NOTE

THE COURT, THE BAR, AND CERTIORARI AT OCTOBER TERM, 1958 *

I. INTRODUCTION

Twenty-three years ago, Chief Justice Charles Evans Hughes wrote, "I think that it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder, falling short, I believe, of 20 percent, show substantial grounds and are granted. I think that it is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality." [1] In 1958 a member of the Court remarked, "of the total petitions acted on I think it must be said that more than one-half were so untenable that they never should have been filed." [2] It is the purpose of this Note to examine the United States Supreme Court docket for October Term, 1958, as a representative year, in the light of the above statements. Professors Frankfurter and Fisher have stated that "only by quarrying in the hundreds of dreary petitions for *certiorari* which have been denied could pedantic demonstration be made of some of the niggling points, or issues long since at rest, on which the bar seeks the Court's reviewing power." [3] Essentially, this is what has been done.[4]

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[1] S. REP. No. 711, 75th Cong., 1st Sess. 39 (1937) (letter from Charles Evans Hughes to Senator Wheeler).

[2] Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541, 547 (1958).

[3] Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 594 (1938).

[4] For cases on writ of certiorari on the appellate docket which were granted or denied at October Term, 1958, the petitions for certiorari and briefs in opposition were read; for appeal cases on the appellate docket in which probable jurisdiction was noted or postponed, or which were summarily dismissed or affirmed at October Term, 1958, the jurisdictional statement and the motion to affirm or dismiss were read. In addition, all cases on the appellate docket which were dismissed pursuant to U.S. SUP. CT. R. 60 (by stipulation of the parties) were similarly treated. Furthermore, a sampling of approximately 100 cases was taken from the miscellaneous docket, October Term, 1958.

II. Major Standards Governing Review

The standards adopted by the Supreme Court in granting certiorari have been set forth in its Rule 19:[5] first, has the state or federal court decided an *important federal question* not yet determined by the Supreme Court; and second, have the courts of appeals *conflicted* on the same question, or is the court of appeals in conflict with state law on an important state question, or has the court of appeals decided a question so as to conflict with the applicable decisions of the Supreme Court, or has the state court decided a federal question "in a way probably not in accord" with decisions of the Court. The following sections will examine the Court's application of these standards to the petitions presented.

A. *Conflicts*

Mr. Justice Harlan has said that "the most assured way of satisfying the requirement of Rule 19 is to show the issue sought to be reviewed involves a conflict of decisions among the lower federal courts on a point of federal law."[6] That this is recognized by those seeking the Court's review is apparent from an examination of the petitions: as has been noted in prior years,[7] an overwhelming majority allege the existence of a conflict of some nature.

1. Direct Conflict

Of all cases in which writ of certiorari was granted, about one-third contained an actual conflict. These ranged in terms of importance from whether small loan companies are exempted from the Fair Labor Standards Act[8] to the lesser question of whether, in a civil suit by the United States seeking double damages for fraudulent transactions in surplus property, the action is barred by a five-year statute of limitations.[9] Although

[5] The statutory authority for the Court's appellate jurisdiction is contained in 28 U.S.C. §§ 1252-57 (1958). For a sharp criticism of Rule 19's value as a guide to the bar, see Harper & Pratt, *What The Supreme Court Did Not Do During the 1951 Term*, 101 U. Pa. L. Rev. 439, 440 (1953).

[6] Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 111 (1959).

[7] Harper & Liebowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. Pa. L. Rev. 427, 443, 455 (1954).

[8] 52 Stat. 1067 (1938), as amended, 29 U.S.C. § 213(a)(2) (1958). The Sixth Circuit said yes on this question in Mitchell v. Kentucky Fin. Co., 254 F.2d 8 (6th Cir. 1958); the First Circuit reached an opposite result in Aetna Fin. Co. v. Mitchell, 247 F.2d 190 (1st Cir. 1957). The Supreme Court granted certiorari in the former case, 358 U.S. 811 (1958), and reversed, 359 U.S. 290 (1959).

[9] 28 U.S.C. § 2462 (1958). This question turned on whether the statute was to be characterized as penal or remedial. The Court of Claims, in Erie Basin Metal Prods., Inc. v. United States, 138 Ct. Cl. 67, 150 F. Supp. 561 (1957), said that the statute was penal and held that the Government was barred by the statute of limitations. Conversely, in United States v. Doman, 255 F.2d 865 (1958), suit was brought nine years after the transaction and the Third Circuit, finding the statute remedial in nature, held the action not untimely. Certiorari was granted in the latter case *sub nom.* Koller v. United States, 358 U.S. 892 (1958), and the Supreme Court affirmed per curiam, 359 U.S. 309 (1959).

the presence of conflict is often acknowledged by the Court as its basis for granting certiorari,[10] in certain cases it has gone unmentioned: in *Glus v. Brooklyn E. Dist. Terminal*,[11] the Second Circuit held that the Federal Employers' Liability Act statute of limitations [12] is not tolled despite the fact that the employee relied upon misrepresentations by his employer as to the applicable period. While this was in direct conflict with the Fourth Circuit,[13] the Supreme Court's stated reason for granting certiorari was that "the question is important and recurrent." [14] In *Green v. McElroy*,[15] the District of Columbia Circuit's approval of government procedures in industrial security clearance cases was apparently in conflict with the Ninth Circuit's holding in *Parker v. Lester*.[16] There was no stated reason for the granting of the petition in this case. Although the granting of certiorari in these cases could easily be explained on the importance of the issue, the Court's failure to enunciate the conflict as a distinct ground for the grant is difficult to explain.

Notwithstanding what has been said, the existence of an intercircuit conflict does not insure the granting of certiorari.[17] This is significantly illustrated in prior litigation of the question presented by *Melrose Distillers, Inc. v. United States*: [18] whether dissolution of a corporation under state corporation laws abates a pending federal criminal prosecution against the corporation. In *United States v. United States Vanadium Corp.*,[19] the Tenth Circuit had held that the prosecution was abated under Delaware law; this was in direct conflict with a previous holding of the Seventh Circuit.[20] The Government's petition for certiorari in *Vanadium* was denied; [21] however, in the instant case, without opposition from the Government,[22] Melrose's petition was granted [23] and the issue was finally

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[10] *E.g.*, NLRB v. Cabot Carbon Co., 360 U.S. 203, 210 (1959); Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 300 (1959).

[11] 253 F.2d 957 (2d Cir.), *rev'd*, 359 U.S. 231 (1959).

[12] 53 Stat. 1404 (1939), as amended, 45 U.S.C. § 56 (1958).

[13] Scarborough v. Atlantic Coast Line R.R., 178 F.2d 253 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950).

[14] 359 U.S. 231, 232 (1959).

[15] 254 F.2d 944 (D.C. Cir. 1958), *rev'd*, 360 U.S. 474 (1959).

[16] 227 F.2d 708 (9th Cir. 1955). For further assertion of the conflict, see 46 CALIF. L. REV. 828 (1958).

[17] See Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465 (1953). *But see* Roehner & Roehner, *Certiorari—What is a Conflict Between Circuits*, 20 U. CHI. L. REV. 656 (1953).

[18] 359 U.S. 271 (1959), *affirming* 258 F.2d 726 (4th Cir. 1958).

[19] 230 F.2d 646 (10th Cir. 1956).

[20] United States v. P. F. Collier & Son, 208 F.2d 936 (7th Cir. 1953).

[21] 351 U.S. 939 (1956).

[22] The significance of the Government's request to grant certiorari is discussed generally at note 401 *infra* and accompanying text. For cases in prior terms where the Court has denied certiorari despite lack of Government opposition see Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); United States v. Community Serv., Inc., 189 F.2d 421 (4th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952).

[23] 358 U.S. 878 (1958).

resolved by the Supreme Court in favor of the Government.[24] It thus appears that "an issue for which *certiorari* once seemed inopportune may, through the accumulation of similar instances or in the clearer perspective of the ramifications of the particular problem, later emerge as obviously important." [25]

In *Zipp v. Commissioner*,[26] the question was whether remaining stockholders in a closely held corporation receive a taxable dividend upon the complete redemption by the corporation of a former stockholder's shares.[27] The Sixth Circuit answered in the affirmative, directly contrary to a contemporary Third Circuit holding.[28] Because of the importance of the question in the administration of the Internal Revenue Code, the propriety of the Supreme Court's denial of certiorari in this case may be open to criticism. The issue raised in *NLRB v. Southern Bleachery & Print Works, Inc.*[29] was whether the exercise as well as the possession of supervisory authority was necessary in order to qualify for exemption as a "supervisor" under the Taft-Hartley Act.[30] The Fourth Circuit held that it was; the First [31] and Sixth [32] Circuits had previously held that possession alone was sufficient. Despite the denial of certiorari this problem appears worthy of the Court's attention. In *Seven-Up Co. v. Blue Note, Inc.*,[33] the question was whether, in a diversity action for damages and injunctive relief for trade name infringement, the jurisdictional amount is to be measured by the total value of the property right sought to be protected or by only the amount of alleged damage to that property right. The Seventh Circuit decided that the latter must be shown, the Third Circuit [34] to the contrary notwithstanding. The volume of litigation concerning this issue and its apparent uncertainty [35] would seem to militate toward Supreme Court resolution.

In *Missouri Pac. R.R. v. H. Rouw Co.*,[36] the issue was whether the difference between the selling commission which a shipper would have paid

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[24] 359 U.S. 271 (1959).

[25] Frankfurter & Fisher, *supra* note 3, at 598.

[26] 259 F.2d 119 (6th Cir. 1958), *cert. denied*, 359 U.S. 934 (1959).

[27] See Int. Rev. Code of 1939, ch. 247, § 115(g)(1), as amended, ch. 994, 64 Stat. 931 (1950) (now INT. REV. CODE OF 1954, § 302(d)).

[28] Holsey v. Commissioner, 258 F.2d 865 (3d Cir. 1958). For further assertion of the conflict see Singer, *Tax Consequences of Stock Redemptions for Shareholders Whose Stock is Not Redeemed*, 38 ORE. L. REV. 1 (1958).

[29] 257 F.2d 235 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959).

[30] 61 Stat. 137 (1947), 29 U.S.C. §§ 152(3), (11) (1958).

[31] NLRB v. Leland-Gifford Co., 200 F.2d 620 (1st Cir. 1952).

[32] Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949).

[33] 260 F.2d 584 (7th Cir. 1958), *cert. denied*, 359 U.S. 966 (1959).

[34] Ambassador East, Inc. v. Orsatti, Inc., 257 F.2d 79 (3d Cir. 1958).

[35] See cases cited in both the Seventh and Third Circuit opinions.

[36] 258 F.2d 445 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959).

had the goods been sold at full price and the lesser commissions which shipper actually paid when selling defective goods at a reduced price should decrease the carrier's liability for damages under the Interstate Commerce Act.[37] The Fifth Circuit, in holding for the carrier, recognized that the opposite result had been reached by the Texas Court of Civil Appeals.[38] Irrespective of the seeming importance of this problem, the Supreme Court's Rule 19 makes no provision for the granting of certiorari on conflict between a court of appeals and a state court on a federal question. Even so, however, the Court has seen fit on many occasions in the past to grant review when such a conflict emerged.[39] In *Delaware v. Curran*,[40] the petitioner argued that he was denied a fair trial under the fourteenth amendment when perjured testimony was used against him without the actual knowledge of the prosecuting attorney. The Third Circuit affirmed the granting of federal habeas corpus in this case, while four other circuits have held no violation of due process occurs when the prosecuting attorney is without actual knowledge.[41] A possible distinction in the instant case was the fact that the perjurer was a high-ranking police officer. Nevertheless, the law appears to be in a state of confusion [42] and a decision by the Supreme Court would seem to be desirable. The issue presented by *Ferraiolo v. Newman* [43] was whether the acquisition of stock by exercise of conversion rights could be considered a "purchase" under section 16(b) of the Securities Exchange Act of 1934.[44] Holding that under the facts presented there was no "purchase," the Sixth Circuit distinguished a prior decision of the Second Circuit [45] by characterizing the acquisition in that case as being "voluntary" in view of the market conditions there existing. However, if section 16(b) is to be considered a prophylactic rule which admits only of an objective standard, the voluntariness of the conversion is irrelevant and the cases are clearly in conflict.[46] Urging this view upon the Court, the

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[37] 34 Stat. 593 (1906), as amended, 49 U.S.C. § 20(11) (1958).

[38] Texas & N.O.R.R. v. H. Rouw Co., 271 S.W.2d 666 (Tex. Ct. Civ. App. 1954); Thompson v. H. Rouw Co., 237 S.W.2d 662 (Tex. Ct. Civ. App. 1951). In both of these cases, review was denied by the Supreme Court of Texas. (The cases, although involving the same shipper, are unrelated.)

[39] See generally ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 329 (2d ed. Wolfson & Kurland 1951).

[40] 259 F.2d 707 (3d Cir.), *cert. denied*, 358 U.S. 948 (1958).

[41] United States v. Jakalski, 237 F.2d 503 (7th Cir. 1956); Coggins v. O'Brien, 188 F.2d 130 (1st Cir. 1951); Wild v. Oklahoma, 187 F.2d 409 (10th Cir. 1951); Schectman v. Foster, 172 F.2d 339 (2d Cir. 1949), *cert. denied*, 339 U.S. 924 (1950).

[42] See generally Note, *Perjured Testimony: Its Effect on Criminal Defendant's Constitutional Rights*, 7 DUKE L.J. 150 (1958).

[43] 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959).

[44] 48 Stat. 896, 15 U.S.C. § 78p(b) (1958). Section 16(b) seeks to deter stock manipulations by corporate insiders through rendering them liable to the corporation for profits realized by purchase and sale within six months.

[45] Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947).

[46] For discussion of this analysis see 107 U. PA. L. REV. 719 (1959). See also 72 HARV. L. REV. 1392 (1959).

Government filed a memorandum in support of the petition for certiorari. However, the issue appears to have arisen only these two times in twenty-five years,[47] and this may explain the Court's refusal to hear the case.[48]

Other direct conflicts in which certiorari was denied are susceptible to more ready explanation. In *Brown Paper Mill Co. v. Commissioner*[49] and *Crowell-Collier Publishing Co. v. Commissioner*,[50] the dispute involved the availability of judicial review on determinations of excess profits tax refunds under section 732(c) of the 1939 Internal Revenue Code.[51] The *Brown* and *Collier* cases held them nonreviewable and, by the Government's own admission in a memorandum to the Court, were directly in conflict with the Ninth Circuit.[52] Although not opposing the petition for certiorari, the Government informed the Court that the Ninth Circuit had granted a rehearing in the *Helms* case and there was a possibility that the conflict might vanish.[53] In *Stedman Mfg. Co. v. Redman*,[54] the district court,[55] in a patent infringement action against the lessee of machinery, also enjoined the lessor who was not a named party but who in fact conducted the defense. Only the lessee appealed. The Fourth Circuit affirmed on the ground that the patent was valid. The petition for certiorari pointed to an Eighth Circuit decision[56] which held that an unnamed party cannot be enjoined, thus being in conflict with the district court decision in the instant case. However, as was pointed out in the brief in opposition, petitioner did not present this issue to the Fourth Circuit and therefore no conflict existed between the *circuits*.[57]

Another area of direct conflict acknowledged by the Court to be subject to review obtains where a state court or court of appeals decides a federal question in a way not in accord with the applicable decisions of the Supreme Court.[58] In *United States v. Hulley*,[59] the issue was whether

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[47] See Brief in Opposition, Ferraiolo v. Newman, 359 U.S. 927 (1959).

[48] Another important issue under § 16(b) was likewise refused review by the Court. See Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

[49] 255 F.2d 77 (5th Cir.), *cert. denied*, 358 U.S. 906 (1958).

[50] 259 F.2d 860 (2d Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

[51] Int. Rev. Code of 1939, § 732(c), added by ch. 10, 55 Stat. 26 (1941), as amended.

[52] Helms Bakeries v. Commissioner, 236 F.2d 3 (9th Cir. 1956). For subsequent history of this case see note 53 *infra*.

[53] The Ninth Circuit subsequently did reverse itself in the *Helms* case, thereby eliminating the conflict. 263 F.2d 642 (9th Cir. 1959).

[54] 257 F.2d 867 (4th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

[55] 154 F. Supp. 378 (M.D.N.C. 1957).

[56] S. S. Kresge Co. v. Winget Kickernick Co., 96 F.2d 978 (8th Cir. 1938), *cert. denied*, 308 U.S. 557 (1939).

[57] Conflict between a court of appeals and a district court is clearly not meritorious of Supreme Court review. See ROBERTSON & KIRKHAM, *op. cit. supra* note 39, § 325.

[58] U.S. SUP. CT. R. 19.

[59] 102 So. 2d 599 (Fla.), *rev'd per curiam*, 358 U.S. 66 (1958).

under federal statute [60] a federal tax lien is superior to a mechanic's lien arising under state law before the accruing of the tax. The Supreme Court of Florida gave the mechanic's lien priority, and the Government argued in its petition that this holding disregarded a series of Supreme Court decisions.[61] In *Rogers v. Calumet Nat'l Bank*,[62] a state court's power to review the discretion of the Attorney General in vesting property under the Trading With the Enemy Act [63] was questioned. The Appellate Court of Indiana reviewed the action, thus conflicting in principle with a prior Supreme Court ruling.[64] In both these cases the Court granted certiorari and reversed per curiam, by this means maintaining adherence to its decisions.

But even a direct conflict with a Supreme Court decision does not guarantee review. In *Idaho Power Co. v. United States*,[65] decision was sought as to whether, upon a corporation's redemption of existing shares of stock for both newly created shares of equal par value and cash, the cash is to be considered a dividend. The Court of Claims said that it was to be considered as part of the redemption rather than as a dividend entitling petitioner, a public utility, to an income tax deduction.[66] The Government, also asking for grant of the petition, conceded the utility's allegation of conflict with *Commissioner v. Estate of Bedford*.[67] Particularly in view of the Government's urgent request for clarification,[68] it would appear that certiorari should have been granted. *McKenna v. Seaton* [69] presented the issue of the prevalence of an application for a mineral land lease—incomplete under the Secretary of the Interior's regulations—over a subsequent but complete application. The District of Columbia Circuit affirmed the Secretary's ruling that the omission was a curable defect despite the noncompliance with the regulation and that there was no loss of priority. Petitioner alleged conflict with Supreme Court decisions [70] to the effect that the Secretary is bound by his own regulations and has no

[60] INT. REV. CODE OF 1954, §§ 3670, 3672.

[61] *E.g.*, United States v. Vorreiter, 355 U.S. 15 (1957); United States v. Colotta, 350 U.S. 808 (1955).

[62] 128 Ind. App. 628, 149 N.E.2d 214 (1958), *rev'd per curiam*, 358 U.S. 331 (1959).

[63] 40 Stat. 415, 416 (1917), as amended, 50 U.S.C. APP. §§ 5(b), 7(c) (1958).

[64] Silesian-American Corp. v. Markham, 156 F.2d 793 (2d Cir. 1946), *aff'd sub nom.* Silesian-American Corp. v. Clark, 332 U.S. 469 (1947).

[65] 142 Ct. Cl. 534, 161 F. Supp. 807, *cert. denied*, 358 U.S. 832 (1958).

[66] Int. Rev. Code of 1939, ch. 247, § 26(h), 53 Stat. 18 (now INT. REV. CODE OF 1954, § 247).

[67] 325 U.S. 283 (1945).

[68] The Government stated that in another case it had urged a dividend result relying upon the very argument petitioner raised in the instant case. The Government's argument there also failed. Hawkinson v. Commissioner, 235 F.2d 747 (2d Cir. 1956). *Cf.* Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465, 466 (1953).

[69] 259 F.2d 780 (D.C. Cir.), *cert. denied*, 358 U.S. 835 (1958).

[70] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954). See Service v. Dulles, 354 U.S. 363 (1957); Chapman v. Sheridan-Wyoming Co., 338 U.S. 621 (1950).

power to alter their requirements. These decisions appear consonant with petitioner's position and, as noted by Judge Prettyman in dissent,[71] the case raises an important question of an administrator's adherence to his own rules. However, the denial of review can perhaps be explained in that the regulations then in force were amended before the Court ruled on the petition.[72]

2. "Proximate" Conflicts

The great majority of conflicts alleged in other petitions do not survive critical examination; thus the certworthiness of the petition usually must rest upon other grounds. However, some within this class approach true conflict sufficiently to engender future litigation and this prospective confusion justifies a more liberal interpretation of the direct conflict standard and often results in Supreme Court review. In *Forman v. United States*,[73] the Ninth Circuit reversed a conviction and ordered petitioner's acquittal; on rehearing it modified the order and remanded for new trial. Petitioner alleged double jeopardy under *Sapir v. United States*,[74] but the Ninth Circuit held that the acquittal order was not based on insufficiency of evidence as was the case in *Sapir*.[75] Although the Ninth Circuit's distinction appears to be fair, the Court evidently felt the issue so unclear as to warrant clarification.[76] Other cases presenting "proximate" conflicts have not met with success as did *Forman*. In *Cohen v. Public Housing Administration*,[77] petitioner alleged that federal-state public housing was being allotted on a racially segregated basis. The Fifth Circuit's holding that petitioner had no standing because she failed to apply for occupancy was alleged to be in conflict with one of its own cases and one decided by the Fourth Circuit.[78] The latter cases were distinguished by the lower court on the ground that complainant there had made known his pursuit of relief while in the instant case the quest for relief was unarticulated *up to the time of suit*. Furthermore, absence of formal application was not a bar to standing in the Fourth Circuit because defendant had an

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71 259 F.2d at 784.

72 43 C.F.R. § 200.5 (1954). The regulations now provide for an application requiring less information and thus the pre-amendment incomplete application here involved would now be sufficient.

73 259 F.2d 128 (9th Cir.), *modified on rehearing*, 261 F.2d 181 (9th Cir. 1958), *rehearing denied*, 264 F.2d 955 (9th Cir. 1959), *aff'd*, 361 U.S. 416 (1960).

74 348 U.S. 373 (1955).

75 The Ninth Circuit originally reversed with directions to enter judgment for defendant in view of its holding that the case was submitted to the jury on an erroneous theory. 259 F.2d at 128. It modified this order inasmuch as the indictment was sufficient to present an alternative theory. 264 F.2d at 956. See also Carbon Black Export, Inc. v. The SS Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed as improvidently granted*, 359 U.S. 180 (1959).

76 It is to be noted that the Court's opinion gives no reason for the grant of certiorari.

77 257 F.2d 73 (5th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

78 Gibson v. Board of Pub. Instruction, 246 F.2d 913 (5th Cir. 1957); School Board v. Allen, 240 F.2d 59 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

announced policy of segregation, a fact not present in the instant case. Although there was evidence in the instant case that defendant thought segregation desirable,[79] the finding of no such announced policy lessens the impact of the allegation of direct conflict. *A. D. Julliard & Co. v. Johnson*[80] raised the issue of the allowability of an income tax deduction for payments made to the Government in settlement of an alleged violation of the Emergency Price Control Act of 1942.[81] The Second Circuit denied the deduction whereas the First Circuit in *Commissioner v. Pacific Mills*[82] had allowed it under similar circumstances. Analysis reveals, however, that in the instant case the alleged transgression was "willful," while in *Pacific Mills* the alleged violation was due only to "negligence," and the Supreme Court has recognized such a distinction.[83]

3. Intracircuit Conflicts

The Supreme Court's rules governing review plainly make no provision for resolving conflicts existing within the same circuit. Nevertheless, the Court has in the past based grants of certiorari upon conflicting decisions of different panels in the same court of appeals.[84] In *General Motors Corp. v. United States*,[85] the Court of Claims apparently reversed itself for the second time within four years on the question of whether that part of the purchase price attributable to a warranty contract accompanying the sale of consumer durable goods was subject to federal excise tax.[86] Citing previous Supreme Court decisions[87] as precedent, petitioner alleged an "intracircuit conflict." Whatever may be the certworthiness of a true intracircuit conflict,[88] there was no conflict in the Court of Claims: the instant case clearly overruled the former decision. Other petitioners have attempted to follow a similar route to review by alleging that there is confusion in the circuit resulting from disagreement among circuit and district

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[79] 257 F.2d at 75.

[80] 259 F.2d 837 (2d Cir. 1958), *cert. denied*, 359 U.S. 942 (1959).

[81] Ch. 26, 56 Stat. 23.

[82] 207 F.2d 177 (1st Cir. 1953).

[83] Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958) (dictum).

[84] Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950): "Because of this intracircuit conflict, we made a . . . grant of certiorari"; Maggio v. Zeitz, 333 U.S. 56 (1948); John Hancock Mut. Life Ins. Co. v. Bartels, 308 U.S. 180, 181 (1939): "Because of conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court . . . and because of the importance of the question, we granted certiorari . . . ." *But see* Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108 (1959): "[C]ontrary decisions between different components of the same Court of Appeals . . . will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."

[85] 142 Ct. Cl. 842, 163 F. Supp. 854, *cert. denied*, 358 U.S. 866 (1958).

[86] Int. Rev. Code of 1939, ch. 247, § 3443(a)(2), 53 Stat. 417 (now INT. REV. CODE OF 1954, § 6611).

[87] See cases cited note 84 *supra*.

[88] See text accompanying note 84 *supra*; ROBERTSON & KIRKHAM, *op. cit. supra* note 39, at § 336.

judges;[89] that there is current dispute among different panels within the circuit;[90] and that there is conflict with an older case of the same circuit.[91]

B. *Important Federal Questions*

The other significant basis for obtaining the Court's review is the presentation of an important federal question.[92] In this section the degrees of importance of the myriad federal questions placed before the Court will be examined.

1. Degree of Importance of the Question

Aside from those cases reviewed to resolve a direct conflict, virtually all cases in which the Court grants certiorari contain a federal question of exceptional importance to the public in the administration of the law. To illustrate: *Nelson v. County of Los Angeles*,[93] involving the due process constitutionality of a county's discharge of public employees because of their refusal on fifth amendment grounds to obey its order to answer congressional committee questions relating to subversive activity, readily reveals an issue of crucial importance in the area of civil liberties.[94] *Louisiana Power & Light Co. v. City of Thibodaux*[95] raised a recurring and significant question regarding the scope of federal jurisdiction:[96] the extent of a federal district judge's power to abstain from interpreting a theretofore uninterpreted state statute. In *FTC v. Travelers Health Ass'n*,[97] the issue of the authority of the FTC to regulate interstate advertising of an insurance company when the company's home state controlled both interstate and intrastate deceptive trade practices posed a highly important problem in the field of government regulation of business.[98]

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89 United States v. Chan Chick Shick, 254 F.2d 4 (2d Cir. 1958), *aff'd sub nom.* Tak Shan Fong v. United States, 359 U.S. 102 (1959) (no reason given for the grant of certiorari). Confusion was alleged to be manifested in the following cases: United States v. Boubaris, 244 F.2d 98 (2d Cir. 1957); Petition of Zaino, 131 F. Supp. 456 (S.D.N.Y. 1955); Petition of Apollonio, 128 F. Supp. 288 (S.D.N.Y. 1955).

90 McKenna v. Seaton, 259 F.2d 780 (D.C. Cir.), *cert. denied*, 358 U.S. 835 (1958), alleged to be in conflict with Barash v. Seaton, No. 14069, D.C. Cir., April 25, 1958; Seaton v. Texas Co., Nos. 13636, 13637, D.C. Cir., May 8, 1958; McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).

91 Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir.), *cert. denied*, 358 U.S. 838 (1958), alleged to be in conflict with Des Marais v. Beckman, 198 F.2d 550 (9th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

92 See text accompanying note 5 *supra*.

93 362 U.S. 1 (1960).

94 See also, *e.g.*, Abel v. United States, 362 U.S. 217 (1960); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684 (1959).

95 360 U.S. 25 (1959).

96 See also, *e.g.*, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

97 362 U.S. 293 (1960).

98 See also, *e.g.*, FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959); SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65 (1959).

However, there are cases of seemingly exceptional importance with which the Court chooses not to deal. In *Lodge 12, District 37, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc.*,[99] the issue was whether a federal district court had jurisdiction to determine if certain action was equivalent to an unfair labor practice, which finding was requisite in deciding whether there was a breach of a collective bargaining agreement to arbitrate. This question, never decided by the Supreme Court,[100] appears to be one of some consequence in the allocation of jurisdiction between the courts and the NLRB. *Brown-Forman Distillers Corp. v. Collector*[101] presented the question of whether the imposition of an apportioned state income tax on a foreign corporation whose only nexus with the state was the presence of manufacturers' representatives was consonant with the commerce and due process clauses of the federal constitution. Because the Court's recent pronouncement[102] on what constitutes a sufficient nexus involved foreign corporations having substantially more contact[103] with the taxing state and because that decision provoked considerable uncertainty,[104] review would appear to have been desirable. In *Underwood v. Maloney*,[105] the issue was whether or not the class suit device of Federal Rule of Civil Procedure 23 could be utilized to obtain diversity jurisdiction over an unincorporated association[106] where applicable state law[107] prohibited class suits against such associations. The commentators have indicated the moment of the controversy and have criticized the lower court decision.[108] In *Brewster v. United States*,[109] the Court was urged to decide if Congress had authorized the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations to investigate labor unions. Although it is arguable that Congress would be particularly inclined to correct the lack of authorization found by the District of Columbia Circuit, the Government's position that clarification is needed on

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[99] 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958).

[100] *Id.* at 472. See also 107 U. PA. L. REV. 876 (1959).

[101] 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed, cert. denied*, 359 U.S. 28 (1959).

[102] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

[103] In *Northwestern States*, the corporation had both an office and salesmen who actively solicited orders within the taxing state. Neither fact appeared in *Brown-Forman*. In addition, 48% of the cement company's sales were made in the taxing jurisdiction.

[104] See CCH STATE TAX CAS. REP. ¶¶ 13-001 to -080.

[105] 256 F.2d 334 (3d Cir.), *cert. denied*, 358 U.S. 864 (1958).

[106] The citizenship of an unincorporated association for purposes of diversity jurisdiction is that of all the members and not of the entity. Thomas v. Board of Trustees, 195 U.S. 207 (1904). See 3 MOORE, FEDERAL PRACTICE ¶ 17.25, at 1412-13 (2d ed. 1948).

[107] FED. R. CIV. P. 17(b) provides that capacity to be sued in the federal courts is to be determined ordinarily by the law of the state in which the district court sits.

[108] 107 U. PA. L. REV. 559 (1959); Comment, 68 YALE L.J. 1182 (1959).

[109] 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958) (Reed, Associate Justice of the Supreme Court, retired, dissenting in the court of appeals).

the degree of specificity required of Congress in extending authorization to this subcommittee [110] and to committees in general seems tenable.

Although at one time "almost half of the granted petitions . . . concerned taxation," [111] this number has currently diminished to less than ten per cent. And among the denials are to be found several cases of apparent significance. The issue in *Commissioner v. American Gilsonite Co.*[112] was whether costs incurred in the bagging and transportation to point of shipment of petitioner's mineral product were "ordinary treatment processes" so as to be included in gross income for the purpose of computing depletion allowance.[113] This general problem has been most perplexing to the lower federal courts [114] and its importance is further evidenced by a recent Supreme Court grant of certiorari [115] at the urgent behest of the Government [116] in a similar case. *Ford Motor Co. v. United States* [117] raised a substantive issue—whether the sale of a warranty contract was subject to federal excise tax—identical to that in *General Motors Corp. v. United States.*[118] In view of the manifest vacillation by the Court of Claims [119] on this question and the widespread business use of warranty contracts, the failure of the Supreme Court to grant certiorari is difficult to explain.

Perhaps the harshest criticism of the Court's exercise of discretionary jurisdiction in the past was directed at the failure to grant certiorari in the civil liberties area.[120] Without attempting generally to evaluate the validity of such a criticism [121] in this Term or any other, examination of the 1958 docket uncovers certain cases in this field which might reasonably have been reviewed. In *Garland v. Torre,*[122] a newspaper reporter

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[110] See United States v. Lamont, 236 F.2d 312 (2d Cir. 1956); United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956); United States v. O'Connor, 135 F. Supp. 590 (D.D.C. 1955), *rev'd per curiam,* 240 F.2d 404 (D.C. Cir. 1956).

[111] Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929,* 44 HARV. L. REV. 1, 15 (1930).

[112] 259 F.2d 654 (10th Cir. 1958), *cert. denied,* 359 U.S. 925 (1959).

[113] Int. Rev. Code of 1939, ch. 247, § 114(b)(4)(B), 53 Stat. 45, as amended, ch. 521, § 319, 65 Stat. 497 (1951) (now INT. REV. CODE OF 1954, § 613(a)).

[114] See cases cited 108 U. PA. L. REV. 758, 760 n.11 (1960).

[115] United States v. Cannelton Sewer Pipe Co., 268 F.2d 334 (7th Cir.), *cert. granted,* 361 U.S. 923 (1959) (No. 513).

[116] See 108 U. PA. L. REV. 758, 763 n.29 (1960).

[117] 140 Ct. Cl. 487, 156 F. Supp. 554 (1957), *cert. denied,* 358 U.S. 864 (1958).

[118] 142 Ct. Cl. 842, 163 F. Supp. 854, *cert. denied,* 358 U.S. 866 (1958), discussed in text accompanying notes 85 and 86 *supra.*

[119] *Ibid.* The *Ford* case apparently overturned General Motors Corp. v. United States, 147 F. Supp. 739 (Ct. Cl. 1957), which itself appeared to overturn General Motors Corp. v. United States, 128 Ct. Cl. 465, 121 F. Supp. 932 (1954), *cert. denied,* 348 U.S. 942 (1955).

[120] See, *e.g.,* Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari,* 99 U. PA. L. REV. 293, 303-11 (1950); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term,* 100 U. PA. L. REV. 354, 367-92 (1951).

[121] "Regardless of what standard for review may be formulated, no one dissatisfied with a decision below, be he litigant, lawyer, or law professor, ever applauds a denial of certiorari." Weiner, *The Supreme Court's New Rules,* 68 HARV. L. REV. 20, 63 (1954).

[122] 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958). Mr. Justice Douglas was of the opinion that certiorari should have been granted.

challenged, as contrary to the first amendment, a federal contempt conviction arising from refusal to divulge the identity of her source of information. In *Miranda v. Commission of Investigation* and two related cases,[123] the New York Commission of Investigation, specifically charged by its authorizing statute to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws . . ." [124] refused to accept petitioner's plea of fifth amendment privilege against self-incrimination despite the fact that federal agents were present and that petitioner was under investigation by a federal grand jury. The question of the availability of the privilege in a state proceeding when there is a showing of collaboration between state and federal officers has been specifically left open by the Court.[125] And the recent per curiam opinion in *Mills v. Louisiana* [126] sheds no light on the problem. It would seem that *Miranda*, denied review by the Court twenty-one days after the *Mills* decision [127] and presenting an excellent case for a finding of collaboration, afforded the Court an opportunity for clarification.

One may fairly distinguish the cases examined in the preceding paragraphs from the larger number of cases which, although presenting questions of apparent significance and therefore properly reviewable by the Court, cannot be said to have been improperly denied. In *SEC v. Insurance Sec., Inc.*,[128] a stockholder-director sold control of an investment advisor company at a price in excess of net asset value. The issue was whether he could be enjoined under the Investment Company Act of 1940 [129] from subsequently acting as a director of such a company on the theory that his prior conduct constituted gross misconduct or gross abuse of trust. The Ninth Circuit's holding of no abuse has been sharply criticized.[130] The Court's denial can perhaps be explained by the relative infrequency of the specific occurrence and by the factual determinations necessarily inherent in the resolution of this issue. In *Flying Tiger Line, Inc. v. County of Los Angeles*,[131] determination was sought regarding the extent to which a domiciliary county could impose an ad valorem property tax on aircraft engaged in interstate and foreign commerce. The California Supreme Court applied a percentage-of-time-in-the-state formula. The general principles of state power to tax migratory assets have been

123 Riccobono v. Commission of Investigation, and Castellano v. Commission of Investigation, all reported in 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550, *cert. denied*, 360 U.S. 930 (1959).

124 N.Y. Sess. Laws 1958, ch. 989, § 2, para. 5.

125 Knapp v. Schweitzer, 357 U.S. 371 (1958).

126 360 U.S. 230 (1959).

127 *Mills* was decided June 8, 1959; certiorari was denied in *Miranda* together with *Riccobono* and *Castellano* on June 29, 1959.

128 254 F.2d 642 (9th Cir.), *cert. denied*, 358 U.S. 823 (1958).

129 54 Stat. 841, 15 U.S.C. § 80a-35 (1958).

130 72 HARV. L. REV. 1176 (1959); 68 YALE L.J. 113 (1958). It is to be noted also that the SEC was the petitioning party here. See note 401 *infra* and accompanying text.

131 51 Cal. 2d 314, 333 P.2d 323, *cert. denied*, 359 U.S. 1001 (1959).

enunciated by the Court,[132] but no suggestions as to formulas have been forthcoming.[133] Helpful as such a statement by the Court would be in settling an extensively litigated state court question, the Court's time may be more profitably spent. It was asserted in *Bercut-Vandervoort & Co. v. United States*[134] that the General Agreement on Tariffs and Trade's[135] ban on discrimination against imported products was violated by effectively taxing petitioner's imported gin on a wine-gallon basis while taxing domestic gin on a proof-gallon basis.[136] Although the result of the case affects many similarly situated importers,[137] the Court's decision to allocate its time elsewhere is not open to serious question. In four cases before the Court,[138] the issue was whether state statutes[139]—regulating minimum motor carrier rates so as to preclude lower rates for which the United States negotiated—were contrary to the supremacy clause of the Constitution. The Court had recently held invalid a California statute which did not absolutely preclude the lower rates but which required special application to the state commission.[140] Petitioner maintained that the ground of decision in that case was that the required procedures, not the preclusion of lower rates, were the unconstitutional element. Although this argument has been given some credence,[141] the Court evidently felt its prior decision sufficiently clear. *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*[142] posed the question of the right of a common carrier holding an ICC certificate of public convenience and necessity to maintain an action for damages for infringement of his territory by a non-

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132 *E.g.*, Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590 (1954); Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

133 See the concurring opinion in the *Flying Tiger* case, 51 Cal. 2d at 323, 333 P.2d at 328.

134 Customs Appeal No. 4937, C.C.P.A., Nov. 14, 1958; the opinion of the Customs Court may be found in 151 F. Supp. 942 (1957).

135 61 Stat. (Part V) A18, as amended, 62 Stat. 3679 (1948).

136 The tax on domestic gin is imposed at the time of withdrawal from bond (at that time being over 100 proof) and based on proof gallonage. The tax on petitioner's gin is imposed at the time of import (at that time being already bottled and 100 proof or under) and based on wine gallonage. The effect of this is to include in petitioner's tax base the diluting products used in the bottling operation while not including the dilutions in the tax base of the domestic producers.

137 151 F. Supp. at 953 (dissenting opinion).

138 Kentucky v. United States and Hughes Transp., Inc. v. United States, 128 Ct. Cl. 221, 168 F. Supp. 219 (1958), *cert. denied*, 359 U.S. 968 (1959); Union Transfer Co. v. United States, 168 F. Supp. 217 (Ct. Cl. 1958), *cert. denied*, 359 U.S. 968 (1959); United States v. Pennsylvania Public Util. Comm'n, 393 Pa. 537, 143 A.2d 341, *cert. denied*, 358 U.S. 884 (1958).

139 KY. REV. STAT. §§ 281.590, .685 (1959); NEB. REV. STAT. §§ 75-222, -224 (Supp. 1957); PA. STAT. ANN. tit. 66, §§ 1142-43 (1959).

140 Public Util. Comm'n v. United States, 355 U.S. 534 (1958).

141 "We think the plaintiffs' argument is a legitimate one, in view of some of the language in the Supreme Court's opinion, but, reading the opinion as a whole, we think the California decision governs the instant case . . . ." 168 F. Supp. at 218. See also Note, *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 162-64 (1958).

142 330 P.2d 522 (Ore. 1958), *cert. denied*, 359 U.S. 1001 (1959).

certificated carrier.[143] The Supreme Court of Oregon held, not without uncertainty,[144] that the Interstate Commerce Commission had exclusive power to punish. Perhaps the Supreme Court felt its prior pronouncements had adequately delineated this general area.[145] *Socarras v. United States*[146] presented the issue of whether Federal Rule of Criminal Procedure 21(b) permits a criminal defendant to move for transfer of trial in the transfer*ee* rather than the transfer*or* court. Because, as the Government pointed out, much of the apparent hardship resulting from the Fifth Circuit's denial of the motion could be mitigated by the allowance of such a motion in absentia in the transferor court, review by the Supreme Court does not seem essential.

The civil liberties area also produced several cases falling into this category. In *Blum v. Texas*,[147] state authorities withheld statements made by prosecution witnesses from petitioner; he argued that such action constituted a denial of fourteenth amendment due process. Although *Jencks v. United States*[148] concerned the "procedures for the administration of justice in the *federal* courts,"[149] it is not wholly untenable to argue that the above circumstances are a denial of fair trial. But since there was dispute in the Texas courts as to the existence of prejudice, perhaps the issue is not best presented by the instant case. One issue in *MacKenna v. Ellis*[150] was whether or not a state court's imposition of counsel on a criminal defendant against his wishes constituted a denial of fair trial under the fourteenth amendment. The Fifth Circuit held that petitioner was entitled to a hearing on his writ of habeas corpus to determine the truth of his allegations. This question has not been decided by the Supreme Court;[151] but inasmuch as a new trial may be granted solely on the ground of another issue[152] also remanded for hearing and inasmuch as it may be determined at the hearing that in fact there was no imposition of counsel, it would appear that the case is not now ripe for review. In *De Bernardo v. Rogers*,[153] a deportation proceeding in which an indigent defendant was denied the right to counsel was attacked as a denial of fifth amendment

143 The noncertificated carrier had been enjoined by the ICC from operating over the petitioner's route. United Truck Lines v. ICC, 189 F.2d 816 (9th Cir.), *cert. denied*, 342 U.S. 830 (1951).

144 "Under the circumstances it is not unreasonable to assume that it was the intent of Congress to place in the Interstate Commerce Commission the exclusive power to determine whether particular violations of the Act should result in punishment." 330 P.2d at 528. See also 68 HARV. L. REV. 1272 (1955).

145 *E.g.*, T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959).

146 No. 17252, 5th Cir., May 27, 1958, *cert. denied*, 358 U.S. 826 (1958).

147 317 S.W.2d 931 (Tex. Crim. App. 1958), *cert. denied*, 359 U.S. 952 (1959).

148 353 U.S. 657 (1957).

149 Palermo v. United States, 360 U.S. 343, 345 (1959). (Emphasis added.)

150 263 F.2d 35 (5th Cir. 1958), *cert. denied*, 360 U.S. 935 (1959).

151 *But cf.* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942).

152 The petitioner had alleged that he was denied reasonable opportunity to secure the presence and testimony of his witnesses, and the court of appeals determined that he was entitled to a hearing on this also.

153 254 F.2d 81 (D.C. Cir.), *cert. denied*, 358 U.S. 816 (1958).

due process. Although the issue is undecided by the Court, several points justify the denial of certiorari: there was some question as to whether petitioner had waived counsel,[154] and there was no issue of fact or law decided at the hearing which was not subsequently decided when petitioner was represented by counsel.[155] Review was sought in *Fouts v. United States*[156] as to whether petitioner by failure to demand trial at any time had waived his right to speedy trial under the sixth amendment when trial was held ten years after indictment.[157] Although the handicap in defending ten years after the transaction is apparent, perhaps the Government's averment that such lengthy delays are contrary to its present policy reveals the Court's position in denying certiorari.[158] Finally, in *Eaton v. Board of Managers*,[159] petitioner, a Negro physician, alleged a fourteenth amendment denial of equal protection by the refusal of a North Carolina hospital to grant him courtesy staff privileges. The facts alleged to constitute state action—the sole issue—were, *inter alia*: the hospital's use of eminent domain; the land for the hospital had been originally deeded by the city and county so long as it be used for their benefit and they held a possibility of reverter in case of disuse or abandonment; prior annual subsidies by the city and county and present per diem payments by them for the care of indigent patients; and prior operation by municipal authority.[160] Even though these facts appear to be stronger than those of *Girard College Trusteeship*,[161] it may be that the Court is seeking a more generic situation before passing judgment on this significant issue.

Another category of federal-question cases presents problems which, though interesting and novel, are comparatively insignificant in that a Supreme Court decision would have relatively little value except to the

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154 The hearing had been originally recessed so petitioner could obtain counsel. When the hearing was reconvened petitioner did no more than merely state that he was indigent. The hearing then proceeded. 254 F.2d at 82.

155 Petitioner was subject to deportation because of two prior convictions for crimes involving moral turpitude. See 66 Stat. 204 (1952), 8 U.S.C. § 1251 (1958). Petitioner admitted the convictions at the deportation hearing and was found deportable. The dispositive issue, whether the crimes of which petitioner had been convicted involved moral turpitude, was relitigated in petitioner's subsequent suit for declaratory judgment in which he was represented by counsel. 254 F.2d at 82.

156 258 F.2d 402 (6th Cir.), *cert. denied*, 358 U.S. 884 (1958). Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Whittaker were of the opinion that certiorari should have been granted.

157 Petitioner was federally indicted after being convicted in a state court and sentenced to ten years' imprisonment. Upon release after serving the state sentence he was convicted under the original federal indictment.

158 *But see* Petite v. United States, 361 U.S. 529, 533 (1960) (separate opinion by Mr. Justice Brennan).

159 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959). Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Brennan were of the opinion that certiorari should have been granted.

160 "In 1881, when the hospital was established, and thereafter during the period ending in 1901, when it was supported and operated by municipal authority, it might well have been described as a State agency even though the funds for its operation had been illegally appropriated by the municipalities." 261 F.2d at 525.

161 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958) (the second *Girard College* case).

actual litigants. Many such cases reach the Court's docket. Representative is *United States v. Winters*,[162] in which the Tenth Circuit held that an Oklahoma petitioner's otherwise deductible business expense for gifts of whiskey to clients was nondeductible because an Oklahoma statute[163] forbade making gifts of whiskey. Since only Oklahoma and Mississippi[164] had such statutes,[165] the issue of whether disallowance of the deduction is necessary to implement state policy appears too limited to justify Supreme Court review. The petitioner in *Earle v. United States*[166] challenged the Second Circuit's holding that she had forfeited her alien departure bond[167]—despite her timely departure—by obtaining employment in violation of her alien status. The Government gained the proceeds as liquidated damages without showing specific injury.[168] Although the issue seems interesting enough, research indicates no other cases having ever arisen on the point. In *Holeman v. Louisville & N.R.R.*,[169] petitioner, possessing a railroad pass with a waiver of liability but having made additional payment for a parlor seat, was denied recovery for injuries sustained when the train was derailed. The Supreme Court has in the past[170] upheld the waiver where the passage was wholly gratuitous. The *Holeman* case afforded the Court an opportunity to limit this criticized[171] decision but it would appear that the infrequency of the distinguishing fact here present calls for Court denial of review. In *Walkden v. United States*,[172] estate tax was paid under an invalid will; the beneficiary under the valid will (a charitable organization—thus exempting the estate from the tax) sought recovery of the amount paid. The Sixth Circuit having held the *refund* barred by the statute of limitations,[173] petitioner argued that this was not a suit for refund but for the return of money paid due to mutual mistake. The issue of statutory interpretation is engaging but apparently of no widespread significance.

In *Grady v. Irvine*,[174] the question was whether the fact that the Virginia wrongful death statute[175] creates a new *right* of action rather

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[162] 261 F.2d 675 (10th Cir. 1958), *cert. denied*, 359 U.S. 943 (1959).

[163] Okla. Laws 1933, ch. 153, § 2.

[164] MISS. CODE ANN. § 2613 (1957).

[165] Government's Brief in Opposition, p. 5.

[166] 254 F.2d 384 (2d Cir.), *cert. denied*, 358 U.S. 822 (1958).

[167] The conditions of the bond were that the alien comply with the conditions of admission and depart on the proper date. 254 F.2d at 386 n.1.

[168] The court found "indirect damage done to the national economy, the expense of investigation and the maintenance of an agency to enforce the provision of the Immigration Laws." 254 F.2d at 387.

[169] 319 S.W.2d 47 (Ky. 1958), *cert. denied*, 359 U.S. 1012 (1959).

[170] Francis v. Southern Pac. Co., 333 U.S. 445 (1948).

[171] See, *e.g.*, 96 U. PA. L. REV. 902 (1948); 9 U. PITT. L. REV. 304 (1948); 34 VA. L. REV. 604 (1948).

[172] 255 F.2d 681 (6th Cir.), *cert. denied*, 358 U.S. 825 (1958).

[173] Int. Rev. Code of 1939, ch. 247, § 910, 53 Stat. 138 (now INT. REV. CODE OF 1954, § 6511(a)).

[174] 254 F.2d 224 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958).

[175] VA. CODE ANN. §§ 8-628.1, -633, -634, -640 (Supp. 1957).

than *cause* of action[176] calls for a redetermination of diversity jurisdiction when the administrator is substituted as plaintiff. The Supreme Court has held[177] that substitution of a nondiverse administrator in a stockholder's derivative suit does not necessitate redetermination, but this was distinguished by the Fourth Circuit by means of its interpretation of the Virginia act.[178] Inasmuch as interpretation of the Virginia statute has been peculiar,[179] Supreme Court review does not seem essential. In *Barnard-Curtiss Co. v. United States*,[180] a subcontractor sought to recover under the Miller Act[181] on a performance bond filed by a contractor for the protection of the United States. The losing party in the district court filed an appeal to the Tenth Circuit thirty-one days after judgment. Petitioner argued that the thirty-day period of Federal Rule of Civil Procedure 73(a) should govern rather than the sixty-day provision for cases in which the United States is a party. Although the precise issue in the instant case has never been resolved by the Supreme Court, an earlier decision[182] involving similar circumstances under a predecessor of the Miller Act held that the United States is a real litigant for purposes of jurisdictional amount. The implications of that case and the restricted impact of the question presented indicate the propriety of the Court's decision not to review.

2. Correctness of the Decision Below as a Possible Factor Regarding Importance

The Court has unequivocally stated that a denial of certiorari is of no precedential value regarding the merits of a case.[183] However, this is not to say that the apparent correctness of the decision below may not, in some cases, become a factor in the Court's decision to deny review.[184] Thus the failure to accept cases presenting important questions undecided

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176 Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269 (1896).

177 Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957).

178 See 4 MOORE, FEDERAL PRACTICE ¶¶ 25.02, .05 (2d ed. 1953).

179 254 F.2d at 227.

180 252 F.2d 94 (10th Cir.), *cert. denied*, 358 U.S. 906 (1958).

181 49 Stat. 793 (1935), 40 U.S.C. §§ 270a-d (1958).

182 United States Fid. & Guar. Co. v. United States, 204 U.S. 349 (1907).

183 See, *e.g.*, Atlantic Coast Line R.R. v. Powe, 283 U.S. 401, 403-04 (1931); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (opinion of Mr. Justice Frankfurter respecting the denial of the petition for writ of certiorari). Nonetheless, legal commentators, Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 438, 440 n.60 (1954); the courts, *e.g.*, United States v. Camara, 271 F.2d 787, 789 (7th Cir. 1959); MacInnis v. United States, 191 F.2d 157, 161 n.3 (9th Cir. 1951), *cert. denied*, 342 U.S. 953 (1952); Nelson v. Commissioner, 104 F.2d 521 (4th Cir. 1939); Berger v. United States, 170 F. Supp. 795, 796-97 (S.D.N.Y. 1959); Ross v. State, 157 Tex. Crim. 371, 246 S.W.2d 884, *rehearing denied*, 157 Tex. Crim. 375, 246 S.W.2d 886, *cert. denied*, 343 U.S. 969 (1952); and the general public, Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354, 355 & n.6 (1951), have indicated the belief that the denial of certiorari does have some precedential value.

184 "But if the cases are viewed as a whole, it would seem that, since the grants of certiorari came most often in cases where the Court disapproved of the decisions

by the Supreme Court is possibly explained by the indisputable correctness of the lower court opinion. Such a case was *Rushlight v. United States*,[185] in which the petitioner, who had been contracting with the Government for four years, attempted to set off losses incurred in two of those years against excess profits in the other years for the purpose of reducing his liability to the Government under the Renegotiation Act.[186] The Ninth Circuit's decision that the act makes no provision for setoff appears eminently accurate. In *Bennett v. The Mormacteal*,[187] a longshoreman, injured on his employer's ship, sought to avoid the exclusive remedy against his employer provided by the Longshoremen's & Harbor Workers' Compensation Act[188] by libelling the ship in rem. Despite petitioner's argument that the ship was a juridical third party,[189] it is clear that the suit was directed against the employer-shipowner, thus falling under the statute. In *Petition of Terzich*,[190] petitioner's ability to attack collaterally a final order of deportation in a naturalization hearing was in issue. The Third Circuit's decision that this is clearly precluded by the statute[191] and its Congressional history appears unassailable.[192] *Bedno v. Fast*[193] raised the question of whether the Federal Trade Commission Act[194] precluded a state from regulating *truthful* price advertising of eyeglasses. The Wisconsin Supreme Court's holding that the act applied only to *false* advertising is, in the statute's own terms, patently correct. In *Noe v. FCC*,[195] it was contended that Loyola University's connection with the Society of Jesus made it a "representative of [an] alien" under the Communications Act of 1934[196] so as to preclude the school from obtaining a television license. The District of Columbia Circuit's finding that the connection was too attenuated[197] to fall within the statutory purpose is not open to

below, the denial of certiorari may imply at least some degree of approval of the decision below." Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439, 446 (1953). Examination of Supreme Court statistics for the last ten years reveals that of all cases in which certiorari was granted, about two-thirds were reversed.

185 259 F.2d 658 (9th Cir. 1958), *cert. denied*, 359 U.S. 952 (1959).

186 56 Stat. 245 (1942), as amended, 50 U.S.C. APP. § 1191 (1958).

187 254 F.2d 138 (2d Cir.), *cert. denied*, 358 U.S. 817 (1958).

188 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).

189 The exclusiveness of the act applies only to the employee-employer relationship. *Ibid.*

190 256 F.2d 197 (3d Cir.), *cert. denied*, 358 U.S. 843 (1958).

191 66 Stat. 243 (1952), 8 U.S.C. § 1429 (1958).

192 Petitioner may seek judicial review of the deportation order by habeas corpus, declaratory judgment, or injunctive relief under § 10(b) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009(b) (1958). 256 F.2d at 199, 200.

193 6 Wis. 2d 471, 95 N.W.2d 396, *cert. denied*, 360 U.S. 931 (1959).

194 52 Stat. 114 (1938), 15 U.S.C. § 52 (1958).

195 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959).

196 48 Stat. 1086, as amended, 47 U.S.C. § 310(a) (1958).

197 "But the record shows that this hierarchical chain of authority . . . has never been used in the past to impinge upon the independence of the University in the operation of its radio station. Under all the circumstances, even if Section 310(a) be thought to have a semblance of relevance to the present case, it nevertheless would be inapplicable since it was incorporated in the Communications Act to 'guard against alien control and not the mere possibility of alien control.' S. REP. No. 781, 73d Cong., 2d Sess. 7 (1934)." 260 F.2d at 741-42.

question. And, although the general issue of what constitutes an "alien" under this statute has not been passed upon by the Court, the facts of this case do not lend themselves to fruitful delineation of the scope of the statutory prohibition. Finally, the Court, in *Alaska Airline, Inc. v. CAB*,[198] was asked to determine if the Civil Aeronautics Act[199] authorized the CAB to promulgate regulations concerning depreciation of air carriers. The District of Columbia Circuit's conclusion, after exhaustive review of the legislative history, that no such authority exists appears unobjectionable.[200]

III. The Petitions

It has been said many times that the great majority of petitions filed are totally frivolous and that their draftsmen are totally inept.[201] It is here proposed to examine the quality of the lawyers' work with regard to the petitions for certiorari.

A. *Ineffectual Attempts To Obtain Review*

1. False Conflicts

A number of petitions alleged a conflict with a case that had been decided many years before. Needless to say, if the older conflicting case is an undisputed Supreme Court decision of long standing the age of the case adds force to the precedent.[202] But in the large majority of these cases, the petitioner appears to be doing no more than making a token attempt to comply with the Rules, and the Court has regarded him in like

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198 257 F.2d 229 (D.C. Cir.), *cert. denied*, 358 U.S. 881 (1958).

199 Ch. 601, § 487(d), 52 Stat. 1000 (1938).

200 The court found that grants of such authority to other federal agencies have been expressly provided for by statute. Federal Power Act, 49 Stat. 854 (1935), 16 U.S.C. § 825a(a) (1958); Natural Gas Act, 52 Stat. 826 (1938), 15 U.S.C. § 717h(a) (1958); Motor Carrier Act, 49 Stat. 563 (1935), as amended, 49 U.S.C. § 320(c) (1958); Interstate Commerce Act, 54 Stat. 916, 944 (1940), as amended, 49 U.S.C. § 20(4) (railroads), § 913 (water carriers) (1958); Communications Act of 1934, 48 Stat. 1078, 47 U.S.C. § 220(b) (1958). The fact that the Board may indirectly regulate depreciation through its authority to fix a carrier's rates adds weight to the court's finding.

201 *E.g.*, Ulman & Spears, *Dismissed For Want of a Substantial Federal Question*, 20 B.U.L. Rev. 501 (1940). "This steady broadening of the Supreme Court's jurisdiction upon *certiorari* and the marked increase in the number of petitions filed have been accompanied, however, by no corresponding gain in understanding at the bar concerning the nature and function of the writ." Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238, 262 (1934).

202 In State *ex rel.* Klapp v. Dayton Power & Light Co., 263 F.2d 909 (6th Cir.), *rev'd per curiam*, 359 U.S. 552 (1959), a resident of Ohio sued another resident of Ohio and joined the defendant's mortgagee, a resident of New York whose interest was identical to that of the defendant's. The mortgagee removed to a district court and the requisite jurisdiction was affirmed by the Sixth Circuit. Since plaintiff and one of the defendants were residents of the same state the case was clearly in conflict, as alleged by petitioner, with The Removal Cases, 100 U.S. 457 (1879).

fashion.[203] In *City of Tallahassee v. Olin Mills, Inc.*,[204] the question concerned the validity of imposing a state license tax on transient drummers engaged in interstate commerce where the sales contracts were consummated outside the state. The Supreme Court of Florida held the tax an undue burden on interstate commerce. Petitioner alleged a conflict with a Fourth Circuit decision;[205] however, since the time of that decision the Supreme Court had clearly settled the issue contrary to the prior holding.[206] In *Byrne v. Matczak*[207] the issue was whether the separation of the jury after a civil case had been committed to it was ground for reversal despite no showing of prejudice. Conflict was alleged with an 1808 federal case[208] which held that separation in itself would cause the verdict to be set aside. However, as the brief in opposition pointed out, modern authority is to the contrary.[209] *Reserve Life Ins. Co. v. North*[210] was a diversity case in which the issue was common-law fraud. Petitioner alleged that the Fourth Circuit decision conflicted with numerous pre-*Erie* cases dating back to 1806.[211]

It is undeniable that many cases are worthy of Court review solely because they involve a fact situation, the impact or implication of which has never before been assessed within the framework of a governing legal principle. Thus, certiorari was granted in *Ingram v. United States*[212] to determine as to both entrepreneurs of the gambling enterprise and their employees the quantum of evidence necessary to support a conviction of conspiracy to evade federal lottery taxes.[213] On the other hand, where controlling legal principles have been given substance through application to a number of fact situations so that the effect of certain facts upon the rule of law may be reasonably predicted, an allegation of conflict is not justified if the presence or absence of such significant facts may reasonably

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[203] "Especially is the Court wary of spurious conflicts, loose allegations of conflict, conflicts depending upon the petitioning counsel's peculiar view of the facts. Multiplication of asserted conflicts is not only ineffective, but may be damaging; ten or twenty distinguishable cases have been known to bury one which is indistinguishable." Frankfurter & Hart, *supra* note 201, at 269 n.75. But the Court has granted certiorari in the past for a "seeming conflict," Delgadillo v. Carmichael, 332 U.S. 388, 389 (1947), and even for an "alleged conflict," Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631, 633 (1949).

[204] 100 So. 2d 164 (Fla. 1958), *cert. denied*, 359 U.S. 924 (1959).

[205] Lucas v. City of Charlotte, 86 F.2d 394 (4th Cir. 1936).

[206] Nippert v. City of Richmond, 327 U.S. 416 (1946).

[207] 254 F.2d 525 (3d Cir.), *cert. denied*, 358 U.S. 816 (1958).

[208] Lester v. Stanley, 15 Fed. Cas. 396 (No. 8277) (C.C.D. Conn. 1808).

[209] See cases cited in the Third Circuit opinion, 254 F.2d at 528-29.

[210] 255 F.2d 240 (4th Cir.), *cert. denied*, 358 U.S. 874 (1958).

[211] *E.g.*, Iasigi v. Brown, 58 U.S. (17 How.) 182 (1854); Russell v. Clarke's Executors, 11 U.S. (7 Cranch) 69 (1812); McFerran v. Taylor, 7 U.S. (3 Cranch) 270 (1806). Another example of a pre-*Erie* conflict is Kagan v. Moody, 309 S.W.2d 515 (Tex. Ct. Civ. App. 1957), *cert. denied*, 358 U.S. 873 (1958), involving a question of state property law, and alleged to be in conflict with Love v. Simms's Lessee, 22 U.S. (9 Wheat.) 515 (1824).

[212] 360 U.S. 672 (1959).

[213] INT. REV. CODE OF 1954, §§ 4401, 4411, 7201. The conspiracy statute may be found in 18 U.S.C. § 371 (1958).

distinguish the cases and thereby produce the opposite result. Nonetheless, many such conflict allegations, reconcilable because of differing facts, are found in the petitions. In *Owensboro on the Air, Inc. v. United States*,[214] the issue was whether or not petitioner had received adequate notice of the contemplated deletion of a television channel where notice of proposed rulemaking made no mention of it but where petitioner became aware of the proposed action during the course of the proceeding. The District of Columbia Circuit found sufficient notice, and conflict was alleged with a Ninth Circuit decision [215] which refused to sustain a conviction for violation of a regulation despite actual notice of the regulation. The significant distinguishing fact in the latter case was that the regulation had not been published in the *Federal Register* as specifically required by the Administrative Procedure Act.[216] In *United States v. Delta Air Lines, Inc.*,[217] the dispute concerned the correctness of an accrual basis taxpayer accruing as income in the year of allowance mail transportation pay which was not actually received until a subsequent year. The Fifth Circuit's denial of the accrual was alleged to be in conflict with the Supreme Court [218] and two other circuits.[219] But in the instant case the amount involved was not ascertainable with reasonable accuracy in the year of allowance. Other instances of such conflict allegations involved the following issues: the quantum of evidence of negligence sufficient to take a case to the jury;[220] the quantum of evidence of fraudulent concealment sufficient to take a case to the jury;[221] what constitutes adequate notice under the Miller Act;[222] the sufficiency of evidence to sustain a finding of highest and best use of property in a condemnation proceeding;[223] the reasonableness of a municipal zoning classification of property as residen-

214 262 F.2d 702 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 911 (1959).

215 Hotch v. United States, 212 F.2d 280 (9th Cir. 1954).

216 60 Stat. 238 (1946), 5 U.S.C. § 1002(a)(3) (1958).

217 255 F.2d 501 (5th Cir.), *cert. denied*, 358 U.S. 882 (1958).

218 Continental Tie & Lumber Co. v. United States, 286 U.S. 290 (1932).

219 Schaeffer v. Commissioner, 258 F.2d 861 (6th Cir. 1958); Baird v. Commissioner, 256 F.2d 918 (7th Cir. 1958), *aff'd sub nom.* Commissioner v. Hansen, 360 U.S. 446 (1959).

220 *E.g.*, Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir.), *cert. denied*, 359 U.S. 1013 (1959), alleged to be in conflict with Lee v. Pennsylvania R.R., 192 F.2d 226 (2d Cir. 1951).

221 Crummer Co. v. Du Pont, 255 F.2d 425 (5th Cir.), *cert. denied*, 358 U.S. 884 (1958), alleged to be in conflict with Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951).

222 49 Stat. 794 (1935), 40 U.S.C. § 270b(a) (1958), United States *ex rel.* Hopper Bros. Quarries v. Peerless Cas. Co., 255 F.2d 137 (8th Cir.), *cert. denied*, 358 U.S. 831 (1958), alleged to be in conflict with Bowden v. United States *ex rel.* Malloy, 239 F.2d 572 (9th Cir. 1956), *cert. denied*, 353 U.S. (1957).

223 United States v. Jones Beach State Parkway Authority, 255 F.2d 329 (2d Cir.), *cert. denied*, 358 U.S. 832 (1958), alleged to be in conflict with United States v. Des Moines County, 148 F.2d 448 (8th Cir.), *cert. denied*, 326 U.S. 743 (1945); Jefferson County v. TVA, 146 F.2d 564 (6th Cir.), *cert. denied*, 324 U.S. 871 (1945); United States v. Two Acres of Land, 144 F.2d 207 (7th Cir. 1944), *cert. granted*, 324 U.S. 833, *dismissed on motion of petitioner*, 324 U.S. 884 (1945).

tial;[224] whether, under California law, a soldier traveling in his own automobile to a newly assigned station was within the scope of his employment;[225] whether employees who sell food to interstate carriers are engaged in interstate commerce for purposes of the Fair Labor Standards Act;[226] whether, in assessing the validity of a patent, the criteria of "invention" have been met;[227] whether, in a condemnation proceeding, the exclusion of evidence of subsequent sales of other property was prejudicial;[228] and whether a registrant was prejudiced by failure of a local selective service board to post the names of advisors in the board's office as required by then-existing regulations.[229]

A discouraging number of petitions alleged conflicts which any reasonable examination would prove to be patently frivolous. In *Odd Fellows Oakridge Cemetery Ass'n v. Oakridge Cemetery Corp.*,[230] appellant unsuccessfully sought to enjoin a municipality from erecting a pumphouse upon a cemetery corner lot which had been conveyed to it by the cemetery for that purpose. On appeal to the Supreme Court, conflict was alleged with Supreme Court opinions[231] involving the abridgement of religious freedom. At issue in *UMW v. Meadow Creek Coal Co.*[232] was a labor union's responsibility in tort for members' actions. Petitioner asserted that the Sixth Circuit's finding of union liability conflicted with a Supreme Court decision.[233] Reference to that decision readily reveals the Court's express disavowal of consideration of the union responsibility issue.[234]

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[224] *E.g.*, McMahon v. City of Dubuque, 255 F.2d 154 (8th Cir.), *cert. denied*, 358 U.S. 833 (1958), alleged to be in conflict with Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[225] Chapin v. United States, 258 F.2d 465 (9th Cir. 1958), *cert. denied*, 359 U.S. 924 (1959), alleged to be in conflict with Hinson v. United States, 257 F.2d 178 (5th Cir. 1958); United States v. Mraz, 255 F.2d 115 (10th Cir. 1958).

[226] 52 Stat. 1067 (1938), as amended, 29 U.S.C. § 213(a)(2) (1958), Mitchell v. Sherry Corine Corp., 264 F.2d 831 (4th Cir.), *cert. denied*, 360 U.S. 934 (1959), alleged to be in conflict with McLeod v. Threlkeld, 319 U.S. 491 (1943).

[227] *E.g.*, Zoomar, Inc. v. Paillard Prods., Inc., 258 F.2d 527 (2d Cir.), *cert. denied*, 358 U.S. 908 (1958), alleged to be in conflict with Otto v. Koppers Co., 246 F.2d 789 (4th Cir. 1957), *cert. denied*, 355 U.S. 939 (1958); Plax Corp. v. Precision Extruders, Inc., 239 F.2d 792 (3d Cir. 1957).

[228] United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir.), *cert. denied*, 358 U.S. 921 (1958), alleged to be in conflict with United States v. 63.04 Acres of Land, 245 F.2d 140 (2d Cir.), *on remand*, 154 F. Supp. 198 (E.D.N.Y. 1957), *aff'd*, 257 F.2d 68 (2d Cir. 1958).

[229] Wolfe v. United States, 256 F.2d 434 (6th Cir.), *cert. denied*, 358 U.S. 819 (1958), alleged to be in conflict with Steele v. United States, 240 F.2d 142 (1st Cir. 1956).

[230] 14 Ill. App. 2d 378, 144 N.E.2d 853 (1957), *appeal dismissed*, 358 U.S. 36 (1958).

[231] Fowler v. Rhode Island, 345 U.S. 67 (1953); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

[232] 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959).

[233] United States v. White, 322 U.S. 694 (1944).

[234] "The only issue in this case relates to the nature and scope of the constitutional privilege against self-incrimination. We are not concerned here with a complete delineation of the legal status of unincorporated labor unions. We express no opinion . . . as to the necessity of considering them as separate entities apart from their members for purposes other than the one posed by the narrow issue in this case." *Id.* at 697.

In *Evans v. Buchanan*[235] the Third Circuit ordered the Delaware State Board of Education to adopt a plan for desegregating schools. Petitioner contended that, according to Delaware law, local school boards must be a party to these decisions and alleged conflict with a decision of the Delaware Supreme Court.[236] However, it was there clearly held that, although the state board's rules called for joint action with local boards, Delaware law vested ultimate power in the state board. Petitioner argued in *White v. United States*[237] that the opening of a fourth class air mail parcel by federal agents without a warrant was an illegal search and seizure and alleged that the Ninth Circuit's denial of this claim conflicted with an Eighth Circuit decision.[238] However, the earlier case definitely stated that the prohibition extended only to first class mail and thus, whatever the substance of petitioner's claim, no conflict existed. The question in a Ninth Circuit case[239] was whether, conceding that the exclusion of certain evidence was error, petitioner had waived the objection. Petitioner's alleged conflict was with a Supreme Court case[240] that concerned the evidentiary point but did not consider waiver. An issue for decision in *Dorn v. Balfour, Guthrie & Co.*[241] dealt with the liability of a ship's port agent, whose only relationship to the vessel on which petitioner was injured was in making contractual arrangements for its benefit when requested to do so by the master. The Ninth Circuit having held no duty, petitioner asserted that the Supreme Court had reached the opposite result.[242] However, that case spent fifty-five pages of the *United States Reports* discussing a jurisdictional issue and, in one sentence, affirmed the district court's dismissal of a claim against a port agent.

2. Manufactured Federal Claims

It has been observed that "every case is important to the individual litigant who has lost below, so that his counsel is in duty bound to attempt, in as lawyerlike fashion as possible, to fit the questions presented by that case into certiorari categories."[243] Yet every duty has its limit, and the zeal of some lawyers—far in excess of whatever the duty may be—results in a glaring abuse of the Court's rules. Thus, where petitioner's recovery under an airline insurance policy depended upon whether his trip was "scheduled,"[244] petitioner alleged that a federal question was presented because some federal statute talks in terms of scheduled trips.

235 256 F.2d 688 (3d Cir.), *cert. denied*, 358 U.S. 836 (1958).
236 Steiner v. Simmons, 111 A.2d 574 (Del. 1955).
237 254 F.2d 137 (9th Cir.), *cert. denied*, 358 U.S. 829 (1958).
238 Oliver v. United States, 239 F.2d 818 (8th Cir.), *petition for cert. dismissed*, 353 U.S. 952 (1957).
239 Ruud v. United States, 256 F.2d 460 (9th Cir.), *cert. denied*, 358 U.S. 817 (1958).
240 McCandless v. United States, 298 U.S. 342 (1936).
241 262 F.2d 48 (9th Cir. 1958), *cert. denied*, 360 U.S. 918 (1959).
242 Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).
243 Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 64 (1954).
244 Thompson v. Fidelity & Cas. Co., 16 Ill. App. 2d 159, 148 N.E.2d 9, *cert. denied*, 358 U. S. 837 (1958).

But the Illinois Appellate Court had simply construed the insurance contract, never mentioning any federal statute. In a diversity case involving the accuracy of a trustee's accounts in which a "net worth method" test was applied,[245] petitioner argued that an important, undecided federal question was presented inasmuch as, while the Court has reviewed the validity of this test for federal income tax purposes, it has never considered it in a trustee's accounting context. In a diversity negligence and breach of warranty action against an airplane manufacturer,[246] petitioner asserted that CAB approval of the aircraft as being safe must have influenced the finding in the manufacturer's favor; thus a federal question was presented. However, the only place where mention of CAB approval may be found is in the petition for certiorari itself. A Tennessee statute[247] authorizing the reimbursement of utilities forced to relocate because of interstate highway construction was held invalid under the state constitution,[248] and petitioner alleged a substantial federal question because the federal highway program was instrumental in passage of the state statute. And finally, in a diversity suit for fraud,[249] petitioner represented the case as raising a federal question by citing pre-*Erie* Supreme Court decisions in fraud cases.[250]

Scrutiny of the petitions reveals that some litigants go beyond an argumentative statement of the facts and refashion them so as to lend weight to the substantive claim presented. Thus, in *Spano v. New York*,[251] petitioner alleged that he was beaten by the police, a fact not appearing at any stage of the litigation, including the subsequent Supreme Court opinion finding coercion.[252] In *United States v. Thompson*,[253] petitioner argued that the burden of proof employed in his criminal prosecution for contempt was "preponderance of the evidence" rather than "beyond a reasonable doubt"; but the district court opinion[254] makes clear that such was not the case. Thompson further asserted that he was subjected to double jeopardy because the trial judge considered his original conviction in sentencing him for contempt; this was expressly

[245] Bird v. Stein, 258 F.2d 168, 180-81 (5th Cir. 1958), *cert. denied*, 359 U.S. 926 (1959).

[246] Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[247] Tenn. Acts 1957, ch. 170.

[248] State v. Southern Bell Tel. & Tel. Co., 319 S.W.2d 90 (Tenn. 1958), *cert. denied*, 359 U.S. 1011 (1959).

[249] Reserve Life Ins. Co. v. North, 255 F.2d 240 (4th Cir.), *cert. denied*, 358 U.S. 874 (1958). See prior discussion in text accompanying notes 210-11 *supra*.

[250] See cases cited note 211 *supra*.

[251] 360 U.S. 315 (1959), *reversing* 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958).

[252] It may also be noted that one of the crucial facts relied upon by the Supreme Court in finding coercion—the sympathy falsely aroused by a policeman who was a childhood friend of the petitioner and who told petitioner his job was in jeopardy if petitioner didn't confess—appeared in neither the petition for certiorari nor the state court decision.

[253] 261 F.2d 809 (2d Cir. 1958), *cert. denied*, 359 U.S. 967 (1959).

[254] 117 F. Supp. 685, 690 (S.D.N.Y. 1953).

disavowed by the trial judge. One of petitioner's major contentions in a case coming from Oregon [255] was that the state supreme court *sua sponte* amended the indictment and affirmed petitioner's conviction on a point never in issue at the trial; a reading of the opinion lends no support to this assertion. In *Holeman v. Louisville & N.R.R.*,[256] petitioner contended that the expense of the trip in issue would have been reimbursable by the railroad if the petitioner did not have a pass; but the Kentucky court's opinion [257] clearly states that it was a pleasure trip to visit petitioner's daughter. Although the Court will re-examine certain ultimate facts found by lower courts if a federal right hinges on such a finding,[258] it is manifest that the situations discussed above do not fit within this category.

3. Confusion Between Federal and State Rights

As one would expect, some petitioners are unaware of the fact that judicially created federal rules of court are inapplicable to state practice.[259] For example, in a state bribery conviction,[260] petitioner urged the Court to find entrapment as a matter of law, citing *Sherman v. United States*.[261] But that case specifically mentioned that the defense was available in the *federal* courts.[262] Two state cases [263] involved delays in arraignment and petitioners urged violation of the rules of the *McNabb* [264] and *Mallory* [265] cases—both specifically limited to the federal courts [266] and to Federal Rule of Criminal Procedure 5(a).[267]

Several petitioners asserted the infringement of a state statute as a ground for Supreme Court review, including: an Oklahoma statute [268]

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255 State v. Langley, 214 Ore. 445, 323 P.2d 301 (1958), *cert. denied*, 358 U.S. 826 (1958).

256 319 S.W.2d 47 (Ky. 1958), *cert. denied*, 359 U.S. 1012 (1959). See prior discussion of this case in text accompanying notes 169-71 *supra*.

257 319 S.W.2d at 47.

258 Norris v. Alabama, 294 U.S. 587 (1935); Fiske v. Kansas, 274 U.S. 380 (1927).

259 This was especially true of petitioners on the miscellaneous docket and others who appeared *pro se*.

260 State v. Moore, 168 Ohio St. 270, 153 N.E.2d 675 (1958), *cert. denied*, 359 U.S. 944 (1959).

261 356 U.S. 369 (1958).

262 *Id.* at 372.

263 People v. Wein, 50 Cal. 2d 383, 326 P.2d 457, *cert. denied*, 358 U.S. 866 (1958); People v. Teitelbaum, 163 Cal. App. 2d 184, 329 P.2d 157 (Dist. Ct. App. 1958), *appeal dismissed, cert. denied*, 359 U.S. 206 (1959).

264 McNabb v. United States, 318 U.S. 332 (1943).

265 Mallory v. United States, 354 U.S. 449 (1957).

266 318 U.S. at 345.

267 354 U.S. at 453.

268 OKLA. STAT. ANN. tit. 12, § 854 (1958).

regarding the admonition of juries before a recess;[269] an Ohio statute[270] allegedly giving an appeal by right in criminal cases to the Ohio Supreme Court;[271] a Kentucky statute[272] concerning oaths of election officials;[273] a Kentucky statute[274] giving the city legislative body final authority to determine what public improvements shall be made.[275] Clearly, violation of a state statute alone presents no federal question.

4. Petitions Primarily of Factual Significance

There are a large number of petitions which set forth controversies, in areas governed by developed legal principles, that are decided on the basis of the presence or absence of a particular fact or facts. It has been previously noted[276] that certain factual situations in still-developing areas of the law are certworthy. But those in which a decision would provide guidance to no one other than the litigants directly involved should never reach the Supreme Court docket. However, such cases persist: the issue of whether petitioner contributed to respondent's delay in bringing a copyright infringement suit so as to bar his defense of laches was presented[277] as was the question of whether certain advances made by petitioner to a closely held corporation constituted capital contributions or loans.[278] Also brought before the Court was the correctness of both courts below in holding that the record supported the finding that an insured obtained reinstatement of a National Service Life Insurance policy by fraud.[279] The nature of certain payments by a corporation to the widow of an employee—taxable income or gift[280]—was likewise raised.[281]

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269 Crabtree v. Oklahoma, 359 U.S. 990 (1959) (denying certiorari to the Criminal Court of Appeals of Oklahoma, unreported).

270 Appellant alleged violation of OHIO REV. CODE ANN. § 2953.04 (Page 1954); this section, however, is not in point. Section 2953.02 (Anderson Supp. 1959) provides for an appeal by right for cases involving constitutional claims. Appellant appeared *pro se.*

271 Dye v. Ohio, 358 U.S. 45 (1958) (dismissing appeal and denying certiorari to the Supreme Court of Ohio, unreported).

272 KY. REV. STAT. § 116.120 (1959).

273 Hodges v. Hodges, 314 S.W.2d 208 (Ky.), *cert. denied,* 358 U.S. 894 (1958). This case alleged violation of several Kentucky statutes.

274 KY. REV. STAT. § 94.292(3) (1959).

275 City of Druid Hills v. Broadway Baptist Church, 316 S.W.2d 698 (Ky. 1958), *cert. denied,* 359 U.S. 910 (1959).

276 See text accompanying and following notes 212-13 *supra.*

277 Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co., 255 F.2d 519 (2d Cir.), *cert. denied,* 358 U.S. 831 (1958).

278 Gilbert v. Commissioner, 262 F.2d 512 (2d Cir.), *cert. denied,* 359 U.S. 1002 (1959). Losses resulting from a capital contribution are deductible to a limited extent only, Int. Rev. Code of 1939, ch. 247, § 117(d)(1), 52 Stat. 502 (now INT. REV. CODE OF 1954, § 1211), whereas losses resulting from the noncollectibility of a business loan are fully deductible. Int. Rev. Code of 1939, ch. 247, § 23(k)(1), 52 Stat. 462 (now INT. REV. CODE OF 1954, § 166). The Supreme Court has articulated the general standard governing this problem in John Kelley Co. v. Commissioner, 326 U.S. 521, 530 (1946).

279 Kiefer v. United States, 255 F.2d 189 (D.C. Cir.), *cert. denied,* 358 U.S. 828 (1958).

280 The Supreme Court has articulated a general standard in Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929).

281 Simpson v. United States, 261 F.2d 497 (7th Cir. 1958), *cert. denied,* 359 U.S. 944 (1959).

In *State v. Kilgore*,[282] petitioner, while visiting in South Carolina and intending to remain five days more, went into North Carolina, bought whiskey and re-entered with his purchase without paying the South Carolina tax; petitioner contended that he was moving in interstate commerce and therefore immune from the tax; the state court held that he had come to rest; this factual determination is governed by a long standing Supreme Court doctrine.[283] Similarly, in *Gough Indus., Inc. v. State Bd. of Equalization*,[284] the issue was whether a "continuous journey" was interrupted when goods for export were delivered to a packer before shipment abroad, title passing to the buyer on delivery of goods to the packer. This factual determination is also governed by well-settled rule.[285] In *National Union Fire Ins. Co. v. Republic of China*,[286] petitioner sought resolution of whether loss of insured vessels occasioned by the masters' and the crews' defection to the Communist Chinese in contravention of the owner's order was caused by "barratry"—within marine and war risk insurance coverage—or by "seizure," which is excepted from coverage; the general maritime definitions have been articulated with precision many times.[287]

5. Totally Frivolous Petitions

All that may be said concerning a substantial number of contentions found in the petitions is that they are completely frivolous. One petitioner, indicted on a gambling charge,[288] alleged a denial of fair trial because some jury members had at one time placed a wager;[289] another[290] alleged that the imposition of the personal holding company surtax[291] on a corporation deriving its income solely from patent royalties was repugnant to the Constitution inasmuch as congressional creation of the patent was constitutionally authorized.[292] The contentions were made: that a life sentence imposed by a state court for a murder conviction was unreasonable;[293] that a state statute[294] requiring naturopaths to obtain a medical

[282] 233 S.C. 6, 103 S.E.2d 321, *cert. denied*, 358 U.S. 826 (1958).

[283] Coe v. Errol, 116 U.S. 517 (1886).

[284] 51 Cal. 2d 746, 336 P.2d 161, *cert. denied*, 359 U.S. 1011 (1959).

[285] See Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929).

[286] 254 F.2d 177 (4th Cir.), *cert. denied*, 358 U.S. 823 (1958).

[287] *E.g.*, Patapsco Ins. Co. v. Coulter, 28 U.S. (3 Pet.) 222 (1830); Greene v. Pacific Mut. Life Ins. Co., 91 Mass. (9 Allen) 217 (1864); Earle v. Rowcroft, 8 East 126, 103 Eng. Rep. 292 (K.B. 1806).

[288] INT. REV. CODE OF 1954, § 4411.

[289] Gaston v. United States, 358 U.S. 898 (1958) (denying certiorari to District of Columbia Circuit, unreported). This despite the fact that the trial judge questioned the prospective jurors regarding "sour experiences" with gamblers.

[290] O'Connor v. Commissioner, 260 F.2d 358 (6th Cir. 1958), *cert. denied*, 359 U.S. 910 (1959).

[291] Int. Rev. Code of 1939, ch. 247, § 502(a), 53 Stat. 105 (now INT. REV. CODE OF 1954, § 543(a)(1)).

[292] Petitioner appeared *pro se*.

[293] Revard v. State, 332 P.2d 967 (Okla. Crim. Ct. App. 1958), *cert. denied*, 359 U.S. 1000 (1959).

[294] MO. REV. STAT. §§ 334.010, .030 (Supp. 1952).

license violated fourteenth amendment due process because, *inter alia*, this construction of the statute was part of a plot against naturopaths by medical doctors;[295] that fair trial was denied in a state prosecution in which the prosecuting attorney appeared as a witness against petitioner to identify him, for purposes of the state multiple offender statute,[296] as a man formerly prosecuted;[297] that, in a condemnation proceeding, the United States Attorney improperly associated with the jury members because he accompanied them on a bus trip to the viewing of the property while petitioner's counsel did not;[298] that, because petitioner might copyright his petition and because the parties to *Societe Internationale v. Rogers*[299] had not presented material facts concerning the litigation, petitioner had a right to intervene therein.[300]

Further illustrations: in *Daviditis v. National Bank*,[301] the lower courts for the third time[302] found no federal jurisdiction in petitioner's nondiversity action to set aside an alleged common-law fraudulent conveyance; petitioner here attempted to found jurisdiction on seven different federal statutes.[303] Petitioner alleged in *Acme Specialties Corp. v. Bibb*[304] that an Illinois statute[305] prohibiting sale and use of sparklers violated due process inasmuch as prior statutes had for twenty-two years exempted sparklers. Two petitions[306] made the contention that the majority opinion of the FCC in the present case was assailable because one commission member had formerly misinterpreted the statute now in issue.[307] And it was argued[308] that the court erred in holding a rea-

[295] State *ex rel.* Collet v. Errington, 317 S.W.2d 326 (Mo. 1958), *cert. denied*, 359 U.S. 992 (1959).

[296] FLA. STAT. ANN. § 775.09 (1944).

[297] Shargaa v. State, 102 So. 2d 809 (Fla.), *cert. denied*, 358 U.S. 873 (1958).

[298] Webb v. United States, 256 F.2d 669 (4th Cir. 1958), *cert. denied*, 358 U.S. 931 (1959). Petitioner appeared *pro se*.

[299] 357 U.S. 197 (1958).

[300] Leighton v. Rogers, 359 U.S. 935 (1959) (denying certiorari to the District of Columbia Circuit, unreported). Petitioner appeared *pro se*. The Government said: "The petitioner is a complete stranger without any economic stake in the outcome of the litigation and without any status in the case." Brief in Opposition, p. 4.

[301] 262 F.2d 884 (7th Cir.), *cert. denied*, 359 U.S. 1012 (1959).

[302] Daviditis v. National Bank, 251 F.2d 299 (7th Cir. 1958); Davis v. Foreman, 239 F.2d 579 (7th Cir. 1956).

[303] 18 U.S.C. §§ 241, 493, 1005 (1958); 28 U.S.C. §§ 1331, 1339, 1348, 1349 (1958). Petitioner appeared *pro se*.

[304] 13 Ill. 2d 516, 150 N.E.2d 132, *cert. denied*, 358 U.S. 840 (1958).

[305] ILL. ANN. STAT. ch. 38, §§ 276.27-.31 (Smith-Hurd Supp. 1959).

[306] Springfield Television Broadcasting Corp. v. FCC, 259 F.2d 170 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 930 (1959); Winnebago Television Corp. v. United States, 258 F.2d 163 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 930 (1959).

[307] It is true that former Commissioner Doerfer had erred in the interpretation of 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307(b) (1958). Television Allocations, 22 F.C.C. 365, 376, 378-79 (1957) (dissent). But he did not do so in the instant case.

[308] American Nat'l Bank & Trust Co. v. Taussig, 255 F.2d 765 (7th Cir.), *cert. denied*, 358 U.S. 883 (1958).

sonable time for collateral attack on a judgment [309] had elapsed when petitioner, after failing to appeal from the original judgment, sought to attack collaterally ten years later.

B. *Mechanics*

1. Jurisdictional Defects

There is a group of petitions—some presenting questions suitable for Supreme Court review—which suffer from the infirmity of failure to satisfy a jurisdictional prerequisite. Among the recurrent defects are untimely filing, failure properly to raise the issue below, that the judgment below is not final or that it rests on adequate nonfederal grounds, and that the question presented is moot.

Untimely Filing

The times allotted for filing petitions for certiorari are clearly set forth in the rules of the Court.[310] Where the ninety-day requirement was applicable, petitions for certiorari were found filed 95,[311] 100,[312] and 108 [313] days after final judgment of the court below. In the last case petitioner sought to justify the delay by arguing that the petition was filed within ninety days after *notification* [314] of the Seventh Circuit judgment. But the authority cited concerned a peculiarity of the Second Circuit and was therefore inapposite.[315] Examination of petitions in those cases governed by the thirty-day rule revealed filings 35,[316] 44,[317] and 62 [318] days after final judgment of the court below. One of these petitioners attempted to explain his waiting forty-four days to file by contending that the time for filing dates not from the day of the judgment of the court of appeals but from the day that the judgment was returned to the district court. Rule 22(2) [319] is clearly contrary.

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309 FED. R. CIV. P. 60(b)(4).

310 U.S. SUP. CT. R. 22 (certiorari), 11 (appeal).

311 Spaeth v. United States, 254 F.2d 924 (6th Cir.), *cert. denied*, 358 U.S. 831 (1958).

312 Cuba R.R. v. United States, 254 F.2d 280 (2d Cir.), *cert. denied*, 358 U.S. 840 (1958).

313 Armour & Co. v. Atchison, T. & S.F. Ry., 254 F.2d 719 (7th Cir.), *cert. denied*, 358 U.S. 840 (1958).

314 That is, when the mandate was physically returned.

315 Commissioner v. Estate of Bedford, 325 U.S. 283 (1945).

316 Walters v. United States, 256 F.2d 840 (9th Cir.), *cert. denied*, 358 U.S. 833 (1958).

317 United States v. Lustman, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958).

318 Murrell v. United States, 253 F.2d 267 (5th Cir.), *cert. denied*, 358 U.S. 841 (1958).

319 "A petition for writ of certiorari to review the *judgment of a court of appeals* in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within thirty days after the *entry of such judgment.*" U.S. SUP. CT. R. 22(2). (Emphasis added.)

Although the Court has on occasion stated that certiorari was denied because of late filing,[320] in none of the above cases did the Court choose to ascribe a reason. Objections that have been advanced against the Court's explaining denial of review in every case include it would require additional time in an already crowded schedule, and different members of the Court may have different reasons for voting to deny.[321] However, it would appear that these reasons are inapplicable when the denial is premised upon a tardy filing.[322]

Failure To Raise Properly Below

Both statute and Court rule require that in cases coming from state courts the federal question be properly raised by the litigants and passed upon by the court. In several state cases in which review was sought, this defect was observed.[323] For example, having obtained a Mexican divorce and discontinued support payments, the petitioner later obtained a Nevada divorce. After the second divorce order, petitioner's wife in *Douglas v. Douglas*[324] sued for and recovered support payments found to be owing until the time of the Nevada decree. The petition for certiorari asserted that the decision in the wife's favor violated the Status of Aliens Treaty.[325] Inasmuch as this contention—the only one presented—was raised for the first time in the petition, it would have seemed proper for the Court to have stated this defect as the reason for its denial. In *Mc-*

[320] Delphi Frosted Foods Corp. v. Illinois Cent. R.R., 342 U.S. 833, *denying certiorari to* 188 F.2d 343 (6th Cir. 1951); Hope Basket Co. v. Product Advancement Corp., 342 U.S. 833, *denying certiorari to* 187 F.2d 1008 (6th Cir. 1951).

[321] Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-18 (1950) (opinion of Mr. Justice Frankfurter respecting the denial of the petition for writ of certiorari). For criticism of this position see Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439, 440-46 (1953).

[322] In contrast to the certiorari cases mentioned, it is interesting to note that in Territo v. United States, 170 F. Supp. 855 (D.N.J. 1958), *appeal dismissed*, 358 U.S. 279 (1959), an appeal from a three-judge district court was taken 132 days after entry of judgment. Even though the statute, 28 U.S.C. § 2101(b) (1958), clearly provides a maximum sixty-day limitation, no mention of late filing was found in the preliminary papers. The Court dismissed "for the reason that the notice . . . was not filed within the time provided by law." 358 U.S. at 279.

[323] An excellent example of this defect was noted in a case on appeal: in City of Miami v. Ganger, 101 So. 2d 116, 123 (Fla. 1958), *appeal dismissed*, 359 U.S. 64 (1959), appellant challenged the validity of assessment against his property for street improvement. The Supreme Court of Florida held that appellant had received adequate notice by publication and was now estopped from challenging; appellant, relying on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), urged in his jurisdictional statement that the notice was inadequate since no necessity was shown by the state for dispensing with actual notice. The Court postponed jurisdiction to a hearing on the merits, 358 U.S. 804 (1958), and subsequently "dismissed for want of a properly presented substantial federal question." 359 U.S. 64 (1958). Both the state court opinion and the preliminary papers were unclear as to whether the issue of "necessity" had been properly presented; evidently argument revealed that it had not. Therefore, an issue of apparent significance was foreclosed from review.

[324] 164 Cal. App. 2d 230, 330 P.2d 659 (Dist. Ct. App. 1958), *cert. denied*, 359 U.S. 990 (1959).

[325] 46 Stat. 2753 (1930).

Dermott v. Jamula,[326] petitioner argued, *inter alia*, that the state court's failure to reinstate him in his union despite his late payment of dues violated fourteenth amendment equal protection. As the brief in opposition pointed out, this issue had not been raised below. In *Sarner v. Sarner*,[327] an argument advanced by appellant was that the state court violated a federal right by not properly notifying him that the contempt proceeding was *criminal*. The motion to dismiss correctly indicated appellant's failure to articulate this theory previously. The petitioner in *New Jersey v. Dancyger* [328] alleged that the prosecutor's comment to the jury concerning petitioner's failure to testify violated due process. Here, too, the question was not argued before the state court. *McDermott, Sarner* and *Dancyger*, all of which presented several issues considered by the state court in addition to the allegations initially raised in the petition, are illustrative of the difficulties allegedly inherent [329] in the Court's stating the reason for each denial. Finally, in *Loeb v. Loeb*,[330] petitioner contended that the forum state's refusal to entertain an action for alimony based upon a valid foreign *ex parte* divorce violated the privileges and immunities clause of the federal constitution. This point was raised for the first time in an unsuccessful petition to the New York Court of Appeals [331] for reargument; thus it was not reviewable according to the settled policy of the Court.[332]

The express requirement that the question be properly raised below and passed upon by the court does not exist in cases originating in federal courts, "although only in exceptional circumstances will . . . [the Court] consider questions not presented." [333] Thus, in *St. Paul Fire & Marine Ins. Co. v. Chicago Union Station Co.*,[334] which concerned a railroad station company's liability for loss of baggage, petitioner first argued the significance of the Interstate Commerce Act [335] in his certiorari petition. In *De Pova v. Camden Forge Co.*,[336] a diversity case, the petition for certiorari introduced the issue of forum non conveniens. It is manifest that neither case meets the "exceptional circumstance" [337] requisite.

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326 154 N.E.2d 595 (Mass. 1958), *cert. denied*, 359 U.S. 968 (1959).

327 28 N.J. 519, 147 A.2d 244, *appeal dismissed, cert. denied*, 359 U.S. 533 (1959).

328 29 N.J. 76, 148 A.2d 155, *cert. denied*, 360 U.S. 903 (1959).

329 See note 321 *supra* and accompanying text.

330 4 N.Y.2d 542, 152 N.E.2d 36, 176 N.Y.S.2d 590 (1958), *cert. denied*, 359 U.S. 913 (1959).

331 5 N.Y.2d 793, 154 N.E.2d 574, 180 N.Y.S.2d 322 (1958).

332 Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1944).

333 ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 61, at 109 & n.1 (2d ed. Wolfson & Kurland 1951).

334 253 F.2d 441 (7th Cir.), *cert. denied*, 358 U.S. 830 (1958).

335 34 Stat. 593 (1906), as amended, 49 U.S.C. § 20(11) (1958).

336 254 F.2d 248 (3d Cir.), *cert. denied*, 358 U.S. 816 (1958).

337 See text accompanying note 333 *supra*.

Want of A Final Judgment

A federal statute[338] requires that all cases coming from state courts be final judgments. As has been done on occasion in the past,[339] lack of final judgment was given as the express reason for denying certiorari in *NAACP v. Williams.*[340] In this case petitioner was cited for contempt on failure to produce certain records. Among petitioner's arguments were the following: that the $25,000 fine paid into the court constituted cruel and unusual punishment; that the citation of contempt following the order to produce by only a few hours constituted a denial of due process. The latter argument appears significant,[341] but inasmuch as the fine may be reduced when compliance is had, the judgment was not final. In *Wright v. Cincinnati, N.O. & Tex. Pac. Ry.*,[342] petitioner's jury verdict in an FELA case was reversed and the case was remanded for new trial by the Ohio court. It being manifest that there had been no ultimate decision in the case,[343] the Court could justifiably have assigned this as reason for denial. And, in *Anonymous (No. 1) v. Hart*,[344] petitioner's motion to quash a subpoena was transferred to another term of the Supreme Court of New York. The motion had neither been heard nor decided; there was, therefore, no final judgment. The Court stated no reason for the denial of certiorari.

Whether or not the state court decision represents a final judgment is in itself a federal question.[345] And many respondents argue, in opposition to the petition, that the Court should find nonfinality. Thus in *Burns v. Ohio*,[346] the Clerk of the Ohio Supreme Court notified petitioner that his in forma pauperis appeal must be accompanied by a docket fee. Contrary to the state's main argument opposing certiorari, the Court held, two Justices dissenting, that the clerk's letter to petitioner was the court's "final judgment."

Generally,[347] in cases coming from the federal courts, the statutes[348] allow review of both final and interlocutory judgments, but it has been observed that only "extraordinary cases"[349] of the latter kind will be examined. An interesting situation is found in *Rogers v. Schering Corp.*:[350]

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338 28 U.S.C. § 1257 (1958).

339 *E.g.*, Florida *ex rel.* Hawkins v. Board of Control, 342 U.S. 877 (1951); Garcia v. Pan Am. Airways, Inc., 329 U.S. 741 (1946).

340 359 U.S. 550 (1959).

341 See 359 U.S. at 551 (separate opinion of Mr. Justice Douglas).

342 107 Ohio App. 310, 152 N.E.2d 421 (1958), *cert. denied*, 359 U.S. 979 (1959).

343 See Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948).

344 359 U.S. 953 (1959) (denying certiorari, unreported below).

345 Department of Banking v. Pink, 317 U.S. 264 (1942).

346 360 U.S. 252 (1959).

347 For comprehensive outline of this area and the exceptions, see ROBERTSON & KIRKHAM, *op. cit. supra* note 333, §§ 125, 130.

348 28 U.S.C. §§ 1252-54 (1958).

349 ROBERTSON & KIRKHAM, *op. cit. supra* note 333, § 130.

350 262 F.2d 180 (3d Cir.), *cert. denied*, 359 U.S. 991 (1959).

after the district court vacated an arbitration award on the ground that an arbitrator was without qualification,[351] respondent appealed to the Third Circuit; petitioner's motion to dismiss the appeal because of the nonfinality of the district court's order was denied. When petitioner sought certiorari, respondent argued that the order below—the denial of the motion to dismiss the appeal—was nonfinal. Since the interlocutory order of the Third Circuit appears to be in conformity with existing law[352] and since the forthcoming Third Circuit decision on the merits may render petitioner's objection moot, this case could not be classified as an "extraordinary"[353] one. In *England v. Louisiana State Bd. of Medical Examiners*,[354] the Fifth Circuit remanded for hearing after holding that the district court erred in dimissing—for want of a substantial federal question—respondent's claim that the state's Medical Practice Act[355] as applied to chiropractors was contrary to the fourteenth amendment. That the question is not now ripe for review is apparent. In *Haltom City State Bank v. Seaboard Surety Co.*,[356] the United States was sued in the Court of Claims and impleaded petitioner as a third-party defendant. Petitioner's motion to dismiss—on the ground that United States recovery against him in the Court of Claims would violate his right to jury trial—was denied. Since the merits have yet to be resolved against the United States,[357] the Court of Claims' order is clearly interlocutory, and, although the jury trial issue appears as an important federal question, there seems to be no overriding necessity for the Court to entertain the case at this time. Finally, in *Preformed Line Prods. Co. v. Watson*,[358] the District of Columbia Circuit held that the district court's finding of nonpatentability should be vacated because the issue was not properly before the court; however, the order was conditioned on petitioner's application to the district court for a new trial on the issue of patentability. The petition for certiorari urged that the vacating should have been unconditional. The possibility of the district court finding for petitioner on remand renders Supreme Court consideration at this time unnecessary, even if the issue of patentability were otherwise proper for Court review.

Adequate Nonfederal Ground

A long-standing principle of the Supreme Court is that it will not review cases coming from state courts which are based on independent,

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351 165 F. Supp. 295 (D.N.J. 1958).

352 Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550 (1957).

353 See note 349 *supra* and accompanying text.

354 259 F.2d 626 (5th Cir. 1958), *rehearing denied*, 263 F.2d 661 (5th Cir.), *cert. denied*, 359 U.S. 1012 (1959).

355 LA. REV. STAT. §§ 37:1261, :1271(4), :1286 (1950).

356 359 U.S. 1001 (1959) (denying certiorari to the Court of Claims, unreported).

357 The third-party complaint against petitioner cannot prevail if the United States wins.

358 257 F.2d 664 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 945 (1959).

adequate, nonfederal grounds.[359] In two cases[360] the Court of Appeals of Maryland held that a Maryland retroactive tax amendment was repugnant to due process under both the federal and state constitutions. Respondent's brief in opposition was based solely on the argument of adequate nonfederal grounds. Since the Maryland court intermingled the issues sufficiently to cause some confusion[361] as to whether there was an adequate state ground and since the issue presented appears to be of limited importance,[362] the Court could properly refrain from stating the jurisdictional defect as the reason for denial—a practice having some precedent.[363] In *Miller v. Department of Alcoholic Beverage Control*, [364] petitioner, alleging that inadequate notice had denied him due process, sought mandamus to review the revocation of his liquor license. The California court held only that mandamus did not lie because of petitioner's failure to exhaust administrative remedies,[365] an adequate state ground. Likewise, in *State ex rel. Iaus v. Carlton*,[366] appellant, asserting that a municipal zoning ordinance was unconstitutional, sought mandamus for the issuance of a construction permit. The decision of the Supreme Court of Ohio was limited to holding that mandamus was unavailable because appellant did not exhaust his administrative remedies,[367] an adequate state ground. The Court's failure to articulate this reason for denial in *Miller* and *Carlton* can be explained only by the possibility that the Court also believed the claims on the merits to be without importance or substance.[368]

A somewhat different aspect of the same jurisdictional defect is presented when a state court finds that a claimant has ignored reasonable state procedures in presenting his federal question.[369] Thus, in *People v. Wein*,[370] the California Supreme Court denied petitioner's request to augment the record on appeal in order to prove that he had not been promptly

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359 Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

360 Comptroller of the Treasury v. Rheem Mfg. Co., 216 Md. 259, 140 A.2d 301, *cert. denied*, 358 U.S. 822 (1958); Comptroller of the Treasury v. Glenn L. Martin Co., 216 Md. 235, 140 A.2d 288, *cert. denied*, 358 U.S. 820 (1958).

361 *Cf.* Minnesota v. National Tea Co., 309 U.S. 551 (1940).

362 The case turns on the validity of a Maryland statute, MD. ANN. CODE art. 81 (1957), as amended by Md. Laws 1957, ch. 3, which retroactively applied a sales and use tax for a period of ten years.

363 *Cf.* Rice v. Arnold, 342 U.S. 946 (1952); McKay v. Foster, 332 U.S. 783 (1947).

364 160 Cal. App. 2d 658, 325 P.2d 601 (Dist. Ct. App.), *cert. denied*, 358 U.S. 907 (1958).

365 This is the rule in California. Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P.2d 942 (1941).

366 168 Ohio St. 279, 154 N.E.2d 150 (1958), *appeal dismissed, cert. denied*, 359 U.S. 312 (1959).

367 This is the rule in Ohio. State *ex rel.* Lieux v. Village of Westlake, 154 Ohio St. 412, 96 N.E.2d 414 (1951).

368 See note 321 *supra* and accompanying text.

369 Herndon v. Georgia, 295 U.S. 441 (1935); *cf.* Rogers v. Alabama, 192 U.S. 226 (1904).

370 50 Cal. 2d 383, 326 P.2d 457, *cert. denied*, 358 U.S. 866 (1958), 359 U.S. 942, 992 (1959).

arraigned; petitioner alleged the tardy arraignment as a violation of constitutional rights. But the state court's denial was based solely on the California rule that such a claim cannot be initially raised on appeal.[371] And in *Friedman v. Hill*[372] petitioner's assertion that there was insufficient evidence of his employee's interstate activity to sustain the employee's action under the Fair Labor Standards Act[373] was rejected by the Oklahoma Supreme Court on the sufficient state ground that petitioner's failure to move for a directed verdict at the trial precluded review of the argument.[374]

The importance of the jurisdictional prerequisite is recognized in the many briefs in opposition which allege the existence of an independent, nonfederal ground for the state court's decision. However, a considerable number of these allegations are without merit. In *Medberry v. Patterson*,[375] petitioner sought state habeas corpus, contending that his conviction of twenty years ago was constitutionally invalid because, then indigent, he was denied counsel and transcript on appeal. The Colorado Supreme Court affirmed the denial without opinion. Opposing certiorari, the state urged that the absence of an opinion in itself raised the possibility that the state court decision rested on an adequate state ground.[376] The respondent's sole contention in *Flying Tiger Line, Inc. v. County of Los Angeles*[377] was that the California Supreme Court held only that the case should be remanded to a state agency to determine whether any other state had acquired the power to tax petitioner's aircraft. But, in fact, that court held specifically that the county could not assess the tax upon the *full* value of the property. Finally, in *NAACP v. Alabama ex rel. Patterson*,[378] respondents alleged that the Alabama Supreme Court's reaffirmance on remand from the Supreme Court of petitioner's contempt conviction was based on acts of noncompliance other than that which the Court had previously declared to be constitutionally protected. It was true that there was a clearly nonfederal ground for the Alabama decision, but the Court held that the Alabama court was precluded from resting the decision upon it.[379]

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371 People v. Newell, 192 Cal. 659, 221 Pac. 622 (1923).

372 325 P.2d 434 (Okla.), *cert. denied*, 358 U.S. 825 (1958).

373 52 Stat. 1069 (1938), as amended, 29 U.S.C. § 216(b) (1958).

374 This is the rule in Oklahoma. Richardson v. Shaw, 313 P.2d 520 (Okla. 1957).

375 358 U.S. 932 (1959) (denying certiorari to the Supreme Court of Colorado, unreported).

376 Had the state indicated some nonfederal ground upon which the judgment could have been based, the argument would not be untenable. See generally ROBERTSON & KIRKHAM, *op. cit. supra* note 333, § 91.

377 51 Cal. 2d 314, 333 P.2d 323 (1958), *cert. denied*, 359 U.S. 1001 (1959). See prior discussion of this case in text accompanying notes 131-33 *supra*.

378 360 U.S. 240, *reversing* 268 Ala. 531, 109 So. 2d 138 (1959).

379 In the prior disposition of the case, the parties were in agreement, and the case was argued and decided upon the basis that only that part of the order which required production of the membership lists had been violated. 360 U.S. at 243.

Mootness

The Constitution prohibits the Supreme Court from deciding moot issues: they present no case or controversy.[380] Thus, in *NAACP v. Committee On Offenses Against the Administration of Justice*,[381] petitioner alleged that the Virginia Supreme Court of Appeals' failure to quash a subpoena of a legislative committee which demanded production of the names of NAACP members violated its constitutionally protected rights. Respondent argued that inasmuch as the committee had been dissolved before the petition and there was no indication that the names will be otherwise sought, the case had become moot. The Court so held.

2. Draftsmanship

The Supreme Court Rules state that "review on writ of certiorari . . . will be granted only where there are special and important reasons therefor."[382] Many petitioners instruct the Court concerning the significance of their case; many more do not. Particularly in those cases in which certiorari is granted is a good showing of importance made. Thus, in a case involving the question of whether a civilian employee of the military may be tried for a noncapital offense by an overseas court-martial,[383] petitioner pointed out that the issue affects all civilian personnel of the armed forces overseas. In *Service Storage & Transfer Co. v. Virginia*,[384] the Court was asked to determine if motor transportation between two points in the same state—but traversing another state en route—was interstate in nature; petitioner indicated that a great number of truckers were engaged in such carriage. Virtually every other petition granted contained some attempt to conform to the admonishment of the rule, and in the remaining few the importance was usually manifest.

Petitioners not infrequently amass figures—"either the number of cases litigated or likely to be litigated on the issue, or the number of people affected by the decision"[385]—to emphasize the significance of their cases. The Government, probably having some advantage in the compilation and availability of pertinent statistics, rarely overlooks an opportunity to use them in demonstration of significance or insignificance before the Court. Thus, the Government has stated that the determination of a particular issue will affect 27,000 persons;[386] that the United States is

[380] U.S. CONST. art. III, § 2; see Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

[381] 358 U.S. 40, *vacating* 199 Va. 665, 101 S.E.2d 631 (1958).

[382] U.S. SUP. CT. R. 19(1).

[383] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960), *reversing* United States *ex rel.* Bohlender v. Wilson, 167 F. Supp. 791 (1958).

[384] 359 U.S. 171 (1959), *reversing* 199 Va. 797, 102 S.E.2d 339 (1958).

[385] Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 449 (1954). For the Court's recognition of this factor see Alcoa S.S. Co. v. United States, 338 U.S. 421, 423 (1949); Ludecke v. Watkins, 335 U.S. 160, 162 n.2 (1948).

[386] Wiggins v. United States, 261 F.2d 113 (5th Cir. 1958), *cert. denied*, 359 U.S. 942 (1959).

making a claim similar to that in the instant case in forty pending cases;[387] that millions of dollars of strike benefits are being paid which will not be included as taxable income;[388] that 3,800 cases involving ten million dollars are affected by the issue;[389] that the ICC reports that thousands of railroad runs similar to the one in issue are made each day;[390] that there are 20,000 civilian overseas employees that may be affected.[391] A limited number of other petitioners also present statistics. Their papers have pointed out that the decision will have impact upon 22,000 businesses holding government contracts and three million employees will be affected;[392] that there are fourteen cases pending on the validity of the statute under attack;[393] that every inactive railroad employee who may have cause to bring suit against the railroad is concerned;[394] that many companies are involved in the same litigation;[395] that 130 firms received payments of which the Government now seeks return;[396] that seven suits are pending because of the allegedly defective airplanes involved in the instant case;[397] that throughout the country there are 235 cases which may arise concerning the question;[398] that there are a host of cases on the point involving between three hundred million and one billion dollars;[399] and that many thousands of cases bearing on the issue are pending.[400]

The Government, particularly successful in securing review of petitions for certiorari, had over seventy-five per cent granted in the current

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387 United States v. Isthmian S.S. Co., 359 U.S. 314 (1959), *affirming in part and reversing in part* 255 F.2d 816 (2d Cir. 1958).

388 Kaiser v. United States, 262 F.2d 367 (7th Cir. 1958), *cert. granted*, 359 U.S. 1010 (1959) (No. 858).

389 Commissioner v. Acker, 361 U.S. 87 (1959), *affirming* 258 F.2d 568, 575 (6th Cir. 1958).

390 United States v. Seaboard Air Line R.R., 361 U.S. 78 (1959), *reversing* 258 F.2d 262 (4th Cir. 1958).

391 McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960), *affirming* 259 F.2d 927 (D.C. Cir. 1958).

392 Greene v. McElroy, 360 U.S. 474 (1959), *reversing and remanding* 254 F.2d 944 (D.C. Cir. 1958).

393 Scales v. United States, 260 F.2d 21 (4th Cir.), *cert. granted*, 358 U.S. 917 (1958) (No. 488), *reargument ordered*, 360 U.S. 924 (1959).

394 Pennsylvania R.R. v. Day, 360 U.S. 548 (1959), *reversing and remanding* 258 F.2d 62 (3d Cir. 1958).

395 Swift & Co. v. United States, 257 F.2d 787 (4th Cir.), *cert. denied*, 358 U.S. 837 (1958).

396 National Biscuit Co. v. United States, 257 F.2d 787 (4th Cir.), *cert. denied*, 358 U.S. 837 (1958).

397 Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958).

398 General Pub. Util. Corp. v. United States, 358 U.S. 831 (1958) (denying certiorari to the Court of Claims, unreported).

399 R. H. Macy & Co. v. United States, 255 F.2d 884 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). The accuracy of this estimate was denied by the United States.

400 Bercut-Vandervoort & Co. v. United States, 359 U.S. 953 (1959) (denying certiorari to the United States Court of Customs and Patent Appeals, unreported). This was pointed out by the dissent in the United States Customs Court, 151 F. Supp. 942, 953 (Cust. Ct. 1957).

term.[401] This is due to the Solicitor General's extreme selectivity as well as to excellence of presentation. In *Barr v. Matteo*,[402] the issue was whether allegedly defamatory statements made by the acting director of the Office of Rent Stabilization in the exercise of his duties were absolutely privileged. The Government demonstrated substantial significance by listing various important and not so important officials who were covered by the result in the court of appeals. In *SEC v. Variable Annuity Life Ins. Co.*,[403] resolution was sought as to whether the sale of variable annuity contracts was subject to SEC regulation. The Government contended that the adverse ruling below enabled all investment companies to escape regulation by including an optional annuity clause in their securities. The question in *United States v. Republic Steel Corp.*[404] was the legality of respondent's dumping of industrial solids in navigable streams without the permission of the Army Engineers. The Government urged that its position had saved the United States three and one-half million dollars since 1949, that the issue involved every navigable stream in the country, and that the interpretation of the Rivers & Harbors Act of 1899,[405] required by the question presented, would apply to numerous factual situations. In *FTC v. Travelers Health Ass'n*,[406] the Government alleged that more than half the complaints brought by the FTC involve companies which solicit by mail in foreign states. The issue presented in *United States v. 93.970 Acres of Land*[407] was whether a government condemnation proceeding barred consideration—under the doctrine of election of remedies—of the validity of the lessor-government's prior revocation of a lease on the now condemned property; and further, if consideration of revocation was not precluded, whether the lease was revocable under the circumstances. The Government convinced the Court that the adverse determination below placed "severe restriction . . . on the ability of the United States to get, quickly, land it may need for government purposes,"[408] inasmuch as the Government would be forced to forego condemnation until the validity of lease revocation could be determined.

A small number of private litigants equalled the Government's usually excellent presentation by stressing the general importance of the issue rather than their own personal plight. *Fouts v. United States*[409] is demonstrative: petitioner stated that his case afforded the Court an excellent

401 A study made shows that in 1955, 61.5%, in 1956, 73.8%, and in 1957, 64.5% of the Government's petitions for certiorari were granted. Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541, 548 (1958).

402 360 U.S. 564 (1959), *reversing* 256 F.2d 890 (D.C. Cir. 1958).

403 359 U.S. 65 (1959), *reversing* 257 F.2d 201 (D.C. Cir. 1958).

404 264 F.2d 289 (7th Cir.), *rev'd*, 80 S. Ct. 884 (1960).

405 30 Stat. 1151, 1152, 33 U.S.C. §§ 403, 407 (1958).

406 362 U.S. 293 (1960), *reversing* 262 F.2d 241 (8th Cir. 1959). For a statement of the case see text accompanying notes 97-98 *supra*.

407 360 U.S. 328 (1959), *reversing* 258 F.2d 17 (7th Cir. 1958).

408 360 U.S. at 331.

409 258 F.2d 402 (6th Cir.), *cert. denied*, 358 U.S. 884 (1958). See prior discussion of this case at notes 156-58 *supra* and accompanying text.

opportunity to decide whether the constitutional right to counsel accrues immediately after indictment or only after arraignment. In *Garland v. Torre*,[410] petitioner, pointing to respected scholarly authority[411] and persuasive English cases,[412] urged that the decision below impeded the gathering of news throughout the United States. In *Cohen v. Public Housing Administration*,[413] petitioner demonstrated that the FHA's extensive operations were racially segregated in more than one local area. The petitioner in *Flying Tiger Line, Inc. v. County of Los Angeles*[414] alleged that every state which has contacts with migratory assets was concerned. And in *Baldwin v. Board of Tax-Roll Corrections*,[415] the issue was whether petitioner's property, leased to the United States and used as a post office, was exempt from state property taxation by the Enabling Act,[416] which exempted land owned by the United States or reserved to its use. Petitioner pointed out that this same immunity was granted by every state admitted to the Union after 1888.

But, similar to other review-seeking endeavors of litigants, some of the attempts to demonstrate an issue's general significance were totally frivolous. In *Charles H. Tompkins Co. v. Lloyd E. Mitchell, Inc.*,[417] involving the construction of a narrow point in a particular contract, petitioner wrote that "the great volume of contracts written throughout the United States renders the issues in this case of primary importance." In a case dealing with the constitutionality of segregated restrooms in a state courthouse,[418] petitioner assigned the impact of the particular discriminatory practice at issue upon foreign policy as a reason for the Court's review.[419]

The importance of a reply by the successful party below to his opponent's petition is obvious.[420] But, unfortunately, a great many replies do no more than discuss the correctness of the lower court decision. A limited number do, however, address themselves to showing the absence of issues worthy of the Court's attention. In *SEC v. Insurance Sec. Inc.*,[421]

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410 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). See prior discussion of this case in text following note 122 *supra*.

411 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 497 (1947).

412 Georgius v. Vice Chancellor, [1949] 1 K.B. 729; Lawson v. Odhams Press Ltd., [1949] 1 K.B. 129.

413 257 F.2d 73 (5th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959). See prior discussion of this case at notes 77-79 *supra* and accompanying text.

414 51 Cal. 2d 314, 333 P.2d 323 (1958), *cert. denied*, 359 U.S. 1001 (1959). See prior discussion of this case at notes 131-33 *supra* and accompanying text.

415 331 P.2d 412 (Okla. 1958), *cert. denied*, 359 U.S. 926 (1959).

416 Act of June 16, 1906, ch. 3335, § 3(3), 34 Stat. 270.

417 259 F.2d 177 (D.C. Cir.), *cert. denied*, 358 U.S. 874 (1958).

418 Dawley v. City of Norfolk, 260 F.2d 647 (4th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

419 The Fourth Circuit held that the district court was within its discretion in instructing petitioner to seek his remedy in the state courts.

420 ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 315 (2d ed. Wolfson & Kurland 1951).

421 254 F.2d 642 (9th Cir.), *cert. denied*, 358 U.S. 823 (1958). See prior discussion of this case at notes 128-30 *supra* and accompanying text.

respondent said that there was no conflict, no case pending and the only similar case ever litigated was not directly in point. In a case[422] involving United States seizure of a coal mine, the Government argued that no other seizure cases were pending in the Court of Claims and that actions on all similar seizures were now barred by the statute of limitations;[423] in a case[424] involving the Lucas Act[425] the Government pointed to the rarity of such cases: only two were known to be pending. In a case[426] involving a claim before the Foreign Claims Settlement Commission, the Government asserted that this was the last litigation of its kind and that even if petitioner were to succeed in the Supreme Court, it would fail on remand inasmuch as the Commission was no longer in existence;[427] and in a case[428] concerning sales of ships by the United States Maritime Commission, the Government alleged that there was no longer statutory authorization[429] for the sales and that only six cases might be affected by a Court decision. In this area, too, the majority of well drafted replies were framed by the Government.

Extensive Argument on the Merits

Evidently, even in the area of direct conflict, the attitude of the petitioning bar is that the certworthiness of a case is enhanced by extensive argument on the law. While the correctness of the legal decision below may be relevant to the Court's determination to grant or deny certiorari,[430] extended argument on this point is neither necessary nor desirable.[431] Support for this statement can be found in *Robert C. Herd & Co. v. Krawill Mach. Corp.*,[432] where the three-page certiorari petition rested solely on the conflict.[433]

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422 Pewee Coal Co. v. United States, 142 Ct. Cl. 796, 161 F. Supp. 952 (1958), *cert. denied*, 359 U.S. 912 (1959).

423 28 U.S.C. § 2401(a) (1958).

424 Lane Indus., Inc. v. United States, 142 Ct. Cl. 712, 162 F. Supp. 443, *cert. denied*, 358 U.S. 864 (1958).

425 60 Stat. 902 (1946), as amended, 41 U.S.C. § 106 (1958) (compiler's note).

426 First Nat'l City Bank v. Gillilland, 257 F.2d 223 (D.C. Cir.), *cert. denied*, 358 U.S. 837 (1958).

427 69 Stat. 574 (1955), 22 U.S.C. § 1641*o* (1958).

428 Alaska S.S. Co. v. United States, 141 Ct. Cl. 399, 158 F. Supp. 361, *cert. denied*, 358 U.S. 834 (1958).

429 The original sale was authorized by Act of March 8, 1946, ch. 82, § 2, 60 Stat. 41.

430 See notes 183-200 *supra* and accompanying text.

431 "Only in exceptional cases is any but cursory discussion of the merits appropriate in the petition at all." Frankfurter & Hart, *The Business of the Supreme Court at the October Term, 1933*, 48 HARV. L. REV. 238, 265 (1934).

432 359 U.S. 297 (1959), *affirming* 256 F.2d 946 (4th Cir. 1958).

433 The court of appeals holding conflicted with A. M. Collins & Co. v. Panama Ry., 197 F.2d 893 (5th Cir. 1952).

Length

Though the most effective petitions are limited in length,[434] the majority of those presented are far too verbose.[435] It is believed that an *average* length of twelve to fifteen pages is sufficient for all but a few cases. A high percentage of the surplusage in the petitions, and a great many papers in their entirety, deal exclusively with an evaluation of the correctness of the decision below,[436] never addressing themselves to the significance of the case for Supreme Court review.[437] Many pages are devoted to discussion of issues most unlikely to attract the Court's attention: for example, sufficiency of the evidence in commonplace civil litigation,[438] everyday problems of admissibility of evidence,[439] and technical objections to jury charges.[440] It has been elsewhere observed [441] that one of Rule 19's criteria [442] for review from a court of appeals—extreme departure from normal judicial proceedings—may well cause many petitions concerning insignificant issues. Since this particular criterion is rarely invoked suc-

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[434] See text accompanying notes 430-33 *supra*.

[435] Probably the most egregious example discovered was a petition of 162 pages (exclusive of appendices) which argued solely the merits of the decision below including such issues as sufficiency of the evidence, admissability of certain evidence, and the propriety of certain jury instructions. Should the petition have been filed at all, 1/20th of these pages would have sufficed. United States v. De Lucia, 262 F.2d 610 (7th Cir. 1958), *cert. denied*, 359 U.S. 1000 (1959). Another example was a petition for certiorari of 77 pages (exclusive of appendices) which provoked a brief in opposition (evidently not to be outdone) of 102 pages. UMW v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959). Others, although not so spectacularly long, presented many more pages than required by their cases. For example, in Theriot v. Mercer, 262 F.2d 754 (5th Cir.), *cert. denied*, 359 U.S. 983 (1959), petitioner devoted 52 pages to criticize, point-by-point, the errors found by the court of appeals in its reversal of petitioner's jury verdict in a negligence action. This petition should never have been filed in any event. On the other hand, in Marshall v. United States, 360 U.S. 310 (1959), *reversing* 258 F.2d 94 (10th Cir. 1958), petitioner took but 3 pages to present his case for review. Certiorari was granted. 358 U.S. 892 (1958).

[436] *E.g.*, George Sollitt Constr. Co. v. Gateway Erectors, Inc., 260 F.2d 165 (7th Cir. 1958), *cert. denied*, 359 U.S. 925 (1959); Doane Agricultural Serv., Inc. v. Coleman, 254 F.2d 40 (6th Cir.), *cert. denied*, 358 U.S. 818 (1958).

[437] It must be noted that when the case is utterly lacking in any such significance it is an impossible task to do so.

[438] *E.g.*, Giguere v. United States Steel Corp., 262 F.2d 189 (7th Cir.), *cert. denied*, 360 U.S. 934 (1959); Cartellone v. Lehmann, 255 F.2d 101 (6th Cir.), *cert. denied*, 358 U.S. 867 (1958).

[439] *E.g.*, Central R.R. v. Jules S. Sottnek Co., 258 F.2d 85 (2d Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); De Fonce Constr. Co. v. City of Miami, 256 F.2d 425 (5th Cir.), *cert. denied*, 358 U.S. 875 (1958).

[440] *E.g.*, Brinkley v. Pennsylvania R.R., 254 F.2d 598 (3d Cir.), *cert. denied*, 358 U.S. 865 (1958); Butler v. Watts, 103 So. 2d 123 (Fla. Dist. Ct. App. 1958), *cert. denied*, 359 U.S. 926 (1959).

[441] Frankfurter & Hart, *supra* note 431, at 274.

[442] "Where a court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." U.S. SUP. CT. R. 19(1)(b).

cessfully[443] and since Rule 19 would, in any event, remain sufficiently flexible[444] to insure "supervision," the efficacy of retaining this criterion may be questioned. All in all, it must be said that the general quality of the draftsmanship is poor.

C. *Effect of Previous Supreme Court Action*

1. Prior Decisions on the Merits

It is indeed a rarity for the Supreme Court to specifically overrule one of its prior decisions.[445] Nonetheless, numerous petitions present issues which the Court has previously decided adversely to the petitioner's contention. Although most of the questions would appear significant if they were to be considered de novo, these petitioners are probably ill-advised in seeking review absent some indication[446] that the Court might be inclined to reverse itself.

However, one case of singular interest is *Yancy v. United States*,[447] where petitioner was convicted under the narcotics law on two counts—one for purchase[448] and one for sale[449]—and given consecutive sentences. There was direct proof of sale but the conviction of purchasing was based solely on a presumption arising from possession of the narcotics which were later sold. Certiorari was granted less than a month after the Court, in *Harris v. United States*,[450] affirmed consecutive sentences for a conviction on two counts (one for purchase and one for receiving and concealing) under the same statutes. Both convictions in *Harris* were based entirely on presumptions arising from the fact of possession.[451] The two cases seem not to be distinguishable, nor is the reason behind the Court's grant of certiorari readily perceived.[452]

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[443] Frankfurter & Hart, *supra* note 431, at 274; Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 447 (1954).

[444] "The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered. . . ." U.S. SUP. CT. R. 19(1).

[445] A study has been made which reveals that this has occurred less than one hundred times in almost 150 years. See generally Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151 (1958).

[446] *E.g.*, in Knapp v. Schweitzer, 357 U.S. 371 (1958), both the concurring and dissenting opinions expressed desire to reconsider Feldman v. United States, 322 U.S. 487 (1944).

[447] 252 F.2d 554 (6th Cir. 1958), *cert. granted*, 359 U.S. 941 (1959) (No. 792).

[448] INT. REV. CODE OF 1954, § 4704.

[449] 65 Stat. 767 (1951), as amended, 21 U.S.C. § 174 (1958); INT. REV. CODE OF 1954, § 7237.

[450] 359 U.S. 19 (1959). See also Gore v. United States, 357 U.S. 386 (1958).

[451] It is to be noted that the petition for certiorari was filed before the *Gore* and *Harris* decisions.

[452] For a contrary statutory interpretation argument see Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 YALE L.J. 916, 927-29 (1958).

Several petitioners, recognizing that their contentions were clearly precluded by prior Court decisions, forthrightly urged reversal. One such petitioner,[453] convicted in a state court which admitted evidence seized illegally by state officers, asserted that *Wolf v. Colorado*[454] should be overturned; another[455] asked the Court to reverse *United States v. White*,[456] which held that a corporation is not entitled to the fifth amendment privilege against self-incrimination; still another[457] sought re-examination of *Eilenbecker v. District Court*,[458] which held that no federal right to jury trial exists in cases of state contempt convictions.

Less candid were those petitioners who ignored the adverse state of the law regarding their contentions. Thus it was alleged[459] that the penalty provisions of the Agricultural Adjustment Act of 1938[460] were unconstitutional;[461] that a survivor's depreciable basis in property originally held in the entireties should be valued at market value at date of death rather than at cost;[462] that a court of one state has no jurisdiction to find lack of domicile in a sister state so as to collaterally impeach a divorce decree of the sister state;[463] that a state immunity statute which affords no protection against federal prosecution violates fifth amendment rights;[464] that a defense of res judicata may be raised in a denaturalization proceeding by introducing the prior naturalization order.[465] And it was contended[466] that an order for delivery of possession entered on a declaration of taking in a federal condemnation proceeding was a final order appealable to the

[453] People v. McIntyre, 15 Ill. 2d 350, 155 N.E.2d 45 (1958), *cert. denied*, 360 U.S. 917 (1959).

[454] 338 U.S. 25 (1949).

[455] United States v. 3963 Bottles, 265 F.2d 332 (7th Cir.), *cert. denied*, 360 U.S. 931 (1959).

[456] 322 U.S. 694 (1944).

[457] Sarner v. Sarner, 28 N.J. 519, 147 A.2d 244, *appeal dismissed, cert. denied*, 359 U.S. 533 (1959).

[458] 134 U.S. 31 (1890).

[459] Corpstein v. United States, 262 F.2d 200 (10th Cir. 1958), *cert. denied*, 359 U.S. 966 (1959).

[460] 52 Stat. 39, 7 U.S.C. §§ 1281-1366 (1958).

[461] The constitutionality of the act was upheld in Wickard v. Filburn, 317 U.S. 111 (1942). See also United States v. Haley, 358 U.S. 644 (1959).

[462] Faraco v. Commissioner, 261 F.2d 387 (4th Cir. 1958), *cert. denied*, 359 U.S. 925 (1959). Directly contrary to this position is Lang v. Commissioner, 289 U.S. 109 (1933).

[463] Colby v. Colby, 217 Md. 35, 141 A.2d 506, *cert. denied*, 358 U.S. 838 (1958). Directly contrary to this position is Williams v. North Carolina, 325 U.S. 226 (1945).

[464] Raley v. Ohio, 360 U.S. 423 (1959), *affirming in part and reversing in part on other grounds* 167 Ohio St. 295, 147 N.E.2d 847 (1958). Knapp v. Schweitzer, 357 U.S. 371 (1958), forecloses this argument.

[465] United States v. De Lucia, 256 F.2d 487 (7th Cir.), *cert. denied*, 358 U.S. 836 (1958). This argument was foreclosed by the Supreme Court in Knauer v. United States, 328 U.S. 654, 671-73 (1946).

[466] Hartshorn v. District of Columbia Redevelopment Land Agency, 359 U.S. 984 (1959) (denial of certiorari to the District of Columbia Circuit, unreported).

court of appeals.[467] In view of the extreme infrequency of Supreme Court reversal of itself,[468] the number of petitions urging the Court to take this very action is surprisingly large.

2. Prior Denial of Certiorari—Similar Issue

Although it has been observed that "flexibility is the essence of *certiorari*, and it is by no means unknown for the Court to grant the writ to consider an issue which at an earlier time it had refused to review," [469] it is not unreasonable to predict that, absent a subsequently arising conflict or circumstances enhancing the importance or ripeness of a case for review, prior denials of certiorari (other than those attributable to defects in jurisdictional prerequisites) will in most cases be followed by refusals to review cases presenting a similar issue. The exception to this general proposition is illustrated by two cases on the 1958 docket: *Melrose Distillers, Inc. v. United States* [470] and *Glus v. Brooklyn E. Dist. Terminal.*[471] As was the circumstance in *Melrose*, the Court had previously denied certiorari on two cases involving the *Glus* issue—one with identical facts but an opposite result [472] and one with a similar result.[473] It is to be noted with regard to both *Melrose* and *Glus* that the courts of appeals were still in conflict when certiorari was granted.

Despite the general tendency of the Court, many cases present issues similar to those previously denied review. The decision [474] that distributors of punchboards and pushcards in interstate commerce are subject to the Federal Trade Commission Act [475] has been denied review at least three times; [476] the holding [477] that a transfer [478] of surplus to capital incident to a stock dividend results in the imposition of a documentary

[467] Under 28 U.S.C. § 1291 (1958). Catlin v. United States, 324 U.S. 229 (1945), expressly holds that such an order is not final. Furthermore, petitioner did not invoke the interlocutory appeals procedure under 28 U.S.C. § 1292(b) (1958).

[468] See note 445 *supra.*

[469] Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 113 (1959).

[470] 359 U.S. 271 (1959), *affirming* 258 F.2d 726 (4th Cir. 1958). See prior full discussion of this point notes 18-24 *supra* and accompanying text.

[471] 359 U.S. 231 (1959), *reversing* 253 F.2d 957 (2d Cir. 1958). For a statement of this case see notes 11-13 *supra* and accompanying text. See also notes 112-16 *supra* and accompanying text.

[472] Scarborough v. Atlantic Coast Line R.R., 178 F.2d 253 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950).

[473] Damiano v. Pennsylvania R.R., 161 F.2d 534 (3d Cir.), *cert. denied*, 332 U.S. 762 (1947).

[474] James v. FTC, 253 F.2d 78 (7th Cir.), *cert. denied*, 358 U.S. 821 (1958).

[475] 38 Stat. 719 (1914), as amended, 15 U.S.C. §§ 45(a)(1), (c) (1958).

[476] Seymour Sales Co. v. FTC, 216 F.2d 633 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 928 (1955); U.S. Printing & Novelty Co. v. FTC, 204 F.2d 737 (D.C. Cir.), *cert. denied*, 346 U.S. 830 (1953); Feitler v. FTC, 201 F.2d 790 (9th Cir.), *cert. denied*, 346 U.S. 814 (1953).

[477] Allied Chem. & Dye Corp. v. McMahon, 253 F.2d 663 (2d Cir.), *cert. denied*, 358 U.S. 829 (1958).

[478] Since N.Y. STOCK CORP. LAWS § 13 prohibits the increase of the capital stock account incident to the declaration of a stock dividend, the "transfer" in the instant case consisted of converting earned surplus into capital surplus rather than converting earned surplus into capital stock—the normal procedure. The difference is one of form, not of substance.

stamp tax[479] on the stock issued has formerly been denied review.[480] And certiorari had previously been denied[481] on the issue presented by *Bennett v. The Mormacteal.*[482] Two cases[483] successfully challenged the constitutionality of a Louisiana statute[484] conditioning college admission on the approval—without established objective standards—of high school principals and superintendents of education; petitioners sought review despite a recent denial of certiorari by the Court in another Fifth Circuit case[485] involving a Louisiana pupil assignment statute[486] without such objective standards. Review was also sought from a decision[487] upholding, against a thirteenth amendment challenge, a state statute[488] requiring employers to withhold employees' gross income tax; although, as petitioner pointed out, the Supreme Court had never examined such a contention on the merits, it had declined to grant certiorari in a case[489] sanctioning the withholding provisions of the Federal Insurance Contribution Act.[490] And the decision[491] that rate increases pursuant to a "favored nation" clause in a natural gas sale contract are "rate changes" under the Natural Gas Act[492] has been denied review at least twice[493] before.

Other examples: Court consideration of the decision[494] that mandamus[495] will not lie to nullify a federal district judge's order grant-

[479] Int. Rev. Code of 1939, ch. 247, § 1802(a), 53 Stat. 196.

[480] United States Steel Corp. v. United States, 136 Ct. Cl. 816, 142 F. Supp. 948, *cert. denied,* 352 U.S. 1015 (1956).

[481] Smith v. The Mormacdale, 198 F.2d 849 (3d Cir. 1952), *cert. denied,* 345 U.S. 908 (1953).

[482] 254 F.2d 138 (2d Cir.), *cert. denied,* 358 U.S. 817 (1958). See prior discussion of this case in text accompanying notes 187-89 *supra.*

[483] Louisiana State Bd. of Educ. v. Lark, 252 F.2d 372 (5th Cir.), *cert. denied,* 358 U.S. 820 (1958); Board of Supervisors v. Ludley, 252 F.2d 372 (5th Cir.), *cert. denied,* 358 U.S. 819 (1958).

[484] LA. REV. STAT. ANN. §§ 17:2131-35 (Supp. 1959).

[485] Orleans Parish School Bd. v. Rush, 242 F.2d 156 (5th Cir.), *cert. denied,* 354 U.S. 921 (1957).

[486] La. Acts 1954, No. 556, § 1.

[487] Akers v. Handley, 238 Ind. 288, 149 N.E.2d 692, *cert. denied,* 358 U.S. 907 (1958).

[488] IND. ANN. STAT. § 64-2617 (Supp. 1959).

[489] Abney v. Campbell, 206 F.2d 836 (5th Cir. 1953), *cert. denied,* 346 U.S. 924 (1954).

[490] Ch. 531, 49 Stat. 639 (1935), as amended, ch. 468, 62 Stat. 438 (1950).

[491] Sun Oil Co. v. FPC, 255 F.2d 557 (5th Cir.), *cert. denied,* 358 U.S. 804 (1958).

[492] 52 Stat. 822 (1938), 15 U.S.C. § 717c(d) (1958).

[493] Mississippi Power & Light Co. v. Memphis Natural Gas Co., 162 F.2d 388 (5th Cir.), *cert. denied,* 332 U.S. 770 (1947); see Cities Serv. Gas Producing Co. v. FPC, 233 F.2d 726 (10th Cir.), *cert. denied,* 352 U.S. 911 (1956); *cf.* Continental Oil Co. v. FPC, 236 F.2d 839 (5th Cir. 1956), *cert. denied,* 352 U.S. 966 (1957); Humble Oil & Ref. Co. v. FPC, 236 F.2d 819 (5th Cir. 1956), *cert. denied,* 352 U.S. 967 (1957).

[494] Lemon v. Druffel, 253 F.2d 680 (6th Cir.), *cert. denied,* 358 U.S. 821 (1958).

[495] 28 U.S.C. § 1651(a) (1958).

ing transfer [496] to another forum had previously been withheld.[497] And the determination [498] that the applicable statute of limitations [499] does not bar the Government from offsetting subsequently determined excess freight charges against claims of carriers under the Transportation Act [500] has recently been denied review by the Court.[501] A state taxation case also falls into this category: in *International Shoe Co. v. Fontenot*,[502] an apportioned state net income tax [503] on a foreign corporation whose only contact with the taxing state was regular solicitation by salesmen was upheld by the Louisiana courts; the Supreme Court had only recently denied review of an identical attack on the same statute.[504]

Situations may arise, however, in which an earlier decision, apparently conflicting with the present holding, has been denied certiorari. Now that a conflict exists, the prior denial should not be indicative of the same result in the present case; in fact, inasmuch as the correctness of the lower court decision may conceivably have been a factor in the failure to grant the writ in the prior case,[505] the present one is all the more certworthy. However, certiorari was denied in a decision [506] which was later alleged to be in conflict with *Ferraiolo v. Newman*; [507] perhaps the present denial in *Ferraiolo* is explainable because of the distinction between the cases drawn by the Sixth Circuit [508] or because of the demonstrated infrequency [509] of the factual setting. And, in *Curran v. Delaware*,[510] certiorari —previously denied in a similar case [511] reaching the opposite result—was again refused. However, the prior case is distinguishable in that the

[496] 28 U.S.C. § 1404(a) (1958).

[497] Great No. Ry. v. Hyde, 245 F.2d 537 (8th Cir.), *cert. denied*, 355 U.S. 872 (1957).

[498] United States v. Missouri Pac. R.R., 250 F.2d 805 (5th Cir.), *cert. denied*, 358 U.S. 821 (1958).

[499] Commodity Credit Corporation Charter Act, § 4, 62 Stat. 1070 (1948), as amended, 15 U.S.C. § 714b(c) (1958).

[500] Ch. 772, § 332, 54 Stat. 955 (1940).

[501] Union Pac. R.R. v. United States, 137 Ct. Cl. 931, 147 F. Supp. 483, *cert. denied*, 353 U.S. 950 (1957).

[502] 236 La. 279, 107 So. 2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959).

[503] LA. REV. STAT. §§ 47:21, :31 (Supp. 1952).

[504] Brown-Forman Distillers Corp. v. Collector, 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed, cert. denied*, 359 U.S. 28 (1959).

[505] See text accompanying notes 183-200 *supra*.

[506] Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947).

[507] 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959). For prior discussion of this case see notes 43-46 *supra* and accompanying text.

[508] See text above and following note 45 *supra*.

[509] See text accompanying notes 47-48 *supra*.

[510] 259 F.2d 707 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959). See prior discussion of this case in text accompanying notes 40-42 *supra*.

[511] Schechtman v. Foster, 172 F.2d 339 (2d Cir. 1949), *cert. denied*, 339 U.S. 924 (1950).

decision rested on the alternative ground that petitioner there failed to exhaust state remedies.

Finally, there are situations in which the Supreme Court has regularly denied review in all cases on a similar issue, regardless of result. One explanation may be simply that the Court has announced a general rule in the area, and the cases subsequently arising, while reaching differing results, merely involve application of the general rule. Thus, in *Wright v. United States*,[512] a civilian firefighter at a naval installation sued under the Federal Employees Pay Act[513] for overtime wages for hours spent at the base off duty but subject to call. General standards concerning what constitutes "working time" were set down by the Court in 1944;[514] since that time all cases involving the problem have been denied review.[515] In other cases all that can be said is that the Court, declining to announce a rule, has apparently decided to leave resolution of the problem to the lower courts[516]—at least for the time being. Thus, with regard to the issue presented in *Seven-Up Co. v. Blue Note, Inc.*,[517] the Supreme Court has denied certiorari in cases which appear to reach dissimilar results.[518]

3. Prior Denial—Similar Issue—Same Petitioner

It is axiomatic that a petitioner who has once been denied review on an issue properly presented to the Court will have little chance of success when he presents the same or similar issue to the Court a second time. A notable exception is that of a state prisoner seeking federal habeas corpus.[519] Several petitioners in cases appearing on the 1958 docket[520] unsuccessfully asked for certiorari to a court of appeals, certiorari to the

[512] 359 U.S. 1001 (1959) (denying certiorari to the Court of Claims, unreported).

[513] 59 Stat. 295 (1945), as amended, 5 U.S.C. §§ 901-58 (1958).

[514] Skidmore v. Swift & Co., 323 U.S. 134 (1944); Armour & Co. v. Wantock, 323 U.S. 126 (1944).

[515] General Elec. Co. v. Porter, 208 F.2d 805 (9th Cir. 1953), *cert. denied*, 347 U.S. 951 (1954) (plaintiff recovered); Glenn L. Martin Neb. Co. v. Culkin, 197 F.2d 981 (8th Cir.), *cert. denied*, 344 U.S. 866 (1952) (plaintiff recovered); Bell v. Porter, 159 F.2d 117 (7th Cir. 1946), *cert. denied*, 330 U.S. 813 (1947) (plaintiff did not recover); Bowers v. Remington Rand, Inc., 159 F.2d 114 (7th Cir. 1946), *cert. denied*, 330 U.S. 843 (1947) (plaintiff did not recover); Rokey v. Day & Zimmerman, Inc., 156 F.2d 734 (8th Cir. 1946), *cert. denied*, 330 U.S. 842 (1947) (plaintiff did not recover); Sawyer v. United States, 138 Ct. Cl. 152, *cert. denied*, 355 U.S. 868 (1957) (plaintiff did not recover); Conn v. United States, 107 Ct. Cl. 422, 68 F. Supp. 966 (1946), *cert. denied*, 332 U.S. 757 (1947) (plaintiff did not recover).

[516] *Cf.* 108 U. PA. L. REV. 601, 605 n.36 (1960).

[517] 260 F.2d 584 (7th Cir. 1958), *cert. denied*, 359 U.S. 966 (1959). See prior discussion of this case in text accompanying notes 33-35 *supra*.

[518] Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc., 245 F.2d 453 (7th Cir.), *cert. denied*, 355 U.S. 837 (1957); Kelly, Inc. v. Lehigh Nav. Coal Co., 151 F.2d 743 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

[519] Darr v. Burford, 339 U.S. 200 (1950), requires that the petitioner seek certiorari to the highest state court before beginning the federal habeas corpus procedure. See generally Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 473 (1960).

[520] MacKenna v. Ellis, 263 F.2d 35 (5th Cir.), *cert. denied*, 360 U.S. 935 (1959) (certiorari previously denied: MacKenna v. Texas, 355 U.S. 851 (1957)); Williams

state courts having been previously denied. One notably persistent petitioner appeared three times on the docket—first seeking review of the original conviction;[521] then twice seeking review from denials of state habeas corpus;[522] and all three times presenting a multiplicity of similar contentions.[523]

Unfortunately some litigants—even though not in the habeas corpus class—are not to be discouraged; a sampling follows: the Supreme Court in *Morgenstern Chem. Co. v. Searle & Co.*[524] denied certiorari to a Third Circuit decision which remanded a trademark infringement suit for injunction but denied petitioner's claim for an accounting of profits; petitioner again sought the accounting on remand in the district court, and for the second time in the same Term unsuccessfully petitioned for certiorari.[525] In *Puritan Church Bldg. Fund v. United States*,[526] petitioner, claiming exemption as a religious organization,[527] sought an income tax refund; it had raised the identical issue when originally resisting payment of the tax and certiorari had been denied.[528] In *Ginsburg v. Sullivan*,[529] petitioner, who suffered summary judgment in his prior libel suit to which certiorari was denied,[530] requested the Seventh Circuit to mandamus the district court to hear his amended complaint which presented the same claim.[531] And in *Furnish v. Board of Medical Examiners*,[532] petitioner sought a declaratory judgment to void an order suspending him from medical practice; he had litigated the identical issue in the state courts, and that litigation also resulted in a denial of certiorari.[533]

Several litigants attempted to circumvent a prior lower court decision by contending that they were not in privity with the party against whom

v. Moore, 262 F.2d 335 (5th Cir.), *cert. denied*, 360 U.S. 911 (1959) (certiorari previously denied: Williams v. Texas, 355 U.S. 850 (1957)); Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959) (certiorari previously denied: Curran v. Delaware, 352 U.S. 913 (1956)); Florida *ex rel.* Thomas v. Culver, 253 F.2d 507 (5th Cir.), *cert. denied*, 358 U.S. 822 (1958) (certiorari previously denied: Thomas v. Florida, 354 U.S. 925 (1957)).

[521] People v. Wein, 50 Cal. 2d 383, 326 P.2d 457, *cert. denied*, 358 U.S. 866 (1958).

[522] Wein v. California, 359 U.S. 992 (1959) (denying certiorari to the Supreme Court of California, unreported); Wein v. California, 359 U.S. 942 (1959) (denying certiorari to the Supreme Court of California, unreported).

[523] For a particularly frivolous contention by this petitioner see notes 263-67 *supra* and accompanying text. See also notes 370-71 *supra* and accompanying text.

[524] 253 F.2d 390 (3d Cir.), *cert. denied*, 358 U.S. 816 (1958).

[525] 262 F.2d 592 (3d Cir.), *cert. denied*, 360 U.S. 908 (1959).

[526] 256 F.2d 888 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 927 (1959).

[527] Int. Rev. Code of 1939, ch. 247, § 101(6), 53 Stat. 876 (now INT. REV. CODE OF 1954, § 501).

[528] Puritan Church v. Commissioner, 209 F.2d 306 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 975 (1954).

[529] 358 U.S. 882 (1958) (denying certiorari to Seventh Circuit, unreported).

[530] Ginsburg v. Black, 237 F.2d 790 (7th Cir. 1956), *cert. denied*, 353 U.S. 911 (1957).

[531] The litigant was not to be easily foreclosed; he appeared *pro se*.

[532] 257 F.2d 520 (9th Cir.), *cert. denied*, 358 U.S. 882 (1958).

[533] 149 Cal. App. 2d 326, 308 P.2d 924, 309 P.2d 493 (Dist. Ct. App.), *cert. denied*, 355 U.S. 827 (1957).

the adverse decision was rendered. Their position rejected, they sought certiorari; in effect, this was their second appearance before the Court on the same issue. Thus, in *Gart v. Cole*,[534] petitioners sought to enjoin federal and city officials from executing a housing redevelopment program on the ground that sale of land to Fordham University was a violation of religious freedom; certiorari had been denied in a state case raising the identical issue brought by landowners and tenants who represented the same classes as petitioners.[535] Somewhat similar is the interesting situation presented by *Hughes Transp., Inc. v. United States*;[536] petitioner therein had appeared as amicus curiae in a prior California case[537] before the Supreme Court.

IV. The State of the Docket

A. *Substantive Content*

A statistical examination of the Supreme Court's docket at the October Term 1958 evidences that a wide variety of subject matter was presented. The two most popular classes of claims concerned allegations of the misapplication of federal criminal procedural safeguards and allegations of unconstitutional state deprivations of some property interest; each of these classes constituted about twelve per cent of the total number of cases on the docket. Following closely were those cases involving federal administrative agencies, straight common-law diversity cases, and cases involving federal taxation; each accounted for about ten per cent of the total number. Those categories constituting approximately five per cent each were: alleged state deprivations of constitutionally guaranteed civil liberties; admiralty problems; claims arising under sundry federal statutes; alleged federal deprivation of civil liberties; patent, copyright and trademark problems; and labor law controversies. Finally, the two-to-three per cent category included those cases dealing with Indian affairs, the Federal Rules of Civil Procedure, state disbarments, the Federal Employers' Liability Act, federal jurisdiction, racial discrimination, state and federal contempt, state taxation, bankruptcy and antitrust.

B. *Reasons for the Crowded Docket*

Serious concern over the past, present and predictable size of the Court's docket[538] illustrates the statement that "hosts of litigants will

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[534] 263 F.2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959).

[535] 64th St. Residences, Inc. v. City of New York, 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1, *cert. denied*, 357 U.S. 907 (1958).

[536] 128 Ct. Cl. 221, 168 F. Supp. 219 (1958), *cert. denied*, 359 U.S. 968 (1959). See prior discussion of this case in text accompanying notes 138-41 *supra*.

[537] Public Util. Comm'n v. United States, 355 U.S. 534 (1958).

[538] Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 114 (1959); S. Rep. No. 711, 75th Cong., 1st Sess. 39 (1937) (letter from Chief Justice Hughes to Senator Wheeler).

take appeals so long as there is a tribunal accessible." [539] Much of this Note has already dealt with bad lawyering, which accounts for much of the docket congestion. Other isolable causes will here be examined.

1. Federal Employers' Liability Act Cases

The Court's exercise of certiorari in FELA cases has been severely criticized from the beginnings of this jurisdiction [540] to the present day, and the issue continues to divide the present Court.[541] However, it would seem that the effect of Court review of run-of-the-mill FELA litigation upon the total number of cases on the docket arises not from the number of FELA cases presented—relatively few [542]—but from the larger number of non-FELA cases which, in seeking review, apparently rely upon the FELA review standard. Thus, two petitioners [543] against whom verdicts were directed in diversity tort actions relied upon prior FELA cases [544] to support contentions that they had been deprived of their seventh amendment right to jury trial. Likewise, non-FELA petitioners who suffered appellate reversal of their jury verdict,[545] judgment not withstanding the verdict,[546] or summary judgment,[547] or who had certain issues withheld from the jury,[548] alleged denial of their constitutional right to jury trial. Inasmuch as the Court rarely [549] deals with such contentions in other than FELA cases, it would seem that the granting of certiorari in FELA cases in some measure contributes to the presence of these cases

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[539] *Ibid.*

[540] Frankfurter & Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928).

[541] For the conflicting views of the members of the Court see Harris v. Pennsylvania R.R., 361 U.S. 15 (1959).

[542] Mr. Justice Douglas points out in Harris v. Pennsylvania R.R., *supra* note 541, at 16-25, that only 109 FELA cases presenting issues of negligence or causation under the act were filed from January 31, 1949 to October 19, 1959.

[543] Sheptur v. Procter & Gamble Distrib. Co., 261 F.2d 221 (6th Cir. 1958), *cert. denied*, 359 U.S. 1003 (1959); Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[544] The cases relied on were Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956); Lavender v. Kurn, 327 U.S. 645 (1946); Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944).

[545] *E.g.*, State Farm Mut. Auto. Ins. Co. v. Yszara, 263 F.2d 937 (5th Cir.), *cert. denied*, 360 U.S. 932 (1959); Theriot v. Mercer, 262 F.2d 754 (5th Cir.), *cert. denied*, 359 U.S. 983 (1959); E. I. du Pont de Nemours & Co. v. Kissinger, 259 F.2d 411 (5th Cir. 1958), *cert. denied*, 359 U.S. 950 (1959); Texas & Pac. Ry. v. Laborde, 257 F.2d 587 (5th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

[546] *E.g.*, Sword v. Gulf Oil Corp., 251 F.2d 829 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958).

[547] *E.g.*, Cooper v. R. J. Reynolds Tobacco Co., 256 F.2d 464 (1st Cir.), *cert. denied*, 358 U.S. 875 (1958).

[548] *E.g.*, Doane Agricultural Serv., Inc. v. Coleman, 254 F.2d 40 (6th Cir.), *cert. denied*, 358 U.S. 818 (1958); Hurst v. Gulf Oil Corp., 251 F.2d 836 (5th Cir.), *cert. denied*, 358 U.S. 827 (1958).

[549] See Dick v. New York Life Ins. Co., 359 U.S. 437 (1959).

on the Court's docket.[550] This appears to be so despite the fact that the bar should realize that FELA cases are in a category by themselves.

2. Diversity Cases

The Court's rules provide for review by certiorari where "a court of appeals has . . . decided an important state or territorial question in a way in conflict with applicable state or territorial law." [551] Although it is infrequently utilized,[552] this rule precipitates the filing of the large number of common-law diversity cases [553] that reach the docket.[554] These allege direct conflict with the prevailing rule of the state concerning such issues as whether a New Jersey corporation statute [555] requires directors' approval of a profit-sharing plan; [556] the Texas duty of due care owed by a storeowner to an invitee; [557] the Texas duty of inspection imposed on a landowner; [558] the Oregon application of the doctrine of *res ipsa loquitur*; [559] the use of the equitable doctrine of clean hands in the Virgin Islands; [560] the Texas application of the rule of absolute verity; [561] the Louisiana and Texas doctrines governing the right of a seller to rescind a contract upon breach of a condition precedent; [562] whether an Illinois statute [563] making it unlawful for cattle to run at large permits the defense of contributory negligence; [564] the Oklahoma doctrine of proximate

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[550] "There is, however, one thing the Court can do, albeit negatively. It must be scrupulously careful to avoid taking cases which do not satisfy the criteria for review, lest lawyers be led to believe that the rules governing *certiorari* are so capriciously applied that their only prudent course is to 'take a chance' that their petitions may find favour too." Harlan, *supra* note 538, at 115.

[551] U.S. SUP. CT. R. 19(1)(b).

[552] The rule has been criticized as having little value because of this. Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 445-46 (1954); see also Fey, *The Supreme Court—An Operational Survey*, 4 CATHOLIC LAW. 64, 70 (1958).

[553] Discussion in this section of the Note will be confined to those diversity cases which present no federal question such as matters concerning federal jurisdiction or the Federal Rules of Civil Procedure, but which concern common-law matters such as controversies of tort, contract or property.

[554] There were filed approximately 4 times as many common-law diversity cases as FELA cases, and they comprised slightly less than 10% of the appellate docket.

[555] N.J. STAT. ANN. §§ 14:9-1 to -5 (1937).

[556] De Pova v. Camden Forge Co., 254 F.2d 248 (3d Cir.), *cert. denied*, 358 U.S. 816 (1958).

[557] Thacker v. J. C. Penney Co., 254 F.2d 672 (5th Cir.), *cert. denied*, 358 U.S. 820 (1958).

[558] Sword v. Gulf Oil Corp., 251 F.2d 829 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958).

[559] Reynolds Metals Co. v. Yturbide, 258 F.2d 321 (9th Cir.), *cert. denied*, 358 U.S. 840 (1958).

[560] Dreis v. Bishop, 257 F.2d 495 (3d Cir. 1958), *cert. denied*, 359 U.S. 914 (1959).

[561] O'Boyle v. Bevil, 259 F.2d 506 (5th Cir.), *cert. denied*, 359 U.S. 913 (1959).

[562] Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F.2d 137 (2d Cir. 1958), *cert. denied*, 358 U.S. 946 (1959).

[563] ILL. ANN. STAT. ch. 8, § 1 (Smith-Hurd 1941).

[564] Beiter v. Erb, 259 F.2d 911 (7th Cir. 1958), *cert. denied*, 359 U.S. 953 (1959).

cause;[565] and the New York rule of a manufacturer's liability for hidden defects.[566] Obviously, these are not issues befitting Supreme Court review. While many diversity petitioners allege direct conflict with state or territorial law, an even greater number do no more than argue the merits of their case.[567] Further evidence of the poor quality of the diversity petitions is demonstrated by the fact that only a handful[568] mentioned *Erie R.R. v. Tompkins*.[569] Although the Court has apparently limited the scope of this criterion in reframing its rules,[570] the desirability of its retention at all may be open to question.[571]

3. Identical Question Pending

The Court has followed a policy of granting certiorari in certain cases that "present questions identical with, or related to, matters already before [it] . . . on the merits."[572] A number of cases on the 1958 docket may be accounted for in this manner; however, there is little correlation between their number and the consumption of the Court's time inasmuch as these cases are usually disposed of simultaneously with the similar case pending when certiorari was granted. In some, the subsequently filed case was decided with the pending case: petitioner in *County of Allegheny v. Frank Mashuda Co.*[573] alleged similarity with *Martin v. Creasy*[574]—both cases involving the issue of federal district court abstention. In *Barr v. Matteo*,[575] petitioner contended that his case paralleled that of *Howard v. Lyons*[576]—both concerned defamation immunity of governmental officials. In *Taylor v. McElroy*,[577] similarity was alleged with *Green v. McElroy*[578]—the cases involved government procedures for

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565 Pryor v. Lee C. Moore Corp., 262 F.2d 673 (10th Cir. 1958), *cert. denied*, 360 U.S. 902 (1959).

566 Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959).

567 *E.g.*, McDonald v. O'Meara, 259 F.2d 425 (5th Cir. 1958), *cert. denied*, 359 U.S. 910 (1959); Doane Agricultural Serv. Inc. v. Coleman, 254 F.2d 40 (6th Cir.), *cert. denied*, 358 U.S. 818 (1958).

568 *E.g.*, Taormina Corp. v. Escobedo, 254 F.2d 171 (5th Cir.), *cert. denied*, 358 U.S. 827 (1958); Wegmann v. Mannino, 253 F.2d 627 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958).

569 304 U.S. 64 (1938).

570 The former criterion was "where a . . . court of appeals . . . has decided an important question of local law in a way *probably* in conflict with applicable local decisions. . . ." Former U.S. Sup. Ct. R. 38(5)(b), 306 U.S. 718 (1939). (Emphasis added.) Compare with the current rule in text accompanying note 551 *supra*.

571 See also discussion accompanying notes 441-44 *supra* and accompanying text.

572 ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 339 (2d ed. Wolfson & Kurland 1951).

573 360 U.S. 185 (1959).

574 360 U.S. 219 (1959).

575 360 U.S. 564 (1959).

576 360 U.S. 593 (1959).

577 360 U.S. 709 (1959).

578 360 U.S. 474 (1959).

industrial security. Petitioner in *Wilson v. Bohlender*[579] contended that *McElroy v. United States ex rel. Guagliardo*[580] and *Kinsella v. United States ex rel. Singleton*[581] were similar—the issue of military prosecutions overseas being present in all. And the issue in *Commissioner v. Glover*[582] was represented as similar to that in *Commissioner v. Hansen*,[583] while petitioner in *Baird v. Commissioner*[584] alleged identity with both *Glover* and *Hansen*—all three cases involved the issue of time of includibility in a dealer's income of amounts held in reserve by his finance companies. In other instances, the subsequently filed case was taken and reversed per curiam after the pending case was decided: petitioners in *Aho v. Jacobsen*[585] and *McDaniel v. The Lisholt*[586] alleged similarity with *Kermarec v. Compagnie Generale Transatlantique*[587]—all cases involving the issue of a shipowner's standard of duty to licensees. In *United States v. Colonial Chevrolet Corp.*[588] petitioner alleged similarity with *Glover, Hansen* and *Baird.*

An interesting variation was presented by *Mills v. Louisiana*;[589] petitioner stressed affinity to *Knapp v. Schweitzer*,[590] undecided at the time of the filing of the *Mills* petition. Certiorari in *Mills* was granted after *Knapp* was decided[591] and the case was then affirmed per curiam on the authority of *Knapp*. Apparently, there was a sufficient question of federal-state collaboration in *Mills* to cause at least four Justices[592] to feel that *Knapp* might not be dispositive.

In still other cases, the subsequently filed petition may be "held" until disposition of the pending case;[593] certiorari is then denied when the lower court decision is in accord with the Court's decision in the pending case:[594] petitioner in *Schaeffer v. Commissioner*[595] alleged similarity with

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[579] 361 U.S. 281 (1960).

[580] 361 U.S. 281 (1960).

[581] 361 U.S. 234 (1960).

[582] 360 U.S. 446 (1959).

[583] *Ibid.*

[584] *Ibid.*

[585] 359 U.S. 25 (1959).

[586] 359 U.S. 26 (1959).

[587] 358 U.S. 625 (1959).

[588] 360 U.S. 716 (1959).

[589] 360 U.S. 230 (1959). See prior discussion of the problem presented by this case at text accompanying notes 123-27 *supra.*

[590] 357 U.S. 371 (1958).

[591] *Knapp* was decided on June 30, 1958; the petition for certiorari in *Mills* was filed on May 29, 1958, and certiorari was granted on October 13, 1958, 358 U.S. 810 (Nos. 74, 75).

[592] The Court's settled practice is that the affirmative vote of four Justices is required to grant certiorari and to note probable jurisdiction. Ohio *ex rel.* Eaton v. Price, 360 U.S. 246 (1959) (separate opinion of Mr. Justice Brennan).

[593] Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction,* 46 COLUM. L. REV. 255, 257-58 (1946).

[594] See generally ROBERTSON & KIRKHAM, *op. cit. supra* note 572, at § 339.

[595] 258 F.2d 861 (6th Cir. 1958), *cert. denied,* 360 U.S. 917 (1959).

Hansen, Glover and *Baird*;[596] perhaps the Court "held" this case rather than consolidating it with the others[597] because petitioner, appearing pro se, might not have added significantly to the clarification of the issue. In *Hill v. Waterman Steamship Corp.*,[598] similarity with *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*[599] was asserted—both cases, apparently in conflict, involved the issue of choice of federal or state law in a wrongful death action based upon a maritime tort. And appellant in *Brown-Forman Distillers Corp. v. Collector*[600] alleged similarity with *Northwestern States Portland Cement Co. v. Minnesota*[601]—both concerned the issue of what activities of a foreign corporation form a nexus sufficient to subject it to taxation by the taxing state.

Some petitioners, cognizant of the practice of the Court on similar cases, contrive unsuccessfully to bring their cases within it. Thus in *Brewster v. United States*,[602] the Government, alleging similarity with *Flaxer v. United States*[603] and *Barenblatt v. United States*,[604] argued that all involved the issue of congressional authorization of its committees; but, inasmuch as each case concerned a different committee, consolidation of the cases would not appear to be helpful. However, the Government's reliance upon the similarity of the pending cases to illustrate the general importance of the issue raised in *Brewster* seems sound.

4. Action by the Supreme Court and the Courts Below

In the past the Court has assigned as a reason for reviewing a particular case that the issue presented—an important federal question—was specifically left open by a previous case.[605] Such a situation gives additional encouragement to a petitioner whose case raises the issue previously left open. In *Rios v. United States*,[606] petitioner pointed out that "it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment."[607] And in the three New York Com-

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[596] 360 U.S. 446 (1959). See text accompanying notes 582-84, 588 *supra*.

[597] Petitioner urged these alternatives upon the Court; the Government, in its memorandum suggested that the case be held pending disposition of the others.

[598] 251 F.2d 655 (3d Cir. 1958), *cert. denied*, 359 U.S. 927 (1959).

[599] 358 U.S. 613 (1959).

[600] 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed, cert. denied*, 359 U.S. 28 (1959). See notes 502-04 *supra* and accompanying text.

[601] 358 U.S. 450 (1959).

[602] 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958). See text accompanying notes 109-10 *supra*.

[603] 358 U.S. 147 (1958).

[604] 360 U.S. 109 (1959).

[605] *E.g.*, Powell v. United States Cartridge Co., 339 U.S. 497, 499 (1950); Morris v. McComb, 332 U.S. 422, 425-26 (1947).

[606] 256 F.2d 173 (9th Cir. 1958), *cert. granted*, 359 U.S. 965 (1959) (No. 40, Misc., renumbered No. 854).

[607] Quoting from Benanti v. United States, 355 U.S. 96, 102 n.10 (1957).

mission of Investigation Contempt Cases,[608] petitioner pointed out that the Court has not decided "whether, in a case of such collaboration between state and federal officers, the defendant could successfully assert his privilege in the state proceeding." [609] However, by no means should all instances of the Court's abstention from deciding a particular issue be read as encouraging subsequent review. In *Romero v. International Terminal Operating Co.*,[610] the Court left open the question of "whether the District Court may submit to the jury the 'pendent' claims under the general maritime law in the event that a cause of action [under the Jones Act] be found to exist"; [611] however, it appeared to do so simply because *Romero* did not present the issue. This nevertheless encouraged the petition in *Bartholomew v. Universe Tankships, Inc.*[612] Moreover, the Government's petitions in *McElroy v. United States ex rel. Guagliardo* [613] and *Kinsella v. United States ex rel. Singleton* [614] specifically mentioned that civilian employees and military dependents charged with noncapital crimes were excluded from consideration by the Court in *Reid v. Covert*; [615] but it is obvious that the reason for the Court's exclusion in *Reid* was to limit the scope of its decision. The fundamental reason for review of *Guagliardo* and *Singleton* was the importance of the question.[616]

The fact that the Supreme Court has been known to review obscure cases of no general importance simply to correct patent error or injustice [617] also encourages litigants with cases generally not worthy of review. Thus, in *Coleman v. Mountain Mesa Uranium Corp.*,[618] where the issue concerned the abandonment of property, petitioner admitted that his case was

608 Commission of Investigation v. Lombardozzi, 5 N.Y.2d 1026, 158 N.E.2d 250, 185 N.Y.S.2d 550, *cert. denied*, 360 U.S. 930 (Miranda, Riccobono, Castellano), *appeal dismissed as moot*, 361 U.S. 7 (Lombardozzi), *cert. denied*, 361 U.S. 10 (1959) (Mancuso). See prior discussion of these cases in text accompanying notes 123-27 *supra*.

609 Knapp v. Schweitzer, 357 U.S. 371, 380 (1958).

610 358 U.S. 354 (1959).

611 *Id.* at 381.

612 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959).

613 361 U.S. 281 (1960), *affirming* 259 F.2d 927 (D.C. Cir. 1958).

614 361 U.S. 234 (1960), *affirming* 164 F. Supp. 707 (S.D.W. Va. 1958).

615 354 U.S. 1, 22-23, 45, 75 (1957).

616 An interesting twist is found in a case on appeal: in Steinbeck v. Gerosa, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958), appellant, arguing in his jurisdictional statement that his case had merit, relied upon the fact that two Justices had dissented from the denial of certiorari in a case presenting a similar issue. Corona Daily Independent v. City of Corona, 346 U.S. 833 (1953). Evidently, it was appellant's reasoning that inasmuch as two members of the Court had at one time apparently agreed with him, a strong possibility existed that other members of the Court might now share this view. On the other hand, it might persuasively be argued that the noting of dissents from denials of certiorari indicates that the question has been thoroughly considered by the members of that Court and laid to rest; therefore the likelihood of obtaining review on such an issue is all the more diminished. This latter argument was suggested to the authors by Professor Paul Mishkin of the University of Pennsylvania Law School.

617 See generally ROBERTSON & KIRKHAM, *op. cit. supra* note 572, § 334.

618 257 F.2d 382 (10th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

generally unimportant but nonetheless urged review to correct the alleged injustice.[619]

Often the lower court opinion contains a statement giving impetus to the litigants to seek review. That recognition by the court that its decision is in direct conflict with a state court or court of appeals adds immeasurably to petitioner's confidence that he will succeed in reaching the Court was revealed by several petitions.[620] An expression by the court below of dissatisfaction with the rule laid down by the Supreme Court also encourages petitioners to seek review.[621] In this class are statements that a dissenting Supreme Court opinion was "most persuasive";[622] that "we are not at liberty to disregard this binding precedent simply because a contrary view may seem to reach a conclusion more in keeping with the realities of this particular case";[623] that "as a new question it is hard to see why . . .";[624] that "although the equities of this case strongly favor a recovery by plaintiff, we conclude that under the pleadings and authorities cited . . . ."[625] Similarly, lower court recognition of the absence of a controlling Supreme Court decision will sometimes provoke a petition for certiorari: "we have no clear-cut decision by the U.S. Supreme Court on the supposed right to publish anonymously; two of their cases which may bear on the question are conflicting";[626] "the precise extent of [the] power

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619 In addition to ROBERTSON & KIRKHAM, *op. cit. supra* note 572, § 334, petitioner cited McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5 (1949). This latter contains the following statement: "The Chief had several purposes in going into the merits of a case on petition for certiorari or the jurisdictional statement. First, he was interested in preventing grave miscarriages of justice, and occasionally he would recommend the grant of certiorari in a case of no public importance whatever simply because the decision below was unjust, unreasonable, or plainly wrong." *Id.* at 13.

620 *E.g.*, Mitchell v. Robert De Mario Jewelry, Inc., 260 F.2d 929, 933 (5th Cir. 1958), *rev'd*, 361 U.S. 288 (1960); Seven-Up Co. v. Blue Note, Inc., 260 F.2d 584, 586 (7th Cir. 1958), *cert. denied*, 359 U.S. 966 (1959); Missouri Pac. R.R. v. H. Rouw Co., 258 F.2d 445, 448 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); Glus v. Brooklyn E. Dist. Terminal, 253 F.2d 957, 958 (2d Cir. 1958), *rev'd*, 359 U.S. 231 (1959).

621 "But in affirming the Court said: 'Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio "to do an impossibility, and then punish him for refusal to perform."' Whether this be read literally as its deliberate judgment of the law of the case or is something of a decoy intended to attract our attention to the problem, the declaration is one which this Court, in view of its supervisory powers over courts of bankruptcy, cannot ignore." Maggio v. Zeitz, 333 U.S. 56, 59 (1948).

622 Holeman v. Louisville & N.R.R., 319 S.W.2d 47, 48 (Ky. 1958), *cert. denied*, 359 U.S. 1012 (1959).

623 Deep Sea Tankers, Ltd. v. The Long Branch, 258 F.2d 757, 773 (2d Cir. 1958), *cert. denied*, 358 U.S. 933 (1959).

624 United States Dredging Corp. v. Krohmer, 264 F.2d 339, 341 (2d Cir.), *cert. denied*, 360 U.S. 932 (1959).

625 Spector v. Pete, 157 Cal. App. 2d 432, 440, 321 P.2d 59, 64 (Dist. Ct. App.), *cert. denied*, 358 U.S. 822 (1958).

626 People v. Talley, 332 P.2d 447, 452 (Cal. Super. Ct. 1958) (concurring opinion), *rev'd and remanded*, 362 U.S. 60 (1960). The majority opinion stated: "upon the precise question in issue, the United States Supreme Court has not spoken." 332 P.2d at 451.

to tax has not yet been decided by the Supreme Court of the United States." [627]

In some states there is an appeal by right to the highest court of the state when any judge below dissents.[628] Petitions alleging that the existence of a dissent should give rise to a grant of certiorari [629] indicate that some petitioners believe a similar practice to exist in the federal system. Quite apart from such erroneous beliefs, however, dissenting opinions containing vigorous statements on federal questions may well provoke petitions for certiorari. Two examples are assertions in dissent that the decision constituted cruel and unusual punishment,[630] and that the majority opinion was contrary to a Supreme Court decision.[631]

V. Conclusion

As a result of "quarrying in the hundreds of dreary petitions" placed before the Supreme Court at the October Term, 1958, several conclusions may be drawn regarding the performance of the interlocking functions of the bar and the Court. Some petitions reveal either an inexcusably careless disregard of the criteria governing Supreme Court review or, at least, a total ignorance of them. While a partial explanation of this phenomenon may lie in pressure and incitement from clients frustrated in the lower courts, the ultimate responsibility remains with the bar. And certainly poor draftsmanship which fails to make lucid demonstration of how the case meets the Court's criteria—a defect from which even some certworthy petitions suffer—can be attributable only to the bar. On the other hand, the Court's laborious task of picking the wheat from the chaff seems to be performed with skill and adeptness. In addition to the rather obvious selection between the totally unworthy and the clearly deserving petitions, the Court must winnow out the poorly drafted but meritorious case from those whose unimportance or frivolity is disguised by clever and skillful drafting. Considering the generally unsatisfactory quality of the petitions submitted by the bar, the Court selects cases for review with extraordinary proficiency.

J. H. C.
H. C. G.
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627 Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal. 2d 314, 323, 333 P.2d 323, 328 (1958) (concurring opinion), *cert. denied*, 359 U.S. 1001 (1959).

628 *E.g.*, N.Y. Civ. Prac. Act § 588.

629 *E.g.*, United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir.), *cert. denied*, 358 U.S. 921 (1958); Central R.R. v. Jules S. Sottnek Co., 258 F.2d 85 (2d Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

630 People v. Wein, 50 Cal. 2d 383, 425-28, 326 P.2d 457, 481-84, *cert. denied*, 358 U.S. 866 (1958).

631 Fugiani v. Barber, 261 F.2d 709, 713 (9th Cir. 1958), *dismissed under Rule 60*, 358 U.S. 924 (1959).