe for review, thus leaving unsettled the conflict between NEPA's requirement of strict compliance with its section 102 procedures and the apparent exemption from these requirements embodied in both NEPA's legislative "compromise" with WQIA and the CEQ guidelines.

Examining the purpose of NEPA, the court in the instant case observed that section 101 of the Act established a substantive policy strictly applicable to all federal agencies and departments. The court observed further that the principal object of NEPA, and more specifically of the procedures outlined in section 102, is to insure that environmental issues are considered "to the fullest extent possible"[43] before any federal agency action takes place.[44] Analyzing section 102 in detail, the court found that its requirement of a "detailed statement" assessing the environmental impact of a project and the viability of alternative approaches was meant to be more than a pro forma ritual. In the court's estimation, the passage of section 102 contemplated an exhaustive, systematic, interdisciplinary study of the environmental consequences of proposed agency action, the performance of which was itself evidence that an agency had considered environmental issues on the same footing as all others.[45] Moreover, section 102 imposes a duty that the instant court held deserving of rigorous enforcement, and one that permits an exception only when a particular agency's operations expressly prohibit or make impossible full compliance with section 102. The court then turned its attention to the specific AEC regulations under attack. After examining regulations prohibiting the AEC from independently raising environmental issues and removing these issues from the normal review process unless raised by an intervenor, the court found them in violation of NEPA.[46] It pointed out that NEPA requires the AEC to consider

43. This is to be compared with the more flexible standard for implementing the general substantive policy of § 101 that "leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances." 449 F.2d at 1112. The qualifying phrase "to the fullest extent possible" in § 102 "does not provide an escape hatch for footdragging agencies . . . . Congress did not intend the Act to be such a paper tiger." 449 F.2d at 1114.

44. Senator Jackson used the phrase "action forcing" to characterize the procedural duties. 115 CONG. REC. 40416 (1969).

45. Section 102 requires that environmental values be given "appropriate" consideration. On this point, the instant court states: "§ 102(2)(B) cannot be interpreted to blunt the thrust of the whole Act or to give agencies broad discretion to downplay environmental factors in their decision making processes. The Act requires consideration 'appropriate' to the problem of protecting our threatened environment, not consideration 'appropriate' to the whims, habits or other particular concerns of federal agencies." 449 F.2d at 1113.

46. The instant court explained that the AEC's "crabbed interpretation of NEPA makes a mockery of the Act." 449 F.2d at 1117.

environmental, technical, and economic issues alike and, in addition, imposes an affirmative duty on the AEC itself to raise environmental problems. Similarly, the court dismissed the contention that NEPA does not command immediate compliance with its requirements. Unpersuaded by the AEC's argument that a transition period was needed before NEPA could be implemented, the court asserted that from the absence of a timetable in the Act, it can be inferred that Congress expected immediate compliance with NEPA's procedures.[47] Continuing its analysis of the AEC regulations, the court rejected the AEC's interpretation that section 104 dispensed with the need for consideration of a project's possible adverse effects on water whenever certification was obtained under the Water Quality Improvement Act. The court characterized the AEC's reading of section 104 as a "total abdication of responsibility"[48] that had little support in legislative history. While conceding that section 104 requires obedience to the specific statutory obligations binding upon an agency, the court pointed out that the WQIA and NEPA were not mutually exclusive in their requirements[49] and that the AEC could comply with both. In short, the court held that the plain meaning of the Act would govern, and the AEC would have to make an independent evaluation of a project's environmental impact on water quality, notwithstanding certification under the WQIA. Finally, the court took up the AEC's contention that projects begun prior to NEPA's enactment were not fully subject to its mandate and procedures. The AEC's regulations assumed that for these projects mere filing of environmental impact reports would suffice. The court, however, found that a refusal to consider project alternatives that would maximize environmental protection did not fulfill the statutory obligation of reducing environmental damage "to the fullest extent possible." As a result, the court held that not only must the AEC evaluate the environmental impact of all its projects, both old and new, but that it also must evaluate possible modifications of its projects at any stage of construction.

As the first major court review of the National Environmental Policy Act, the instant decision should establish a strong precedent in

47. Judge F. Skelly Wright, the author of the instant decision, noted: "In view of the importance of environmental consideration during the agency review process . . . such a [14 month] time lag is shocking." 449 F.2d at 1119.

48. It was the conclusion of the court that § 104 of NEPA does not permit the complete abdication of responsibility exercised by the AEC. 449 F.2d at 1127.

49. Since there seemed to be little doubt on the part of the court that the AEC could conduct the NEPA balancing-of-interests analysis consistent with WQIA, the court found that § 104 of NEPA did not exempt the AEC from complying with both Acts. 449 F.2d at 1125.

favor of the Act's rigorous enforcement. It strictly construes NEPA's procedural requirements and, as a result, increases the probability that the Act eventually will produce a uniform and generally applicable approach to environmental issues throughout governmental agencies and departments. In terms of national policy, that objective is plainly one of the Act's desired ends. To understand it in a clearer perspective, one need look back no earlier than the immediate pre-NEPA period when federal agencies were not subject to the Act's mandate. The consideration given to environmental issues was infrequent and superficial.[50] Whether NEPA will alleviate that problem remains to be seen, but the instant court's interpretation of the Act is a favorable sign. Aside from forcefully advancing NEPA's basic policy, the instant decision should have a significant impact on the practical level as well. In fact, one of its immediate consequences is already becoming apparent. The decision has necessitated a reconsideration of AEC licensing approvals for projects that were already under way at the time of NEPA's passage,[51] since in none of those cases was there the requisite examination of environmental issues. The instant court indicated that suspension of a project would be reasonable pending a full consideration by the agency of all relevant environmental issues. It also indicated that the modification of project plans would be warranted when the environmental damage from continuation of a project as originally designed exceeded its economic and social value. Naturally, the AEC opposes any judicial action that will result in the interruption of construction on its nuclear power plant projects. In the instant case, it argued that the greatest dispatch in the construction of these facilities is necessary in light of the national power crisis. While it scarcely can be doubted that a severe shortage of electrical energy exists on occasion, the AEC's argument against the application of NEPA to pre-NEPA ongoing projects is basically *in terrorem*. If NEPA's mandate is complied with scrupulously, affected AEC projects will certainly experience delay and disruption. The cost to the public in terms of tax money and an increased susceptibility to power shortages, however, is one that Congress has determined that society should pay. There are yet more basic reasons for ignoring the AEC's argument. In the long run, the potential damage to the environment as a result of air and water pollution is far greater than the temporary and mild discomforts arising from delays in the production of electricity by

50. For a discussion of prior consideration of environmental issues see notes 12-14 *supra* and accompanying text.

51. *See* 1 CCH ATOM. EN. L. REP. ¶ 3583.

nuclear power facilities. More importantly, there are no factual grounds for the AEC's fear that interruption of its ongoing projects will seriously handicap the nation's ability to deal with power shortages. The present ability of nuclear power plants to alleviate an energy crisis[52] is slight indeed. In 1968, for example, nuclear power generated only eight-tenths of one percent of the total electricity in the United States,[53] and the AEC has predicted that by 1980 nuclear power will fill only three percent of the nation's total electricity needs.[54]

NEPA's mandate applies to many agencies that are subject to other environmental quality legislation. Although in section 104 of NEPA Congress attempted to deal with the problem of statutory overlap, it was uncertain before the instant decision how the courts would structure the relationship between NEPA and the Water Quality Improvement Act. At one time, both the former AEC regulations and the CEQ guidelines were in agreement that mere reference to a water quality certificate would suffice to fulfill the section 102 "detailed statement" requirement. That was not the position of the instant court, however. Clarifying NEPA's ambiguity on this point, the court stated that a certificate under WQIA could not replace an independent agency evaluation of a project's effect on water quality. The basis for the court's decision is sound. Had it held otherwise, the AEC easily could have escaped its responsibilities under NEPA, a result wholly inconsistent with the purposes of the Act. In addition, it should be observed that compliance with WQIA could very well be irrelevant to an agency's final action for NEPA purposes since it does not necessarily mean that there is no environmental damage. Compliance merely means that the damage, if it exists, comes within tolerable limits for WQIA purposes.[55] Under NEPA, however, the same result might not be forthcoming. NEPA's required comparison of environmental effects with the social benefits of the project could lead to the conclusion that environmental injury, acceptable under WQIA,

52. *See generally* ENVIRONMENTAL POLICY DIVISION, LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE ECONOMY, ENERGY, AND THE ENVIRONMENT (1970); Hubbert, *Energy Resources*, in ENVIRONMENT—RESOURCES, POLLUTION & SOCIETY (W. Murdoch ed. 1971); *Special Project—The Energy Crisis: The Need for Antitrust Action and Federal Regulation*, 24 VAND. L. REV. 705 (1971).

53. ENVIRONMENTAL POLICY DIVISION, *supra* note 52, at 26.

54. For this and other forecasts on hydroelectric and fossil fuels see Udall v. FPC, 387 U.S. 428, 447 (1967).

55. The Water Quality Improvement Act of 1970 encourages state control of pollution to navigable waters and state establishment of water quality standards. Thus, a state may license a federal facility to discharge a certain amount of waste as long as state standards are not exceeded. Therefore, some pollution damage to the water quality will occur. 33 U.S.C. § 1160 (1970).

is wholly unacceptable within the broader context of NEPA's environmental policy mandate. Even though the court's interpretation of section 102 seems unimpeachable, some criticism of this aspect of the decision has emerged.[56] The criticism has focused primarily on the lack of expertise in the AEC to make an independent evaluation of a project's impact on water quality. The only environmental impact analysis that the AEC was initially intended to handle relates to the problem of radiation emission from nuclear facilities. Nevertheless, the instant decision indicates that the AEC, as well as every other federal agency, will have to set up new procedures and develop new expertise to carry out its expanded duties under NEPA, particularly with respect to water quality. Certainly, that imposes a difficult adjustment burden which, if unrelieved, could result in widely inconsistent decisions depending on the skill of an agency's water quality evaluation experts. Apparently the validity of this criticism has been recognized, and Congress has set out to accommodate the interests of the federal agencies while at the same time leaving NEPA's integrity intact. A Senate amendment[57] to the Federal Water Pollution Control Act frees licensing agencies from having to develop their own expertise for evaluating water quality effect and puts this burden on the Environmental Protection Agency, the federal agency charged with overseeing federal actions affecting the environment. In light of the criticism of the instant decison on this point, this amendment seems to be a reasonable solution to the problem.

Despite the solid support given to environmentalists by the instant decision, the decisiveness of their victory remains to be seen.[58] The instant court dealt solely with the adequacy of AEC regulations that theo-

56. Comments by Atomic Energy Commissioner William O. Doub before the Senate Interior and Insular Affairs Committee on November 3, 1971. BNA ENVIR. REP., 2 CURRENT DEV. 793 (Nov. 5, 1971).

57. *Id.* at 783. Senator Baker's amendment to § 511 of S. 2770, the Federal Water Pollution Control Act Amendments of 1971, was adopted. S. 2770 was passed 86-0 by the Senate.

58. Several recent cases have commented on the instant decision, but the application and acceptance of it has not been consistent. In Kalur v. Resor, 3 ENVIR. REP. CASES 1458 (D.D.C. Dec. 22, 1971), *Calvert Cliffs* was held to require that the Corps of Engineers must make a full NEPA § 102 detailed environmental impact statement for permits granted for discharges into navigable waters under the Rivers and Harbors Act of 1899 (Refuse Act) § 13, 33 U.S.C. § 407 (1970). The court held that the Corps could not rely on the determination made by the Environmental Protection Agency as conclusive regarding the effect of the discharges on water quality. The *Kalur* decision could be in conflict with the Baker amendment to S. 2770, the Federal Water Pollution Control Act Amendments of 1971. *See* note 57 *supra* and accompanying text. In Natural Resources Defense Council, Inc. v. Morton, 3 ENVIR. REP. CASES 1473 (D.D.C. Dec. 16, 17, 1971), the court granted a preliminary injunction against the sale of new oil leases off the coast of Louisiana because the strict NEPA § 102 duties, as interpreted in the *Calvert Cliffs* decision, had

retically were designed to implement NEPA.[59] It was not called upon to decide the merits of an agency decision made in full compliance with NEPA's procedures. Yet, what the courts decide in such a case is critically important to the public, and only a strict standard of judicial review of agency decisions will advance the legislative policies embodied in NEPA. This strict standard is necessary for two key reasons. The first concerns the federal regulatory agencies as institutions, whose practices have been criticized sharply in recent years.[60] They have been accused of serving the interests of the particular industry that they are supposed to govern instead of protecting the interests of the public. As long as these agencies exist, there is always the possibility that the AEC or some other federal agency will comply with section 102 of NEPA and yet reach a decision that is injurious to the environment. Only a forceful application of NEPA's policy standards will counteract the traditional tendency of federal agencies to ignore considerations that have an adverse economic effect on the regulated industries. The second reason for a strict standard of review is more obvious. The environmental crisis is real and at a critical stage. When called upon to do so, courts must utilize the available statutory mandates to prevent a worsening of air and

not been followed. The court found that there had not been a sufficiently thorough consideration of alternative energy sources or the possibility of modifying current marketing policies with respect to existing fuel supplies.

On the other hand, in Upper Pecos Ass'n v. Stans, 3 ENVIR. REP. CASES 1418 (10th Cir. Dec. 7, 1971), the court held that only the Forest Service was required to make a § 102 statement for a project even though the Commerce Department's Economic Development Administration was a major participant, contributing 80% of the construction costs. In his dissent, Judge Murrah argued that the *Calvert Cliffs* decision required the Economic Development Administration also to consider environmental issues "to the fullest extent possible" by filing a § 102 statement on the project. In Pennsylvania Environmental Council, Inc. v. Bartlett, 3 ENVIR. REP. CASES 1421 (3d Cir. Dec. 1, 1971), the lower court decision was affirmed. *See* note 26 *supra*. Distinguishing the *Calvert Cliffs* decision, the court pointed out that the final decision to build the road in question had been made a month before the effective date of NEPA. It dismissed the facts that no actual construction had begun by NEPA's effective date and that federal officials still had to make the final inspection of the project. The court found that Congress had no intention of reopening decisions already made, and hence NEPA did not apply.

59. The strength of the instant decision's mandate can be seen in the revised AEC regulations that were issued on September 9, 1971. 36 Fed. Reg. 18071 (1971). Even these revised regulations, however, may fail to pass muster under NEPA. For example, they allow for the issuance of a partial operating license pending completion of a § 102 statement. Nevertheless, in Izaak Walton League v. Schlesinger, 3 ENVIR. REP. CASES 1453 (D.D.C. Dec. 13, 1971), the court granted a preliminary injunction against issuing such a partial operating license for a nuclear power plant to function at 50% capacity until the § 102 statement was prepared and distributed. It reasoned that such operations constituted action under NEPA which required the § 102 statement as proof of consideration of the environmental impact of the project.

60. *See* E. COX, R. FELLMETH, & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969).

water pollution. If the federal agencies respond to the NEPA mandate in the appropriate public spirit, the court's need to be vigilant will not be so great. The AEC, for example, already has shown a shift in attitude concerning this matter that is far more amenable to the public interest.[61] On the other hand, if the agencies tend to remain industry oriented, the courts will have to be more skeptical than ever in reviewing environmental questions under NEPA and other acts. Anything less than that will render such legislation ineffective and will intensify the environmental crisis.

Torts—Condominiums—Condominium Unit Owner Has Standing To Sue Unincorporated Unit Owners' Association for Injuries Inflicted Because of the Associatiou's Negligence

Plaintiff, a condominium unit owner, sued the unit owners' association for injuries allegedly caused by the association's negligent maintenance of the condominium's common areas.[1] Plaintiff owned one of 60 units in the condominium and belonged to the management association that controlled the project's common areas. The unit owners' association demurred to the complaint, contending that a member of an unincorporated association has no standing to sue the association itself be-

61. The new chairman of the AEC outlined this shift in attitude in his first major speech to the atomic energy industry: "It is not [the AEC's] responsibility, however, if a utility encounters unanticipated costs because of a failure to do its job properly, failure to comply with procedures, or because of a change in the law. We are sympathetic; we understand your problem, but it is your problem.

"Finally—and let me underscore this point—it is not the AEC's responsibility to ignore in your behalf an indication of Congressional intent, or to ignore the courts. We have had a fair amount of advice on how to evade the clear mandate of the federal courts. It is advice that we do not think proper to accept. If you regard the legislative or judicial framework as extreme or unworkable, you have a clear remedy through the seeking of legislative relief. We sympathize with the difficulties that you are facing, but we have no intention of evading our responsibilities under the law. . . .

"Let me reiterate: the Atomic Energy Commission, like any government agency, exists to serve the public interest. The public interest may overlap, but it is not coincident with private interests. Private interests may, and indeed through the operation of the well-known invisible hand are likely to, serve the public interests. The motivation is different. The role of a government agency, designed to achieve and enforce public goals, is distinct." Address by Dr. James R. Schlesinger, Chairman of the Atomic Energy Commission, at the All-Conference Banquet of the Atomic Industrial Forum-American Nuclear Society Annual Meeting, Bal Harbour, Fla., Oct. 20, 1971.

1. Plaintiff tripped over a negligently placed water sprinkler.

cause the negligence of any member is imputed to every other member. Plaintiff maintained that even though he was a member of the unit owners' association, he lacked sufficient control over the association to be imputed with its negligence and, therefore, should have standing to sue. The trial court sustained the demurrer. On appeal to the California District Court of Appeal, *held*, reversed. Although a member of the unincorporated unit owners' association, a condominium unit owner has standing to sue the association for injuries caused by its negligence when the association has a legal existence separate from its members and the unit owner cannot directly control the association's activity. *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 265 (1971).

Every purchaser of a condominium apartment acquires two property interests[2]—an ownership in severalty of the apartment unit itself[3] and an undivided ownership of the common areas as tenant in common with other unit owners.[4] Although condominiums existed as long ago as 500 B.C.,[5] their recent proliferation stems from a 1961 amendment[6] to the National Housing Act[7] that provides for insurance on condominium mortgages if condominium ownership is recognized under the laws of the state in which the condominium is located. Immediately after the passage of the amendment, state legislatures began passing condominium enabling acts, which would ensure the availability of low down-payment, federally insured mortgages.[8] The regulations enacted pursuant to the National Housing Act originally required the establishment of a unit owners' association in order for the condominium to qualify for a federally insured mortgage.[9] Although a unit owners' association is no longer required by the regulations, the regulations still recognize its continuing

2. *See generally* Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1 (1963).

3. The ownership in severalty has all the attributes of other ownerships of real estate. Condominium apartments can be separately owned, conveyed, devised, inherited, mortgaged and taxed. *See generally* Kerr, *supra* note 2, at 2.

4. The common areas include those parts of the land and building intended for common use, including foundations, main walls, roofs, halls, corridors, lobbies, stairways, elevators, and entrances. *See generally* Kerr, *supra* note 2, at 2.

5. Kerr, *supra* note 2, at 1, 3.

6. Act of June 30, 1961, Pub. L. No. 87-70, § 234, 75 Stat. 160 (codified at 12 U.S.C. § 1715(y) (1970).

7. 12 U.S.C. §§ 1701-50 (1970).

8. *E.g.*, KY. REV. STAT. §§ 381.805-.910 (1971) (enacted in 1962); TENN. CODE ANN. §§ 64-2701 to -2722 (Supp. 1970) (enacted in 1963). *See generally* Note, *Condominium—A Comparative Analysis of Condominium Statutes*, 13 DE PAUL L. REV. 111 (1963).

9. 24 C.F.R. § 234.26(b) (1962), *as amended*, 29 Fed. Reg. 12640 (1964). The regulations are enacted pursuant to 12 U.S.C. § 1715(b) (1970).

efficacy.[10] As a management device, the unit owners' association is charged with the care and administration of the owners' undivided interests in the common areas.[11] In the event that the association, either acting directly or through its agent, is negligent in the performance of its responsibilities,[12] the question of the association's tort liability arises. At common law an unincorporated association had no legally recognizable existence because legal personality was thought to be a sovereign gift conferred only by incorporation.[13] The major consequence flowing from the application of this doctrine was that the association was not subject to suit and, therefore, bore no tort liability. In more recent times, limitations of the common-law doctrine have emerged. Statutes permitting suits against an unincorporated association now exist in a number of states.[14] The courts, however, have uniformly construed such statutes to be procedural in nature,[15] giving the unincorporated association legal personality for the purpose of permitting injured third parties to sue, but leaving unchanged a substantive rule of liability that has repeatedly barred suits against an association by one of its members.[16] Known as the "joint principal rule,"[17] it is predicated upon the partnership principle that the members of an unincorporated association are engaged in a

10. *See* 24 C.F.R. § 234.26(f) (1971).

11. *See* A. FERRER & K. STECHER, LAW OF CONDOMINIUM § 7 (1967); P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 9.04(4)-(5) (1971).

12. The unit owners' association, for example, may elect a board of governors, which in turn either employs persons to care for the common areas or contracts to have this work done.

13. Brown v. Protestant Episcopal Church, 8 F.2d 149 (E.D. La. 1925). Furthermore, courts probably were fearful that membership might change during the suit, and were uncertain whether the identity of association members could be established. *See Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1081 (1963). The common-law rule was strongly criticized. *See, e.g.*, Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977 (1929); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924).

14. *See, e.g.*, CAL. CORP. CODE § 24001 (West Supp. 1971). Nearly all condominium enabling acts, however, are silent on the subject of tort liability of the unit owners' association. *See* P. ROHAN & M. RESKIN, *supra* note 11, § 10A.03(1). For statutes which do, however, make provision for the tort liability of the unit owners' association see FLA. STAT. ANN. § 711.18 (1969); IDAHO CODE § 55-1515 (Supp. 1966); MICH. STAT. ANN. § 26.50(22) (Supp. 1971); MISS. CODE ANN. § 896-15 (Supp. 1971); N.C. GEN. STAT. § 47A-26 (1966); VA. CODE ANN. § 55-79.37(2) (1969). At least one authority, however, believes all these statutes are too vague and therefore inadequate. *See* P. ROHAN & M. RESKIN, *supra* note 11, § 10A.03(3).

15. Inglis v. Operating Eng'rs Local 12, 18 Cal. Rptr. 187 (Dist. Ct. App. 1961), *rev'd per curiam*, 58 Cal. 2d 269, 373 P.2d 467, 23 Cal. Rptr. 403 (1962); Martin v. Curran, 303 N.Y. 276, 101 N.E.2d 683 (1951). *But see* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).

16. *See* cases cited note 15 *supra*.

17. *See Developments in the Law—Judicial Control of Actions of Private Associations*, *supra* note 13, at 1088.

joint enterprise and by virtue of that status are coprincipals with respect to the acts of other members.[18] Courts following this rule have held that since the members are coprincipals with respect to the acts of one another, the negligence of one member of the association is imputed to all other members, including the injured member, and therefore the injured member cannot sue the association for injuries resulting from another member's negligence.[19] They reason that by suing the association, an injured member would, in effect, be suing himself to recover for negligence that is imputed to him by virtue of his association membership. Until recently, the joint principal rule possessed considerable vitality, but a growing number of courts have altered the rule and granted an injured member of an unincorporated association standing to sue the association for its negligence. One group of courts has adopted the "adverse interest" test of standing first applied in *Taxicab Drivers' Local 889 v. Pittman*.[20] In that case plaintiff, a union member, was unjustifiably expelled from union membership. Since he was employed in a closed shop, the expulsion also had the effect of causing the plaintiff to lose his job. Plaintiff brought suit against the union for unlawful interference with his employment. Rejecting the joint principal rule, the court held that an association is liable to one of its members when the acts done by the association are so clearly against the member's interest that any inference of consent or coprincipalship on the part of the member would be unreasonable.[21] Although the adverse interest test has been applied to cases involving wrongful expulsion from an association[22] and to intentional torts,[23] there is some doubt whether the test could be extended to permit a member to recover for the negligence of his associa-

18. *See, e.g.*, Gilbert v. Crystal Fountain Lodge, 80 Ga. 284, 4 S.E. 905 (1887) (action for slander by an association against one of its members will not lie); Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933) (member replacing glass in window of association meeting hall has no standing to sue when fire escape falls upon him); DeVillars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950) (member of fraternal organization injured by an exploding steam table cannot recover against the organization); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941) (labor union not liable for negligently placed platform in meeting hall). *See also* Crane, *Liability of Unincorporated Association for Tortious Injury to a Member*, 16 VAND. L. REV. 319 (1963).

19. *See* cases cited note 18 *supra* and accompanying text. *See also* 23 MINN. L. REV. 666 (1939).

20. 322 P.2d 159 (Okla. 1957).

21. *Id.* at 167. *See* United Ass'n of Journeymen v. Borden, 160 Tex. 203, 328 S.W.2d 739 (1959); Fray v. Amalgamated Meat Cutters Union, 9 Wis. 2d 631, 101 N.W.2d 782 (1960); Bonsor v. Musician's Union, [1956] A.C. 104 (1955); Crane, *supra* note 18, at 322.

22. *See also* International Ass'n of Machinists v. Gonzalez, 356 U.S. 617 (1958); Williams v. Masters Local 2, 384 Pa. 413, 120 A.2d 896 (1956).

23. Inglis v. Operating Eng'rs Local 12, 18 Cal. Rptr. 187 (1961).

tion.[24] A second group of courts has adopted the "entity" test of standing applied in *Marshall v. International Longshoreman's Union*.[25] In that case a union member sued for injuries caused by the negligence of the union in maintaining its parking lot. Abandoning the joint principal rule in favor of the entity test, the court imposed liability on the union, notwithstanding plaintiff's union membership. The court reasoned that the union should be treated as a corporation since associations commonly act through elected officers and the individual members have little or no control over either the officers' conduct or the daily operations of the association. Accordingly, it concluded that, for the purpose of tort liability, an association's property and agents are distinct from its members.[26] In spite of the entity test's conceptual compatibility with the association's objective, observable behavior, and the test's apt analogy to corporate activities,[27] it has not been extended and has been applied only to unincorporated labor unions.[28]

The court in the instant decision observed that recent legislation[29] and judicial decisions[30] had diminished the viability of the joint principal rule to the extent that a member's standing to sue an unincorporated

24. It should be pointed out that since the rights of a member vis-à-vis his association are often determined by the rules of the association itself, the association could elicit consent to an act, or prohibit objection to it, by its rule-making powers. *See* Finnegan v. Pennsylvania R.R., 76 N.J. Super. 71, 84-85, 183 A.2d 779, 786 (1962). *See also* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Crane *supra* note 18, at 322.

25. 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962). *See Developments in the Law—Judicial Control of Actions of Private Associations, supra* note 13, at 1092.

26. *Cf.* UMW v. Coronado Coal Co., 259 U.S. 344 (1922) (applying the entity test when a union charged with violation of the Sherman Act raised the joint principal rule as a defense).

27. It has been suggested that these 2 factors make the entity test preferable to the adverse interest test. *See Developments in the Law—Judicial Control of Actions of Private Associations, supra* note13, at 1092.

28. *See, e.g.*, Daniels v. Sanitarium Ass'n Inc., 59 Cal. 2d 602, 381 P.2d 652, 30 Cal. Rptr. 828 (1963); Operating Eng'rs Local 12 v. Fair Employment Practice Comm'n, 276 Cal. App. 2d 504, 81 Cal. Rptr. 47 (1969); Benoit v. Local 299, Amalgamated Electrical Radio Workers, 150 Conn. 266, 188 A.2d 499 (1963); Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); Miazga v. Operating Eng'rs Local 18, 196 N.E.2d 324 (Ohio Ct. App. 1964), *aff'd*, 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965); Brawner v. Sanders, 244 Ore. 302, 417 P.2d 1009 (1966).

29. The court referred to state statutes recognizing an unincorporated association's liability to third persons and permitting execution on its property to enforce a judgment. CAL. CORP. CODE §§ 24001-02 (West Supp. 1971). It recognized that unincorporated associations could own property, CAL. CORP. CODE §§ 21200-01 (West Supp. 1971); that they could engage in commercial ventures, CAL. COMM. CODE § 1201(28) (West Supp. 1971); and engage in labor activities, CAL. LABOR CODE § 1117 (West 1971).

30. In addition to *Marshall*, the court referred to the following decisions: Orser v. Vierra, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967) (association member not liable for unauthorized intentional torts); Smith v. Hensley, 354 S.W.2d 744 (Ky. 1961) (partner can sue a business partnership for the loss of a truck as the result of partnership negligence).

association was now contingent upon the satisfaction of the two conditions implicit in the *Marshall* decision—the separate legal existence of the association apart from its members and the absence of direct control by the members over the operations of the association. Applying these criteria to the present facts, the court determined that both conditions had been satisfied. It reasoned that since the individual units and common areas were susceptible to two different modes of control,[31] the unit owners' association must exist apart from its members. In addition, the court found that the California statute, like the condominium legislation of other states, calls for the creation of a management association and, as a result, effectively removes responsibility for the operation and maintenance of the common areas of the condominium from the direct control of the association members.[32] Accordingly, the court held that plaintiff did have standing to sue the unit owners' association for its alleged negligence and remanded the case for trial. A concurring judge noted that the majority did not decide whether the property of an individual unit owner could be used to satisfy a judgment against the association. That judge found that a duty to procure liability insurance had been delegated by contract to the association in the condominium plan. The judge reasoned that an individual member should therefore be liable for judgments against the association only to the extent of his proportionate share in the common property.[33]

The instant decision represents an extension of the entity theory of standing to a rapidly growing form of organization, the condominium unit owners' association. In viewing the unit owners' association as an entity, the court recognized that concepts developed in the field of partnership law often have little relevance to large unincorporated associations, which normally act through elected officers and over which the individual members have little or no actual control. The association represents institutionalized behavior instead of individual activity;[34] its existence is perpetual and independent of any one member's approval.[35] Thus the court's decision to treat the association as a legal "person" and to grant the plaintiff in the instant case standing to sue is correct in

31. The units were controlled by each owner individually, and the common areas were controlled by the association. No unit owner could individually direct the care of the common areas.

32. CAL. CIV. CODE §§ 1355, 1358 (West Supp. 1971), provide for management of the project by a board of governors elected by the condominium owners' association. In plaintiff's condominium the association members could vote by proxy and cumulative voting was allowed.

33. 17 Cal. App. 3d at 831, 95 Cal. Rptr. at 263 (Roth, P.J., concurring).

34. For the first use of this analogy, although in a case involving different legal questions, see United States v. White, 322 U.S. 694, 701 (1944).

35. *Id.*

refusing to sacrifice reality to theoretical legal formalism.[36] Moreover, the instant court's fundamental approach seems more likely to achieve a fair result for all parties concerned than application of either the joint principal rule or the adverse interest test. First, it gives an injured association member who bears no actual responsibility for his own injury his day in court and at least some chance of obtaining compensation for his injury from the association, which in reality is the culpable party. Secondly, by using the twofold standard of the *Marshall* decision as a condition precedent to the application of the entity test, the instant court has not overlooked the situation in which the injured association member does, in fact, exercise control over the association and its activities. When that is the case, the injured party does stand as a joint principal with other association members and the court should apply the joint principal rule, refusing him standing to sue. Finally, of course, it should be emphasized that a grant of standing to sue under the entity test is not tantamount to the imposition of liability upon the association. The association still can interpose all of the defenses available to it that would be available if a nonmember had brought suit.[37]

Unfortunately, as noted by the concurring opinion,[38] the instant court did not decide whether the property of an individual unit owner could be used to satisfy a judgment against the association.[39] If the instant court's decision only means that the plaintiff can recover a judgment against the association, and that the substantive liabilities of association members are left unchanged,[40] it generally is agreed that as tenants in common of the common areas, each of the unit owners would be jointly and severally liable for torts committed on the condominium grounds.[41] That result would be undesirable in at least two respects. While the joint principal rule bars an injured unit owner from recovery against the association in all cases, the imposition of joint and several liability reverses the hardship and results in the harsh treatment of the

36. *See* Marshall v. International Longshoreman's Union, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962). *See also* B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 62 (1928).

37. The association still would have at its disposal a formidable arsenal of common-law defenses, including contributory negligence, assumption of the risk, and nondelegable duties of landowners. *See* P. ROHAN & M. RESKIN, *supra* note 11, § 10A.04(2).

38. *See* note 33 *supra*.

39. The majority did intimate in a footnote that it could be implied from CAL. CIVIL CODE § 1357 (West Supp. 1971) allowing liens for labor, services or materials, that a unit owner would only be liable for his proportionate share of any liability arising out of the common areas. The concurring opinion argued that the statute could not be extended to cover judgments in tort.

40. *See* cases cited note 15 *supra*.

41. *See, e.g.*, 4 R. POWELL, REAL PROPERTY § 633.25 (P. Rohan ed. 1971).

innocent unit owner, who is in no way responsible for the plaintiff's misfortune. For example, a unit owner in a large condominium normally would be unlikely to have any control over or knowledge of an unsafe condition in the common areas. Nevertheless, if each owner is jointly and severally liable, a plaintiff injured as a result of that condition could enforce a judgment solely against the unit owner.[42] Worse still is the realization that if a right of contribution is not judicially or statutorily authorized,[43] the innocent unit owner would be unable to distribute liability among the other unit owners. On the other hand, if the present decision meant to alter the liabilities of the parties and hold that an unincorporated association now incurs liability to the same extent that a corporation does, the injured unit owner becomes the potential sufferer.[44] The reason for this is that the assets of a small condominium association could well be insufficient to indemnify a severely injured plaintiff.[45] In light of the inequities inherent in either possible approach, it has been suggested that what could judicially evolve is a dual test of liability.[46] If the defendant association is small, the courts would treat the unit owners as tenants in common, thus permitting joint and several liability. Assuming the existence of a right of contribution this would mean that liability could be distributed equally among all association members. On the other hand, if the defendant is a large, well-endowed association, they would treat the association as a separate entity and impose liability on the basis of substantive corporate law. While in either instance the likelihood of impartial treatment for all parties concerned would be increased, the application of the dual test of liability raises an obvious problem: what is the standard to distinguish between the small association and the large one? Since no resolution of that problem is

42. Actually, the problem of whether an innocent unit owner should be jointly and severally liable exists regardless of whether the plaintiff is a unit owner. Joint and several liability could work in favor of the third-party plaintiff as well.

43. *See* Evan, *The Administration of Insurance for Condominiums*, 1970 U. ILL. L.F. 204, 216. Only 9 jurisdictions have judicially authorized contribution. In 23 others, contribution statutes have been enacted, some of which are quite limited. *See* W. PROSSER, THE LAW OF TORTS § 50 (4th ed. 1971).

44. It has been argued that simply incorporating the common areas would solve the potential problem of joint and several liability. *See* Note, *Condominiums: Incorporation of the Common Elements—A Proposal*, 23 VAND. L. REV. 321, 327 (1970). The suggestion has been generally discredited. *See, e.g.*, 4 R. POWELL, *supra* note 41, § 633.25, in which it is contended that the corporate entity is still in fact the agent of the owners, and joint and several liability could be predicated on the basis of undisclosed or partially disclosed principals.

45. *See Developments in the Law—Judicial Control of Actions of Private Associations*, *supra* note 13, at 1092.

46. *Id.*

readily apparent, the dual test lacks the degree of certainty necessary to condominium law.[47] Without the requisite definitions, condominium unit owners would be unsure of their duties and liabilities to one another, and the popularity of the condominium concept could suffer. Ideally, a statutory resolution of this dilemma is needed. A satisfactory statute would impose limited proportionate liability on unit owners coupled with adequate, mandatory insurance purchased by the unit owners' association covering injury or property damage occuring in the common areas.[48] The assets of the association would only be charged against an uninsured liability or against liabilities in excess of coverage. In either of those two instances, the unit owner would not be liable beyond his proportionate share in the common areas. Equally important, there would only be a small risk that a deserving plaintiff would go uncompensated.

47. *See* P. ROHAN & M. RESKIN, *supra* note 11, § 10A.02(1).

48. *Id.* § 10A.05(2). Several condominium enabling acts provide for the purchase of casualty insurance by the unit owners' association, but have no requirement concerning liability insurance. *See, e.g.*, KY. REV. STAT. § 381.885 (1971). Other enabling acts at least refer to the tort liability of a unit owner. *See* statutes cited note 16 *supra*.