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Nor do we think that the Supreme Court's approving description of Commission policy "requir[ing] [broadcasters] to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purpose in seeking air time," *CBS*, 453 U.S. at 387, 101 S.Ct. at 2825, detracts from our conclusion. Petitioners argue that permitting licensees to refuse access to teletext allows broadcasters to ignore a candidate's desire both to provide "the public with detailed campaign information" and to discuss a complex set of campaign issues, and that this relieves the broadcaster of the need for the individualized tailoring of his or her response to the candidate's request. Brief for TRAC/MAP at 51. Implicit in the Commission's decision that a broadcaster need not provide access to teletext, however, is the conclusion that such purposes as discussion of complex issues may be satisfied by resort to the main channel. We cannot say that the Commission's conclusion is irrational. Complex campaign issues have been treated for years in television broadcasting, well before teletext, and we do not see, nor have petitioners directed us to, any evidence that carries the petitioners' burden of showing that main channel access cannot be tailored to satisfy, as much as reasonably possible, a candidate's desire for air time for such purposes. Accordingly, we affirm the Commission's decision with respect to section 312(a)(7).[7]

IV.

[3] Section 315 of the Communications Act of 1934 imposes two substantive obligations upon broadcast licensees. Section 315(a) requires a licensee to provide "equal opportunities" to competing candidates. In operative part, it provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station[.]

47 U.S.C. § 315(a) (1982). Section 315(b) imposes the so-called "lowest unit rate" obligation upon licensees. That provision declares:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—
>
> (1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of the general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time; and
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. § 315(b) (1982). The predicates for the application of both parts of section 315 are the same. There must be "a legally qualified candidate for a public office," "a broadcasting station," and a "use" of

7. Petitioners offer an additional ground for challenging the Commission's decision regarding § 312(a)(7) and teletext. They claim that the decision "directly contradicts" Commission precedent holding that "[l]icensees may not adopt a policy that flatly bans Federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers." The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2289 (1978). *See* Brief for TRAC/MAP at 50. We do not reach the question whether the teletext decision conflicts with this established Commission policy, for no one raised this argument before the agency and the Commission, therefore, had no opportunity to pass on it. Section 405 of the Communications Act has codified the requirement of exhaustion of administrative remedies, *see* 47 U.S.C. § 405 (1982), and this court has construed section 405 "to require complainants, before coming to court, to give the FCC a 'fair opportunity' to pass on a legal or factual argument." Washington Association for Television and Children v. FCC, 712 F.2d 677, 681 (D.C.Cir. 1983) (citing *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 737 (D.C.Cir.1976)); *see also Neckritz v. FCC*, 502 F.2d 411, 417 (D.C.Cir. 1974). Thus, we do not consider this legal argument, which petitioners have advanced on appeal, but which no one presented to the Commission.

that station. The first of these is not at issue; the other two are dispositive.

Petitioners challenge the decision that section 315 does not apply to teletext on the ground that "[t]he Commission's ruling is clearly at odds with the statute." Brief for TRAC/MAP at 40. Congress has explicitly charged the FCC with "prescrib[ing] appropriate rules and regulations to carry out the provisions of ... section [315]." 47 U.S.C. § 315(d) (1982). "Accordingly, [the agency's] construction of the statute is entitled to judicial deference 'unless there are compelling reasons that it is wrong.'" *CBS*, 453 U.S. at 390, 101 S.Ct. at 2827 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969)). Even applying the considerable deference we owe the agency, however, we are unable to conclude that the agency's construction of the statute is a rational one, for it is plainly at odds with the language and intent of the statute. *See CBS*, 453 U.S. at 390, 101 S.Ct. at 2827. We believe that the agency erred in concluding that teletext does not constitute "traditional broadcast services" within the contemplation of the statute and that teletext is incapable of a "use" as that statutory term has evolved.

In section 153(*o*) of the Communications Act of 1934, Congress defined the term "broadcasting" to mean "dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(*o*) (1982). The Commission appears to have suggested that teletext transmissions are neither "radio communications" nor "intended to be received by the public." First, the Commission argued that the print nature of teletext differentiates it from more traditional types of electromagnetic transmissions, and that Congress, therefore, could not have intended to cover such a service under section 315. Second, the Commission distinguished teletext from "traditional broadcasting" in that teletext is an "ancillary" service. We address these points in turn.

The Commission's attempt to distinguish teletext from traditional broadcasting because of teletext's textual and graphic nature conflicts with the plain intent of Congress. The proper starting place for statutory interpretation is with "the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979). On this question it is also the terminal point, for the definition of "radio communication" unmistakably includes such transmissions as teletext. In section 153(b) of the Act, Congress defined "radio communication" as

> the transmission by radio of *writing, signs, signals, pictures*, and sounds *of all kinds*, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

47 U.S.C. § 153(b) (1982) (emphasis added). The text could hardly be clearer. Teletext falls squarely within this definition. Teletext involves "print and textual transmission" and that is plainly covered.

The Commission's attempt to distinguish teletext from the "traditional broadcast mode of mass communication" by calling it an "ancillary" service, *see Memorandum Opinion and Order*, 101 F.C.C.2d at 833, departs without explanation from well-established precedent. Teletext and main channel broadcasting are merely different time intervals within the broadcast spectrum. Teletext is "ancillary" to main channel broadcasting only in the sense that it will probably not attract nearly as many viewers. But the Commission has explicitly held that the "number of actual or potential viewers is not significant" in determining whether something constitutes "broadcasting." *See Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, Fourth Report and Order*, 10 Rad.Reg.2d (P & F) 1625, 1628 (1967). What matters is "an intent for *public* distribution." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 548 (D.C.Cir.1958) (emphasis in original), *cert. denied*, 361 U.S. 813 (1959). Under the *Functional Music* test, recently reaffirmed

by this court in *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1201 (D.C.Cir.1984), an intent for public distribution exists when the licensee's "programming can be, and is, of interest to the *general* ... audience." 274 F.2d at 548 (emphasis original). The Commission has made no attempt to distinguish or repudiate this test, and no one disputes that teletext can and does carry programming, including news, sports, weather, and information about community events, of interest to a general audience. Given our conclusion about "radio communication," it is obvious that teletext service meets the statutory definition of "broadcasting" and that the Commission therefore erred in deciding that obligations applicable to "broadcasting stations" do not apply to teletext.

We reach a similar conclusion with respect to the Commission's efforts to establish as a matter of law that a candidate cannot "use" teletext within the meaning of section 315. In a careful analysis of the legislative history, Judge Maris concluded that Congress clearly intended section 315 to apply "only to the personal use of [transmission] facilities by the candidates themselves." *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1, 5 (3d Cir.1950), *cert. denied*, 341 U.S. 909, 71 S.Ct. 622, 95 L.Ed. 1347 (1951). The Commission has accordingly defined a "use" as follows:

> In the case of *spots*, if a candidate makes any appearance in which he is identified or identifiable by voice or picture, even if it is only to identify sponsorship of the spot, the whole announcement will be considered a use. In the case of a *program*, the entire program is a use if "the candidate's personal appearance(s) is substantial in length, integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of the candidate."

1978 Political Broadcasting Primer, 69 F.C.C.2d at 2245 (emphasis in original). If, as the Commission urges in support of its conclusion that teletext is exempt from section 315, the teletext services were utterly incapable of a "use" thus defined, we might still doubt the rationality of a conclusion that one could not "use" teletext under section 315. Defining a "use" as a personal appearance by "voice or picture" suggests an approach under which the Commission defines "use" according to the qualities of the medium being used. In the case of traditional broadcasting, that "use" took on an audio-visual character consistent with that of the medium. Given the textual nature of teletext, it appears to be an unexplained departure from the Commission's past practice for it not to redefine "use" to account for the nature of the new medium. Such a redefinition would allow for "use" of teletext broadcasting when there was transmission of personal statements, reprints of speeches, policy papers by the candidate, and the like. These represent clear examples of a candidate's making personal use of the teletext broadcasting medium and appear to fall within the meaning of section 315. At a minimum, the Commission would have to address whether the existence of personal "textual uses" of teletext might necessarily follow from the Commission's previous treatment of "uses" and then either redefine "use" to include such a situation or explain why it feels it can reasonably refuse to do so under the statutory scheme.

We also have a more particular objection to the Commission's reasoning. The Commission asserted that a "use" was not possible because teletext could not reproduce a "voice or picture" of a candidate. In this, the Commission ignored the fact that teletext is capable of high-resolution graphics and can transmit a recognizable image of a candidate using that capability. The transmission of a "drawing or other pictorial representation" of a candidate, if "identified or identifiable," will satisfy "the requirement for an appearance by voice or picture of a candidate." *Carter/Mondale Reelection Committee, Inc.*, 80 F.C.C.2d 285, 286 (Broadcast Bureau 1980). Thus, even under the current definition, teletext cannot be found utterly incapable of a "use" under section 315. Because the Commission did not acknowledge or in any

way deal with this inconsistent precedent, its ruling cannot be deemed the product of reasoned decisionmaking.

Accordingly, we reverse the Commission's decision with respect to section 315 and remand for further proceedings consistent with this opinion. We now turn to an examination of the Commission's treatment of the fairness doctrine.

V.

[4] The fairness doctrine "provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 C.F.R. § 73.1910 (1985). The doctrine arose "under the Commission's power to issue regulations consistent with the 'public interest,' ... [and] imposes two affirmative obligations on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110–11, 93 S.Ct. 2080, 2090, 36 L.Ed.2d 772 (1973). The basic purpose of the fairness doctrine is to ensure that the American public not be left uninformed. *Green v. FCC*, 447 F.2d 323, 329 (D.C.Cir.1971). In serving this interest, the Commission has emphasized that "the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith." *Fairness Report*, 48 F.C.C.2d 1, 9 (1974).

In practice, this means that the Commission exercises very limited review of the first part of the doctrine, the obligation to devote an adequate amount of time to the discussion of public issues. Decisions about the quantity of time to devote and the issues selected rest with the licensee. The Commission, in reviewing whether the licensee has provided an adequate amount of public interest programming, limits the inquiry to a "determination of [the] reasonableness" of the sum of the time provided. *Fairness Report*, 48 F.C.C.2d at 10. With respect to the choice of issues covered, the Commission has, in the past,

> indicated that some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely. But such statements on [the Commission's] part are the rare exception, not the rule, and [the Commission does not] ... becom[e] involved in the selection of issues to be discussed, nor ... [does it] expect a broadcaster to cover each and every issue which may arise in his community.

Id. (citation omitted).

With respect to the second part of the fairness doctrine obligation, the duty to provide reasonable coverage to discussion of opposing viewpoints, the Commission has also attempted to preserve licensee discretion. In its 1974 *Fairness Report*, the Commission summarized its position as follows:

> When a licensee presents one side of a controversial issue, he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make a provision for the opposing views in his *overall programming*. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesman and format for their presentation are left to the licensee's good discretion subject only to a standard of reasonableness and good faith.

48 F.C.C.2d at 8 (emphasis in original). The reasonableness of the balance depends on a variety of factors, including such considerations as the amount of time afforded each side, the frequency of presentation of each side's position, and the size of the audiences of such presentations. *Id.* at 17.

The FCC in the teletext docket decided to exempt that service entirely from the requirements of the fairness doctrine. The Commission premised its decision on the fact that Congress never actually codified the Commission's fairness doctrine, and

that the Commission, therefore, had no obligation to extend its own policy to new services like teletext. Petitioners dispute this interpretation, arguing that the fairness doctrine "is a statutory obligation that requires *all* broadcasting services to provide reasonable opportunities for the presentation of contrasting viewpoints on controversial matters of public importance." Brief for TRAC/MAP at 34–35 (emphasis in original). Because teletext constitutes broadcasting under the terms of the statute, petitioners argue that the fairness doctrine must be applied. *Id.* at 37.

We begin our analysis by reciting the classic formulation of the fairness doctrine:

> The Commission has ... recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.

Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). Thus, the fairness doctrine imposes obligations on "licensees" in the use of their "broadcast time." Teletext is broadcast time operated by Commission licensees or by lessees under the control of licensees. We find it clear, therefore, that the fairness doctrine by its terms applies to teletext; no extension is necessary. Indeed, it appears an affirmative departure from precedent for the Commission to say that a licensee's fairness obligations apply only to a part of its broadcast time. Thus, we must examine whether the doctrine amounts to a statutory obligation preclusive of the Commission's making such a departure, and, if not, whether the Commission adequately explained its change in policy.

The dispute about whether the fairness doctrine is a statutory obligation or a Commission policy centers around a 1959 amendment to section 315 of the Communications Act of 1934. Congress amended section 315(a) explicitly to exclude from the definition of "use of a broadcasting station" such programming as bona fide newscasts, bona fide news interviews, bona fide news documentaries, and on-the-spot coverage of bona fide news events. *See* Pub.L. No. 86–274, 73 Stat. 557 (1959). Alongside the insertion of this change in the statute, Congress also added the following language to section 315(a):

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed on them under this Act to operate in the public interest and to afford reasonable opportunity for the presentation of conflicting views on issues of public importance.

47 U.S.C. § 315(a) (1982). *See also* Pub.L. No. 86–274, 73 Stat. 557 (1959). Petitioners suggest that we must treat this passage as a codification of the fairness doctrine as applied at the time of the 1959 amendment and that the Commission, therefore, may not alter the fairness obligation, even if it believes such a change to be required in the public interest. We disagree.

We do not believe that language adopted in 1959 made the fairness doctrine a binding statutory obligation; rather, it ratified the Commission's longstanding position that the public interest standard authorizes the fairness doctrine. The language, by its plain import, neither creates nor imposes any obligation, but seeks to make it clear that the statutory amendment does not affect the fairness doctrine obligation as the Commission had previously applied it. The words employed by Congress also demonstrate that the obligation recognized and preserved was an administrative construction, not a binding statutory directive. Congress described the obligation to which

it addressed its admonition as one "imposed ... *under the Act*," 47 U.S.C. § 315(a) (1982) (emphasis added), not by the Act. This suggests that Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act. Thus, by its 1959 amendment, "Congress ... expressly accepted ... that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations." *Red Lion*, 395 U.S. at 382, 89 S.Ct. at 1802. "In other words, the amendment vindicated the FCC's general view that the Fairness Doctrine inhered in the public interest standard." *Id.* at 380, 89 S.Ct. at 1801.

[5] Because the fairness doctrine derives from the mandate to serve the public interest, the Commission is not bound to adhere to a view of the fairness doctrine that covers teletext. "An agency's view of what is in the public interest may change, either with or without a change in circumstances." *Greater Boston Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970) (footnote omitted), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971). To the extent that the Commission's exemption of teletext amounts to a change in its view of what the public interest requires, however, the Commission has an obligation to acknowledge and justify that change in order to satisfy the demands of reasoned decisionmaking. *See id.; see also International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, 459 F.2d 1329, 1341 (D.C.Cir.1972) ("It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them.").

The Commission has offered two justifications for its refusal to apply the fairness doctrine to teletext. First, the Commission relies on its theory about the textual nature of teletext and the first amendment implications flowing from this distinction between teletext and other, more traditional modes of broadcasting. As we have already discussed, *see supra* pp. 506–509, however, the Supreme Court has drawn a different line so that the Commission can gain no constitutional support for the disparity in regulation between teletext and traditional broadcasting.

The second justification is more substantial. The Commission decided, and petitioners have not disputed, that the burdens of applying the fairness doctrine might well impede the development of the new technology and that "the likelihood of licensees' embarking upon ... endeavors [like teletext] will be substantially affected" by the agency's policy. *Report and Order*, 53 Rad.Reg.2d (P & F) at 1324. Accordingly, the Commission explicitly concluded that "the public interest is better served by not subjecting teletext to Fairness Doctrine obligations." *Id.*

We believe the Commission acted rationally in so concluding. Petitioners have not challenged the Commission's assertions about the negative impact the application of the fairness doctrine would have upon the development of teletext. Moreover, the Commission's view that encouragement of new technologies serves the public interest is not only rational, but is explicit in the Communications Act of 1934. *See* 47 U.S.C. § 303(g) (1982). In effect, the Commission posited an absence of fairness doctrine burdens and made predictions about the marginal encouragement to the development of teletext and the marginal diminution, if any, in the presentation of opposing viewpoints on controversial matters of public importance. In weighing the public interest implications of the two marginal effects, the Commission concluded that the balance favored forbearance from applying the fairness doctrine, and, absent a showing, not even attempted here, that this conclusion was arbitrary and capricious, we cannot disturb the Commission's decision on this point. Accordingly, with respect to the fairness doctrine, we affirm the decision of the Commission.

To summarize: we reverse and remand the Commission's decision for further proceedings consistent with this opinion as it concerns section 315 of the Communications Act of 1934, and we affirm the Commission's decision with respect to section 312(a)(7) and the fairness doctrine.

It is so ordered.

MacKINNON, Senior Circuit Judge (concurring in part and dissenting in part).

I concur in parts II and IV of Judge Bork's opinion but dissent with respect to parts III and V. I would thus allow reasonable access to teletext by legally qualified candidates for federal elected office on behalf of their candidacies. I would also hold that the fairness doctrine is applicable. This would require teletext operators to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. In my opinion this would not impede the development of teletext.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5685

EMERSON EMORY, APPELLANT

v.

SECRETARY OF THE NAVY

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-02494)

On Motion for Summary Affirmance

Filed May 19, 1987

Joseph E. diGenova, United States Attorney, *Royce C. Lamberth*, *R. Craig Lawrence* and *Eileen M. Houghton*, Assistant United States Attorneys were on appellee's motion for summary affirmance.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Emerson Emory, pro se, was on appellant's brief.

Sherman Cohn, appointed by the Court, was on the brief as *amicus curiae.*

Before: BORK, SILBERMAN and D. H. GINSBURG, *Circuit Judges.*

Opinion PER CURIAM.

PER CURIAM: Appellant Emerson Emory has appealed the dismissal of his complaint by the district court. Emory had filed suit seeking declaratory and injunctive relief for alleged discrimination that resulted in his non-selection for promotion to the rank of rear admiral in the United States Naval Reserve. The district court dismissed the complaint for want of subject matter jurisdiction. We hold that the district court has jurisdiction to consider Emory's claims. Accordingly, we reverse.

Emory was an ensign in the Medical Corps of the United States Naval Reserves beginning in 1949. He remained on active duty as a reserve officer from that time until his voluntary retirement in 1980.[1] In the interim, he was promoted in the normal sequence to the rank of captain, obtaining that status in 1972. Thereafter he was considered, but not selected, for promotion to the rank of rear admiral by selection boards meeting in January of 1977, 1978, 1979, and in October of 1979. During the period 1977-1979, Emory was eligible for promotion to the rank of rear admiral. Emory was not, however, in what is known as the "primary promotion zone." Because Emory was "below the zone" during the years in question, a promotion selection board would have

[1] Emory's voluntary retirement may have been induced, in part, by his conviction and sentence in a federal district court to twelve years in prison. Had Emory not voluntarily retired, he would have been liable to an involuntary separation proceeding as a result of his conviction.

had to consider him to be one of a select group of especially well qualified applicants to recommend him for promotion. Emory would have been in the "primary zone" for the first time in 1980. Prior to the next duly convened rear admiral promotion selection board, however, Emory was transferred at his request to the Retired Reserve List. He was therefore not considered for promotion after October, 1979.

In August, 1983, after exhausting his administrative remedies, Emory filed this action in the district court alleging that his failure to advance to the rank of rear admiral was due to racial discrimination within the Navy. Specifically, Emory alleged that the failure to include a black officer on the promotion selection boards resulted in his not being promoted. He sought a declaratory judgment that the Navy had violated his rights under the law and Constitution, a preliminary injunction requiring appellee to promote him immediately to the rank of rear admiral retroactive to July 1, 1978, and such other relief as the court deemed appropriate. Emory waived any back pay entitlement he might have had. He alleged that the court had jurisdiction to order the relief sought under the fifth and fourteenth amendments to the Constitution and under 28 U.S.C. §§ 1331, 1343 (1982).

On July 20, 1984, the district court granted appellee's motion to dismiss, finding that the case was nonjusticiable because "it is not capable of resolution through the judicial process without interference into areas reserved to other branches of government." The court reasoned that because promotion under 10 U.S.C. § 5912 (1982)[2] is a matter reserved to the legislative and ex-

[2] 10 U.S.C. § 5912 provides:

> Permanent and temporary appointments under this chapter in grades above lieutenant commander in the Naval Reserve and in grades above major in the Marine Corps Reserve shall be made by the President, by and with the

ecutive branches of government, the court did not have the power to order a retroactive promotion.

Moreover, the court concluded that even if Emory's claims were meritorious, in order even to be considered for promotion, Emory had to be on active status. 10 U.S.C. § 591(a) (1982). The court stated that "[t]here is no basis for the court to order plaintiff reinstated to active status pending final disposition of his claim because his inactive status was not involuntarily imposed upon him and it was not a result of the alleged wrongs." Thus, the court concluded that Emory's decision voluntarily to retire made his claim for promotion moot. With respect to Emory's request for declaratory relief, the court ruled that such relief was "inappropriate" on a claim that has become moot.

I

We note at the outset that the notice of appeal in this case was timely filed.[3] Federal Rule of Appellate Procedure 4(a)(1) provides that in a civil case in which the United States is a party, a notice of appeal must be filed within sixty days of entry of the judgment. Fed. R. App. P. 4(a)(1). Subsection (4) of that rule provides, however, that this time period may be tolled if a party files a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). Rule 59(e) provides that such a motion must be "served not later than 10 days after the entry of judgment." District courts are not empowered to extend the ten day time limitation. *See Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 941 (D.C. Cir. 1986).

advice and consent of the Senate. All other permanent and temporary appointments under this chapter shall be made by the President alone.

[3] We acknowledge with appreciation the substantial contribution of *Amicus*, Professor Sherman Cohn, to the resolution of this issue.

Courts have routinely construed papers captioned "motion to reconsider" as a motion to alter or amend the judgment under Rule 59(e). *See Fischer v. United States Dept. of Justice*, 759 F.2d 461, 464-65, n.4 (5th Cir. 1985); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 41 (2d Cir. 1982). Such treatment is appropriate even though the movant does not specify under which rule relief is sought, because "[a]ny motion that draws into question the correctness of the judgment is functionally a motion under Civil Rule 59(e), whatever its label." 9 *Moore's Federal Practice* ¶ 204.12[1] at 4-67 (1987). Parties may reasonably rely, however, only upon a timely Rule 59(e) motion to reconsider as a basis for delaying the filing of their notice of appeal. *See Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d at 942.

In this case, the district court's judgment was entered on July 20, 1984.[4] Emory's notice of appeal was filed on May 16, 1985, well beyond the sixty-day appeal period. When this case was last before us, we were concerned that a motion to reconsider, filed by Emory on August 6, 1984, did not toll the appeal period because it was filed beyond the ten days allowed by Rule 59(e). We are now satisfied that although the motion was not filed within the prescribed ten day period, it was served during that time. That being the case, the motion, and hence, the notice of appeal, are timely.

Briefly, Fed. R. App. P. 4(a)(4) contains two distinct requirements. First, that the motion relied upon to toll the appeal period be "filed" in the district court, and second, that it be a "timely motion." A "timely motion"

[4] The order of July 20, 1984, satisfies the procedural requirements for the entry of judgment established by this court in *Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985). The order stated the judgment of the district court on a separate document, and was entered by the Clerk of the court on the civil docket.

under Fed. R. Civ. P. 59(e) is one that is served not later than 10 days after entry of judgment. *Keohane v. Swarco, Inc.*, 320 F.2d 429, 430-32 (6th Cir. 1963). Thus, Rule 4(a)(4) is satisfied if the motion is served not later than ten days after the entry of judgment, and if the motion is "filed", which under Fed. R. Civ. P. 5(d), can occur "within a reasonable time [after service]." *Id.* If Emory perfected service of his Rule 59(e) motion by mailing[5] it to the United States Attorney within ten days after entry of the July 20, 1984 judgment, and the motion was filed within a reasonable time thereafter, the motion and his subsequent appeal were timely. *Interstate Commerce Comm'n v. Carpenter*, 648 F.2d 919 (3d Cir. 1981).

Emory's Rule 59(e) motion was dated July 27, 1984, seven days after judgment. In addition, Emory submitted an affidavit together with his supplemental brief to this court in which he avers that the motion was indeed mailed that day. It is true, as noted by the government, that the text of the Certificate of Service does not indicate the date of service. In light of the fact that Emory is proceeding *pro se*, however, it would seem hypertechnical at best to conclude that the date of service cannot be determined because the date appears slightly above the certificate, rather than in the text of the certificate itself. In light of these facts, we conclude that the Rule 59(e) motion, and hence, the notice of appeal, were timely filed.

II

Emory alleged that there were no minority members on the selection boards that considered him for promotion. He also alleged that he was discriminated against by the selection boards because of his race. He sought a preliminary injunction requiring appellee retroactively to

[5] Fed. R. Civ. P. 5(b) provides that "[s]ervice by mail is complete upon mailing."

promote him to the rank of rear admiral, and a declaratory judgment that appellee had violated his statutory and constitutional rights.

Generally, courts have shown an extreme reluctance to interfere with the military's exercise of its discretion over internal management matters. *See, e.g., Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Reaves v. Ainsworth*, 219 U.S. 296, 306 (1911). This deference is "at its highest when the military, pursuant to its own regulations, effects personnel changes through the promotion or discharge process." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979), *clarified*, 627 F.2d 407 (D.C. Cir. 1980).

Here, Congress has enacted legislation that details the procedures for the promotion of officers in the Naval Reserves and, as pointed out by the district court, the courts have no role in this process. *See* 10 U.S.C. § 5891 *et seq.* (1982). The selection and promotion process has been specifically reserved to the executive and legislative branches of government. The promotion selection board must first recommend Emory for promotion. The President must then nominate Emory to the Senate, and upon Senate confirmation, appoint him to his new rank. 10 U.S.C. § 5912. The district court was clearly correct in concluding that it cannot intervene in this process and order Emory promoted retroactively to the rank of admiral.

To so conclude, however, is not to say that there is an absence of subject matter jurisdiction over Emory's constitutional claims. We have no quarrel with the district court's conclusion that the operation of the military is vested in Congress and the Executive, and that it is not for the courts to establish the composition of the armed forces. But constitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches

of government. Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. *Parker v. Levy*, 417 U.S. 733 (1974). It is precisely the role of the courts to determine whether those rights have been violated. *Dillard v. Brown*, 652 F.2d 316, 320 (3d Cir. 1981).

We note that Emory's current inactive status is not a bar to the district court fashioning some relief if it determines that his claims are indeed meritorious. *See Dilley v. Alexander*, 603 F.2d at 925. In *Dilley*, suit was brought by Army Reserve officers who had been released from active duty because they had twice been passed over for promotion. The officers complained that the promotion selection boards were in violation of applicable statutes and regulations because they did not include an appropriate number of reserve officers. Judge MacKinnon, writing for this court, concluded that the officers were entitled to be reinstated to active duty and to be considered again by promotion selection boards constituted in accordance with applicable statutes and regulations. *Id.* at 916. Unlike the appellants in *Dilley*, Emory voluntarily chose to remove himself from active status. That fact, however, does not affect the justiciability of claimed constitutional violations that preceded his decision to retire.

We express no view on the merits of Emory's claims. We simply hold that dismissal of his complaint for want of subject matter jurisdiction was error. Accordingly, we reverse and remand the case to the district court for further proceedings consistent with this opinion.

In re John DEMJANJUK, Petitioner.

v.

Honorable Edwin MEESE, United States Attorney General, and Honorable George Shultz, Secretary of State, Respondents.

No. 86-5097.

United States Court of Appeals, District of Columbia Circuit.

Feb. 27, 1986.

As Amended March 7, 1986.

Petitioner sought writ of habeas corpus, immediate hearing, and stay of execution of extradition warrant. The Court of Appeals, Bork, Circuit Judge, held that: (1) petitioner seeking stay of execution of extradition warrant to Israel on basis of the International Convention on the Prevention and Punishment of the Crime of Genocide failed to establish that implementing legislation necessary to give effect to provisions of the Convention had been enacted, and thus, the Convention was not applicable; (2) even if the Convention were in effect, extradition of petitioner was granted on basis of murder charges rather than genocide, and thus, the Convention would not affect extradition; and (3) petitioner failed to demonstrate likelihood of success on merits, and thus, stay of execution of extradition warrant was unjustified.

Request denied.

1. Habeas Corpus ⇐48

Generally, circuit judge has jurisdiction to grant writ of habeas corpus only if petitioner's immediate custodian is located within circuit.

2. Habeas Corpus ⇐48

The Court of Appeals would decline to transfer application for writ of habeas corpus by petitioner seeking stay of execution of extradition warrant, where it was absolutely clear from application that applicant was not entitled to award of writ, and applicant faced imminent extradition to Israel. 28 U.S.C.A. § 2241(b); F.R.A.P.Rule 22 note, 28 U.S.C.A.

3. Habeas Corpus ⇐48

Under general rule that circuit judge has jurisdiction to grant writ of habeas corpus only if petitioner's immediate custodian is located within circuit, the United States Attorney General would be treated as custodian of petitioner who was in custody of United States marshal in a confidential location, so that jurisdiction would lie in the District of Columbia Circuit and in no other jurisdiction. 28 U.S.C.A. § 2241(a, b).

4. Habeas Corpus ⇐103

Habeas corpus petitioner seeking stay of execution of extradition warrant to Israel on basis of the International Convention on the Prevention and Punishment of the Crime of Genocide failed to establish that implementing legislation necessary to give effect to provisions of the Convention had been enacted, and thus, the Convention was not applicable.

5. Extradition and Detainers ⇐2

Even if it were assumed that implementing legislation had been enacted, the International Convention on the Prevention and Punishment of the Crime of Genocide would not have been in effect at time petitioner sought stay of execution of extradition warrant on basis of the Convention, in light of requirement that instrument of ratification be deposited with the Secretary General of the United States and that the Convention would become effective on 90th day following deposit of such instrument.

6. Extradition and Detainers ⇐5

Even if the International Convention on the Prevention and Punishment of the Crime of Genocide were in effect, the Convention would not affect extradition of petitioner, where extradition of petitioner to Israel was granted on basis of murder charges rather than genocide. 18 U.S.C.A. § 3184.

7. Habeas Corpus ⇐70

In order to grant request for stay of execution, court must find that habeas corpus petitioner made strong showing on merits, that, absent immediate relief, petitioner will suffer irreparable harm, that other parties would not be substantially harmed by issuance of stay, and that public interest supports issuance of stay.

8. Habeas Corpus ⇐70

Even if extradition to Israel of habeas corpus petitioner charged with having murdered tens of thousands of people would qualify as irreparable harm, petitioner failed to demonstrate likelihood of success on merits, and thus, stay of execution of extradition warrant was unjustified.

John J. Gill was on the petition for writ of habeas corpus.

Before BORK, Circuit Judge.

Opinion filed by Circuit Judge BORK.

BORK, Circuit Judge:

Petitioner John Demjanjuk seeks a writ of habeas corpus, an immediate hearing, and a stay of execution of an extradition warrant. Demjanjuk has been certified as extraditable to the State of Israel pursuant to an extradition treaty between the United States and Israel and is currently in the custody of United States Marshals, on behalf of the Attorney General of the United States, at a location unknown to his attorneys.

Demjanjuk claims that the Senate's recent advice and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) served to amend the extradition treaty and thereby voided the several decisions of the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit which certified petitioner as extraditable to Israel.[1] The Genocide Convention, however, is not yet in effect in the United States. Even if it were in effect, Demjanjuk is not being extradited for the crime of genocide. The petition for a writ of habeas corpus and the request for a stay and for an immediate hearing must, therefore, be denied.

I.

[1] The jurisdiction of a judge in this circuit to entertain this petition must be addressed at the outset. 28 U.S.C. § 2241(a) (1982) provides: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." The general rule is that a circuit judge has jurisdiction to grant a writ of habeas corpus only if the petitioner's immediate custodian is located within the circuit. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494-95, 93 S.Ct. 1123, 1129, 35 L.Ed.2d 443 (1973). Pursuant to 28 U.S.C. § 2241(b) (1982), a circuit judge may decline to entertain the habeas petition and may transfer the application for hearing and determination to the appropriate district court.

[2] Although transfer to the district court is the usual practice, Fed.R.App.P. 22(a) advisory committee notes, I decline to transfer this application. Because it is absolutely clear from the application that the applicant is not entitled to an award of the writ and a hearing is therefore not required, transfer would serve no purpose. Transfer would be particularly inappropriate in this case given the imminence of petitioner's extradition to Israel.

[3] Demjanjuk is in the custody of a United States Marshal, in a confidential

1. The cases dealing with the extradition of petitioner are *Demjanjuk v. Petrovsky*, 612 F.Supp. 571 (N.D.Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1198, 89 L.Ed.2d 312 (1986); *In re Extradition of John Demjanjuk*, 612 F.Supp. 544 (N.D.Ohio 1985); *In re Extradition of John Demjanjuk*, 603 F.Supp. 1468 (N.D.Ohio), *dismissed*, 762 F.2d 1012 (6th Cir.1985); *In re Extradition of John Demjanjuk*, 603 F.Supp. 1463 (N.D.Ohio 1984), *United States v. Demjanjuk*, 518 F.Supp. 1362 (N.D.Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982).

location. This means that petitioner's attorneys cannot be expected to file in the jurisdiction where petitioner is held. It is impracticable to require the attorneys to file in every jurisdiction, and it would be inappropriate to order the whereabouts of the petitioner made public. Yet it is essential that petitioner not be denied the right to petition for a writ of habeas corpus. A justice of the Supreme Court, of course, has nationwide jurisdiction over habeas corpus petitions, but requiring all such petitions to be filed in the Supreme Court could produce inconvenience for the members of that Court and, in any case, transfer to the district court is the normal practice because of the potential necessity of a hearing. Thus, short of concluding that Demjanjuk's application must be considered by a Supreme Court justice, I think it is appropriate, in these very limited and special circumstances, to treat the Attorney General of the United States as the custodian. Jurisdiction will therefore lie in the D.C. Circuit and in no other jurisdiction. Should it become known that petitioner is held in a jurisdiction other than this one, a judge of this circuit would be divested of jurisdiction. There is an analogy to the jurisdiction accepted here: a district court may take jurisdiction of a habeas claim where the petitioner is held abroad in the custody of the United States and there is thus no forum where the immediate custodian is located. *See Ex parte Hayes*, 414 U.S. 1327, 94 S.Ct. 23, 38 L.Ed.2d 200 (1973) (per Douglas, J., on application for writ of habeas corpus); *see also* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 359 n. 52 (2d ed. 1973) ("It would thus appear that it has been decided ... that at least a citizen held abroad by federal authorities has access to the writ in the District of Columbia.").

If "it appears from the application that the applicant or person detained is not entitled" to a writ of habeas corpus, 28 U.S.C. § 2243 (1982), the petition may be denied. Otherwise, the judge must "forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted" and thereafter set a hearing. *Id.* As the analysis below demonstrates, petitioner is not entitled to a writ of habeas corpus.

II.

Petitioner alleges that the International Convention on the Prevention and Punishment of the Crime of Genocide, "to which the United States will soon become a party," "has, or will soon, effectively amend the United States-Israel [Extradition] Treaty." Petition for Writ of Habeas Corpus at ¶¶ 4, 6, *Demjanjuk v. United States*, 784 F.2d 1114 (filed 1986). This allegation concerning the effective date of the Convention is rather equivocal. It is clear from other materials, however, that the Convention is not presently in effect.

[4] In giving its advice and consent, the Senate specifically conditioned ratification of the Genocide Convention on the enactment of implementing legislation: "III. The Senate's advice and consent is subject to the following declaration: That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted." 132 Cong.Rec. S1378 (daily ed. Feb. 19, 1986). Article V of the Genocide Convention requires the enactment of "the necessary legislation to give effect to the provisions of the ... Convention." The Report of the Senate Committee on Foreign Relations plainly states that the above declaration was intended to "reinforce[ ] the fact that the Convention is not self-executing." Staff of Senate Comm. on Foreign Relations, 99th Cong., 1st Sess., *Report on Genocide Convention* 26 (Comm.Print 1985). Petitioner has not demonstrated nor have I determined that the necessary implementing legislation has been enacted.

[5] But even if it is assumed that the implementing legislation has been enacted, the Genocide Convention would nevertheless not yet be in effect. Article XI of the Convention requires that the instrument of ratification or accession be deposited with the Secretary General of the United Nations. Article XIII provides that the Convention becomes effective "on the ninetieth day following the deposit of the instrument of ratification or accession." The Secretary General is thereby provided with time to circulate the new instrument to the other parties to the Convention and provide notice of the conditions attached to the new ratification. *Report on Genocide Convention, supra*, at 14. The Senate voted to ratify the Convention on February 19, 1986. Thus, even had the implementing legislation been simultaneously enacted on February 19, 1986, the Genocide Convention would not be in effect until mid-May.

III.

[6] The Genocide Convention, if it were in effect, would, in any event, provide no support for petitioner's habeas application. The Convention cannot override a pre-existing extradition treaty when extradition was not granted on the basis of allegations of genocide. The district court authorized extradition of Demjanjuk pursuant to the Convention of Extradition between the Government of the United States of America and the Government of the State of Israel, Dec. 10, 1962, 14 U.S.T. 1717, T.I.A.S. No. 5476 ("Extradition Treaty"). Under 18 U.S.C. § 3184 (1982), the Extradition Treaty applies once the district court finds, *inter alia*, that the requesting country has jurisdiction to try the crime alleged. The district court found that Israel has jurisdiction to try the petitioner for murder under the international law doctrine of "universal jurisdiction." *In re Extradition of John Demjanjuk*, 612 F.Supp. 544, 558 (N.D. Ohio 1985). Petitioner claims that the jurisdictional requirements under the Genocide Convention are more restrictive and divest Israel of jurisdiction over this case, thus rendering the extradition illegal.

Petitioner could argue that extradition is sought in order that he be tried for genocide and that the Genocide Convention supersedes or modifies the Extradition Treaty. Neither of these contentions survives analysis. Under the Extradition Treaty, "persons shall be delivered up ... for prosecution when they have been charged with ... any of the following offenses: 1. Murder.... 3. Malicious wounding; inflicting grievous bodily harm." 612 F.Supp. at 559. In this case, Israel charged petitioner "with having 'murdered tens of thousands of Jews and non-Jews' while operating the gas chambers to exterminate prisoners at Treblinka ... and that the acts charged were committed 'with the intention of destroying the Jewish people and to commit crimes against humanity.'" *Demjanjuk v. Petrovsky*, 776 F.2d 571, 578 (6th Cir.1985). Although these allegations would certainly appear sufficient to support a charge of genocide, "the United States Attorney ... has requested Demjanjuk's extradition only for the crimes of murder, manslaughter and malicious wounding; inflicting grievous bodily harm," and the district court found "that Israel seeks Demjanjuk's extradition for trial on charges of murder, pursuant to sections 1(b) and 2(f) of the Israeli Statute, and that those charges are recognized as crimes under Article II of the Treaty." 612 F.Supp. at 560. Indeed, the district court noted "that Demjanjuk is non-extraditable for any of the other charges included in the [Warrant Request and Arrest Warrant]." *Id.*

Until the United States and Israel amend the Extradition Treaty to include the crime of genocide and make genocide a crime under their respective domestic laws, genocide does not provide a basis for extradition. The Convention does not purport to interfere with extraditions for lesser included, or different, offenses pursuant to pre-existing extradition treaties. Rather, it provides guidelines when extradition for genocide is sought.

In short, the Genocide Convention does not affect the extradition of petitioner. Since genocide is not the basis for this extradition, the Genocide Convention, even if it were now law, would be irrelevant.

IV.

[7, 8] Petitioner also requests a stay of execution of the extradition warrant. In order to grant a stay request, I must find

that petitioner has made a strong showing on the merits, that absent immediate relief, petitioner will suffer irreparable harm, that other parties would not be substantially harmed by the issuance of a stay, and that the public interest supports issuance of a stay. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir.1958); *see also Cuomo v. United States Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C.Cir.1985); *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977). While the imminent extradition of petitioner to Israel may qualify as a threat of irreparable harm, petitioner, as shown above, fails to demonstrate a likelihood of success on the merits. A stay of the execution of the extradition warrant is therefore unjustified.

V.

Petitioner has failed to demonstrate that he is entitled to the relief requested. The Genocide Convention is not in effect, and were it in effect, it would be irrelevant to the extradition in question. Petitioner's request for a writ of habeas corpus and for a hearing and stay are, therefore, denied.

ARROW AIR, INC., Petitioner,

v.

Elizabeth Hanford DOLE, Secretary of Transportation, Respondent,

Professional Association Travel Services, Inc., Rich International Airways, Inc., Spantax, S.A., and United Airlines, Inc., Intervenors.

No. 84-1438.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 24, 1985.

Decided Feb. 28, 1986.

As Amended April 30, 1986.

Charter air carrier challenged Civil Aeronautics Board statement of regulations requiring carrier to provide return transportation for passengers who had paid for return transportation. The Court of Appeals, Markey, Chief Judge, sitting by designation, held that: (1) the CAB action was interpretative, rather than substantive, and (2) action was reasonable.

Affirmed.

1. Aviation ⇐101

Evidence was sufficient to find that action of CAB was an interpretation of existing regulations requiring payments by charter carriers for passenger return trips, rather than a new rule making, when it served primarily to remind carriers of repeatedly articulated preexisting duty, provided sufficient, reasoned analysis of regulations as shown by purpose and legislative history and consistent policy of protecting passengers and administrative and practical impact did not serve to create any new law, rights or duties. Federal Aviation Act of 1958, § 1006, as amended, 49 U.S.C.A. § 1486; 5 U.S.C.A. § 553(b, c).

2. Aviation ⇐101

Civil Aeronautics Board interpretation of regulations to require that charter carriers provide return trips to passengers for which passengers have paid, regardless of status of payments by charter operator, was not unreasonable in light of Board's elaborate prepayment and escrow provisions, double tiered regulatory scheme and reasonable explanation. 5 U.S.C.A. § 553(b, c).

Petition for Review of an Order of the Civil Aeronautics Board.

O.D. Ozment, with whom Lawrence D. Wasko, Washington, D.C., was on the brief, for petitioner.

Alice Owens, Atty., Dept. of Trans., Washington, D.C., of the Bar of the Supreme Court of Alabama, pro hac vice, by special leave of Court, with whom J. Paul McGrath, Asst. Atty. Gen., Catherine G. O'Sullivan and Edward T. Hand, Attys., Dept. of Justice, Kenneth N. Weinstein, Deputy Asst. Gen. Counsel and Robert D. Young, Atty., Dept. of Trans., Washington, D.C., were on brief, for respondent. Thomas L. Day, Atty., Dept. of Trans., Washington, D.C., also entered an appearance for respondent.

Harold S. Boros, Gary B. Garofalo and Aaron A. Goerlich, Washington, D.C., were on brief for intervenors, Rich Intern. Airways, Inc. and Spantax, S.A.

Kenneth Berlin, Washington, D.C., was on brief for intervenor, United Airlines, Inc. John E. Keys, Jr., Washington, D.C., and Stephen P. Sawyer, Bentonville, Ark., also entered appearances for intervenor, United Airlines, Inc.

Marc A. Silverstein, Washington, D.C., was on brief, for intervenor, Professional Ass'n Travel Service, Inc.

Before WRIGHT and GINSBURG, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Appeals for the Federal Circuit.

Opinion for the Court filed by Chief Judge MARKEY.

MARKEY, Chief Judge:

Arrow Air, Inc. (Arrow) petitions for review of Civil Aeronautics Board (CAB) "Interpretation of Regulations Concerning Payment to Direct Air Carrier(s)," ER-1087 and SPR-194 (ER-1387), adopted and made effective August 17, 1984. *See* 49 Fed.Reg. 33,436 (Aug. 23, 1984).[1] We affirm.

I. BACKGROUND

A. *The Regulatory Background*

During the 1950s and 1960s, charter air travel was limited almost exclusively to members of "affinity groups," organizations permitted to charter aircraft for out-and-back-together (pro rata) transport of their members. *See* EDR-348 and SPDR-64, 43 Fed.Reg. 11,215, 11,215-16 (March 17, 1978).

CAB experimented with new charter packages in the late 1960s and early 1970s, applying restrictions intended "not only to maintain a legally sufficient distinction between charter and scheduled operations, but to protect scheduled carriers from the threat of excessive diversion of traffic to the new services." *Id.* at 11216. Because those restrictions proved onerous, unpopular, and largely unsuccessful, CAB gradually "liberalized" its regulatory policies.

The first authorized "nonaffinity charter" (Inclusive Tour Charter) required a seven-day stay and purchase of ground accommodations. *Id.* The second ("Travel Group Charter"), authorized in 1972, did not require a minimum-stay. CAB continued to require seat purchases 60 days before departure and a complex pricing formula. *Id.* Other innovations included the "One-stop-inclusive Tour Charter" in 1975 and the "Advance Booking Charter" (air-only) in 1976. *Id.* at 11,217.

As part of its 1972 charter reform, CAB promulgated proposed amendments to its economic regulations. The amendments of interest here required that direct air carriers (carriers), before performing one leg of a round-trip charter, "must require full payment of the total price or the posting of a satisfactory bond for full payment." *See* EDR-223, 37 Fed.Reg. 5,826, 5,826 (March 21, 1972); 14 C.F.R. §§ 207.13(b), 208.32(e), 212.10(b) and 214.14(b) (1972). CAB's stated purpose was to prevent passenger stranding:

> With the increase in the number of persons traveling abroad on charter trips, there have been instances in which persons participating in U.S.-originating

* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1982).

1. CAB, the originally named respondent in this case, ceased to exist on January 1, 1985 by operation of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, as amended by the Airline Deregulation Act of 1978, 92 Stat. 1705, and the Civil Aeronautics Board Sunset Act of 1984, 98 Stat. 1703 (Sunset Act). Under section 12(e) of the Sunset Act, 49 U.S.C. § 1556(e), a suit to which CAB is a party and relating to a transferred CAB function "shall be continued with the head of the federal agency to which the function is transferred." Accordingly, the Secretary of Transportation (Secretary) is substituted for CAB as respondent.

among various right-wing groups as "drifting" (a statement we have disposed of in the context of another allegation earlier, *see* page 1572, *supra*), asserted that Carto "organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa." The published sources relied upon by defendants support the assertion that Carto created this organization, and that its purpose was to "send[ ] American blacks back to Africa." They do not establish, however, that the proposal envisioned "forced deportation"—in fact, to the contrary, one of them asserted that Carto (overtly at least) only sought "voluntary" repatriation. While the latter detail reduces not at all the repugnant racism of the scheme, it is possible to be a racist without being guilty of the quite separate fault of advocating the forced deportation of United States citizens. It is the distinction between the actions of White Citizen Councils, during the worst days of the civil rights struggle, in subsidizing bus fares for blacks willing to emigrate from the South, and the action of groups such as the Ku Klux Klan in driving blacks out by physical force. As far as racism is concerned, there is no distinction between the two, but the latter contains an additional and quite distinct repugnancy. Since the published sources referred to by the defendants not only do not establish this point but to the contrary assert that Carto's scheme was formally for "voluntary" repatriation, we think it is a jury question whether this allegation, if false, was made with actual malice.

[15] We find that a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice. That article was the subject of a prior defamation action which was settled to Carto's satisfaction, a fact likely known to Bermant's editors, if not Bermant. Whether the particular statements relied on were false and whether the appellees were actually aware of that falsity are matters for a jury to determine. Allegation 19, the illustration suggesting that Carto emulated Hitler, and allegation 29, that Carto joined the singing of "Hitler's 'Horst Wessel Lied' " and delivered a speech in an attempt to emulate Hitler's style and charisma, were based solely on the *True* article. There is no other evidence that Carto emulates Hitler in appearance or in action, allegations the jury could find to be defamatory.

[16] We turn next to the five allegations based solely upon the conversation with Robert Eringer:

13. Statement that Carto "conducts his business by way of conference calls from a public telephone," which arguably suggests criminality;
14. Claim that in 1968 a Carto front organization "used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York" (since Liddy was later convicted of felony in connection with political activities, the allegation could be considered defamatory);
17. Illustration showing Carto secretly observing prospective employees through a one-way mirror;
23. One-way mirror allegation, in text;
27. Claim that a lead story in an issue of *The Spotlight* was a total hoax.

We find that a jury could reasonably conclude that Bermant made these allegations with a disregard for their truth or falsity that constituted actual malice. For one thing, there is only Bermant's word for the fact that Eringer ever said anything that supports the statements. The same was true for the statements, discussed earlier, attributed to Bartell and Suall—but as we noted, *see* pages 1576–1577, *supra*, those individuals were present at known locations in this country and could have been deposed by the plaintiffs, whereas the mysterious Mr. Eringer was thought to be somewhere in England. Moreover, Bermant's dealings with Eringer display a much lesser degree of care, despite the scurrilous allegations for which he is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto's operations; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he did not care whether Eringer was reliable. These actions came close to the hypothetical case of actual malice the Supreme Court described in *St. Amant*: a story "based wholly on an unverified anonymous telephone call." 390 U.S. at 732, 88 S.Ct. at 1326. Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer's assertions, should have gone to the jury.

* * * * * *

We affirm the District Court's grant of summary judgment as to all claims of defamation except those addressed in Part V of this opinion. As to the latter, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

James L. DRONENBURG, Appellant,

v.

Vice Admiral Lando ZECH, Chief of Naval Personnel, et al.

No. 82-2304.

United States Court of Appeals, District of Columbia Circuit.

Nov. 15, 1984.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 81-00933), Oliver Gasch, Judge.

Stephen V. Bomse, Leonard Graff and Calvin Steinmetz, Washington, D.C., were on the suggestion for rehearing en banc filed by appellant.

Charles Lister and Margaret R. Alexander, Washington, D.C., were on the supporting petition for amicus curiae the American Civil Liberties Union of the National Capital Area.

Abby R. Rubenfeld, Evan Wolfson, Sarah Wunsch and Anne E. Simon, New York City, were on the joint brief of amicus curiae LAMBDA Legal Defense and Education Fund, Inc., et al., in support of the suggestion for rehearing en banc.

Before ROBINSON, Chief Judge, WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

ORDER

On Appellant's Suggestion for Rehearing *En Banc*

PER CURIAM.

The Suggestion for Rehearing *en banc* of Appellant, and the briefs *amici curiae* in support thereof, have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court, *en banc*, that the aforesaid Suggestion for rehearing *en banc* is denied.

Opinion dissenting from denial of suggestion to hear case *en banc* filed by Chief Judge SPOTTSWOOD W. ROBINSON, III, and Circuit Judges WALD, MIKVA and HARRY T. EDWARDS.

Statements of Circuit Judges GINSBURG and STARR are attached. Also attached is a statement of Circuit Judge BORK, joined by Circuit Judge SCALIA.

SPOTTSWOOD W. ROBINSON, III, Chief Judge; WALD, MIKVA and HARRY T. EDWARDS, Circuit Judges, dissenting from denial of suggestion to hear case en banc:

We would vote to vacate the decision of the panel and to rehear the matter before the court *en banc*. This is a case of extreme importance in both a practical and a jurisprudential sense. For reasons discussed below, we do not think that *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *aff'g mem.* 403 F.Supp. 1199 (E.D.Va.1975), is controlling precedent here. Moreover, we are deeply troubled by the use of the panel's decision to air a revisionist view of constitutional jurisprudence.

The panel's extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court. The *ratio decidendi* of the panel decision is fairly well stated in the last paragraph of the opinion. Jurists are free to state their personal views in a variety of forums, but the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court.

We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint. Regardless whether it is the proper role of lower federal courts to "create new constitutional rights," *Dronenburg v. Zech*, 741 F.2d 1388, at 1396 (D.C. Cir.1984), surely it is not their function to conduct a general spring cleaning of constitutional law. Judicial restraint begins at home.

We object most strongly, however, not to what the panel opinion does, but to what it fails to do. No matter what else the opinions of an intermediate court may properly include, certainly they must still apply federal law as articulated by the Supreme Court, and they must apply it in good faith. The decisions of that Court make clear that the constitutional right of privacy, whatever its genesis, is by now firmly established. An intermediate judge may regret its presence, but he or she must apply it diligently. The panel opinion simply does not do so. Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts. Such an approach to "interpretation" is as clear an abdication of judicial responsibility as would be a decision upholding all privacy claims the Supreme Court had not expressly rejected.

We find completely unconvincing the suggestion that *Doe v. Commonwealth's Attorney* controls this case. In *Doe*, the Supreme Court affirmed without opinion a three-judge district court's dismissal of a pre-enforcement constitutional challenge to a state criminal statute. Dronenburg, by contrast, challenges the constitutionality of his discharge pursuant to a military regulation not expressly authorized by statute. To hold Dronenburg's claims hostage to a one-word summary affirmance disregards the well-established principle that such a disposition by the Supreme Court decides the issue between the parties on the narrowest possible grounds. *See Mandel v. Bradley*, 432 U.S. 173, 176–77, 97 S.Ct. 2238, 2240–41, 53 L.Ed.2d 199 (1977) (per curiam); *Fusari v. Steinberg*, 419 U.S. 379, 391–92, 95 S.Ct. 533, 540–41, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring). Moreover, the Court has clearly indicated that the *Doe* issue remains open. *See Carey v. Population Services International*, 431 U.S. 678, 688 n. 5, 694 n. 17, 97 S.Ct. 2010, 2018 n. 5, 2021 n. 17, 52 L.Ed.2d 675 (1977) ("[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."); *New York v. Uplinger*, — U.S. —, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984) (dismissing certiorari as improvidently granted).

Even were we convinced by Judge Ginsburg's well-intentioned attempt to justify the panel decision as a simple application of *Doe*, we would still vote to vacate the opinion. The opinion purports to speak for the court throughout the text, and we cannot indulge its twelve-page attack on the right of privacy as a harmless exposition of a personal viewpoint. *Cf. Dronenburg*, at 1396 n. 5.

In its eagerness to address larger issues, the panel fails even to apply seriously the basic requirement that the challenged regulation be "rationally related to a permissible end." There may be a rational basis for the Navy's policy of discharging all homosexuals, but the panel opinion plainly does not describe it. The dangers hypothesized by the panel provide patently inadequate justification for a ban on homosexuality in a Navy that includes personnel of both sexes and places no parallel ban on all types of heterosexual conduct. In effect, the Navy presumes that any homosexual conduct constitutes cause for discharge, but it treats problems arising from heterosexual relations on a case-by-case basis giving fair regard to the surrounding circumstances. This disparity in treatment calls for serious equal protection analysis.

We intimate no view as to whether the constitutional right of privacy encompasses a right to engage in homosexual conduct, whether military regulations warrant a relaxed standard of review, or whether the Navy policy challenged in this case is ultimately sustainable. What we do maintain is that the panel failed to resolve *any* of these compelling issues in a satisfactory manner. Because we believe that the panel substituted its own doctrinal preferences for the constitutional principles established by the Supreme Court, we would vacate the decision of the panel and hear the case anew.

1. The dissenting opinion bends "judicial restraint" out of shape in suggesting that it is improper for lower federal courts ever to propose "spring cleaning" in the Supreme Court. In my view, lower court judges are not obliged to cede to the law reviews exclusive responsibility for indicating a need for, and proposing the direction of, "further enlightenment from Higher Authority." *See United States v. Martino*, 664 F.2d 860, 881 (2d Cir.1981) (Oakes, J., concurring). It is a view on which I have several times acted. *See, e.g., Mosrie v. Barry*, 718 F.2d 1151, 1162–63 (D.C.Cir.1983) (concurrence questioning consistency of *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), with prior precedent on the concept of liberty sheltered by due process); *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 953–55 (D.C.Cir.1982) (concurrence questioning cogency of Supreme Court precedent on "zone of interests" test for determining standing to sue); *see also American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 49 (D.C.Cir.1983) (Wald, J.) (citing, *inter alia*, *Copper & Brass*); *United States v. Ross*, 655 F.2d 1159, 1193–94 (D.C.Cir. 1981) (Wilkey, J., dissenting) (questioning seamlessness of web woven by *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), and its precursors), *rev'd*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

GINSBURG, Circuit Judge:

In challenging his discharge for engaging in homosexual acts in a Navy barracks, appellant argued that the conduct in question falls within the zone of constitutionally protected privacy. The panel held that, either because of the binding effect of the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), *summarily aff'g* 403 F.Supp. 1199 (E.D.Va.1975), or on the basis of principles set forth in other Supreme Court decisions, the Navy's determination could not be overturned. I agree with the first basis of that holding. *See Hicks v. Miranda*, 422 U.S. 332, 344–45, 95 S.Ct. 2281, 2289–90, 45 L.Ed.2d 223 (1975).

It is true that, in its discussion of the alternative basis, the panel opinion airs a good deal more than disposition of the appeal required.[1] Appellant and amici, in suggesting rehearing en banc, state grave concern that the panel opinion's "broad scope" creates correspondingly broad law for the circuit and, in so doing, sweeps away prior landmark holdings and divergent analyses.

The concern is unwarranted. No single panel is licensed to upset prior panel rul-

ings, landmark or commonplace, or to impose its own philosophy on "the court." The panel in this case, I am confident, had no design to speak broadly and definitively *for the circuit.* I read the opinion's extended remarks on constitutional interpretation as a commentarial exposition of the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of "the court."

Because I am of the view that the Supreme Court's disposition in *Doe* controls our judgment in this case, and that the panel has not tied the court to more than that, I vote against rehearing the case en banc.

Statement of Circuit Judge BORK, joined by Circuit Judge SCALIA.

BORK, Circuit Judge:

The dissent from the court's denial of the suggestion of rehearing en banc undertakes to chide the panel for criticizing the Supreme Court's right to privacy cases and for failing to extract discernible principle from those cases for application here. In rather extravagant terms the dissent accuses the panel of such sins as attempting to "wipe away" Supreme Court decisions, of "throw[ing] down gauntlets" to that Court, and "conduct[ing] a general spring cleaning of constitutional law." While rhetorical excess may be allowed to pass, we think that underlying it in this instance are serious misunderstandings that require a response.[1]

In the first place, the dissent overlooks both what we actually did and the necessity for it. The appellant cited a series of cases—*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); and *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977)—which he claimed established a privacy right to engage in homosexual conduct. It was, therefore, essential that the panel examine those decisions to determine whether they did enunciate a principle so broad. We quoted the pivotal language in each case and concluded that no principle had been articulated that enabled us to determine whether appellant's case fell within or without that principle. In these circumstances, we thought it improper for a court of appeals to create a new constitutional right of the sort appellant sought. That much is certainly straightforward exegesis. The dissenters appear to be exercised, however, because the conclusion that we could not discover a unifying principle underlying these cases seems to them an implicit criticism of the Supreme Court's performance in this area. So it may be, but, if so, the implied assessment was inevitable. It is difficult to know how to reach the conclusion that no principle is discernible in decisions without seeming to criticize those decisions. Had our real purpose been to propose, as the dissent says, that those cases be eliminated from constitutional law, we would have engaged in a much more extensive analysis than we undertook. As it was, we said no more than we thought required by the appellant's argument.

Unless the dissent believes that we are obliged to dissemble, enunciating a unifying principle where we think none exists, then its only criticism must be with the adequacy of our analysis rather than our bona fides. That criticism, we may note, would be a good deal more persuasive if the dissent set forth (as it conspicuously did not) the unifying principle that we so obviously overlooked.

Contrary to the dissent's assertion, moreover, the panel opinion explained the rational basis for the Navy's policy with respect to overt homosexual conduct. Slip op. at 20–21. We cannot take seriously the dissent's suggestion that the Navy may be constitutionally required to treat heterosexual conduct and homosexual conduct as either morally equivalent or as posing equal dangers to the Navy's mission. Relativism in these matters may or may not be an arguable moral stance, a point that we as a court of appeals are not required to address, but moral relativism is hardly a constitutional command, nor is it, we are certain, the moral stance of a large majority of naval personnel.

Though we think that our analysis of the privacy cases was both required and accurate, we think it worth addressing the rather curious version of the duties of courts of appeals that the dissent urges. It is certainly refreshing to see "judicial restraint" advocated with such ardor, but we think the dissent misapprehends the concept. "Judicial restraint" is shorthand for the philosophy that courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance. That philosophy does not even remotely suggest that a court may not offer criticism of concepts employed by a superior court. Some very eminent jurists have done just that and have thereby contributed to the growth and rationality of legal doctrine. *See, e.g., Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir.1970) (Friendly, J.) (criticizing Supreme Court cases holding professional baseball exempt from federal antitrust laws); *United States v. Dennis*, 183 F.2d 201, 207–212 (2d Cir.1950) (L. Hand, J.), *aff'd*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) (criticizing Supreme Court's explication and application of the "clear and present danger" test, and proposing a reformulation of that test which the Court proceeded to approve, 341 U.S. at 510, 71 S.Ct. at 867); *United States v. Roth*, 237 F.2d 796, 801 (2d Cir.1956) (Frank, J., concurring) (criticizing the Supreme Court's decisions affirming the constitutionality of an obscenity statute as overlooking a variety of historical, sociological, and psychological grounds for calling the constitutionality of the statute into question). *See also* Arnold, *Judge Jerome Frank*, 24 U.Chi.L.Rev. 633, 633 (1957) ("When forced by *stare decisis* to reach what he considered an undesirable result [Judge Frank] would write a concurring opinion analyzing the problem and plainly suggesting that either the Supreme Court or Congress do something about it. It was a unique and useful technique whereby a lower court judge could pay allegiance to precedent and at the same time encourage the processes of change."). None of the judges mentioned could be characterized as lacking judicial restraint.

The judicial hierarchy is not, as the dissent seems to suppose, properly modelled on the military hierarchy in which orders are not only carried out but accepted without any expression of doubt. Law is an intellectual system and courts are not required to approve uncritically any idea advanced by a constitutionally superior court. Lower court judges owe the Supreme Court obedience, not unquestioning approval. Without obedience by lower courts, the law would become chaos. Without reasoned criticism, the law would become less rational and responsive to difficulties. The fact that criticism may come from within the judicial system will often make it more valuable rather than less. We say this,

1. The dissent also objects to our reliance on the Supreme Court's summary affirmance, in *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), of a district court judgment that upheld a state statute making it a criminal offense to engage in private consensual homosexual conduct. Since the Navy's regulation in this case is if anything a less drastic restriction on the liberty of homosexuals than the statute in *Doe*, it must follow—on any conceivable rationale that could be given for *Doe*—that the regulation is constitutional. The dissent tries to evade this straightforward analysis by relying on the Court's suggestion in *Carey v. Population Services International*, 431 U.S. 678, 694 n. 17, 97 S.Ct. 2010, 2021 n. 17, 52 L.Ed.2d 675 (1977), that the *Doe* issue remains open. It is true in one sense that the issue remains open—a summary affirmance does not foreclose full consideration of the issue by the Supreme Court. That is all the language from *Carey* suggests. But it was settled in *Hicks v. Miranda*, 422 U.S. 332, 344–45, 95 S.Ct. 2281, 2289–90, 45 L.Ed.2d 223 (1975), that summary affirmances by the Supreme Court *are* fully binding on the lower federal courts, and *Carey* does not even hint otherwise. Hence *Carey* cannot justify the dissent's refusal to follow *Doe*.

however, only to clarify the question of the proper relationship between inferior and superior courts and more for its application to future cases than to this one. In the present case, as we have said, any criticism the dissent may believe it detects in the panel opinion was at most implicit and inseparable from the analysis required of us.

STARR, Circuit Judge:

It is not the province of the lower federal courts to chide the Supreme Court for decisions that, in the considered view of federal judges, may be ill-reasoned or misguided. It is our bounden duty, whatever our own views of the matter may be, to follow in good faith applicable precedent, no matter how disagreeable that precedent might be.

But in my judgment, the panel in its opinion for the court has simply not strayed from this elementary judicial obligation. To the contrary, the panel's moving beyond *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), to examine more broadly the Supreme Court's teachings on the right of privacy, beginning with *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), seems not only appropriate but necessary to treat dispassionately and fairly the constitutional claims advanced by Mr. Dronenburg.

And I am satisfied that the panel has rightly analyzed the applicable materials. It simply cannot seriously be maintained under existing case law that the right of privacy extends beyond such traditionally protected areas as the home or beyond traditional relationships—the relationship of husband and wife, or parents to children, or other close relationships, including decisions in matters of childbearing—or that the analytical doctrines enunciated by the Court lead to the conclusion that government may not regulate sexually intimate consensual relationships. In our federal system, governments indisputably have done so for two centuries in a variety of ways that seem to have gone, until more recent times, utterly unquestioned. While bright lines in the law of privacy are difficult for the most earnestly conscientious judges to discern, the teachings and doctrines which we thus far have to guide our way in this troubling area suggest that the result here is entirely correct—a result that can be reached without resort to a single dissenting opinion from one or more members of the Supreme Court concerned by the legitimacy of creating judge-made rights, as opposed to rights clearly and broadly enumerated at the Founding. *Goldman v. Secretary of Defense*, 739 F.2d 657 (D.C.Cir.1984) (Starr, J., dissenting from denial of suggestion to hear case *en banc*).

KEY NUMBER DIGEST

ADMINISTRATIVE LAW AND PROCEDURE

IV. POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS AND AGENTS.

(C) RULES AND REGULATIONS.

⇐182. Nature and scope.

C.A.Cal. 1984. In determining whether rule is substantive or interpretive for purposes of the Administrative Procedure Act, substantive rules are rules which create law and are usually implementary to an existing law, incrementally imposing general, extrastatutory obligations pursuant to authority properly delegated by the legislature, while interpretive rules merely clarify or explain existing law or regulations and go more to what the administrative officer thinks the statute or regulation means. 5 U.S.C.A. § 553(b), (b)(A), (d), (d)(2).—Alcaraz v. Block, 746 F.2d 593.

⇐394. —— Notice; necessity.

C.A.Cal. 1984. Exceptions to Administrative Procedure Act's notice and comment provisions are narrowly construed and only reluctantly countenanced but, while agency must carefully follow notice and comment law even though self-adopted in situations otherwise exempted from the Act, congressional policy for interpreting good cause extremely narrowly does not operate in those situations, although agency may not use "good cause" to manipulate procedures to its own uses. 5 U.S.C.A. §§ 552(a)(2), 553.—Alcaraz v. Block, 746 F.2d 593.

⇐413. —— Administrative construction.

C.A.D.C. 1984. Interpretation by the FCC of its own policies and regulations is entitled to great deference.—National Ass'n of Regulatory Utility Comrs v. F.C.C., 746 F.2d 1492.

Deference to administrative interpretation is even more clearly in order when construction of an administrative regulation rather than a statute is in issue.—Id.

A court must necessarily look to the administrative construction of a regulation if the meaning of the words used is in doubt.—Id.

Administrative interpretation of administrative regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation.—Id.

⇐416. Effect.

C.A.9 1984. Agencies must comply with their own regulations.—Confederated Tribes and Bands of Yakima Indian Nation v. F.E.R.C., 746 F.2d 466.

⇐419. —— Retroactivity.

C.A.2 1984. In determining whether to give retroactive effect to new rules adopted in course of agency adjudication, court must balance desirable effects of application of new rule against the possible unfairness sustained by litigant.—N.L.R.B. v. Niagara Mach. & Tool Works, 746 F.2d 143.

(D) HEARINGS AND ADJUDICATIONS.

⇐461. —— Admissibility.

C.A.9 1984. In the absence of ambiguity, Federal Energy Regulatory Commission must ascertain the meaning of a contract without resort to parol or extrinsic evidence; contract is not ambiguous merely because parties disagree on its interpretation.—Pacific Gas and Elec. Co. v. F.E.R.C., 746 F.2d 1383.

⇐466. Depositions.

C.A.9 1984. Extent of discovery to which party to an administrative proceeding is entitled is primarily determined by particular agency; rules of civil procedure are inapplicable and Administrative Procedures Act does not provide expressly for discovery. 5 U.S.C.A. § 551 et seq.—Pacific Gas and Elec. Co. v. F.E.R.C., 746 F.2d 1383.

V. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS.

(A) IN GENERAL.

⇐668. —— Persons aggrieved or affected.

C.A.7 1984. A person is aggrieved within meaning of the Administrative Procedure Act for standing purposes if he alleges that he has or will sustain some actual or threatened injury in fact resulting from challenged agency acts and the alleged injury was to an interest arguably within zone of interests protected or regulated by the statute in question. 5 U.S.C.A. § 551 et seq.—Hartigan v. Federal Home Loan Bank Bd., 746 F.2d 1300.

(B) DECISIONS AND ACTS REVIEWABLE.

⇐701. In general.

C.A.7 1984. Under the Administrative Procedure Act, an administrative decision is immune from judicial review only if review is expressly precluded by statute or if the agency's action is committed to agency discretion by law; this exception is a narrow one and there is a presumption in favor of judicial review. 5 U.S.C.A. § 701(a).—Hartigan v. Federal Home Loan Bank Bd., 746 F.2d 1300.

The "committed to agency discretion" exception to judicial review of administrative decisions arises only when the statute is drawn in such broad terms that in a given case there is no law to apply. 5 U.S.C.A. § 701(a).—Id.

(D) SCOPE OF REVIEW IN GENERAL.

⇐749. Presumptions.

C.A.7 1984. Under the Administrative Procedure Act, an administrative decision is immune

James L. DRONENBURG, Appellant,

v.

Vice Admiral Lando ZECH, Chief of Naval Personnel, et al.

No. 82-2304.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 29, 1983.

Decided Aug. 17, 1984.

Rehearing En Banc Denied Nov. 15, 1984.

Discharged Navy petty officer brought action seeking to enjoin discharge and an order for his reinstatement. The United States District Court for the District of Columbia, Oliver Gasch, J., rendered summary judgment for the Navy, and appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) District Court had subject-matter jurisdiction, and (2) Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection.

Affirmed.

Opinion on rehearing, D.C.Cir., 746 F.2d 1579.

1. Federal Courts ⇐181

District court had jurisdiction of action by discharged Navy petty officer challenging constitutionality of mandatory discharge for homosexual conduct. 5 U.S.C.A. § 702; 28 U.S.C.A. § 1331; U.S.C.A. Const.Amends. 1, 5, 14.

2. Courts ⇐96(3)

Supreme Court's summary disposition of a case constitutes a vote on the merits and as such is binding on lower federal courts.

3. Armed Services ⇐11, 22

The military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society.

4. Constitutional Law ⇐82(10), 242.1(3)

There is no constitutional right to engage in homosexual conduct and, hence, Navy's policy of mandatory discharge for homosexual conduct is not violative of any constitutional right to privacy or equal protection as unique needs of the military justify determination that homosexual conduct impairs its capacity to carry out its mission. U.S.C.A. Const.Amends. 1, 4, 5, 9, 14.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 81-00933).

Stephen V. Bomse, San Francisco, Cal., with whom Steven M. Block, Leonard Graff, San Francisco, Cal., and Calvin Steinmetz, Washington, D.C., were on the brief, for appellant.

William G. Cole, Atty., Dept. of Justice, Washington, D.C., of the Bar of the District of Columbia Court of Appeals, pro hac vice by special leave of the Court, with whom J. Paul McGrath, Asst. Atty. Gen., Anthony J. Steinmeyer, Richard A. Olderman, Attys., Dept. of Justice and Stanley S. Harris, U.S. Atty., Washington, D.C. (at the time the brief was filed), were on the brief, for appellees. Marc Johnston, Atty., Dept. of Justice, Washington, D.C., also entered an appearance for appellees.

Charles Lister and Arthur B. Spitzer, Washington, D.C., were on the brief, for amicus curiae urging remand.

Before BORK and SCALIA, Circuit Judges, and WILLIAMS,* Senior District Judge, United States District Court for the Central District of California.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

James L. Dronenburg appeals from a district court decision upholding the United States Navy's action administratively discharging him for homosexual conduct. Appellant contends that the Navy's policy of mandatory discharge for homosexual conduct violates his constitutional rights to privacy and equal protection of the laws. The district court granted summary judgment for the Navy, holding that private, consensual, homosexual conduct is not constitutionally protected. We affirm.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

I.

On April 21, 1981, the United States Navy discharged James L. Dronenburg for homosexual conduct. For the previous nine years he had served in the Navy as a Korean linguist and cryptographer with a top-security clearance. During that time he maintained an unblemished service record and earned many citations praising his job performance. At the time of his discharge Dronenburg, then a 27-year-old petty officer, was enrolled as a student in the Defense Language Institute in Monterey, California.

The Navy's investigation of Dronenburg began eight months prior to the discharge, in August, 1980, when a 19-year-old seaman recruit and student of the Language Institute made sworn statements implicating Dronenburg in repeated homosexual acts. The appellant, after initially denying these allegations, subsequently admitted that he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on the Navy base. On September 18, 1980, the Navy gave Dronenburg formal notice that it was considering administratively discharging him for misconduct due to homosexual acts, a violation of SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix ("J.A.") at 216, which provided in pertinent part, that

> [a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.[1]

On January 20 and 22, 1981, at a hearing before a Navy Administrative Discharge Board ("Board") Dronenburg testified at length in his own behalf, with counsel representing him. He again acknowledged engaging in homosexual acts in a Navy barracks.

The Board voted unanimously to recommend Dronenburg's discharge for misconduct due to homosexual acts. Two members of the Board voted that the discharge be characterized as a general one, while the third member voted that the discharge be an honorable one. The Secretary of the Navy, reviewing this case at appellant's request, affirmed the discharge but ordered that it be characterized as honorable. On April 20, 1981, the appellant filed suit in district court challenging the Navy's policy mandating discharge of all homosexuals. The district court granted summary judgment for the Navy.

II.

[1] As a threshold matter, we must dispose of appellees' contention that the district court lacked subject matter jurisdiction over this action. According to appellees, the doctrine of sovereign immunity precludes the bringing of this action except insofar as the Tucker Act permits damage suits in the Claims Court. Brief for Feder-

1. Discharge for homosexual conduct was not invariably mandatory. Instruction 1900.9C ¶ 6b (Jan. 20, 1978) provides that:

> A member who has solicited, attempted, or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances. Retention is to be permitted only if the aforesaid conduct is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the unit to which the member is assigned either at the time of the conduct or at the time of processing according to the alternatives set forth herein.

J.A. at 218. Moreover, the Secretary of the Navy retained the power to keep a person in service despite homosexual conduct on an ad hoc basis for reasons of military necessity.

These regulations have since been replaced by SEC/NAV Instruction 1900.9D (Mar. 12, 1981) which implements a Department of Defense Directive. J.A. at 219. The policy of 1900.9C, under which appellant was discharged, is continued in effect by 1900.9D.

al Appellees at 11–16. Appellees reason that the appellant's action is essentially one for damages; specifically, back pay against the government. The Claims Court, appellees allege, has exclusive jurisdiction over such actions where, as here, the amount is in excess of $10,000. In the alternative, appellees claim, appellant may waive the damages to the extent they exceed $10,000 and bring the suit in the district where Dronenburg resides, the Northern District of California. Brief for Federal Appellees at 15.

This circuit has held in a case remarkably similar to this one that the federal courts have jurisdiction to determine the legality and constitutionality of a military discharge. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 859 (D.C.Cir.1978). Matlovich, like the appellant here, challenged the Air Force's decision to discharge him based upon his homosexual activities. In vacating and remanding the determination to the district court, this court relied upon the "power and the duty [of the federal courts] to inquire whether a military discharge was properly issued under the Constitution, statutes, and regulations." 591 F.2d at 859, *citing Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958); *Van Bourg v. Nitze*, 388 F.2d 557, 563 (D.C.Cir.1967); *Hodges v. Callaway*, 499 F.2d 417, 423 (5th Cir.1974). We are bound by that prior determination and therefore are not free to refuse to hear this case on jurisdictional grounds.

We are further bound by another decision of this court holding that "the United States and its officers ... are [not] insulated from suit for injunctive relief by the doctrine of sovereign immunity." *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982). *See also Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C.Cir.1981). In *Schnapper*, the complainants alleged that certain officials of the Administrative Office of the United States Courts and the Register of Copyrights violated, among other things, various provisions of the Constitution, the old Copyright Acts, 17 U.S.C. § 105 (1976) and 17 U.S.C. § 8 (1970), and portions of the Communications and Public Broadcasting Acts. 667 F.2d at 106. The complaint sought injunctive and declaratory relief, as does the complaint here.[2] In finding that the District Court for the District of Columbia did in fact have jurisdiction, the court held that 5 U.S.C. § 702 was intended to waive the sovereign immunity of the United States in suits for injunctive relief. That section provides, in part, that

> [a]n action in a court of the United States seeking relief other that [sic] money damages and stating a claim that an agency or an employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief thereon denied on the ground that it is against the United States ....

5 U.S.C. § 702 (1982). In discussing the legislative history of this section, the court said:

> The legislative history of this provision could not be more lucid. It states that this language was intended "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a federal official ...." S.Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976).

Schnapper, 667 F.2d at 108. The court also noted that the Senate Report had expressly stated that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *Id., quoting* S.Rep. No. 996, 94th Cong., 2d Sess. 7–8 (1976). The *Schnapper* court concluded by stating its belief that "section 702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief." *Id.* Because no such statute has been pointed to by the appellees here, we are bound to take jurisdiction over this case.[3]

2. In his amended complaint, appellant eliminated any damages claim. Reply Brief of Appellant at 6 n. 6. Specifically, appellant seeks to have this court enjoin the Navy from discharging him and order his reinstatement. Complaint at 12; J.A. at 12.

III.

Appellant advances two constitutional arguments, a right of privacy and a right to equal protection of the laws. Resolution of the second argument is to some extent dependent upon that of the first. Whether the appellant's asserted constitutional right to privacy is based upon fundamental human rights, substantive due process, the ninth amendment or emanations from the Bill of Rights, if no such right exists, then appellant's right to equal protection is not infringed unless the Navy's policy is not rationally related to a permissible end. *Kelley v. Johnson*, 425 U.S. 238, 247–49, 96 S.Ct. 1440, 1445–47, 47 L.Ed.2d 708 (1976). We think neither right has been violated by the Navy.

A.

According to appellant, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and the cases that came after it, such as *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), have "developed a right of privacy of constitutional dimension." Appellant's Opening Brief on Appeal at 14–15. Appellant finds in these cases "a thread of principle: that the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body" except by the least restrictive means available and in the presence of a compelling state interest. *Id.* at 15. Given this principle, he urges, private consensual homosexual activity must be held to fall within the zone of constitutionally protected privacy. *Id.*

[2, 3] Whatever thread of principle may be discerned in the right-of-privacy cases, we do not think it is the one discerned by appellant. Certainly the Supreme Court has never defined the right so broadly as to encompass homosexual conduct. Various opinions have expressly disclaimed any such sweep, *see, e.g., Poe v. Ullman*, 367 U.S. 497, 553, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting from a decision that the controversy was not yet justiciable and expressing views on the merits later substantially adopted in *Griswold*). More to the point, the Court in *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), summarily affirmed a district court judgment, 403 F.Supp. 1199 (E.D.Va.1975), upholding a Virginia statute making it a criminal offense to engage in private consensual homosexual conduct. The district court in *Doe* had found that the right to privacy did not extend to private

3. We note that there has been some disagreement on the question whether 5 U.S.C. § 702 (1982) does in fact waive sovereign immunity in suits under 28 U.S.C. § 1331 (1982). The Second Circuit first held, as an alternative ground for a correct decision, that the 1976 amendments to § 702 "did not remove the defense of sovereign immunity in actions under [28 U.S.C.] § 1331." *Estate of Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir.1978). Later, however, another of that circuit's panels, one which included within it the author of the opinion in *Watson*, disagreed with that determination, *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 724 (2d Cir.1983), as have the Third, Fifth, Sixth and Ninth Circuits. *Jaffee v. United States*, 592 F.2d 712, 718–19 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir.1980), *rev'd on other grounds*, 456 U.S. 728, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982); *Warm v. Director, Dep't of Treasury*, 672 F.2d 590, 591–92 (6th Cir.1982) (per curiam); *Beller v. Middendorf*, 632 F.2d 788, 796–97 (9th Cir.), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1980). *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 346 (2d ed. Supp.1981) ("Since the Administrative Procedure Act does not itself confer jurisdiction, [the determination in *Watson*] would mean, would it not, that the amendments had no effect on immunity at all?").

whether to bear or beget a child." *Eisenstadt* itself does not provide any criteria by which either of those decisions can be made.

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), severely limited the states' power to regulate abortions in the name of the right of privacy. The pivotal legal discussion was as follows:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 [11 S.Ct. 1000, 1001, 35 L.Ed. 734] (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 [89 S.Ct. 1243, 1247, 22 L.Ed.2d 542] (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8–9 [88 S.Ct. 1868, 1872–1873, 20 L.Ed.2d 889] (1968), *Katz v. United States*, 389 U.S. 347, 350 [88 S.Ct. 507, 510, 19 L.Ed.2d 576] (1967), *Boyd v. United States*, 116 U.S. 616 [6 S.Ct. 524, 29 L.Ed. 746] (1886), *see Olmstead v. United States*, 277 U.S. 438, 478 [48 S.Ct. 564, 572, 72 L.Ed. 944] (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484–485 [85 S.Ct. at 1681–1682]; in the Ninth Amendment, *id.*, at 486 [85 S.Ct. at 1682] (Goldberg J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer v. Nebraska*, 262 U.S. 390, 399 [43 S.Ct. 625, 626, 67 L.Ed. 1042] (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 288] (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 [87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010] (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541–542 [62 S.Ct. 1110, 1113–1114, 86 L.Ed. 1655] (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453–454 [92 S.Ct. at 1038–1039]; *id.*, at 460, 463–465 [92 S.Ct. at 1041, 1043–1044] (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 [64 S.Ct. 438, 442, 88 L.Ed. 645] (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 [45 S.Ct. 571, 573, 69 L.Ed. 1070] (1925), *Meyer v. Nebraska*, *supra*.
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

410 U.S. at 152–53, 93 S.Ct. at 726–27. The Court nevertheless refused to accept the argument that the right to abort is absolute.

> The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. *The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.* The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 [25 S.Ct. 358, 49 L.Ed. 643] (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 [47 S.Ct. 584, 71 L.Ed. 1000] (1927) (sterilization).

Id. at 153–54, 93 S.Ct. at 727 (emphasis added). Thus, though the Court gave an illustrative list of privacy rights, it also denied that the right was as broad as the right to do as one pleases with one's body. Aside from listing prior holdings, the Court provided no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy.

Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), held unconstitutional yet another regulation of access to contraceptives on grounds of privacy. The New York statute required that distribution of contraceptives to persons over sixteen be only by a licensed pharmacist. That provision was held unconstitutional because no compelling state interest was perceived that could overcome "the teaching of *Griswold* . . . that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.* at 687, 97 S.Ct. at 2017. A compelling state interest was required "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." *Id.* at 688–89, 97 S.Ct. at 2018. Limiting distribution to licensed pharmacists significantly burdened that right. *Id.* at 689, 97 S.Ct. at 2018.[1]

These cases, and the suggestion that we apply them to protect homosexual conduct in the Navy, pose a peculiar jurisprudential problem. When the Supreme Court decides cases under a specific provision or amendment to the Constitution it explicates the meaning and suggests the contours of a value already stated in the document or implied by the Constitution's structure and history. The lower court judge finds in the Supreme Court's reasoning about those legal materials, as well as in the materials themselves, guidance for applying the provision or amendment to a new situation. But when the Court creates new rights, as some Justices who have engaged in the process state that they have done, *see, e.g., Doe v. Bolton*, 410 U.S. 179, 221–22, 93 S.Ct. 739, 762–63, 35 L.Ed.2d 201 (1973) (White, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 167–68, 93 S.Ct. 705, 733–34, 35 L.Ed.2d 147 (1973) (Stewart, J., concurring), lower courts have none of these materials available and can look only to what the Supreme Court has stated to be the principle involved.

In this group of cases, and in those cited in the quoted language from the Court's opinions, we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be

[1] The Court also struck down a provision of the law forbidding distribution of contraceptives to those less than 16 years old, but there was no majority rationale for this result and it would not advance our inquiry to discuss the various opinions offered.

said that none of these covers a right to homosexual conduct.

The question then becomes whether there is a more general principle that explains these cases and is capable of extrapolation to new claims not previously decided by the Supreme Court. It is true that the principle appellant advances would explain all of these cases, but then so would many other, less sweeping principles. The most the Court has said on that topic is that only rights that are "fundamental" or "implicit in the concept of ordered liberty" are included in the right of privacy. These formulations are not particularly helpful to us, however, because they are less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated. We would find it impossible to conclude that a right to homosexual conduct is "fundamental" or "implicit in the concept of ordered liberty" unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw.

In dealing with a topic like this, in which we are asked to protect from regulation a form of behavior never before protected, and indeed traditionally condemned, we do well to bear in mind the concerns expressed by Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494, 544, 97 S.Ct. 1932, 1958–59, 52 L.Ed.2d 531 (1977):

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Whatever its application to the Supreme Court, we think this admonition should be taken very seriously by inferior federal courts. No doubt there is "ample precedent for the creation of new constitutional rights," but, as Justice White said, the creation of such rights "comes nearest to illegitimacy" when judges make "law having little or no cognizable roots in the language or even the design of the Constitution." If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights,[5] we think it certain that lower courts should not do so. We have no guidance from the Constitution or, as we have shown with respect to the case at hand, from articulated Supreme Court principle. If courts of appeals should, in such

5. It may be only candid to say at this point that the author of this opinion, when in academic life, expressed the view that no court should create new constitutional rights; that is, rights must be fairly derived by standard modes of legal interpretation from the text, structure, and history of the Constitution. Or, as it has been aptly put, "the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground." J. Ely, *Democracy and Distrust* 2 (1980). These views are, however, completely irrelevant to the function of a circuit judge. The Supreme Court has decided that it may create new constitutional rights and, as judges of constitutionally inferior courts, we are bound absolutely by that determination. The only questions open for us are whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide.

circumstances, begin to create new rights freely, the volume of decisions would mean that many would evade Supreme Court review, a great body of judge-made law would grow up, and we would have "pre-empt[ed] for [ourselves] another part of the governance of the country without express constitutional authority." If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.

Turning from the decided cases, which we do not think provide even an ambiguous warrant for the constitutional right he seeks, appellant offers arguments based upon a constitutional theory. Though that theory is obviously untenable, it is so often heard that it is worth stating briefly why we reject it.

Appellant denies that morality can ever be the basis for legislation or, more specifically, for a naval regulation, and asserts two reasons why that is so. The first argument is: "if the military can defend its blanket exclusion of homosexuals on the ground that they are offensive to the majority or to the military's view of what is socially acceptable, then no rights are safe from encroachment and no minority is protected against discrimination." Appellant's Opening Brief on Appeal at 11–12. Passing the inaccurate characterization of the Navy's position here, it deserves to be said that this argument is completely frivolous. The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities. If a court refuses to create a new constitutional right to protect homosexual conduct, the court does not thereby destroy established constitutional rights that are solidly based in constitutional text and history.

Appellant goes further, however, and contends that the existence of moral disapproval for certain types of behavior is the very fact that [illegible] from regulating [illegible] matter of general constitutional principle [illegible] difficult to understand how an adult's election of a partner to share sexual intimacy is not immune from burden by the state as an element of constitutionally protected privacy. That the particular choice of partner may be repugnant to the majority argues for its vigilant protection—not its vulnerability to sanction." Appellant's Opening Brief on Appeal at 13. This theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason. We stress, because the possibility of being misunderstood is so great, that this deference to democratic choice does not apply where the Constitution removes the choice from majorities. Appellant's theory would, in fact, destroy the basis for much of the most valued legislation our society has. It would, for example, render legislation about civil rights, worker safety, the preservation of the environment, and much more, unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities. It is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality.[6] For these reasons, appellant's argument will not withstand examination.

[4] We conclude, therefore, that we can find no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one. We

6. At oral argument, appellant's counsel was pressed by the court concerning his proposition that the naval regulations may not permissibly be founded in moral judgments. Asked whether moral abhorrence could never be a basis for a regulation, counsel replied that it could not. Asked then about the propriety of prohibiting bestiality, counsel replied that that could be prohibited but on the ground of cruelty to animals. The objection to cruelty to animals is, of course, an objection on grounds of morality.

need ask, therefore, only whether the Navy's policy is rationally related to a permissible end. *See Kelley v. Johnson*, 425 U.S. 238, 247–49, 96 S.Ct. 1440, 1445–47, 47 L.Ed.2d 708 (1976). We have said that legislation may implement morality. So viewed, this regulation bears a rational relationship to a permissible end. It may be argued, however, that a naval regulation, unlike the act of a legislature, must be rationally related not to morality for its own sake but to some further end which the Navy is entitled to pursue because of the Navy's assigned function. We need not decide that question because, if such a connection is required, this regulation is plainly a rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces. To ask the question is to answer it. The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate. This very case illustrates dangers of the sort the Navy is entitled to consider: a 27-year-old petty officer had repeated sexual relations with a 19-year-old seaman recruit. The latter then chose to break off the relationship. Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction.

The Navy's policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the maintenance of "discipline, good order and morale[,] ... mutual trust and confidence among service members, ... insur[ing] the integrity of the system of rank and command, ... recruit[ing] and retain[ing] members of the naval service ... and ... prevent[ing] breaches of security." SEC/NAV 1900.9D (Mar. 12, 1981); J.A. at 219. We believe that the policy requiring discharge for homosexual conduct is a rational means of achieving these legitimate interests. *See Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir.), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1980). The unique needs of the military, "a specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974), justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission.

Affirmed.

John F. HARMON, Appellant,

v.

BALTIMORE & OHIO RAILROAD.

No. 83–1532.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 13, 1984.

Decided Aug. 17, 1984.

Railroad employee, who received benefits under the Longshoremen's and Harbor Workers' Compensation Act for injuries he sustained while repairing a hopper, or funnel, through which coal passed as it moved from railroad cars to the holds of barges and ships at railroad's coal pier, brought suit against the railroad under the Federal Employers' Liability Act. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., 560 F.Supp. 914, entered summary judgment in favor of railroad, and employee appealed. The Court of Appeals, Mikva, Circuit Judge, held that Longshoremen's and Harbor Workers' Compensation Act provided exclusive coverage for employee, precluding coverage for employee under the Federal Employers' Liability Act.

Affirmed.

1. Workers' Compensation ⇐262

An employee is covered by the Longshoremen's and Harbor Workers' Compensation Act only if he or she meets both the situs and status tests. Longshoremen's and Harbor Workers' Compensation Act §§ 2(3), 3(a), as amended, 33 U.S.C.A. §§ 902(3), 903(a).

2. Workers' Compensation ⇐262

Simple distinction between "traditional railroading tasks" and "traditional maritime tasks" is not the sole inquiry to be made in determining a railroad employee's status under the Longshoremen's and Harbor Workers' Compensation Act; declining to follow *Conti v. Norfolk & Western Ry. Co.*, 566 F.2d 890. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), as amended, 33 U.S.C.A. § 902(3).

3. Workers' Compensation ⇐262

Longshoremen's and Harbor Worker's Compensation Act provided exclusive coverage for railroad employee injured while repairing a hopper, or funnel, through which coal passed as it moved from railroad cars to the holds of barges and ships at railroad's coal pier, precluding coverage for employee's injuries under the Federal Employers' Liability Act. Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 2(3), 3(a), as amended, 33 U.S.C.A. §§ 901 et seq., 902(3), 903(a); Federal Employers Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 82-03093).

J. Michael Farrell, Washington, D.C., of the Bar of the District of Columbia Court of Appeals pro hac vice by special leave of the Court, with whom Kurt C. Rommel, Washington, D.C., was on the brief, for appellant.

George F. Pappas, Baltimore, Md., of the Bar of the Court of Appeals for Maryland pro hac vice by special leave of the Court, with whom Walter J. Smith, Jr., Washington, D.C., was on the brief, for appellee.

Before WRIGHT, MIKVA and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

A recurring problem in workers' compensation laws has been the coverage of maritime workers. Commencing in 1917, when the Supreme Court held that under certain circumstances states could not constitutionally provide compensation to injured maritime workers, *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), Congress, the courts, and the states have struggled to carve out rational areas for state and federal laws. The original "*Jensen* line", named after that 1917 case, held that the states could not cover longshoremen injured seaward of the water's edge. In 1927, after several unsuccessful attempts to extend state compensation remedies to injured maritime workers, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* (1982), to provide coverage for such precluded longshoremen and others similarly situated. That statute, significantly amended in 1972, has been intersected by other federal compensation laws. We here address the application of the LHWCA, as amended in 1972, to the facts in this case and the interface, if any, between that Act and the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (1982).

John Harmon, appellant, was employed by the Baltimore and Ohio Railroad Company (B & O) at its coal pier in Baltimore. He was injured while repairing a hopper, or funnel, through which coal passes as it

tinuing duty to periodically reexamine its deregulatory scheme and to make appropriate adjustments as needed;[85] and, of course, the courts remain open for future challenges should experience demonstrate serious shortcomings in its policies or achievements.[86]

VIII. Conclusion

[38] Our review of the ICC boxcar exemption decisions has led us to conclude that the Commission's general exemption of boxcar freight rates from regulation was amply reasoned and supported by the record. But we conclude, as well, that in exempting joint rates from regulation, the ICC failed to adequately consider the potential for large railroads with "market" power over a through route to appropriate profits which deservedly belong to small railroads that are co-participants with the large carrier in joint rates for that route. It is therefore certainly within our remedial discretion, and we think it appropriate, to vacate the ICC order to exempt boxcar freight rates from regulation only so far as it applies to joint rates. *See, e.g., Action on Smoking and Health v. Civil Aeronautics Board*, 699 F.2d 1209, 1212 n. 13 (D.C. Cir.1983) (vacating recision of prior regulation only to the extent the court found such rescission not adequately explained); *Monsanto Co. v. Kennedy*, 613 F.2d 947, 956 (D.C.Cir.1979) (remanding for FDA reconsideration of only that part of its decision that applied to levels of chemical in beverage containers as to which the agency had not generated data at the time of its initial decision). In so doing we are admittedly concerned that the resulting situation—in which joint rates remain regulated but other rates are not regulated—could cause a disequilibrium in the Commission's deregulation policy as well as in the transportation market, *i.e.*, shippers might tend in some cases to move away from using unregulated single carrier routes in favor of through routes, or vice-versa, or other dislocations in the boxcar freight market might ensue. Of course, any such predictable imbalances would presumably justify the ICC in promulgating temporary emergency rules to govern the situation until either the ICC reevaluates its exemption of joint rates in light of our holding today or until it can, under the notice and comment procedure of the Administrative Procedure Act, promulgate new permanent rules which reflect our holding. *See* 5 U.S.C. §§ 553(b)(B), 553(d)(3) (agency may for "good cause" issue rules without notice or public procedure); *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 554; *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C.Cir.1981). Such rules of course must avoid the problems we have identified in this opinion of large carriers abusing their power over small carrier co-participants in through routes. *ILGWU v. Donovan*, 733 F.2d 920 at 922 (D.C.Cir.1984) (court's "unambiguous mandate [may not be] blatantly disregarded by [agency issuing interim emergency orders]"). Other than this limitation, it is for the Commission, and not this court, to decide if interim rules are needed and if so what those rules should provide. *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 554; *cf. Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 800 (D.C.Cir.1983) (promulgation of order without notice and comment procedures under 5 U.S.C. § 553(b)(B) is proper only if the agency concludes there is an "emergency situation ... [where] delay would do real harm").

We have also concluded that the ICC car hire decision was a promulgation of a substantive rule, and not an exemption authorized by 49 U.S.C. § 10505(a) and therefore must be vacated. In addition, we find that the ICC relied on an improper view of its role in assuring that the Alaska Railroad's rates be "equal and uniform" and therefore vacate and remand for further consideration the rate exemption as applied to the Alaska Railroad. We find unpersuasive, however, petitioners' arguments that the general maximum rate exemption must be vacated as applied to Canadian-United States boxcar traffic, or that the valid portions of the order will allow undue discrimination against ports. Finally, we have considered other arguments raised by the parties, not explicitly addressed in this opinion, and find them without merit. For the reasons set forth above, this case is remanded to the Commission for proceedings consistent with this opinion.

It is so ordered.

85. *Telocator Network v. FCC, supra* note 20, 223 U.S.App.D.C. at 361 n. 191, 691 F.2d at 550 n. 191; *Public Serv. Comm'n v. FPC*, 151 U.S.App.D.C. 307, 317, 467 F.2d 361, 371 (1972); *National Ass'n of Theatre Owners v. FCC*, 136 U.S.App.D.C. 352, 361, 420 F.2d 194, 203 (1969), *cert. denied*, 397 U.S. 922, 90 S.Ct. 914, 25 L.Ed.2d 102 (1970); *American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633 (*en banc*), *cert. denied*, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966); see *National Broadcasting Co. v. United States*, 319 U.S. 190, 225, 63 S.Ct. 997, 1013, 87 L.Ed. 1344, 1367 (1943); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 173 U.S.App.D.C. 413, 421, 525 F.2d 630, 638, *cert. denied sub nom. National Ass'n of Radiotelephone Sys. v. FCC*, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976).

86. *Atchison, T. & S.F. Ry. v. ICC*, 188 U.S.App.D.C. 360, 377, 580 F.2d 623, 640 (1978); *American Airlines, Inc. v. CAB, supra* note 85, 123 U.S.App.D.C. at 320, 359 F.2d at 634; *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1072 (5th Cir.1975), *cert. denied sub nom. Chevron Oil Co. v. FPC*, 426 U.S. 941, 96 S.Ct. 2660, 49 L.Ed.2d 394 (1976). In *Public Serv. Comm'n v. FPC*, 167 U.S.App.D.C. 100, 511 F.2d 338 (1975), we engaged in precisely this type of reevaluation with respect to an agency order deregulating natural gas rates by providing for advance payment to gas producers. Although in 1972 we sustained the agency's effort as a "justifiable experiment in the continuing search for solutions to our nation's critical shortage of natural gas," *Public Serv. Comm'n v. FPC, supra* note 85, 151 U.S.App.D.C. at 317, 467 F.2d at 371, we later, in followup litigation again attacking the agency's action, struck it down because the agency had "failed to engage in 'meaningful review, analysis, and evaluation'" of the practical results of its experiment. *Public Serv. Comm'n v. FPC, supra*, 167 U.S.App.D.C. at 104, 511 F.2d at 342, quoting *Public Serv. Comm'n v. FPC, supra* note 85, 151 U.S.App.D.C. at 317, 467 F.2d at 371. See generally *American Pub. Gas Ass'n v. FPC*, 186 U.S.App.D.C. 23, 38-39, 567 F.2d 1016, 1031-1032 (1977).

Mary Pat LAFFEY, et al.,

v.

NORTHWEST AIRLINES, INC.,
Appellant,

Air Line Pilots Association, Non-Aligned Party. (Two Cases)

Mary Pat LAFFEY, et al., Appellants,

v.

NORTHWEST AIRLINES, INC.,

Air Line Pilots Association, Non-Aligned Party. (Two Cases)

Nos. 83-1033, 83-1034, 83-1167 and 83-1168.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 8, 1983.

Decided July 20, 1984.

In Title VII and Equal Pay Act case, in which an airline was found to have violated the latter Act by paying its stewardesses less than its pursers, the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., Chief Judge, 582 F.Supp. 280, resolved disputed matters. Appeal and cross appeal were taken. The Court of Appeals held that: (1) there was no basis for overturning the determination that the airline's purser/stewardess pay differential was based on sex or that a uniform cleaning allowance for men, but not for women, discriminated impermissibly on the basis of sex; (2) in view of the full and fair opportunity the airline had to litigate the issues of whether stewardesses and pursers performed "equal work," the measurement of back pay, oversights in the delineation of the Title VII class, and error in characterizing the Equal Pay Act violations as willful, the strong policy of repose precluded reconsideration; (3) the time frame for back pay accrual was Minnesota's two-year limitation on the recovery of wages under any federal or state

law; (4) the stewardesses were entitled to pre-Act longevity in calculating back pay for the relevant, post-Act time periods; (5) the district court properly declined to revisit the 1974 remedial order provision on the rate of prejudgment interest; and (6) stewardesses were entitled to postjudgment interest on the liquidated damages.

Affirmed in part, reversed in part and remanded with instructions.

1. Labor Relations ⇐1333

Employer's actual but erroneous belief that two jobs are in fact different does not wholly shelter employer from equal pay for equal work liability in that judges have discretion only to limit, not to eliminate, damages when employer, in "good faith," erroneously but reasonably believed that his conduct conformed to legal requirements. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), (d)(1)(iv), as amended, 29 U.S.C.A. § 206(d), (d)(1)(iv); Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260.

2. Labor Relations ⇐1333

Amendment providing that compensation differentiation "authorized by" Equal Pay Act shall not be unlawful employment practice under Title VII did not change governing law "equal pay for equal work regardless of sex" so as to exonerate employers who in fact failed to reward equal work with equal pay, so long as they honestly believed that jobs in question were in fact different. Fair Labor Standards Act of 1938, § 6(d)(1)(iv), as amended, 29 U.S.C.A. § 206(d)(1)(iv); Civil Rights Act of 1964, § 703(h), as amended, 42 U.S.C.A. § 2000e–2(h).

3. Labor Relations ⇐1333

Basing wages on "a bona fide job rating system," a sex-neutral objective measure, exemplifies legitimate employer conduct Congress envisioned as permissible use of other factors other than sex, but employer's mere belief, untested by any objective job rating system, that men and women are not engaging in equal work does not fall within what Congress envisioned as bona fide "other factor." Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

4. Labor Relations ⇐1333

Airline discriminated on basis of sex by providing male-only uniform cleaning allowance for cabin attendants and there was no need to consider average monetary value of overall benefit package in question to male and female employees because cleaning allowance was simply another supplement to male salaries. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

5. Federal Courts ⇐917

Airline could not relitigate issues of whether "equal work" was performed by its female stewardesses and male pursers and whether it could, as a matter of law, have "willfully violated" Equal Pay Act notwithstanding absence of iniquitous state of mind, based on argument that prior holdings were "clearly erroneous" and that adherence to law of the case would work manifest injustice where there were no truly "exceptional circumstances." Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

6. Labor Relations ⇐1333

Difference in supervisory responsibility between airline's male pursers and female stewardesses was not sufficient to justify unequal pay. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

7. Labor Relations ⇐1527

District court's finding that positions of male purser and female stewardess at airline were substantially equal for Equal Pay Act purposes was not contradicted by findings of fact. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

8. Labor Relations ⇐1535

District court's determination that airline's violation of Equal Pay Act was willful because employer consciously and voluntarily charted a course which turned out to be wrong was not clearly erroneous, rendering airline liable for a third of back pay. Portal-to-Portal Pay Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

9. Labor Relations ⇐1550

Airline, on third appeal in employment discrimination action, failed to establish any basis for abandoning district court's original back pay formula based on its claim that back pay for stewardesses should have been computed on basis of single "cabin attendant" classification, rather than based on actual "premium pay level" airline established for its male pursers. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

10. Federal Courts ⇐916

Airline waived any argument available with respect to its claim that formula for calculating back pay awards for stewardesses should have been based on average rates of pay of stewardesses and pursers, rather than higher rate of pay for male pursers, by not raising that issue on its first appeal of adverse judgment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

11. Federal Courts ⇐917

Airline failed to establish any basis for overturning law of the case with regard to Title VII and Equal Pay Act back pay awards to stewardesses based on its claim that purser pay included compensation directly traceable to "foreign flying" and that component should be excluded as "factor other than sex." Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

12. Federal Courts ⇐916, 917

Airline's attack on 1980 order and definition of Title VII class was barred by doctrines of waiver and law of the case where 1974 remedial order, issued long after cutoff date urged by airline, contained essentially the same open ended class definition as 1971 certification order, but airline did not test meaning of 1974 order as to stewardesses who had not received notice of class action in its appeal from that order. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

13. Federal Courts ⇐916

Airline waived its claim that district court erroneously expanded class of stewardesses who could recover back pay under Title VII by failing to raise that issue on its first appeal. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

14. Federal Courts ⇐916, 917

Where airline had opportunity on its first appeal of adverse judgment in Title VII class action to raise issue of status of two groups of class members, but failed to do so, its failure to raise argument constituted waiver and airline's subsequent attack on ruling denying airline's requested exclusions from class was barred by principles of waiver and law of the case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

15. Labor Relations ⇐1179

Minnesota's two-year limitation on recovery of wages under any federal or state law was applicable as limitation on back pay recovery by airline stewardesses employed by Minnesota airline in that three-year District of Columbia statutes relied on by district court were not designed to prevent sex discrimination or did not evince particular interest in preventing sex discrimination. D.C.Code 1981, §§ 12–301, 36–216; M.S.A. § 541.07(5); Civil Rights Act of 1964, § 706(d, e, g), as amended, 42 U.S.C.A. § 2000e–5(e), (f)(1), (g).

16. Labor Relations ⇐1535, 1545

District court's determination that airline did not have reasonable foundation for positive belief that in fact its policies of compensating stewardesses and male pursers complied with Equal Pay Act was not

clearly erroneous and, therefore, stewardesses were entitled to liquidated damages. Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260.

17. Labor Relations ⇐1542

Although stewardesses employed by airline received retroactive adjustment of their wages when collective bargaining agreement and negotiation for two years equalized stewardess and purser pay rates, airline was not relieved of its liquidated damages liability for period of negotiations during which pursers received, but stewardesses continued to await, higher pay to which they were entitled under Equal Pay Act. Portal-to-Portal Act of 1947, § 11, 29 U.S.C.A. § 260.

18. Labor Relations ⇐393

Railway Labor Act section requiring airline to maintain status quo during two-year pendency of contract negotiations did not preclude airline from immediately equalizing wages upward in accordance with judicial determination that existing wage disparity between pay of stewardesses and pursers violated Equal Pay Act. Fair Labor Standards Act of 1938, § 6(d)(2), as amended, 29 U.S.C.A. § 206(d)(2); Railway Labor Act, § 6, 45 U.S.C.A. § 156.

19. Labor Relations ⇐1535

In calculating amount of back pay due to stewardesses under Equal Pay Act and Title VII, stewardesses were entitled to longevity credit for their pre-Act service in that denying longevity credit for that service, when men were given such credit for doing the same work, would differentiate between similarly situated males and females on basis of sex. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

20. Federal Courts ⇐917

Under law of the case doctrine, district court properly declined to revise its prior ruling with respect to rate of prejudgment interest after it had been determined that 1974 remedial order in employment discrimination action was not final, which had effect of extending prejudgment period from 1974 through entry of final judgment in 1982.

21. Federal Courts ⇐953

Law of the case doctrine did not preclude district court from awarding post-judgment interest on liquidated damages under Equal Pay Act based on district court's 1974 ruling refusing to award post-judgment interest on prejudgment interest where liquidated damages were not awarded until 1980 and those damages were compensatory, rather than a substitute for prejudgment interest. 28 U.S.C.A. § 1961; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

22. Interest ⇐39(3)

Stewardesses who obtained awards of liquidated damages under Equal Pay Act were entitled to postjudgment interest on all elements of the judgment, including liquidated damages. 28 U.S.C.A. § 1961; Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

Appeals from the United States District Court for the District of Columbia (Civil Action No. 70-2111).

Phillip A. Lacovara, Washington, D.C., with whom William R. Stein, Washington, D.C., was on the brief for Northwest Airlines, Inc., appellant in Nos. 83-1033 and 83-1167 and appellee in Nos. 83-1034 and 83-1168.

Michael H. Gottesman, Washington, D.C., with whom Robert M. Weinberg and Jeremiah A. Collins, Washington, D.C., were on the brief for Laffey, et al., appellees in Nos. 83-1033 and 83-1167 and appellants in Nos. 83-1034 and 83-1168. Julia Penny Clark, Washington, D.C., also entered an appearance for Laffey, et al.

Before GINSBURG, BORK and STARR, Circuit Judges.

OPINION PER CURIAM

PER CURIAM

This Equal Pay Act Title VII class action concerns the former practices of Northwest Airlines (NWA) with regard to the employment of cabin attendants. Women employed by NWA in the all-female category "stewardess" received less pay than men in the all-male "purser" category. In addition, NWA required female cabin attendants to share double rooms on layovers while providing single rooms to male cabin attendants; it paid male attendants, but not females, a cleaning allowance for uniforms; and it imposed weight restrictions upon females only.[1]

The lawsuit challenging these practices commenced in the summer of 1970 and has been intensely litigated since its inception. District court adjudications were twice appealed at interlocutory stages; in response, panels of this court meticulously reviewed an extensive record. On November 30, 1982, the district court concluded all tasks within its charge and entered final judgment. NWA appealed and plaintiffs cross-appealed.

We affirm the challenged rulings in principal part. On the few points on which we do not uphold the district court's determinations, we specify, precisely, the required modification so that adjustments to the final judgment can be calculated without further adversarial contest. Our opinion thus serves as the court's closing chapter in this nearly fourteen-year-old controversy.

I. Background

A. *Prior Proceedings*

Trial of plaintiffs' multiple charges of NWA violations of the Equal Pay Act, 29 U.S.C. § 206(d) (1982), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. V 1981) (Title VII), commenced in late 1972 and concluded in early [illegible] In September [illegible] and concluded *Laffey v. Northwest Airlines, Inc.*, 366 F.Supp. 763 (D.D.C.1973) [hereafter, *1973 Findings*], the district court determined that NWA had violated the law in each of the respects alleged in the complaint. Of dominant importance to the monetary relief awarded plaintiffs, the district court found that stewardesses and men serving as pursers performed substantially equal work. The purser/stewardess salary differential, the less desirable layover accommodations for women, and the cleaning allowance limited to men, were held impermissible under both the Equal Pay Act and Title VII; the weight limits for women were declared unlawful under Title VII. In an April 1974 remedial order, *Laffey v. Northwest Airlines, Inc.*, 374 F.Supp. 1382 (D.D.C.1974) [hereafter, *1974 Remedial Order*], the district court decreed injunctive relief and specified back-pay computation formulas. Judgment pursuant to the April order was entered May 20, 1974.

Both sides appealed. In a painstaking opinion, released October 20, 1976, a panel of this court affirmed the district court "on all substantive questions of statutory infringement" and "uph[e]ld most but not all the [district] court's specifications on relief." *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 437 (D.C.Cir.1976) [hereafter, *Laffey I*]. NWA's petition for rehearing and suggestion for rehearing en banc were denied September 8, 1977; its petition for certiorari was denied February 21, 1978. 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792.

When the case returned to the district court, in March 1978, NWA moved for relief from 1974 injunctive provisions, which had been stayed pending appeal and petition for certiorari, requiring it to furnish female cabin attendants single rooms on

1. The practices cited in text were the predicate for monetary relief. Several other challenged practices were redressed solely by injunctive relief: restricting "purser" jobs to men alone; permitting male cabin attendants, but not females, to wear eyeglasses; permitting male attendants, but not females, to carry luggage of their own choice aboard flights; imposing flight arrangements under which male attendants, without regard to length of service, ranked as superior to female attendants aboard a plane; maintaining a shorter maximum height requirement for female cabin attendants than for males.

layovers and cleaning allowances for uniforms. The district court denied NWA's motion, and NWA appealed.

Again after careful review, on October 1, 1980, we affirmed the district court's order. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578 (D.C.Cir.1980) [hereafter, *Laffey II*]. In the process, we observed that the 1974 order, reviewed in *Laffey I*, did not qualify as a final judgment because the district court had not at that point completed its work and disassociated itself from the case. *Id.* at 583–84. We noted, however, that the 1974 adjudication, awarding extensive injunctive relief, was appealable of right under 28 U.S.C. § 1292(a)(1) (1982), and that "the permanence and pervasiveness of the order's injunctive provisions enabled review on the merits of all interrelated features of the order save those the District Court had reserved for future adjudication." *Id.* at 584 n. 49.

While clarifying that the 1974 district court adjudication was not a "final decision" within the meaning of 28 U.S.C. § 1291 (1982), we hastened to declare the district court "entirely right," *Laffey II*, 642 F.2d at 584, in declining NWA's request to modify the injunction; modification would have involved reopening issues already decided by that court and "laid to rest" when we affirmed the district court's directives in *Laffey I*. *Id.* at 584–85. We then stated with emphasis impossible to obscure that even if we were convinced of the error of a decision made on an earlier appeal in this litigation, we would adhere to the established "law of the case" absent extraordinary cause to depart from our precedent. *Id.* at 585–86. Pointedly, we cited the First Circuit's admonition against reconsideration "after denial of petitions for rehearing and certiorari." *Id.* at 585 & n. 58 (citing *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir.1965)).

The district court has now resolved all disputed matters in this protracted case. We approach the multiple issues raised by NWA and the three raised by plaintiffs mindful that "[i]f justice is to be served," *Laffey II*, 642 F.2d at 585, "[t]here must be an end to dispute." *Id.* (quoting *Legate v. Maloney*, 348 F.2d at 164, 166 (1st Cir. 1965)).

B. *Issues on Appeal*

We indicate here the order in which this opinion discusses the issues raised by the cross-appeals, and state, summarily, our disposition as to each issue.

1. NWA's Appeal

a. Alleging supervening Supreme Court decisions, NWA asks us to overturn i) the root determination that the purser/stewardess pay differential was based on sex, and ii) the already twice-reviewed determination that the cleaning allowance for men but not women discriminated impermissibly on the basis of sex. Discerning no clear change—indeed no change at all—in the governing law, we adhere to the law of the case on both issues.

b. Asserting a flaw in the determination that stewardesses and pursers performed "equal work," double faults in the measurement of backpay, oversights in the delineation of the Title VII class, and error in characterizing the Equal Pay Act violations as "willful," NWA urges alteration of prior dispositions on these questions. In view of the full and fair opportunity NWA had to litigate these issues in the district court and on appeal in *Laffey I*, we hold that "the strong policy of repose," *Laffey II*, 642 F.2d at 585, precludes consideration of NWA's earlier rehearsed arguments and more recent afterthoughts.

c. As to the Title VII back-pay accrual period, we adhere to the law of the case on the nonretroactivity of that statute's current two-year limitation. However, we modify the district court's specification of a three-year period borrowed from the District of Columbia's minimum wage law or general statute of limitations. Instead, we hold that, in the unique circumstances presented here, the time frame most appropriately borrowed is Minnesota's two-year limitation on "the recovery of wages ... under any federal or state law." Minn. Stat.Ann. § 541.09(5) (West Supp.1982–1983).

d. Reviewing the district court's award of liquidated damages under the Equal Pay Act, we conclude that guidance supplied in *Laffey I* was properly followed and sustain the determination in all respects.

2. Plaintiffs' Cross-Appeal

a. As to credit for service prior to the passage of the Equal Pay Act and Title VII, *Laffey I* instructed only a "look at the collective bargaining agreement" on remand to determine whether "longevity" rather than "seniority" controlled. 567 F.2d at 476. Our opinion did not contemplate stripping plaintiffs of the pre-Act experience credits that the district court initially allowed them for the limited purpose of calculating the backpay NWA owed for post-Act service. Failure to accord plaintiffs longevity credit for all their days of service to NWA as stewardesses, in determining their post-Act pay level, would impermissibly project into the post-Act period a sex-based differential. We therefore reverse the district court's post-*Laffey I* ruling on this point and instruct that court to recognize plaintiffs' pre-Act longevity in calculating backpay for the relevant, post-Act, time periods.

b. As to interest, the district court properly declined plaintiffs' invitation to revisit the 1974 remedial order provision on the rate of pre-judgment interest. However, no "law of the case" settled the question of post-judgment interest on liquidated damages. That issue ripened on remand after our *Laffey I* decision. Reviewing the district court's ruling on the merits, we reverse the determination and hold plaintiffs entitled to post-judgment interest on liquidated damages.

In sum, we instruct the district court on remand to 1) allow backpay under Title VII beginning two years, not three years, prior to the filing of the first EEOC charge; 2) credit plaintiffs with pre-Act longevity in calculating backpay due for post-Act service, and to check [illegible] on liquidated damages. [illegible] respects, we affirm the district court's dispositions.

II. Alleged Supervening Supreme Court Precedent

Laffey I affirmed district court determinations that the purser/stewardess pay differential, and the cleaning allowance for men's uniforms but not women's, violated the Equal Pay Act and Title VII. Supervening Supreme Court decisions, NWA maintains, reveal that those affirmations were wrong. NWA cites *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), as supervening precedent establishing that the purser/stewardess pay differential was lawful, and relies on *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), with regard to the cleaning allowance. Neither High Court decision, we conclude, alters the law earlier applied in this case. We therefore reaffirm *Laffey I* as the law of the case and of the circuit.[2]

A. *The Purser/Stewardess Pay Differential*

The alleged supervening decision, *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), resolved this "sole issue": whether female jail guards who did not prove their work equal in skill, effort, and responsibility to the work of male jail guards, and therefore failed to establish an Equal Pay Act violation, could nonetheless challenge their rate of pay as discriminatory under Title VII. 452 U.S. at 166 n. 8, 101 S.Ct. at 2246 n. 8. The Supreme Court answered "yes"; it held that despite complainants failure to satisfy the equal work standard, they could remain in court under Title VII on their charge that the County had set "the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of

2 A decision of one panel of this court may not be overruled by another panel; a panel's decision may be rejected only by the court en banc. *See Brewster v. Commissioner of Internal Revenue*, 607 F.2d 1369, 1373 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979); *United States v. Caldwell*, 543 F.2d 1333, 1369 n. 19 (D.C.Cir.1974) (citing cases), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976).

the jobs warranted." *Id.* at 166, 101 S.Ct. at 2246. Title VII, the Court explained, in contrast to the Equal Pay Act, does not bar "'claims of discriminatory undercompensation ... merely because [the female complainants] do not perform work equal to that of male [employees].'" *Id.* at 181, 101 S.Ct. at 2254.

In imaginative argument, NWA asks us to spy a silver lining for employers in *Gunther*. NWA urges that the Supreme Court, in the process of rejecting a proffered restricted reading of Title VII, enlarged the scope of the Equal Pay Act's residuary affirmative defense, which permits payment of different wages if "made pursuant to ... a differential based on any other factor other than sex."[3] For purposes of this argument, NWA concedes that pursers and stewardesses in fact performed "equal work" within the meaning of the Equal Pay Act.[4] But *grace à Gunther*, NWA contends,. an employer "who premises a wage differential on his determination that two jobs are different" escapes Equal Pay Act and Title VII liability, "even if that conclusion is later found to be mistaken." Brief for Northwest Airlines, Inc. [hereafter, NWA Brief] at 33.

[1] For two reasons we cannot indulge NWA's endeavor to persuade us that *Gunther* widened the Equal Pay Act's exception for pay differentials "based on a bona fide use of 'other factors other than sex.'" *Gunther*, 452 U.S. at 170, 101 S.Ct. at 2248 (quoting 29 U.S.C. § 206(d)(1)(iv) (1982). First, NWA's position is incompatible with the statutory design. Under the Fair Labor Standards Act, which Congress adopted as the procedural and remedial framework for Equal Pay Act claims, a court has discretion to disallow, in whole or in part, liquidated (double) damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to [the violation] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of t[he Act]." 29 U.S.C. § 260 (1982). NWA contends that an employer's actual but erroneous belief that two jobs are in fact different wholly shelters the employer from equal pay for equal work liability, NWA Brief at 14, 33; that contention is not synchronous with a congressional direction giving judges discretion only to limit, not to eliminate, damages when an employer, in "good faith," erroneously but reasonably believed his conduct conformed to legal requirements.[5]

[2] Second, NWA's inflation of the Equal Pay Act's residuary defense to exonerate employers who in fact failed to reward equal work with equal pay, so long as they honestly believed the jobs in question in fact were different, Reply Brief of Northwest Airlines, Inc. [hereafter, NWA Reply Brief] at 3–4, 19, is not sensibly extracted from Justice Brennan's opinion for the Court in *Gunther*. That decision interpreted Title VII to accommodate sex-based discrimination in compensation claims that did not fit within the equal pay for equal work principle. Specifically, *Gunther* rejected the argument that the "Bennett Amendment" to Title VII, 42 U.S.C. § 2000e–2(h) (1982),[6] confined Title VII sex-based wage discrimination complaints to claims that could also be brought under the Equal Pay Act. *Gunther* held that the Bennett Amendment had a more modest design: it simply incorporated into Title VII the Equal Pay Act's four affirmative defenses.[7] The *Gunther* opinion left untouched governing law on "equal pay for equal work regardless of sex." *See Corning Glass Works v. Brennan*, 417 U.S. 188, 190, 94 S.Ct. 2223, 2226, 41 L.Ed.2d 1 (1974).

NWA features most prominently, *see* NWA Brief at 28–29, lines clipped from a passage in *Gunther* in which Justice Brennan focused on the Equal Pay Act's fourth affirmative defense, applicable to differentials "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv) (1982). In this passage, Justice Brennan stated that genuinely non-sex-based factors, for example, "a bona fide job rating system," might be used by an employer in setting compensation, without offense to federal law, even when such factors have a disparate impact on one sex. *Gunther*, 452 U.S. at 170–71 & n. 11, 101 S.Ct. at 2248–2249 & n. 11.

[3] Basing wages on "a bona fide job rating system"—a sex-neutral, objective measure—exemplifies the legitimate employer conduct Congress envisioned as a permissible "use of 'other factors other than sex,'" *Gunther* explained. *Id.* NWA, however, employed no "bona fide job rating system" or other sex-neutral, objective standard[8] in setting wage rates for pursers and stewardesses. The passage NWA clips, read in its entirety, contains no suggestion that Congress also envisioned as a bona fide "other factor" an employer's mere belief, untested by any objective job rating system, that men and women are not engaging in equal work. Indeed, a fair reading of the passage indicates just the opposite.[9]

Gunther, in the portion featured by NWA, addressed only the impact Equal Pay Act affirmative defenses might have on "the outcome of some Title VII sex-

3. The Act specifies four affirmative defenses; they permit payment of different wages for equal work if "made pursuant to (i) a seniority system; (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1) (1982).

4. Specifically, in presenting its *Gunther* supervening law position, NWA acknowledges "the district judge's determination of the objective equality of the [purser and stewardess] jobs and the amount and nature of the pay differential." *See* Reply Brief of Northwest Airlines, Inc. [hereafter, NWA Reply Brief] at 17.

5. We note, moreover, that *Laffey I* remanded the question of NWA's "good faith" for reconsideration by the district court, and supplied this instruction:

> Nor is it enough that it appear that the employer probably did not act in bad faith; he must affirmatively establish that he acted both in good faith and on reasonable grounds [the former involving a "subjective inquiry," the latter, "an objective standard"]. That duty is accentuated here, where the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition [reserving pursers' jobs and pay for men], the industry custom nor the employees' silence was a reliable indicium of the demands of the law.

Laffey I, 567 F.2d at 465 (footnotes omitted; quotations in brackets from *id.* at 464).

6. The Bennett Amendment provides that compensation differentiation "authorized by" the Equal Pay Act "shall not be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e–2(h) (1982).

7. *See supra* note 3.

8. *See, e.g., Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1136–37 (5th Cir.1983) (indicating that experience, if in fact the basis for a pay differential, qualifies as a "factor other than sex," but holding that even when the employer introduces evidence demonstrating a male employee's greater experience, plaintiff must be accorded a full and fair opportunity to rebut proof that the pay differential was in fact attributable to a demonstrated objective, non-sex-based factor). *Plemer* reversed a district court judgment for defendant, and emphasized that "once [an Equal Pay Act] plaintiff shows that she was paid less than a male who was performing substantially the same job," "the burden both of production and of [ultimate] persuasion" shifts to the employer. *Id.* at 1136. Cited to us by NWA as a supplemental authority, *see* FED.R.APP. P. 28(j); D.C. CIR.R. 8(k), *Plemer* offers not a shred of support for NWA's thesis that no liability for an Equal Pay Act violation is incurred by an employer who sincerely believed jobs a court finds equal were in fact different.

9. NWA constantly tenders cropped snippets that convey less than comprehensively the Court's statements in *Gunther*. As a further example, NWA quotes the Court as "observ[ing] that a prohibition against discrimination against women 'because of their sex' strikes [only] at *'disparate treatment* of men and women.'" NWA Brief at 29 (NWA's emphasis). The Court's opinion places the emphasis elsewhere: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Gunther*, 452 U.S. at 180, 101 S.Ct. at 2253 (quoting and adding emphasis to the Court's footnote in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13, 98 S.Ct. 1370, 1375 n. 13, 55 L.Ed.2d 657 (1978), in turn quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971)). It is remarkable that NWA has selected and adjusted to suit its purpose words that originated with the Seventh Circuit in *Sprogis*, a decision holding an airline's no-marriage rule for stewardesses unlawful under Title VII.

based wage discrimination cases." *Gunther*, 452 U.S. at 170, 175 n. 14, 101 S.Ct. at 2248, 2250 n. 14. NWA, however, maintains that the Court's discussion should be read to augur incorporation of a line of Title VII "disparate treatment" decisions into Equal Pay Act law.[10] Even if we could find in *Gunther* the between-the-lines dictum NWA ascribes to the Court, NWA's argument for exoneration from equal pay liability would not succeed.

The Title VII decisions NWA cites unexceptionally involve situations in which the employer did not classify jobs overtly by sex (or race). *E.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In that setting, where sex-based categorization, if it exists, is covert, the Court has elaborated rules for establishing discriminatory intent or the lack thereof. This case, however, involves overt sex classification—explicitly disparate treatment. Purser jobs were reserved for men only; the stewardess class was all-female.[11] NWA has cited no case, nor do we know of any, suggesting that a Title VII or Equal Pay Act plaintiff must demonstrate, beyond sex-segregated job classifications and unequal pay for equal work, the employer's evil mind—in NWA's words, "disparate treatment" that proceeds from "discriminatory animus" or a "bad-faith attempt to evade the law." NWA Brief at 14, 39.

In sum, so far as we can tell, neither Congress nor the Court has ever entertained the notion that an employer who intentionally classifies jobs by sex, and in fact pays women less for the same work, can achieve exoneration by showing he sincerely thought the jobs he separated by sex were different. *But see* NWA Brief at 33; NWA Reply Brief at 3-4, 19. Justice Brennan's opinion in *Gunther*, it is certain, establishes no such novel law. Where, as here, there is an actual intent to separate jobs by sex, and the employer is found in fact to have paid women less for equal work, all precedent in point indicates that disparate treatment is solidly established.[12]

In *Goodrich v. International Brotherhood of Electrical Workers*, 712 F.2d 1488, 1493 n. 11 (D.C.Cir.1983), we noted that the Equal Pay Act's residuary defense covering "factors other than sex" affords no "convenient escape from the Act's basic command." Unless and until Congress or the Supreme Court declares otherw , our dominant guides remain the command that

10. The Court indicated in *Gunther* that the Equal Pay Act's fourth affirmative defense might shelter a pay standard otherwise vulnerable under Title VII as "fair in form, but discriminatory in operation." 452 U.S. at 170, 101 S.Ct. at 2248 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971)). NWA seizes on this acknowledgment that Equal Pay Act law may limit some Title VII neutral rule "disparate impact" claims, and insists that the Court somehow meant to infuse into Equal Pay Act law Title VII "disparate treatment" analysis developed in cases of alleged nonovert sex classification not even cited *en passant* in *Gunther*.

11. From 1947, when the purser classification was established, until June 15, 1967, NWA confined the purser position to males. Between 1949 and 1957, NWA hired men for a second cabin attendant position. Men engaged for these posts were called "flight service attendants" (FSAs). FSAs performed essentially the same duties and received the same pay as female cabin attendants. Unlike the all-female stewardess class, however, FSAs had a contractual right to fill purser vacancies and were deemed qualified for purser posts upon completion of the FSA probationary period. By May 1965, all but three of the FSAs who remained with NWA had been elevated to purser positions. The three men who had not advanced to the purser category were voluntarily based in Hawaii. *See 1973 Findings*, 366 F.Supp. at 766–67, 772–73 (Findings of Fact (FOF) 11–17, 37–38).

12. An employer's "discriminatory motive" or "desire to pay men—because they were men—more than [women received]," far from ranking as an "essential element" of a plaintiff's claim, as NWA maintains, *see* NWA Brief at 14, 34, is not even relevant, under the Supreme Court's decisions, to the determination whether explicitly sex-based classification violates Title VII. *See Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, — U.S. —, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). *See also infra* note 15.

"equal work will be rewarded by equal wages," S.Rep. No. 176, 88th Cong., 1st Sess. 1 (1963), and the instruction that the Equal Pay Act is a "broadly remedial" statute targeting an "endemic problem of employment discrimination," by firmly establishing as federal law the "principle of equal pay for equal work regardless of sex." *Corning Glass Works*, 417 U.S. at 190, 195, 208, 94 S.Ct. at 2226, 2228, 2234. NWA's argument, attributing to *Gunther* a meaning that would substantially reduce the force of the federal equal pay requirement, is artful but unavailing; it fails to elevate from the untenable to the plausible the claim that in *Laffey I* we incorrectly stated the law governing the purser/stewardess pay differential.

B. *The Uniform Cleaning Allowance*

[11] *Laffey I* affirmed the district court's determination that NWA discriminated on the basis of sex by providing a male-only uniform cleaning allowance. 567 F.2d at 456. *Laffey II* held a second challenge to the district court's ruling on the cleaning allowance unwarranted by any "circumstance capable of generating injustice from adherence to the law of the case." 642 F.2d at 586. Despite the stern "law of the case" analysis and admonition in *Laffey II*, *id.* at 585–86, and the court's further statement that it considered *Laffey I*'s cleaning allowance holding "fully accurate," *id.* at 586,[13] NWA seeks to continue the fray. It cites *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), and describes that case as an "intervening decision," NWA Brief at 17, although *Gilbert* issued over two years before *Laffey II* was argued.[14]

Gilbert was a Title VII challenge that turned on the Court's conclusion that the disability program in question did not group persons by "gender as such." *Gilbert*, 429 U.S. at 134–35, 97 S.Ct. at 407–408 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 & n. 20, 94 S.Ct. 2485, 2492 & n. 20, 41 L.Ed.2d 256 (1974)). The issue was an employer's exclusion of women unable to work due to pregnancy or childbirth from disability benefits. The program did not divide potential recipients by "gender as such," the Court reasoned, because one of the two groups comprised "nonpregnant persons," and thus "include[d] members of both sexes." *Gilbert*, 429 U.S. at 134–35, 97 S.Ct. at 407–408. In the absence of classification based upon "gender as such," the Court inquired whether there was any "gender-based discriminatory effect." *Id.* at 137–39, 97 S.Ct. at 408–410. NWA relies on the "discriminatory effect" portion of the *Gilbert* analysis. NWA Brief at 53.

Even in *Gilbert* itself, however, the Court indicated that "discriminatory effect" analysis should not come into play when the program at issue divides recipients into groups classified by "gender as such." 429 U.S. at 136–37 & n. 15, 97 S.Ct. at 408–409 & n. 15.[15] That is the situation

13. The court reviewed its prior holding, not for NWA's benefit, but "in the interest of soundness of the law for the future." *Laffey II*, 642 F.2d at 586. It acknowledged that outlays for uniforms and their maintenance, when made primarily for the employer's benefit, do not count as wages under the Fair Labor Standards Act. *Id.* at 588. Allowances that primarily serve the interest of the employee, however, do qualify as wages, the court stated. The male-only cleaning allowance, the court concluded, was a wage supplement, a benefit to the employee rather than a "boon to the employer." *Id.* at 589. Had the allowance primarily benefited the employer rather than the employee, the court observed, "NWA obviously would have extended it to female cabin attendants as well." *Id.*

14. Moreover, the precedential force of *Gilbert* had become clouded before presentation of the *Laffey II* appeal. *See Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 723–25, 98 S.Ct. 1370, 1382–1384, 55 L.Ed.2d 657 (1978) (Blackmun, J., concurring).

15. NWA, in its *Gilbert* argument, manifests a blindspot similar to the one evident in its failure to perceive, in presenting its *Gunther* argument, that when an employer intentionally classifies jobs or job benefits by sex, one need not search further to find differential treatment based upon gender. *Compare, e.g., Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) *with Personnel Administrator v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

here—all male cabin attendants received a uniform benefit package with a cleaning allowance, all female attendants received a different package without a cleaning allowance.[16]

Congress has overruled *Gilbert* prospectively "to prohibit sex discrimination on the basis of pregnancy," [17] and the Supreme Court believes Congress "also rejected the test of discrimination [*Gilbert*] employed." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, ——, ——, 103 S.Ct. 2622, 2627, 2631, 77 L.Ed.2d 89 (1983). In its most recent expression in point, the Court left no doubt that, when classification by sex is undisguised, there is no need to consider, as *Gilbert* did, "the average monetary value of the [overall benefit package in question] to male and female employees." *Id.* 103 S.Ct. at 2632 n. 26. Further, the Court quoted with apparent approval the EEOC's position that it is not "a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." *Id.* (quoting 29 C.F.R. § 1604.9(e) (1983)).

In *Laffey II*, the court described the cleaning allowance "as simply another supplement to male salaries." 642 F.2d at 589. *Gilbert* presents no occasion for us to study again that twice-studied issue. *See id.* at 586.

16. NWA, in its Reply Brief at 27–28, suggests that we view uniform-related benefits as a "grooming" issue with no discriminatory implications because of the "conventional distinction" in apparel men and women wear. While it is too late for NWA to dress the matter in new garb, we note that the question here is not whether men can be required to wear pants, and avoid kilts. *Cf. Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir.1975) (en banc) (holding that Title VII is not violated by an employer's refusal to hire men (but not women) with long hair). Women's clothes require cleaning just as men's do; and prescribing more costly uniforms for stewardesses was NWA's decision, not a benefit women sought or an action impelled by the market or convention.

17. *See* Pub.L. [illegible]–555, 92 Stat. 2076 (1978) (codified at [illegible] § 2000e(k) (1982)).

III. Additional Law of the Case and Waiver Issues

A. *Laffey I Holdings Challenged as "Clearly Erroneous"*

[5] NWA does not dispute that *Laffey I* "actually decided" two issues which it now seeks to relitigate: first, that "equal work" was performed by NWA stewardesses and pursers, and second, that NWA, as a matter of law, could have "willfully" violated the Equal Pay Act notwithstanding the absence of an "iniquitous ... state-of-mind." *Laffey I*, 567 F.2d at 461; NWA Brief at 11 n. 1, 13. NWA seeks to reopen these two issues, not by positing the existence of supervening case law, but by arguing that our prior holdings were "clearly erroneous" and that adherence to law of the case in these instances "would work a manifest injustice." *Melong v. Micronesian Claims Commission*, 643 F.2d 10, 17 (D.C.Cir.1980) (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.1967)).[18] Because we perceive no error whatever in *Laffey I*'s disposition of these two issues, let alone the "clear" error and "manifest injustice" that would warrant departure from the law of the case, we reject NWA's arguments and reaffirm the holdings of *Laffey I* with respect to the issues of equal work and willfulness.

Moreover, we take this opportunity to emphasize that this court will not, absent truly "exceptional circumstances," *Laffey II*, 642 F.2d at 585, look favorably on arguments against the law of the case which fall only under the "manifest injustice" rubric.[19] We do not intend to allow this avenue of attack on the law of the case to become an auxiliary vehicle for the repetition of arguments previously advanced, without success, in appellate briefs, petitions for rehearing, and petitions for certiorari.

18. The Supreme Court recently noted approvingly the dual elements of "clear error" and "manifest injustice" in law of the case doctrine, citing the *White v. Murtha* decision on which this court relied in its *Melong* analysis. *Arizona v. California*, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 1391 n. 8, 75 L.Ed.2d 318 (1983).

19. *Laffey II*, 642 F.2d at 585–86, set out the following situations, drawn from *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278–79 (D.C.Cir.1971), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972), in which a court may recall its mandate, to illustrate circumstances justifying a deviation from the law of the case:

> [T]o correct clerical mistakes, to clarify [the] opinion or mandate, to remedy fraud on the court or other misconduct, to avoid divergent results in cases pending simultaneously, or to minister to other similar aberrations. No such aberrations are present in the instant case.

1. *Equal Work*

In its *1973 Findings*, the district court concluded that the jobs of purser and stewardess at NWA "require equal skill, effort and responsibility and are performed under similar working conditions." 366 F.Supp. at 788, 789 (Findings of Fact (FOF) 78; Conclusions of Law 2, 4). In *Laffey I*, this court explicitly affirmed this finding and conclusion, 567 F.2d at 453, thus establishing the equal work prerequisite to Equal Pay Act liability as the law of the case.

NWA's challenge to this holding hinges on its interpretation of two of the district court's findings of fact in 1973. In one pivotal finding, FOF 65, the district court described the "chain of command" for an NWA flight:

> If one purser is aboard, he is denominated the Senior Cabin Attendant irrespective of his relative length of service as compared to the other attendants. If two or more pursers are aboard the flight, the most senior purser is the Senior Cabin Attendant. If no purser is aboard the flight, the most senior stewardess or FSA is the Senior Cabin Attendant.

1973 Findings, 366 F.Supp. at 785. The nature and scope of a Senior Cabin Attendant's supervisory responsibilities is described in another critical finding, FOF 67:

> Stewardesses who serve as Senior Cabin Attendant are subject to discipline if they fail to carry out their "supervisory" responsibilities, and are held just as accountable as pursers who fail to carry out their "supervisory" responsibilities.

Id. The district court also noted in this latter finding that NWA had no merit pay adjustment whereby either pursers or stewardesses who "supervise" effectively were paid more than less capable or effective supervisors.

Seizing upon the district court's recognition in FOF 65, above, that pursers supervised stewardesses, but not *vice versa*, NWA argues vehemently that the two jobs cannot be deemed "equal" because "[j]obs that entail different degrees of supervisory responsibility are not equal within the meaning of the Equal Pay Act." NWA Brief at 41. Next, relying upon the court's description in FOF 67, above, of the cabin attendants' "accountability" for the discharge of their supervisory duties, NWA maintains that the district court's findings "compel the conclusion that the supervisory responsibility had real content" and that *Laffey I*'s conclusion that the pursers' supervisory function was "insignificant" thus "actually contradicted the trial judge's findings." *Id.* at 42.

We cannot accept either branch of NWA's argument. It is, of course, elementary that "jobs need not be identical in every respect before the Equal Pay Act is applicable ...." *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n. 24, 94 S.Ct. 2223, 2232 n. 24, 41 L.Ed.2d 1 (1974). In *Laffey I*, this court explained:

> [T]he phrase "equal work" does not mean that the jobs must be identical, but merely that they must be "substantially equal." A wage differential is justified only if it compensates for an appreciable variation in skill, effort or responsibility between otherwise comparable job work activities.

567 F.2d at 449 (citations omitted). This "substantially equal" test, which has been adopted by no fewer than nine other circuits, *Thompson v. Sawyer*, 678 F.2d 257, 272 n. 12 (D.C.Cir.1982), necessarily implies that there can be job responsibilities—including supervisory duties—so "'insubstantial or minor'" as not to "'render the equal pay standard inapplicable.'" *Laffey I*, 567 F.2d at 449 (quoting 29 C.F.R. § 800.122 (1975)).

[6] Therefore, to the extent that NWA's argument suggests that *any* differ-

ence in supervisory responsibility renders jobs unequal, it is manifestly incorrect as a matter of law. Critically, the authority NWA cites as support for this proposition is not, in fact, inconsistent with the "substantially equal" test.[20] Indeed, NWA itself acknowledges several other cases in which supervisory responsibilities were found to be too minor to warrant a finding of unequal responsibility. *See Hill v. J.C. Penney Co.*, 688 F.2d 370, 373–74 (5th Cir. 1982); *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 422 (5th Cir. 1971).

[7] NWA's claim that *Laffey I*'s finding of equal work "actually contradicted" the district court's findings is also patently incorrect. As we understand NWA's argument. FOF 67, when read together with FOF 65, "compels" the conclusion that the district court viewed the supervisory responsibilities as not insubstantial. This contention, however, plainly overlooks the district court's express finding that the pursers' supervisory functions "require no greater skill, effort or responsibility than the other functions assigned to all cabin attendants," *1973 Findings*, 366 F.Supp. at 786 (FOF 69), and its further explicit finding of equal "skill, effort and responsibility" on the part of stewardesses and pursers, *id.* at 788–89 (FOF 78; Conclusions of Law 2, 4). It follows as ineluctably as night follows day that the district court found that the pursers' supervisory duties did not alter the equivalence of the two jobs under scrutiny in this case.[21]

20. NWA cites *Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir.1977); *Noles v. Concord Lace Corp.*, 25 FEP Cas. (BNA) 367, 370 (M.D.N.C. 1980), and 29 C.F.R. §§ 800.122, 800.130 (1983), as authority for its assertion that "[j]obs that entail different degrees of supervisory responsibility are not equal within the meaning of the Equal Pay Act." NWA Brief at 41. None of these authorities conflict with the view of the court in *Laffey I* that supervisory responsibilities can be so minor as not to render two jobs unequal.

Indeed, NWA grossly misreads *Usery's* holding. In *Usery*, the court explicitly followed the Eighth Circuit's use of the "substantially equal" standard of comparison in evaluating the work of a male cook and four female cooks. 558 F.2d at 1320. That case in no wise stands for the proposition that any difference in supervisory responsibilities, without more, automatically works a cognizable legal difference in jobs. To the contrary, NWA conveniently and inexplicably overlooks the clear statements in *Usery* that the male employee had different responsibilities than female employees, worked during the cafe's busiest hours, was given greater duties of heavy lifting, was responsible for training other employees, and "had authority to make effective recommendations with regard to discipline." All this was sufficient for the Eighth Circuit to conclude, in affirming the district court's factual findings, that the job of the male employee had "[e]nough substantial distinctions [as to both] effort and responsibility ..." to render it legally different from the jobs of the four female employees. That case is a far cry from the instant situation.

Similarly, in *Noles* the district court employed a "substantially equal" analysis in finding that the work of one male employee, who was "in charge of" an entire shift in one department of a textile mill, was not equal to that of the plaintiffs. Since the *Noles* opinion does not describe the nature of the male worker's supervisory responsibilities, NWA cannot plausibly maintain that the case stands for the proposition that any difference in supervisory duties renders jobs unequal. Moreover, another male worker had heavy lifting functions and was one of only a few employees trained in the operations of a particular kind of plant machinery.

Finally, NWA can find no support in the cited Wage and Hour Division of the Department of Labor regulations. On the contrary, 29 C.F.R. § 800.122 clearly states that "[i]nsubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." Far from offering support to NWA at this late stage of the litigation, this section, as noted in the text above, was invoked by the *Laffey I* court in its discussion of equal work. Nor does § 800.130 provide any comfort to NWA. That section states, *inter alia*, the common sense proposition that if an employee assumes supervisory responsibilities during the absence of the regular supervisor, higher wage rates to such a "relief" supervisor may be appropriate. But to embrace this proposition scarcely means that we should read out of the regulations the bedrock principle that "insubstantial or minor differences" in skill or responsibility do not constitute a legally significant distinction between jobs. The issue is not, as NWA would have it, whether there are "different degrees of supervisory responsibility" but whether the differences are insubstantial and minor. As to that issue, NWA's arguments fail completely.

21. NWA claims that FOF 69 reflects an "erroneous assumption" by the district court that "the issue under the Equal Pay Act is whether the

There is, in cutting through the prolific underbrush planted in our way by NWA, upon analysis no conflict whatever between the district court and this court as to the importance of the supervisory duties assigned to pursers. *Laffey I* affirmed the district court's finding that "NWA purser and stewardess positions are substantially equal within the intent of the Equal Pay Act...." 567 F.2d at 453. NWA has come forward with nothing to suggest that this affirmance of the district court's conclusion with respect to the importance of supervisory duties was in error. NWA's argument, based ultimately on a tortured reading of the district court's findings and an inaccurate portrayal of the applicable law fails.

2. *Willfulness*

[8] Under 29 U.S.C. § 255(a) (1976), a "willful" violation of the Fair Labor Standards Act (FLSA), of which the Equal Pay Act is a part, triggers a three-year, as opposed to the Act's ordinary, two-year statute of limitations. In *Laffey I*, this court determined that NWA's violation of the Equal Pay Act had been "willful" within the meaning of section 255(a), 567 F.2d at 463, thus rendering NWA liable for a third year of backpay. In reaching this conclusion, the court canvassed the legislative history of section 255(a) and rejected NWA's suggestion that a violation must be animated by a bad purpose or evil intent to be deemed willful. *Id.* at 461. Instead, the court determined that employer noncompliance with the Equal Pay Act is "willful" in at least two other instances: where the employer "is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt," and where "an equally aware employer consciously and voluntarily charts a course which turns out to be wrong." *Id.* at 462.

NWA was held to have failed the second branch of this test:

> NWA not only knew of the Equal Pay Act and its content but also correctly understood its prohibition on different salary levels for men and women performing substantially similar work. With little or nothing beyond internal consideration by laymen—even after the present legal challenge got under way—the company consciously though erroneously concluded that its treatment of pursers and stewardesses was unaffected by the Act. We deem that sufficient to comprise willfulness; in the District Court's words, "[t]he conduct of the Company in the exercise of that judgment was willful."

Id. at 463 (citation omitted).[22]

In this appeal, NWA argues that the law of the case established in *Laffey I* is "clearly erroneous" and the source of "manifest injustice," once again urging upon us a contrary analysis of the legislative intent undergirding section 255(a). NWA contends that a proper reading of the legislative history of the 1966 FLSA amendments "confirms that Congress meant [the willfulness standard] to encompass only intentional disregard for the law, rather than the deliberate-but erroneous test adopted" in *Laffey I*. NWA Brief at 23. For the reasons stated below, we disagree with NWA as to the proper test of willfulness under the Equal Pay Act. Accordingly, we reaffirm *Laffey I*'s finding that NWA willfully violated the Act within the meaning of section 255(a).

In recasting its version of the relevant legislative intent, NWA argues that the *Laffey I* court was erroneously of the view

jobs are more alike than they are different...." NWA Brief at 42. This argument falls before the express language and plain meaning of FOF 69—that the supervisory functions "require no greater ... effort or responsibility." NWA is conveniently seeing ghosts in conjuring up the image of a district court—eleven years and two appeals ago—having fallen into error by embracing allegedly erroneous assumptions.

22. Similar considerations regarding NWA's meager efforts to ascertain its obligations under the Equal Pay Act were central to the district court's award of liquidated damages, on remand from the decision in *Laffey I*, as discussed *infra* in section V.

that there was no relevant legislative history to shed light on the pivotal word, "willful." NWA Brief at 85. NWA accordingly invites us to focus on three unadopted 1965 bills which were the predecessors of the 1966 amendments. NWA deems "crucial" certain portions of the hearings on one of those bills, H.R. 8259, 89th Cong., 1st Sess. (1965), and the report of the House Education and Labor Committee on a second bill, H.R. 10518. H.R.Rep. No. 871, 89th Cong., 1st Sess. (1965). The importance of the latter is touted on the basis that it represents the "first appear[ance] [of section 255(a)] in its present form." NWA Reply Brief at 42.[23]

The original administration-sponsored bill, H.R. 8259, sought, *inter alia*, to increase the limitations period to three years for all FLSA claims, and accordingly did not prescribe willfulness as a precondition to liability for the third year. NWA attempts to fashion a favorable interpretation of the willfulness provision ultimately incorporated into section 255(a) in the following manner: first, NWA summarizes a few snippets of testimony against H.R. 8259,[24] and then notes that at the conclusion of the hearings, "the Subcommittee met in executive session and drafted a new bill that included the [willfulness] language ultimately enacted." NWA Brief at 85. NWA then attributes this change to legislators who opposed the extension of liability in cases not involving conscious disregard of the law. *Id.* at 86. To substantiate this new learning as to the true meaning of the legislative materials, NWA cites a sentence from the minority statement in the Committee report on the revised bill, indicating that the Subcommittee's discussions had "resulted in the adoption of several amendments offered by members of the minority." *Id.* (citing H.R.Rep. No. 871, *supra*, at 74). NWA jumps from this statement to the conclusion that the willfulness provision was adopted "in response to the criticism of the proposal to impose an additional year of liability even on 'honest' violators of the [Equal Pay] Act." NWA Reply Brief at 42.

NWA's argument proves no such thing. The single sentence upon which it relies from the minority statement provides woefully inadequate support for its restrictive reading of the "willfulness" language. That sentence stands all by itself in the introduction to the minority report. Nowhere in this document is there any description of the amendments which the minority proposed, why it proposed them, what the majority said in response to the proposals, or why the proposals were adopted by the full Committee. Moreover, the minority report does not contain *a single word* about the "willfulness" provision in H.R. 10815. This brings us, then, to a broader point about this provision. The proposed legislation was lengthy, complex,

23. NWA claims that the *Laffey I* court "overlooked" this committee report. *Id.* While the opinion in *Laffey I* does not expressly refer to the report, it is clear that the court was aware of the genesis of section 255(a) as we know it. *See* 567 F.2d at 460 & n. 222 (reference to hearings on H.R. 8259). Even though neither party called the court's attention to the committee report in *Laffey I*, there is no reason to believe that the court was unaware of it. Moreover, NWA badly over-argues the point that the *Laffey I* court was operating without benefit of the enlightening legislative history which NWA has unearthed at the eleventh hour. NWA says that the *Laffey I* court fashioned its "willfulness" test "on the impression that there was no relevant legislative history." NWA Brief at 85. *Laffey I* said no such thing, nor did it imply as much. Rather, the court noted, quite correctly, that it had uncovered no "*clearcut statement* in the legislative history as to why the extension to three years was thus encumbered." 567 F.2d at 460 (emphasis added).

24. NWA specifically references a colloquy between Secretary of Labor Wirtz and Congressman Martin, an opponent of all three bills considered in 1965, in which Rep. Martin expressed concern that an across-the-board extension of the limitations period to three years would penalize employers who had not deliberately violated the law. *Hearings on H.R. 8259 Before the House Ed. and Labor Comm., General Subcomm. on Labor*, 89th Cong., 1st Sess. 54 (1965). NWA also notes that a number of witnesses in the hearings on H.R. 8259 were of the opinion that the back-pay period "*should not* be increased for violations which 'result from misunderstanding of the law,' or 'honest differences of opinions.'" NWA Brief at 85, citing *id.* at 980, 2250 (emphasis added).

and dealt with a number of thorny issues, including an increase in the minimum wage and a significant expansion of the FLSA's coverage. Adoption of the "willfulness" language ultimately codified in section 255(a) was undoubtedly a matter of limited congressional focus in the 1965 and 1966 deliberations over this legislation; the paucity of pertinent legislative materials, therefore, is not surprising.

Given the relative silence of the legislative record in this respect, *Laffey I*, 567 F.2d at 460, a silence which NWA has not persuasively broken with its theory advanced on this third appeal, we defer to the careful treatment and final settlement of this issue in *Laffey I*. The law of the case we honor here rests on the *Laffey I* court's painstaking review of the legislative history, including Congress' pivotal concern over small, unsophisticated businesses—a category that manifestly excludes NWA—which might not recognize the sweep of the FLSA's coverage. *Id.* at 460–61. Equally important, *Laffey I* recognized the need for a liberal construction of remedial statutes, and at the same time appropriately took into account the absence of clear congressional intent to impose upon plaintiffs the heavy burden of demonstrating an employer's evil intent. *Id.* This latter point is especially important in light of the fact that the Equal Pay Act merely allows a plaintiff to recover, after an appropriate showing, wages which have been improperly denied, and does not involve the imposition of criminal sanctions.

In short, we find nothing compelling, and certainly nothing demonstrating "clear error" in this court's earlier opinion, in the 1965 sources relied upon by NWA. The careful analysis of the meaning of 29 U.S.C. § 255(a) set out in *Laffey I* must stand.

B. *Backpay*

Moving from the domain of the Equal Pay Act's legislative history to an issue under Title VII, the district court, in *Remedial Order* awarded each Title VII plaintiff[25] backpay in the amount of the full difference between what she earned as a stewardess and what she would have earned if she had been paid at the same rate as a purser of equal seniority. 374 F.Supp. at 1385–86. On appeal in *Laffey I*, NWA challenged certain aspects of these "remedial measures," 567 F.2d at 437, including what it saw as the district court's improper refusal to adjust the pursers' rates of pay downward in the amount of the compensation allegedly based on the "foreign flying" required of pursers. Of pivotal importance, however, NWA failed at that time to appeal the underlying decision to use pursers' pay rates as the upper end of the back-pay formula.

The court in *Laffey I* determined that NWA had failed to show that any portion of the pursers' pay was attributable to "foreign flying." 567 F.2d at 452 n. 153. *See infra* section III. B.2. The *Laffey I* decision also affirmed the back-pay formula adopted by the district court. *Id.* at 478.

In 1978, following the remand of these proceedings to the district court after *Laffey I*, NWA for the first time attacked the use of the full purser rates, apart from its unsuccessful, earlier argument with respect to the alleged "foreign flying" component. NWA at this juncture claimed that the district court should use a hypothetical wage rate which would have been paid to a single, combined class of "cabin attendants," rather than purser rates, in computing backpay. Record Document ("R.") 16. The district court, however, refused to entertain NWA's argument, on the ground that "the relief requested is precluded by the Judgment of the Court of Appeals in that it is beyond the Mandate of that Court and seeks to raise issues not challenged on appeal ...." Order Denying Motion to Modify Award of Backpay to the Title VII Class (D.D.C. July 9, 1979), R. 50.

25. It will be recalled that the instant action was brought both under Title VII and the Equal Pay Act. The back-pay element of relief was granted by the district court as part of the remedy to the Title VII class, as well as to the Equal Pay Act plaintiffs. In this appeal, NWA's challenge to the computation of backpay is with respect to the Title VII plaintiffs only.

NWA now seeks to avoid the law of the case as to the computation of backpay by arguing that under the post-*Laffey I* decisions of the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), and *Ford Motor Co. v. EEOC*, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982), the back-pay award here impermissibly overcompensates the Title VII plaintiffs by placing them "in a better position than they would have been in if the alleged discrimination had not occurred." NWA Brief at 15; *see* also *id.* 43–47. NWA also revives its earlier, unsuccessful argument that the back-pay awards under both Title VII and the Equal Pay Act are incorrectly inflated by the court's failure to exclude from pursers' pay that portion attributable to "foreign flying." NWA once again tries to characterize "foreign flying" compensation as a "factor other than sex" for Equal Pay Act purposes, and invokes the three above-cited High Court decisions in support of its claim that Title VII damages should be reduced by this amount.

Because this court affirmed the back-pay awards in *Laffey I*, and inasmuch as we discern no relevant supervening change in the law embodied in the decisions relied upon by NWA, we decline the invitation to overturn the law of the case as to the computation of backpay.

1. *Wage Rate for Hypothetical Combined Cabin Attendant Classification*

[9] NWA strenuously contends that if it had not maintained the sex-segregated job classifications of purser and stewardess and had, instead, used only a single "cabin attendant" classification, the wage rate paid to employees in that hypothetical classification would have closely approximated the rates paid by other airlines with only a single classification, rather than the "premium pay level" NWA established for pursers. In support of this proposition, NWA relies upon an affidavit proffered in 1978. *See* Declaration of Terry M. Erskine, Joint Record Excerpts ("J.R.E.") 139.

NWA argues that the use of the pursers' pay rate in the back-pay formula, rather than the lower rate which arguably would have been paid to those in the hypothetical, combined cabin attendant classification, violates the bedrock rule that Title VII back-pay may not "catapult [plaintiffs] into a better position than they would have enjoyed in the absence of discrimination." *Ford Motor, supra*, 458 U.S. at 234, 102 S.Ct. at 3067. It also argues that *Manhart*, in particular, establishes that the back-pay remedy here was improper. NWA Brief at 43–44.

We disagree. In the first place, and most critically, we do not read these three High Court decisions as establishing *any* pertinent new rule of law as respects this case under Title VII. The fundamental proposition that the purpose of Title VII remedies is to "make whole" the victims of discrimination has been settled for some time, *see, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975), and was clearly recognized by this court in *Laffey I*. *See* 567 F.2d at 476 ("The remedial order in this case is to make employees whole, but not more than whole."). Therefore, we perceive nothing new, as respects NWA's argument, in these three decisions.

We also find unpersuasive NWA's assertion that *Manhart* compels the abandonment of the back-pay formula affirmed in *Laffey I*. Above all, *Manhart* arose out of the extraordinarily sensitive setting of a sex-based contributory system in a pension plan, circumstances far removed from the situation here of treating female employees differently although they performed the same work as male employees. Second, the only language that provides comfort to NWA is set forth in a single footnote,[26]

Further doubt about the District Court's equitable sensitivity to the impact of a refund

26. Footnote 36 of the *Manhart* opinion reads, in relevant part:

> order is raised by the court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.
>
> 435 U.S. at 720 n. 36, 98 S.Ct. at 1381 n. 36.

consisting of guardedly worded *dicta*. *Manhart*, in contrast to the case before us, disallowed *any* retroactive monetary award, and in the course of so doing suggested that *if* such an award had been appropriate, the lower court "should at least have considered" a different formula. The High Court's understandably deep concern for equitable considerations, including the grave consequences to pension funds flowing from a retroactive finding of liability, strongly suggests that this portion of the *Manhart* footnote was not addressed to the matter of remedies in garden-variety Title VII cases, such as the case at hand.[27]

[10] Moreover, in the absence of supervening, controlling authority, NWA cannot properly request—for the first time—that this court mandate the use of "averaging techniques" in the back-pay formula.[28] As explained *supra* at p. 1076, the procedural posture of this case at the time of *Laffey I* "enabled review on the merits of all interrelated features of the order save those the District Court had reserved for future adjudication," *Laffey II*, 642 F.2d at 584 n. 49. The issues reserved by the district court dealt only with the "mechanics of payment" pursuant to the *1974 Remedial Order*. *See* 374 F.Supp. at 1389. The part of the case that the court reserved obviously did not include the back-pay formula itself, which was clearly set out by the district court, *id.* at 1385–87 (paragraphs 5–7), and which plainly used the full purser pay rates as the upper end of the back-pay computation.[29] Thus, NWA had the opportunity to appeal any feature of the back-pay award, including the use of the full purser rates, in *Laffey I*. Therefore, NWA must be deemed to have waived any argument available at that time which it did not assert.

Adherence to the rule that a party waives a "contention that could have been but was not raised on [a] prior appeal," *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 62 (1982), is, of course, necessary to the orderly conduct of litigation. Failure to follow this rule would lead to the bizarre result, as stated admirably by Judge Friendly, "that a party

> million Americans participate in retirement plans other than Social Security." 435 U.S. at 721, 98 S.Ct. at 1382. *See also Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, ——, 103 S.Ct. 3492, 3512, 77 L.Ed.2d 1236 (1983) (O'Connor, J.) (to avoid adverse impact on pension funds, decision extending *Manhart*'s liability rule should be made prospective).

28. NWA did not have to languish on the legal sidelines awaiting the 1978 culmination of the *Manhart* litigation. *Manhart* scarcely enunciated for the first time a principle that, save for its footnote 39, would have theretofore been unsupportable in Title VII law or theory. As we previously indicated, *Manhart* in this particular respect broke no new legal ground, but instead observed the possible effects of the well established "make whole" principle in the setting of that case.

29. It further appears from the record that NWA considered the district court's *1974 Remedial Order* to be a final judgment. *See* R. 161 (NWA Notice of Appeal from "[t]he final judgment entered in this action on May 20, 1974 ..."), R. 160, R. 164 (NWA supersedeas bond entered in its appeal from the May 20, 1974 "final judgment").

who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir.1981), *cert. denied*, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). NWA's failure to challenge the backpay formula on its first appeal resulted in the *Laffey I* affirmance of that portion of the *1974 Remedial Order*, and the inclusion of the formula in the law of the case. *See Raxton Corp. v. Anania Associates, Inc.*, 668 F.2d 622, 624 (1st Cir.1982).

2. *Foreign Flying*

[11] As previously indicated, NWA reargues its already rejected position that purser pay included compensation directly traceable to "foreign flying" and that this component of compensation should be excluded as a "factor other than sex" under the Equal Pay Act back-pay computations, and from the Title VII back-pay computations under the Supreme Court decisions discussed *supra* in section III.B.1.

We disagree. We find, for the reasons outlined in the preceding section, that the Supreme Court decisions in *Manhart*, *Teamsters*, and *Ford Motor* do not bring into question the treatment in *Laffey I* of the "foreign flying" issue, as those cases merely articulate already established principles of Title VII law.[30] NWA's other arguments on this issue are foreclosed by the law of the case, clearly set out in *Laffey I*, 567 F.2d at 452–53 n. 153. Unless there is supervening authority, and we have concluded that there is none, NWA must satisfy the stringent test of "clear error" and "manifest injustice," a rigorous standard which has not been met as to the foreign flying issue. As this court held eight years ago, NWA simply failed to carry its burden on this issue the first time around. We refuse to replough this well-worn field that much deserves henceforth to lie fallow.

C. *Composition of the Title VII Class*

NWA challenges the composition of the Title VII class on several grounds. It argues that the district court's order of December 5, 1980, J.A. 168, improperly added to the class "hundreds of new employees" who had been "hired after the cut-off date for the last round of notices" of the class action. NWA Brief at 55–56. NWA also appeals from the district court's order of June 6, 1980, J.R.E. 162, which included in the Title VII class two groups of stewardesses which NWA seeks to exclude—those on leave from their jobs as stewardesses as of the cut-off date who subsequently decided not to return to work, and those who as of the cut-off date had transferred permanently to non-stewardess jobs at NWA. We consider each of these arguments separately.

1. *Stewardesses Not Notified of Class Action*

In its February 1971 order, the district court certified the instant case as a class action under *both* Fed.R.Civ.P. 23(b)(2) and 23(b)(3). The court defined the Title VII class as "all female in-flight cabin attendants currently employed by [NWA] and/or employed by [NWA] any time since July 2, 1965." 321 F.Supp. 1041, at 1043. Thereafter, two rounds of notices were sent to class members, in 1971 and 1972, pursuant to the requirements of Fed.R.Civ.P. 23(c)(2).

The district court, in its *1974 Remedial Order*, again defined the term "Title VII plaintiff(s)" to include "all female cabin attendants employed by [NWA] at any time on or after July 2, 1965, excluding only those who filed timely written elections with this Court to be excluded from this lawsuit in its entirety." 374 F.Supp. at 1384. In its appeal from this order in *Laffey I*, NWA did not challenge the foregoing definition of the class on the grounds it now advances. NWA did, however, challenge the inclusion of stewardesses whose employment with NWA was terminated prior to the ninetieth day preceding the first filing with the Equal Employment Opportunity Commission ("EEOC"). The *Laffey I* court agreed, and directed the district court to exclude this group of ex-employees from the class. *See infra* section III.C.2. On remand, the district court corrected its earlier error (and another, minor mistake as to the actual date of the first EEOC filing). It redefined the Title VII class to include only stewardesses who were employed by NWA on or after January 29, 1970. Employees terminated prior to this date were to be included only on a showing of certain extenuating circumstances. This redefinition was reflected in the district court's Order Respecting Computation of Backpay and Implementation of Final Judgment, November 30, 1982.[31] Thus, NWA had scrutinized the Title VII class definition at the time of *Laffey I*.

Seeking to avoid waiver and law of the case obstacles to appellate review, NWA claims, in effect, that it was not on notice at the time of *Laffey I* that the district court would include in the class stewardesses never furnished the requisite notice or opportunity to opt out under Rule 23(b)(3). NWA interprets the district court's refusal to exclude those stewardesses who had not received notice of the class action, J.A. 168, as dependent upon the district court's view that the parties and the court had shared, as of the time of the 1971 and 1974 orders, "the intent and understanding" that the definition of the Title VII class adopted therein was broad enough to encompass the disputed group of stewardesses. NWA Brief at 56–57.

NWA argues that there was no such "understanding" between the parties, and claims that it "proceeded to trial with the understanding that the backpay class had been fixed by the universe of cabin attendants to whom notice was sent." NWA Brief at 57. It further argues that the December 1980 order was improper, inasmuch as Rule 23(c)(1) permits a court to "alter" a class certification only prior to the decision on the merits. NWA perceives here the evil of "one-way intervention."

Appellees, on the other hand, heatedly dispute NWA's claim as to the original "understanding" that the Title VII class did not include the disputed group of stewardesses. Appellees cite to substantial portions of the record as support for the true "understanding" of an open-ended class.[32] Under appellees' theory, NWA had full knowledge of the manner in which the class definition would be applied and thus waived the arguments now advanced here because it did not assert those contentions in the proceedings leading up to the *1974 Remedial Order* or in its appeal to this court in *Laffey I*. Appellees further argue that *Laffey I* established the open-ended class definition as the law of the case, which, as an additional ground, bars NWA from now attacking inclusion of the disputed group of stewardesses.

[12] Without deciding whether the parties had the disputed "understanding" as to the meaning of the 1971 definition of the Title VII class, we conclude that NWA's attack on the 1980 order (and definition) is barred by the doctrines of waiver and law of the case. We reach this conclusion in light of the fact that the *1974 Remedial Order*, issued long after the 1972 cut-off date now urged by NWA, contained essentially the same open-ended class definition as the 1971 certification order. NWA knew, or should have known, that the express terms of the 1974 order—sweeping into the class "all female cabin attendants employed by [NWA] *at any time* on or *after July 2, 1965*" (emphasis added)—

30. At most, NWA can argue that *Manhart* expressly mandates "equitable sensitivity" in fashioning back-pay awards. This principle does not embody any novel and independent requirement, but rather is aimed at ensuring the fidelity of the lower federal courts in shaping equitable decrees to implement fully the paramount Title VII "make whole" principle.

31. The 1982 Order defines the Title VII class as "all female cabin attendants employed by the Company at any time on or after January 29, 1970 (and certain other female cabin attendants who are to be treated as eligible ... by reason of detrimental reliance on certain class notices), except for those female cabin attendants who filed timely written elections ... to be excluded ..." J.R.E. 202.

32. Appellees' Reply Brief at 60–62 (discussing appellees' argument to district court regarding the December 1980 order, R. 3[illegible]12).

could manifestly be read as extending beyond 1972. It was up to NWA to test the meaning of the 1974 order as to stewardesses who had not received notice of the class action, if it so desired, in its appeal from that order—the appeal which culminated in *Laffey I*. NWA failed to do so. NWA, albeit represented now by different counsel, must be held to have waived the opportunity to raise this issue. For the reasons stated *supra* at pp. 1089–1090, we must recognize the law of the case established in *Laffey I*.

[13] In addition, we note that NWA's argument regarding the impropriety of "one-way intervention" has been rejected by other courts which have held that "classwide backpay under Title VII can be awarded in a [Rule 23] (b)(2) class action." [33] This development in Title VII law, signalled by the Fourth Circuit's 1971 decision in *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971), was well under way as of NWA's appeal in *Laffey I*. Had NWA wished to clarify the definition of the Title VII class in relation to this expansion of (b)(2) actions, it clearly had the opportunity to raise the issue in *Laffey I*.[34]

2. *Former Stewardesses*

In *Laffey I*, NWA argued that the district court erred, in its *1974 Remedial Order*, "in granting relief pursuant to Title VII in the form of backpay to stewardesses whose employment with [NWA] [had] terminated more than ninety days prior to the first filing by an employee of [a] ... charge with the Equal Employment Opportunity Commission." 567 F.2d at 472. NWA's argument was based upon the settled rule that "only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the ... class." *Id.* NWA reasoned that the discrimination in this case "could not be deemed continuing as to those who left [NWA's] employ more than ninety days prior to the class filing with the [EEOC]," *id.* at 473, and that, as a result, those employees were not entitled to recover as members of the Title VII class.

The *Laffey I* court agreed with NWA's contention in this respect:

> A severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof. To hold otherwise would effectively read the timely-filing requirement out of the statute.

Id. (citations omitted). Accordingly, the *Laffey I* opinion directed the district court, on remand, to "exclude from the Title VII recovery those employees whose connection with NWA was dissolved more than ninety days before the class filing with the [EEOC]," while retaining those terminated stewardesses "who would have brought themselves within the Equal Pay Act class ...." *Id.* at 476.

After remand, NWA then sought the exclusion of two *additional* groups of ex-stewardesses: those on leaves of absence on the 90th day prior to the filing of the first EEOC charge and who, subsequent to that date, left the employ of NWA without having returned to work as stewardesses; and those who were employed by NWA at least until the 90th day prior to the first EEOC filing, but who had transferred to non-stewardess positions. The district court denied NWA's requested exclusions

33. Appellees' Reply Brief at 63–64 (citing, *inter alia*, *Paxton v. Union National Bank*, 688 F.2d 552, 563 (8th Cir.1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983); *Alexander v. Aero Lodge No. 735, Intern. Ass'n*, 565 F.2d 1364, 1372 (6th Cir.1977), *cert. denied*, 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801–02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971).

34. In light of our conclusion in this respect, we do not have to reach, nor do we, the specific question addressed in decisions from other Courts of Appeals, such as *Lorillard*.

in an order dated June 6, 1980. J.R.E. 162. This denial was based on the district court's understanding that *Laffey I* had resolved this issue. *See* District Court's Order of February 19, 1981, denying reconsideration of its June 6, 1980 order. J.A. 172, 173.

NWA challenges the June 6, 1980 order, arguing that the district court misunderstood *Laffey I*. Downplaying the fact that *Laffey I* dealt explicitly only with terminated stewardesses, NWA claims that a truer indication of that court's mandate was its recognition that "only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class." 567 F.2d at 472. This language, NWA argues, empowered the district court to consider its claims that certain stewardesses, other than those in the terminated group expressly dealt with in *Laffey I*, had no viable claims allowing their inclusion in the class. NWA traces the district court's failure to so interpret the mandate of *Laffey I* to its overly "wooden reliance" on the "phrase 'left the Company's employ ....'" NWA Brief at 61.

[14] Without reaching the merits of NWA's arguments against inclusion of the two disputed groups of stewardesses, we hold that the district court correctly construed the *Laffey I* mandate. NWA had the opportunity in *Laffey I* to raise the issue of the status of these two additional groups of class members, just as it had the opportunity to raise the issue of the terminated stewardesses. NWA simply and indisputably failed to do so. Its failure to raise these arguments constituted a waiver of them. *See supra* at pp. 1089–1090. Moreover, as to the law of the case, in *Laffey I* the court "affirm[ed]," 567 F.2d at 473, the award of backpay to all class members except those "whose connection with [NWA] was *dissolved* more than 90 days before the class filing with the Commission." *Id.* at 476 (emphasis added). NWA's attack on the district court's December 1980 ruling is thus barred by the principles of waiver and law of the case.

IV. The Limitation Period on Title VII Backpay

[15] In the 1972 amendments to Title VII, Congress limited back-pay liability to no more than two years prior to the filing of charges with the Equal Employment Opportunity Commission. *Laffey I* held that the 1972 amendments did not apply to this case and directed the district court on remand to "determine the local statute of limitations most appropriate to this case," 567 F.2d at 469. On remand, the district court referred to District of Columbia law, noted that the District has no borrowing statute and generally applies its own statute of limitations as a "procedural" prescription, and determined that the most relevant statutes are the D.C. Minimum Wage Law, D.C.Code Ann. § 36–416 (1973) (now codified at D.C.Code Ann. § 36–216 (1981)), and the general statute of limitations, D.C. Code Ann. § 12–301 (1981). *See Laffey v. Northwest Airlines, Inc.*, 481 F.Supp. 199, 200–01 (D.D.C.1979). Both of these laws provide for a three-year limitations period.

Were we writing on a clean slate, we might well decide that the two-year rule specified in the 1972 Title VII amendments should apply, if not directly, then at least by analogy, as the best indicator of the federal legislators' view of the appropriate back-pay liability limitation period. We are reluctant, however, to depart from the law of the case on the nonretroactivity of Title VII's current two-year limitation. Nevertheless, we modify the district court's decision specifying a three-year period borrowed from the District of Columbia's minimum wage law or general statute of limitations. In the unique circumstances presented here, we hold that the time frame most appropriately borrowed is Minnesota's two-year limitation on "the recovery of wages ... under any federal or state law." Minn.Stat.Ann. § 541.07(5) (West Supp.1982–1983).

Absent a federal limitation period which we can apply, we gene[illegible]ow the

limitation period of the state in which the federal trial court sits. If a traditional statute of limitations were needed here, we would be required to employ a District of Columbia statute of limitations. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n. 29, 96 S.Ct. 1375, 1389 n. 29, 47 L.Ed.2d 668 (1976); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411, 413 (D.C.Cir.1977). However, what is at issue is not a statute of limitations in the usual sense but rather a substantive cap on the amount of backpay that may be awarded.

Having refused to apply the federal two-year limit, *Laffey I* stated:

> [T]he problem at this point is simply that of fashioning a federal common law period of limitations. Most often this is effected by adopting the period prescribed by the most analogous state statute.... [A]doption of the state limitation period is proscribed only when it would create important conflicts with the federal policy underlying the cause of action or when it would amount to a discriminatory restriction of a federal right of action. Neither of those conditions exists here.

567 F.2d at 468–69 (footnotes omitted). The current two-year federal statutory cap on recovery, 42 U.S.C. § 2000e–5(g), for which *Laffey I* wished to find a "federal common law" substitute, is not addressed, as a statute of limitations would be, to the timeliness of the filing of charges or the institution of a lawsuit. Timeliness of filing with the Commission is governed by section 2000e–5(e) and that of the institution of a lawsuit by section 2000e–5(f)(1). But when those provisions are satisfied by timely filings, and when a plaintiff has made his substantive case, section 2000e–5(g) comes into play for the first time to define the maximum remedy. As the court stated in *Miller v. Miami Prefabricators, Inc.*, 438 F.Supp. 176, 181 (S.D.Fla.1977):

> When measured against the broad "make whole" purposes of Title VII it becomes evident that the two year cap on back pay contained in 42 U.S.C. § 2000e–5(g) is not a statute of limitations. Rather, that provision was inserted by Congress in an attempt to limit the back pay which could be recovered from employers who have been engaged in discrimination for many years.

As a limit on liability rather than a statute of limitations, section 2000e–5(g) is a substantive rather than a procedural measure. Where there is no similar back-pay cap in state law, a state statute of limitations will be used for federal purposes, here a substantive purpose. Where the issue is substantive, the District of Columbia does not automatically apply its own prescription. *See In re Air Crash Disaster at Washington, D.C.*, 559 F.Supp. 333, 341–42 (D.D.C.1983); *Williams v. Williams*, 390 A.2d 4, 5 (D.C.1978).

In this case, we have been pointed to no jurisdictions other than Minnesota and the District of Columbia that have a relevant connection to the parties and actions involved in this litigation.[35] The District of Columbia is obviously a jurisdiction whose laws should be examined. But of the two conceivably applicable D.C. statutes, neither manifests a policy closely analogous to the one at stake here. The Minimum Wage Law, D.C.Code Ann. § 36–203, on which the district court relied, is not designed to prevent sex discrimination but rather to establish minimum hourly wages, maximum hours, and overtime compensation rates. That statute's three-year limit on minimum wage claims, D.C.Code Ann. § 36–216, seeks merely to prevent the prosecution of stale claims—a policy not implicated here. Likewise, the D.C. three-year "catch all" statute of limitations, D.C.Code Ann. § 12–301, on which the district court also relied, serves to limit the bringing of stale claims and evinces no particular interest in preventing sex discrimination.

35. Appellees contend that neither state has a governmental interest or statutory policy that is relevant because this is a federal claim that no state has any legitimate interest in regulating substantively. But at the time of *Laffey I* there was a federal limit on liability and this court, though it found the federal limit itself inapplicable, did not decide that backpay should be awarded back to the effective date of Title VII, as appellees here then contended. Instead, *Laffey I* found that federal policy required that a relevant state limitation should be found. The state does not regulate the federal claims; the federal common law does, and it does so by constituting itself from analogous state law.

Minnesota law is more to the point and there is no doubt that the parties and actions at issue touch and concern that state. Appellant is a Minnesota corporation; appellant's headquarters are in Minnesota; the wage scales challenged in this case were all set by collective bargaining agreements negotiated and signed in Minnesota; the employment relationship of every member of the appellee class was established in Minnesota and was controlled by decisions taken there; all interviews and hiring occurred in Minnesota; the employment contract of each appellee class member stated that it was to be "viewed as a Minnesota contract of employment governed by the laws of that state in every respect"; and, when this case was certified as a class action, notice was directed to 2,634 stewardesses, of whom only ten lived in the District of Columbia while 1,694 lived in Minnesota. *See* Declaration of James A. Abbott, R. 61 at ¶¶ 2–4.

In contrast to the District of Columbia, Minnesota does have a statute closely analogous to Title VII, *i.e.*, the Minnesota Human Rights Act, Minn.Stat.Ann. § 363.01 (West 1983). Like Title VII, the Minnesota Human Rights Act extends its protection beyond sex-based classes to other groups and prohibits discrimination in aspects of employment besides compensation. The Minnesota Equal Pay Act that appellant would have us adopt merely prohibits wage differentials and protects only sex-based groups. Minn.Stat.Ann. § 181.67 (West 1983). Significantly, the Minnesota Supreme Court, in discussing the Minnesota Human Rights Act, has applied case law interpreting Title VII. *See Brotherhood of Railway & Steamship Clerks v. State*, 303 Minn. 178, 188–91, 229 N.W.2d 3, 9–11 (1975).

The Minnesota Supreme Court has decided that Minn.Stat.Ann. § 541.07(5) (West Supp.1982–1983) is the statute of limitations that should govern claims of discrimination brought under the Human Rights Act. *See Brotherhood of Railway & Steamship Clerks*, 303 Minn. at 195–96, 229 N.W.2d at 13–14. Section 541.07(5) prescribes a two-year limitations period "for the recovery of wages or overtime or damages, fees or penalties accruing under any federal or state law respecting the payment of wages or overtime or damages, fees or penalties...." We find that the limitations period for recovery of backpay should be established by recourse to that statute. Accordingly, the recovery period is two years.

V. The Liquidated Damages Award

The district court's 1974 Remedial Order, 374 F.Supp. at 1390, disallowed liquidated damages under the Equal Pay Act. On appeal in *Laffey I*, we "remand[ed] the matter of liquidated damages in toto for reconsideration by the District Court." 567 F.2d at 466 n. 279. With our *Laffey I* instructions as its guide, the district court permitted further discovery and ultimately found that the relevant facts mandated a liquidated damages award. *Laffey v. Northwest Airlines, Inc.*, 24 Empl.Prac.Dec. (CCH) ¶ 31,384 (D.D.C. Nov. 21, 1980) [hereafter, *Nov. 21, 1980, Decision*]. NWA contends that the district court erred in finding liquidated damages mandatory and in calculating the amount of the award. We reject both contentions as insubstantial and sustain the district court's liquidated damages adjudication in all respects.

A. *Plaintiff's Entitlement to Liquidated Damages*

As *Laffey I* recounted, 567 F.2d at 463–65, the Fair Labor Standards Act, which serves as the procedural and remedial framework for Equal Pay Act claims, initially provided that prevailing employees were entitled to an automatic award of liquidated damages in an amount equal to unpaid wages. Congress [illegible]ded the

statute in 1947[36] to commit to judicial discretion disallowance or limitation of liquidated damages if the employer satisfies the court that he acted "in good faith" and with "reasonable grounds for believing that his act or omission was [lawful]." 29 U.S.C. § 260 (1982). Both prior to and after this amendment, courts have described liquidated damages as serving a compensatory, not a penal, purpose. *See, e.g., Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945); *Thompson v. Sawyer*, 678 F.2d 257, 281 (D.C.Cir.1982); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir.1982); *Usery v. Chef Italia*, 540 F.Supp. 587, 591 n. 9 (E.D.Pa.1982).

Initially, the district court concluded that NWA had acted "in good faith": NWA committed a "willful" violation of the Equal Pay Act, the court explained, because it "was fully aware of [the Act] and adopted a deliberate and knowing course of conduct despite its awareness"; but the evidence did not indicate "an intentional, bad faith, attempt [by NWA] to evade the law." *1974 Remedial Order*, 374 F.Supp. at 1390.[37] For several reasons, the district court, on first examination, also found it "not unreasonable" for NWA to believe that its purser/stewardess pay differential was lawful. *Id.*

On review, we held "the reasons given by the District Court for disallowing liquidated damages ... legal[ly] inadequa[te]." *Laffey I*, 567 F.2d at 465. "The good faith of which the Act speaks," we restated, "is 'an honest intention to ascertain what the ... Act requires and to act in accordance with it.'" *Id.* at 464 (quoting *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877, 74 S.Ct. 120, 98 L.Ed. 384 (1953)). "Good faith" must be established affirmatively, we observed; it is not enough that "it appear that the employer probably did not act in bad faith." *Laffey I* at 465.

Four of the five reasons supplied by the district court for finding NWA reasonably believed it complied with the law related to then traditional industry practice and employee acquiescence.[38] We stated: "That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks." *Id.* (footnote omitted). Further, we remarked that "the prevalence of sex-discrimination litigation against the airline industry naturally prompts the question whether NWA should reasonably have known that neither its own tradition, the industry custom nor the employees' silence was a reliable indicium of the demands of the law." *Id.* (footnotes omitted).[39]

36. *See Laffey I*, 567 F.2d at 463–65 & n. 25 (quoting and discussing section 11 of the Portal to Portal Act of 1947, 29 U.S.C. § 260 (1982)).

37. *See also* Appellant's [NWA] Combined Reply Brief and Brief on Cross-Appeal at 58–59, *Laffey I* (arguing that to rebut NWA's proof in support of its alleged good faith, plaintiffs had to point to "direct evidence of bad faith or deliberate [Equal Pay Act] wrong, or that sex was consciously the rate basis, or that employer was trying to evade the [Equal Pay Act]").

38. The fifth factor cited by the district court was "the absence of any clear legal precedent or guideline precisely in point." *1974 Remedial Order*, 374 F.Supp. at 1390. We recognized that this factor was indeed relevant to a determination whether an employer had a good faith, reasonably grounded (but erroneous) belief that his conduct was lawful. But "legal uncertainty," we added, "to assist the employer's defense, must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice." *Laffey I*, 567 F.2d at 466. We indicated that on remand it would be appropriate for the district court to consider whether "the absence of precise legal guidelines" was in fact the "condition [that] actually led NWA to believe that it was in compliance with the Equal Pay Act." *Id.* The district court did so and concluded: "[NWA] was in the position to study and know the nature of the work being performed by its employees. For it to erroneously conclude that the jobs were different was not a consequence of *legal* uncertainty." *Nov. 21, 1980, Decision*, 24 Empl.Prac.Dec. at 18,286 (emphasis in original).

39. *Cf. Laffey I*, 567 F.2d at 466 n. 276 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280 (1975) (Title VII decision) for proposition that maintenance of practice of "highly questionable legality" constitutes bad faith).

In *Laffey I*, we recognized that "[a]ny assessment of an employer's good faith or grounds for his belief in the legal propriety of his conduct is necessarily a finding of fact, to be disturbed on appeal only if clearly erroneous." 567 F.2d at 464 (footnote omitted). We found, however, that the district court had erroneously declared and applied the governing law: it had misperceived the meaning of both "good faith" (by apparently accepting the absence of bad faith as sufficient) and "reasonable grounds" (by considering several factors irrelevant to that determination). The "clearly erroneous" rule, *see* FED.R.CIV.P. 52(a), therefore did not stand in the way of a remand.

On this appeal, by contrast, we find no legal infirmity in the district court's assessment. Instead, we are satisfied that the district court closely followed the guidance supplied in *Laffey I*, which constitutes the law of the case and of this circuit. Approaching the district court's fact findings with appropriate regard to that tribunal's function and to the need for finality served by FED.R.CIV.P. 52(a), we have no occasion to disturb the liquidated damages award.

[16] We summarize here the principal points made by the district court with ample record support in explanation of its ultimate finding that NWA did not have "a reasonable foundation for a *positive* belief that in fact its policies comp[lied] with the law." *Nov. 21, 1980, Decision*, 24 Empl. Prac.Dec. at 18,286 (emphasis in original). First, NWA officials concluded that the jobs of purser and stewardess were in fact different "without consulting the in-flight supervisors responsible for knowing the duties of each, without commissioning a study of the jobs (as they did nine years later), and without scrutinizing the jobs for differences in duties." *Id.*[40] Next, NWA's alleged belief that "wages established through collective bargaining" were invulnerable to Equal Pay Act challenge, despite the language of the Act and the Wage-Hour Administrator's published interpretation,[41] could not rest on "an honest intention to ascertain what the Act required." *Id.*

Additionally, NWA could not establish its "good faith" by reason of its termination of "*other* discriminatory personnel practices—after considerable delay and an EEOC find-

40. NWA refers to its "thorough" internal review of the possible application of the Equal Pay Act to the Company's personnel practices as indicative of its "good faith" and "reasonable grounds." *See* NWA Brief at 72; *see also Nov. 21, 1980, Decision*, 24 Empl.Prac.Dec. at 18,285–86 (summarizing NWA's contentions). This review consisted of conversations shortly after the Act's passage among Robert Ebert, Vice President for Personnel, James Abbott, Labor Relations Counsel (Personnel Department), and Homer Kinney, Director of Labor Relations (Personnel Department). *See* 12/20/78 Deposition of Homer R. Kinney at 4–7, *reprinted in* Supplemental Record Excerpts (S.R.E.), Vol. I; 12/19/78 Deposition of James A. Abbott at 56, *reprinted in* S.R.E., Vol. I. No participant asserted that he in fact recalled discussing the differences in duties between pursers and stewardesses. *See* 12/20/78 Deposition of Homer R. Kinney at 4–7, 42–43; 12/19/78 Deposition of James A. Abbott at 56–57, 62–63, 66–67. Nor does it appear that the officials in question were best positioned to conduct a close review of the work of pursers and stewardesses. *See Laffey I* Joint Appendix at 723–24, 734–36 (trial testimony of Chester L. Steward) (chain of direct supervision of pursers and stewardesses ran through Department of Transportation Services, not Personnel Department); *id.* at 897 (trial testimony of Robert Ebert) (he had only general, not detailed knowledge of purser and stewardess duties).

41. The district court quoted and added emphasis to the United States Department of Labor, Wage-Hour Administrator, Interpretive Bulletin on Equal Pay for Equal Work § 800.106 (Apr. 25, 1964), which states:

> [W]here equal work is being performed within the meaning of the statute, a wage rate differential which exists between male and female employees *cannot be justified on the ground that it is a result of negotiation by the union with the employer*, for negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment.

Reprinted in 29 C.F.R. § 800.106 (1983). The district court appropriately rejected NWA's various attempts to cloud this clear statement. *See Nov. 21, 1980, Decision*, 24 Empl.Prac.Dec. at 18,286 (citing *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 663 (4th Cir.1969)) ("If [employer] did not know, it was because he did not look, or looking, did not see, or want to see what was so plainly there.").

ing of probable violations." *Id.* (emphasis in original). Further, NWA gained no mileage from its "purported reliance on an EEOC statement that the duties of the purser and stewardess were different," for the vaunted EEOC statement "merely recited [NWA's] own job descriptions." *Id.* at 18,287. Finally, NWA's actions "*after* the lawsuit was filed ... fail[ed] to satisfy its burden of showing an honest intention to comply [with the law] prior to commencement of litigation." *Id.* (emphasis in original).[42]

In *Laffey I*, we cautioned the district court that the employer bore a "'substantial burden' of proving that his failure to comply was in good faith and also was predicated on reasonable grounds for a belief that he was in compliance." 567 F.2d 464–65 (quoting in part *Rothman v. Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir.1953)) (footnote omitted). "If the employer cannot convince the court in these respects," we emphasized, "an award of liquidated damages remains mandatory." *Id.* at 465 (footnote omitted). The district court, for solid, plainly stated reasons, was unconvinced that NWA acted with the requisite "good faith" and "reasonable grounds."[43] We uphold that determination as free from any clear error.

42. Nor, in light of the record as a whole, did NWA's conduct after the commencement of litigation impel any finding that "good faith" and "reasonable grounds" supported NWA's 1970–1976 retention of the sex-based pay differential. *See infra* pp. 1098–1099 (differential maintained for two years following district court declaration that it violated the Equal Pay Act).

43. We have described the "good faith" inquiry—did the employer honestly intend to ascertain and act in accordance with Equal Pay Act requirements—as "subjective," and the "reasonable grounds" inquiry as "objective." *Laffey I*, 567 F.2d at 464. If theoretically discrete, the two inquiries are not so readily compartmentalized in practical application. Inquiry into the subjective state of mind of the employer, if we attribute rationality to that employer, is likely to be influenced by the fact trier's perception whether a reasonable person, diligently seeking to conform his or her conduct to legal requirements, might have acted as the employer in fact did.

B. *The Liquidated Damages Calculation*

NWA next argues that, even if the district court properly determined that the statute entitled the Equal Pay Act plaintiffs to liquidated damages, the years 1974 and 1975 should have been left out of the calculation. These are the relevant facts. NWA's contract with the cabin attendants' union expired at the end of 1973. Negotiations for a new contract took place in 1974 and 1975. During that two-year interval, pursers and stewardesses were paid under the terms of the expired contract, which accorded higher pay to pursers. The new contract, signed December 20, 1975, equalized purser and stewardess wage rates[44] and provided for a retroactive adjustment covering the negotiation period.

[17] Thus, in early 1976, the stewardesses received "retro-pay" for the difference between wages paid pursers and stewardesses in 1974 and 1975. The parties agreed on subtraction of this retro-pay from NWA's basic back-pay liability. NWA unsuccessfully sought credit for the retro-pay against liquidated damages as well, and now challenges the district court's refusal to subtract the retro-pay from the liquidated damages award. *See Laffey v. Northwest Airlines, Inc.*, 582 F.Supp. 280 at 281, 282–284 (D.D.C.1982) [hereafter, *Oct. 25, 1982, Mem. Op.*], *reprinted in* J.R.E. 180, 183–89.

NWA now argues for rigid separation of "good faith" from "reasonable grounds" and incorrectly reads our *Laffey I* opinion to leave untouched the district court's original finding of good faith. *See* NWA Brief at 20, 72 n.*. We note, however, that NWA itself has exhibited less than perfect consistency in deciding whether to characterize a factor as relevant to "good faith" or to "reasonable grounds." *Compare* Appellant's [NWA] Combined Reply Brief and Brief on Cross-Appeal at 54–55, *Laffey I* (arguing that collective bargaining history and stewardess acquiescence demonstrated NWA acted in good faith), *with* NWA Brief at 72 n.* (arguing that, when *Laffey I* rejected these factors, the court addressed only "reasonableness," not "good faith").

44. This contract, effective January 31, 1976, and applicable to the years 1974–1977, merged all cabin attendants into a single classification. *See* NWA Brief at 11 n.*.

In opposing credit for the retro-pay against liquidated damages, plaintiffs relied on the district court's November *1973 Findings*, 366 F.Supp. at 789, holding that the purser/stewardess pay differential violated the Equal Pay Act.[45] Retroactive adjustment over two years later, plaintiffs argued and the district court agreed, did not relieve NWA of its liquidated damages liability for the years 1974 and 1975, a period during which pursers received, but stewardesses continued to await, the higher pay. NWA, on the other hand, maintained that the retro-pay stewardesses received in 1976 should be treated for all Equal Pay Act remedial purposes as if it had been paid in 1974 and 1975. NWA characterized payments under 1973 contract as merely "on account"; lump-sum adjustments retroactively establishing actual wage rates for past years, NWA stressed, were a "standard feature of labor agreements in the airline industry." *See Oct. 25, 1982, Mem.Op.* at 282, *reprinted in* J.R.E. 185 (quoting NWA); NWA Brief at 22, 82.

We conclude that the district court appropriately refused to "relate back" the retro-pay, and thereby exclude 1974 and 1975 from the liquidated damages calculation. The wages involved in fact were not received until two years after they were earned. That reality, in the circumstances here presented, is dispositive of plaintiffs' statutory entitlement to liquidated damages.

[18] In rejecting NWA's "relate back" argument, the district court stressed this central consideration: "liquidated damages are not punitive"; they are intended to compensate employees for a payment delay "which might result in damages too obscure and difficult of proof" to be redressed by any other means. *Oct. 25, 1982, Mem.Op.* at 282–283, *reprinted in* J.R.E. 185–86 (quoting language appearing in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583–84, 62 S.Ct. 1216, 1222–23, 86 L.Ed. 1682 (1942)); *see* cases cited *supra* 1096. As its principal ground of objection to the district court's ruling,[46] NWA asserts that section six of the Railway Labor Act, 45 U.S.C. § 156 (1982), obligated it to maintain the status quo as to all conditions of employment, including wages, during the two-year pendency of contract negotiations.[47] That Act, we are confident, does not stop an employer from immediately equalizing wages upward in accordance with the judicial determination

45. The district court's April *1974 Remedial Order*, 374 F.Supp. at 1385, provided that backpay would continue to accrue until NWA equalized purser and stewardess wages. This Order was stayed pending NWA's appeal, petition for rehearing, and petition for certiorari. *See supra* p. 1075.

46. The district court correctly observed, *see Oct. 25, 1982, Mem.Op.* at 282–283, *reprinted in* J.R.E. 185–86, that the right to liquidated damages is nonwaivable by employees, *see Schulte v. Gangi*, 328 U.S. 108, 114, 66 S.Ct. 925, 928, 90 L.Ed. 1114 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704, 65 S.Ct. 895, 900, 89 L.Ed. 1296 (1945), and that a union, in collective bargaining, cannot surrender rights secured by the Equal Pay Act. *See* 29 U.S.C. § 206(d)(2) (1982). *EEOC v. AT & T Co.*, 365 F.Supp. 1105, 1128 (E.D.Pa.1973), *aff'd in relevant part*, 506 F.2d 735 (3d Cir.1974) (without discussion of this point). Thus airline industry collective bargaining patterns, *see supra* p. 1099, provide no insulation to NWA against the full measure of recovery Congress specified for Equal Pay Act violations.

We further note our agreement with the district court's remarks on a Fair Labor Standards Act regulation cited by NWA. 29 C.F.R. § 778.303 (1983) (employer who grants retroactive pay increase must also increase overtime pay retroactively). This regulation serves to insure employees' receipt of overtime compensation on retroactive pay increases; it is not addressed to situations involving an "underlying unlawful differential in wages" or any other delinquency in meeting statutory obligations. *See Oct. 25, 1982, Mem.Op.* at 283–284, *reprinted in* J.R.E. 187–88.

47. The provision on which NWA relies states that "[i]n every case where [the negotiation procedures of the Act have come into play], rates of pay, rules, or working conditions shall not be altered by the carrier [until the Act's negotiation procedures have run their course]." 45 U.S.C. § 156 (1982).

that an existing wage disparity violates the Equal Pay Act.[48]

The Railway Labor Act provision NWA cites fosters bargaining over disputes to avert the disruption of commerce strikes and lockouts occasion. *See, e.g., Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 148–50, 90 S.Ct. 294, 298–299, 24 L.Ed.2d 325 (1969). But the Equal Pay Act *requires* equalizing the wages of the lower paid sex up to the level of the higher paid sex. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 206–07, 94 S.Ct. 2223, 2233–2234, 41 L.Ed.2d 1 (1974). A court determination of an Equal Pay Act violation leaves nothing for the employer and union to bargain about. Just as the National Labor Relations Act's prohibition against an employer's unilateral change in wages under negotiation[49] gives way to commands for an employer's compliance with other laws,[50] so the analogous provision of the Railway Labor Act erects no obstacle, on the facts here presented, to an employer's immediate payment of equal wages to men and women performing equal work.

Stewardesses did not receive until 1976 pay made to pursers in 1974 and 1975; NWA must now compensate for the withholding period, during which it remained out of compliance with the Equal Pay Act, by paying the liquidated damages ordered by the district court.

VI. Issues Raised by Laffey as Cross-Appellant

A. *Pre-Act Longevity*

[19] In calculating the amount of back-pay due for NWA's post-Act wage violations, the district court held that the women should receive credit only for stewardess service performed subsequent to the Act under which they were recovering. The district court reasoned that the Supreme Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), precluded crediting the women with pre-Act longevity. Because we find that the district court improperly applied these decisions, we reverse.

The back-pay recovery period covers the years 1967 through 1976. During that time NWA had a pay ladder for pursers such that salary rose with increased years of service or "longevity." Under this policy a man hired as a purser in 1957 would have accumulated ten years' longevity by 1967 and would have been paid accordingly. The issue facing the district court was whether, for purposes of computing back-pay, a woman who had also been hired in 1957 as a cabin attendant and who had worked continuously as such until 1967 should be credited with the same longevity in determining her 1967 salary. Under the district court's holding, the woman in this example would be entitled only to the pay of a purser with three years' longevity if she were recovering under the Equal Pay Act. She would be entitled only to the pay received by a purser with two years' longevity if she were recovering under Title VII.

We think that a woman hired in 1957 should today be credited with the same longevity as a man hired in that year. This does not involve finding that discrimination prior to the passage of the Act was somehow illegal. The stewardesses claim no damages for pre-Act pay differentials, nor could they. Their claim is that their current status be the same as that of men who have the same job characteristics, including job longevity. That claim of equal treatment seems to us required by the law. Indeed, the only case authority we have found dealing expressly with this subject holds squarely that a back-pay award should take into account "the length of service of the employees," including years of service prior to the effective date of Title VII. *Sears v. Atchison, T. & S.F. Ry.*, 645 F.2d 1365, 1378 (10th Cir.1981), *cert. denied*, 456 U.S. 964, 102 S.Ct. 2045, 72 L.Ed.2d 490 (1982).

United Air Lines, Inc. v. Evans and *Teamsters v. United States* are not to the contrary. In these cases the Supreme Court held that *bona fide* seniority systems do not violate Title VII even where they perpetuate the effects of prior discrimination. The Court based its decisions on section 703(h) of that Act, which provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ...." Section 703(h), 42 U.S.C. § 2000e–2(h) (1976). These decisions do not apply to cases, such as the present one, where there is no allegation that a seniority system violates Title VII, but only a claim for an appropriate remedy.[51] The distinction between a remedy issue and a violation issue under Title VII was explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), and repeated in *United Air Lines, Inc. v. Evans*, 431 U.S. at 559, 97 S.Ct. at 1889–1890. In *Evans* the Court stated:

> The difference between a remedy issue and a violation issue is highlighted by the analysis of § 703(h) of Title VII in *Franks*. *As we held in that case, by its terms that section does not bar the award of retroactive seniority after a violation has been proved.* Rather, § 703(h) "delineates which employment practices are illegal and thereby prohibited and which are not." 424 U.S. at 758 [96 S.Ct. at 1261].

431 U.S. at 559, 97 S.Ct. at 1889–1890 (footnote omitted) (emphasis added). Clearly, section 703(h) does not preclude the crediting of retroactive pre-Act longevity in the present case. Indeed, *Franks v. Bowman Transportation* highlights this point by stating:

> There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved ....

424 U.S. at 761–62, 96 S.Ct. at 1262–1263.

Having demonstrated that the district court's holding was not required by *Evans* and *Teamsters*, we turn to the affirmative reasons for according pre-Act longevity. To deny women longevity credit for their pre-Act service, when men were given such

48. We note in this context the specific command directed to unions in the Equal Pay Act:

> No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of [the Equal Pay Act].

29 U.S.C. § 206(d)(2) (1982). *See also, e.g., Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 249–53, 90 S.Ct. 1583, 1591–1594, 26 L.Ed.2d 199 (1970) (to advance objectives of other legislation, court may sanction exception to Norris LaGuardia Act that does not undermine that Act's purposes); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 39–42, 77 S.Ct. 635, 639–641, 1 L.Ed.2d 622 (1957) (same); *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*, 523 F.2d 164, 168–69 (2d Cir.1975) (Railway Labor Act's unilateral wage change prohibition does not block trustee's unilateral change made to keep bankrupt operating), *cert. denied*, 423 U.S. 1017, 96 S.Ct. 451, 46 L.Ed.2d 388 (1975), 423 U.S. 1073, 96 S.Ct. 855, 47 L.Ed.2d 82 (1976).

49. *See, e.g., NLRB v. Katz*, 369 U.S. 736, 743, 745–47, 82 S.Ct. 1107, 1111, 1112–14, 8 L.Ed.2d 230 (1962) (employer's unilateral change in wages under negotiation violates § 8(a)(5) of the National Labor Relations Act).

50. *See* Standard Candy Co., 147 NLRB 1070, 1073 (1964) (ALJ opinion adopted by Board) (unilateral change in wages to comply with Fair Labor Standards Act does not violate § 8(a)(5) of the National Labor Relations Act); Southern Transport, Inc., 145 NLRB 615, 617–18 (1963) (Board opinion) (same); *cf. EEOC v. AT & T Co.*, 365 F.Supp. 1105, 1129 (E.D.Pa.1973) (unilateral changes in provisions of currently binding contract to conform with Title VII or Equal Pay Act do not violate National Labor Relations Act), *aff'd in relevant part*, 506 F.2d 735 (3d Cir. 1974) (without discussion of this point).

51. Moreover, the district court did not hold, as appellee argues, that Northwest's longevity system was a bona fide seniority system. Absent such a conclusion, there is no basis whatever for application of the Court's decisions in *Teamsters* and *Evans*.

credit for doing what the court has held to be the same work, would "differentiat[e] between similarly situated males and females on the basis of sex." *Evans*, 431 U.S. at 558, 97 S.Ct. at 1889. If NWA unilaterally computed the backpay in this way, its action would violate Title VII; *a fortiori*, such a method of calculation is not permissible as part of a judicial remedy. Moreover, such a limited remedy would run counter to the "make whole" purpose of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419, 421, 95 S.Ct. 2362, 2372, 2373, 45 L.Ed.2d 280 (1975). The Supreme Court has stated that Congress' purpose in vesting discretionary powers in the courts to provide relief under Title VII was to "make possible the 'fashion[ing] [of] the most complete relief possible.'" *Albemarle Paper Co.*, 422 U.S. at 421, 95 S.Ct. at 2373 (quoting section-by-section analysis accompanying Conference Committee Report on the Equal Employment Opportunity Act of 1972). We therefore reverse the district court's ruling on this issue and instruct the court to credit plaintiffs' pre-Act longevity in calculating backpay for the relevant, post-Act time periods.

B. *Interest*

1. *Rate of pre-judgment interest for the 1974–82 period*

[20] In paragraph 19 of its 1974 order, the district court made the following ruling on pre-judgment interest:

> 19. INTEREST—With respect to all monies to be paid under the foregoing provisions of this Order, the Company shall pay six percent interest per annum from the date the violation occurred giving rise to said liability through the date upon which payment is made in accordance with this Order.

1974 Remedial Order, 374 F.Supp. at 1389. In 1974, the district court believed that the judgment it was entering was a final one (R. 7, at 4; R. 115, at 25, 26). The panel in *Laffey II*, however, ruled in 1980 that the 1974 order was not a "final judgment," 642 F.2d 578, 583–84 (1980). This ruling had the effect of extending the prejudgment period from May 20, 1974 through the entry of final judgment on November 30, 1982.

Following the decision in *Laffey II*, plaintiffs moved for a determination of the pre-judgment interest that should apply to this additional period. Plaintiffs noted that interest rates generally had risen greatly after 1974 and recommended that the rate for each year of the 1974–82 period be 90% of the average prime rate for that year, compounded quarterly. At the hearing on plaintiffs' motion, the district court concluded that its prior ruling should not be revised. We affirm.

We are unpersuaded by plaintiffs' argument that the district court did not make a decision as to the rate of interest that should be awarded from 1974 to 1982. In rejecting plaintiffs' contention, the district judge stated that he had "determined the interest to be awarded without regard to the length of the pre-judgment period." R. 120; *Laffey v. Northwest Airlines, Inc.*, 29 Empl.Prac.Dec. (CCH) 25,330, 25,332 (D.D.C. Oct. 6, 1981). Moreover, the express terms of the 1974 order set no limit on the length of the pre-judgment period. We stress that although the 1974 judgment was ultimately declared non-final, we entertained in *Laffey I* all objections to dispositive rulings that the parties placed before us. *See Laffey II*, 642 F.2d at 584 n. 49. We have discussed above the salutary purposes served by the doctrine of the law of the case. According to that doctrine,

> a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.

1B J. Moore, *Moore's Federal Practice* ¶ 0.404[1] (1983). Reconsideration of a prior decision, unappealed at an earlier stage although the opportunity to do so was present, is justified only in a limited number of circumstances:

> [The law of the case] must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

Bell v. Murtha, 377 F.2d 428, 431–32 (5th Cir. 1967). *See also Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1189–90 (5th Cir.1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Jenkins v. Patterson*, 488 F.2d 436, 441 n. 4 (5th Cir.1974). None of the above criteria for reopening the district court's decision obtains here. We therefore affirm the district court's holding that plaintiffs are entitled to pre-judgment interest at six percent simple for the 1974–82 period.

2. *Post-judgment interest on liquidated damages*

In 1981 the district court held that the law of the case precluded it from awarding post-judgment interest on liquidated damages. In paragraph 19 of its 1974 order, the district court noted, it had not awarded post-judgment interest on pre-judgment interest. By analogy, it reasoned, that ruling "is fully applicable to liquidated damages since liquidated damages are a substitute for pre-judgment interest" (R. 119, at 2). We do not believe that law of the case settles this issue. Our evaluation of the merits leads us to conclude that plaintiffs are entitled to post-judgment interest on liquidated damages. Consequently, we reverse.

[21] The district court did not award liquidated damages until 1980; it thus had no occasion to decide in 1974—and it did not decide in 1974—whether plaintiffs were entitled to post-judgment interest on liquidated damages. That question did not arise until 1981, following our *Laffey I* decision. Since the district court had not previously decided this question, it was "free to rule thereon as it thought proper." *Salvani v. Pilson*, 181 F.2d 615, 619 (D.C. Cir.), *cert. denied*, 339 U.S. 981, 70 S.Ct. 1030, 94 L.Ed. 1385 (1950).

The district court's 1974 ruling refusing to award post-judgment interest on pre-judgment interest does not apply by analogy here, for liquidated damages are not merely "a substitute for pre-judgment interest" (R. 119, at 2). As defined by this court in *Thompson v. Sawyer*, 678 F.2d 257, 281 (1982), liquidated damages are "compensatory, intended to reimburse workers for intangible losses—difficult to prove but nonetheless the very real consequences of unfair wages." Liquidated damages differ in amount and, to some extent, in kind from pre-judgment interest. Inasmuch as the law of the case did not control the question whether post-judgment interest should accrue on liquidated damages, that issue was and is open for determination on the merits.

[22] The federal post-judgment interest statute, 28 U.S.C. § 1961 (1982), provides, in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in district court ....

This statute has been interpreted to mean that

> once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed.

Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir.1973); *see R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir.1983). The law requires the awarding of post-judgment interest on all elements of the judgment, including liquidated damages. We therefore reverse the determination below and hold that plaintiffs are entitled to post-judgment interest on liquidated damages.

Conclusion

For the reasons stated, we instruct the district court on remand to (1) allow backpay under Title VII beginning two years, not three years, prior to the filing of the first EEOC charge; (2) credit plaintiffs with pre-Act longevity in calculating backpay due for post-Act service; and (3) allow post-judgment interest on liquidated damages. In all other respects, we affirm the district court's dispositions.

It is so ordered.

COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA, et al., Plaintiffs,

v.

UNITED STATES of America, et al., Defendants.

Civ. A. No. 82-0912.

United States District Court, District of Columbia.

Jan. 10, 1983.

As Corrected March 11, 1983.

Seven black citizens who were registered to vote in county moved to intervene in voting rights action instituted by county and two county officials seeking declaratory judgment, implemented by injunction, that at-large method of election in county was not subject to preclearance by Attorney General, that preclearance had already been given, and that at-large method did not have purpose or effect of denying or abridging right to vote on account of race, color or previous conditions of servitude. Three-judge District Court, Bork, Circuit Judge, and Barrington D. Parker and Oberdorfer, JJ., held that: (1) black citizens' motion to intervene would be granted; (2) institution of at-large elections required preclearance; and (3) Attorney General's failure to object to two statutes relating to at-large elections for county governing body did not amount to preclearance by Attorney General; (4) substantial fact issue existed as to retrogressive effect of at-large elections precluding summary judgment.

Order accordingly.

See also, 102 S.Ct. 715; 509 F.Supp. 1334.

holder may prosecute derivative action pro se because he is properly a plaintiff, and may represent himself and simultaneously present arguments common to corporate plaintiff), *appeal dismissed*, 312 F.2d 399 (2d Cir.1963); *cf. Church of the Visible Intelligence that Governs the Universe v. United States*, No. 574 79T (Ct.Cl. , '1) (semble). *See generally* Annc 1073, 1082 87 (1968).

1. Declaratory Judgment ⇐306

Although black registered voters' motion to intervene in Voting Rights Act proceeding was filed relatively late, where they moved for intervention less than one month after United States abandoned issue of whether, in order to obtain declaratory judgment of preclearance, county officials were required to demonstrate that voting procedure change did not violate statute prohibiting denial or abridgment of right to vote on account of race or color through voting qualifications did not seek discovery or to relitigate old issues, and their local perspective on current and historical fact at issue could be enlightening to court, motion to intervene would be granted. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

Memorandum on Summary Judgment

2. Elections ⇐12

Where laws eliminated legal power of governor and General Assembly over local affairs and vested it exclusively in county council elected at large by county voters, institution of at-large elections for unfettered county local government was sufficient change to require preclearance under Voting Rights Act. S.C.Code 1976, §§ 4-9-10 et seq., 4-9-10(b); S.C.Act June 20, 1967, 55 Stat. at Large, p. 523, § 1 et seq.; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

3. Elections ⇐12

De jure change in voting qualifications and procedures as well as de facto change in voting requires preclearance by Attorney General under Voting Rights Act. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

None of these exceptions applies here. Furthermore, there is no first-, fifth-, or sixth-amendment right to representation by a layman. *See Turner*, 407 F.Supp. at 480, 481. Finally, I note that plaintiff has obtained counsel in other cases in this court. *See Move Org'n v. City of Philadelphia*, 89 F.R.D. 521, 523 n. 1 (E.D.Pa.1981).

4. Elections ⇐12

Political subdivision must state that it desires preclearance of election before it can claim preclearance by silence of Attorney General. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

5. Elections ⇐12

Where letter that submitted state statute affecting voting changes in county to Attorney General did not request preclearance nor mention any voting changes, Attorney General's silence concerning statute did not constitute preclearance of at-large election system for county provided for in statute. S.C.Act June 20, 1967, 55 Stat. at Large, p. 523, § 1 et seq.

6. Elections ⇐12

Where Attorney General reserved his right to object to any referendum adhered to by local counties pursuant to home rule statute passed by South Carolina legislature, Supreme Court held that letter informing Attorney General of referendum results was only request for reconsideration of Attorney General's earlier objection to statute, and that county's at-large method of election had still not been precleared; Attorney General did not preclear at-large elections when he reviewed home rule statute. S.C.Code 1976, § 4-9-10 et seq.; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

7. Federal Civil Procedure ⇐2491.5

Voting rights action in which county and two of its officials alleged that even if at-large method of election did represent change in method requiring preclearance, change did not have effect of denying or abridging right to vote on account of race, affidavit submitted by black citizens opposing county's motion for declaratory judgment raised substantial fact issue as to whether system was retrogressive precluding summary judgment. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

8. Elections ⇐12

District court has no authority either to review, or to preview, decision of Attorney General under section of Voting Rights Act governing alteration of voting qualifications and procedures. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

9. Elections ⇐12

District court's role under section of Voting Rights Act governing alteration of voting qualifications and procedures is to examine change de novo, as alternative to Attorney General's decision regarding preclearance. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

10. Elections ⇐12

Difference between background circumstances which prevailed in county at time of original Voting Rights Act, specifically fact that less than half of voting population was registered to vote, and those currently prevailing, that over 50% of voting population are registered, did not justify reexamination of firm conclusions made by Congress in extending Act to county and Supreme Court in holding that categories chosen by Congress were and are appropriate. Voting Rights Act of 1965, § 4(b), as amended, 42 U.S.C.A. § 1973b(b).

Joseph W. Dorn, Kilpatrick & Cody, Washington, D.C., Randall T. Bell, M. Elizabeth Crum, McNair Glenn Konduros Corley Singletary Porter & Dibble, P.A., Columbia, S.C., Howard P. King, Bryan, Bahnmuller, King, Goldman & McElveen, Sumter, S.C., for plaintiffs.

Gerald W. Jones, Paul F. Hancock, J. Gerald Hebert, David S. Cunningham, III, Attys., Civ. Rights Div., Dept. of Justice, Washington, D.C., for defendants.

Armand Derfner, Washington, D.C., Laughlin McDonald, Atlanta, Ga., for defendants-intervenors.

Before BORK, Circuit Judge, and BARRINGTON D. PARKER and OBERDORFER, District Judges.

MEMORANDUM ON MOTION TO INTERVENE

Seven black citizens who are registered to vote in Sumter County, South Carolina, at

least one of whom was a party in *Blanding v. DuBose*, 454 U.S. 393, 102 S.Ct. 715, 70 L.Ed.2d 576 (1982), move pursuant to Fed. R.Civ.P. 24 to intervene in this Voting Rights Act proceeding which is a sequel to *Blanding*. Some of the movants made representations to the Attorney General in opposition to the preclearance of the at-large voting method for Sumter County Council members at issue in *Blanding*. When the Attorney General first refused preclearance, Sumter County nevertheless continued to schedule at-large elections. Some movants and the United States sought to enjoin future at-large elections pending preclearance. After a three-judge District Court in South Carolina granted a preliminary injunction, but ruled for the County on the merits, the United States did not perfect its appeal; intervenors perfected theirs and prevailed in the Supreme Court on their contention that the Attorney General had not precleared at-large elections for the Sumter County Council. *Blanding v. DuBose, supra.*

Movants allege that they have an "intensely local" perspective with respect to the allegedly discriminatory effects and purpose of the change in elections methods effected by Sumter County that would be helpful to us and necessary to the full and proper resolution of this case.[1]

Movants also allege that the United States defendants may or cannot adequately represent movants' interests because those interests may diverge from defendants' conception of the public interest. In support of this allegation movants point to the failure of the United States to pursue its appeal in *Blanding*, contending that if they had not protected their own interests in the Supreme Court they would have already lost the rights which they preserved there and now defend here. In addition, movants point to defendants' change in position in the instant proceeding on October 27, 1982, at which time defendants abandoned a contention that in order to obtain a declaratory judgment of preclearance under Section 5 of the Voting Rights Act plaintiffs must demonstrate that the voting procedure change did not violate section 2 of the Act.

Movants represent that they would enter the case subject to all outstanding orders, that they do not seek to reopen discovery, and that in making a factual record without delaying the trial, they would rely principally upon an opportunity to examine and cross-examine witnesses called by others, and not attempt to call any other witnesses, except by leave of court if special circumstances arise.

Plaintiffs oppose the motion to intervene as untimely, and urge that, if it is granted, movants' participation should be limited to the filing of a post-trial memorandum. Plaintiffs object to movants' failure to seek to intervene until the close of discovery and on the eve of argument on motions for summary judgment. Plaintiffs claim prejudice in that they would have conducted their discovery and prepared and evaluated their case differently if the movants had been parties earlier. For example, plaintiffs say they would have conducted more extensive discovery had they known that Section 2 would be at issue. Plaintiffs emphasize the time essence here because there have been no local elections in Sumter County for six years, pending resolution of this controversy. In addition to the difficulty of confronting a Section 2 issue without discovery, plaintiffs urge that movants' intervention would necessarily make the trial longer, and more complicated and, for plaintiffs at least, more expensive. *See* Plaintiffs' Memorandum in Response to Petition for Leave to Intervene (Dec. 13, 1982).

Movants rely on a long line of cases in which this Court has routinely allowed intervention by persons situated similarly to movants,[2] and point to at least one other

1. *See* Plaintiffs' Memorandum in Support of Petition for Leave to Intervene (Nov. 26, 1982) at 4.

2. *Busbee v. Smith*, C.A. No 82 0665 (D.D.C.) (order allowing intervention March 22, 1982);

case in which intervenors, and not the United States, made the only argument for their position in the Supreme Court. *City of Lockhart v. United States*, — U.S. —, 103 S.Ct. 998, 74 L.Ed.2d 863 (1982). Moreover, they cite authority that intervention should be allowed, even where the United States' interest is apparently parallel, upon a "minimal" showing that the United States' representation of the public interest as it views that interest "may" not adequately represent the movants' legitimate interest. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 and n. 10, 92 S.Ct. 630, 636 and n. 10, 30 L.Ed.2d 686 (1972).

[1] We are persuaded that, on balance, movants should be allowed to intervene on a limited basis. Although movants filed relatively late, they moved less than a month after defendants' abandoned the Section 2 issue. *See Liddell v. Caldwell*, 546 F.2d 768 (8th Cir.1977). Plaintiffs have not explained why the discovery they conducted before October 27, 1982, (when the defendants' Section 2 argument was at issue) did not prepare them to deal with that issue. Movants do not seek discovery or to relitigate old issues, but only to participate prospectively, and to assure a vigorous response to plaintiffs' claim. *See Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C.Cir.1977). Their local perspective on the current and historical facts at issue could be enlightening to us. Finally, we are confident that we can effectively limit movants' cross-examination and other potentially time-consuming activities in the same way that we intend to control the presentations of the parties themselves so as to minimize the burden on them as well as on the Court, which unfettered intervention might otherwise entail.

[illegible] at least upon [illegible] nor will be permitted to [illegible] if they so desire, within the limit of their proposed intervention and such other limits as the Court may set. We may or may not be required to decide the Section 2 issue, but we will be better able to deal with it if we have evidence than if the argument were before us only in the abstract.

In passing the Voting Rights Act Amendments of 1982, Pub.L. No. 97-205, 96 Stat. 131 135 (June 29, 1982), Congress amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to read as follows:

> SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to

City of Port Arthur, Texas v. United States, 517 F.Supp. 987, 991 n. 2 (D.D.C.1981), *prob. juris. noted*, 455 U.S. 917, 102 S.Ct. 1272, 71 L.Ed.2d 457 (1982); *City of Richmond, Va. v. United States*, 376 F.Supp. 1344, 1349 n. 23 (D.D.C. 1974), *remanded on other grounds*, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975); *Beer v. United States*, 374 F.Supp. 363, 367 n. 5 (D.D.C.1974), *remanded on other grounds*, 425 U.S. 130, 133 n. 3, 96 S.Ct. 1357, 1360 n. 3, 47 L.Ed.2d 629 (1976); *City of Petersburg, Va. v. United States*, 354 F.Supp. 1021, 1024 (D.D.C. 1972), *aff'd*, 410 U.S. 962, 93 S.Ct. 1441, 35 L.Ed.2d 698 & *sub nom Diamond v. United States*, 412 U.S. 901, 93 S.Ct. 2290, 36 L.Ed.2d 967 (1973); *New York State v. United States*, 65 F.R.D. 10, 12 (D.D.C.1974); *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

have members of a protected class elected in numbers equal to their proportion in the population.

96 Stat. at 134. The Senate Report on the 1982 Amendments stated that: "In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S.Rep. No. 97–417, 97th Cong., 2nd Sess. (May 25, 1982) at 12 n. 31, *reprinted in* 1982 U.S.Code Cong. & Ad. News 177, 189 n. 31. In a Reply Brief to the Supreme Court in *City of Lockhart v. United States & Cano*, No. 81–802 (Oct. 1982) (filed by defendants in this action together with their Amended Memorandum on October 27, 1982), the United States noted the importance and complexity of the impact of the 1982 amendment of Section 2 on a Section 5 case: "Whether ... the 'results' standard of Section 2 can properly be imported into Section 5 presents a complex issue which can be decided only after a comprehensive assessment of the statutory scheme and legislative history." *Id.* at 4. The United States also represented that "[t]hat inquiry should be performed in the first instance by [a] district court." *Id.*

In order to best address the issue, as preserved by the intervenors, but not delay resolution of the primary subject of this action which has precluded County Council elections in Sumter County for at least four years, the Court will allow intervenors to preserve the issue, cross-examine witnesses and rebut evidence on it adduced by plaintiffs.

An accompanying Order will grant intervenors' motion. A separate accompanying Order will set a pretrial briefing schedule with the expectation that the parties (including defendants if they wish) may include in those briefs argument regarding the legal issues and an outline of the evidence which will be developed to resolve the Section 2 issue originally raised by defendants and now preserved by intervenors (including an estimate of any additional courtroom time required to adduce such evidence).

MEMORANDUM ON SUMMARY JUDGMENT

The County Council of Sumter County, South Carolina (Sumter County), and two Sumter County officials brought this action against the United States pursuant to section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c ("the Act"). They have also invoked the Ninth, Tenth, Fourteenth and Fifteenth Amendments of the United States Constitution. Their amended complaint seeks declaratory judgment, implemented by an injunction, that an at-large method of electing the Sumter County Council is not subject to preclearance by the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965; that if such preclearance is required, the Attorney General has already given it; and that, in any event, the at-large method at issue does not have the purpose or effect of denying or abridging the right to vote on account of race, color, or previous condition of servitude. In 1978, the two individual plaintiffs and other qualified electors of Sumter County voted in favor of the at-large method of election in a referendum. Plaintiffs now also seek declaratory and injunctive relief to protect the rights of the qualified electors of Sumter County to vote for the at-large method of election for County Council in a referendum, and to have the votes counted in the at-large elections which they advocate. Finally, they challenge as inappropriate and, therefore, unconstitutional, Congress's 1982 extension of the Act as applied to Sumter County.

Defendants, who are the United States, its Attorney General and its Assistant Attorney General for Civil Rights, have moved to dismiss and for summary judgment on six of the seven counts in the complaint. Plaintiffs have filed cross-motions for summary judgment, including a motion for partial summary judgment on Count III, the count on which defendants believe a trial is required. Meanwhile, when defendants retreated from an earlier contention concerning the interrelation between Sections 2 and 5 of the Voting Rights Act,[1] seven Hacks voters of Sumter County moved for leave to intervene and to take a limited role in the proceedings henceforth.

All of these motions have been fully briefed, and all except the motion to intervene have been argued to this three-judge court. For reasons more fully stated below, the Court in an accompanying Order will deny the defendants' motion to dismiss and the plaintiffs' motion for summary judgment, and grant defendants' motions for summary judgment, thereby leaving for trial Count III in its entirety. The motion for limited intervention is the subject of a separate Memorandum and Order issued today.

I

This case is a sequel to litigation which culminated in the decision of the Supreme Court in *Blanding v. DuBose*, 454 U.S. 393, 102 S.Ct. 715, 70 L.Ed.2d 576 (1982) (*per curiam*) *rev'g*, 509 F.Supp. 1334 (D.S.C. 1981). A brief account of that case will set the stage for this one.[2]

In *Blanding*, a number of citizens of Sumter County sought to enjoin at-large elections for Sumter County's County Council in 1978. In 1967, the South Carolina General Assembly passed Act No. 371, placing governmental powers for Sumter County in a County Council, whose members were to be elected at-large from the County. By oversight, plaintiffs allege, Act No. 371 was not submitted to the U.S. Attorney General for preclearance pursuant to the Voting Rights Act, and at-large County Council elections were held in Sumter County in 1968, 1970, 1972 and 1974. In 1975, South Carolina passed the Home Rule Act which permitted each South Carolina county to select by referendum one of five alternate forms of local government contained in the statute, and to decide in the referendum whether the county governors would be elected from single-member districts or at-large. The Act specifically provided that if Sumter County held no referendum, the council-administrator system derived from Act No. 371 in 1968 would remain in place. Section 4-9-10(b). The Home Rule Act of 1975 was submitted to the U.S. Attorney General for preclearance; he interposed no objection at that time, but "he indicated that the outcomes of Home Rule Act referenda or assignments of forms of government under the Act would be subject to preclearance." 454 U.S. at 396, 102 S.Ct. at 716.[4] Thereafter, Sumter County held no referendum and by assignment the council-administrator system was elected at-large. In 1976, Sumter County submitted for preclearance Act No. 371 of 1967 and the County Ordinance implementing that Act on authority of the Home Rule Act. The Attorney General interposed no objection to the council-administrator form, but "made a timely objection to the at-large method of election of the Council." 454 U.S. at 396, 102 S.Ct. at 717. Private parties in Sumter County then instituted suit, and on June 21, 1978, the scheduled at-large elections for County Council were enjoined by a District Court in *Blanding v. DuBose*, No. 78–883 (D.S.C. June 22, 1978) (Defendants' Ex. C). In November 1978, the County went ahead

1. *Compare* Memorandum of the United States in Opposition to Plaintiffs' Motion for Summary Judgment (Oct. 18, 1982) at 17–19 *with* an Amended Memorandum (Oct. 27, 1982) at 17.

2. *Blanding* had been consolidated in the three-judge District Court in South Carolina with another action involving the same subject matter as *Blanding* and the same parties as in the case now at hand. *See United States v. County Council of Sumter County*, No. 78–883 (D.S.C.); Exs. A, B & C to Defendants' Motion for Summary Judgment (Oct. 1, 1982). The government's appeal to the Supreme Court evidently was not perfected.

3. Upon application by the plaintiffs in *Blanding*, the South Carolina District Court enjoined the at-large elections scheduled in 1978, see Defendants' Motion for Summary Judgment (Oct. 1, 1982), Ex. C, and County Council elections evidently have not been held in Sumter County since that time.

4. The U.S. Attorney General's letter of August 28, 1975, to the South Carolina Attorney General with respect to the Home Rule Act had stated that such an "assignment of such forms of government also constitutes a change which is subject to preclearance requirements of the Voting Rights Act of 1965." Plaintiffs' Motion for Summary Judgment (Oct. 4, 1982) Ex. Q

with a planned referendum, and a majority of voters in Sumter County approved an at-large method of election for County Council, despite the Attorney General's 1976 objection.

In 1981, the defendants in *Blanding*, including E.M. DuBose, one of the plaintiffs here, won a declaratory judgment from a three-judge District Court in South Carolina that the County had obtained preclearance from the Attorney General for at-large elections in June 1979, when the County had sent a letter to him reporting that the 1978 referendum had approved at-large council elections for Sumter County, and the Attorney General had failed to respond until September of that year, more than 60 days after receiving the letter. The District Court stated that the 1978 county referendum had approved an election method different from that in effect on November 1, 1964, and that the 1979 letter reporting its results was a request for preclearance. The District Court concluded that the Attorney General's failure to respond within 60 days as required by the Act constituted preclearance of the change by default. 509 F.Supp. at 1336–37. On appeal, the Supreme Court reversed, holding that the 1979 letter had been a request for reconsideration of the Attorney General's 1976 refusal to preclear the change, and was thus not subject to the 60-day requirement. *Blanding v. DuBose*, 454 U.S. at 399–401, 102 S.Ct. at 719.

Having failed to persuade the Attorney General to reconsider his 1976 refusal or to persuade the Supreme Court that the Attorney General had precleared the at-large method by default in 1979, plaintiffs now invoke the alternate remedy available to them under Section 5: seeking a declaratory judgment from this Court that the at-large election method of electing the county's governing body authorized for Sumter County by the General Assembly and the 1978 county referendum is not a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," or if it is, that it either has been precleared or "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," within the meaning of Section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c. The complaint is in seven counts. We address them in order.

A

Count I alleges that the at-large method of election did not establish a "practice or procedure with respect to voting [in Sumter County] different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, and that it is therefore not subject to the requirements of the Voting Rights Act. Plaintiffs allege that before that date and until about 1968, the Sumter County Board of Commissioners, the local forerunners of the County Council, acted as a ministerial body only. It is a fact that that Board was appointed by the Governor of South Carolina on the recommendation of the Sumter County delegation to the South Carolina General Assembly. The legislative functions contemplated now for the County Council were allegedly performed prior to 1968 by the State Legislature which enacted local Sumter County bills on the recommendation of the Sumter County delegation. The plaintiffs' theory is that before November 1, 1964, the Sumter County delegation was the *de facto* governing body of Sumter County, and was elected at-large, and now the County Council would be the governing body and it would also be elected at-large. Since each body was or is to be elected at-large, plaintiffs argue that functionally there has been no method of election change that requires preclearance either by the Attorney General or this Court.

Plaintiffs' argument, although facile, simply ignores the Governor's *de jure* power before November 1, 1964, to appoint the county's governing body,[5] the Governor's *de jure* power to veto legislation (including local bills for Sumter and other counties) and the *de jure* power of the entire General

5. *Compare United States v. County Council of Charleston County, South Carolina*, 473 F.Supp. 641 (D.S.C.1979), where the pre-1964 County Commission was elected at-large.

Assembly to enact local laws for Sumter County different from those recommended by the Sumter County delegation. The plaintiffs' argument also ignores the legal fact that the Governor and the majority of the legislators who had the actual and legal powers to govern Sumter County were not elected at-large by the voters of Sumter County; they were elected by the voters of the entire State of South Carolina. It may be that their legal powers were subject, by some diplomatic arrangements and customs, to the political power of the Sumter County delegation which, in turn, had legal powers over the local affairs of other counties. But, at the very least, legal authority over the local affairs and choice of Commissioners of Sumter County was shared between the Governor (elected statewide), the General Assembly (elected from all counties, only one of which was Sumter), and the County Commissioners (appointed by the Governor and confirmed by the General Assembly on recommendation of the Sumter County delegation).

In 1967, the General Assembly passed Act No. 371 (later implemented by the Home Rule Act of 1975). By vesting the local County Council with all local legislative powers and making it locally elected, Act No. 371 stripped away the legal power theretofore vested in the Governor, the General Assembly and the Sumter County delegation over local Sumter County affairs. It eliminated the power of South Carolina voters outside Sumter County over that County's local affairs. The 1967 law released the locally chosen County Commissioners from those actual and legal restraints, and from out-of-county voter influences, and vested in them all these legal powers, subject only to the will of the voters of Sumter County, voting at-large.

[2, 3] It may be that plaintiffs could prove at trial their proffer that the Governor and the General Assembly universally deferred (without any trade-offs) from 1895 until 1968 to the Sumter County delegation with respect to the governance of Sumter County, and that the County Commissioners were uniformly mere ministerial agents of the delegation. But the laws of 1967 and 1975 which eliminated the legal powers of the Governor and the General Assembly, persons elected by voters outside of Sumter County, over local affairs and vested it exclusively in a County Council elected at-large by Sumter County voters is too vast a change to ignore. As plaintiffs' counsel conceded at oral argument a *de jure* change as well as a *de facto* change in voting requires preclearance under the Act. Hearing Transcript (Nov. 29, 1982) at 17–18.[6] We note that both the District Court and the Supreme Court in *Blanding v. DuBose* stated that the Home Rule Act of 1975 (which implemented Act No. 371 of 1967) changed the voting method involved in the selection of supervisors in Sumter County. 454 U.S. at 395, 102 S.Ct. at 716 ("this change"), 399, 102 S.Ct. at 718 ("change to at-large County Council elections"); *Blanding v. DuBose*, No. 78–764, mem. op. at 1 (D.S.C. June 22, 1978) (Defendant's Ex. C) ("The record in these cases establishes conclusively that in 1967 the procedure for electing members of the County Council for Sumter County, South Carolina, was changed by statute"). Without regard as to whether the change was good or bad for the people of Sumter County, or for the advantage or disadvantage of any racial or other group there, we are persuaded as a matter of law that the institution of at-large elections for the unfettered Sumter County local government required preclearance.

Plaintiffs invite our attention to an opinion of the Supreme Court of South Carolina holding that, under the South Carolina State Constitution in place on November 1, 1964, the General Assembly enacted "many local laws" so that "for all practical purposes the county government was controlled by the Acts of the General Assembly" and "the General Assembly was the governing body of the respective counties." *Duncan v. York County*, 267 S.C. 327, 334, 228 S.E.2d 92, 95 (1976). The Supreme Court of

6. JUDGE BORK: . . . [I]s it enough to trigger Section V that there was a *de jure* change?

MR. BELL: As I understand the case, it's either a *de jure* change or a factual change.

South Carolina noted that "it is common knowledge that only legislative delegations from the counties affected concerned themselves with local bills." Thus, "[i]n addition to being state legislators, members of the Senate and of the House were effectually the county legislature and governing board." *Id.* The foregoing statement of local law does not alter the fact that during all the years prior to 1967 the *de facto* power of the county delegation with respect to local legislation was subject to the *de jure* power of the entire General Assembly and the Governor, just as its *de facto* power over appointments to the local Board of Commissioners was subject to the *de jure* power of the Governor. This *de jure* scheme was unarguably altered by the 1967 and 1975 statutes, and constitutes a change cognizable under Section 5 of the Act.[7] *Accord Chariton County (Georgia) Board of Ed. v. United States*, No. 78-0564 (D.D.C. July 27, 1978) *Horry County (South Carolina) v. United States*, 449 F.Supp. 990 at 995 (D.D.C.1978).

Defendants urge us to preclude plaintiffs from litigating the question of whether there was a change in voting methods requiring preclearance because they raised (or could have raised) and lost that contention in the District Court proceedings which culminated in the Supreme Court's decision in *Blanding v. DuBose, supra*. The undisputed facts of the shift of power from the Governor and the General Assembly to the new County Council require a ruling for defendants on the merits of Count I without resort to the technicalities of collateral estoppel.

B

Count II of the complaint, on which both parties seek summary judgment, alleges that the at-large method of election for Sumter County Council was precleared by the Attorney General's failure to object to two statutes (Act No. 1339 of 1968 and the Home Rule Act of 1975) relating to at-large elections for the Sumter County governing body. Undisputed facts show that plaintiffs' preclearance claim is without merit. These undisputed facts are that in 1967, Bill No. 371 established the seven-member Sumter County Commission, elected at-large, 1967 South Carolina Act No. 371. In 1968, Bill No. 1339 made a modest amendment to Act No. 371: it gave the Commission power to decide for itself which members would serve four year terms and which would serve two year terms, instead of directly specifying which members would so serve. Act No. 1339 did not affect the at-large method of election set forth in Act No. 371, and by itself the amendment might well not be a change in voting procedures requiring preclearance. For reasons which plaintiffs do not entirely explain, the South Carolina Attorney General did not submit Act No. 371 of 1967 to the Attorney General of the United States for preclearance, despite its broad-ranging effect on the organic relationship between the State Governor, the General Assembly, and the government of Sumter County. *See* pp. 700-701, *supra*. On July 29, 1968, an Assistant State Attorney General submitted to the U.S. Attorney General copies of seven acts passed by the General Assembly in its 1968 session; one of the seven was Act No. 1339.

[4, 5] The U.S. Attorney General precleared neither of these Acts. Act No. 371 was not submitted to him. The letter that submitted Act No. 1339 did not request preclearance nor mention any voting changes. Defendants' Ex. B. *Cf. City of Rome v. United States*, 446 U.S. 156, 169 n. 6, 100 S.Ct. 1548, 1557 n. 6, 64 L.Ed.2d 119 (1980). Nor did plaintiffs claim in the litigation culminating in *Blanding v. DuBose*, to which they were party, that the 1968 transmittal of Act No. 1339 had any preclearance implications. Nevertheless, plaintiffs now claim that the Attorney General's

7. This resolution of the issue makes it unnecessary for us to reach the factual dispute as to whether the County Board of Commissioners appointed by the Governor (on recommendation of the County delegation) as of November 1, 1964, was a cipher, as contended by plaintiffs, or exercised joint governing responsibility with the state legislative delegation, as urged by defendants.

silence about Bill No. 1339 effected preclearance of the entire at-large election system. This claim is without merit. As the Supreme Court ruled in *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978), a political subdivision must state that it desires preclearance before it can claim preclearance by silence. *Id.* at 136-38, 98 S.Ct. at 981. That ruling applies here and requires summary judgment for defendants on plaintiffs' claim that the Attorney General's silence about Act No. 1339 of 1968 precleared an at-large election system for Sumter County.

[6] The other prong of plaintiffs' preclearance claim relates to the Home Rule Act of 1975. 1975 S.C. Acts, No. 283, codified as S.C. Code § 4-9-10 *et seq.* (1976 and Supp.1980) (Plaintiffs' Ex. M). The 1975 Home Rule Act implemented Act No. 371 and its counterparts applicable to other South Carolina counties. *See* pp. 699-700, *supra*. When the Home Rule Act was submitted for preclearance, the Attorney General reserved his right to object to any referenda or assignment results adhered to by local counties pursuant to that Act. When Sumter County submitted the 1967 Act No. 371 and its local ordinance implementing the Home Rule Act assignment of at-large elections to the Attorney General for preclearance in 1976, he "made a timely objection to the at-large method of election of the Council." *Blanding v. DuBose*, 454 U.S. at 396, 102 S.Ct. at 717. In 1978, the Attorney General declined to withdraw his objection to at-large elections for the council even if the election method were approved by county referendum; nevertheless, in November 1978, a county referendum opted for the at-large election method originally contemplated by Act No. 371. In *Blanding*, the Supreme Court held that a letter informing the Attorney General of the referendum results was only a request for reconsideration of the Attorney General's 1976 objection, and that Sumter County's at-large method of election still had not been precleared.

Despite the Supreme Court's ruling in *Blanding v. DuBose*, and the terms of the Attorney General's letter of August 28, 1975, *see* note 4, *supra*, plaintiffs persist in contending that the Attorney General's "attempt to reserve his right to reconsider the assignment [of forms of government and methods of election] . . was ineffective." Plaintiffs' Memorandum in Support of Motion for Summary Judgment (Oct. 4, 1982), at 16. They contend that the Home Rule Act itself established the form of government and method of election for each South Carolina county, including Sumter. According to plaintiffs, at that point, the Attorney General was obligated either to object or to forever hold his peace. They rely upon a statement of the South Carolina District Court made before the Supreme Court spoke in *Blanding v. DuBose* that the Attorney General was required to pass on "all components" of the Home Rule Act submission at the time of the submission; and that the subsequent passage of "adoptive ordinances merely implemented statutes which had been previously precleared." *United States v. County Council of Charleston County, South Carolina*, 473 F.Supp. 641, 646-47 (D.S.C.1979). Plaintiffs also rely upon a District Court's decision in *United States v. Georgia*, C.A. No. C76-1531A (N.D.Ga.1977), *aff'd. mem.*, 436 U.S. 941, 98 S.Ct. 2840, 56 L.Ed.2d 782 (1978). *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment (Oct. 4, 1982) at 16 17. Significantly, perhaps, this same October 4, 1982 Memorandum of plaintiffs fails to discuss or even cite the Supreme Court's opinions in *Blanding* or *Sheffield, supra*.

Defendants point out in response that when, in 1976, the Attorney General precleared the Home Rule Act, there was no way of knowing whether Sumter County would hold a referendum or not, or whether a referendum if held would select a new form of government or method of election and, if it did, which form or method it would adopt. Defendants point to regulations formulated by the Attorney General for the administration of Section 5 which adopt the traditional, common sense princi-

ple that he may refrain from reviewing voting changes prematurely. *See* 28 C.F.R. § 51.7 (1975); *cf.* 28 C.F.R. § 51.20 (1982). So here, defendants urge, the Attorney General precleared the "ripe" provisions of the Home Rule Act that transferred certain legal powers of the Governor and the General Assembly to local governments and created the right to hold referenda, while he reserved for future review those sequelae of the Home Rule Act which depended upon local decisions about whether to hold referenda and the results of those held.[8] *Cf. United States v. Board of Commissioners of Sheffield, Ala., supra.*

From the foregoing we are satisfied, again without reference to principles of collateral estoppel, that the Supreme Court's precedent of *Blanding v. DuBose*, the plain language of the Attorney General's letter of August 28, 1975, and ensuing events in Sumter County all combine to require that we reject plaintiffs' claim that the Attorney General precleared at-large elections when he reviewed the Home Rule Act of 1975. An accompanying Order therefore grants summary judgment to defendants on both issues raised by Count II of the complaint.

C

In Count III of their complaint, plaintiffs assert that, even if the at-large method of election did represent change in method requiring preclearance, and, even if the change were not precleared by the Attorney General, it passes muster under Section 5 of the Voting Rights Act. More specifically, Count III alleges that the changes effected pursuant to Act No. 371 and the Home Rule Act of 1975 as implemented by the 1978 referendum, gave all Sumter County voters an opportunity to elect the members of the county's governing body, "which opportunity no voter in Sumter County enjoyed on November 1, 1964," Amended Complaint (Aug. 23, 1982), ¶ 39; augmented the ability of black voters to participate in the political process and to vote for their county's governing body "which was previously appointed by the Governor of South Carolina," *id.*, ¶ 40; does not abridge any right to vote on account of race, color, or otherwise; will not lead to "retrogression" in the position of racial minorities with respect to the effective exercise of their right to vote; and does not have the purpose or effect of diluting the voting strength of black voters in South Carolina.

Plaintiffs move only for a partial summary judgment on Count III: that the "change" does not have the effect of "denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c.[9] Plaintiffs contend that before and after the change black voters voted in the election for Sumter County's governing body: before the change the legislative delegation was the governing body and was elected at-large; after the change the County Commission was the governing body and was also so elected. Secondly, plaintiffs support their motion with proffers of evidence that the "black community . . . did not object to the at-large method of election for members of the Commission, but in fact welcomed the opportunity to be able to vote for members of the Commission." Plaintiffs' Memorandum (Oct. 4, 1982), *supra*, at 23. Thirdly, plaintiffs urge that the pre-1964 Board of Commissioners was appointed and no black had any role in appointing a member of the Board, whereas the method at issue gives all voters, black and white, a role in the process. Since the black voters now have a right to vote for members of the County Commission which they did not

8. Ignoring *Charleston County* (as did the Supreme Court in *Blanding v. DuBose*), defendants distinguish *United States v. Georgia, supra*, on the ground that the voting changes which the Attorney General purported to reserve for review in that case were all in place when he reviewed Georgia's Home Rule Act, whereas the Sumter County changes on which the Attorney General reserved judgment were uncertain and yet to take effect when he ruled on part of South Carolina Home Rule Act and reserved on other parts. Amended Memorandum of the United States in Opposition to Summary Judgment (Oct. 27, 1982) at 13-14. This appears correct to the Court.

9. Defendants make no cross-motion with respect to Count III and contend a trial is necessary on that count as a whole.

previously have, defendants claim on authority of *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), and *Charlton County Board of Ed. v. United States*, C.A. No. 78-0564 (D.D.C.1978), that the minority's ability to participate is actually increased.

Defendants point out that plaintiffs would test for retrogression by comparing the role of black voters before 1967 with their role now, even though plaintiffs sought no preclearance in 1967 and the matter is only coming to issue in 1983. Defendants contend that retrogression must be tested by examining how the appointive system used prior to 1967 would operate *today* as compared to how an at-large system in place *today* would operate. Defendants refer us for guidance to the Supreme Court's decision in *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). There, as here, the local jurisdiction had delayed the preclearance process, in that case with respect to several annexations to municipality of Rome, Georgia. The Supreme Court endorsed the procedure, once the case finally came to litigation, of responding "to the realities of a situation as they exist at the time of decision." *City of Rome v. United States*, 472 F.Supp. 221, 247 (D.D.C.1979), *aff'd.*, 446 U.S. 156, 186, 100 S.Ct. 1548, 1566, 64 L.Ed.2d 119 (1980).

[7] In traversing the plaintiffs' motion, defendants proffer deposition testimony from qualified political historians and local South Carolina political figures that if an appointive system were operative today at least two black persons would be serving on the county's governing board two more than now serve. We agree with defendants and *City of Rome* that we should consider a comparison of the appointive and at-large methods in the context of the present. Accordingly, the defendants' proffer raises an issue of fact about retrogression which cannot be resolved without an evidentiary hearing.

In addition, defendants originally contended that even if the change from the appointive method which previously obtained to the current at-large system were not demonstrably retrogressive, defendants are entitled to an opportunity to show that the changed method is itself discriminatory, and that plaintiffs have the burden of establishing that the at-large system does not violate section 2 of the Voting Rights Act.[10] Defendants subsequently have abandoned their contention that plaintiffs have an obligation to satisfy Section 2 requirements.[11] Defendants preserve, however, the contention that, according to *Beer*, even if a change is not retrogressive, it may not be precleared if it "discriminates on the basis of race or color so as to violate the Constitution." *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976); *see Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982). *Compare* Memorandum of the United States in Opposition to Plaintiffs' Motion for Summary Judgment (Oct. 18, 1982) at 17 n. 7, *with* Amended Memorandum of the United States in Opposition to Plaintiffs' Motion for Summary Judgment (Oct. 27, 1982) at 17. In support of their amended opposition argument that the new method is unconstitu-

10. The Voting Rights Act Amendments of 1982, Pub.L. No. 97-205, 96 Stat. 131, amended Section 2 of the Act to read that

> No voting . . practice or procedure shall be imposed or applied . . in a manner that results in a denial or abridgement of the right . . to vote.

See 96 Stat. at 134. The Senate Report on the 1982 Amendments stated that by amending Section 2, "it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S.Rep. No. 97-417, 97th Cong., 2d Sess. (May 25, 1982) at 12 n. 31, *reprinted at* 1982 U.S. Code Cong. & Ad.News 177, 189 n. 31. Defendant United States has argued in its Reply Brief to the Supreme Court in *City of Lockhart v. United States & Cano*, No. 81-802, (Oct. 1982) that "[w]hether the 'results' standard of Section 2 can properly be imported into Section 5" should be determined "in the first instance" by a District Court. *Id.* at 4 (filed in this action together with Defendants' Amended Memorandum, Oct. 27, 1982).

11. This argument will apparently be preserved, however, by the intervenors in this action whose petition to intervene is granted today in a separate Memorandum and Order.

tionally discriminatory, defendants proffer substantially the same evidence that they originally had proffered in support of their Section 2 argument: e.g., expert testimony concerning the historical evidence of racial discrimination in South Carolina governments (including Sumter County's); the purpose and effect of the institution of an at-large voting system in Sumter County; alleged racial polarization of voting in the county; and difficulties encountered by blacks seeking political support in Sumter County at-large, as distinguished from in single member districts. Defendants' Amended Memorandum, *supra*, at 19–22. Defendants suggest that the retrogression, purpose and effect questions are inextricably intertwined, that decision on all of these issues should be postponed until after the trial on the merits, and that therefore plaintiffs' motion for partial summary judgment on retrogression should be denied.

We agree that decision on all of these questions depends upon facts which should be developed at trial. Accordingly, we will follow the example of our colleagues in *Busbee v. Smith, supra*, to the extent of reserving resolution of these issues until after trial. In addition, a separate Order filed today will grant the motion to intervene filed by interested black voters of Sumter County thereby preserving the Section 2 argument now raised by them and permitting them to cross-examine witnesses and possibly adduce rebuttal evidence.

D

[8, 9] Count IV of the complaint alleges that the Attorney General will object to any method of election other than a single-member district method, and that such a method would dilute the voting strength of black voters in Sumter County and deny and abridge their right to vote in violation of Sections 2 and 5 of the Voting Rights Act and the First and Fifteenth Amendments of the Constitution. Cross-motions for summary judgment dispute whether we can, or should, anticipate in this proceeding the position that the Attorney General would take, if we later invalidate the at-large election method at issue here. As defendants point out, however, we have no authority either to review, or to preview, decisions of the Attorney General under Section 5. Defendants' Motion for Summary Judgment (Oct. 1, 1982) pp. 8-9, ¶ 9; *see Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). Plaintiffs seek a declaratory judgment in the nature of an advisory opinion with respect to a matter over which we have no jurisdiction. Even if the Attorney General's intention were as alleged,[12] it is not within our power to anticipate or rule on it; this Court's role under Section 5 of the Act is to examine the change *de novo* as an alternative to the Attorney General's decision regarding preclearance. Accordingly, the accompanying Order will deny plaintiffs' motion for summary judgment on Count IV and grant defendants' motion thereon.

E

In Count V, plaintiffs claim that defendants' refusal to preclear the method of election for which the individual plaintiffs voted in the 1978 referendum denied and impaired their constitutional right to vote and the similar right of all of the other citizens who voted in the 1978 referendum for the at-large system, and effectively denied their rights to vote in scheduled at-large elections pursuant to the Home Rule Act. Plaintiffs invoke the First, Fifth, Ninth and Tenth Amendments, as well as Section 17 of the Voting Rights Act.

Again, in Count V, the plaintiffs are challenging the failure of the Attorney General to preclear the at-large method of election for Sumter County. For reasons already stated, our role must be limited to *de novo* consideration of whether the method of election violates rights protected by the Voting Rights Act or the Constitution. We cannot sit in judgment here upon whether the Attorney General's refusal to preclear violated rights asserted by plaintiffs. *See* *Morris v. Gressette*, [illegible] *United States*, [illegible] F.Supp. [illegible] (D.D.C. 1978). Plaintiffs are not entitled to any declaratory judgment about the effect on them of defendants' refusal to grant Section 5 preclearance. The accompanying Order will grant defendants' motion for summary judgment on Count V.

F

Count VI is a rather bold demand that this Court in effect overrule decisions of the Supreme Court validating Congress's decision to apply the Voting Rights Act to some States and not to others. Since this issue has been resolved by the Supreme Court, plaintiffs may be raising it here to preserve it for reconsideration by the Supreme Court upon appeal. Our accompanying Order granting the defendants' motion for summary judgment on Count VI will accomplish this. *See City of Rome v. United States*, 472 F.Supp. 221, 235 (D.D.C.1979), *aff'd.*, 446 U.S. 156, 180, 100 S.Ct. 1548, 1563, 64 L.Ed.2d 119 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 324–28, 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1966).

G

[10] Count VII of the complaint challenges the constitutionality of the 1982 amendments to Section 5 of the Voting Rights Act of 1965 on the ground that Congress failed to make current factual findings about the extent of voting registration in 1975 and 1982 comparable to the congressional findings made on this subject to justify the Voting Rights Act legislation enacted in 1965. With regard to Congress's 1975 extension of the Act, the Supreme Court has ruled that it was constitutionally accomplished. *City of Rome v. United States, supra*, 446 U.S. at 180, 100 S.Ct. at 1563. Defendants maintain, in effect, that the voting discrimination that justified the 1965 Act has been eliminated, at least in South Carolina and in Sumter County, so [illegible] Rights Act in 1982. [illegible] plaintiffs point to Section 4(b) of the Act which made the Act applicable to a state or political subdivision only if less than half of the state's or subdivision's voting population was registered to vote on November 1, 1964. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Oct. 18, 1982) at 51. Plaintiffs proffer without contradiction that while less than half of the voting populations of South Carolina and of Sumter County were registered to vote in 1964, on May 28, 1982, slightly more than half were registered. These circumstances, plaintiffs claim, distinguish the 1982 extension as applied to them from the circumstances relied upon in *South Carolina v. Katzenbach, supra*, to uphold the 1964 Act.

Defendants respond that voting practices in Sumter County have not changed so remarkably as to justify this Court's re-examination of the factual premise for Congress's decision to include the county in the category of political entities embraced by the Voting Rights Act as amended. Indeed, defendants point out that the Senate Judiciary Committee specifically mentioned Sumter County as a jurisdiction which had not yet complied with Section 5 as it was enacted in 1964. *See* S.Rep. No. 97–417, 97th Cong., 2nd Sess., p. 14 (May 25, 1982), *reprinted at* 1982 U.S.Code Cong. & Ad.News 177, 191. Obviously, the preclearance requirements of the original act and its 1982 amendment had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent. We are not persuaded that the difference between the background circumstances which prevailed in Sumter County in 1964 as related by plaintiffs in support of their motion and those obtaining today, justify our re-examination of the firm conclusions made by Congress in extending the Act,[13]

12. Defendants state that plaintiffs have misstated defendants' true position on this issue. Defendants' Motion for Summary Judgment (Oct. 1, 1982), p. 9, ¶ 9, and Ex. D.

13. We note that both Houses of the 97th Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982. *See, e.g.*, S.Rep. No. 97-417, 97th Cong., 2d Sess. (May 25, 1982), *reprinted in* 1982 U.S.Code Cong. & Ad.News 177-410; H.R.Rep. No. 97-227, 97th Cong., 1st Sess. (Sept. 15, 1981); 128 Cong.Rec., Nos.

and the Supreme Court in *City of Rome* and *South Carolina v. Katzenbach, supra*, in holding that the categories chosen by Congress were and are appropriate. Accordingly, plaintiffs' motion for summary judgment on Count VII will be denied, and defendants' will be granted. This ruling is without prejudice to reopening of the issue of the constitutionality of the 1982 amendments by the plaintiffs or by the Court, *sua sponte*, if the proof at trial should require reconsideration of this aspect of the case.

Douglas GATES, etc., Plaintiff,

v.

Michael MONTALBANO, Defendant.

No. 82 C 1269.

United States District Court,
N.D. Illinois, E.D.

Jan. 10, 1983.

Suit was brought by administrator of decedent's estate claiming that police officer's fatal shooting of decedent violated decedent's constitutional rights. On officer's motion to dismiss, the District Court, Shadur, J., 550 F.Supp. 81, found wrongful death claim was barred, and administrator moved for reconsideration. The District Court, Shadur, J., held that wrongful death claim arising out of fatal shooting of victim by police officer was barred where it was not brought within two years as specified in Illinois Wrongful Death Act.

Motion denied.

74-77 (daily eds. June 14-18, 1982) (Senate); 128 Cong.Rec. H3839-H3846 (daily ed. June 23, 1982) & 127 Cong.Rec. H6938-H7011 (daily ed. Oct. 5, 1981) (House).

1. As Opinion I pointed out, 550 F.Supp. at 82, Administrator Gates had not complied with the briefing schedule set by this Court on Montalbano's motion, so that the Court had to review the legal questions on its own. Apparently neither Montalbano's motion nor notice of the Court's order was received by Administrator Gates's counsel, who had moved offices since filing this action.

Death ⇐38

Wrongful death claim arising out of fatal shooting of victim by police officer was barred where it was not brought within two years as specified in Illinois Wrongful Death Act. Ill.Rev.Stat.1981, ch. 83, ¶ 15.

Janette C. Wilson, Wilson, Howard, P.C., Chicago, Ill., for plaintiff.

William W. Kurnik, Judge, Kurnik & Knight, Ltd., Park Ridge, Ill., for defendant.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

Douglas Gates ("Administrator Gates"), Administrator of the Estate of Waymon Gates ("Gates"), initially sued several defendants under 42 U.S.C. §§ 1983 and 1985, claiming the fatal shooting of Gates by City of Dwight Police Officer Michael Montalbano ("Montalbano") was without probable cause and a violation of Gates's constitutional rights. After the other defendants had been dismissed for other reasons, Montalbano moved to dismiss the complaint (filed some three years after the cause of action accrued) on limitations grounds. In *Gates v. Montalbano*, 550 F.Supp. 81 (N.D. Ill.1982) ("Opinion I") this Court dismissed the wrongful death claim of Gates's next of kin but denied dismissal as to Gates's own claim (which had survived his death and devolved upon Administrator Gates).

Administrator Gates has now moved for reconsideration of Opinion I's dismissal of the wrongful death claim.[1] For the reasons stated in this memorandum opinion and order, his motion is denied.

Opinion I

Opinion I found *Beard v. Robinson*, 563 F.2d 331, 334-38 (7th Cir.1977) dispositive as to Gates's own civil rights claim. *Beard* taught such a claim (1) survived Gates's death and (2) was subject to the catchall five-year limitation period established by Ill.Rev.Stat. ch. 83, § 16 ("Section 16") rather than the two-year period specified for analogous tort actions in Ill.Rev.Stat. ch. 83, § 15.[2]

As for the wrongful death claim, however, Opinion I concluded failure to file the complaint within the two years specified in the Illinois Wrongful Death Act (the "Act," Ill.Rev.Stat. ch. 70, §§ 1-2) was fatal. Opinion I reasoned (1) Illinois law made the two-year period a *condition* to the right to sue, rather than a mere statute of limitations, and (2) that condition applied to a corresponding federal civil rights action because "Illinois law is not 'generally ... inhospitable to survival of § 1983 actions.' Nor does application of the Wrongful Death Act have any 'independent adverse effect on the policies underlying § 1983.'" 550 F.Supp. at 83 (quoting *Robertson v. Wegmann*, 436 U.S. 584, 594, 98 S.Ct. 1991, 1997, 56 L.Ed.2d 554 (1978)).

Reconsideration[3]

For the most part Administrator Gates's memorandum is a hodgepodge of unrelated—and irrelevant—Illinois case law dealing with aspects of the Act other than its two-year condition on filing suit. Only one arguably relevant contention seems to emerge from the confusing presentation. It appears to hinge on two propositions:

1. One recent Illinois Supreme Court decision has departed (albeit for limited purposes) from the consistent line of authority treating the two-year period as a limitation on the survivability of the statutory right rather than a typical statute of limitations. *See Wilson v. DF Bast Co., Inc.*, 73 Ill.2d 58, 22 Ill.Dec. 394, 382 N.E.2d 784 (1978).[4]

2. In accordance with *Beard's* rejection (563 F.2d at 337) of "the often strained process of characterizing civil rights claims as common law torts" for purposes of selecting a limitation period, civil rights claims of wrongful death are also subject to Section 16's general five-year limitation period and not the two-year period imposed by the Act itself.

Because the argument clearly fails on its second premise, the first need not be explored.

As *Beard* made clear (563 F.2d at 334), "the applicable limitations period is that which a court of the State where federal court sits would apply had the action been brought there." But in *Beard* no state limitations period was specifically applicable to the civil rights claim at issue—a claim that, as Opinion I pointed out (550 F.Supp. at 82), was remarkably similar to the survived claim of Gates himself. Thus *Beard* had to choose between the two-year limitation period for personal torts (applicable only by analogy) and Section 16's catchall five-year period (applicable by virtue of its residual nature).[5] Not surprisingly policy considerations (such as the greater severity of constitutional deprivations vis-a-vis common law torts and the desirability of applying a uni-

2. *Beard* recognized (563 F.2d at 333-34) the survivability of, and the applicable limitations period for, federal civil rights actions turn on state law so long as it is "not inconsistent with the Constitution and laws of the United States," 42 U.S.C. § 1988.

3. Montalbano did not move for reconsideration of Opinion I's refusal to dismiss Gates's own survived claim. Nonetheless, in responding to Administrator Gates's current motion Montalbano takes issue with that aspect of Opinion I, claiming that under *Kent v. Muscarello*, 9 Ill.App.3d 738, 293 N.E.2d 6 (2d Dist.1973) a police officer is not an "officer" within the meaning of Illinois' Survival Act. Suffice it to say that *Beard* (563 F.2d at 334) forecloses such reliance on *Kent* as a matter of law, for it reads *Kent* and other Illinois cases as making the "officer" question one of fact.

4. Administrator Gates's memorandum seems to suggest at least some of Gates's next of kin were minors (though in this respect as in all others it is difficult to understand just what is being advanced). If so the 1977 amendment to Act § 2 (enacted in response to the Illinois Appellate Court's opinion in *Wilbon*, before its reversal by the Supreme Court) would be directly applicable to claims on their behalf.

5. In a broad sense Section 16 was directly applicable, for it expressly governs "all civil actions not otherwise provided for"—a residual category defined by the courts as embracing causes of action created by statute. *Beard*, 563 F.2d at 335.